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FROM THE COMPETITIVE TO THE COMPLEMENTARY:  
THE CHANGING ROLES OF THE LEGAL AND MENTAL HEALTH  
PROFESSIONS IN A NEW TERRITORY

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## HISTORY

The Family Mediation Service was first created, as a pilot project in 1981, for the judicial district of Montreal. Due to the importance and the implications of mediation, the following numerous institutions got involved:

- the Judicature through the Honorable Chief Justice of the Superior Court;
- the Ministry of Justice;
- the Ministry of Social Affairs;
- the Bar of Montreal;
- the Subcommittee on the practice of Family Law of the Bar of Montreal;
- the Community Legal Aid Center of Montreal and
- the Social Service Center of Greater Montreal.

Their involvement led to the signing of a protocol of agreement setting specific procedures governing the mediation service.

The Family Mediation Service became a permanent program on the first of April 1984, and the number of mediators was increased from four to seven. Moreover, in the fall of 1984, a second Family Mediation Service was inaugurated in the city of Quebec for that specific judicial district.

## DESCRIPTION OF MEDIATION SERVICE

The general objective of the service is twofold:

- a) To help couples avoid unnecessary separations as well as to minimize the effects of potential separations; and

- b) If a separation is inevitable, to help the couples reach a just and equitable agreement in the matters of custody, access, support and property division.

## NATURE OF THE SERVICES

### Counselling services prior to separation or divorce

The couple or one of the spouses can apply, to the service in order to receive the necessary assistance. More specifically, it is a question of helping the client or the couple in a thoughtful approach to consider all the possible options.

This approach constitutes short term assistance in order to verify the viability of the conjugal bond and to avoid needless a separation. If the couple wishes to undertake marriage counselling, a referral is made to the appropriate service in either the public or private sector. On the otherhand, if the couple decides to separate, mediation is offered as an option.

### Mediation service

Mediation is meant for couples who have already decided to separate or divorce. Mediation is in fact a process of negociation which can have therapeutic and preventive effects on all the family.

Mediation is a mutually constructive self-empowering process which permits the effective resolution of conflict between spouses.

### SPECIFIC OBJECTIVES OF THE FAMILY MEDIATION SERVICE

- Terminate the spousal dependency or in other words, beginning to let go;
- Validate the needs of all family members;
- Maximize the available financial resources i.e. assets and revenues;
- Restructure the relationships between members of that specific family.

Divorcing couples need to maximize their power. This empowerment is arrived at by their knowledge of emotional, psychological, social, legal and financial implications regarding the termination of spousal dependency and their ongoing responsibility as parents.

Parents whose self-esteem is reinforced in the mediation process can share parenting responsibilities with greater facility.

Generally, the mediation process can facilitate the necessary change in styles and patterns of communication and conflict resolution, enabling the divorcing couple to negotiate a settlement.

The main characteristics of the Family Mediation Service in Montreal as well as the process of mediation will be discussed later on.

Let us now briefly look at the staffing and training.

### STAFFING AND TRAINING

The Family Mediation Service is composed of seven mediators, one intake worker

one coordinator, one staff-attorney and one secretary. We are multi-lingual and multicultural staff who can offer mediation in French, English, Italian and Spanish. Most of the professional members are social workers. Others have a degrees in psychology.

All the mediators have undergone an intensive program in family therapy or marriage counselling and there is a wide acceptance of the systems theory as a way of understanding family and individual behaviour. The practice of their profession has made them familiar with the dynamics of family development particularly in regard with: the effects of divorce on ex-spouses and children; the therapeutic responses that qualified therapists could make to be supportive; in order to assist the participants to move through psychological and legal barriers towards a settlement.

Some of our members were trained by well known mediator John Haynes, president of the American Academy of Family Mediators. Others were trained by Mrs. Françoise Lafortune, teacher and mediator at School of Social Work, McGill University in Montreal.

All members of the Service, with the assistance of the staff-attorney, regularly meet to share and discuss substantive informative in the fields of family law, budgeting and family psychology.

They must become familiar with family law, and with the legal process, not for the purpose of practicing law but rather to enable them to work with the couples within the parameters of the legal system and to recognize when to refer their clients to attorneys.

Mediation has often been referred to as bargaining in the shadow of the law. It is a facilitative process, not an advocacy process.

Our mediators are familiar with general family budgeting and accounting procedures and have a general understanding of tax law. All this information enables them to help the participants develop realistic budgets and to handle properly their assets and property.

All our mediators received some training related to negotiation techniques so they can make appropriate moves that can assist participants avoid impasses. There is also ongoing consultation between members of the service regarding clinical issues and techniques.

In this way, the mediation experience is shared for the benefit of divorcing couples and their children.

Let us now briefly look at the definition of family mediation.

Family Mediation: what it is

The definition of family mediation is dependent on: what is being mediated, who is doing the mediating and on the setting in which the mediation is offered.

"Divorce mediation is an interprofessional process in which a divorcing couple in conflict voluntarily request the help of a third neutral, trained person, in a confidential relationship, to help them resolve their conflicts so that a mutually acceptable plan can be worked out by them to insure a viable, communicative post-divorce family in which the needs of all parties, especially those of the children, are addressed and met. Divorce mediation is a process

in which the parties commit themselves to reach an agreement and to cooperate rather than compete with each other. It is a process in which the parties are responsible for their own decisions and consequences. The mediation process is goal directed, problem solving and here-and-now oriented. It is future oriented, not past oriented. Although the agreement is a result of self-determination, ultimately it must be approved by the court". (1)

What it is:

- mediation is first and foremost a process.
- mediation is a goal orientated, problem-solving intervention.
- mediation is a process of conflict management (Haynes, 1981).
- mediation has definite stages involving a series of techniques for accomplishing necessary tasks (Taylor, 1981).
- mediation is usually a short term process.
- mediation as a process is more interactive than interpersonal.
- mediation focuses on the present and on the future.
- mediation requires the active participation of both parties.
- mediation as an alternative or a complement to the adversary process.
- mediation is a self-empowering process.

Many questions concerning mediation are also answered by understanding what is not.

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(1) Extract from an Editorial by Myer Elkin entitled "Divorce Mediation: An Alternative Process for Helping Families to Close the Book Gently", in Conciliation Courts Review, Vol.20, 1982, page iv.

What it is not:

- mediation is not therapy although it has some therapeutic effect on the parties depending on the case and the situation.
- mediation is not a panacea for all psychological and interactive problems.
- mediation is not arbitration.
- mediation is not the same as traditional negotiation of divorce disputes (through representation of attorneys).
- mediation is not conciliation (conciliation being an umbrella concept for divorce counselling, marital therapy, evaluation services, etc...)

We will now describe the Main characteristics of the Family Mediation Service in Montreal

Our model is characterized by being:

1. Closed
2. Interdisciplinary
3. Global
4. Voluntary

Our mediation service is a public service with full governmental funding. It is located in the Montreal Court House. The service is available to all, free of charge, regardless of the income level, as long as one of the spouses resides in the judicial district of Montreal.

Moreover, our model is characterized by being "closed". By this term it is meant that nothing said or written during the mediation process is admissible as evidence in court, unless both parties consent thereto. Therefore,



subject to this last condition, the mediator cannot be compelled to testify in Court. It also means that no report is sent to the judge in a case where no mediated agreement is arrived at.

Secondly we describe our model as an interdisciplinary one for many reasons. The presence, on a permanent basis, of a lawyer acting, as a legal consultant for the mediators is one of the reasons. The staff-attorney is a Legal Aid lawyer appointed jointly by the Community Legal Aid Center of Montreal and the President of the Bar of Montreal.

The role of the staff-attorney is to give the mediators and the parties impartial legal information as to the law applicable to specific issues, the legal process, or the consequences of the options considered. Later on during this presentation, we will specify the role of this staff-attorney during and outside the mediation process.

The Family Mediation Service promoted the interface of various and diverse professions during the process of mediation. It is assumed that divorcing couples will best be served if they can be educated to recognize the need to consult experts for specific problems.

At the Family Mediation Service, we are aware of our possibilities, of our limitations, and of what can be accomplished by experts in different disciplines. So whenever a red light zone is recognized, we will not hesitate to slow down, even halt the mediation process and give the couple the task of consulting an expert on a specific issue.

Thirdly, the service is characterized by being voluntary. All participants (mediator as parties) are always free to start, suspend, withdraw or stop the process at any time. Mediation is not mandatory in Quebec. A strong commitment to the mediation process is expected from the parties.

Finally, we do global mediation in the sense that we help couples negotiate not only custody and access, but also support and property division.

"If divorce mediation is a good idea whose time has come, its benefits may be needlessly restricted by focussing the mediation process, particularly in court settings, on only child custody issues and leaving resolution of the financial issues to a different process. Division between these aspects of divorce is only superficially separable because they are inextricably intertwined (1)

Concurrent with many authors, we believe that restricting mediation to custody and access is an artificial limitation that reduces the effectiveness of the total process.

The results obtained so far in Montreal (Filion, Periard, Tremblay, 1983) and elsewhere seem to confirm this view. (Pearson and all, 1983).

Because of that and other reasons, the Montreal Family Mediation Service is not widely accepted by the legal profession.

Some lawyers claim that the service has sought to alienate the legal profession by creating a "parallel legal system", which replaces lawyers in their work and field of competence.

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(1) Folberg, H. Jay, "Divorce Mediation - the emerging american model", The resolution of Family Conflict, John M. Eekelaar and Sanford N. Katz, Butterworths et Co. (Canada) Ltd, 1984, p.205

Many lawyers, threatened by the broad mandate of the service, and by the absence of a code of professional conduct for mediators, simply refuse to use it, or do so with a degree of resistance and suspicion.

This conflict can arise from an attempt by distinct professions to claim exclusive jurisdiction and expertise over a service provided. This is the case in Montreal where both the legal profession and the mental health profession are vying for control of the territory.

From the beginning up to recently we have claimed that mediation provides an alternative to the adversarial process. We spoke of "complementary" services yet in reality we have not been real partners with lawyers.

To a certain extent this possibly explains the existing conflict with the Bar.

The service was created to complement the work of lawyers and judges, yet in effect we attracted only self-referred clients.

It is understandable that with time a gap was created between the professions to the detriment of the clientele.

In November of 1984, a meeting with lawyers practicing in family law made it possible to reduce the tensions between the two and to directly exchange on this fundamental issue.

Since then, our practice has noticeably evolved. Our discussions have changed. Experience has shown to what extent it is important to collaborate with the lawyer or the lawyers involved in the case in order to clarify the mandate, to consult each other and elaborate on realistic and lasting solutions for the family.

The absence of clear definitions regarding the roles of the attorneys and mediators, engenders sentiments of mistrust between the professions.

In effect lawyers worry that:

- A couple may come to an agreement without adequate representation;
- A couple may live with that agreement without having the Courts ratify the settlement;
- One party could easily overlook his rights, particularly due to weakness, guilt or for the sake of expediency. Thus a party in mediation may be disadvantaged because of the mediator's lack of legal training or because of the limited contact with the staff lawyer.
- The mediator, with little legal training does not have the competence to advise the couple and mediate the financial and property issues.
- A loss of clientele and of revenue.

In short, compared to attorneys, we are no less possessive regarding our turf.

Complementary services are as much a problem as they are a solution since divorce occurs within both the family system and the legal system.

"... divorce and family disputes as both matters of the heart and of the law..." (Folberg, 1984, p.198)

Even though no code of ethics has been written, there exists in practice certain rules of conduct. We have solicited the collaboration of the Bar and hope to together elaborate on a code of professional conduct for mediators as done by the American Bar Associations and in Ontario.

Be that as it may, the function regulations of the Family Mediation Service are as follows:

1. The mediator has an ongoing obligation to advise the couple to obtain legal counsel prior to starting the mediation process.
2. The mediator shall advise the participants to seek independent legal counsel prior to resolving the financial and property issues.
3. The mediator writes up the memorandum of agreement; this unsigned document is handed over to the parties and to their lawyers.
4. The staff-attorney does not undertake any procedure for either party.
5. It is up to the parties themselves to formalize the memorandum of agreement by addressing themselves to their respective lawyers.
6. All agreements prepared by the Mediation Service are reviewed by the staff attorney.
7. The staff attorney will also advise the participants that the memorandum of agreement should be separately reviewed by independent counsel before it is signed.

You will also undoubtedly realize to what extent it becomes imperative to have a code of ethics written up to reassure attorneys of our practice.

Perhaps once that this step has been achieved, the service can work with lawyers to provide a more complete support and help to families in the process of a break-up.

A written code of conduct should involve the Bar and the Family Mediation Service in the least possible delays. Our collaboration is established.

We shall now turn to the mediation process.

The Mediation: A process

Mediation is in fact a process of negotiation which can have therapeutic and preventive effects on all the family.

We will now elaborate on our model to shed light on the implication of all participants in the mediation process:

- implication of the intake worker
- implication of the mediator
- implication of the couple
- implication of the staff attorney
- implication of respective lawyers of the parties
- implication of the Court

Role of the intake worker

The role of the intake worker constitutes a key role since it is the door of entry to the social services of the Superior Court. Given the unique resources of the social services, she plays a strategic and privileged role along with the judges, lawyers and clients of the Court House.

This role has necessitated and continues to necessitate a permanence, a presence, with the need to locate the reception office on the same floor as the Family Division.

The procedure involved in the mediation service is relatively straight forward. People seek out the service after having heard of it through lawyers, judges, other social services, relatives or friends.

One or both parties contact the intake worker, either in person or over the phone.

She ascertains the extent to which both parties voluntarily wish to mediate and ensures that the problems of the family are within the realm of the service's work.

If the intake worker finds that the case does not apply to the service, she can refer the family to other social services. If she decides that the case is within the jurisdiction of this service, she opens the file and sends it to the coordinator of the service who in turn assigns it to a mediator.

Role of the mediator and others partners

Their role will be explained by presenting each of the mediation stages as follows:

1st: Information - Evaluation - Orientation

(usually one session of 1:30 hour or 2:00 hours can overlap in a second session)

What the mediator does:

The mediator:

- Sets the stage for the mediation and fosters trust in the process and between the parents;
- Clarifies the decision for separation;
- Discusses with the permission of the couple, their problematic marriage as well as their way of resolving their conflicts;.
- Clarifies the expectations of each party confronted with mediation;
- Informs the clients of the differences between the mediation process and the adversary system, idem for the possibilities and limits of the mediation process;
- Assesses the couple's readiness and willingness to help them throughout the process;
- Circumscribes the object of the litigation between them;
- Places focus on the children's needs and rights;
- Explains the cooperative nature and information sharing aspects of the mediation process



- Clarifies his mandate with person who has made the referral be it the judge, the lawyer or the two attorneys or other sources of referral;
- Emphasizes on the necessity for each party to consult an attorney;
- Determines a common agenda with the couple;
- According to the case and its needs, refers the couple to an individual marriage or divorce counselor, a lawyer or other resources.

How the mediator does it:

- He observes and listens in the here and now of the session;
- He identifies the communication pattern of the couple and the balance of power;
- He maintains or regains control;
- He tries to establish functional communication between parties;
- He equilibrates power in order that all take his place in the mediation session;
- He lays down ground rules;
- If the couple and the mediator accept to work together, tasks are given by the mediator to the couple

What the couple does

- The couple listens to the information given by the mediator;
- The couple furnishes data and information as requested;
- The couple informs the mediator of their expectations and formulates the issues to be mediated;

- The couple decides if mediation is suitable to both parties;
- The couple decides if the rules and tasks of the mediation process are acceptable to both parties; if so they sign the mediation contract;
- The couple negotiates, if necessary, a temporary agreement when an urgent issue is at hand;
- If the couple accepts to work with the mediator, they also accept the tasks given by the mediator.

#### The role of the clients' attorneys:

At this stage the clients' attorneys have a determining role. If they have made the referrals, a meeting with the parties, the attorneys and the mediator is vital in order to clarify mutual expectations and to define the mandate of the mediator.

The lawyers inform their respective clients of their rights, their responsibilities and their recourses.

The professionals act as real collaborators.

The attorneys invite their clients to commit themselves to the mediation process.

#### The role of the Courts

\*Not only at this first stage but all stages.

The judge can at all times, if he considers it appropriate, refer the couple to the Family Mediation Service with their consent.

The role of the court is more indirect than direct in the sense that there will be no contact between them during the mediation process except for an exchange of correspondence at the beginning and the end of the process. In fact the mediator informs the referring judge:

- If there is a settlement, a copy of the memorandum of agreement is sent to the judge.
- When no settlement is reached, a letter is sent to the judge informing him of the outcome. There is no report on the contents of the mediation.

However, it must not be understood that the role of the Court is negligible, to the contrary it is dominant and determinant throughout the process of mediation. I make this perfectly clear.

In fact, the success of divorce mediation is dependent upon the very existence of the Courts and the potential for litigation.

"The courts, by creating precedents of how similar issues have been judicially resolved in the past, creates the framework by which mediators provide information about legal norms and offer remedies that have been adopted by courts following research and expert input that may not be readily available in mediated cases"(1)

We know that some cases cannot be settled or mediated. The threat of court litigation, with all of the human and material expense that it requires, may be central to help some parties cut through their egocentric nearsightedness to see their interests. Mediation works best when guidelines exist how the law would be applied to resolve the dispute

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(1) Folberg, H. Jay, "Divorce Mediation - the emerging american model", in the Resolution of Family Conflict, p.200

Moreover the ability of the courts comes into play when there exists an unresolved controversy between divorcing spouses or when the enforcement of settlement provisions is required.

Therefore, if the courts did not exist for all these reasons, it is unknown whether mediation could be as effective as it is.

#### Role of the staff attorney \*

The role of the staff attorney is to give the mediators and the divorcing couple impartial legal information in regards to the law itself, the legal process, and the consequences of the options considered.

We operate as an interdisciplinary team.

How does this work in practice?

During the first stage, the mediator identifies some legal issues that need to be clarified. The staff lawyer, if necessary, is asked to provide substantive information about the law, and any relevant jurisprudence. Usually the couple wants to know the difference between a legal separation and divorce, how long they have to wait before a final judgement is rendered?, how much they will have to pay? Who has to pay for the alimony and debts?, etc...

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\* The staff lawyer can stay in the interview session anywhere from 10 minutes to one hour, depending on the questions and the needs of the clients. He could also simply speak to the mediator without involving the clients.

Approximately more than half of our couples have had a legal consultation prior to coming to our mediation service.

Quite often, given the intensity of the emotions experienced during this crisis, couples forget or misinterpret legal advice to their respective advantage. This makes it imperative to correct inaccurate perceptions and is thus one of the most important tasks to be undertaken by the staff-attorney at the onset of the mediation process.

For those who have not had a legal consultation, the staff-attorney advises them that they are not ready to enter into negotiation since they lack the necessary legal knowledge to make decisions.

During the first stage, the staff attorney informs the couple that he is impartial and cannot serve as a legal representative for either. His neutrality enhances his credibility in the eyes of both parties. He is well placed to inform the couple about the role of the court and the range of resolutions that a court might impose. He also informs the parties that the judge has the broad discretion to divide property, to set alimony and child support payments and to impose visitation rights.

During this time, the mediator acts as an observer. This gives him the chance to recheck the communication patterns of the parties, the power balance, their motivation, willingness, and readiness to mediate. After the interview, the mediator and the lawyer meet to discuss the case.

Second stage: Definition of Parental Goals - Development of options

At this stage, discussion is geared towards how the parents will continue to be parents after the separation. There is no model of how to divide parental authority. All avenues are explored. Their

advantages and disadvantages are considered in respects to the emotional and developmental needs of the child. The creation of alternatives should also be determined on the realities of the family.

Mediation provides structure and helps parents to review all the options and determine the most appropriate plan to make shared parenting work successfully.

What the mediator does:

In this phase the mediator is guided by certain fundamental principles.

In my opinion they are:

1. The parents are in a good position to determine their child's needs and to recognize what both of them have to offer.
2. A child is more likely to adjust to the separation when the parents deal directly with each other on matters that concern him (her).
3. A child needs to maintain an ongoing relationship with both parents.
4. A child needs to be informed about the separation and to be reassured about his present and future.

The involvement of children in the mediation process is an unsettled issue for mediators. Some authors contest the position that has been taken by Haynes (1981) et Coogler (1978) that children should not be part of the decisions made during mediation.

I am in agreement with this position in respects to financial issues but in regards to custody and visitation rights especially when these issues are contested. I cannot conceive how the mediation process can be completed without seeing the child(ren) either alone, or in a family interview.

I contend that children need to feel they are part of the decision-making over their own future.

They should always be involved by the parents in the process. The parents should inform them of their recourse to mediation, and they should ask for feedback before reaching decisions regarding custody and visitation.

It is not necessary for the mediator to meet the children on many occasions, but at the very least they should be involved in the symbolic acceptance of the mediation plan or memorandum of agreement. For example, parents can say at this session that they will never be back with one another the way it was before, and that they look forward to seeking a new life...Both parents can provide emotional closure to the children by taking that opportunity to reaffirm the absence of blame and the finality of the decision. However this must be done in a way that does not further burden the child the burden of the decisions rests with the parents.

Before making decisions regarding their children, parents should take into consideration different aspects. To this end the mediator attempts to make the parents focus on the following:

- The children's reaction to the parents decision to separate in respects to their age and development;
- The needs of the child;
- The sharing of parental authority (legal, social, and personal implications)

The mediator stimulates the development of options, the clarification of goals and the evaluation with the couple of the consequences of each possible solution.

Among the numerous decisions that separating parents must reach, the mediator helps them to focus on:

- The child's place of residence;
- The time and location of contacts between the child and either parent;
- The child's activities with either parent (vacation time, holidays, birthdays, recreational activities, educational activities, etc);
- The involvement of grand parents, relatives and new partners in the child's life, etc;
- The manner in which critical decisions about their child will be made;
- The child's best interests.

The mediator ensures to a certain degree an equitable and functional division of parenting roles and responsibilities. He verifies if living arrangements are acceptable to both parents and conducive to the child's normal development.

The mediator controls the mediation process not the content. If necessary he intervenes to change dysfunctional problem-solving patterns using strategies which assist the mediation process and prevent impasses.

He manages conflict and negotiation, maintaining a power balance between the two parties.

#### The role of the staff-attorney

If need be, he is invited by the mediator to see the couple to clarify or reclarify legal concepts such as joint custody, exclusive physical custody, and other forms of custody in order to understand their legal implications, and their historical effectiveness.



By reclarifying these legal concepts, the staff-lawyer establishes the parameters within which the negotiation will take place.

### The role of the couple

The couple exchanges information about their personal needs, resources, situation and future plan for the child. They identify and clarify issues, consult children, family members or when needed a new spouse, grand parents, in-laws, etc...

Later they will develop options, define the range of options ordering priorities, evaluating all the implications of the different options. Then they will negotiate and bargain, looking at the consequences of the chosen solutions, taking into consideration the best interest of the child. They can refer, if necessary to their personal lawyers for clarifying some legal aspects of the options.

### The role of the clients attorneys

If necessary they provide their clients legal information during the course of the mediation process.

### Third stage: Budget: Development of options

At this point, parents have some ideas concerning the children. Financial issues are part and parcel of the decisions about who incurs the daily expenses for the child and who sets aside the time necessary to care for the child.

It has been observed that some parents may exchange custodial rights and obligation for financial reasons. Aware of this, the mediator has to assist parents in carefully considering how their role can fulfill the best interest of their child.

#### Role of the mediator

The mediator invites the couple to fill, individually, a budget form (a list of income, fixed and variable expenditures and debts). Each parents will get a copy of the other's budget so that direct information is shared.

Only positive criticism and constructive options are tolerated.

The mediator evaluates to a certain degree the equitable distribution of resources and responsibilities. Seeing to it that there is a compromise on the part of the couple and that there is satisfaction for both rather than exploitation. He tends to maximize the available financial resources taking into consideration the family's revenues and needs. If there is a full disclosure, mutual trust and complete information, the figures may speak for themselves.

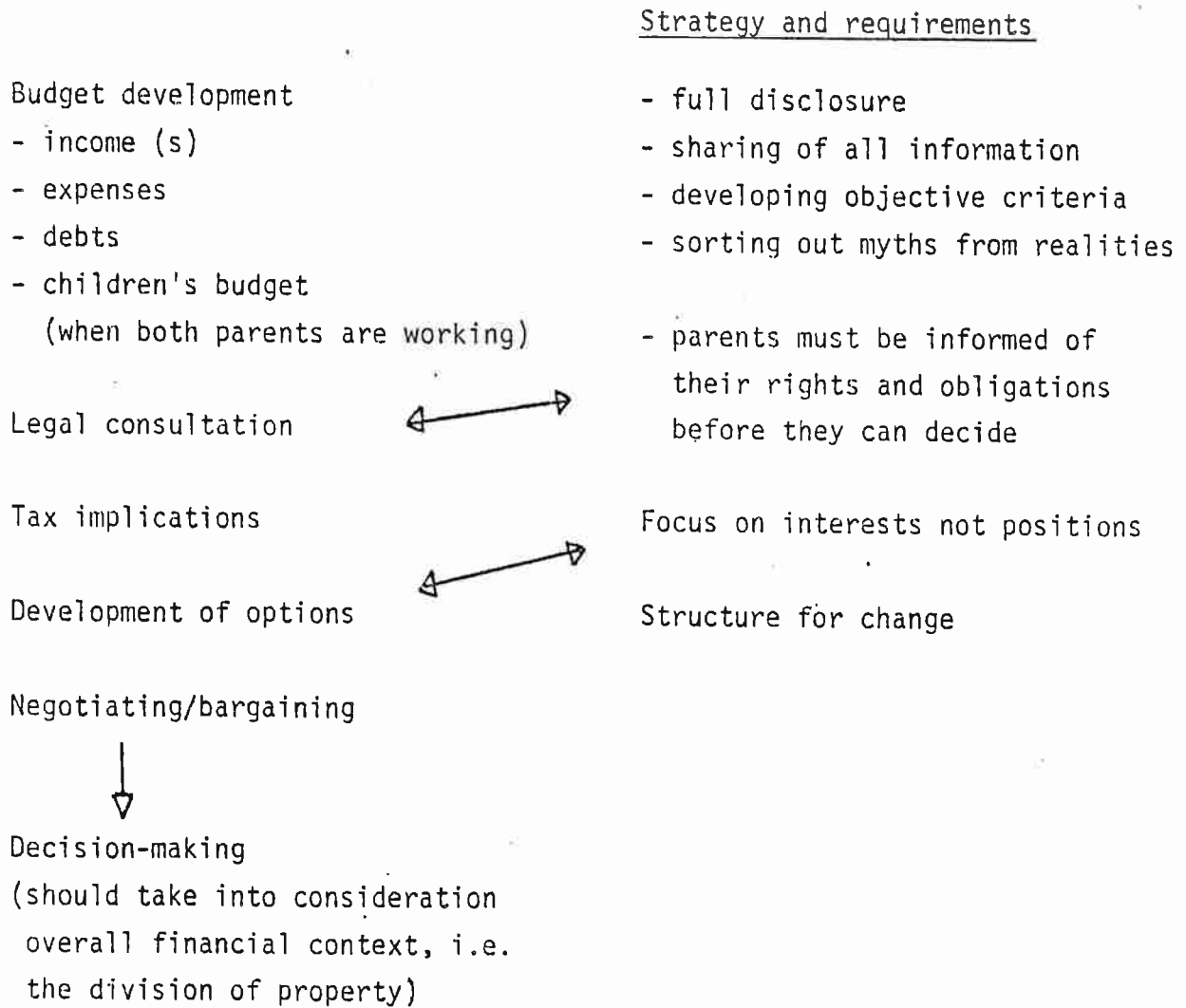
#### Methodology for mediating support

The mediator facilitates the process, structures, simplifies, organizes the relevant data and options so that the couple, sharing the best available information, will then make the best decisions.

In order to achieve this particular task, great emphasis is laid on specific tasks given to the participants. Therefore, the outcome will be a mutually satisfactory, self determined private agreement reflecting the parties' own preferences.

Let us now look briefly at the steps involved in dealing with support.

Steps involved in dealing with support



### Role of the couple

The couple exchange the information on the budget forms as requested by the mediator. They assert their personal needs as well those of the children, taking into account resources and debts.

They decide how to increase resources and/or decrease needs when there is a gap between available resources and expressed needs. They seek the information and, focus on the issues. If necessary, they can refer to their individual lawyers to verify information concerning tax implications or other legal and financial issues.

### Role of the staff attorney

The staff-lawyer and the mediator may meet outside the presence of the couple. This enables them discuss the legal ramifications in the case, elaborate on additional options for the couple, evaluate circumstances that should halt mediation process and to consider referring the participants to their respective lawyers or other experts.

The staff-lawyer may also meet the couple in the presence of the mediator to assist them in understanding certain figures and point out certain legal aspects and fiscal implications.

### Role of the clients' attorneys

If necessary, they meet their respective clients to clear up legal and fiscal considerations when one or some options are being look at at the budget stage.

Fourth stage: Identification of assets and liabilities - Development of options.

This section will deal with the process of identifying assets, evaluating the worth, agreeing on principles of fairness and with the development of options with regard to the division of assets.

Let us briefly look at the steps involved with property division.

Steps involved with property division

Strategy and requirements

- |  |  |
|--|--|
| Identification of assets and debts   | Same as with working with support issues |
| Evaluation of assets and debts   |  |
| Establishing principles de division  |  |
| Legal consultation   |  |
| Tax implications   |  |
| Development of options   |  |
| Negotiation and bargaining   |  |
| ↓  |  |
| Decision-making<br>(Taking into consideration the decisions regarding support) |  |

### Role of the mediator

The mediator proceeds in the same manner as for the support. He uses the same strategy. How does he perform this difficult task?

- By proceeding step by step;
- By providing a safe structured environment;
- By starting with what is known and accepted;
- By tackling the hardest last;
- By being aware of his limits as a mediator;
- By not hesitating to slow down or halt the process;
- By referring the couple to their respective lawyers or other experts;
- By having confidence in both parents as being capable to reach an agreement with the help of a third party.

### We will now look at the specific tasks of the couple

- The parties exchange the information on the financial forms as requested by the mediator;
- They establish principles of division after identifying and evaluating all assets and debts;
- They define fairness and equity considering their reality;
- They identify and clarify issues, consult experts when needed such as: real estate brokers/appraisers, accountants, investment brokers, life insurance consultants, pension experts, welfare agents, lawyers, etc...
- Later they will develop options while evaluating legal and fiscal implications of the different options. Then they will negotiate and bargain taking into consideration the overall financial context.

Role of the staff-attorney

Idem as the support issues.

Role of the clients attorneys

Idem as the support issues.

Fifth stage: Negotiation, Bargaining and Decision making

Having gone through all the stages of the process, the couple is now ready to negotiate. For each major issue, participants must choose the option they can live with, even if it is not what they originally wanted.

Role of the mediator

The mediator can use directive and budgeting statements, clarify and summarize, and keep control while allowing the couple to explore for themselves which options are really viable.

In other words, he encourages participants to take the risky step and decide.

" The mediator's role during this stage is to start the interchange between participants and then monitor it so that each person is given a chance to talk, make offers and consider them without undue pressure". (1)

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(1) Folberg, H. Jay, and Taylor, Alison, Mediation, a comprehensive guide to resolving conflicts without litigation, Jossey-Bass Publishers, California, 1984, p.55

To help the participants carry on a negotiation, the mediator must direct them away from bargaining over positions and encourage them to develop objective criteria for decisions (Fisher and Ury, 1983).

Various techniques may be used among which are:

- Maintaining some sort of equity in communication;
- Reflecting the doubts and fears of each participant;
- Using direct confrontation;
- Having the participants start decision making from the least costly or lowest - priority items;
- Legitimizing their right to be ambivalent;
- Declaring an impasse;
- Etc...

Sometimes readiness for decision-making requires a change in perception, a need for information, a change in individual development and maturation. The mediator should become skilled at evaluating each participant's readiness before proceeding with this stage.

#### Role of the couple

They negotiate and bargain, looking at the implications of their choices, taking into consideration the overall financial context and assuring the best interest of the child.

Cooperation and openness in the process of decision-making will result in decisions which reflect respect and interests for all family members.



### Role of the staff-attorney

He has to remind the participants that it is their duty to get independent legal advice before the conclusion of the mediation process.

The staff-attorney may also provide the couple with impartial legal information on specific issues and on the consequences of the options considered. This is especially helpful during this session.

### Role of the clients attorneys

They must be available to meet the needs of their clients during stage, if it is required.

### Sixth stage: Resolving the issues, Revision and Writing the memorandum of agreement

The function of stage 6 of mediation is to produce a document that outlines clearly the participants' intentions, their decisions and their future.

This memorandum of agreement is a declaration of intentions and not legally binding. It is also not signed, more like a plan of action rather than a contract binding the parties.

### Role of the mediator

In our model, it is the mediator who writes up the memorandum.

The mediator is the primary person involved in recording, organizing, and accurately reflecting the decisions that have been reached.

The process by which the issues of support, property and child custody are brought to a close can be as important as the settlement document itself.

" Viewed in this way, the importance of the document is no more supreme than the cooperative process that produces it"(1)

That is way it is not appropriate to be offended by changes done after a revision by the lawyers. The important thing is that it reflects the intentions of both parties and the reality of the situation. The mediator may if appropriate, congratulate the couple for their hard work and ability to come to a mutual agreement.

He writes up the memorandum of agreement and submits it to the staff lawyer to make certain that it is free of legal ambiguities. Following this, the agreement is typed up and sent to the parties' respective lawyers and the parties, for discussion and ratification prior to final approval by the Court.

#### Role of the couple and their respective attorneys

The parties assist the mediators in carrying out his(her) responsibility in accurately recording, organizing and reflecting the decisions that have been reached. Depending on the case and the situation, the participants, either separately or jointly, may need to write their own wording of an option to ensure that it reflects their idea of the agreement and submit it to the mediator for inclusion in the mediated plan.

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(1) Folberg, H. Jay, "Divorce mediation - the emerging american model", The Resolution of Family Conflict", John M. Eekelaar and Sanford N. Katz, Butterworths et Co., (Canada) Ltd, 1984 p.206

## CONCLUSION

The model of intervention developed by the Family Mediation Service in Montreal reveals the need for couples to find a human and complete solution to family disputes outside the judicial process. The couples who use the Family Mediation Service are self-referred in 75% of the cases and is done so before the initiation of legal procedures. The couples referred by a judge or by lawyers constitute the rest. This situation is explained by such factors as:

- The resistance and distrust manifested by lawyers with regard to mediation;
- The absence of incentives for the use of the service;
- The practice of spontaneous recourse to the court for settling conflicts;
- For economic reasons as a loss of clientele and of revenue;
- The absence of clear roles for both the legal and social service professions when involved in the mediation process.

Family Mediation is perceived not as just the domain of either the mental health or the legal profession, but rather a joint effort at providing better alternatives for family members.

In Montreal, at the beginning, we presumed that it would be better to negotiate all of the issues arising from separation or divorce. We offered global mediation only because we have had our own staff lawyer. The presence of this lawyer enhances both the credibility of our service and that of the mediators. At the same time, it gives the divorcing parties a certain sense of security.

Marital breakdown often creates a deep sense of vulnerability and the interdisciplinary team sets a context that divorce is both a legal and emotional process.

In four years, the Family Mediation Service has handled over 1500 cases, 80% of which were mediations.

Approximately 70% of the mediation cases were successful, in the sense that a mediated agreement was produced.

A random research conducted last summer showed that out of our supposedly unsuccessful cases only 1% were contested in Court.

These results are highly encouraging. However the resistance, the mistrust and the competition between the professions should make way for dialogue.

Our challenge in meeting the needs of families in conflict, is to develop a system of justice that will foster a spirit of cooperation rather than one of confrontation.

Therefore there is an urgent need for a code of ethics and a definition of standards of practice for this new profession.

We must learn to work together and in order to do this, we must clearly define our respective roles and responsibilities. The legal system and social services are both needed to provide families with sufficient and to resolve their disputes. I believe that family mediation must fill the gap left open by the courts.

The Family Mediation Service has to produce harmony and equilibrium within the Court system.

A clearer role for mediation must be defined within family law.

In Montreal it is imperative that we mediate with the lawyers the various existing demands, to arrive at a settlement that will represent the rights and desires of both professions.

Hopefully we can look forward to the development of this process.

Family Mediation is not a panacea, nor is it a substitute for the legal process. Rather, it is a new territory accessible to both the legal and the mental health professions.

Our respective boundaries must still be defined as must be our common interests.

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