Kluwer Mediation Blog

Mediating in Cases in Domestic Violence – Between a Rock and a Hard Place

Sabine Walsh (Sabine Walsh Mediation) · Wednesday, November 6th, 2013

In a one day survey of Domestic Violence Services provided in Ireland on this day last year (6 November 2012), the following statistics were recorded: 537 women and 311 children were accommodated and/or received support from a domestic violence service; 115 helpline calls were received from women; 117 women and 152 children were living in a refuge; 21 women could not be accommodated due to lack of space. (www.womensaid.ie). Separation and divorce can be the result of domestic violence, but also a trigger for it.

The question of whether, and how, to mediate with couples who have experienced or are experiencing domestic violence or abuse has challenged and divided mediation professionals for many years now without consensus on how to handle such cases having been reached. Domestic abuse can be a contra-indicator for mediation for a number of reasons, mainly however that it is likely to compromise the equality of bargaining power, the free interaction with and the voluntary participation in mediation. On one end of the debate, scholars and practitioners argue that all cases involving domestic abuse should be ruled out of mediation. On the other end it is argued that the power imbalances caused by such abuse can be counterbalanced or eliminated by means of a combination of specific mediator skills and structural safeguards.

The practical reality, as so often, appears to lie in somewhere in the middle. In Ireland, mediators are trained to identify and manage situations which involve domestic abuse, by means primarily of pre-mediation screening, a knowledge of the dynamics of domestic abuse and information about support services to which victims, and perpetrators, can be referred. In theory, therefore, unsuitable cases are screened out of mediation and even if one does “slip through the cracks”, mediators can terminate the process and refer parties on to alternative services. Cases deemed suitable, where, for example, the violence is historic, admitted, or was a once-off event, and where the victim can give assurances as to her (or his) ability to engage effectively in the process, can be mediated with appropriate safeguards such as public waiting areas, separate arrival times and sometimes shuttle mediation.
In practice, however, things are a lot less straightforward. To illustrate just how complex this issue can be, let me give just a few practical examples:

As judges are becoming more sensitised to mediation or – as some would argue – to what mediation can do to reduce court lists, more cases are being sent to mediation by judges. While these referrals are not mandatory, it can be difficult in practice to say no when a judge suggests that he or she will adjourn a case to facilitate the parties in reaching an amicable resolution through

mediation. This can occur even in cases where domestic violence has been disclosed, and certainly where such abuse lurks, as yet undisclosed, in the background. Mediators can therefore find themselves being asked to mediate a case involving domestic abuse in cases where one or both parties are not only afraid of their spouse or partner, but also of the potential negative legal consequences, real or imagined, of refusing to engage in such a mediation. The mediator in such a situation has, as yet, no power of directly communicating with the court in relation to the suitability of a case for mediation.

An example of such a case is I. v. I. [2011] IEHC 411, a custody and parenting case which featured an exceptionally high level of conflict between the parties, allegations, some proven, of domestic violence, negative impacts on the child in question and the commissioning of an expert report on the welfare of the child. In this case, despite, or rather because of the high level of conflict and the over 70 court appearances that preceded this judgment, the Judge made an interlocutory order on the substantive issue and then further ordered that before any further court proceedings the couple should attend mediation, appointed a specific mediator and then ordered "that the parties shall be obliged to explain to the court in the event of any further proceedings why they did not take up this opportunity." (Per Abbott J.) Where should the mediator even begin in such a case where even before screening the written High Court judgment gives enough information about the circumstances to, at least on paper, raise serious concerns about suitability for mediation?

On a slightly less dramatic scale, in my own practice I have had a number of referrals of cases from lawyers over recent months of cases involving domestic abuse of various degrees. In most of these the legal advisers have been aware of the abuse, and have still recommended mediation to resolve matters in relation to the couple's separation. Do I screen these cases out and send them back to the solicitor? If I do, being brutally honest about it, am I likely to get many more referrals from them? Do I try to muddle through with the assistance of structural and procedural changes and try to balance the imbalances out as much as possible? Or do I listen to the advice of a friend who works for a domestic violence advocacy service who feels strongly that victims of domestic violence should never engage in as informal a process as mediation where that victim has no assistance in recognising, voicing and advocating her own needs and interests?

These referrals also fail to recognise the potential for the mediation itself to trigger further outbreaks of violence. Parties themselves may self -refer saying: "It's OK he only ever was violent when he was drinking but that has stopped now", only to find that the stress and upheaval of the mediation drives people back into negative behaviours or releases anger that has been building for a while, with dangerous consequences. One such case was referred to me by a lawyer with the assurances that the violence was in the past, both parties had had counselling to address its consequences and "it was no longer an issue". Both parties reiterated this at screening sessions and confirmed their desire to proceed with mediation. At first, all seemed well and the interaction between the parties was positive and respectful. Until the finances were put on the negotiation table. When it came to agreeing a sum that the husband would pay to the wife by way of maintenance, an obviously ingrained pattern of control on the one side and submission on the other became apparent and the resulting dynamic ultimately led me to terminate the mediation.

The final example I want to share is more subtle and complex, and is currently keeping me awake at night, at least to a degree… What of a situation where violence is disclosed by the victim and admitted by the abuser, and the situation is not dangerous enough to warrant immediate screening out, but yet worrying enough to consider doing so. While the obvious solution might be when in doubt, screen out, but I know that by doing so the couple, who are still living under the same roof,

will be tied into contentious court proceedings for at the very least another year. If they were to reach agreement in mediation, however, they would likely be able to move out and move on within the next month or two. Will they, and their children who have witnessed the violence and have been living in a highly conflictual situation be better served by a less formal process with less safeguards but hopefully speedier resolution and some potential for personal development or a more structured, safeguarded process which is however likely to take much longer, drain more of the family's resources and encourage a higher level of conflict and adversarial behaviour between the parties? I don't know, but I'll try to find out…

This entry was posted on Wednesday, November 6th, 2013 at 5:41 pm and is filed under Uncategorized
You can follow any responses to this entry through the Comments (RSS) feed. You can skip to the end and leave a response. Pinging is currently not allowed.