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# Kluwer Mediation Blog

## New Frontiers in Cross Border Family Mediation

Sabine Walsh (Sabine Walsh Mediation) · Saturday, November 5th, 2011

As globalisation progresses and migration increases, the number of bi-national and bi-cultural relationships and marriages is increasing. This brings a new richness and diversity to our society, but can also bring new challenges and difficulties when those relationships break down. One of the difficulties that can arise is international parental child abduction, where one parent brings the child or children to another country, often their country of origin, without the other parents' consent. This usually results in complex legal proceedings under the Hague Convention or Brussels II bis Regulation, and a time of intense anxiety and crisis for all family members involved. It is in this area, and the broader area of dealing with the fallout from the end of a bi-national relationship, that mediation is playing an increasingly significant part.

I recently had the privilege of taking part in the first Training in International Family Mediation, organised by a number of organisations involved in international child abduction and mediation – MIKK from Germany, Child Focus and the Katholieke Universiteit Leuven from Belgium, and Centrum Internationale Kinderontvoering from Holland. The project was co-funded by the European Commission. Twenty one mediators from twenty one Member States of the EU took part in two exceptional weeks of training in Brussels. The outcome of this first stage of the project has not only been an enormous learning experience for me personally, but has also resulted in the foundation of a network of specially trained international family mediators.

I must admit to wondering myself, when I first heard about the project, how mediation could possibly work in as exceptional and “legalised” a situation as child abduction. Even the basic question of how mediation could work where the two parties, by definition, would be in different countries caused me to scratch my head. Furthermore, what room would there be for mediation within the strict legal procedures and time limits set out by the Conventions? And how could parents, whose trust in each other is non-existent in the aftermath of an abduction, possibly find their way to agreement, even with the help of mediators?

I have now discovered that mediation is not only possible in these cases, but very much desirable, as it offers specific advantages to parents which traditional legal mechanisms cannot offer. Some of these advantages are relevant to family breakdown in general. The potential for a speedy, cost-effective resolution of a conflict that mediation offers is as relevant to domestic family disputes as it is to international ones. Likewise, the focus on the needs and interests of the parties, and in particular their children, in a safe, confidential environment is an advantage of family mediation in general, as is the flexibility of the process.

Mediation however offers a number of specific advantages to parents in the context of a child abduction case. One of these relates to the scope of the dispute. In general, in cases taken under the Hague Convention on the Civil Aspects of International Child Abduction (1980), to which 86 countries are parties, the only issue that can be decided by the court is whether the child or children should be returned or not returned to their state of habitual residence. This means that the court has no jurisdiction to decide any other matters relevant to the future of the family, such as custody, access, maintenance or any other matters that might require a decision in order for the family to move on. A new set of proceedings to decide such matters must be commenced in the relevant state, depending on where the child and the parties will live. This means, in effect, that at least two sets of legal proceedings in two different courts, possibly in two different countries will be required to regulate the circumstances of the family after the abduction. In mediation however, the scope is determined by the parties, not by legal rules, and therefore all matters relating to the dispute can be addressed. In practical terms this means that the parents can address not only where the child or children will live, but all other arrangements such as contact with the non-resident parent, a parenting plan, and financial matters. Not only will this save the family time and money, but it can significantly reduce the stress on everyone, in particular the children.

Another potential advantage of mediation in child abduction cases, particularly when used early on in the conflict, is that it can de-escalate what would otherwise, due to the legal framework under which such cases are dealt with, become an “all or nothing conflict” – the child stays with the abducting parent in the one country, or returns to the left behind parent in the other country. In many cases, the parent making the application for the return of the child (statistically more often the father), would in fact be satisfied with regular access to the child, even across borders, but files an application for the full return of the child because the legal process for return is an easier one. In mediation, the real needs and interests of the parties can quickly be uncovered and distinguished from their legal positions, and the actual issues can be worked out such as, for example, how cross border access may take place.

Another advantage worth mentioning is the potential for mediators collaborating with lawyers and judges to ensure the enforceability of all matters agreed, not just the return or non-return of the child but also parenting plans and similar, in all the relevant jurisdictions. This latter part of the process will require specific skills on the part of the mediator, both in terms of drafting the agreement and knowing whose input will be required in order to make the agreement workable and enforceable, which brings me to the question of what additional skills are required for such mediations.

I was asked on my return from Brussels whether something as specific as cross border family mediation could possibly require an additional two weeks of training. My reply was that if one could spend an hour discussing the physical positioning of an interpreter in the mediation room then yes, it definitely required two weeks. The multiplicity of factors that will play a part in such a mediation can easily be underestimated. First of all, there are the legal structures and frameworks within which such mediations take place, with which a mediator must be familiar. Then there are the issues of working in different languages, and most importantly, with different cultures, value systems, religions, beliefs and traditions, all of which form both the background to the dispute and often play a substantive role in the dispute, such as what faith or language a child should be educated in. Knowing who, in different cultures, has a stake in and may need to be a part of the mediation is essential, as is knowing under what circumstances such a mediation would not be appropriate or should be discontinued. Last and by no means least such mediations require a certain structure in order to be successful and workable within often very tight time constraints.

Mediators practicing in this area must be clear about and comfortable with working within these structures.

Finally, a few words about best practice and the model that is suggested and is applied by the organisations already working in this area. The first hallmark of international family mediation is that it is carried out by co-mediators. The co-mediation team should ideally consist of one male and one female mediator, one from each of the parents' countries, and one being from a legal and one from a psycho-social background. This is not always achievable but at the very least, one mediator should be from each of the parties home countries. In an Irish-German family, for example, one mediator should be Irish and one should be German. Both joint sessions and caucuses are used in this type of mediation, and sessions are usually scheduled over a period of three days approximately. Very importantly in cases of child abduction, arrangements are often made for the left behind parent to have contact with the child at some stage during, though not actually in the mediation. The voice of the child or children will usually be brought into the mediation, either directly or by means of an interview with a third party such a psychologist or social worker. The parties legal representatives are actively involved at all stages, particularly when it comes to drafting the agreement, and translators or interpreters may also sometimes be used, though it is generally preferable if a common language can be found to mediate in.

I hope that this very brief overview of this exciting and challenging new area of mediation has been useful. From my point of view as a mediator and as a participant in the training programme, I can see only enormous benefits for bi-national families in using mediation to resolve, and even prevent the crises that can result in children being taken from their home country and the fallout that ensues. Thanks to the talent, expertise and dedication of the organisers, trainers and participants involved in the International Family Mediation Training Project, I feel competent to work in this area, and very much look forward to developing and expanding the network of international family mediators. A big thank you to all TIM organisers, trainers and participants!

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