

Breaking Impasses in Family Law Negotiations

Richard Maurice

“I think people should try to teach young children that these qualities – stubbornness and a capacity to listen – might look like opposites, but they are not.”

Renzo Pinao – Architect, 1998 Pritzker Prize winner, is perhaps known for his controversial design of “One Sydney Harbour”.

“Being stubborn is a virtue when you are right, it’s only a character flaw when you are wrong.”

Chuck Noll - was an American professional football player and head coach. Regarded as one of the greatest head coaches of all time, his sole head coaching position was for the Pittsburgh Steelers of the National Football League from 1969 to 1991.

Introduction

This paper focuses on how to overcome impasses or deadlocks during negotiations to settle disputes whether assisted by a mediator or via direct negotiation. These strategies are applicable to many other types of litigation, including family law proceedings.

There is nothing more frustrating than spending hours in negotiations only to hit a roadblock that prevents the resolution of a matter. It is a bit like cruising down a highway only to reach a sign that says “Road Closed” just before you arrive at your destination. This paper explores techniques to break an impasse, some of which are obvious and others that are not.

What Causes an Impasse?

There are many causes. Sometimes it is only one, but more often than not there is more than one and they sometimes overlap:

1. **Stubbornness or intransigence** – a party has reached the minimum outcome they have in mind and simply wants to put their “final offer” and go home. Sometimes stubbornness is mirrored, meaning both parties are being unreasonable and/or unrealistic. This obviously presents a real challenge even for a skilled negotiator.
2. **Line in the sand** – like stubbornness, a party refuses to compromise any further from their “last offer,” saying, “I have already given away too much.”
3. **It’s a matter of principle** – a party stops listening to their legal advisers and

the mediator because they perceive that the negotiations are “unfair” and will give the other party a “win” they do not deserve.

4. **Party feels pressured** – a party feels their legal advisers or the mediator are applying too much pressure on them to agree to something they do not want to accept.
5. **Negotiation exhaustion** – after many hours, a party feels overwhelmed by the process and says they cannot think clearly and do not feel they can continue.
6. **No alternative but to litigate** – like negotiation exhaustion, a party simply “wants their day in court” and is prepared to take their chances, no matter how irrational that may be.
7. **Hidden agenda** – a party is not genuinely committed to reaching a settlement and has participated in negotiations for some other reason, usually ulterior. A skilled negotiator should pick this up early on, either to deal with it or terminate negotiations.

With regard to feeling pressured and negotiation exhaustion, I always recommend that, if possible, negotiations be temporarily suspended and resumed on another day. If you continue, the risk is that a party will renege on the agreement shortly after negotiations.

What Are the Solutions to These Problems?

A. Categories of Intransigence

There are various categories of stubbornness or intransigence, including:

1. Positional rigidity – “**I want 75% – full stop.**”
2. Loss aversion – fear of giving up assets already mentally “owned”; e.g., retaining a family home even if it is financially impossible to do so.
3. Emotional entrenchment – anger or perceived injustice in the process.
4. Strategic posturing – an attempt to gain the “upper hand” by ceasing to cooperate.
5. Mistrust-driven resistance – suspicion that the other side is concealing something, usually (but not always) assets.
6. Risk blindness – unrealistic assessment of likely litigation outcomes.

Your response depends on which of these you are confronting.

B. Shift from Positions to Interests

When a party insists on getting something, it is rarely their true objective. Instead of debating about it:

- Ask: “What does that outcome achieve for you?”
- Identify the underlying needs: security, liquidity, vindication, control.

- Reframe the conversation around objectives rather than demands.
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C. Use Objective Benchmarks

Rigid parties struggle to maintain extreme positions when they must face the reality that what they want cannot realistically be achieved (Ask., “what are the actual prospects of obtaining 75% from a judge?”).

In financial disputes, discuss:

- Comparable judicial outcomes
- Statutory factors
- Comparable negotiated settlements
- Strength of independent valuations or expert evidence
- Tax or other regulatory implications
- Likely legal costs
- The delay in obtaining a judicial decision, including the possibility of an appeal

Shift the discussion from “what I want” to “what litigation would likely give me.” Find out not just what they want, **but why they want it**, and focus them on that objective. Reality testing must be conducted carefully and incrementally.

D. Break a Global Deadlock into Components

Stubbornness often emerges when a party reaches their “bottom line.” You can disassemble the deadlock by looking at different ways to implement an offer:

- Different ways of dividing the asset pool
- Liquidity versus retained assets
- Superannuation versus cash (including splitting)
- Timing of payments, including instalments
- Thinking outside the box – e.g., offering something of sentimental value

Resolving smaller issues first can create momentum that reduces resistance: “We’ve come this far; we should see it through.”

Even if they initially resist a final offer, they may accept asset-specific allocations that achieve a similar result in a more palatable way.

E. Repackage the Offer

Sometimes resistance is emotional rather than financial. Techniques include:

- Altering structure without changing net outcome
- Offering payment by instalments
- Considering tax-effective approaches (e.g., transfer of real estate in specie rather than sale)
- Swapping illiquid for liquid assets
- Offering face-saving language in consent orders

For example include a notation like:

“The Court notes that in coming to this compromise, both parties have accepted and relied upon the accuracy of the representations made to the other party about their financial circumstances.”

Such wording can reassure parties regarding full and frank disclosure, even if it merely reflects existing statutory obligations.

F. Introduce Litigation Risks Carefully

Risk must be explained neutrally, not as a threat. The approach should be incremental:

- Quantify the likely litigation range
 - Outline costs
 - Explain judicial variability
 - Discuss delay
 - Explain evidentiary risks
 - Address cross-examination vulnerabilities
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G. Manage Expectations

Ensure that a party:

- Understands the range of outcomes
 - Understands and accepts litigation risk
 - Is not escalating conflict unnecessarily
 - Is not reacting emotionally to perceived unfairness
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H. Explain the Advantages of Compromise

You should emphasize that **compromise is not surrender**:

- Describe offers as risk-reduction measures

- Reframe negotiation as exchange, not concession
 - Emphasise certainty versus uncertainty
 - Highlight the preservation of key assets
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I. Sticking Points

Often a dispute appears to turn on a single issue, but closer examination reveals more:

- An intellectual property dispute may involve reputation and enterprise value.
- A “custody” dispute may involve just proving they are the better parent.

Each issue should be addressed separately rather than being conflated, as conflation promotes deadlocks. Careful planning and agreement on sequencing are essential.

Emphasize that there is no guarantee that a judge would grant their application in whole or even in part. Failure in negotiation does not guarantee success in court.

Litigation is inherently risky. When someone says they “want their day in court,” my response is often: *“Be careful what you wish for — it will be a day, but it may not be your day.”*

J. Complex Disputes

Complexity does not improve with judicial determination. If anything, it increases.

The starting point in complex disputes is to resolve the simplest issues first. It is like climbing a mountain: you begin at the base and progress upward. Momentum builds confidence in reaching the summit.

K. Parking an Issue

Troublesome issues can be “parked” temporarily while easier matters are resolved. Partial agreement or identifying common ground can progress negotiations.

However while it is possible to settle only part of a dispute and leave the balance for judicial determination, most litigants obviously prefer complete finality on the day.

L. BATNA and WATNA

BATNA and WATNA are key mediation concepts in negotiation.

- **BATNA** – the best fallback option if negotiations fail.
- **WATNA** – the worst-case outcome if negotiations fail.

Understanding both sharpens risk awareness and clarifies what is truly at stake.

M. Hidden Agenda

If a party is not genuinely committed to settlement, early signs may include unrealistic or provocative offers. A skilled negotiator should identify this early on and either try to address this or terminate negotiations.

Conclusion

Impasses are common but not insurmountable. With skilled mediation and disciplined negotiation, parties can overcome an impasse rather than allow it to prevent settlement of a dispute.

An impasse may appear to be an impenetrable wall, but with the methods outlined above, it can often be bypassed rather than a failed attempt to break it down.

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About the Author

Richard Maurice holds degrees in Law and Economics from Sydney University.

He was admitted in 1984 and worked in private practice as an employed solicitor in a general practice and later for the Federal Attorney General's Office representing disadvantaged parties and as a duty solicitor in the Family Court, in NSW State Children's Courts and in many NSW Local Courts.

In 1988, he was called to the private bar. Since then he has practiced mainly in the areas of Family Law, De facto relationships and Child Support, together with Wills and Probate.

He has appeared in a number of significant Family Law cases including seminal cases on Family Law and De Facto property division like *Pierce and Pierce* (1999) FLC 92-844 and *Black v. Black* (1991) DFC ¶ 95-113 and *Jonah & White* [2011] FamCA 221 and more recently *Sand & Sand* [2012] FamCAFC 179 and *Vega and Riggs* [2015] FamCA 797.

In recent years his practice has focused on conducting mediations in all types of Family Law matters and now practices exclusively in that area.

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