

Mediation,
Family Law Disputes
and the
Best Interests of Children

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Rob and Judy were married for 16 years, and have recently separated. Their children, Sarah, age 12, Nicholas, age 8 and Carla, age 5 are caught up in a custody battle being fought in the courts. Both parents have lawyers and are determined to have full custody of the children; there will be only one winner.

Katie was adopted by Nancy when she was 8 months old. They lived happily together for 12 years, until her mom became mentally ill and ended up in hospital for several months. The local child protection agency "apprehended" Katie and placed her in a foster home through the regular court process used across Canada. Nancy is informed about, and attends all case conferences and court hearings about her daughter, but she feels she has no real input into the decisions being made about her daughter's life.

Hadiya, age 17, ran away from an abusive home situation and has been living on the streets for two years. She is now pregnant and trying to make a decision about whether or not to keep her child or give it up for adoption. Hadiya feels that she can't bear to abandon her child to strangers, yet she has no family members who are willing to take in her child, let alone help her to raise it.

These are the stories of real people. Mediation is not being used in any of these cases, and yet, mediation has become available across Canada in assisting people to make decisions about children. I would like to explore the benefits and concerns about the use of mediation, or alternative dispute resolution (ADR) in private and public family law disputes. Part of this exploration will include whether or not children should be directly involved in the mediation process and if mediation meets with the best interests of children.

Background

Many professionals working in the field of family law have recognized that the adversarial nature of litigation is potentially damaging to the parties in family law cases, especially to those with ongoing relationships. In 1982, U.S. Supreme Court Chief Justice Burger mentioned divorce, child custody and adoption as prime candidates for mediation. It was recognized that ADR techniques would work well in family law cases where there are children involved, as parent/guardian relationships must survive the dispute resolution process. (Bernstein, *Using* 33-34)

The traditional combative approach of family law undermines child welfare in several ways. In typical family law court cases, parties are cast in the role of opponents, each striving to win the battle at hand. The courts assume that the parties in dispute have divergent interests, and frames disputes as zero sum processes in which there are "winners" and "losers". Divorce litigation promotes conflict between the parents, exacerbates parental emotional distress and delivers awards that often make it impossible for

the non-custodial parent to participate fully in parenting. In the worst cases, litigation can reinforce extreme parental solutions, including parent alienation and parental abduction. (Irving & Benjamin 414-415)

Many family law professionals believe that neither the courts nor family law lawyers are equipped to protect children's welfare, despite their best intentions. Lawyers are trained to advocate for the rights and benefits of their adult clients, not for the overall needs or interests of the children. Neither judges nor lawyers claim any specialized expertise in family dynamics and/or child development. (Irving & Benjamin 414) Many judges do not believe that they are the best people to be making decisions about children, and often refer cases to mediators so that parents can receive appropriate support in making difficult decisions. (Beck & Biank 181)

Mediation And Family Law Across Canada

Mediation is a process of conflict resolution, where a neutral third party who has no decision making power, assists the parties in voluntarily reaching a mutually acceptable settlement. (Bernstein, *Using* 28) During the early 1980's, the first area of family law to use mediation focused on the private side of law -- disputes between spouses over custody, access and support. But mediation has also been strongly urged (and strongly opposed) for the public law side, in the areas of child protection and adoption. (Baar 32)

Mediation programs and services across Canada have developed in a variety of ways. Mediators come from many different backgrounds: some are lawyers, some are mental health professionals, while others are trained volunteer lay people from the community. In certain provinces, judges are trained in mediation for the family court cases they have to deal with.

British Columbia decided to embrace mediation for use in family law in a direct, innovative way. By 1996, 114 of B.C.'s 135 judges had received mediation training, and had mediated over 100,000 cases. Judges can make use of conferences, mini-trials and full hearings, if cases are not settled through the mediation process. (Baar 33)

In Alberta, research has shown that public perception about how the court deals with family matters is poor. It is widely believed that "the court has no uniform process or established guideline to aid litigants, lawyers, or judges in the application of the best interest standard in child custody cases." In addition, it was found that most litigants do not feel part of the process and often do not understand how the Court reaches decisions affecting their future and that of their children. The Honourable Hugh Landerkin has proposed that Alberta restructure its system to resemble the B.C. system. (Landerkin 630)

Child Custody Disputes:

Divorce is affecting more and more children across Canada. In 1994 and 1995, there were about 79,000 and 78,000 divorces, respectively, with 47,000 children subject to a custody order. (Irving & Benjamin 414) While many couples still settle their cases in court, divorce mediation is now commonly used to help couples reach a workable agreement; and in fact, is now court mandated in many provinces.

Family mediation is a co-operative process whereby a neutral third party, typically trained in family dynamics and child development, assists parents to resolve the disputes between them. Mediation presumes that these parents have some interests in common, most notably, mutual love and concern for their children, and a common desire to preserve and protect their best interests. (Irving & Benjamin 415)

Parents may meet with the mediator individually, and then come together to start the mediation. The mediator guides them through a dispute resolution process, ultimately with the goal of developing a parenting plan that both parents can live with. The Academy of Family Mediators Standards of Practice for Family and Divorce Mediation states... "the mediator has a responsibility to promote the participants'

consideration of the interests of children and other persons affected by the agreement." (Beck & Biak 180)

Some family mediators have recognized that parents may have a diminished capacity to parent in the period before, during and immediately after the divorce is finalized. When therapists or mediators meet with divorcing parents during this crucial time, the parents' assessment of their children will often be inaccurate because parents have distorted perceptions of how their children are functioning during the upheaval. (Beck & Biak 182)

Children have their own issues at the time of divorce. Calling children the "hidden clients" of divorce, Beck and Biak suggest that by incorporating child assessment into divorce mediation, the needs and vulnerabilities of the children can be determined. Objective, assessable data can be gathered for each child by a child therapist, and it can be used as a resource when making decisions about the parenting agreement. Having children assessed helps parents achieve a more informed settlement. (Beck & Biak 180)

Adoption

Until recently, statutory adoption required that biological parents give up all future access to children. Bernstein reviews the societal assumptions surrounding the secrecy that was traditionally used around the adoption process. An unmarried woman keeping her child was destined to live in shame in her community. To escape this humiliation, birth mothers were persuaded to secretly have their children and give them up for adoption. Women were told that by giving up their children for adoption, they would be providing them with a better future. In order to escape the stigma of illegitimacy, children were given a chance to live a "normal" life with an adopted family. For their part, adoptive parents were made to feel ashamed of their infertility, and were eager to have children so that they would not be seen as defective. It was decided that for everyone's sake, they would pretend that the adopted children were their own natural children. (Bernstein, *Using* 8)

This "veil of secrecy" was not good for the long term mental health of adopted children. Luckily, views and assumptions around adoption in Canada have changed over the past twenty years. In the past, the focus was on the rights of the adults involved; the right of a birth mother to give up her child and the right of adoptive parents to have a child. Only in recent times have we shifted our thinking to being child-focused - that every child has a right to a family, and the adoption must be in the child's best interests. (Bell, 36) More and more, decision-making within adoptions is being made, by viewing the results of these decisions from the adopted child's perspective. (Bernstein, *Using* 48)

Throughout history, other adoption processes have been used. Customary adoption is the cultural process Aboriginal peoples have always used to transfer rights and obligations of parenting a child to an adoptive parent. The two major factors involved in customary adoption are that adoption is based on necessity, and that the child is protected and cared for by the adoptive parents. (Lomax 197-199) With customary adoption, there are no secrets; parents and other relatives can have ongoing access and participation in children's lives.

A similar form of "open" adoption has been introduced successfully in Canada. With open adoption, birth parents and adoptive parents agree to have some form of communication, either directly or through an intermediary. (Bernstein, *Using* 5) Mediated open adoption has been used for the past twenty years, and involves a process in which clients design their own adoptions and arrange for a channel of communication and/or contact that remains open as the child grows up. (Bernstein, *Using* 36)

Child Protection

There is a need to protect children in our society from abuse and neglect. Canada's Child and Family Services Act states that help given to parents should be provided, wherever possible, on the basis of

mutual consent. (Bernstein, *CPM* 79) It has been suggested that the least intrusive way for a state agency to ensure the safety of children is by working on a voluntary and consensual basis with the family. (Barsky 111)

In reality, our child protection laws enable child protection (CP) workers to investigate allegations of abuse and neglect, "apprehend" children from their families and then place these children with foster families or into group homes. The power of CP workers is backed up by our criminal justice system, including police services and the court system. This process leaves parents feeling angry, alienated and filled with despair.

Child protection mediation has been developed as a method to attempt to build a working relationship between families and child protection agencies. The mediation process used in child protection cases brings the case closer to a domestic, family law agreement, as opposed to a CP agreement. At first, CP workers were skeptical that mediation could improve matters. They often felt overwhelmed and overworked, and were concerned that mediation would call into question their professional assessment. (Bernstein, *CPM* 92)

Barsky explores how CP mediation has been compared to other CP processes, like case conferencing. Provided with training, CP workers are able to provide family members with an equal say in the process, but given that their primary mandate is to ensure the welfare of children, they may find it more expedient to limit the involvement of family members in the process. In case conferences where the CP worker facilitated the meeting, family members rarely asked questions, raised their own issues, or challenged position statements made by CP workers. By controlling the flow of discussion, CP workers can consciously or unconsciously disempower family members. When mediators are made responsible for facilitating the process, they can ensure that all of the parties have equal opportunity for discussion and input. (Barsky, 121-124)

An interesting example of CP mediation is found in British Columbia, where an innovative process has been created. There, judges have been trained in mediation techniques, and preside at mandatory case conferences as part of an early intervention and monitoring approach. Dennis Schmidt, the Associate Chief Judge of B.C., believes that parents need to be able to feel that they can communicate directly with the judge. He described a case where he flew into a 300-person Aboriginal community in northern B.C. to mediate three child apprehensions. At the case conference, the judge convened the social worker, her supervisor, the chief, two band councilors, the mother and extended family, and the older children who were the subjects of apprehension. Also present were lawyers for the family and for the social workers. After a day of mediation, the judge, the social workers and the lawyers flew out, leaving the children in their own community with services in place to ensure the safety and well-being of the children. (Baar, 32-33)

Benefits of Mediation

Strengthening Relationships

One of the most important goals of mediation is to improve the relationship of the parties. Mediators work in the context of ongoing relationships that have the potential for future disputes, and offer participants ways to deal with particular problems. (Kolb 467) Mediation is particularly beneficial for family law cases, as children have an ongoing need for connection with parents, siblings, grandparents or other extended family members who are interested and available to have a relationship with the child. (Bernstein, *Using* 37) A negotiated agreement resulting from mediation at best improves, or at worst does not damage the relationship of the parties. (Landerkin 662)

Participation in mediation creates improved communication systems, which will help both sides to cooperate throughout the length of the relationship. As communication improves, there is room for trust to be established, mutual recognition to be shown, and respect for each other's ideas. Whether

mediation is used in adoption, child protection or child custody, mediators strive to promote co-operation and good will. (Irving & Benjamin 415). During child protection mediation, there have been improvements in the ongoing working relationships between social workers and family members. (Bernstein, *CPM* 110) Once trust has been established on both sides, parties can come to realize that both of them love the child, and can calm themselves from suspicions and fears. (Bernstein, *Using* 47) Mediators encourage the parties to keep open minds, consider new options and look for creative solutions. (Barsky 116)

Information and Education

One of the results of mediation is that participants gain knowledge about the legal system and awareness about their rights. Research has shown repeatedly that mediation processes and outcomes are carefully respectful of the rights and requirements of all family members, irrespective of their age or gender. (Irving & Benjamin 416)

Another important outcome of mediation is that it provides parents with education in child development and the harmful effects of parental conflict on it. (Irving & Benjamin 415) Parents can come to understand that children are developing people; and must be permitted to reach their developmental milestones. If they fail to do so, there can be negative ramifications which are well known and understood. Parental conflict can cause great harm to the developmental process. During mediation, parents must compromise for the joint good of their child. (Landerkin 664) Armed with more information, parties are able to develop a wider range of options; focusing on meeting the needs and interests of the children. (Barsky 116)

Parents may be missing valuable information that would make a difference in the decision-making process. Peggy Beck and Nancee Biank suggest that divorce mediators consider expanding on the original scope of divorce mediation, by encouraging child assessment by therapists, to determine each child's needs and increase awareness of their best interests. (Beck & Biank 180)

Meaningful Agreements

Mediated family case settlement offers participants an opportunity for real input into the process and the crafting of the final agreement. The process encourages parties to accept mutual responsibility for children, and helps them formulate clear and specific parenting plans in keeping with their circumstances and the welfare of their children. Agreements tend to be more detailed and specific, and are more likely to be seen by both parents as fair and reasonable, so that parents are more likely to comply with their terms and conditions. (Irving & Benjamin 415)

During a two year pilot project in Oregon, it was shown that adoption and child protection mediation could empower parents to make cooperative, permanent plans for their children, and to develop individualized and durable solutions. (Barsky 132) More notably, mediation has resulted in high settlement rates and high compliance rates, as well as positive levels of user satisfaction among parents, child protection workers, and judicial representatives. (Bernstein, *CPM* 110)

Another benefit of family law mediation is that, compared to litigation, mediation is faster. (Irving & Benjamin 415) Delay is of particular concern for children in care; as they possess a different sense of time and are left feeling insecure about their lives, at great psychological and emotional cost. (Bernstein, *CPM* 115-116) Children in foster care wait an average of 2 to 5 years for the courts to process their cases; with mediation the time has been cut to 3 - 4 months. (Bernstein, *Using* 38)

In divorce litigation, it has also been shown that mediation produces a substantial increase in the speed of the case settlement. (Bernstein, *CPM* 110) This is important, as children are deeply affected by living in a state of "limbo". Mediation alleviates the tension that is created by prolonged litigation. (Munro 888)

Transformative Elements:

A concern often expressed about the child protection system is that some parents are alienated and disenfranchised by it, and as a result, many of these parents feel resentful and angry toward their child protection workers. (Barsky 111) This is similar to what happens in divorce mediation, where one parent feels cut out of their child's life with a court decision. Mediation emphasizes the importance of the family to a child's well-being, which helps to reduce the risk of the parents withdrawing from the situation in anger or despair. (Bernstein, *CPM* 80)

There are several transformative elements which can come about during family mediation. Past research has shown that mediation contributes to the empowerment of family members by helping them to develop a wider range of creative options, and providing both sides with an equal opportunity to participate in the process. As well, there is an emphasis on shared responsibility and decision making. (Barsky 116)

Empowerment involves restoring to individuals of a sense of their own value, strength and capacity to handle life problems. Part of this process includes encouraging individuals in recognizing and acknowledging the situation and problems of others. (Bernstein, *Using* 52)

The empowering aspect of mediation simply reflects the fact that mediation gives decision - making power to the parties directly involved in a dispute. (Barsky 112) Often, there is a need for power-balancing in order for mediation to be successful. One of the most common interventions in mediation is ensuring that everyone has an equal opportunity to speak. Mediators alter established patterns of communication between the parties, which has resulted in many participants feeling that they had more say, and therefore more power, in the decision making process. (Barsky 127) In many cases, just the involvement of a mediator has a power-balancing effect, as it prevents one side (such as a child protection worker) from misusing their power and authority because they do not want to look unreasonable in front of the mediators.

The use of focusing the parties on the best interests of the child was also seen as having an impact on the power dynamics between the parties. Mediation does not change the relative power of the parties, but instead, it has an impact on how the parties use their power. (Barsky 127-129)

Concerns About Mediation

There are several valid concerns raised by the critics of mediation. It is often mentioned that low income families have no options. Mediation can be seen as a poor "second best" process, as many families cannot afford litigation. Some research on child protection mediation suggests that while family members may experience empowerment in the mediation process, there is reason to question the voluntariness and fairness of mediation in a context where the alternatives (especially court) are limited and are perceived as being "stacked against one side." In addition, there is evidence that for some parents, having the services of a lawyer to explain the process and to advocate on their behalf, is more empowering than participating in mediation. (Barsky 112 -114; Fiss 331-333)

Some critics fear that if mediation is used instead of court or adjudication that children's rights may get overlooked as parental rights take over. As well, mediation is not a public process, and each case is treated individually, so there could be a wide range of agreements reached for similar cases. Owen Fiss argues that mediation cannot bring about true justice; justice is found in the courts, where judgments bring reality closer to our ideals. Finally, there is a risk that mediation can be used merely to facilitate social control, making poor outcomes "feel" better. (Barsky 131; Fiss 333)

Children's Rights and Best Interests

There is, in family law, a premise that a parent has the right to have a relationship with his or her children and is only to be deprived of that right if he or she has abused or neglected them. (Munro 867) The latest research concerning joint custody shows that decisions are not being based on the best interests of

children, but instead, are often based on the needs of each parent. (Beck & Biank 185) The interests of children are usually referred to indirectly; a child's right to contact with both parents seems an incidental outcome of the parents' rights to equal time with the child. (Munro 865)

This is disturbing, for if child custody disputes are being settled with a focus on the rights of parents, then it reduces children to just another possession, which must be divided after the dissolution of a marriage. This concept of using parental rights in order to get "possession" of children, implies ownership, and rises up like a specter from the past. (Munro 899)

Many of Canada's laws, including the Divorce Act, use language, such as "custody" and "access" which reflect the bygone era in which women and children were legally chattel, or, belonging to the head of the household. (Irving & Benjamin 417) Historically, children were seen as parental property, and while parents were required under common law to provide their children with the basic necessities of life, there were virtually no laws against the abuse, neglect or exploitation of children. Children as property had no basic rights beyond the right not to be killed, maimed or deprived of the bare necessities of life. (Howe & Covell 99)

After Confederation, Canadians started changing their beliefs about how children should be treated. Society had a duty not only to prevent cruelty or the maltreatment of children, but also to provide children with a protective and positive social environment for their development. (Howe & Covell 99) Laws were created which criminalized child abuse, and child protection agencies were established across Canada to investigate charges of abuse. An era of paternalistic intervention had begun which would last until the present day.

During the 1980's, Canada showed a shift to acknowledging children as bearers of rights. The first major step was in the creation of the Canadian Charter of Rights and Freedoms, which acknowledged that rights and freedoms were for everyone, regardless of age. Next, the government enacted the Young Offenders Act, giving youth due process rights never before seen in Canada. Then, in 1989, Canada participated in the development of the International Convention on the Rights of the Child. (Int. Convention)

The Convention introduced several areas of rights for children, including the rights of protection, participation and the right to health care and education. (Howe & Covell 101) In its preamble, the Convention states that in order to reach their full potential, children need to grow up in a family environment, within an atmosphere of happiness, love and understanding. Article 3 goes on to say that all decisions made by public or private social welfare institutions and courts of laws must be based on the "best interests" of the child. (Int. Convention)

Emphasized throughout the Convention is the belief that a child has a right to the love, care and guidance of a parent. In article 9 of the Convention, a pledge is given which ensures that children shall not be separated from his or her parents against their will, except when necessary in cases of abuse or neglect of the child by the parents. As well, it acknowledges the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests. (Int. Convention)

This Convention has been linked to other pieces of Canadian legislation. Ontario's Child and Family Services Act contains a Declaration of Principles, which states that the promotion of a child's best interests, protection and well-being is paramount. "Best interests" considerations include: the child's physical, mental and emotional needs; the child's cultural and religious background; the importance for the child's development of a positive relationship with a parent and the continuity of care, including the effect of disruption of that continuity; the child's relationships by blood or through an adoption order; the child's wishes; and the effect on the child of delay in the disposition of the case. (Bernstein, *Using* 50)

In Canada, our laws are steadily moving away from the concept of "parental rights" and focusing more

on the best interests of the child. A child is seen less as a chattel in which a party has a proprietary interest and more as a unique person whose individual needs and wants should be paramount. (Davies 1215) What is interesting is that there is considerable adult resistance to the idea of children's rights. Many adults believe that children are not rational or capable of making the informed decisions that must accompany the practice of rights; as well, it is believed that if you give children rights, they may make more mistakes in exercising them, because of their lack of experience. (Howe & Covell 104)

Behind much of the adult suspicion of children's rights is the persisting concept of children as parental property. Some adults believe that if you support children's rights, this will threaten the rights claims of adults. There is a belief that taking children's rights seriously would mean the erosion of the authority of teachers in the classroom and of parents in the home. (Howe & Covell 104)

The Convention emphasizes that children should be informed of their rights and assures children the right to be heard in any judicial and administrative proceedings affecting the child. Their views may be heard directly or expressed through a representative. It also goes on to state that children have the right to freedom of expression; including freedom to seek, receive and impart information and ideas of all kinds.

It is significant to note that within the field of divorce mediation, most mediators assume that negotiations should take place only between the parents, that is, without the involvement of their children, but there is considerable controversy over this issue. When mediators across Canada were surveyed on this issue, mediators who were attorneys included children 28% of the time, while mediators with mental health backgrounds included children 65% of the time. (Lansky 147,151)

Mediators identified a wide range of benefits to the children if they were included in the mediation process. Children reported feeling less afraid and upset about the divorce process, and have shown an overall reduction in their anxiety level, as well as a better understanding of the process. As well, including children in mediation helped them to adjust to post divorce conditions more easily because they understood why certain decisions were made. (Lansky 148)

There are also benefits to the parents in having the children participate. Including children can add valuable information to the mediation process and remind the parents of the importance of finding satisfactory solutions to issues concerning their children. As well, information provided by children may increase the parents' and mediator's understanding of the children's needs. This is especially helpful if the parents have different, or inaccurate assessments of their children's needs and concerns.

When mediators were asked why they included children, they revealed a wide range of motivations, including: providing children with the opportunity to have an input into the parenting plan; reducing the likelihood that adolescent children would sabotage the agreement and aiming to refocus the mediation back on the needs of the children. As well, meeting with the children helped the mediator moderate the parents' behaviour if they were attempting to put too much pressure on their children. (Lansky 148 -151)

Marvin Bernstein identifies how mediated open adoption was beneficial for adoptees. In general, the mental health of an adopted child was stronger, as the greater sense of co-operation between birth and adoptive parents, creates a healthier home environment for the adoptee. With open adoption, children feel safe to talk to both adoptive parents and birth parents about the adoption process. Children are provided with information about their birth families, thus eliminating obsession with unanswered questions.

As the child gets older, they can decide whether they want to continue any contact with biological family members. Because they have met their birth parent, the adoptee does not have any notion of being abandoned or forgotten, and there is no need for search and reunion with biological family members. Over the long term, adoptees often develop an admiration for his/her adoptive parents once he/she has the maturity to realize that the adoptive parents treated the birth parents with respect and compassion.

(Bernstein, *Using* 48)

Conclusion:

Ultimately, mediation serves to empower parents and respect their self-determination, on the simple ground that it is they, and not the state, which must enact whatever parenting plan upon which they agree. (Irving & Benjamin 415) Family law disputes are full of emotion, anger and despair. There is a crisis at hand, whether it is a marriage that has fallen apart or a family that has ceased to function. The urgency of the situation is not lost on the children. The pain of the situation affects even very young children. Court processes do little to alleviate this suffering, and in fact, usually make it worse. To date, there is little empirical evidence which demonstrates that the outcomes of mediated cases are better for children; more research is needed in this area. But mediation provides judges with an alternative model for dealing with family law disputes, not just replacing the courts, but actually transforming them. (Baar 33)

Part of this transformation must include children's voices. We have seen many benefits of involving children as participants in the mediation process. But above all else, if children are taught mediation skills, they will be able to use these skills for the rest of their lives. The family law system must attempt to incorporate the principles of the International Convention on the Rights of the Child into its existing processes so that the child's best interests can be met.

Bernstein maintains that "...the best interests of the child will truly be served when the child is seen as a real person - not a fantasy child, not an idealized child, not a special child, not a commodity - but a child with his own genetics, his own talents, and his own identity." (Using 51) The best interests of the child will also be served when our children are educated about their rights, and encouraged to exercise them in every aspect of their lives.

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