

Mediation: Trick or Treat?

With the Family Courts buckling under the weight of the pending cases in both public and private family law, the use of mediation has become one way of relieving the system's congestion, but can it relieve the disputing family's?

Mediation is a form of dispute resolution, which means that in family matters a mediator, or trained communicator, is used to help the family come to an agreement on issues they don't see eye to eye on. In practical terms, the end result is that usually the spouses will go to a mediation centre where they will sit with the mediator who will try to help them reach a compromise.

It is always better for divorcing couples and families with children, to try to resolve their problems without the use of the courts or mediators, but if you find yourself in the Family Courts and are then given the option of continuing on in the courts or using mediation, it is often best to mediate.

Mediation, if successful, will save money and time and will avoid the parties having to 'fight' each other in court. Perhaps the most important aspect about mediation, if conducted well, is that it can pave the way for prolonged peaceful communication between the family members more readily than court culture will allow.

There are times however, when mediation is limited in its capacity to be progressive. Mediation can sometimes be used in court as a political pawn; a way of making one party look co-operative and pro-active, in order to gain favour with the judge. Lawyers may advise their clients to suggest mediation for that reason, even if the other party has already expressed the view that mediation would not be helpful. The inference made by the courts then, is that a party that does not agree to mediation is being un-cooperative and are more likely to be viewed by the residing judge as the party that is frustrating resolution and ultimately as the party 'in the wrong', with consequences to follow (like reduced contact with children).

In the broad and diverse nature of human behaviour, this is a rather narrow perception of the refusal to mediate but again, it is indicative of a system that cannot and for the moment, will not wrap its head around the reality of many divorce scenarios. This forceful and judgemental approach to handling families goes against everything mediation stands for and is directly juxtaposed with the spirit of conciliation. The adversarial nature of court and the cooperative nature of mediation are uncomfortable bed-fellows; in the family context, having the two systems side by side tends to make these approaches less efficient.

Perhaps then the least efficient way for mediation to manifest itself is when the parties are already some way into the divorce process or other family-related process and the lawyers have already begun to establish the opposing party as an adversary. At this point, going to mediation can be a waste of time as your lawyers will advise you not to divulge certain things to 'the other side' like any evidence you may have or the action plan to put forward your 'case'. Being open in mediation is paramount, so without full and frank disclosure, mediation is very limited in its ability to bring about resolution. The twist in this tale is that if mediation is suggested in the middle of the court process and once again if one party does not see the use in going, that party may well be punished for their point of view regardless of whether or not that party has understood the uselessness of mediation at this point.

The difficulties in the Family Courts can be boiled down in their entirety to one thing: conflicts of interest. There are conflicting interests for lawyers, who need to represent their client's wishes but who also need to try to steer a neutral path for the parties, the judges are conflicted by their own perceptions of the family unit and the parties themselves are often torn between their hurt and the truth. Mediators and others also feature in this terrible catch 22 the court perpetuates: their desire to get a resolution. But at what cost? If you have a good mediator, they will not force you to agree to anything and they will be able to get a feel for your scenario. The more agreements they help foster, the more successful they are considered and sometimes, these mediators will try to get parties to agree and make that agreement binding, which in turn they view as a success. This may be so in professional terms for the negotiator, but if the solution doesn't suit you, you don't have to agree to anything. Mediation is only a good tool if the mediator puts the parties' interests before their own.

Nevertheless, there are ways to override the court process's primitive assumption-making techniques: one way to do this is to collaborate with your spouse or the relevant family member. You may want to hurt each other at this time in your lives, but where the court's approach may harm you and your family in ways that make Freddy Krueger look tame, it is the lesser of two evils and is more likely to achieve the end result: a compromise that benefits the family as a whole.

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