

ROLE OF MEDIATION IN SOLVING MARRIAGE DISPUTES

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“An ounce of mediation is worth a pound of arbitration and a ton of litigation!”

- Joseph Grynbaum

Abstract

Marriage breakdown can also harm the general wellbeing of children by placing them at greater risk of criminal behaviour and of abuse. A long term study of over 500 Australian children found that: "The relationship between cohabitation and delinquency is beyond contention: children of cohabiting couples are more likely to be found among offenders than children of married couples". Delay and time consuming processes of the litigation prosecuted in accordance with the details procedures has resulted into development of alternative dispute redress mechanism. Mediation has now been widely known as a potent toll of resolving disputes in the ADR Mechanism. It has already achieved a phenomenal success in countries like United Kingdom and United States. Conceptually Mediation and conciliation is different than other ADR mechanisms. In this paper author will highlight that How a Mediation is helping in settlement of family disputes, growth of mediation in solving matrimonial disputes.

Key words: mediation, conciliation, breakdown, marriage dispute, ADR Mechanism

Introduction

Marriage both preserves life and protects health. As the social researchers Linda Waite and Maggie Gallagher comment, "Despite the fashionable tendency to regard marriage as an institution of declining usefulness, the health gap between the married and the non-married in developed countries is growing rather than narrowing" . Both married men and married women feel healthier

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and are significantly less likely to suffer from chronic illnesses or disabilities. Studies by Waite and others also confirm that simply sharing a living space with someone else does not confer the same level of protection as being married.

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Delay and time consuming processes of the litigation prosecuted in accordance with the details procedures has resulted into development of alternative dispute redress mechanism. Mediation has now been widely known as a potent toll of resolving disputes in the ADR Mechanism. It has already achieved a phenomenal success in countries like United Kingdom and United States. Conceptually Mediation and conciliation is different than other ADR mechanisms. In this process the attitude of the parties is completely transformed with regard to the approach to the problem¹. Similar to other alternative dispute resolution techniques, however, it does offer a cluster of features that differ from the formal judicial systems that have had global influence over the primary ways in which legal conflicts are resolved.

In this regard, mediation both builds and diversifies the capacity for resolving conflicts in society. International commercial mediation has been, for many years, the preferred means of resolving cross-border business disputes in the world. However, in the past few years, the government and the judiciary have been making conscious efforts to increase the use of alternative dispute resolution methods, and have also set up mediation centres across India. Currently, various centres across the countries are settling matters mainly pertaining to the laws of property, matrimony, commercial disputes and partnerships. However with these schemes receiving more support from the government and the judiciary, there seems to be a bright future for mediation in India. It is hoped that in the near future mediation becomes the preferred choice for disputant parties for all matters which can be resolved by a mutually agreed out of court settlement.

¹ http://lawcommissionofindia.nic.in/adr_conf/chodosh4.pdf.

Mediating cases involving domestic violence: Solution or setback?

While mediating divorce disputes has become a mainstream feature in family law scholars and practitioners have been resistant to the use of mediation in those cases where the parties are enmeshed in an abusive relationship.² Despite extensive debate concerning the advantages and disadvantages of mediating cases involving domestic abuse, most individuals consider mediation to be inappropriate.³ Mediation is an appropriate means to resolve domestic violence cases only if it does so effectively and in accordance with notions of evenhandedness and fairness to both parties, particularly the victim, who is typically at a disadvantage during both litigation proceedings and mediation sessions.⁴ Both the victim and abuser must receive equal opportunity to resolve their dispute. If the abuser perpetuates control of the victim in the proceeding, then our judicial system has denied those victims a fair forum.⁵ The best resolution of a domestic violence situation will involve the least amount of emotional friction at a level that remains fair to both parties⁶. Some critics of litigation in domestic violence cases do not see mediation as an inappropriate means to conflict resolution. “Rather, mediation is designed as an alternative to present conflict resolution models, specifically litigation.”⁷ But is an alternative desirable in such a situation? If the mediators are appropriately trained in both legal and psychological disciplines, perhaps they can help arrange a compromise to avert deep-seated abuse.⁸ Courts do not have this dual capacity to provide both legal and

² The Note will explore the meaning of a fair or effective mediation in cases involving domestic violence. There is much debate as to what constitutes a “successful” mediation.

³ Compare Steegh, *infra* note 4, at 204 with Wheeler, *infra* note 6, at 572.

⁴ Nancy Ver Steegh, Yes, No, and Maybe: Informed Decision Making About Divorce Mediation in the Presence of Domestic Violence, 9 WM. & MARY J. WOMEN & L. 145, 166 (2003). “Women, including battered women, are less likely to be represented than men.”

⁵ Obviously most divorces involve great emotional distress, but in cases of domestic violence, it is more likely that there will be greater trauma, such as a victim’s fear of recurrent abuse. See Laurel Wheeler, *Mandatory Family Mediation and Domestic violence*, 26 S. ILL. U. L.J. 559, 561-562 (2002). Risk of pursuit and retribution by abusive spouses deter many women from leaving violent situations. *Id.*

⁶ *Ibid.*

⁷ *Ibid.*

⁸ *Ibid.*

psychological services which “families in transition typically require:”⁹

Moreover, mediation provides former spouses with an opportunity to resolve their disputes amicably and tailor compromises to their specific needs.¹⁰ Particularly in cases where parents share custody of the children, their continuing relationship will forever benefit from its non-adversarial dissolution.¹¹ The agreements reached by mediation have a greater likelihood of long-term compliance compared to divorce settlements imposed on the parties by judicial decree.¹² When judges are asked to resolve disputes that the parties themselves could not undertake, they are positioned in an almost impossible situation¹². Contrary to the premise of the adversary system, judges are not always able to reach a “correct” solution¹³.

While mediation may provide a more cordial alternative to litigation, in cases of domestic violence it is not only beneficial but sometimes necessary to provide victims with greater bargaining power, particularly where the abuser possesses the means to hire an attorney and the victim does not.¹⁵ Although many disclaim the benefits of mediation due to its inability to place both parties on equal footing in domestic violence situations, they fail to realize the reality of litigating such cases; many battered women cannot afford to retain an attorney.¹⁶

Marital mediation—for couples wanting to preserve their marriage during difficult times and decision making situations

Family Mediation has become part of our mainstream. Especially where children are involved and the parents are seeking a divorce or legal separation, courts are frequently referring the parties to mediation where there is the potential for an agreeable resolution of their situation. In other cases, spouses and parents who have separated but where a Complaint has not yet been filed in court, are voluntarily seeking mediation privately without the need to or with the hope of avoiding any litigation while hoping to reach a

⁹ *Ibid.*

¹⁰ In cases of divorce and shared custody of the children, the parties recognize that their bonds of marriage and union cannot be completely relinquished. This incentive benefits children and spouses alike. .

¹¹ “A Maryland study found that some family judges display either a lack of interest, a lack of temperament, or a lack of understanding with respect to these cases.” *Id.* (quoting Jessica Pearson, *Court Services: Meeting the Needs of Twenty-First Century Families*, 33 FAM. L.Q. 617, 628 (1999)).

¹² *Ibid.*

¹³ *Ibid.*

peaceful ending of their marriage. There is a good success rate in these mediations in that the parties are able to better inter-relate and address their concerns which has not only long term positive implications for parental communication but also long term effects of how the parties view each other and themselves in a more generous or understanding stance. Thus mediation has become an effective and beneficial avenue for separating couples. And regarding litigation, it has for many also become a complement to a lawyer's advocacy when the attorneys are more collaborative and responsive to their clients.

Less common but potentially a beneficial and effective complement to marriage counseling, is what I and a few others call "marital mediation". Presumably the couple was in love and had a good relationship when they married. Then something or some things happened that caused them either to drift apart and lose their close, loving relationship or something more traumatic occurred that violated the trust the marriage once provided. Regardless of what happened, just as people don't fall in love all at once, so people don't normally fall out of love all at once. Emotions and feelings can sometimes prevent couples from being able to discuss these personal matters productively. Or it may be that the couple does not have the information they need and they are operating with only partial information. It is in mediation when couples often have the "meaningful conversation" that they didn't or couldn't have beforehand. In the neutral and confidential mediation setting, often whatever is hurting the marriage surfaces, and the couple can decide whether and how they might want to address this. Marital mediation is unique in that it is for those who purposefully seek to preserve their marriage while making important decisions regarding for example, financial difficulties, changes in career, income or expense changes, contemplated moves, religious differences, in-law difficulties and child rearing differences, to name a few that many families face at some time or another in their marriages.

Divorce mediators often hear in mediations what the parties believe caused the marriage to erode. For example, divorcing parties frequently complain of being dominated, of being taken for granted, of not being shown any love. The couple who once were lovers no longer court each other, no longer like each other, no longer are intimate. For some there are also disagreements that worsen and cause harm. For others there is little meaningful interaction. The couple finds that they no longer have time for each other but are instead caught up in other activities, having either drifted apart or purposefully seeking distance from the

other. Some but not all couples will seek the assistance of a marriage counselor, a therapist or a pastoral counselor. Many do not. So, based on such stories and experiences, mediation can have another use and purpose: being used throughout a marriage to preserve and strengthen it.

In all mediations, mediators facilitate as neutrals. Mediators themselves do not of course solve their clients' problems, but they do create opportunities for the parties to address and resolve the difficulties themselves. Mediators highlight the opportunities and possibilities that may not have existed or been noticed outside of mediation. In marital mediation, the couple may for the first time come to an understanding of what is actually hurting their marriage. They can then explore what courses of action might help remove this injury. They may agree on an interim plan. They might decide to just try different things and see what happens. The couple may agree to seek marriage counseling, or the assistance of a therapist or other counselor for one or both. If this decision comes about as the joint agreement of the couple, counseling might be more effective than if it were the result of just one party insisting on it. The couple may agree on a parenting plan or a back-to-work transition plan or a plan for how they will deal with their stretched finances. A couple may agree on how they will interact more positively with their other family members such as at holiday time or the joint sharing of vacation, or the couple may agree on certain boundaries with their social friends or extended family. Couples may also create terms for how they will divide roles in a changing family dynamic, or how they will repair and rebuild after a serious breach in their marital relationship.

Couples in marital mediation may work with their mediator independent of a therapist or at the same time. The mediator's role is a skilled neutral facilitator. Stated in another way, the mediator is multipartial, present for both, as a skilled facilitator of difficult conversation with a focus on the quality of the interaction and on quality decision making. Mediation allows and encourages a couple to discuss what is important to them and the couple can be assured that the skilled mediator will listen, track the couple's conversation, and summarize and highlight the opportunities as they arise for clarity, understanding, choice points and quality decision making. Mediations are private. Mediations are confidential. Mediations are not related to insurance or insurance codes or other disclosures or labeling.

In my practice, this form of mediation, marital mediation, is growing and it has many benefits in addition to the above. The most important of which is the preservation of marriage. Sophisticated couples have chosen a mediator often because one has had the experience and benefit in business or on a board of directors of a skilled neutral facilitator and the couple sees the analogous benefit to the marriage. Other couples come to the process in a proactive mode; they enjoy the additional benefit of the privacy that the process affords them.

Most marital mediations are concluded in one to three (1-3) mediation sessions. Decisions are arrived at and the couple experiences a more positive and constructive interaction than they had before they used the process. This experience forms the basis for a stronger reentry back into or a re-knitting together of the gap in the marriage that created the difficulties. A couple typically leaves marital mediation more resilient.

Mediation is something that people involved in a difficult marriage might well consider. More importantly, mediation is an excellent forum for smart couples who are doing their best to stay married. These couples can use the mediation process for making quality decisions around issues that are stressful and difficult. Many marriages might be saved; strong marriages are made stronger. It would be a shame for people to later regret not having pursued such a relatively inexpensive and low-risk opportunity before they contemplated separation or filed for divorce. They will never know what might have been. I have had hundreds of separating and divorcing couples share regretfully that had they only used mediation years earlier for the purpose of talking through difficult or confusing situations that they may have avoided separating and divorcing altogether. This is what marital mediation is designed to do because both parties so desire this. Mediation is simply the process that can be accessed as needed for fully realizing this desire to preserve marriage, and for many, their marital covenant. Mediation: a better process...better outcome.

Benefits of mediation in settlement of marriage disputes

- Advantageous style: In mediation, discussions with spouses and the mediator as well as other advisors are held in a private, comfortable and informal setting, using an efficient process.
- Cost-effectiveness: Mediation relies on direct communication between spouses, rather than a series of phone calls and

meetings with separate attorneys, settlement conferences, and preparation for and court hearings. The mediator maintains a focused, constructive dialogue that accelerates the resolution of divorce or parenting disputes. Almost always, this affords very, very substantial costs savings.

- **Preserving Control:** In mediation, spouses or co-parents make the choices about their family's future (crafting a parenting plan, arranging for support needs, and dividing property and assigning debts). The participants determine these matters directly without control by others, and without the uncertainty of a Judge's Orders.
- **Satisfying solutions:** Cooperative face-to-face problem solving often allows for much more detailed planning and for more creative and satisfactory outcomes. In the collaborative work of family mediation, it is much easier to discuss separate visions of after-divorce needs and circumstances, and to structure agreements to achieve significant tax savings.
- **Child-focused Parenting:** Médiation's style and approach promotes a focus on children's needs and improving parenting relationships over time (with obvious benefits to children and to the parents' sense of personal peace). Research now confirms the astonishing and persistent benefits of mediation to families.
- **Power imbalances:** Mediation may present special challenges or be inappropriate for parties with vast differences in their power (financial sophistication, bargaining savvy, history of medical or mental health or substance abuse issues, and most significantly, when there has been partner violence or abuse). A skilled mediator's evaluation of whether and how to mediate in such a case requires advance disclosure of these issues.
- **Impasse:** And, of course, there is no guarantee that parties will reach a satisfactory resolution of your divorce or family issues in mediation.

Conclusion

The best solution to resolving family law issues in cases of domestic violence do not involve an all-or-nothing approach; mediation should not be outlawed across the board, nor should it be accepted in all cases either.¹⁴ Judges, screeners with a background in psychology or knowledge of the underpinnings of domestic violence, and mediators should collaborate to make a mutual recommendation to the victim. Mediation can be an appropriate tool for some family law cases involving abusive spouses¹⁵.

Mediation is a beneficial means to resolving family law cases due to the inevitable high emotional intensity of the parties. Mediation, with its focus on communication and private resolutions that are specially tailored to the needs of individual parties, is certainly closer to a therapeutic model than the method of adversarial dispute resolution embraced by the courts.



¹⁴ Nancy Ver Steegh, Yes, No, and Maybe: Informed Decision Making About Divorce Mediation in the Presence of Domestic Violence, 9 WM. & MARY J. WOMEN & L. 145, 166 (2003). “Women, including battered women, are less likely to be represented than men.”

¹⁵ *Ibid.*