

SELECTIVE FACILITATION: SOME PRELIMINARY OBSERVATIONS ON A STRATEGY USED BY DIVORCE MEDIATORS

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Serious criticisms have been raised about divorce mediators' claim that they act as purely neutral facilitators of party-driven agreements. This paper reports on a study, based on tape recordings of mediation in the United Kingdom, intended to describe the strategies used by mediators and clients in the attempt to resolve disputes. It identifies a technique, labeled "selective facilitation," through which clients may be steered in particular directions chosen by the mediator. This poses important questions for future evaluation studies and for the regulation of mediation practice.

I. INTRODUCTION

At the heart of the debate over the use of mediation as an alternative to litigation in resolving the disputes of divorcing couples is the notion of the mediator as a neutral facilitator assisting clients in their search for mutually acceptable agreements. Critics of mediation, however, have cast doubt on such claims by suggesting that the process may be used to press weaker parties into accepting less than they could have expected had their case gone through traditional adversarial channels. Such criticism raises serious questions about the role of mediators and the influence they exert over the decisionmaking process. Is their influence really restricted to the facilitation of communication between the disputants? Or does it, as the critics tend to imply, extend beyond these bounds, with mediators seeking to guide disputants toward outcomes that *they*, the mediators, regard as acceptable? The study of mediation sessions reported here is intended to shed some light on these matters. Through the detailed analysis of recordings of interactions between divorce mediators and their clients, it will be possible to describe the strategies used by mediators and to differ-

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entiate them in terms of the extent to which they enhance or reduce client control of the decisionmaking process.

II. MEDIATOR NEUTRALITY

One of the central arguments put forward by advocates of mediation as a method of dispute resolution in divorce is that it offers a means of settling conflicts that leaves the responsibility for outcomes in the hands of the separating couple themselves. Rather than having a decision imposed by a judge or reached by bargaining between partisan lawyers, the couple can make their own agreement based on their particular understanding of their relative situations. Writing in the first issue of *Mediation Quarterly*, for example, Folberg (1983: 9–10) asserts that

The ultimate authority in mediation belongs to the parties themselves, and they can fashion a unique solution that will work for them without a concern for existing precedent or for the precedent that they may set for others. With the help of the mediator, the parties can consider their needs, their interests, and whatever else they deem to be relevant regardless of rules of evidence or substantive law. . . . Too often, family law and procedure are not used as a model but coercively to supplant family self-determination.

As this last sentence suggests, much of the enthusiasm about mediation reflects the influence of libertarian arguments against state intervention (see, e.g., Mnookin and Kornhauser, 1979; Roberts, 1983; 1986). Private ordering is accordingly seen as both more efficient and morally superior to determination by some public authority.¹

In its pure form, however, private ordering carries with it the possibility of the strongest disputant imposing a settlement that seems grossly unfair when measured against some external standard of justice or that infringes the rights of third parties, such as the state as a provider of income support or children with their needs for economic and psychological security. These points have attracted the concern of a number of critics (see, e.g., Bottomley, 1984, 1985; Bottomley and Roche, 1988; Freeman, 1984; Fineman, 1988) and have even been conceded by mediators themselves. Folberg (1983: 13), for example, asks his colleagues:

Should mediators be the embodiment and protectors of community norms? Is it appropriate for mediation to be halted when perceived overreaching occurs? Should a me-

¹ Some of the confusion in the debate over mediation clearly derives from the naive opposition of public and private ordering and from the rather Orwellian equation "Public Bad, Private Good." In reality, the private space of the family has of course always been held in tension with and depended on public legal forms for its creation, maintenance, and dissolution (Dingwall and Eekelaar, 1988).

diator reject an agreement that varies from judicial practices?

The mediators' response is to cite their own ethical concerns. Haynes (1981: 131–132), for instance, despite his professed adherence to the empowerment of parties, insists that “the mediator does not simply facilitate a divorce: s/he does it within a value context.” Since neutrality in a situation of inequality may indeed allow one party to exploit the other, he accepts that a mediator may have to act in a way that enhances the power of the weaker spouse (*ibid.*, pp. 62–63) or to “act forcibly” to prevent the victimization of a third party, such as a child (*ibid.*, pp. 129–132).

The tension between the professed commitment to self-determination and the imposition of an overriding ethical code remains unresolved by the mediation movement. In a recent introductory text, for example, Roberts (1988: 67–72) tries to distinguish between impartiality in the conduct of the mediation process and neutrality in relation to its outcome. Even this, however, is heavily qualified, and the bottom line remains the mediator's duty to identify “patently unjust” settlements and advise weaker parties to reject them (*ibid.*, p. 84).

The failure to reconcile these claims poses two critical problems for mediation. One might be described as the macro-problem of legitimacy. In the absence of a coherent answer to Folberg's questions, mediation invites the sort of challenge that it receives from a feminist critic like Fineman (1988), who argues that, rather than demystifying the process of dispute resolution, mediation simply substitutes an alternative mystification, one that is in many ways more pernicious because its sources are less obvious and the points of resistance less readily identifiable. The other issue is the practical micro-problem of managing the interaction in a mediation session in such a way that the parties will feel that the mediator has been neutral while the mediator is satisfied that a morally acceptable outcome has been produced.

The study of mediation sessions reported here is focused primarily on this second question. Through the detailed analysis of recordings of interactions between divorce mediators and their clients, it will identify strategies used by mediators and differentiate them in terms of the extent to which they enhance or reduce client control of the decisionmaking process. In doing so, however, it will also make available material for the pursuit of the macro-debate. Much of the policy argument has so far been forced to rely on a range of sources whose information on the mediation process is limited. Any conclusions drawn from comparisons between the outcomes of traditional and mediated modes of dispute processing must necessarily be speculative insofar as they are used to make judgments about the nature of client experiences. Studies based on self-reports by participants have been shown in closely related settings, especially medical consultations, to be unreliable as data

on the nature of the original event (Haug and Lavin, 1978; Strong, 1980). Participants try to give accounts that bolster their self-presentation as competent social actors (Stimson and Webb, 1975), or, in the case of mediators, are constructed as part of the process of building demand for their services (Dingwall, 1986). As Erlanger and his colleagues (1987: 603) have recently concluded, "we cannot reform the divorce process until we observe the actual dynamics of the procedure by which it is accomplished."

III. MEDIATION IN BRITAIN

The use of mediation² in matrimonial disputes is a more recent development in Britain than in the United States. The concept was introduced in the United Kingdom during the 1970s, and the first agencies offering the service were set up at the end of that decade.³ There are two main sources of service: in the public sector, the probation service, which has a longstanding responsibility for supplying general social work in support of the courts, runs both relatively brief court-based sessions auxiliary to hearings and somewhat longer sessions in the context of custody investigations;⁴ in the voluntary sector, there are some fifty or sixty agencies that together probably deal with between two and three thousand cases per year. There is only a tiny private, fee-for-service sector in the United Kingdom. No British jurisdiction mandates participation in mediation, although the large public sector contribution should not lead to cozy assumptions about the extent to which involvement can be said to be genuinely voluntary. In general terms, mediation in Britain has probably been more dominated by social workers and their theories than has been the case in the United States.

The data reported here are taken from the pilot phase of a project that involved one of the larger and longer-established independent mediation services. It has played a significant role in training staff from other voluntary agencies, and its practice is thought by other mediators to be broadly representative of the mainstream of the movement, although it makes limited use of techniques and theories that are fashionable elsewhere, such as co-mediation or the Milanese approaches to family systems work (Palazzoli *et al.*, 1978; Palazzoli, 1985). All the staff are women who are experienced, certified social workers. Clients are invited to contribute to the service's costs, but the main sources of income were grants from central and local government and from charities. Couples mostly reach the service at an early stage in their divorce, or post-divorce, dispute by referral from their lawyers.

² The term "conciliation" is more commonly used in Britain.

³ An account of the history of divorce mediation in Britain can be found in Eekelaar and Dingwall (1988). The major differences between the British and American approaches are discussed in Dingwall (1986).

⁴ Descriptions of this work can be found in Davis and Bader (1985); Davis (1988); James (1988); and Dingwall and James (1988).

IV. PARTY CONTROL

In a previous report on one session recorded for this project, Dingwall (1988: 164) showed that the mediator had actively sought to "dissuade one party from offering an agreement which the other would accept and to persuade the other to a different agreement." In this case at least, the mediator intervened in the decisionmaking process in a manner that was at odds with the claims of party control, although, as Dingwall stressed, the outcome that she was seeking was probably more just than the one that might otherwise have been reached. However, this "critical test" established that the idea of mediation as a purely neutral activity could not be sustained as a *general* proposition. The research issue was to define the conditions under which such behavior might occur or, conversely, the factors that might lead to departures from that ideal. A more extensive review of the data has shown that this case is by no means exceptional, for the mediators regularly exerted pressure in favor of some options and against others. However, the outright obstruction seen in this case is unusual. More commonly, mediators seem to proceed not by using the negative power of a veto but through the positive power of encouraging discussion in specific directions. In developing Dingwall's preliminary work, the present paper describes, again through the analysis of a single case, one of the processes by which this is accomplished, which we have termed *selective facilitation*.

V. DATA

The data analyzed here are drawn from one of a series of forty-five mediation sessions covering fifteen cases handled by three mediators. The mediator on a case would normally interview each partner separately in preliminary sessions before arranging for a joint session. The parties in this case are a middle-class couple, Paul and Hazel, with two children under five. They have been married for about ten years. The wife has not worked since the birth of the first child, although she says she has always intended to return to employment when the children are older. The husband is self-employed with a fluctuating income, which poses some problems for an agreement about child support. According to the parties, their relationship has been under strain since the birth of the first child. At first they thought it was purely a result of the financial pressures from relying on a single, irregular income. However, the problems have continued and become more extensive. In the previous twelve months both parties have received counseling, which has led the wife to seek a divorce. The husband has still not fully accepted this. The wife and the two children are living in the matrimonial home, while the husband has moved out to stay temporarily with his sister and her family.

This paper is focused on a sequence of interaction, lasting approximately thirteen minutes, from the second, and as it transpires, final joint session in the case. It is fairly late in the session, and the couple have already reached agreement on custody, visitation ("access") and support payments ("maintenance"). There has been relatively little involvement by the mediator in this process, and the listener is left with the impression that it is simply a parade of decisions that have largely been made by the couple in advance. However, the previous session has identified a serious problem over the future of the matrimonial home.⁵ The husband wants an immediate sale in order to release capital to buy a new place to live, whereas the wife wants to continue living in the house with the children. In the course of this session it emerges that the couple also own a second property, which is rented out.

At the point at which our detailed analysis starts possible solutions to this aspect of the dispute have not previously been discussed.⁶ The analysis of this extract from the session demonstrates that the mediator is working with notions of what kind of settlement would be desirable (a favored outcome) and what kind of settlement would be undesirable (a disfavored outcome), and seeks to guide the interaction accordingly. "Selective facilitation" is the means by which she seeks to achieve this objective. When the wife introduces the topic of the property in the context of accepting a proposal on child support, the mediator begins an active search for an agreement. What is of interest is how she proceeds to facilitate an exploration of one possible outcome while inhibiting consideration of another. Her favored outcome would involve a straight division of the two properties, with the wife retaining the matrimonial home. Her disfavored outcome is the one preferred by the husband, namely that the two properties be sold and the couple each buy somewhere else to live. While she keeps returning to the former option, and twice explicitly suggests it as an appropriate solution, the mediator systematically refrains from exploring the latter and ultimately overtly opposes it.

⁵ In general, British mediators do not represent themselves as dealing with financial and property issues. Indeed, there is an agreement between the National Family Conciliation Council, which is their main accrediting body, and the Law Society, which licenses solicitors, that such work should be left to the parties' lawyers. In practice, however, it is not always possible to exclude discussion of such issues even when focusing on custody or visitation, and this is one of several examples in which a mediator actively facilitates an exploration of such matters.

⁶ At the time of the individual sessions, the husband was still living in the same house as his wife. The first joint session took place about 2 weeks later, by which time he had moved out to live temporarily with his sister. In that session the main concern was with the couple's feelings about this development and with temporary arrangements about the children. The session ended with a plan for a "cooling-off" period, after which long-term plans, including the future of the matrimonial home, would be discussed. The present session picks up from that agreement.

VI. ANALYSIS

A. *An Account of the Dispute*

We begin with the wife's acceptance of the maintenance plan and an introduction of the property dispute. The extract opens with the mediator asking the wife what she feels about the plan:⁷

- 1 M: Well what d'you feel about it in (0.2) principle.
 2 (1.0)
 3 W: I think that's uhm (1.5) seems a good idea. I think
 4 I would be happy with that. I would (0.5) obviously
 5 have to (0.2) do something else (probably later).
 6 (0.5) I mean I have thought of the idea of taking in some
 7 lodgers and we have enough room to have some lodgers to
 8 provide (0.5) me with some extra cash. (0.6) uhm (1.2) You
 9 know or—or sort of—you know I think you're better off
 10 (looking) into it, it depends what comes up (in the end).
 11 (0.5) But I find it very difficult, I mean in one I've been
 12 sort of thinking oh yes well I could (0.7) get in such and
 13 such from lodgers and that would help (). uhm But
 14 I feel (1.0) I find it very difficult having then sort of—
 15 (0.7) half sort of thought of this and trying to think of
 16 that. (0.2) And then Paul comes back and says oh well he
 17 wants to sell the house in order to buy himself a house, I
 18 mean I can't take on a lodger and (.)
 19 M: mhm
 20 W: and tell them oh well next month you'll have to go because
 21 we're selling the house.
 22 H: Oh no well I mean now the—couldn't we sort it out at the
 23 same time?
 24 M: mhm I think it wou[ld—]
 25 W: [We]ll (.) that—I mean in that case
 26 then that's going to be more of a problem because if
 27 we're going to sell the house and I'm going to have less
 28 money (.) capital money to buy—I'll only be able to buy
 29 a smaller house and I'm not going to be able to afford
 30 lodgers.
 31 (2.5)
 32 W: But (0.2) the other thing is the fact that we have two
 33 houses one of which (2.0) uhm (0.4) he's letting that out
 34 and we don't (0.5) don't live in it. (0.6) And so presumably

⁷ The sessions in our data base are transcribed according to the system devised by Jefferson (1984). In the interests of clarity, however, we have simplified the transcript used in this paper by removing a number of the symbols that refer to features of the interaction that are not of direct relevance to our analysis. The parties are identified as *W* equals wife; *H* equals husband; and *M* equals mediator. The principal symbols used here are: (0.3) equals length of pause in tenths of a second; (.) equals micropause of less than one-tenth of a second; (#) equals indecipherable material; and : equals elongated sound (e.g., plain in line 316); [] equals the beginning and end of overlapping talk; = equals no pause between two lines or sentences; (()) equals other sounds as in ((telephone rings)); () equals talk which is indecipherable or where the transcription is uncertain.

- 35 we—we could sell both of those but they are tied up with
 36 (0.4) insurance policies, (0.8) and their income for that.
 37 M: You have another house now.
 38 W: Ye:s.
 39 M: mhm
 40 (0.2)
 41 W: It's in Britvale (0.7) uhm (0.2) and—and Paul says well
 42 you know we've got to sell everything.
 43 (0.8)
 44 H: Well [I'm not—]
 45 W: [(In order)] (to reach a decision) and release this
 46 capital in order for you to buy somewhere which I can
 47 understand him (0.2) wanting to do that.

Having accepted the maintenance plan, at least in principle (lines 3–4), *W* goes on to state that she would need to generate additional income and that she has thought of the idea of taking in lodgers as a means of doing this (lines 4–10). But, she claims, she has not been able to give serious consideration to this possibility because *H* wants to sell the matrimonial home in order to generate capital to “buy himself a house” (lines 11–18, 20–21). In this passage, *W* seems to be pursuing her case against the sale of the house, at least in the short term. However, because this is implied rather than asserted, *H* is able to use her stated concern over the uncertainty surrounding the fate of the house as grounds for suggesting they take a decision sooner, which he has indicated he would like to do, rather than later, which *W* has indicated she would like to do, a course of action that would of course leave the way clear for a consideration of his favored option, the sale of the house as soon as possible (lines 22–23).

In resisting *H*'s suggestion (lines 25–30), *W* elaborates her position, proposing that, if the house were sold, she would have to move to somewhere smaller and would be unable to take in lodgers. She thus now describes the obstacle to taking in lodgers not simply in terms of uncertainty over the fate of the house but also in terms of the possible sale.

Following a lengthy pause (line 31) during which neither *H* or *M* choose to begin a new turn in the conversation,⁸ *W* introduces a further element in the dispute (lines 32–36): the fact that she and *H* actually own two houses; with the second one being rented out. In so doing, she notes that, although they could presumably sell both properties, this would be complicated by their use of the rental income to finance insurance policies. Having made a case

⁸ Given that, as we shall see, *M* treats the sale of the matrimonial home as a disfavored option, it is noticeable that she here clearly passes up an initial opportunity to explore the issue of selling the house by, for example, asking *H* to clarify his position or by putting *H*'s position to *W*. In other words, here is a point at which *M* could well have intervened with a view to exploring the possibility of selling the house, but she does not do so.

against selling the main house, then, she now points to an obstacle to the sale of the second house.⁹

M apparently does not know about the rented property, and she immediately seeks clarification (line 37). Having confirmed that they do in fact own a second house (line 38), *W* goes on to report its location (Britvale) (line 41) and to state that *H* takes the view that both houses should be sold (lines 41–42, 45–47). *H*'s proposal that the matrimonial home be sold is revealed as part of a larger plan involving the sale of two properties.

B. The Mediator Focuses on a Possible Solution

At this point, an option open to *M* would be to explore the pros and cons of *H*'s plan. Rather than doing this, however, she chooses to address the possibility of *H* living in the second house (line 48), implying that this might solve his problem about obtaining a home of his own. If *H* were able to live in the second house, this would remove the need to sell both properties in order to release capital so he could buy another place, and *W* could retain the matrimonial home.¹⁰

- 48 M: You can't live in the house in Britvale?
 49 (0.8)
 50 H: er No it's let. uhm Well there is one room (.) one vacant at
 51 the minute and uhm
 52 M: You can't get them to leave then.
 53 (0.5)
 54 H: No it's tenanted, it's difficult to get the tenants out.
 55 (0.8)
 56 W: Well I'm [not sure] if we really wanted to before.=
 57 H: [It was never—]
 58 =It was never set up to (1.1) to sort of—(0.2) it was set up
 59 to produce money for insurances for the next twenty years
 60 and that's exactly what it's doing. (1.6) (Basically)
 61 W: It's very underlet,
 62 H: It's underlet, it's not managed properly, (0.6) or hasn't
 63 been for a number of years.
 64 (0.4)
 65 H: [And it needs some work done on it.]
 66 M: [You're sure you couldn't get the] tenant—tenancy back.
 67 M: I mean if you needed it as your home.

⁹ In doing this she may be addressing a potential counterargument to her objection to selling the former property, for it could presumably be argued that if the rented house were also sold (and it turns out that *H* is in fact advocating that it should be), enough capital could or might be raised to enable her to purchase a property large enough to accommodate lodgers. In this light, then, *W*'s detailing of an obstacle to the sale of the rented property can be heard as a maneuver designed to support her position of wanting to remain in the matrimonial home.

¹⁰ Note that the obstacle introduced by *W* to the sale of the rented house—insurance premiums—would presumably also stand as an obstacle to *H*'s living in it, since both options would remove the source of income.

- 68 (0.2)
 69 H: That was one possibility (.) that did crop up. uhm You can
 70 apply to evict somebody if you require it as a home.
 71 M: That's right. It's what I thought.
 72 H: uhm (.) You put an eviction on them and (.) get it served
 73 by a court, uhm (1.0) that's—that is a possibility.
 74 (0.2)
 75 W: But you see I'[ve ()]
 76 H: [But you] know I think they sort of see us
 77 getting na(h)sty () again.

In answering *M*'s initial question, *H* asserts (line 50) that he cannot live in the second property as it is rented out. He notes subsequently (lines 50–51) that one room is vacant, but the implications of this remain unexplored as, following a slight hesitation by *H*, *M* poses a supplementary question (line 52) to try to clarify what he indicated was the obstacle to his living in the Britvale property, namely that he cannot get the tenants to leave. *H* explains that this is so because the property does not involve fixed-period tenancies (line 54).¹¹

Subsequently, *W* appears to move toward endorsing the possible solution implied in *M*'s preceding questions: a division of the properties, with *H* taking the rented property as his home (line 56).¹² Referring back to a failed attempt to evict the tenants, she questions their commitment on that occasion, thereby implying that *H* may be overstating the difficulty of evicting the tenants while displaying some inclination toward attempting such a course of action again. This reading of her utterance is supported by the fact that she does not reintroduce the issue of the income the tenants generate to cover the cost of insurance policies, although she had previously proposed that the loss of this income would be an obstacle to the sale. Now, even though it is clear that if *H* were to live in the house, the income would be lost, she does not restate this as a problem. The issue of the insurance is, however, raised by *H*, who, in emphasizing the long-term planning that the rented property has involved, explains why the property is “tenanted” (instead of being occupied with short-term tenants) (lines 58–60).

This is followed by a contribution from *W* (line 61), “It’s very underlet,” which can be viewed as a further indication of incipient alignment with *M* in that it portrays the property in a negative light and minimizes (in contrast to her earlier statement) its importance as an income source. In responding, *H* agrees that the

¹¹ Under English housing legislation at this time, it was difficult to secure evictions of tenants in rental property unless the original lease had been for a fixed term of less than 1 year with no provision for renewal. Possession could be secured if the landlord wanted to resume personal occupation of a property, but even this required a lengthy legal process and complicated the position on subsequent resale.

¹² *W* subsequently explicitly adopts this position.

property is underlet, and further asserts that it is not managed properly (lines 62–63) and, in overlap with *M*'s subsequent question, that it needs work (line 65). But while *H*'s utterance factually confirms *W*'s assertion, it gives no indication of any movement toward accepting the possibility of his living in the house as a potential solution to the dispute.

Despite this, *M* further pursues the possibility of his recovering the tenancy, asking if he is certain he could not repossess the house on the grounds he needs it as a home (lines 66–67). Presumably referring back to the previous attempt to evict the tenants, *H* accepts that this is indeed a possibility (lines 69–70). By proposing that she was aware of this (line 71), *M* formulates her pursuit of this option as having been based on this knowledge. *H* then goes on to spell out the procedure that has to be followed to evict tenants on these grounds (lines 72–73), which is serve an eviction order on them. He does not show any unwillingness to do this, but gives no indication that he would wish to live in the property and hence shows no sign of moving away from his position of wanting to sell the rental house along with the matrimonial home.

To this point, then, the mediator has pursued a line of action directed toward the possibility of the rented property providing *H* with a home and thus removing the need to sell the matrimonial home. For this to be possible, the tenants would have to be evicted. *W* has shown herself willing to explore this option, but *H* has been more guarded. He began by asserting that the tenants could not be evicted, but the mediator has pursued the possibility of eviction (without taking up the insurance question) and has succeeded in getting *H* to agree that it could be achieved.¹³ However, he has still not abandoned his opening position of wanting to sell both properties; indeed, he has not even explicitly indicated that he would in fact be willing to live in the house in Britvale.

C. The Clients Reassert Their Initial Positions

In her next utterance, *M* picks up *H*'s position by asking a question that is designed to establish whether he would like to live in the house (lines 78–79):

- 78 *M*: Well let's see uh first of all is it a house you'd like to
 79 live in.
 80 (1.0)
 81 *H*: It's a house I'd like to get empty because it would be
 82 compatible (.) where we don't have two properties that were

¹³ This passage has many similarities to one previously analyzed by Dingwall (1988: 161–162) in which another mediator is also trying to persuade a husband to relinquish a claim, in this case to a protected tenancy in public housing. The husband in the case also makes considerable use of indirect disagreements, pointing to the obstacles to adopting the mediator's preferred plan rather than rejecting it. However, in the absence of movement, which is occurring here, the mediator becomes a good deal more pressing.

- 83 fairly close,
 84 M: Yes
 85 H: give or take twenty thousand pounds. (0.2) That they were—
 86 they were fairly close (as regards the sum)
 87 M: mhm
 88 (0.5)
 89 H: (that's) cost.
 90 M: mhm
 91 H: So from that point of view
 92 (0.5)
 93 W: [Yeah.]
 94 H: [you—] you could sort of (.) I could then get something that
 95 would give me a capital sum which would er
 96 (.)
 97 M: mhm
 98 (0.2)
 99 W: I mean it seems very (0.6) uhm (0.2) inconsistent I mean

In response to *M*'s question, *H* asserts that he would like the house empty (line 81), that this property is worth substantially less than the matrimonial home (lines 81–83, 85–86, 89), and that he would still want to sell it (lines 91, 94–95). In this sequence he continues to oppose the option of attempting to gain possession of the house so that he can live there. His concern is still with selling it. *W* reacts to *H*'s rejection of the option of residing in the second house by reasserting her opposition to the sale of the two houses:

- 99 W: I mean it seems very (0.6) uhm (0.2) inconsistent I mean
 100 you s—(.) have talked about oh yes well we'll sell all the
 101 houses and (.) you'll only get (0.2) twelve thousand or
 102 fif[teen or whatever it is.]
 103 H: [But I won't get much] for the one in Britvale.
 104 W: Because it's let.
 105 H: (Because it's let).
 106 (0.2)
 107 W: uhm [B u t a n y w a y] sell it now rather than=
 108 H: [And that's incidental.]
 109 W: =waiting possibly I don't know how many months I'm sure it
 110 wouldn't be that difficult to get the people out even if
 111 it meant
 112 (.)
 113 H: Well I don't—I haven't had another go I'm [()]
 114 W: [B u :]t—
 115 (0.2)
 116 H: I've [()]
 117 W: [And getting another fif]teen thousand (off)—
 118 what from it. I mean (.) for you to say oh well we'll
 119 forgo fifteen thousand is completely out of character.
 120 (laughs) I mean it's
 121 M: (laughs)
 122 H: That's true. I suppose in a way,

- 123 (.)
 124 W: I [mean you're—you're] wanting to sort out this=
 125 H: [in a way yes.]
 126 W: =(little) (tax) which is (.) a few hundred (0.2) and yet
 127 you're prepared to sell the house and forgo thousands.
 128 (1.2)
 129 H: Well what I feel is that (0.8) having (2.6) got a
 130 maintenance order on me (.) I haven't got sufficient money
 131 (.) to pay a mortgage (.) or anything.
 132 W: mhm
 133 H: So (0.2) anything that I can increase any capital ()
 134 is my initial capital. (0.9) Re-invest it somehow.
 135 (): mhm
 136 H: uhm (1.4) So I feel that unless I've got that (.) I've
 137 got no (0.5) way of (0.2) increasing my (1.0) uhm
 138 (0.4)
 139 W: Your income.
 140 (0.5)
 141 H: Well not income. My (0.6) capital. On any capital. On my
 142 (0.7)
 143 M: Yo[ur circumstances]
 144 H: [Estate or::] whatever or—or anything, I mean
 145 there's no way—I mean I doubt I wouldn't earn sufficient
 146 money. (.) I would earn sufficient money just to live on.
 147 (.) Basically.
 148 M: So y—you are sayi:ng [that you would feel ()]
 149 H: [I can't pay the rates an]d food
 150 [and] running a small car (). [That's] my—that's my=
 151 M: [mhm] [mhm]
 152 H: =wages gone for the week.
 153 (1.0)
 154 H: I might just about get it to stretch to some life insurance
 155 or something. (0.2) ()

In this sequence *W* assumes a more adversarial posture. First, in line 99, noting that she perceives an inconsistency in *H*'s position, she then reports that *H* takes the view that the sale of the houses will yield only a limited sum of money (lines 100–102). Before she states with what this is inconsistent, however, *H* interrupts, in order to account for his reported view, suggesting that he feels this way because he “won't get much for” the Britvale property (line 103). *W* proposes that this is because it is let (line 104), which *H* accepts (line 105).¹⁴ She then re-starts the detailing of the inconsistency (lines 107, 109–111). Continuing to focus on the rented property, she summarizes *H*'s current position as wanting to sell the house now rather than waiting several months by which time, she suggests, it should be possible to get the tenants out.

¹⁴ The market value of the property is reduced by the fact that any purchaser would have difficulty in obtaining vacant possession because of the tenants' protected rights of occupancy.

W is now explicitly pursuing *H*'s insistence that he wants to sell the second house. Rather than pressing for him to live in it, which he has rejected, she begins to make the case for delaying the sale until the tenants have been evicted rather than selling it as quickly as possible, as *H* would prefer. Despite an indication that *H* is less certain than she is about the chances of regaining possession of the property (line 113), *W* goes on to assert that delaying a sale until the tenants were evicted could raise another fifteen thousand pounds and that his willingness to consider forgoing this amount of money is completely out of character (lines 117–120), which *H* admits (lines 122 and 125). *W* then pinpoints what she sees as the inconsistency in *H*'s position: While he appears to be willing to forgo thousands of pounds to sell the rented property now, he has voiced his concern about sorting out the maintenance plan because he is losing out on a few hundred pounds a year in tax relief (lines 124, 126–127).

In his own defense *H* asserts that he fears he cannot pay a mortgage (lines 129–131) because he has to pay maintenance, and thus needs to increase his capital (lines 133–134). Developing this theme, he doubts whether he actually has enough even to live on (line 136 on) unless he can release the capital tied up in the houses, which he underlines with the contention that his wages barely cover the costs of property taxes, food, and a small car.

In this sequence *W* initially described *H*'s position as wanting to sell both houses. Since he does not contest this, it can be assumed that this is indeed still what he would prefer. Subsequently the focus shifts to the sale of the Britvale property only, with *W* making a case for delaying the sale of this property and *H* reasserting his desire for an immediate sale due to his poor financial position.

D. The Mediator Pursues the Possibility of a Division of the Properties

In the next turn *M* moves to facilitate further consideration of the option of settling the dispute with a straight division of the properties, with *W* keeping the matrimonial home:

- 154 H: I might just about get it to stretch to some life insurance or
 155 something. (0.2) ()
 156 M: If you get could get (0.2) possession of this house
 157 (0.6) would you regard that as an equal division at
 158 some point, that you had one property each. (.)
 159 You said give or take two f—twenty thousand
 160 or [so. And that seemed to be about what—]
 161 H: [No it would still mean the one in Caster] was worth
 162 more than the one in Britvale.
 163 M: Yes. So [:: a hefty sum]:
 164 H: [By quite a large amount.]

165 (1.0)

166 M: I don't know w—er you—you told me I think your father

M continues her focus on the possibility of *H* taking the second house and *W* keeping the first (lines 156–160), but now, responding to *H*'s resistance to her prior formulation of this option, she no longer presupposes that this would involve *H* taking up residence in the property. Rather, she raises the possibility of the properties being divided, while leaving open what *H* would do with the house. In addressing the discrepancy in the value of the two properties, she begins to develop a way in which such a division might become equal (lines 159–160). She restates the differential value between the properties as formulated by *H*, and then appears to be going on to suggest that this difference might be approximately compatible with the additional income that *W* has indicated the house would generate if he were willing to sell after the tenants had been evicted. *H* certainly interprets *M*'s utterance in this way, because he interrupts to indicate that he would not consider such a division to be equal since the matrimonial home in Caster would still be worth more than the rental property in Britvale, even without the tenants (lines 161–162). In overlap, both *M* and *H* then formulate the value differential as considerable (lines 163–164).

M tries to get around this impasse by introducing another factor into the equation: the fact that *W*'s father paid off the mortgage, which might entitle *W* to a larger proportion of the value of the house. The implication here is that the differential value between the properties (even without the tenants) might be disregarded if *W* were really entitled to a larger share of the value of the matrimonial property:

166 M: I don't know w—er you—you told me I think your father

167 had paid off the mortgage [(you had).]

168 W: [m h m :] :

169 M: Yes I don't know whether that er: would entitle you to (0.7)

170 a larger (0.5) proportion?

171 W: (). (0.4) I don't think he would (.)

172 (laughs) want that anyway. I mean he (.) he—he gave it to

173 both of us and I think he wouldn't

174 M: hm

175 (0.5)

176 W: want that.=But on the other hand (0.3) uhm

177 (.)

178 H: Well our solicitor pointed out that I would probably have

179 to pay pay more (.) than Hazel. [A la]rger share anyway=

180 M: [mhm:]

181 H: =because of the children.

182 M: mhm

183 (0.2)

184 W: I mean I don't think there's any—I mean I wouldn't expect

185 to have more because it was my father.

- 186 M: No:. Right oh.
 187 (0.2)
 188 W: uhm Any more than I would expect Paul to claim more because
 189 the other house was initially his.= But I mean he bought
 190 it a few months before we got married and worked—worked a
 191 lot on [it] while we were married. I mean it sort of—
 192 M: [hm]
 193 (0.2)
 194 M: [You see I mean though I:] don't know the actual sums of=
 195 W: [()]
 196 M: =this, but it does seem to be a: (0.6) possible division.

W initially responds by stating that she would not expect a larger share of the value of the properties (lines 171–173, 176). However, *M*'s suggestion seems to prompt her to consider moving toward this potentially more oppositional claim as she states, “But on the other hand . . .” (line 176). This remains undeveloped, though, as *H* observes that, according to his lawyer, *W* would be entitled to a larger share anyway because of the children (lines 178–179, 181). With this acknowledgment of her entitlement, *W* reciprocates by waiving any claim to expect even more by virtue of her father's gift (lines 184–185, 188–191), noted by *M* at line 186.

Although her attempt to find a solution to the problem of the difference in the values of the two properties has not proved entirely successful, *M* has established that there could be a basis for getting each party to accept a division as a form of rough equivalence. She now pursues this possibility:

- 194 M: [You see I mean though I:] don't know the actual sums of=
 195 W: [()]
 196 M: =this, but it does seem to be a: (0.6) a possible division.
 197 I mean if you were able to have the house in Britvale and
 198 Hazel ()
 199 H: Ye:s. [Well you're taking it—]
 200 M: [had the other one you—]
 201 H: Yes. [But you've—you've got a big] if
 202 M: [you would (certainly)—]
 203 ((Telephone rings))
 204 (.)
 205 H: on this house in Britvale.
 206 ((Picking up of a receiver))
 207 M: Hello?
 208 (.)
 209 M: Fine.
 210 (0.5)
 211 M: Well fine. Thank you.
 212 ((Receiver replaced))
 213 H: Well it seems—seems to be a thing that's got to be worked
 214 out. (.) I think.
 215 W: Yeah.
 216 H: uhm But i—i: the one in Britvale could take (.) it could

- 217 take six months or a year to empty it.
 218 M: [mhm]
 219 W: [Yeah] but [what's that's—that when] you're talking in=
 220 H: [To get an order on it.]
 221 W: =terms of—
 222 H: (Oh [all right what's that])
 223 W: [I mean in terms of this sort of] two: year:s,
 224 M: Well I've—it would take that time to sell. I mean
 225 we were saying that just now:, it takes some time.=
 226 H: =It just seems to be going on and on forever. I mean it's

M now openly formulates the division of the properties as an appropriate and acceptable option, implying that the lack of parity in their values is not an insoluble problem (lines 194, 196–198, 200). *H*, while not immediately rejecting this option, casts doubt on its credibility by underlining that the “if” in relation to the house in Britvale (that is, if he were able to gain possession of the Britvale property) is a “big if” (lines 201, 205). At this point, the interview is interrupted by a brief telephone call.

Following the call, *H* continues with a general statement about the need to resolve the conflict over the houses (lines 213–214), before formulating as a problem the “fact” that it could take several months to a year to empty the Britvale house (lines 216–217). Here, then, a contrast is drawn between his wanting to settle the matter of the property in the short term and the delay that the option suggested by *M* would involve. What appears to be implicated here is that *H* still wants his capital released now, but that *M*'s option would not permit him to do so. And although first *W* (lines 219, 221, 223) and then *M* (lines 224–225) subsequently seek to minimize the significance of the delay and thus enhance the credibility of the option, *H* shows no sign of modifying his position as he complains about things “going on and on forever” (line 226).

E. The Mediator Overtly Aligns Against the Option of Selling the Properties

It is interesting to note how *M* deals with this complaint. Again there is no exploration of the possibility of an immediate sale of both the houses. Instead, *M* treats *H*'s complaint as an occasion to refocus attention on the decisions that need to be made in general as opposed to just those relating to the property (lines 228–231):

- 226 H: =It just seems to be going on and on forever. I mean it's
 227 (0.6)
 228 M: Would you feel we've got anywhere now, I mean
 229 (0.8) d'you feel (1.7) that you have made any decisions.
 230 (1.6)
 231 M: That you can work on.

- 232 (2.4)
 233 H: Not er: (1.4) not that I hadn't already thought that
 234 (2.2) that I hadn't realized existed and that was (0.5) uh:
 235 had been answers
 236 (0.5)
 237 M: But you haven't actually [made] joint decisions about=
 238 H: [for.]
 239 M: =them because you were saying you [had found it—]
 240 H: [We don't seem] to talk
 241 at all about things now. (0.6) I don't feel like talking
 242 to Hazel ().
 243 (1.7)
 244 W: Well and I don't (.) I find it difficult because I don't
 245 know what you mean [()]
 246 M: [Well it seems to] me that you have (0.5)
 247 perhaps jointly (.) made some better understanding about
 248 the children and the access.
 249 H: Yeah.
 250 M: And I think you are (0.6) saying that (0.8) neither of you
 251 are really ready to take divorce proceedings but you do
 252 want to know where you are financially,
 253 W: Yeah:().
 254 M: and I—I think .hh you're both saying let's sort out the
 255 maintena[nce] by all means, (0.8) that quite rightly does=
 256 W: [mhm]
 257 M: = lead to decisions about your capital,
 258 W: hm=
 259 M: =i e the houses,=
 260 W: =mhm
 261 M: and that's where you seem to be
 262 (.)
 263 W: That's it yeah.
 264 M: stuck.
 265 W: That's () yes.

M counters *H*'s negativism about the session (lines 233–235, 238, 240–242) by running through the areas in which agreement has been reached. Thus she asserts that they have reached a better understanding over custody and access to the children (lines 246–248), have established that neither of them wants immediate divorce proceedings (lines 250–251), and both want to clarify the financial position (lines 251–252). They are both agreed that a maintenance plan should be implemented (lines 254–255), but they are stuck over what they should do about the houses (line 255 on).

Summaries of this sort are regularly used by mediators as precursors to the closing of their interviews, and there is a strong sense that *M* is now proposing to leave the property dispute unresolved,¹⁵ an interpretation that is supported by her subsequent

¹⁵ Another, shorter version of a summary used as a pre-closing maneuver can be found in Dingwall (1988: 164).

conduct. She begins to exert considerable pressure against *H* as he persists in pursuing his concern about the houses and his belief that he and his wife should at least consider selling them:

- 261 M: and that's where you seem to be
 262 (.)
 263 W: That's it yeah.
 264 M: stuck.
 265 W: That's () yes.
 266 H: Yeah.
 267 W: Yes.
 268 H: I thi[nk we're] stuck on that Hazel wants to use (0.5)=
 269 M: [m h m :]
 270 H: =use it I've (.) had enough of using houses [to pr]oduce=
 271 M: [m h m]
 272 H: =(.) capital and money, () (0.5) and erm I'd much rather
 273 be (.) back with a (.) block sum,
 274 M: hm hm
 275 H: which I can then go and do what I want with or just leave
 276 it where it is (.) earning money in the bank.
 277 M: I can't see why you shouldn't implement the maintenance (.)
 278 proposal.
 279 H: mhm
 280 (0.8)
 281 M: If you can work out with your solicitor what would be a
 282 reasonable sum to offer Hazel and then Hazel could look
 283 at it and discuss it with hers.
 284 (0.6)
 285 W: hm=
 286 M: =And then if you do go on from that

After both *W* and *H* have agreed that they are deadlocked only over the houses, *H* restates the basic difference between them (lines 268, 270, 272), underlining his own position of wanting to release the capital (lines 272–273, 275–276). In responding, however, *M* once again refrains from addressing the possibility of selling both properties. Thus she resists further consideration of the property dispute, opting instead to propose that they should, in concert with their solicitors, work out and implement a maintenance plan along the lines they have agreed in the interview and then proceed from there (lines 277–278, 281–283, 286). In other words, she is now *explicitly* proposing that the property dispute should be held in abeyance.

In doing this, *M* is attempting to separate two issues that *H* has treated as interrelated. His argument has been that the sale of the properties is a necessary prerequisite to his being able to afford the maintenance:

- 286 M: =And then if you do go on from that
 287 (0.6)

- 288 H: But then from that point of view we've still got the
 289 house to run while Hazel is living in it.
 290 [I can't afford the maintenance—]
 291 W: [Well that'd be my responsibility] then.
 292 H: the maintenance policy, well I couldn't afford the
 293 maintenance, on (0.2) what maintenance I would supply you
 294 wouldn't run that house.
 295 W: Well that's up to me, [that's my responsibility.]
 296 M: [I was going to say it would] be up
 297 to her.
 298 (0.5)
 299 W: That's nothing to do with you then once it's sorted out
 300 then that's (0.4) my (.) problem.
 301 H: Yeah. Well I only—the only thing is I do feel it's up to
 302 me to an extent because it still affects my children's life.
 303 (0.4)
 304 M: I don't think you're proposing to cut the ground from
 305 beneath them you're not proposing to take their home away.
 306 H: No: not—not really. But it's going to put a tremendous
 307 strain on the place.
 308 (0.5)
 309 W: But do you think that I would be happy if they were—I
 310 mean d'you think that I would make them suffer.
 311 [Because—]
 312 H: [N o :] I don't think you would.
 313 W: (Not for a moment).
 314 (.)
 315 M: Hazel are you saying you would be willing to
 316 try such a pla:n.

H continues to resist *M*'s proposal on the now-familiar grounds that it presumes that the implementation of the maintenance plan and the dispute over the properties can be separated. The proposal is flawed, he insists, because he would not be able to afford the money *W* needs to maintain the matrimonial home (lines 288–290, 292–294). *W* counters by proposing that it would be up to her to supply any additional money (lines 291, 295), and, following *M*'s agreement (lines 296–297), that as such it would be her problem, not his (lines 299–300). *H* retorts that he feels this is not true because of the involvement of the children, who, by implication, would be adversely affected by any financial difficulties experienced by *W* (lines 301–302).

It is *M* who responds to this proposition by turning *H*'s professed concern for his children's welfare back on him. In so doing, she overtly resists the implication of *H*'s objection to her proposal, namely that he still maintains that both houses should be sold with a minimum of delay (lines 304–305). Her position is almost impossible for *H* to counter because it pre-supposes that, were he to contemplate selling the matrimonial house at this time, he could be seen as taking away his children's home. Such an action could

only damage his moral adequacy as a caring parent and would thus breach one of the basic framing assumptions that mediators seek to establish and maintain: that, as caring parents, the disputants will endeavor to reach a settlement that is fair to their children (cf. Dingwall, 1988: 154). Having already suggested (and facilitated a consideration of) an option that would allow *W* to remain in the matrimonial home, *M* now frustrates an option (whose consideration she has not actively facilitated) that would involve her losing it.

H has little choice but to confirm what *M* has said (line 306) or find himself moving out of character and becoming vulnerable to criticism for intransigence (cf. Dingwall, 1988: 163). Nonetheless, he tries to reassert his position that it would cause difficulties if *W* and the children were to remain in the house (lines 306–307). This is countered by *W*, who, in asking him whether he believes she would make the children suffer (lines 309–311), clearly implies that she would be able to deal with the financial burden that he is presenting as an obstacle to *M*'s proposal. His response is again strongly constrained. To suggest that his wife would make the children suffer would not only breach the framing assumptions of basic good faith in the negotiations but would also attack her competence as a mother and further damage a relationship that he would like to continue. *H* accepts that she would not make the children suffer (line 312) and finds that he has effectively been backed into a corner.

F. Further Pressure from the Mediator

With *H* having been brought to this position, *M* immediately moves to press for acceptance of her proposal that the maintenance plan should be implemented and the property dispute deferred:

- 315 M: Hazel are you saying you would be willing to
 316 try such a pla:n.
 317 W: Yes.=
 318 M: =Although it would mean that you would (.) have the onus
 319 put on you to supply some more money,
 320 (.)
 321 W: Ye:s (). Ye:s.
 322 (0.4)
 323 M: woub—(.). Would it help if I summarized what I think we—
 324 we've discussed,
 325 H: hm
 326 M: and send you a copy,
 327 (.)
 328 W: mhm
 329 M: uhm and send a letter (0.4) the sa—the same letter to
 330 your solicitors,
 331 W: Yeah.
 332 (2.4)

- 333 M: Would that help at all.
 334 H: Yes I think it could. Yeah all right ().
 335 (0.6) Yeah I can't see—
 336 (0.6)
 337 W: But I mean I must admit I'm very reluctant to think about

M asks *W* if she is willing to try to implement the maintenance plan (lines 315–316), even though it would mean she would have to raise more money herself (lines 318–319). Notice that *M* expressly avoids facilitating a detailed exploration of *H*'s concerns. They are only addressed perfunctorily by asking *W* to confirm (which she already effectively has) that the need for her to raise additional income is not an obstacle to the implementation of the maintenance plan. Moreover, the problems *H* has articulated about his more general need to accumulate capital are left untouched. *M* thus pushes on, leaving *H*'s concerns undeveloped and instead pressing for the implementation of the plan, which she knows *W* accepts since it will not jeopardize her position in the house.

The pressure that *M* is exerting is subsequently reinforced when, having elicited affirmation from *W* (lines 317, 321), she does not solicit the view of *H*. Instead she treats the matter as closed by asking the couple whether it would assist them if she were to produce a summary of what has been discussed and send a copy to each of them (lines 323–333). In other words, she effectively moves to end further discussion of the matter.

The issue of the houses, however, is raised again when *W* reiterates her reluctance to think about selling the houses (lines 337–340):

- 337 W: But I mean I must admit I'm very reluctant to think about
 338 selling houses and moving at the mome[nt.] I think it would=
 339 M: [mhm]
 340 W: =be far more traumatic for the children as well,
 341 M: [Well I] don't see why you shouldn't=
 342 H: [But it's]
 343 M: =i[implement all the other things.]
 344 H: [it's a question of point of view,] but it's traumatic
 345 from my point of view,=I've got nowhere to live.
 346 (1.0)
 347 M: W[ell can yo]:u=
 348 W: [(N o : :)]
 349 H: =Really. I mean I have got my sister's place to live I've
 350 got a [room,] but I've nowhere that's mine to live.
 351 M: [Ye:s.]
 352 (1.0)
 353 H: If I wanted somewhere to live [right now.]
 354 M: [Y e : s] :.
 355 H: I mean I'm=
 356 W: =But you say you wouldn't want to live on your own anyway
 357 so:

- 358 (0.2)
 359 H: (laughs) A general hobo, running around,
 360 M: Well I must say if er: it seems to me worth trying the:
 361 the Britvale property again.
 362 H: mhm:
 363 M: Seeing how—uh as:: like Hazel (0.2) uhm my understanding
 364 is that if you needed it for yourself [y o u] have a far=
 365 H: [Yeah.]
 366 M: =better chance of (.) regaining possession. (0.6) And you
 367 have (0.3) [every] reason to say: I [need it as my home.]
 368 H: [mhm] [This is so true] I
 369 mean it's [()] () [()]
 370 M: [Right.] [Well I will do that and send] you
 371 both copies,
 372 H: mhm:
 373 (0.6)
 374 M: I'm not going to suggest that we meet again, (0.5) unless
 375 either of you
 376 (0.2)
 377 H: hm [hm]
 378 W: [mh]m=
 379 M: =feel it is helpful,

Following *W*'s restatement of her opposition to any immediate consideration of the sale of the houses (lines 337–338, 340). *M* reassures her by proposing that she sees no reason why the other decisions they have discussed cannot be implemented (lines 341, 343). Once again *M* makes no effort to explore the option of selling the houses, nor does she facilitate a consideration of this issue after the subsequent interchange between *H* and *W* in which *H* points to his continuing concern about not having a home of his own (lines 344–359). Thus while she addresses his concern over acquiring a home, she does so in a way that is consistent with her terms of reference rather than with his. She uses the occasion to suggest for a second time a settlement based on his regaining possession of the rented property (lines 360–361), providing as grounds for her optimism the fact that he should have a better chance of doing this if he proposes he needs it as his home (lines 363–364, 366–367). Moreover, she immediately proceeds to terminate the discussion (line 370) and to move toward closing the session by suggesting that she will not be proposing further meetings (line 370 on). By doing this, she inhibits any continuation of *H*'s response (lines 368–369), which, although it involves an initial acceptance of her assertion that his chance of regaining possession of the property would be enhanced if he stated that he required it as his home, could well have resulted in his decision to reassert his preference for selling the two properties at the earliest opportunity.

Following this the session is concluded. Interestingly, in responding to *M*'s proposal that they should not meet again, the two clients react somewhat differently. *H*, indicating that he does not

want a further meeting, relates that on a number of occasions he has felt that it would be better if matters were in the hands of a solicitor rather than someone like the mediator. In contrast, *W*, expressing fear at what a solicitor may advise *H* to do, says that she would have preferred to have had further discussions.

VII. DISCUSSION

In analyzing this case, we have illustrated a recurrent feature of the divorce mediation sessions in the present sample. The mediators frequently conduct themselves in ways that show that they are working with notions of favored and disfavored outcomes to the disputes. In this instance, the favored outcome was a division of the two houses, with the wife retaining the matrimonial home and the husband taking the second property. The disfavored outcome was the sale of both houses, with each partner buying a new place to live.

The pressure that the mediator exerts toward the favored and against the disfavored outcome is largely managed by differentially creating opportunities to talk through the favored option rather than, for example, repeatedly producing evaluative statements about the positions of the two clients or the options open to them. This is the process that we have called selective facilitation.

It is essential to distinguish selective facilitation from the routine *agenda management* that goes on in any orchestrated encounter (cf. Dingwall, 1980). Orchestration is one of the means by which speech exchange is ordered in multi-party encounters. The dyadic interactions with which conversation analysis has been mainly concerned are organized by the parties' often tacit reference to a set of conventions about taking turns to talk and to listen (Sacks *et al.*, 1974). This informal, consensual regulation comes under stress as the number of parties increases or as the interaction becomes more goal-oriented (Atkinson, 1977; Atkinson and Drew, 1979). As a result, other means of regulation have evolved to co-ordinate speaking and listening and to maintain the focus of the participants on the business in hand. Atkinson and Drew (1979), for example, identify a pre-allocated form of encounter, of which a court hearing may be the most familiar example, that is governed by an elaborate set of formal interactional rules. An orchestrated encounter, in contrast, involves the identification of one party as a manager of the talk so that the regulation is role based rather than rule based.

Mediation sessions are multi-party encounters in which the problems of co-ordination are compounded by the breakdown of trust between the spouses, which has made interaction under other conditions difficult or impossible. These sessions are defined in opposition to court hearings so that formal, or rule-based, meth-

ods of management are largely excluded.¹⁶ As a result, the mediator is inevitably likely to find herself involved in a great deal of work maintaining the orderly character of talking and listening, including such matters as organizing the opening and the closing of the session, keeping the parties focused on the current topic, and managing the changes from one topic to another. Because this agenda management is directed to the process of interaction, it can be thought of as being executed in ways that are both formally and substantively neutral, although they might well lead to much longer sessions and a lower level of agreements. Selective facilitation, on the other hand, is directed toward influencing outcomes.

This difference between the two processes is nicely illustrated by lines 315–335 above. Lines 323–330 take the form of agenda management. The mediator invites the parties to decide that they have discussed long enough and that she should summarize the results in writing. Her intervention becomes selective facilitation by virtue of its placement after *W*'s agreement to a plan that *H* has not accepted in so many words and by the way in which she pursues a response from *H* after the lengthy pause in line 332. Even here, however, *H* is still withholding an endorsement of the plan: All he is persuaded of is that it might help to have the mediator write a letter.¹⁷

The general case for describing the entire session analyzed here as marked by selective facilitation is supported by two broad considerations. First, it does not incorporate the systematic exploration of both *H*'s and *W*'s preferences in turn. This episode is the only joint discussion directed to resolving the property dispute, and there is no evidence that it is traded against a concession to *H* elsewhere in the mediation process. At the conclusion of this segment, *M* not only moves to close the session but also indicates that she sees no value in further meetings. Second, *M* not only inhibits discussion of *H*'s preferred solution but also clearly challenges its acceptability with her implication that, were *H*'s suggestion implemented, he would effectively be taking away the home of his children (lines 304–305). He can, in her view, demonstrate his moral adequacy as a father only by giving way on his claim.

One must note the strength of the framing of *M*'s role in terms of its formal neutrality on the ways in which she encourages

¹⁶ This is not to say that certain basic rules may not be set out by the mediator in an opening monologue and referred to during the session. The distinction between pre-allocated and orchestrated encounters is one between ideal types. In this case the mediator's opening statement forms part of the parties' *in situ* socialization into a relatively unfamiliar interactional setting. The novelty of this form means that the divorcing couple do not come with a bank of relevant experiences, unlike, say, a court hearing, in which novice participants can draw on prior exposure to a wide range of media representations.

¹⁷ A similar example can be seen in lines 7–10 of Extract 6 in Dingwall (1988: 161), in which the mediator enters a bracketing sequence, a counseling technique for exploring options hypothetically, with only the wife's agreement, and immediately moves to pressure the husband.

or resists the discussion of particular options. Her alignment against *H* selling the house, for example, is constructed as a formulation of his position, which requires his confirmation or disconfirmation (lines 304–307). In the same fashion, her interventions in favor of the division of the two properties are constructed as possibilities rather than as directives about what she believes *H* and *W* should do (lines 194–200, 360–367). If challenged, she could reconstruct any of these episodes to maintain a posture of formal neutrality, claiming that in the first situation (lines 304–307), she had only summarized what she took to be *H*'s position and that in the others she had only canvassed possibilities.¹⁸ It is her consistent pursuit of one settlement option and her avoidance of another that calls her substantive neutrality into question.

It should be stressed that *M*'s conduct in this case is in no way intrinsically unethical, for it remains within the parameters set out by the practitioners quoted in the introduction to this paper. *M*'s interventions have the effect of bolstering *W*, who would normally be regarded as the weaker party in mediation, and the interests of the children, insofar as they might be thought better served by not being obliged to move from their home in addition to having to come to terms with the divorce. Nor is it suggested that the outcome of the case would have been different if she had explored the possibility of selling the matrimonial home. The point is simply to demonstrate the scope for mediators to encourage some outcomes and to resist others while continuing to present themselves as neutral. The extent to which mediators do this by using strategies such as selective facilitation will only become apparent once analysis begins on a larger data base drawn partly from donated recordings of mediation from both American and British sources and partly from new work at four sites in England. This should allow a more precise specification of the conditions under which the phenomenon occurs and of its cumulative impact on outcomes. But, if a similar picture emerges, this will have important analytic and policy implications.

Evaluation studies, for example, will have to take the problem of commensurability between mediation service providers more seriously. As McEwen and Maiman (1986: 443) have noted, "forum types should not be confused with the processes that occur in them." Unless there proves to be some straightforward relationship between organizational structure and interactional process, which remains to be demonstrated, evaluators will have to take account of the nature of the pressures that are actually being applied to clients before coming to conclusions about the relative efficiency or effectiveness of the providers being studied. This of course is to

¹⁸ A number of the practices that speakers use to avoid the overt expression of opinions and thus propose that they are acting impartially are discussed in Heritage (1985), Heritage and Greatbatch (forthcoming), and Clayman (1988; in press).

say nothing of the social justice issues that may arise from the equity or humanity of the application of these techniques.¹⁹

If, however, selective facilitation turns out to be endemic in mediation and is not introduced with sufficient clarity for clients to be able to recognize it and choose whether to go along with it, this would contribute to the case for greater professional or legal regulation of mediators. There is no a priori reason why it should be regarded as illegitimate to press for particular types of resolution to particular types of matrimonial dispute. Client control must surely rank among the great unquestioned goods of our time. Mediator influence becomes a problem only when formal and substantive neutrality are confused so that the pressure becomes invisible or when the choice of goals remains a purely personal matter rather than one for which the practitioner may be socially accountable. Even here, one may wish to draw a distinction between mediators in private practice, who have been chosen freely by the couple, and those in court-affiliated or mandatory programs, where the philosophy of caveat emptor is surely unacceptable.

Until now debates about mediation have been clouded by the difficulty of establishing the exact nature of the experience and a false opposition between neutrality and bias. This paper has shown that the methods of conversation analysis offer a powerful tool for the dissection of this type of encounter and the re-orientation of the debate around more concrete issues of policy and practice.

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¹⁹ It is of course equally possible that the use of selective facilitation is actually counter-productive in terms of producing stable agreements. Does it in fact alienate clients or lead them into token agreements that may close the session but that they have no intention of honoring?

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