

Disputed Child Custody: Strategies and Issues in Mediation

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Disputed child custody is a significant life stressor for both adults and children. Recent efforts have been made to develop a model for family mediation and subsequent clinical strategies that can attempt to address the stressors involved in divorce and perhaps resolve, through mediation, the posttrauma stress experienced by both spouses and children. Reviewed is the literature on the impact of separation and divorce on families and the use of family mediation to resolve disputes. It further addresses psychologic factors involved in the mediation process and the possible effects of mediation on divorce. An established family mediation model for treatment is presented in detail, as are clinical issues often addressed in the family mediation process. Issues and import for clinical application and research are offered.

Contested child custody is a critically important issue. Numerous state laws and statutes place upon attorneys, the court, and mental health professionals the clear responsibility of fashioning a future for the child of divorcing parents. In most cases, it addresses what will be in the best interest of the child and, to meet this task, the legislature often grants both investigatory powers and a broad scope of inquiry to the court determining the best interests of the child. The separation and divorce process dramatically alters one's lifestyle. Its impact

is realized in a variety of ways, including a variation in parental responsibility, an assumption of new roles, and a change in socioeconomic status.^{1,2} Both men and women who have experienced conventional role responsibilities may find considerable difficulty in adjusting to the process of separation.

The children of divorce find themselves in a unique and devastating position, necessitating considerable understanding and support from both the health service delivery system and the legal profession. The purpose of this article is to address: (1) through a literature review, the impact of separation and divorce on families, (2) a concept of family mediation in the separation and divorce process, and (3) the psychologic variables that are important to consider in the course of family mediation. In addition, a unique model for treating the victims of separation and divorce has

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been designed and implemented at the University of Kentucky, Department of Psychiatry, Child Psychiatry Outpatient Clinic. The model is outlined and defined, as are the issues and implications of the separation and divorce process through family mediation.

Divorce as a Stressful Life Event

The impact of separation and divorce on parents and children is the focus of much recent concern.³⁻⁵ The total number of children under 18 involved in divorce has tripled in the last three decades. In general, children who live in families in which there is a high conflict between parents compared to those in low-conflict families show poor adjustment, difficulty in peer relationships, greater aggressiveness and dependency, higher levels of stress, and disruptions in academic and intellectual functioning.^{6,7} The pattern holds true for both divorced and nondivorced families. The ability of the child to maintain warm, close relationships with both parents also appears to play an important role in predicting children's adjustment. Hess and Camara's study⁷ of 9- to 11-year-old children compared family type and family process (parent conflict, warmth, and closeness of parent-child relationship) on measures of child's school performance, social relationship with peers, aggression, and level of stress. The children's relationship with each parent proved to be a stronger predictor of all child outcomes than was interparental conflict. In addition, Hetherington's 1979 study⁶ concluded that parental harmony was an important factor in

children's adjustments. The effect of the divorce was less extreme in adults when adults "supported each other in child-rearing tactics and disciplinary tactics." In addition, Hetherington found that during the first year after divorce, parents made maturity demands, communicated less well, and tended to be less affectionate with their children than were parents of nuclear households. Of 400 children referred for outpatient evaluations, Kalter⁸ reported that children of divorced parents appeared at nearly twice the rate of their occurrence in the general population. Children of divorce, single-parent homes, and stepparent homes exhibited more overt aggression and sexual behavior problems than did children from intact families. Particularly at risk were boys aged 7 to 11 and girls 12 years and older. In a widely cited collection of studies, Wallerstein and Kelly⁹⁻¹¹ interviewed 60 families with 131 children in a northern California suburb. The youngest preschool children, aged 2 to 3½, reacted with regression, cognitive bewilderment, and neediness. In the older preschool children, aged 3½ to 4½, fantasy was more prominent. In early latency-aged children, aged 6 to 8, sadness was a pervasive response. In children aged 9 through 11, anger and aggressive behavior were most common. Nearly one half of the 30 older latency-aged children also suffered noticeable deterioration in school performance and peer relationships. In addition, in Hetherington's two-year follow-up study in behavioral observation of parent-child interaction, divorced parents made fewer maturity demands on their

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children, communicated less well with them, were less affectionate and showed marked inconsistency in discipline. Poor parenting seemed most marked one year after the divorce.

Strategies in Disputed Custody

Family mediation in its present form is a relatively new and innovative technique aimed at several variables affecting marital discord. The mediation process has been frequently endorsed since Congress signed into law the Dispute Resolution Act (PL-96-190) in February 1980. The mediation process essentially aims to provide assistance to those individuals involved in the dispute and to facilitate constructive solutions to controversial issues. Programs aimed at mediation have found a variety of endorsements.^{12, 13} It is the purpose and intent of the mediator to facilitate communication and conflict resolution, to define and establish norms for rational interaction, to encourage exploration of all alternatives, and to create a workable compromise. Deutsch¹⁴ defines this process in a series of stages, which include: (1) communication, (2) development of norms for rational interaction, (3) generation of alternatives, (4) determination of when workable and mutually acceptable agreements have been determined and reached. More recently, Herman *et al.*¹⁵ have addressed the issue of the mediation progress and have identified three key variables that lead to successful conflict resolution and mediation. The three variables are: (1) commitment, (2) communication, and (3) power. It is the mediator who serves as

the facilitator to encourage each of these variables and that these variables reach their maximum benefit in the course of mediation. Herman further addressed the fact that the success of the negotiation process can only occur when both parties experience equal control and power in the negotiation process.

Others, including Kochen and Jick,¹⁶ have been instrumental in developing a model of mediation process. The key to the success of the model involves four independent variables: (1) the nature of the conflict, (2) the situational stress factors involved, (3) the strategies to be used by the mediator, and (4) the personality characteristics of the mediator. Efforts to assess the effectiveness of the mediation process yielded results suggesting that the experience of the mediator is positively correlated with the mediator's effectiveness level. Furthermore, the severity of the impasse was found to be inversely correlated with the success of the mediation efforts. Kressel *et al.*¹⁷ found further support for this, noting that most conflicted couples appeared to wish to use the litigation process as a means of punishing the spouse; furthermore, they also found that the greater the conflict, the less likely the success of the mediation resolution. Finally, they suggest that mediation offers several advantages over court-arbitrated resolution of divorce, including the fact that it provides an improved opportunity for the needs of both parties to be fully heard, it increases the spouse's feelings of competence by circumventing forced dependence on a lawyer or judge to arrive at a just resolution, and it is less

costly and usually facilitated in a shorter period of time than are repeated sessions through the court system. Ebel¹⁸ confirmed that mediated settlements tend to be of a more stable nature because they have been reached through a cooperative mediated process rather than by a unilateral dictum of the courts.

Research conducted by the Toronto-based Conciliation Counseling Service¹³ suggests that the contribution of the mediation process to postdivorce compliance demonstrates considerable improvement over unilaterally imposed court decisions. Bahr cites a two-year followup of individuals receiving divorces wherein only 10 percent of the mediated couples returned to the court with problems related to custody or visitation compared to 26 percent of the traditional custody study couples. Bahr further notes that couples who were able to resolve their conflicts through the mediation process were three times as likely to report improved postdivorce relations between the divorced spouses than were other couples who had not received the mediation process.

The three-year Mediation Evaluation Project¹² supported by the Colorado Bar Association and the Piton Foundation suggested that 60 percent of the mediation couples were able to reach agreement with respect to conflict disputes. Couples who were unable to reach agreement through the mediation process were, however, supportive to the experience and reported improved cooperation and communication as a result of the mediation process, even though it had not resolved the conflict. Sixty-one

percent of the couples were unable to resolve disputes during mediation but did succeed in negotiating compromises before their court-appointed hearings and thus reduced the need for a custody study. Finally, 70 percent of the mediated couples agreed to joint custody, compared to only 14 percent of the control group studied.

Psychologic Factors in Divorce

The psychologic impact of marital dissolution and the process of divorce had been addressed in a number of studies. Wallerstein and Kelly¹⁹ view marital dysfunction as a consequence of divorce whereas Briscoe and associates²⁰ view it more as a causal factor. It is clear that in addressing the ambiguity, the level of stress and the context within which the stressful life events occur become an important ingredient in considering the impact of mediation on the divorce process. The Diagnostic and Statistical Manual (DSM-III; American Psychiatric Association, 1980)²¹ views the process of divorce as a "single" life event. Within this context, however, the divorce process constitutes a major psychosocial transition and can be associated with a variety of stressful life events and psychologic stressors.^{22,23} Research assessing the complexity of such events as marital dissolution and divorce must clearly focus on a multidimensionality of stressors,^{24,25} the way in which the stressful life events are appraised,^{26,27} and, finally, the relative impact of both positive and negative life changes on each of the family members within the

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complexity of the family affected by the dissolution and divorce.²⁸

Marital dissolution has been associated with a variety of psychologic cues and symptoms that relate directly to the psychologic dysfunction. When contrasted with other marital classifications, Bachrach²⁹ and Briscoe *et al.*²⁰ have found that separated and divorced individuals manifest a higher rate of admission into both public and private psychiatric facilities. Jacobson and Portuges³⁰ and Herman¹⁵ suggest that separated and divorced individuals also show a higher rate of suicidal ideation and intent as well as homicidal tendencies, and Nada³¹ and Wechsler *et al.*³² suggest significantly higher rates of alcoholism and substance abuse among individuals experiencing dissolution and divorce than among the normal population. All of these issues focus on the psychologic impact and potential dysfunction experienced by family members in the process of marital dissolution and divorce.

Several researchers have addressed the variety of psychologic problems experienced in marital separation.³³ The literature is consistently unclear as to the etiology and process variables that are addressed in the process of family dissolution, marital separation, and the mediation process. Efforts to assess the major psychosocial transition associated with this process have been carefully explored by Chiriboa and others.^{22, 25, 26} The anxiety and frustration of the divorce process are frequently exacerbated by the legal process. Efforts to develop a mediation approach for divorcing par-

ents have provided a model that may be of some assistance in addressing these issues.

Both clinical and legal issues must be considered when one uses the mediation process in the resolution of disputed divorce proceedings. Kressel *et al.*,¹⁷ Bahr,¹³ and Pearson and Thoennes³⁴ report that the following trends seem apparent from current research: (1) successfully mediated couples report a lower rate of problems and greater compliance with their litigated agreements than do control group couples, (2) successfully mediated couples report a higher level of satisfaction with the mediated agreements and perceive them as more fair than do couples in the control group, (3) successfully mediated couples report better relationships with their ex-spouse than do nonmediated couples, and (4) successfully mediated couples are able to realize a lower schedule of fees and expenses as a result of the mediation process than are couples in the control group.

Mediation as a Model for Treatment

Although several models may exist, the Child Psychiatry Outpatient Clinic at the University of Kentucky Medical Center has received an increasing number of referrals from circuit courts in Central Kentucky requesting mediation and evaluation services. Due to the increasing number of referrals in recent years, the Family Mediation and Evaluation Clinic, a subspecialty clinic, was established in the Child Psychiatry Outpatient Clinic to evaluate these families.

All child litigation cases referred by the circuit courts are seen in this clinic, which mediates/evaluates approximately 70 cases per year. Roughly 90 percent of these cases are seen by the author, with the remaining 10 percent seen by psychiatric residents, child psychiatry fellows, or psychology interns after a training program that involves observation and joint participation. The mediator/evaluation process requires an average of eight to ten sessions with family members, including children, parents, and other significant relatives, with a range of three to 15 sessions. There is a \$600 fee at the time of the first session, usually divided equally between the parents. When the total charge is less than \$600, the parents are reimbursed. When the mediation/evaluation, including court report and a deposition or courtroom testimony, exceeds \$600, the couple is billed. The goals and procedures of this clinic include the establishment of a clinical procedure useful in the mediation and evaluation of child litigation cases (Table 1). As advocates for the child in child litigation cases, the initial strategy is to attempt to see if reconciliation of the family is possible. Maintaining the family structure, if possible, is an ideal solution for the children involved. The parents are initially seen jointly to cut down on distortion and to clarify issues, and when reconciliation is not possible, mediation is used to help parents develop a custody and visitation plan that is in the best psychological interest of their children. Parents are seen jointly during this phase. The goals in mediation are: (1)

reducing conflict between the parents; (2) developing a plan by which the children have frequent contact with each parent; (3) maintaining the psychological attachment between the child and significant adults including parents, siblings, and grandparents; and (4) maintaining continuity of place, routine, and peer relationships.

In situations in which parents remain polarized and mediation breaks down, we shift from mediation to evaluation of the family, which includes a series of joint and individual sessions with parents and children. The goal is to develop an opinion regarding the custodial and visitation plan that will maintain the relationships the child has with each parent, maintain continuity of school experience, and maintain peer relationships. In addition, it is determined where the child feels most comfortable and what plan would best meet their current developmental stage. This is done through indirect evaluation strategies such as the kinetic family drawing, other case-specific drawings, and various structured and unstructured play therapy techniques.

Effectiveness of Mediation Model

The results of a one-year study at the University of Kentucky,³⁵ using the family mediation model with 70 cases referred for court-ordered mediation, resulted in 47 percent of those cases being successfully mediated. Couples who were unable to reach agreement were, however, generally supportive of the mediation experience. In addition, communication skills and social skills train-

Table 1
Stepwise Mediation Process for Psychiatric Family Mediation and Evaluation Clinic

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- Step 1 Only court-ordered cases are accepted where we have access to *all* individuals and necessary records.
- Step 2 Parents are seen conjointly.
- To reduce distortion.
 - To clarify issues.
 - To determine if reconciliation or mediation is possible.
- Step 3 If reconciliation is not possible, there is a shift in focus to mediation, an attempt to facilitate communication between the parents to consider an agreement that feels comfortable to them and is in the psychologic best interest of the children. During this phase the parents are seen jointly. Emphasis is placed on:
- Resolving intense feelings that have interfered with constructive communication.
 - Improving communication.
 - Generating and considering alternatives that focus on the psychologic needs of the children, including:
 - Children need sufficient contact with each parent.
 - Conflict between parents must be reduced or children may become symptomatic.
 - Psychological attachment with siblings, parents, grandparents and significant others must be maintained.
 - Continuity of relationships (peers, teachers) and place (neighborhood, school, church) must be maintained. If mediation is successful, a report is sent to the judge, with copies to each attorney.
- Step 4 When mediation is not successful, a shift toward evaluation occurs. The children are seen individually and jointly. A variety of play therapy techniques including drawings, doll play, mutual story-telling, and fables are utilized to determine:
- Where the child feels most comfortable
 - Where the strongest psychologic attachment lies
 - Which parent has provided the majority of care, nurturance, and emotional support of the children.
 - The adequacy of the parents. This includes quantity of time with the children as well as quality of time. We also ascertain whether either parent has been neglectful or abusive and how parents deal with stress.
- Step 5 In addition to seeing the children individually, the parents are seen individually for a series of sessions. Allegations made by each parent are explored. During this part of the evaluation the following criteria are used to develop an opinion for the court:
- Psychologic attachment—It is important to ascertain the child's strongest psychologic bonds and maintenance of those bonds is extremely important.
 - Continuity—It is important to maintain continuity of significant relationships as well as place.
 - The child's sense of time, referring to the amount of time that it takes a child to break a psychologic attachment.
 - The adequacy of each parent.
 - The child's developmental stage—Some parents are better able to deal with one specific developmental stage than another. For example, a rigid parent may be less successful in handling adolescents than one who is more low-keyed and flexible.
 - How a parent handles stress—Some parents will handle stress, particularly the stress around separation, an adversarial proceeding, and subsequent divorce, in destructive ways.
- Step 6 A rough draft of the court report is made and shared with the parents jointly. This cuts down on inaccuracies in the report and also gives the parents an opportunity to discuss the results of the evaluation. This is also a final opportunity for the parents to attempt to agree on a custodial and visitation plan for their children. During this joint interview the advantages of agreeing on an outcome and cutting down on the conflict and adversarial nature of their relationship are stressed. We emphasize the advantages to the children in the sense that the less external conflict the children experience, the less internal conflict they will experience, which reduces the chance of the children's experiencing symptoms. These symptoms may vary depending on the child's developmental stage and may take the form of physical, behavioral, or emotional symptoms.

Table 1—continued

Step 7 The report of the mediation effort and recommendations are submitted to the judge, with copies to each attorney. A suggested form for this report includes:

- a. Paragraph 1: "In reponse to the court's request for an evaluation in this contested custody case. . . ." In this initial paragraph state who was seen, when they were seen, the one or two specific questions that you attempt to answer in the course of the evaluation.
- b. Paragraph 2: "The history reveals. . . ." In this paragraph we spell out important dates and other information that is pertinent in the history.
- c. Paragraph 3: "The current situation reveals. . . ." Spell out important aspects of the current situation.
- d. Paragraph 4: "The following themes include specific criteria and other issues that are relevant in helping develop the conclusions regarding the best custodial arrangement and visitation plan.
- e. Paragraph 5: "Based on this evaluation, I make the following recommendations for the court's consideration." Address the one or two questions outlined in paragraph one and state short, specific recommendations free of psychologic jargon and easy for the court to understand.

ing were found to be beneficial to couples requiring court-ordered mediation. In 53 percent of the cases, a recommendation was made to the court that involved a plan for custody and visitation. The psychologic best interests of the children are the primary focus.

Several clinical and legal issues emerge in assessing the family mediation process, including one's acceptance of the divorce process, the relationships between ex-spouses, the impact of divorce on the social support system of all parties involved, both adults and children, and the perception of failure that exists among both adults and children when a family is dissolved through divorce.

Clinical Legal Issues and Import of Research

Numerous issues emerge that need to be addressed in both the clinical and research arenas. Such issues address the complexity of personalities, environmental and legal concerns that confront the divorcing couple, the children involved, and the systems of legal and mental health services.

Factors that the court must consider are often based on case law and should demonstrate the variety of relevant factors in meeting the determination of the case. Certainly evidence and testimony should be structured around the information obtained with respect to such factors as the need to preserve the child's psychologic attachments, the need to maintain continuity of place and relationships, the child's sense of time, the place the child feels most comfortable, the adequacy of the parents, the child's developmental stage, and the way in which the parents have handled stress. Every effort must be made to maintain key relationships and to reduce the conflict between the parents.

The individual's acceptance of the divorce process is another key issue. Kreschel and Deutsch³⁶ and Irving³⁷ have addressed one of the most crucial issues in the separation process, i.e., the experience of the person who is left alone in this process. These clinicians and researchers encourage all involved to understand and accept the divorce process as a very painful experience. At the same

time, they encourage acceptance as critically important in perceiving a balanced view of the marriage and to recognize that both have contributed to the dissolution process. Most important is the recognition that each partner must endure a process of learning about the reasons for one's choice of mate so that similar mistakes can be avoided in future relationships. Individuals who feel abandoned in the process must assume greater autonomous functioning and more assertive qualities about their own rights and the utilization of both the health care delivery system and the legal process as instruments of society in the dissolution process.

The stress and tension that is experienced in ex-spouse relationships has become the focus of several clinician-researchers. Weiss³⁸ has demonstrated that, even after the erosion of love and relationship, there is a continuation of attachment in some relationships. It is this attachment that works against the development of autonomy and independence necessary to function as a single adult or to seek new relationships beyond the relationship found in the initial marriage. Hynes³⁹ has confirmed empirically that the higher the lingering attachment to the former spouse, the higher the stress associated with sudden divorce. Within the framework of family mediation, it becomes extremely important that the ex-spouse refrain from unnecessary contact with their former spouse, but when contact is necessary every attempt should be made to work toward rational task-oriented and goal-directed interactions.

Individuals involved in the divorcing

process, both adults and children, tend to experience a loss of support from some aspects of their friendship network; this results in certain feelings of social isolation. Hetherington *et al.*⁶ indicate in their research that it is for a period of about two months after divorce that married friends remain supportive and spend considerable time with divorcing friends. To children of divorce, this becomes an even more critical problem because friendships are less well developed and networks of friendships have not matured. Relatives of divorced individuals are most likely to show some concern for the parties involved, but eventually divorcing individuals will increase their contact with their own relatives but decrease contact with ex-spouse's relations.⁴⁰ For children, it is important that they maintain continuity of peer relationship and school experience, as well as relationships with significant relatives.

Research suggests that more than half of all divorces involve minors and virtually all of these divorces involve parents who are concerned about key issues in family mediation, including family support, custody, and visitation. Hetherington *et al.*⁶ suggest several essential factors must be considered in the adjustment of children to the divorce process. Among these are: the psychological adjustment of the parents to the process of divorce and to the dissolution of the family, the quality of the relationships that exist between the ex-spouses, the level and intensity of the nurturing relationship toward the child from both the custodial and noncustodial parent, the financial resources available and the

integrity of the supporting spouse in the provision of financial support, and the involvement of all minor children in both the perceived and actual process of family dissolution wherein the child has input and understanding in the dissolution process and the new custodial relationship.

The issue of time already spent with the child is crucial. If one party has had temporary custody, he or she is usually given preference by the court. It should be noted, however, that the court frowns on split custody and prefers to keep the sib group intact.

Although earlier decisions have realized that the court has preferred to vest the custody of children of tender years to the mother, more recent case law has realized that equal consideration should be given to each parent, thus requiring that the court consider each parent to be given equal consideration and abrogate the tender years presumption. The court also tends to prefer a custodian with roots in the community rather than one who is transient or who lives in isolation. A sense of responsibility is also important, and the court will not award custody to the parent who shows neglect toward the child or where there is presumption that a custodian of bad character will ultimately adversely affect the child.

The issues of financial sufficiency are considered to be extremely important and the custodian must be able to provide for the child considering both one's own resources and the award of child support. Rarely, however, is a parent denied custody for the lack of money

alone. Consideration is given to several factors and the court usually prefers to have both the male and female role model in the home, although some weight may well be given to the fact that one of the potential custodians is remarried. Another consideration is that of religion, wherein the presence of a religious value is to be considered important but may not be outweighed by other considerations such as finances and role model.

The legal and clinical literature concerning divorce and custody issues continues to emphasize the best interest of the child as the determining standard for adjudication of disputes. Hauser¹ assessed patterns common to families in which custody is contested and noted the more likely presence of disturbances in adult and child adjustment, minimal contact between former spouses, and the absence of parental accord. Also realized were higher rates of relitigation despite joint custody arrangements and the fact that this generally reflects the instability in parent and child relationships and pattern of access. Those individuals who experience the greatest difficulties in resolving or mediating the custodial issue are generally individuals found to have failed in their marital relationships, failed by a legal system whose procedures are inadequate to limiting the burgeoning struggles of spousal conflict and to alter ability in parent-child relations.

There is clear evidence that the separation and subsequent divorce process is stressful for both parents and children.⁴¹ In addition, when parents and children are caught in the adversarial proceeding

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involving battling for custody, visitation and other crucial issues, the level of stress is considerably higher and the potential for adjustment more difficult.⁴² This review of the literature has addressed the impact of separation and divorce of both adults and children and the potential for an innovative model of family mediation. Several issues, primarily clinical in nature, but with legal implications as well, have been enumerated to sensitize those involved in the family mediation process to the concerns necessary to effectively facilitate and resolve the adversarial nature often encountered in disputed cases of custody.

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