

# Kluwer Mediation Blog

## What about the children?

Sabine Walsh (Sabine Walsh Mediation) · Friday, December 6th, 2013



The year is nearly over, and here in the West of Ireland it is cold, wet windy and dark for what seems like most of the day, so I think it is time for a little moan about the frustrations those of us working particularly in family mediation are experiencing. (I promise I'll start 2014 on a more optimistic note..!) This moan relates specifically to the challenges of mediating issues relating to children in a cultural and legal system that still takes a haphazard and fragmented approach to putting children and their voices at the centre of family law.

Admittedly, these are turbulent times in Ireland's family justice system. Over a year after the Irish people voted in favour of a Constitutional Amendment seeking to protect and enhance children's rights, the legislation implementing the Amendment remains stalled while a court case challenging the referendum and its result is appealed to the Supreme Court. Legislation setting up a new Child and Family Agency, promised in the Programme for Government of 2011, is finally working its way through houses of parliament, and promises to address and respond to "recent reports on child protection failings, including inconsistency and fragmentation in service provision." Meanwhile, yet another referendum is planned for 2014 in order to set up a new, distinct and specialised family court. At a legislative level one could argue, therefore, that changes are afoot.

At practice level, however, the picture is very different. While Irish family law has, since 1964, enshrined the principle of the best interests of the child, the application and implementation of this principle lacks any coherence or policy, particularly when it comes to family mediation. Take the example of a court-ordered mediation I had recently – the parents had separated 10 years ago, in the intervening years, there had been over 40 court attendances in relation to various aspects of parenting. The judge, no doubt at the end of his or her tether, referred the case to mediation. The parties attended reluctantly, one admitting it was only to keep the judge happy. On talking to the parents, both admitted that the children, now aged 12 and 14, were becoming increasingly difficult. Both also felt the children should have a say in what should happen next. No one had ever spoken to the children directly, nor had anyone ever suggested that the children might have a role to play

in a court or mediation process.

On another occasion, the teenage children of a couple with whom I was working refused to cooperate in any of the arrangements entered into in mediation by their parents until they were given an opportunity to speak to me. Again, they felt no one had any interest in what they wanted and they had failed to get any of the professionals involved to work with them directly. Yet another case involved a referral of a couple to mediation by their lawyers in a situation where a domestic abuse protection order was in place and the young children of the couple had been witness to the violence. No suggestions in relation to counselling, support for the children, or indeed referral to child protection services had been made. Who was looking out for the children in that case?

I have several about this situation. One is the broader concern about whether recent and proposed legislative changes are merely cosmetic in nature and as such, will not go far enough in empowering and facilitating children in having an input into decisions that affect them, be this in court or in mediation. Ireland was traditionally a paternalistic country, and our deeply depressing record in relation to child protection need not be repeated here. Even where judges and mediators (the latter more so, it would appear) are willing to engage directly with children, parents will often block this, out of fear that the children will be given too much authority and out of a lack of understanding of the role children can have in such proceedings. One need only review the debate around the Children's Referendum to see how alive such misunderstandings and the fear of giving children "too much power" still is.

Even outside the question of giving children a say, how are we to successfully "scaffold" the children of separating parents if the services to do so aren't available, cost too much, or if there are no mechanisms by which parents can be encouraged to avail of such services. Very many legal systems now have such mechanisms in place. In Australia and New Zealand, for example, parents must (subject to certain exceptions) attend mediation in relation to parenting issues, and such mediation is by default child inclusive. In Canada and the UK, parenting classes, or Parenting After Separation programmes are available and in many countries, such as a number of US States, mandatory attendance at these is also required before parents can proceed with separation or divorce proceedings. No such requirements exist here. In many of these countries all judges and other family law professionals receive training on both supporting the welfare of children and on consulting directly with children. It is important to say that a number of judges have received such training here, and further training forms a part of the proposals for the new family courts system.

The current absence of these supports or, more accurately, co-ordinated implementation of and access to such supports leaves it to the family mediator to juggle the parties and the process, and at the same time to bring the voice of the child into the room themselves, and keep the parties focused on the best interests of the child, while remaining impartial and avoiding falling into the role of a parenting coach or worse, the "parenting police". The line between promoting the best interests of the child and pointing out failings in parenting is a fine one and easy to stumble across for the mediator. I should say at this point that even among family mediators themselves there are many varied views on how and whether the interests and the voice of children should be brought into mediation, and that is the subject for another piece, or even a book. It would however make my work much easier, and the lines less blurry, if I knew that, for example, warring parents would be obliged to attend a parenting course in the course of mediation and I could focus on helping them build the learning from that into their parenting plan, or if I could be comfortable in the knowledge that if I am asked to consult directly with children there are mechanisms, and safeguards in place to support me in doing so.

I do have a lot of hope for the future, if the Constitutional amendment is finally implemented and

the new family court system is created, but between now and then, and probably beyond, it falls to all of us working with families to stop and think about who the most important members of those families are, and how important it is to give them a voice.

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