

ROLE OF MEDIATION IN RELATION TO THE FAMILY MATTERS**-OORJA JAIN & SHWETA TAHILANI¹****ABSTRACT**

Mediation is a form of alternative solution to disputes which is helpful to resolve the dispute in a cooperative manner and it acts as an alternative to the court's action. Mediation is a voluntary process that acts as a major tool for individuals to reach to the agreements on issues related to their family disputes. Family mediation is a general process performed by an independent person who is a professionally trained mediator who guides or helps the individuals to work out on the disputes related to their family like matters related to children such as their custody, residence etc., matters related to maintenance, matters related to finance or any other matter related to family issues. Although mediation can be done to resolve any sort of matters but in this paper we are just going to discuss the role of mediation in resolving the issues related to family disputes. In this paper we are also going to discuss the basic mediation process, the role of mediation in resolving different conflicts and providing peace and MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION. Family mediation has been proved as one of the best way to resolve the family disputes as it can help in increasing the self-determination of the parties and their individual ability to communicate, help in promoting the best interest of the children, help to reduce economical and emotional cost associated with resolving of family disputes.

The very first question that arises when the role of mediation in relation to family matters has to be discussed is what mediation actually means?

Mediation is basically a process which helps to the conflicts in a cooperative manner and acts as an alternative to the court's proceedings. It is a closed and voluntary process in which the parties are given an opportunity to make proposals and offers without any fear of leading it against them during the court proceedings.

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To execute the mediation a third party i.e. a mediator is appointed who is neutral party who basically heads/ leads the discussion and provide adjuration to the parties in mediation towards providing solutions by making them communicate in productive and better manner.

Majorly the mediations leads to an effective agreement. The decisions of the mediator is not binding until and unless the parties to mediation gives the authority to the mediator to do so.

Why mediations should be preferred over court proceedings?

Mediation have many advantages over the court proceedings which includes the following:

Speedy

Usually mediation takes days or weeks or months (in complex cases) whereas court proceedings usually takes months or years. Mediation allows efficient time management for resolving a dispute to the parties so that their daily routine does not get hampered.

Cost effective

Mediation is less expensive as compared to court proceedings. Expenses of a mediator varies vastly from the expenses of a lawyer involved in the proceeding.

More conventional

The informality involved in the process of mediation to give opportunities to the parties to get engaged more effectively than they would in court proceeding as court proceedings involve an abundance of rules regulations and procedures which are designed to separate the parties to the suit. As the mediator communicates directly to parties, he can make the parties focus on their needs, interests rather than focusing on an individual as in a court proceeding.

Confidential

The court proceedings majorly takes place in public whereas mediation is totally confidential as there are no transcripts or evidence or records introduced or used during the process of mediation that can be used against the party later during the proceedings.

+ Help to maintain relations

Mediation helps to preserve relationships whether personal or business, that may destroy during the long process of court proceedings. As mediation is not inborn a win or lose process. It can be a win-win situation for both the parties as both the parties negotiate on their issues.

+ Flexible and greater control

The parties to the mediation are in control unlike that to the parties to the court proceedings. In the process of mediation parties have a greater say in terms of negotiation and more control over the outcomes.

+ Excel results

Due to all the above stated reasons parties to mediation get better outcomes as compared to that of law suits. In the case of mediation neither of the party loses nor wins, there is no guilt or fault is admitted on part of any of the parties. The settlement is mutually done which satisfies the party more than that of court proceedings.

+ Greater docility

As the mediation gives better results more quickly and efficiently in terms of cost, the compliance of the dispute in the mediation is generally high than that of court proceedings.

Hence, mediation provides an opportunity to the parties to discuss the disputes, to clear the misunderstandings and negotiate to the points where the court proceedings can't lead to.

What constitutes a family dispute?

Family disputes basically means the issues faced by the members of a family which are not able to sort out with mere communicating, listening, working as a team etc. Family disputes can arise due to disagreement on a particular issue, money matter, division of ancestral property, matrimonial issues, etc.

Process and Procedure of mediation involved in resolving the family disputes:

When we talk about the process and procedure followed in the mediation then we are required to know that mediations in India are generally of two types:

1. Court referred mediation

This kind of mediation is generally referred by the court on the pending cases under Sec 89 of Criminal Procedure Code, 1908. These kind of mediation are basically referred in matrimonial disputes especially in divorce cases.

2. Private mediation

Private mediation is basically done by a qualified expert personnel on fixed fee basis. Anyone from general public to judicial bodies, corporate sector to government sector, personal to business disputes etc. can heir a mediator to find out an alternative solution to their disputes.

The procedure is as follows:

The party whosoever is interested in mediation have to write a letter to the registrar of court to get the permission for starting the mediation proceedings.

The letter contains the name and addresses of both the parties and verification of the person whosoever is wring the letter.

The letter must be signed by the person who is writing it and it does not involve the lawyer for it to be a valid one.

Further, it is presented in the registrar office of the family court and the whole process is free of charge.

*This process can also be formulated by a note instead of a letter.

STEP1:

The note contains the names and addresses of the parties and the parties have to present a draft of the contract which they have agreed to (if) has to be published at the end of the mediation.

STEP2:

It should be signed by both the parties of the dispute with their notary or both their lawyers and notary.

In case the parties to the suit are married then they are also required to submit a copy of birth certificate of their children along with the letter or note.

STEP3:

As the letter or note is filed, then the court appoints a mediator to hear the case from the list of mediators. He can be appointed directly by the parties themselves in the agreement with a fee to an independent/ private mediator.

STEP4:

When the parties to the dispute feel that there is no scope in working of their relationship then the mediator will try to settle the parties to a point where it is most beneficial for them and their children if possible.

For a positive agreement the parties should be flexible in nature and attend the sessions with a mind set to resolve the issue.

STEP5:

The mediator is present there only to make the parties understand each others point of view not to dictate. They can state their opinions and present their wishes to talk it out.

STEP6:

When the parties through the process of mediation reach to an agreement and are agreeing to follow it thoroughly then a contract is drafted and presented in the registrar office of the family court.

STEP7:

The contract is further forwarded by the registrar to the magistrate for his approval and if approved then the parties can go to a notary to publish it and make it official.

There are certain question that arises in one's mind in relation to mediation to family matters:

➤ **In case the parties to the suit want a divorce then how mediation is going to help?**

In case the parties to the disputes needs to have a divorce through mediation then it is necessary for them to live separately at least for 4 years and they should not be separated by law as in such a case they would have gone through a suit in which the official pronouncement of divorce has already be done in open court. In case no such separation is done then the parties need to follow the prescribed process of mediation but the difference comes at the end in which the judge / magistrate after signing the agreement has to pronounce official divorce between the parties in the open court on the application made by the lawyer requesting the same.

➤ **Do parties have an opportunity to communicate to the mediator separately/ individually?**

Yes, the parties have an opportunity to communicate to the mediator separately/ individually but it totally depends upon the discretion of the mediator. Mediator decides this considering the fact that whether separate meetings can give benefits to solving the dispute or not. Whatsoever discussion takes place in private needs to be confidential till the party himself gives the authority to the mediator to disclose it.

➤ **Whether the children possesses any right to say or to be heard during the process of mediation?**

Whenever a family dispute is considered, the interest of the children is considered as the topmost priority. If the mediator feels that the child is competent enough to give his view point on the matter in dispute then, he hears the child privately.

Social workers, psychologist, child advocates etc. are appointed by the court for the same. Children can also be heard by the magistrates or judges privately in their personal chambers. In case it is felt that the professionals are required in any of the matters to deal with children then the mediator or any one of the party can give an application to the court for their appointment.

➤ **What if any of the parties is not attending the mediation?**

The mediation will be closed on the ground of no interest by the mediator in case the party applied for the mediation does not attend it and neither of the parties can proceed with the lawsuit.

In case the other party does not attend the mediation or has no interest to agree upon any contract the court gives them the permission to start a lawsuit.

➤ **In case any of the parties to the mediation lives in abroad then how the process will take place?**

No mediation can take place if any of the parties stay in abroad. No other person can attend mediation even if he has the power of attorney on others place. Only a court proceeding / a lawsuit suit can be done in such a case to resolve the disputes.

➤ **How will we conclude that the mediation process is successful or unsuccessful?**

Mediation process can be considered as successful only when the interest of both the parties are taken into consideration and they reach an amicable settlement. No counselling is given to the parties in the process of mediation but somewhere the mediator does try to reconcile them. If the parties are unable to agree on a particular statement then the mediation is closed and they are given an opportunity to approach the court within two months from the date mediation was

closed else the whole process will fail and the parties have to start it all over again.

➤ **Is there any hidden expenses involved in the mediation process?**

The expenses involved in the process of mediation are relatively less as compared to that of court proceedings. In case both the parties choose common/private mediator then they need to pay the mediators fees else they only need to pay the fees of lawyer if they choose any and there notary fees at the time of contract is published.

**MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE
MEDIATION**

The *Model Standards of Practice for Family and Divorce Mediation* ("Model Standards") are recognised by AFCC (Association of Family and Conciliation Courts) which aims to perform the following functions:

1. Provide guidance to the conduct of family mediators;
2. To inform the parties to the mediation of what they can requires;
3. To develop public confidence in mediation by resolving family disputes.

Standard I

A family mediator shall recognize that mediation is based on the principle of self-determination by the participants.

- A. Self-determination is the ground-laying essence of family mediation. The process of mediation depends on the ability of parties to make their own discretionary and informed decisions.
- B. The vital role of a family mediator is to stand by side of the parties to gain a better understanding of their own needs and interests as well as of others and to facilitate pact among the parties.
- C. A mediator of family disputes should inform the parties that they may look for information and recommend from a various well-spring during the process of mediation.
- D. A family mediator shall inform the parties for withdrawal of matter anytime, if required.
- E. The commitment of family mediator should reach to the parties and the proceedings thereunder. Pressure from outside of the mediation process shall never influence the mediator to undue-influence parties while settlement.

Standard II

A family mediator shall be qualified by education and training to undertake the mediation.

- A. To perform the family mediator's role, a mediator should:
 - 1. Acquire minimum knowledge of family law;
 - 2. Have practical experience of family conflict on parents, children and other parties;
 - 3. Have knowledge specified for process of mediation;
 - 4. Enable to analyse the effect of culture and diversity
- B. relevant educational and practical programmes and training should be conducted.

Standard III

A family mediator shall facilitate the participants' understanding of what mediation is and assess their capacity to mediate before the participants reach an agreement to mediate.

- A. Before family mediation starts a mediator should provide the parties with a brief of the process and procedure:

1. Giving information to the parties that in mediation the main outcome is the contract which is consensual in nature, and the mediator may not force any settlement on the parties;
 2. Separating family mediation from other processes designed to address family issues and disputes;
 3. Notifying the parties that any contracts grasped will be studied by the court when court endorsement is obligatory;
 4. Notifying the parties that they may obtain autonomous guidance from attorneys, counsel, advocates, accountants, therapists or other professionals through the mediation process;
 5. Counselling the parties, in suitable cases, that they can seek the guidance of spiritual figures, elders or other noteworthy persons in their community whose opinions they value;
 6. Debating, if valid, the issue of discrete sessions with the parties, a description of the situations in which the mediator may meet alone with any of the parties, or with any third party and the conditions of privacy concerning these separate sessions;
 7. Notifying the parties that the presence or absence of other persons at a mediation, including attorneys, counselors or advocates, depends on the agreement of the parties and the mediator.
 8. Telling the responsibilities of the mediator to maintain the secrecy of the mediation process and its results as well as any exemptions to privacy;
 9. Supervising the parties of the surroundings under which the mediator may suspend or terminate the mediation process and that a party has a right to suspend or dismiss mediation at any time.
- B. The parties should sign a written contract to mediate their dispute and the terms and circumstances thereof within a rational time after first referring the family mediator.
- C. The family mediator should be alert to the volume and willingness of the parties to mediate before proceeding with the mediation and throughout the process.

- D. Family mediators should not accept a dispute for mediation if they cannot satisfy the prospects of the parties regarding the timing of the process.

Standard IV

A family mediator shall conduct the mediation process in an impartial manner. A family mediator shall disclose all actual and potential grounds of bias and conflicts of interest reasonably known to the mediator. The parties shall be free to retain the mediator by an informed, written waiver of the conflict of interest. However, if a bias or conflict of interest clearly impairs a mediator's impartiality, the mediator shall withdraw regardless of the express agreement of the parties.

- A. Impartiality means freedom from preference or bias in word, action or presence, and includes a pledge to assist all parties as opposed to any one individual.
- B. Conflict of interest means any association between the mediator, any parties or the subject matter of the dispute, that negotiations or appears to compromise the mediator's impartiality.
- C. A family mediator should not accept a dispute for mediation if the family mediator cannot be fair.
- D. A family mediator should recognise and reveal potential grounds of prejudice or conflict of interest upon which a mediator's fairness might rationally be questioned. Such disclosure should be made prior to the start of a mediation and in time to allow the parties to select an alternate mediator.
- E. A family mediator should resolve all doubts in help of disclosure.
- F. A family mediator should guard against bias or partiality based on the parties' individual characteristics, background or performance at the mediation.
- G. A family mediator should avoid conflicts of interest in recommending the services of other professionals.
- H. A family mediator shall not use information about parties obtained in a mediation for individual gain.

- I. A family mediator should withdraw pursuant to *Standard IX* if the mediator believes the mediator's impartiality has been negotiated or a conflict of interest has been recognised and has not been waived by the parties.

Standard V

A family mediator shall fully disclose and explain the basis of any compensation, fees and charges to the parties.

- A. The parties should be provided with adequate information about fees at the onset of mediation to control if they wish to recall the services of the mediator.
- B. The parties' written contract to mediate their dispute should include a description of their fee arrangement with the mediator.
- C. A mediator should not enter into a fee agreement which is depending upon the results of the mediation or the amount of the settlement.
- D. A mediator should not receive a fee for referral of a matter to another mediator or to any other person.
- E. Upon termination of mediation a mediator should return any unearned fee to the parties.

Standard VI

A family mediator shall structure the mediation process so that the participants make decisions based on sufficient information and knowledge.

- A. The mediator should enable full and precise disclosure and the acquisition and development of information during mediation so that the parties can make informed decisions. This may be accomplished by encouraging parties to consult appropriate experts.
- B. Consistent with standards of impartiality and preserving participant self-determination, a mediator may provide the parties with information that the mediator is qualified by training or experience to provide. The mediator shall not provide therapy or legal advice.
- C. The mediator should commend that the parties obtain independent legal representation before concluding an agreement.

- D. If the parties so want, the mediator should allow attorneys, counsel or advocates for the parties to be present at the mediation sessions.
- E. With the agreement of the parties, the mediator may document the parties' resolution of their dispute.

Standard VII

A family mediator shall maintain the confidentiality of all information acquired in the mediation process, unless the mediator is permitted or required to reveal the information by law or agreement of the participants.

- A. The mediator should discuss the parties' outlooks of privacy with them prior to undertaking the negotiation. The written agreement to mediate should include provisions concerning privacy.
- B. Prior to undertaking the mediation the mediator should inform the parties of the limits of confidentiality such as statutory, judicially or ethically authorized reporting.
- C. The mediator shall disclose a participant's threat of suicide or violence against any person to the vulnerable person and the apt authorities if the mediator believes such threat is probable to be acted upon as permitted by law.
- D. If the mediator holds private sessions with a parties, the obligations of discretion concerning those sessions should be discussed and agreed upon previous to the sessions.
- E. If subpoenaed or otherwise noticed to testify or to produce documents the mediator should inform the parties immediately. The mediator should not testify or provide documents in response to a subpoena without an order of the court if the mediator reasonably believes doing so would violate an obligation of confidentiality to the parties.

Standard VIII

A family mediator shall assist participants in determining how to promote the best interests of children.

- A. The mediator should encourage the parties to explore the range of options available for separation or post-divorce parenting arrangements and their respective costs and benefits.

Referral to a specialist in child development may be appropriate for these purposes. The topics for discussion may include, among others:

1. Information about public resources and programs that can help the parties and their children cope with the penalties of family reorganization and family violence;
 2. Problems that on-going conflict creates for children's growth and what steps might be taken to perfect the effects of conflict on the children;
 3. Development of a parenting plan that covers the children's physical residence and decision-making responsibilities for the children, with suitable levels of detail as agreed to by the parties;
 4. The possible need to revise parenting plans as the developing needs of the children evolve over time
 5. encouragement to the parties to develop appropriate dispute resolution mechanisms to facilitate future revisions of the parenting plan
- B. The mediator should be delicate to the impact of culture and religion on parenting philosophy and other decisions.
- C. The mediator shall inform any court-appointed representative for the children of the mediation.
- D. Except in extraordinary circumstances, the children should not participate in the mediation process without the consent of both parents and the children's court-appointed representative.
- E. Prior to including the children in the mediation process, the mediator should consult with the parents and the children's court-appointed representative about whether the children should participate in the mediation process and the form of that participation.

Standard IX

A family mediator shall recognize a family situation involving child abuse or neglect and take appropriate steps to shape the mediation process accordingly.

- A. As used in these Standards, child abuse or neglect is defined by applicable state law.

- B. A mediator shall not undertake a mediation in which the family situation has been assessed to involve child abuse or neglect without appropriate and adequate training.
- C. If the mediator has reasonable grounds to believe that a child of the parties is abused or neglected within the meaning of the jurisdiction's child abuse and neglect laws, the mediator shall comply with applicable child protection laws.
 - 1. The mediator should encourage the parties to explore appropriate services for the family.
 - 2. The mediator should consider the appropriateness of suspending or terminating the mediation process in light of the allegations.

Standard X

A family mediator shall recognize a family situation involving domestic abuse and take appropriate steps to shape the mediation process accordingly..

- A. As used in these Standards, domestic abuse includes domestic violence as defined by applicable state law and issues of control and pressure.
- B. A mediator shall not undertake a mediation in which the family situation has been assessed to involve domestic abuse without appropriate and adequate training.
- C. Some cases are not suitable for mediation because of safety, control or intimidation issues
- D. If domestic abuse appears to be present the mediator shall consider taking measures to insure the safety of parties and the mediator including, among others:
 - 1. establishing appropriate security arrangements;
 - 2. holding separate sessions with the parties even without the agreement of all parties;
 - 3. allowing a friend, representative, advocate, counsel or attorney to attend the mediation sessions;

4. encouraging the parties to be represented by an attorney, counsel or an advocate throughout the mediation process;
5. mentioning the parties to appropriate community resources;
6. Suspending or terminating the mediation sessions, with appropriate steps to protect the safety of the parties.

E. The mediator should facilitate the parties' formulation of parenting plans that protect the physical safety and psychological well-being of themselves and their children.

Standard XI

A family mediator shall suspend or terminate the mediation process when the mediator reasonably believes that a participant is unable to effectively participate or for other compelling reasons.

A. Circumstances under which a mediator should consider suspending or terminating the mediation, may include, among others:

1. The safety of a participant or well-being of a child is threatened;
2. A parties has or is threatening to abduct a child;
3. A parties is unable to participate due to the influence of drugs, alcohol, or physical or mental condition;
4. The parties are about to enter into an agreement that the mediator reasonably believes to be unconscionable;
5. A parties is using the mediation to further illegal conduct;
6. A parties is using the mediation process to gain an unfair advantage;
7. If the mediator believes the mediator's impartiality has been compromised in accordance with *standard iv*.

B. If the mediator does suspend or terminate the mediation, the mediator should take all reasonable steps to minimize prejudice or inconvenience to the parties which may result.

Standard XII

A family mediator shall be truthful in the advertisement and solicitation for mediation.

- A. Mediators should refrain from promises and guarantees of results. A mediator should not advertise statistical settlement data or settlement rates.
- B. Mediators should accurately represent their qualifications. In an advertisement or other communication, a mediator may make reference to meeting state, national, or private organizational qualifications only if the entity referred to has a procedure for qualifying mediators and the mediator has been duly granted the requisite status.

Standard XIII








A family mediator shall acquire and maintain professional competence in mediation.

- A. Mediators should continuously improve their professional skills and abilities by, among other activities, participating in relevant continuing education programs and should regularly engage in self-assessment.
- B. Mediators should participate in programs of peer consultation and should help train and mentor the work of less experienced mediators.
- C. Mediators should continuously strive to understand the impact of culture and diversity on the mediator's practice.

Conclusion

Hence, through the above paper we can conclude that the mediation is the best alternative dispute resolution when it comes to resolving the family disputes. Court proceedings are very time consuming process and the family matters dealt in the open court can hurt the sentiments of the parties to the dispute. Mediation helps to resolve the issue by keeping in mind the interest of both the parties and sentiments of the parties are given the utmost priority. Mediation is an effective process in terms of money as well as time. It basically helps in negotiating with the viewpoints of both the parties unlike the court proceedings where one party wins and other loses. It is typically a win-win situation for both the parties as they can make offers keeping in mind their needs and wants which is suitable for their own betterment.

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