

Good morning Your Honour, ladies and gentlemen, nice to see you all here, at yet another Fabulous Foley's breakfast.

I appreciate the opportunity to be a speaker in this famous forum. Yet, I feel very daring speaking to you about conflict resolution in family law or even mediating a family dispute, and we know conflict resolution and settling a dispute are not necessarily the same thing. It is daring because dealing with families in conflict is our daily business and we are all *experts* in this field. I dare to say "experts" in this "specialist" field of legal practice and long live that specialisation at every level of our family law system!

My topic is "working *with* the parties", subtitled "how on earth can we assist parties to find a way out of intractable disputes?"

We know the legal process isn't getting any easier and litigation isn't becoming any more accessible or affordable. The cases seem more complex, the parties' problems seem more multi-faceted and their disputes seem more intractable. It's not easy to keep ourselves fresh and optimistic, as we approach each client and each case. At times, under the pressures of our work, it is hard to remain conscious of the privilege it is to be invited into the private domain of peoples' lives and relationships.

This morning, I will speak briefly about some lessons I have learned – lessons which assist me to appreciate the uniqueness of the person and their circumstances, and not drift into the staleness of "same ol, same ol...can't you just be reasonable".

For example, social stereotypes of what it means to be a man, a woman, transgendered, straight, gay, old, young, rich or poor, have largely dissolved for me. Individuals defy the stereotypes. When I don't expect people to play a certain role, or behave in a certain way, I am more able to see the individual as they really are.

I have also learned to accept that people in a heightened emotional state will not be able to stick to the facts, however much we insist. The people we work with are rarely able to be objective and rational decision-makers, as there is too much of self at stake; too much of one's

personal identity is challenged by relationship and family breakdown and the associated losses.

I find that the more I can see a person for who they actually are, the more I can accept their feelings as well as their thoughts, the more I can understand what is at stake for this person, the better I am able to work *with* them.

This isn't easy with one person, but as a mediator, I need to be able to do this with both parties, and also consider what is going on with their solicitors, their barristers, their support people and the one on the phone, who I never get to meet. Every person involved, brings who they are to the dynamics of the dispute and to the negotiation. You can see that working *with* the parties is no party.

Then of course, I bring who I am to the work. I need to bring all that I am and have learned, to the table, in a very self-aware way. This involves something of a paradox. As a mediator, I want to be fully present and personally engaged and at the same time, to put aside any personal agenda and ego investment, in order for me to work *with* the parties. We all know how vital it is to be self-aware, self-disciplined and to manage ourselves well.

I mention these things because I believe they are lessons generally applicable to the work we all do.

I also know that being an effective participant in dispute resolution requires me to keep on learning and developing my abilities. So, for the remainder of this presentation, I would like to share with you some ideas from one of the world's experts on negotiation, Daniel Shapiro. He is the founder and director of the Harvard International Negotiation Program and recently published the book "Negotiating the Nonnegotiable", subtitled "How to resolve your most emotionally charged conflicts".<sup>1</sup> His analysis of the nature of conflict and the barriers to resolution, rings true for me in the context of family disputes and I hope is of interest to you.

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<sup>1</sup> Daniel Shapiro, *Negotiating the Nonnegotiable*. Penguin, New York: 2017.

In family law we see emotionally charged conflicts all of the time over parenting, money, property, choice of lifestyle, freedom of movement, family businesses, broken agreements etc, etc. Of course, we know that the best approach to conflict resolution is collaborative problem-solving, by uncovering each person's interests and committing to an agreement which works for both sides. This has even been known to happen! Yet, in the emotionally charged conflicts arising from relationship breakdown, collaborative problem-solving attempts often proves insufficient. Shapiro has spent decades investigating this and has concluded that emotionally charged conflicts may feel non-negotiable, but asserts they can be resolved.

To get to the heart of the conflict and successfully work through it, requires us to look beneath the substantive issues in dispute, to the role of identity in the interaction. Shapiro contends that when we feel threatened for who we are or what we stand for, emotional forces swoop in and lure us into conflict. We become stuck in the adversarial mindset. It is in counteracting the emotional lures that the emotional space is opened for healing grievances and rebuilding connections. Shapiro has developed a method which he calls Relational Identity Theory.

“An emotionally charged conflict gets its ‘charge’ because it implicates fundamental aspects of your identity; who you are, what you hold as important, and how you conceive of meaning in your life. In other words, it threatens *you*.”<sup>2</sup>

Surely, one's identity isn't negotiable? If identity is absolutely fixed, the only way to resolve a conflict is to compromise your own identity or to persuade the other to compromise theirs. This is how conflict becomes a win-lose situation. Conversely, if identity is entirely fluid, there is no assurance that either person will honour an agreement or consider themselves accountable for a previous decision. Shapiro considers that some aspects of identity are fixed and some are fluid, not an either/or situation. He considers it is much more useful to direct attention to those aspects of identity which can be affected, rather than to those which appear to be

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<sup>2</sup> Shapiro, 10-11

immutable. He proposes a framework to help “discover and leverage the most deeply significant aspects of identity underpinning conflict”.<sup>3</sup>

Shapiro posits there are two facets of identity, critical for resolving emotionally charged conflict: core identity and relational identity.<sup>4</sup> Core identity is built on five pillars – beliefs, rituals, allegiances, values and emotionally meaningful experiences. The primary function of identity is not just to survive but to find meaning in life. These five pillars bring significance to life and give vitality to identity. People want to safeguard what is important to them and what gives significance to their lives. A threat to any of these pillars creates an internal crisis because meaningful aspects of core identity feel endangered. The sooner we realise which of the pillars is threatened, the more readily we can address that vulnerability and refocus on resolving the conflict. We can set out to detect which of the core identity pillars feels endangered for each party, because any proposal which threatens an important pillar is unlikely to be acceptable. Core identity is resistant to change.

The other facet of identity is less resistant to change. The person’s relational identity is more malleable and provides a powerful pathway for resolving even the most emotionally charged disputes.<sup>5</sup> Shapiro defines relational identity as the “spectrum of characteristics that define your relationship with a particular person...”<sup>6</sup>. He contends that core identity seeks meaning in existence and relational identity seeks meaning in co-existence. The latter changes constantly as we negotiate a relationship, and it can be shaped. Relational identity matters in resolving a dispute.

The characteristics of relational identity do seem to be amorphous and dependent on feelings of connection or rejection. However, Shapiro contends relational identity involves two specific dimensions: affiliation and autonomy. Awareness and understanding of these dimensions help

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<sup>3</sup> Shapiro, 14

<sup>4</sup> Shapiro, 15

<sup>5</sup> Shapiro, 18

<sup>6</sup> Shapiro, 19

us to build cooperative relations in a conflict.<sup>7</sup> He suggests building affiliations or constructive connections produces a desire to co-operate; because the flip side of affiliation is rejection and rejection feels like a punch. Once hit, we resist co-operation, even if that goes against our rational interests.

The other pillar of relational identity, apart from affiliation, is autonomy. Autonomy is the individual's ability "to think, feel, do and be as they wish, without undue imposition from others".<sup>8</sup> Stepping on another's autonomy is likely to provoke an aggressive response. I realise this is becoming rather abstract and is probably quite indigestible as breakfast food. But Shapiro's 'bottom line' with this relational identity challenge is to figure out how to satisfy the desire to be simultaneously one with the other (affiliation) and one apart from the other (autonomy). Both autonomy and affiliation are intrinsic to any relationship and cultivating an equilibrium is necessary for harmonious relationships.<sup>9</sup>

You might ask how building cooperative relations in conflict is relevant in relationship breakdown, where the parties just want to see the back of each other. Well I think we know that the breakdown of an intimate relationship does not mean the relationship is over. Where they are parents, the needs of the children demand the renegotiation of the parental relationship and we know only too well the dire consequences of ongoing conflict between parents. Where there is shared property, before the end is reached, distribution of what is shared is necessary and there can be life-long and intergenerational consequences of the way in which people part and conclude their financial relations. It is also apparent that the ways in which people separate often have life-long consequences. The emotional and psychological wounds can be profound. I believe that seeking to resolve conflict in ways which respect and do not threaten core identity and which respect individual autonomy, can lead to restoration of embattled individuals and healing of wounded relational identity. Conflict resolution actually

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<sup>7</sup> Shapiro, 20

<sup>8</sup> Shapiro, 21

<sup>9</sup> Shapiro, 23

needs a sense of connection, in some form, with the “other side”, to find a creative pathway. Even if there remain irreconcilable differences, there may be ways to change the system of relations thus reducing conflict and improving co-operation.<sup>10</sup>

I will finish today with reference to the characteristics of the divisive mindset which is triggered by threats to identity. In a counterproductive effort to protect one's identity from perceived harm, the person becomes self-protective and fear-driven. You can recognise this state as the person magnifies differences, minimises similarities, forgets all the good things about the relationship and remembers only the bad. The person becomes self-righteous, morally superior and can rationalise any defence. The person closes down and maintains fixed ideas about their own and the other's identity. They can't listen to the other person's concerns and can't critique their own perspective. “Self-protection trumps collaboration”.<sup>11</sup>

Shapiro holds to the hope that when identity feels threatened, a person has a choice of how to respond. I can allow myself to be trapped in a divisive and static mindset which polarises relations or I can choose a communal mindset which draws me closer to the other, through an integrative dynamic. He believes we can free ourselves from the divisive forces and can foster integrative dynamics. I agree with Shapiro and I am still studying his methods and considering their application to working *with* the parties in family law disputes. Our understanding of the human being, individually and communally, does keep evolving.

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<sup>10</sup> Shapiro, 253

<sup>11</sup> Shapiro, 28