



The Voice of the Child in Mediation

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Abstract

This is a revised and updated article, Kearney (2011), which considers research findings indicating children's wishes and concerns around parental separation and their involvement in the mediation process. It looks at how Irish family mediators bring the child's voice into the room, ensuring that the views and wishes of children are heard, when their parents are engaging in family mediation. Finally, it considers the implications of the Thirty-first Amendment of the Constitution (Children) 2012, and the Mediation Bill, due to be enacted in 2014 and possible challenges facing family mediators when these legislative instruments are enacted.

Keywords

Child, mediation, consultations

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Children are hugely impacted by changes in their family structure. The way in which their future needs are considered, and planned for in the mediation process, can ensure a healthy and successful adaptation to their newly restructured family life.

In 1983, the Government established an All-Party Oireachtas Committee on Marital Breakdown to examine, *inter alia*, the constitutional ban on divorce under Art. 41.3.2, the law in relation to civil nullity and divorce *a mensa et thoro*. In effect this meant the acknowledgment of marital breakdown as a political issue. In 1989, judicial separation became available to provide for financial and other practical consequences of marital breakdown, including custody and access of children. The legal remedy of divorce followed in 1997.

The Irish Constitution 1937, through Article 41, placed a primary value on the family as a unit, recognising it as the natural and primary group of society, guaranteeing to protect the authority of the family. The Constitution's failure to recognise the child as a juristic person with individual rights (Shannon 2005) was addressed in the Constitutional Referendum on Children's' Rights which was held on November 10th 2012. With the passing of this referendum, the people of Ireland by a majority of 58%, albeit the lowest turnout in the history of the state, voted "yes" to the insertion of Art. 42(a) entitled Children into the Irish Constitution. The article states that:



Provision shall be made by law for securing, as far as practicable, that in all proceedings referred to in subsection 1 of this section (which includes guardianship, custody and access proceedings) in respect of any child who is capable of forming his or her own views, the views of the child shall be ascertained and given due weight having regard to the age and maturity of the child.

When this happens, Ireland will be compliant with Article 12 of the UN Convention of the Rights of the Child 1989. The State will be under an obligation to implement legislation providing that children, capable of forming views have a right to have their views heard and given due weight, in accordance with their age and maturity when decisions are being made concerning them. Professionals working with children will be obliged to take children's views into account when decisions are being made concerning them. The emphasis in family mediation will change from one of parental decision making to a shared perspective ensuring children's views are included in the decision making process.

Research Findings

Family mediation practice commenced in the 1980's in Ireland and was initially informed by research from the United States of America, and in particular the findings of Judith Wallerstein and Joan Kelly's longitudinal study on the effects on children of parental separation (Wallerstein et al 1976). Their research highlighted, that even where separating adults intended to be civilised, their engagement in the adversarial process could result in them taking up positions, leading to the emergence of inflexible thinking. Kelly recognised that mediation provides a protective factor for children in the separation process, providing a forum where parents can express their conflict without involving their children. Family mediators working with separating parents can play a pivotal role in assisting them as they make challenging decisions for the future parenting of their children. This process confirms the importance of the work of a mediator in assisting parents to take responsibility for their parenting both during their mediation and into the future separation. More recent research findings support the initial work of Wallerstein and Kelly and identify the concerns that children expressed when their parents separated. Children are often more aware of problems than parents realise, but they don't always understand what is happening and why (Goren, 2004).

The work of Douglas *et al* in Cardiff (2006) concurred with the findings of research carried out in Trinity College Dublin, (Hogan et al., 2002) suggesting that children felt divided loyalties to their parents and were fearful of the future. The Dublin findings suggest that children felt a deep sadness about not living with both parents, but yet were relieved when they were removed from the impact of conflict around the separation. Children made it clear that they wanted to be kept informed about what changes were happening in their family but didn't want to be drawn into their parents' relationship difficulties. This research found that contact with a non-resident parent was one of the most important issues for children, often shaping their overall feelings and views about the separation. They needed reassurance from both parents that they would continue to be involved in their lives. They saw their parents as their most important source of support (*ibid*). Other research on the effects of separation on children found



that following mediation non-custodial parents had more frequent contact and were more involved in decision making around their children (Kelly et al., 2003).

In Australia, research on how the voice of the child is heard at the time of parental separation produces similar findings on the views of children (Bagshaw, 2007). The findings of a research project involving a literature review and telephone interviews with children whose parents had separated or divorced describe how children expressed their grief at separation; the myriad of losses experienced; their need for support and their inability to access such support; their view that children should be consulted and have a right to input into decisions affecting them when their parents' separated. They would have liked more information from their parents before they separated. Research carried out in New Zealand (Goldson, 2006) into the efficacy of a model involving children directly in the mediation process following marital breakdown, confirmed that parental conflict was reduced and conciliation was enhanced: ...children were more relaxed and had adapted significantly better to the situation after having been given the opportunity to have a 'voice' and having been listened to by their parents.

These research findings point to the importance, from the child's point of view, of having a voice in decisions affecting them. The advantage of including children in the mediation process is well documented and supported by international research findings. The benefits of child-inclusive mediation have been well described (Sanchez et al.,) as including greater acceptance of unpopular decisions, better outcomes, follow through and understanding, and improved relationships between parents and children in the decision-making process. Involving children in decisions affecting them can lay the foundation for good decision making in the future, increasing their capacity for self- determination and confidence (ibid). The experience of child-inclusive mediation has noted that listening to children encourages honesty, reduces blaming and arguments and changes the focus from parents' needs to children's needs. An alternative view, however, challenges the appropriateness of mediation as a forum for children to express their views and opinions (Emery, 2002). The concern expressed is that in giving children a voice about their living arrangements they are being given the responsibility to make adult decisions. The reality in practice is that giving children a voice does not mean completely endorsing their wishes, but rather acknowledging them, and giving them an inclusive voice in whatever challenging decisions are being made by those who care for them.

Current Practice

In Ireland, family mediators include the voice of the child in the mediation process in different ways:

- **indirectly** through the information brought into the process by their parents,
- **directly** through a meeting with the mediator,
- **Family meeting** when the agreement is complete.



Mediation in the context of family law is provided by the State through the Family Mediation Service, now integrated into the Legal Aid Board, as well as through private organisations and private practitioners. The needs of children at the time of separation, as identified in research and practice can differ from those of their parents at this difficult time. As a partnering relationship ends and a parenting relationship continues, the mediator works with parents helping them to separate out the differing needs of themselves and their children. On separation, parents are attempting to detach from each other, while their children need to remain attached to both parents. At a time when children need information and routine, parents may find difficulty in communicating with and setting limits for their children. Parents at this painful time may look to their children for affirmation while children need freedom to express negative feelings toward their parents, whom they may blame for the unwelcome changes happening in their lives. Parents need to look toward a hopeful future at a time when their children have difficulty in seeing their changed family in a hopeful way. The challenge for parents in family mediation is to find a parenting plan that addresses the needs of the whole family in a changing future.

Indirect Consultation

Parents are helped to bring their child's interests into the room *indirectly* from the first gathering of information relating to them. The information gathered includes their name and age, what they know about the separation, and how they are reacting to it. For most mediators, this is the preferred form of consultation encouraging parents to consider their child's views and perspectives during the mediation. The mediator interventions are premised on an assumption of parental competence and the emphasis is on parental responsibility as decision makers. While their child's welfare is continually considered in the options parents choose in relation to finance and housing, it is in the parenting session(s) where they are enabled to work together, to plan the best quality of life for their children. The mediator asks child centred questions, and where appropriate may give relevant research information, to assist parents in their decision making. The mediator's questions focus on the history of the parenting relationship, the current arrangements, and the future options. What is working well? What have children been told, if anything, about the breakup of the relationship and what is their reaction to what is happening? The options parents are considering are discussed in detail with the purpose of reality testing the proposed arrangements. By keeping the discussions child focused, the mediator indirectly brings their child into the room. as s/he helps parents to draw up a detailed parenting plan involving responsibility for weekly/weekend schedules, special life events, holidays, religion, education, extracurricular activities, discipline, child-minding, medical/dental, new partners, time with extended family, testamentary guardians, review clauses and any other issues of particular concern to either parent and their children.

As parents plan the detail of their childcare arrangements, the mediator has an opportunity to reality test and pre-empt any difficulties that might arise in the future. The mediation principles of impartiality and confidentiality can have particular relevance. Should concerns arise involving any allegation or fear of abuse, the mediator explores with parents their responsibilities in dealing with these



issues, and follows distinct policies and procedures in ensuring the protection of children (MII Code of Ethics and Practice, 2009).

Direct Consultation

Currently when the voice of the child is missing in the room and that information is needed to move the mediation onwards, parents may ask the mediator to meet directly with their child. The purpose of a direct meeting needs to be clearly understood by all involved, as a balancing of the parents' responsibility for decision making, and an acknowledgment of the rights of children to have their interests and perspectives valued. Giving a child a personal voice in mediation means encouraging him/her to express his/her views and demonstrates a willingness to take those views seriously. It involves setting out clearly for a child the scope of such participation, and providing a child with sufficient information and support to enable him/her to express an informed view. Confidentiality is offered to the child, who may use the session as an opportunity to be heard, while not wishing for his/her views to go back to the parents. Where a child requests and gives permission for detail to be given to his/her parents, the mediator ensures that the child understands and accepts that these wishes may not necessarily happen. For this reason, the mediator prepares parents for the outcome of the direct session, which may result in feedback that can be difficult for either or both parents to hear. The crucial factor is the need for their child not to be at risk in any way for expressing a view which differs from the parental view. Direct work with children does not appear to be routine in family mediation practice in Ireland. Research into the direct involvement of children in the Family Mediation Service showed that:

There was a marked reluctance to engage in direct work with children other than in suitable circumstances. The incidence of such suitable circumstances as evidenced in the findings was low (Foley-Friel, 2011: 59).

The reasons given for not involving children were that they were believed to be too young to be involved, the level of conflict was too high, or the mediators did not feel sufficiently equipped or skilled to engage with children directly. Family mediators involved in direct work with children need to undertake advanced training and to feel comfortable in working with children and in using toys and activities which enable children to express their views. It can be a very powerful and moving experience to work directly with children, enabling them to articulate their views and to bring that understanding to their parents.

Family Meeting

A third way that the child's voice can be brought into the mediation room is through a whole family meeting which some parents choose to avail of when their agreement has been finalised. Parents are facilitated in explaining to their children the detail of the future arrangements they have made for the family. The mediator's obvious knowledge about them can reassure children, who may not have seen



evidence of positive communication between their parents, that they have in fact been talking about them with the mediator in planning their future. Parents agree in advance that any differences between them will not be aired in this session and if appropriate, any queries raised by the children in relation to detail will be renegotiated by the parents at a subsequent session. A family session can be emotional and it is important that any mediator engaging in this work is trained and is comfortable working directly with children. It can be an empowering experience for participants and an opportunity to clarify for children that, while their family is restructuring, they are still a family in their own inimitable way. It can provide a ritualistic ending for one way of being together and an introduction of the newly restructured family in a positive way. Parents sometimes mark this final meeting by going out to share a meal together with their children.

Challenges for Future Practice

Up to now the choice of how to bring the voice of the child into the mediation process has largely been left to the discretion of the family mediator. Now with the passing of the referendum endorsing Article 12 of the UN Convention on the Rights of the Child, children have a legal right to express their views on all matters affecting them, not just in legal proceedings. The Child and Family Act 2013 established the Child and Family Agency on 1st January 2014. The agency is composed of The Family Support Agency, The Health Services Executive Children and Family Services and The National Education Welfare Board. This agency now named TUSLA meaning a new beginning, a new way of working, was launched on 30th January 2014. The agency is responsible for ensuring the implementation of the guidance principles of Children First, one of which is the acknowledgment that children have a right to be heard, listened to and taken seriously in matters concerning them. On March 1, 2012 a draft Mediation Bill was introduced by Minister for Justice and Equality, Mr Alan Shatter TD. This bill has incorporated many of the recommendations made by the Law Reform Commission in its 2010 (Law Reform Commission). Section 18 (1) of the Mediation Bill 2012 provides that:

If in a family law dispute a mediator considers it appropriate to involve the child of a party directly in the mediation process, the mediator shall obtain the agreement of the parties; obtain the consent of the child and provide or ensure the provision of appropriate facilities for involvement of the child in the process.

This will continue to allow parents and mediators to determine whether or not children will participate in the mediation process, whereas the new Article 42.A.4.2 will give children a **right** to express their view. If the Mediation Bill in its current form is adopted it could be, that despite the acknowledged advantages of the mediation process, children's rights could be guaranteed more protection if their parents resolve their legal dispute before a court of law rather than through mediation (Parkes, 2013). It is vital that the provisions of the two pieces of legislation, namely the Child and Family Act 2013 and the Mediation Act (due to be enacted in 2014), work in harmony, ensuring that the voice of the child is heard



directly and a realistic balance is achieved between the needs of children and their parents in preparing for their changing future.

Conclusion

An instructive way of looking at separation and divorce is not as a single event that influences peoples' lives, but rather as a process affecting parents and their children before during and after the event. Family mediation offers a unique opportunity for children to have their voice heard in this process and to have their current and future needs identified. The voice of the child will continue to come into the mediation room **indirectly**, bringing necessary and important information to the parental decision making process. The **family session** may still have an important role in the mediation process, providing an opportunity for parents and children to discuss their shared perspectives and plans. In the event that the Constitutional change giving the child a right to have their voice heard is implemented, the biggest challenge facing family mediators will be the requirement to introduce the voice of the child directly into their process. Child Focused Mediation and Child Inclusive Mediation are terms used in other jurisdictions to distinguish the difference between indirect and directly bringing the child's voice into the mediation process. Research from Australia and New Zealand have developed some new thinking in this area (McIntosh J *et al.*, 2000) suggesting a model that could be adapted to the Irish context. This model involves a partnership of a family mediator and a specialist child consultant. The mediator works with the parents and the child consultant meets with the children. In a subsequent meeting(s) with the mediator and parents, the views of the child are brought into the process, either directly by the child consultant or through their feedback to the mediator. Many family mediators coming from a childcare background will continue to work directly with children. Others will establish partnerships with child consultants. Children's Rights in Ireland are at a significant crossroads and hopefully will be promoted and protected not just in legislation but also in family mediation which in most cases continues to be the most appropriate dispute resolution process for separating parents.



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