



Recommendation 1639 (2003)¹

Family mediation and equality of sexes

Parliamentary Assembly

1. Family mediation is a life-building and life-management process between family members in the presence of an independent and impartial third party known as the mediator. It is most often used in the context of a couple's separation, but also to settle questions relating to education, child custody and access, the determination of an appropriate contribution to the upbringing and maintenance of children, the division of an estate, inheritance, etc. The mediator's task is to support the mediated partners in their progress towards a previously agreed goal. The aim of mediation is to seek a conclusion that is acceptable for the mediated partners, without discussion of blame or responsibility. The agreement reached is intended to lead to appeasement and long-term improvement of the mediated partners' relations.

2. The use of mediation is becoming more widespread across Council of Europe member and Observer states, especially in western Europe, Canada and the United States of America. The Assembly welcomes Recommendation No. R (98) 1 of the Committee of Ministers on family mediation. This recommendation promotes the use of family mediation as an appropriate means of resolving family disputes and sets out certain principles to be respected concerning the scope, organisation and process of mediation, as well as the status of mediated agreements, the relationship between mediation and proceedings before the judicial or other competent authority, and the promotion of and access to mediation.

3. In general, family mediation is valued as an alternative method of resolving family disputes as it has the advantage of promoting methods of friendly settlement and reducing the economic and social costs of separation and divorce for families, the state and society. For family mediation to be successful, however, the main principles of mediation must be respected, in particular the independence and impartiality of the mediator - who must be specially trained - and the confidentiality of the process.

4. Family mediation is not a universal remedy that will solve all family problems while avoiding congestion of the courts with jurisdiction over family issues (divorce, child custody and access, maintenance, division of estates, inheritance, etc.). Researchers and practitioners in the mediation field analyse the practice of mediation with reference to its underlying principles, with the emphasis on theoretical and practical consistency. Their concern is to ensure that court-ordered mediation does not become a less expensive, fast-track option reserved for those who cannot afford traditional judicial procedures. Court-ordered mediation must not become "poor man's justice". They also mention the difficulties faced by mediators in identifying or redressing power imbalances between the parties, especially when domestic violence or another type of spousal abuse is involved.

5. Gender equality must be guaranteed in family mediation as in family justice systems in general. Individual rights must not be sacrificed to cost-effectiveness or the trend towards alternative conflict resolution methods. Neither sex should be disadvantaged in family mediation because of a power imbalance, whether this is a result of one party having suffered abuse, being unable to fully present his or her point of view (e.g. because of drug/alcohol dependency or mental health issues), or being emotionally or financially at a disadvantage (e.g. because one party has looked after the children and not worked outside the home). When patently unfair agreements are reached during family mediation as a result of such a power imbalance, they must not be endorsed by the mediator or approved by a judge.

1. (see [Doc. 9983](#), report of the Committee on Equal Opportunities for Women and Men, rapporteur: Ms Err; and [Doc. 10002](#), opinion of the Social, Health and Family Affairs Committee, rapporteur: Ms Milotinoва). Text adopted by the Standing Committee, acting on behalf of the Assembly, on 25 November 2003



6. It is essential to ensure that mediation does not lead to an agreement that satisfies the wishes of one party if this party dominates the other in any way whatsoever. When the bone of contention is the child, he or she should also be heard in the mediation process because he or she is recognised as having rights. Children should be allowed their say if a solution is to be found that is genuinely in their best interests.

7. The primary aim of mediation is not to reduce congestion of the courts but to repair a breakdown in communication between the parties, with the help of a professional trained in mediation. Judicial proceedings cannot be appropriately replaced by the mediation process unless the constituent elements of mediation are present, namely:

7.1. as freedom of choice for the parties is the key to all mediation, mandatory referral to mediation must be prohibited;

7.2. the independence and impartiality of the mediator must be guaranteed from both the institutional and the professional standpoint;

7.3. the confidentiality of the process must be guaranteed, even in court-ordered mediation, as regards both the judge and the mediated parties;

7.4. the obligation to speedily confirm mediation agreements would guarantee that they are lawful and respect the individual rights of each person covered by them;

7.5. the balance of power between the mediated parties must be guaranteed. This is the responsibility of the mediator, who must be specially educated and trained for this purpose in order to be able to establish that this essential requirement is met;

7.6. as a mediator's competence depends on his or her qualifications, particular attention must be paid to the mediator's training and the official authorisation and supervision of his or her work.

8. The Parliamentary Assembly thus calls on Council of Europe member and Observer states to implement the principles for the promotion and use of family mediation as laid out in Recommendation No. R (98) 1 of the Committee of Ministers and to introduce or strengthen the following measures with a view to ensuring:

8.1. The Parliamentary Assembly thus calls on Council of Europe member and Observer states to implement the principles for the promotion and use of family mediation as laid out in Recommendation No. R (98) 1 of the Committee of Ministers and to introduce or strengthen the following measures with a view to ensuring:

8.2. the existence of equal power between the mediated parties both in theory and in practice;

8.3. the development of standardised screening tools based on a thorough knowledge of power relationships or violence in couples or families in order to correctly identify cases lending themselves to family mediation;

8.4. the inclusion of family mediation in the legal aid system;

8.5. review of the lawfulness and fairness of mediation agreements through their approval by the competent courts;

8.6. the confirmation of mediation agreements by the competent courts;

8.7. the existence of a formal complaints system within every mediation service.

9. In view of the experience accumulated by member states during the last five years, the Assembly recommends that the Committee of Ministers:

9.1. consider revising its guidelines set out in Recommendation No. R (98) 1 in order to reflect the aforementioned concerns and solutions as well as those arising from the need to hear children's views and guarantee their rights;

9.2. enlist the help of experts and experienced practitioners for this purpose.