

Role of Mediator in Family Disputes

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ABSTRACT

The institution of marriage and the sanctity behind it, has been historically viewed as an essential pillar of Indian culture and tradition. Marriage under Indian custom is considered as sacrament, and the society plays an integral role in regulating one's family life. Nevertheless, the understanding of the institution of marriage and its importance in society has been constantly evolving. The principle of equality has replaced tradition and patriarchy as the guiding principle of family law and this has opened up an arena of new and profound grounds for family disputes. Owing to the importance of a 'partnership' in marriage, it has become socially acceptable to abandon marriages that are unequal or intolerable. Family mediation is proposed as an alternative approach to conflict resolution between couples in seeking a divorce to restore the sanctity of marriages when the differences are reconcilable. The authors aims to suggest mediation as a prudent solution in the amicable settlement of family disputes in the Indian context as it has multifaceted resolution advantages such as objectivity, due focus on the issues, neutrality, and independence. Mediation is a desirable form of Alternative Dispute Resolution as it involves space for personal development and social growth for the parties of the conflict. The study also aims to explore the way mediators address issues in mediation and how it has an impact on resolving family disputes.

1. Introduction

Families are gradually adopting the Alternative Dispute Resolution (ADR) process in reaction to the risks of the adversarial approach. Mediation has now become one of the most widely accepted alternatives to traditional divorce and custody proceedings.¹ Courts encourage greater use of mediation in family law disputes with hopes of relieving the overflowing dockets of family courts and reducing the delays and costs of modern litigation. The voluntary, informal, self-determined mediation process is seen as beneficial to parenting because it is believed that parties who participate in the process of creating their own agreement are more likely to adhere to the terms. Mediation may also reduce the emotional and financial toll of litigation.

2. Nature of Family Disputes

Family disputes are unique as compared to other types of disputes. This is due to the closed relationship between the disputing parties whereby the disputing parties are known, who had lived for many years and familiar with how the other will communicate as compared to other types of dispute. Family dispute has mediation as an alternative dispute resolution before the divorce being commenced in the courts of law to overcome the problems. The benefits of mediation such as cheaper, faster, flexible, private setting and confidential compared with litigation enhance the disputing parties to resolve the dispute amicably.

The term family disputes² include any conflict between people who are related in some way, or who are part of a

family or have been part of a family in the past. This can include:

- 1) Disputes within families, such as between couples, parents and children, siblings;
- 2) Disputes between families, such as adult siblings and their families, grandparents and their children's families, blended or step-families, or
- 3) Disputes between separated couples and their families.

However, most of the legal research that been conducted previously referring to family disputes as family disputes that being recognised by Family Law such as maintenance of children, maintenance of wife, custody of children, alimony and matrimonial property. It means the scope of family disputes to be discussed has been narrow into divorce matter in family law. Thus, family disputes in this research may be defined as any disputes that being recognised under Family Law as a family disputes, particularly between husband and wife relating to divorce matter (whether before or after divorce) such as whether to divorce or not, maintenance of wife and maintenance of children, domestic violence, custody of children and distribution of matrimonial property.

Family disputes has its own characteristics which make mediation is a suitable medium to resolve the dispute amicably; firstly, family disputes occur in family situations where there are continuing and interdependent relationships. Secondly, in family disputes, the conflicts often involve a complex interplay of emotional and legal complaints. Thirdly, is the fact that marriage breakdown leads to disputes with frequent impacts on some family members who are not legally competent such as children (requires special procedures and protections). Finally, the family itself represents a private ordering system that has the capacity for resolving its own disputes.

¹LAUREL WHEELER, MANDATORY FAMILY MEDIATION AND DOMESTIC VIOLENCE, 26 S. Ill. U. L.J. 559, 559 (2002).

²Bagshaw, 1995.

3. Scope of Mediation in Family Disputes or Marital Mediation

Mediation became the most commonly used form of ADR in family law. Although the concept of mediation has been around for centuries, its use began in response to dissatisfaction with adversarial approach of the legal system, because the system is inefficient and costly. Mediation is most commonly used in child custody and child placement. Over the past twenty years attitudes toward mediation have become more favourable. The mediator's role is not to resolve the dispute for the parties, but to let them negotiate a settlement on their own. Mediators are often chosen because of their expertise in the area of family law and are able provide the parties with options they may not have considered.

Mediation in the area of child custody and child placement has helped reduce conflict between the parties by focusing them on continual co-parenting by working out issues for the benefit of their children. By practicing problem solving and arriving at their own settlement, parties are more likely to adhere to the agreement, and are more likely to be able to resolve conflicts on their own in the future without the involvement of the court system.³ "Mediation encourages families to fight fair, it enables them to control their own disputes. Marital mediation is a process where an independent third person helps the parties in a divorce reach agreements about property, support, and custody"⁴.

There are six basics to marital mediation and they can be classified as⁵:

1. The parties must seriously and honestly want to reach an agreement.
2. The parties must be willing to face each other, talk with each other and negotiate with each other.
3. The parties must have confidence in the objectivity, integrity and competence of the mediator.
4. All parties, including the children, are indispensable to mediation.
5. The mediator must not direct the clients' attention in any particular way (called channelling) and must remain sufficiently detached to let the clients recognize the issues and make the appropriate decisions themselves.
6. The mediator must keep control of the process so that the parties can deal with the issues in dispute.

4. Mediation Style

While some mediators vary their style of mediation dependent upon the needs of the situation, many have a dominant predisposition to practice one style. In referring a client to mediation, one should know what that style of mediation is and match it to the needs of the case.

³ Leonard L. Loeb, *New Forms of Resolving Disputes*, Family Law Quarterly, 33, 581-588 (1999).

⁴ Attorney Robert Coulson, President of the American Arbitration Association, says - Book Fighting Fair

⁵ William I. Weston, *Divorce Mediation: Cheaper For Your Client, But Dangerous For You*, Compleat Lawyer (1987).

Leonard Riskin has identified four styles of mediation commonly used⁶:

- Evaluative-Narrow
- Facilitative-Narrow
- Evaluative-Broad and
- Facilitative-Broad

Under an Evaluative Narrow approach, the mediator will determine the issues, and "provide some guidance as to the appropriate grounds for settlement based on law, industry practice or technology, finding herself qualified to give such guidance by virtue of her training, experience, and objectivity."⁷ Here the facilitator wants the parties to work out their own agreement because the party's best understand their own situation. The main goal of the facilitator is to "clarify and enhance communication between the parties in order to help them decide what to do." Under this approach the mediator will review documents, pleadings, and briefs to better evaluate the potential outcome of the case. The mediator will then "help the parties understand the strengths and weaknesses of their positions and the likely outcome of litigation, if they do not reach a resolution in mediation."

The second approach is Facilitative-Narrow. The mediator who follows the Facilitative-Narrow style helps the parties to understand the strengths and weaknesses of their case, and the possible outcome if the parties go to court. However, this mediator does not use "his own assessments, predictions or proposals," but instead will help the parties develop, exchange, and evaluate their own proposals because he wants the parties to come to their own agreement.

Under an Evaluative-Broad model, the mediator wants to "learn about the circumstances and underlying interests of the parties and other affected individuals or groups, and then to use that knowledge to direct parties toward an outcome that responds to such interests."

The Facilitative-Broad mediator helps the parties define and identify their interests and helps them find solutions. Another label commonly used is a transformative mediator. This mediator "concentrate[s] on empowering parties to define issues and decide settlement terms for themselves and on helping parties to better understand one another's perspectives." The transformative mediator also "helps parties recognize and exploit the opportunities for moral growth inherently presented by conflict."

As mediation continues to grow in popularity, more attorneys are educating their clients about the advantages of mediation.

5. Goal of Mediator

⁶ Riskin, *Mediator Orientations, Strategies and Techniques*, 12 Alternatives 111 (1994); Riskin, *Understanding Mediator Orientations, Strategies and Techniques: A Grid for the Perplexed*, 1 Harvard Negotiation L. Rev. 7 (1996).

⁷ Alessandra Sgubini, Mara Prieditis & Andrea Marighetto, *Arbitration, Mediation and Conciliation: differences and similarities from an International business perspective* (2004).
<https://www.mediate.com/articles/sgubiniA2.cfm> (Last Visited on: 4 December, 2019).

The mediator's goal is to help the parties reach a settlement they have reached on their own. The arrangement must be fair to both parties and they must both recognize it as being in the best interests of the parties and other members of the family. It is important that each party recognizes the legal and accounting ramifications of the terms of the agreement in order to reach such an agreement. Everything that is said in mediation cannot be used in any legal action, and everything done in the mediation process will be regarded as efforts to settle the issues and thus removed under the rules of evidence. Second, it sets out the expectations the parties will work towards in the mediation process in very general terms and thus sets the tone for discussion.

6. Conclusion

Amicable solutions and long-lasting agreements in family disputes as a result of mediation process are certainly the future of matrimonial dispute resolution. In the 21st century, Mediation seems to be the most appropriate tool to solve family conflicts. Nevertheless, the success of mediation proceedings depends predominantly on their quality of the mediator. The need of the hour is to introduce mechanism to

enhance the training of mediators, especially with regard to their abilities to act in family disputes. The ideal solution for the same would be the ratification of Mediation Act as well as Rules of Conduct for Mediator with specific emphasis on family dispute resolution. For the time being, more scrutiny should be applied in controlling training programs, mediation services and contracts, as well as the procedures followed.

In family disputes with its emotional implications, the professionalism of the mediator should be absolute, as the neutrality of the mediator plays a big role in ensuring an amicable solution to the dispute. Owing to the personal nature of family disputes, his personal life experience should not affect his attitude towards the parties and harm the dispute resolution process. Mediation is a collaborative, party controlled, confidential, informed, impartial, self-responsible and satisfying alternative dispute resolution mechanism. It offers a unique and dynamic resolution of disputes and preserves relationships. And it is of utmost importance that mediators rise up to the challenges to handle conflicts of such inter personal nature such as family disputes.