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MEDIATION ANSWERS

## *The Lawyers' Guide To*

# FAMILY LAW MEDIATIONS

[WWW.MEDIATIONANSWERS.COM.AU](http://WWW.MEDIATIONANSWERS.COM.AU)

# DEDICATION

This guide is dedicated to my 5 year old daughter Alice who is already negotiating with me and feeling where the limits are:

*"Mummy can I have a baby brother? Can we put the baby in your tummy?"*

*"Ok well then can we go the shops to buy the baby?"*

*"Ok well then can we get a white dog, an orange dog and a black cat?"*

*"Ok then well can we just get the orange dog?"*



**SAY HELLO**

**@MEDIATIONANSWERS**

This guide is not legal advice and the views and comments are of a general nature only. This guide is not to be relied upon in substitution for detailed legal advice for an individual's specific situation.



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## WHAT'S INSIDE

**04** **Welcome**  
Thanks for being here

**06** **Summary**  
Summary of this guide.

**07** **Preparation for Mediation**  
Making sure both you and your client are properly prepared for mediation.

**11** **At Mediation**  
On the day at mediation.

**21** **What's Next**  
Book me to deliver my talk that accompanies this guide at your firm.

**22** **Other Resources**  
Inside Family Law, my upcoming guide and workbook for clients and CCH Master Family Law Guide.



## WELCOME

Hi, and thanks for being here.

My name is Zoë Durand and I am a mediator and family lawyer.

In this guide I share my local knowledge on how to approach mediations. These tips are not theories on mediation you might find in text books (which are also very useful), but rather this guide is based on my observations at the coalface.

Of course you already know how to prepare for and represent your client at mediation.

However actively reflecting on how we approach our work is always worthwhile, otherwise we all risk simply "going through the motions".

I am also presenting the contents of this guide at firms, so please don't be shy and feel free to get in touch.

## Zoë Durand

Principal, Mediation Answers

## ABOUT ZOE

Zoë Durand is a Nationally Accredited Mediator and FDRP.

She edited chapters in the current CCH Master Family Law Guide and authored Inside Family Law and hosts the podcast by the same name. She has also authored the Family Law casenotes for the NSW Law Society Journal.

Zoë has 15 years PQE experience and has worked primarily in family law private practice and also at Legal Aid as a Court Appointed Independent Children's lawyer. She previously worked in international commercial law firms K&L Gates and HWL Ebsworth.

She has been the AFCC's correspondent reporting live at their conferences and guest lectures annually in family law at UNSW.

She is the co-founder and co-CEO of FutureCase, the first pre-diagnostic tool for lawyers in relation to family law property matter outcomes.

Outside of law Zoë writes and paints and has exhibited in New York, Sydney, Melbourne, throughout China and the Louvre, Paris. She seeks ways to connect law and art and was the NSW Law Society's in residence artist adjudicating their Young Lawyers Ball.

Zoë is also mum to a robot and gruffalo obsessed 4 year old. She is genuinely passionate about family law and efficiently reaching outcomes which allow families to move forward in a way that preserves their resources.





## YOU ARE NOT JUST PUSHING PAPER... YOUR WORK MATTERS

The purpose of this guide is so we can take a pause to really see and feel how important our work is and look at how we are approaching mediations.

Of course you care about what you do and are driven to create work you are proud of. However in the rush of busy family law work loads and high demands placed on our time, it is so easy for all of us to descend into "conveyor belt" family law.

My hope is that this guide will spark more thoughts and conversations around how we approach mediations and how we can best support clients in getting the most from mediation.

# SUMMARY OF CONTENT

9 key tips to assist you and your client with preparation for mediation and also how to move through blockages to agreement on the day

1

Preparation.  
Line your  
ducks up in a  
row.

2

Intakes.  
Mediation  
begins before it  
begins.

3

Logistics.  
Sweat the small  
stuff.

4

Communication.  
Lost in  
translation?

5

It's all about  
timing.

6

Creativity can  
move things.

7

Change your  
perspective.

8

Document on  
the day. Avoid  
the Bermuda  
Triangle of lost  
in principle  
agreements.

9

And if all else  
fails...



# PREPARATION: LINE YOUR DUCKS UP IN A ROW

There will always be surprises at mediation. However, preparation allows you to manage what is within your and your clients' power:

- **The "law stuff"** - iron out any issues regarding valuations, the balance sheet, disclosure and also ensuring your client understands the law and what is a likely outcome (or possible outcomes) if the matter were to be determined at trial.
- **The "life stuff"** - ask your client to ensure all their ducks are lined up in a row in terms of what they can prepare. For example, if part of their proposal might involve refinancing, have they spoken to their bank/ broker? If they are going to propose that a person be present during the other parties' time with the children have they actually asked that person if they are agreeable to that?
- **Structure your options** - Your client can prepare a table with each issue on the left, and options on the right hand column. This allows them to structure what the issues and possibilities are and to start thinking of ways to move things forward prior to mediation.



"A goal without a plan is just a wish" - Antoine de Saint-Exupery

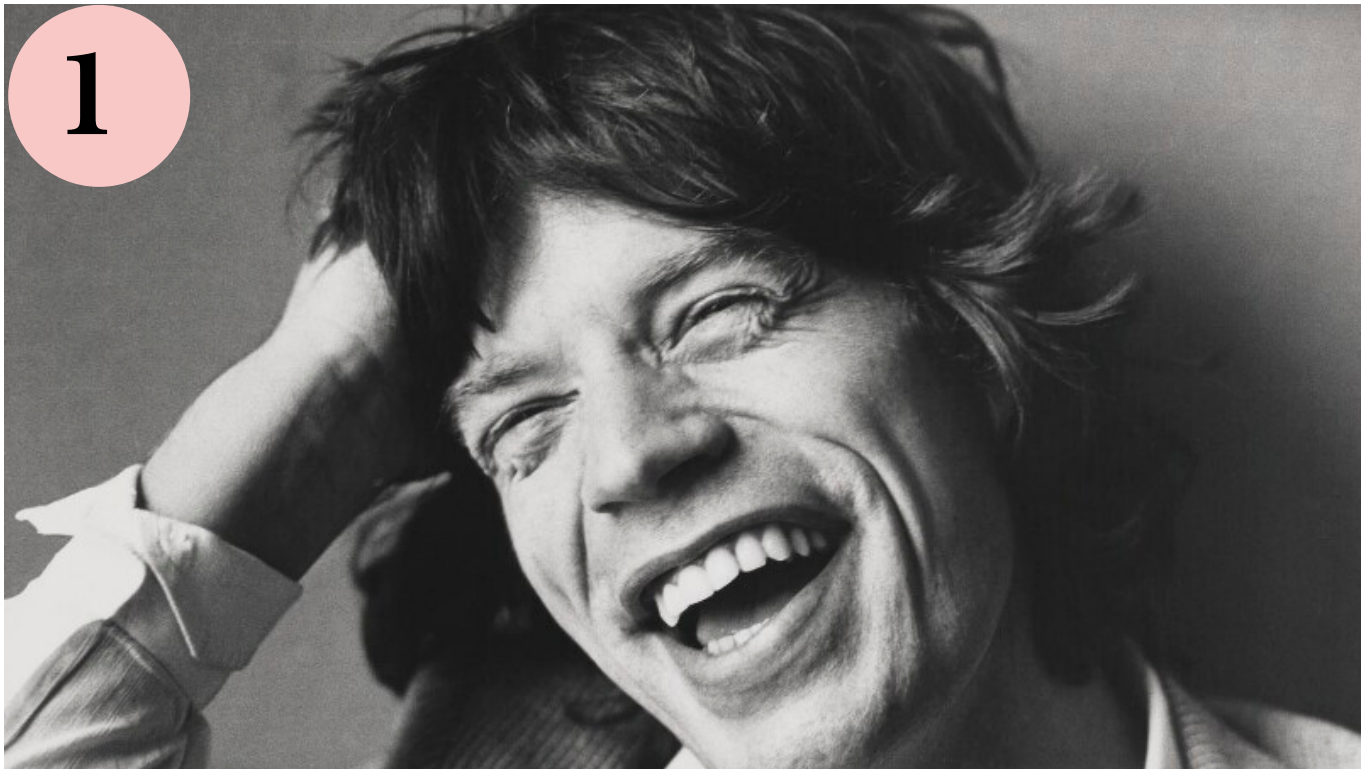


# LINING UP THOSE DUCKS (CONTINUED) & WANTS VS NEEDS

Mediation is a time to look at the bigger picture. In property matters consider discussing with your clients the following 4 considerations prior to the day:

- (1) **Law** - What is the law and how does it apply here? What is the range of likely outcomes? The strengths and weaknesses in each parties' case? The different pathways the matter could take if it continues past mediation?
- (2) **Non legal issues** - Any other motivations driving the matter for either party? I.e. the need to purchase a property in a particular area?
- (3) **Commercial realities** - What are the estimated legal fees going forward?
- (4) **The value of resolution** - What is the price/value your client places on finality in and of itself? I.e. the cost of stress or conversely peace? This is personal and has a different subjective value for each client.

It is important clients are encouraged prior to mediation to consider and differentiate between what they want (ideals) and what they can live with (needs). Although we often talk about parties “wants and needs” at mediation, I believe the two are quite distinct.



"you can't always get what you want / But if you try  
sometimes, you might find / You get what you need."  
- Mick Jagger

# INTAKES: MEDIATION BEGINS BEFORE IT BEGINS

A person can only move so far in one day. That is why in my opinion it is crucial to have an intake session between the mediator, lawyer and their client prior to mediation.

The intake allows the mediator to understand the parties wants, needs and perspectives. However it also allows the client to turn their mind to the issues at mediation and what options might be possible to resolve those issues.

In between the time of the intake and the mediation this allows the client to (consciously or subconsciously) consider other possibilities, what the range of outcomes might be, the bigger picture and also to consider what they might want, but also how the other party might see the issues.

This means that by the time parties come to mediation they arrive with a broader perspective and having travelled through different possibilities outside of simply their ideal outcome.

**Rather than asking clients to move miles in one day at mediation, it helps if they can start to broaden their thinking and integrate other perspectives in the week or two leading up to mediation.**

Sometimes if clients have time to allow ideas to percolate and settle in their mind in the background without the level of pressure they might feel on the day at mediation, we can move much more efficiently on the actual day.



"Nobody has the power to take two steps together, you can make only one step at a time." — Osho.





3

If you ignore little things, they become big problems" - Rohinton Mistry

## LOGISTICS: SWEAT THE SMALL STUFF

When it comes to mediation, sweat the small stuff. Clarify these mere "logistical" issues prior to the day:

- Format - shuttle, or joint, or at least joint for opening session?
- Third parties - an unexpected new partner may derail the whole mediation.
- Opening statements - check your clients opening statement prior.
- Privacy and rooms - ensure soundproofing and that the parties cannot hear each other.
- End times - Can the parties actually attend for the entire day? It may seem obvious, but it is best to know beforehand if anyone has a time they need to leave. Also if there are children, who is collecting them and are the parties on the same page here?

It may seem like mere "logistics" but something seemingly tiny can balloon to become a mammoth obstacle you have to push uphill at mediation. Then logistical issues can negatively influence the actual primary settlement discussions.

4

“The biggest communication problem is we do not listen to understand. We listen to reply,”  
Stephen Covey.



## COMMUNICATION: LOST IN TRANSLATION?

Never underestimate the importance of clear communication. Are you and the solicitor for the other party speaking the same language?

- **Get it in writing.** When making offers write down the bare bones of the offer for the other party. Otherwise there can be misunderstandings, for example 65% of the overall pool? Or 65% of the proceeds of sale etc. This can be written on paper (if face to face) or via email (if zoom/ teams).
- **What is their why?** Ask for clarification around the rationale for any offer. Also understand your clients' rationale. What is the underlying want/ need or idea that is driving an offer? Even if positions may be different, this allows both parties to engage with each other's underlying concerns.
- **Listen.** Really listen to every single thing the other party says. Even the smallest things can be very revealing as to what matters to them, and what might unlock the mediation.
- **Lost in translation?** If you and the other parties' lawyer are lost in translation work out why:
  - Is it a factual issue? If we can close the information gap then it makes reaching agreement more possible. I.e come ready with documents / screen shots of bank balances / superannuation statements. Be willing to work to close gaps.
  - Is it a legal issue? Be willing to talk differences of opinion through openly and ask for the mediators assistance and input.



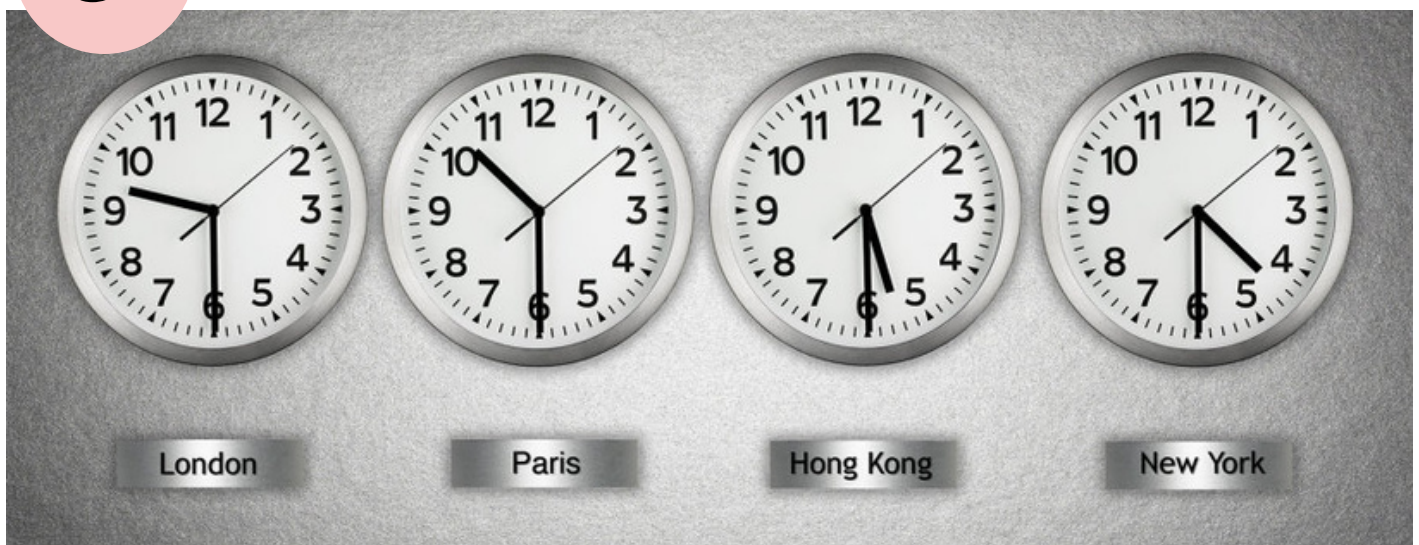
# ITS ALL ABOUT TIMING

Timing is crucial in life and also at mediations. Understand that...

- **People move at different paces.** For some clients they can move to a final position swiftly and prefer to just come to this point quickly. They become fatigued by ongoing back and forth offers and interpret this as playing games. Other clients need to move back and forth gradually to reach a final point in order to accept where their limits are.
- **Start small and build momentum.** Sometimes start with the "easier" agenda topics first to build momentum which carries through to increasingly harder topics.
- **Start big, but low pressure.** However in other situations it might be best to start with the most challenging agenda item (i.e. an ideas exchange without hard pressure for an immediate outcome) for example what school are the children to attend? What about the mother's proposal to move to the South Coast? We can then explore the benefits and negatives of various options without hard pressure to reach a conclusion and then park the issue to discuss easier issues. Then after the parties have had time to digest different perspectives in the background sometimes we can reach agreement. It is important to understand pace, timing and when to push and when to have less pressure.

5

...Because sometimes things move when no one is looking.



"The right offer at the wrong time, is still the wrong offer." - Anon wise family lawyer

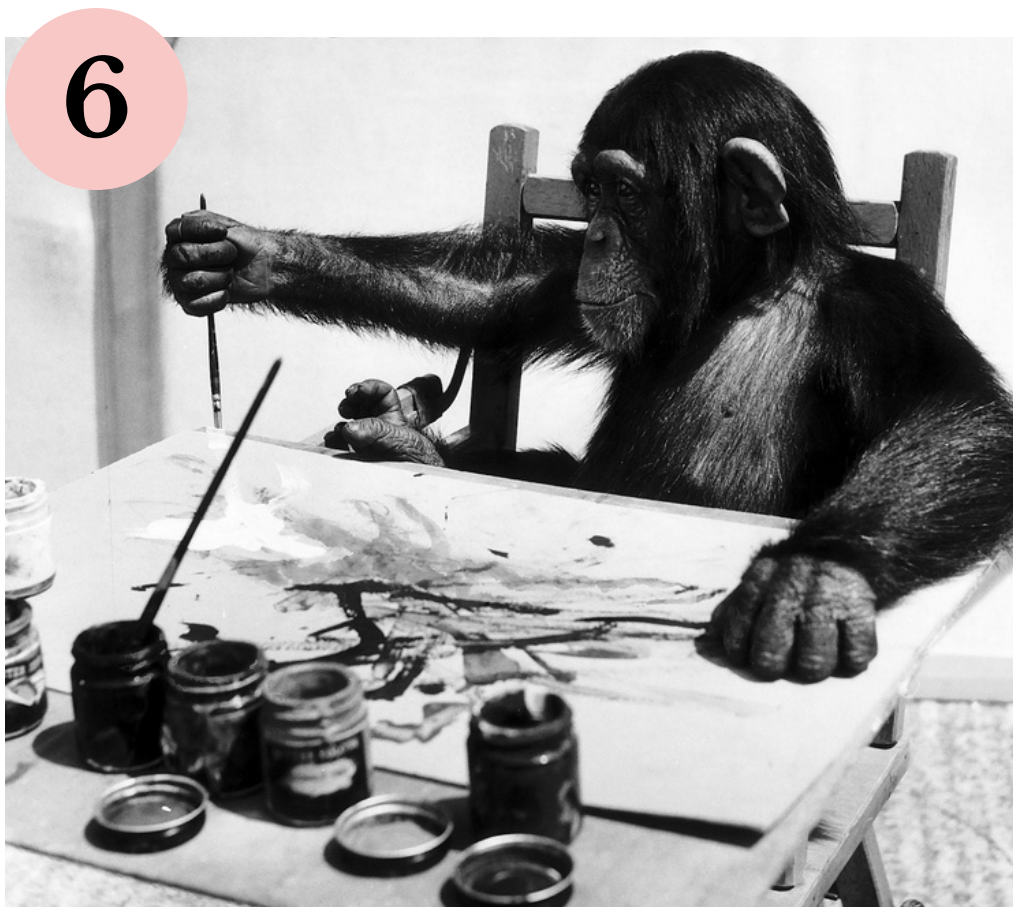
(I am still trying to locate the original source for this quote. If you know, tell me!)

12

# CREATIVITY CAN MOVE THINGS

Sometimes two parties tug-o-waring in the same linear paradigm has its limits. Think creatively:

- **Flow don't force.** Stop going in circles, step back and look at the whole situation again with fresh eyes (coffee break). Sometimes when we let go of something, a new answer will come.
- **Go back to the beginning.** Rather than fixating on slicing between two positions (when the parties are not budging) look at what the origin of the block is between the parties and try to find a new solution. Look beyond positions and understand the reasoning behind what the other party is saying.
- **Choices are an invitation to choose.** If the parties are close to agreement (the last gap) it can sometimes work to offer 2 possibilities. For example, a slightly higher amount of assets to Party A, but a higher portion of that being comprised of superannuation OR a slightly lower amount of assets to Party A, but a higher portion of that being comprised of cash. Sometimes parties can feel compelled to “chose” one option if they are actually given a choice.
- **"Same, same, but different."** Take as many elements from the other party's last offer and tweak the parts you need to. Try to speak in their language and make your counter offer be identical or referable to elements of their last offer.

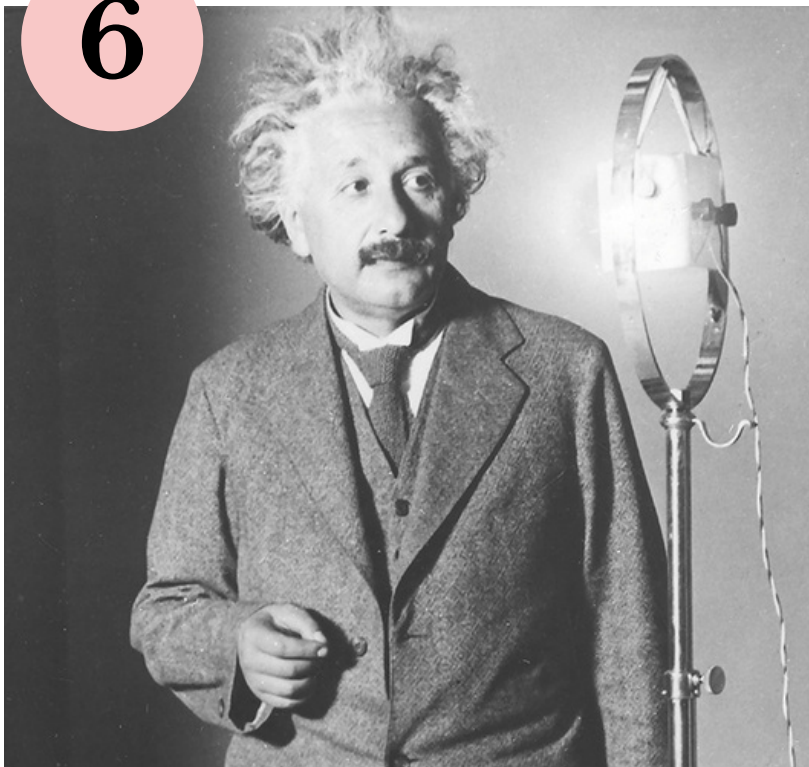


If Congo the painting chimpanzee can think outside the lines, then we can too.

## CREATIVITY (PART 2)

- **Think beyond the linear to different time and thing paradigms.** Consider the mix of assets, time frames and any other things that may be of value to the other party and how these interact. For example, can your client offer the other party an extended period to sell the property (if this is of value to them), but with the proceeds of sale to your client being slightly higher.
- **Lower the bar.** In a parenting matter if the parties are stuck, lower the bar and start small (the smallest possible timeframe i.e. the next few months) rather than trying to come up with an arrangement to age 18. If this comes easily then build up from the smallest time frame and see if the next stage can be reached.
- **From a "no, never" to a "pathway towards a yes".** If a party is saying "no" to something for example recommencing time, (really) listen to reasons for the "no". Ask what would reassure the party in relation to each issue and see if you can shift it from a "no, never" response to a "these would be the steps to deal with each issue" response.
- **Be really simple.** It is not always about doing creative backflips. Go back to the parties opening statement, their core purpose and the beginning of what they wanted. For example they said: *"I want to build on my relationship with our children and I want them to be healthy, happy and feel loved."* If the parties are stuck on if holiday time ends at 1pm or 3pm on the last day and threatening to walk out, take them back to the core purpose of why they are here and if we are all coming from that place now. It is always more effective to remind someone of their own words were than impose your words on them.

6



"Imagination is more important than knowledge. For knowledge is limited, whereas imagination embraces the entire world, stimulating progress, giving birth to evolution."  
- Albert Einstein

# CHANGE YOUR PERSPECTIVE

Mediation is a time to take stock, see all angles and not become myopic.

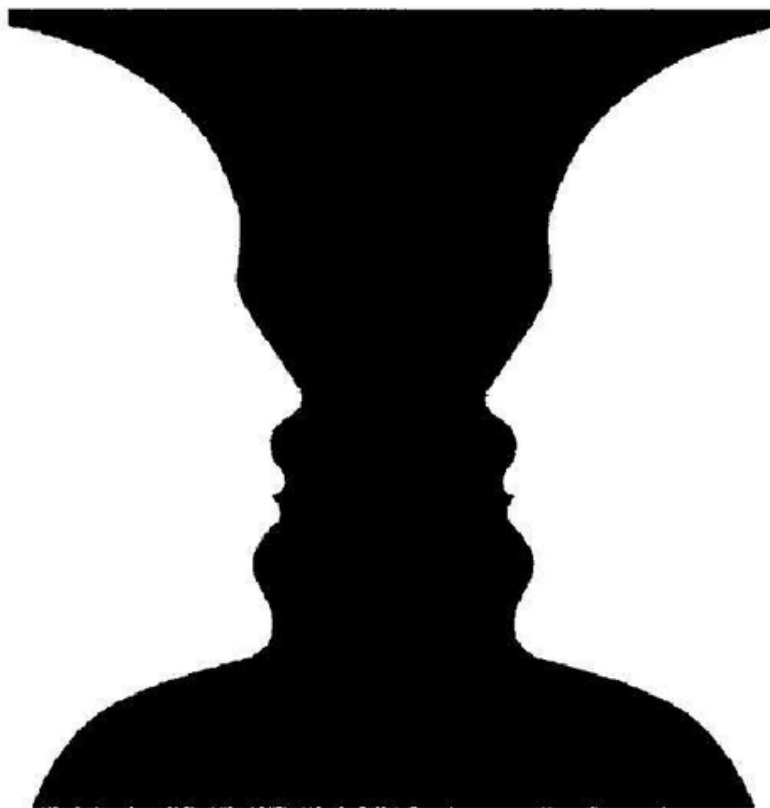
Consider if you were acting for the other party what would you have advised them? What would you see as the strengths and weaknesses in their case? What facts would you focus on? How would you be trying to tell the story? What cases would you be relying on? What is their highest possible, but arguable outcome? And keep with this until you are really (truly) in flow using your best advocacy skills. Then share this with your client.

You may have considered your clients worst outcome, and in theory this should be identical to the other parties' best outcome... but....

Somehow things can feel and look different when we argue in the positive for the other party rather than in the negative for our own client.

7

Is it a vase or two faces?



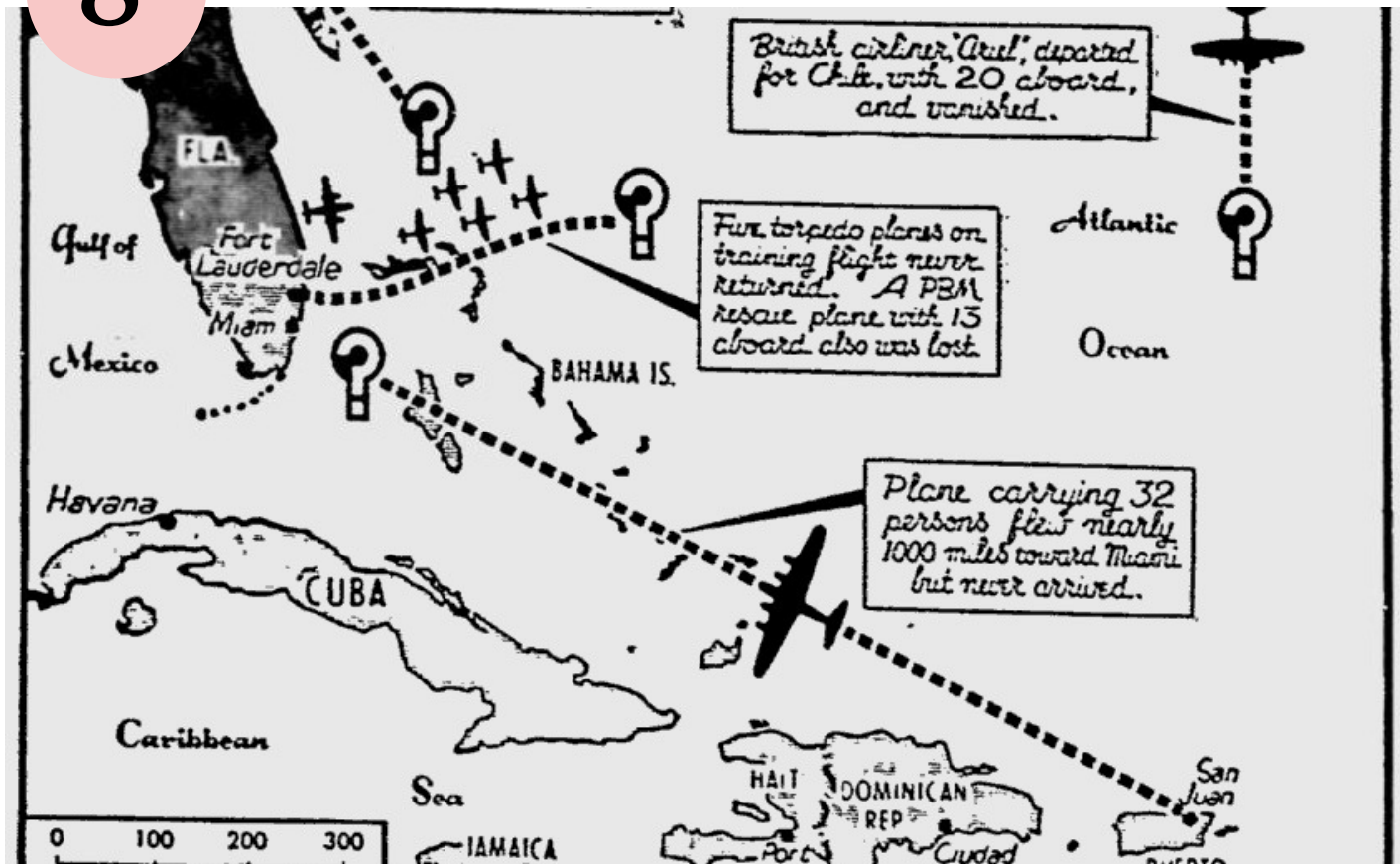
"Everything we hear is an opinion, not a fact.  
Everything we see is perspective, not the truth."  
Marcus Aurelius



# DOCUMENT ON THE DAY. AVOID THE BERMUDA TRIANGLE OF LOST IN PRINCIPLE AGREEMENTS

8

“Do it now. Sometimes 'Later' becomes 'Never’”



Whenever possible document an in principle agreement on the day, not just as Heads Of Agreement, but as Consent Orders or a Parenting Plans etc. This is not always possible and of course clients should not be pressured to sign on the day... however, wherever it is possible and appropriate terms should be signed.

Speaking anecdotally in principle agreements can drift off to the "Isle of Lost In Principle Agreements", where they unravel for a number of reasons:

- **Buyers remorse.** Agreements may completely fall apart due to "buyers remorse." Parties may become influenced from friends and family opinions and outcomes in other matters.
- **Pulled by the tide of multiple changes.** Parties may change their mind and want to renegotiate smaller aspects of the agreement. This can then domino out into the other party also wanting to respond in kind and eventually the parties move further away from the in principle agreement.

# AVOIDING THE ISLE OF LOST IN PRINCIPLE AGREEMENTS (PART 2)

- Time warps. Months can pass in the Isle. Alternatively, it can take months to finalise documents. While we get there in the end, this causes a lot of angst for clients.

Parties may see reaching agreement as distinct and separate from the documentation of that agreement. However, when ironing out "minor" drafting issues, some level of negotiation can resurface.

The "devil is in the detail," so go with the momentum on the day and sign terms so everyone can go home and sleep in peace that evening.

If you cannot document on the day, formulate a clear structured pathway for finalising documents. I.e. *"Party A to draft the Consent Orders and Party B to draft the Application for Consent Orders and both to provide the drafts to each other within 3 days and then provide any proposed amendments by X date."*

Also consider inserting a safety net, for example if the documents are not filed by a certain date and the lawyers cannot directly resolve any drafting issues by that date then the parties may engage the mediator to briefly assist with input to finalise terms.

8



Carpe diem – seize the day

# AND WHEN ALL ELSE FAILS...

Sometimes things don't go to plan... but you can still salvage something and give your client real value.

9



A mediation is an opportunity. It is never a guarantee. No matter how much effort the mediator, lawyers and parties put in. However if things are going pear shaped consider dissecting a matter across items on the agenda (partial agreement) and across time (can even a temporary holding pattern be established rather than final agreement?)

**Capture the progress actually made.** Consider drafting a confidential, non binding written memorandum (unsigned) documenting the progress made. This can be a spring board for further progress and discussions in the future. It can include a list of the items still not agreed.

**Agree to a pathway forward** to continue the conversation. Can the parties exchange written offers shortly after mediation? Offers should at minimum be the final offer made (rather than going backwards).

..



## AND WHEN ALL ELSE FAILS...

· **Think beyond “yes” or “no” to a “maybe.”** If it’s 7pm and the parties are almost agreed, apart from one final detail (for example all aspects, but for if a no spouse maintenance BFA is signed), rather than continuing to pressure the frazzled and hungry parties, perhaps ask the parties to consider the issue and revert back to each other within X days. Pressure is sometimes needed, but at other times pressure will force a “no” (disengagement) when if you can pause on a maybe (keep engagement), parties could reach a “yes” over the next few days.

· **Defer one or two items of agreement.** If most aspects of a parenting matter are agreed see if a written agreement can be reached and this one issue can be deferred to a later date i.e at a later review date for mediation.

· **Ask what steps can be taken to move the matter forward**, even if final agreement cannot be reached. For example, agreement to at least sell an asset (and agreement as to the mechanics here)? For valuation? Agreement to non time issues if time arrangements are not agreed in parenting matters (i.e access to information, enrollment in activities, travel etc)?

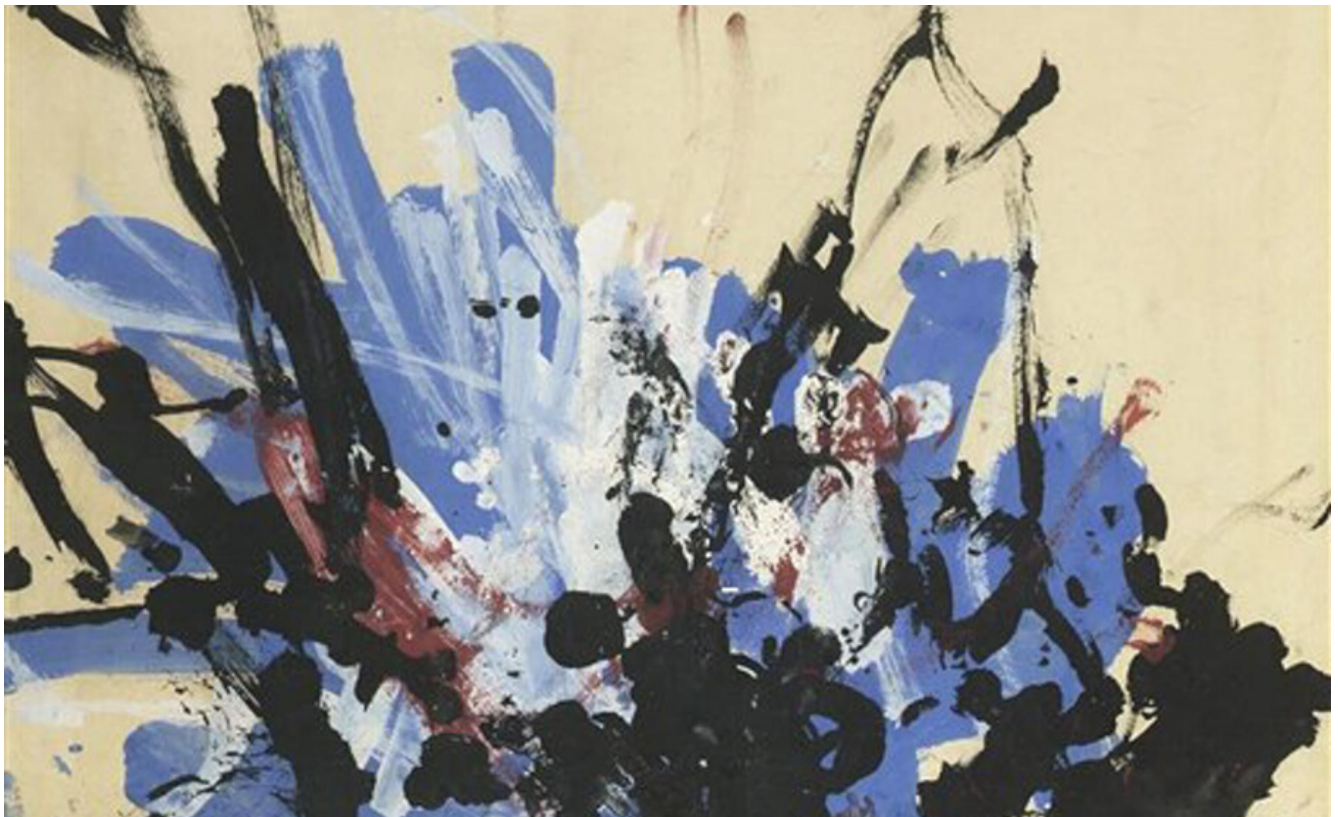
9



Don't get in a tangle. Try to look at what parts of the puzzle are unlocked rather than taking an all or nothing approach.



"BENEATH THE SURFACE I HAVE A  
DEEPER, MORE PROFOUND AND  
MEANINGFUL STORY TO TELL.  
AND ACTUALLY EVERYBODY DOES.  
WE ALL DO." - CANDICE KUMAI



Chaos to order, past to future. By Congo the painting Chimpanzee

Mediation could be seen as a way of moving forward  
from **chaos to order**,  
from **the past to the future**.

It is a privilege that we can be part of helping clients cross that bridge.  
We are playing an **important role at a crucial time in their life story**.  
We all owe our best efforts, intelligence, experience and compassion.



## WHAT'S NEXT?

If you would like me to come and present the content in this guide at your law firm either in person or via zoom, then please be in touch.

Keep an eye out for my guide to mediation for your clients and accompanying workbook which is coming soon.

Otherwise please feel free to say hello at:  
@mediationanswers on Instagram  
Zoë Durand on LinkedIn

**I LOOK FORWARD TO HEARING  
FROM YOU.**

# TESTIMONIALS



**Nora Michael, Managing Director,  
Nora Michael Family Lawyers**

*I have found Zoe's approach to mediations as being unique and special. In my experience with Zoe as mediator in various matters, I have observed Zoe's wonderful ability to combine her experience and knowledge as a family lawyer with her compassion and empathy as a human.*

*Zoe goes above and beyond the call of duty with the time and energy she puts into her role as mediator, and the feedback I have received from clients about Zoe has always been positive. I would have no hesitation in recommending and proposing Zoe as mediator in future and I look forward to her continued assistance in resolving complex family law disputes.*



**Justine Kearney, ABC Journalist**

*"As a journalist and someone who found themselves going through a separation, I found Zoe's book so helpful. I felt like I was sitting down with these Judges, barristers and other legal experts getting exactly the sort of information I needed. I highly recommend this book for anyone about to embark on this difficult and overwhelming time."*



**Isabel Lo, journalist, founder of Media Diversity Australia and former producer for ABC and CNN International**

*"Zoë Durand has provided such an important resource for those going through the process looking for more perspective. I've been recommending Inside Family Law to all my friends."*



**Greg Mclellan, lawyer, Justice Family lawyers**

*Zoë is a very talented and proficient mediator. In particular she has wholly resolved every single one of the several matters that her and I have both been involved in. She has a kind, yet firm and directive approach at mediation.*

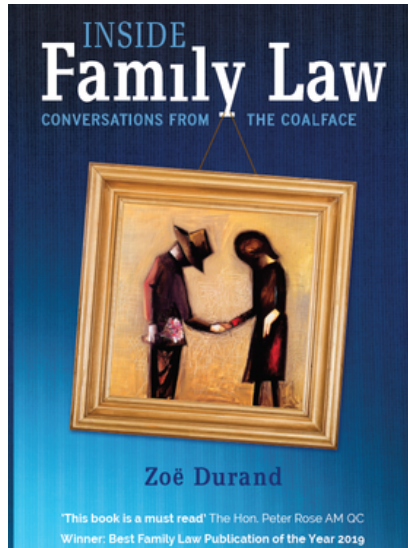
*I have relied upon Zoë for a number of highly complicated parenting and property matters, including some where the parties were substantially far apart.*

*She has always provided outstanding assistance in reaching a final resolution of the matter. Zoë seems to have the magic touch with clients to really listen and understand what the obstacles are and then dissolve those barriers to resolution. She has a unique ability to structure the mediation so that issue A unlocks issue B, unlocks issue C in a way that flows and feels effortless, but no doubt takes planning and skill.*

*In addition to her effective interpersonal skills, I have found that Zoe's extensive knowledge and experience as a practitioner allows her to engage with and effectively resolve highly complex and technical issues. Zoë is always pleasant to work with and I would highly recommend her to those requiring a skillful and experienced mediator.*



# RESOURCES



## Inside Family Law, the book and podcast

Through rare and candid conversations, Inside Family Law demystifies family law and allows readers to have access to the leading minds in family law from Judges, barristers, lawyers, forensic accountants, family therapists, psychologists, registered real property valuers and many more.

Stories from those who have navigated the process first hand including children's stories are also included.

The Inside Family Law podcast continues these conversations.



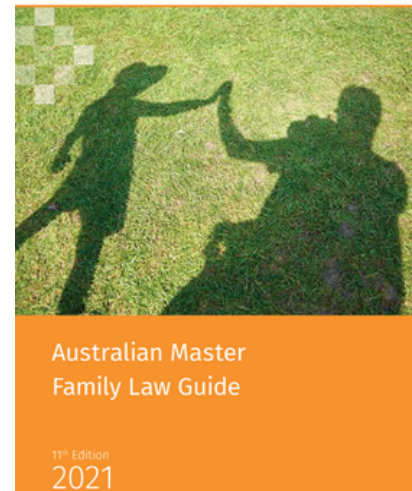
## Guide and workbook for clients... coming soon

Coming soon is your clients go to guide when preparing for mediation, written in an engaging manner in a way that is easily understandable to non lawyers.

This guide will empower your clients as to how to understand mediation, get the most out of the process and prepare so there is the highest possibility of reaching resolution.

An accompanying workbook will take clients through how to consider issues, options and ensure they are in a position to make and explore options at mediation.

Wolters Kluwer



## CCH Master Family Law Guide

Reflecting the latest developments in family law legislation and cases, this book has been written by experts to help you work quickly and confidently to provide accurate advice. The eleventh edition of the Australian Master Family Law Guide is a comprehensive and practical guide to Australian family law. superannuation.

Zoë Durand has edited the updated chapters on Children, namely dispute resolution, parental responsibility parenting orders, plans and guidelines and the principles the court must consider when conducting child related proceedings.

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