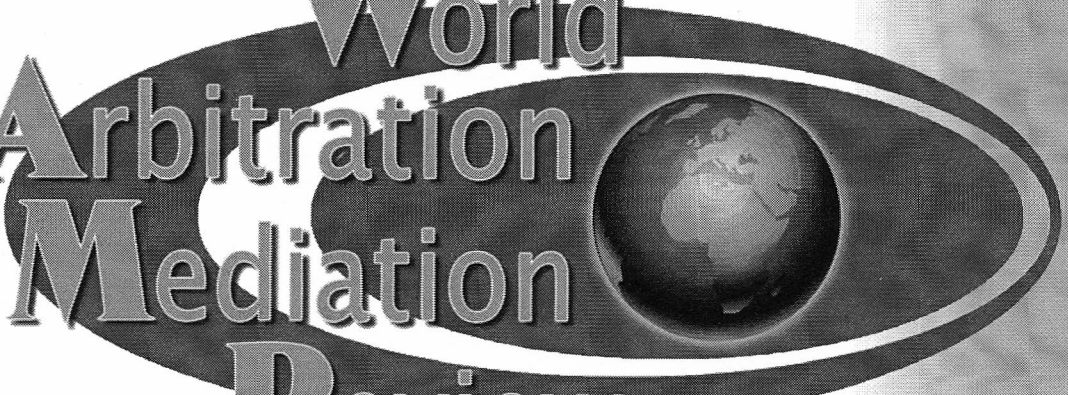
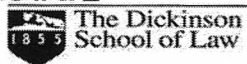


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# A CASE FOR MEDIATION: FAMILY MEDIATION IN INTERNATIONAL CHILD CUSTODY CONFLICTS

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*A Cooperative Project Between The Federal Mediation Association (Bundesverband Mediation, BM) And The Federal Association For Family Mediation (Bundesarbeitsgemeinschaft Für Familienmediation, BAFM).*

## I. INTRODUCTION

Since 2002, the BAFM has been in charge of a network of mediators who help settle international conflicts involving parents and children (in connection with proceedings under the Hague Convention on the Civil Aspects of International Child Abduction [HCA] and with regard to visitation between parents of dual nationality and their children). Apart from professional mediation training, these mediators draw on international experience, including a command of the relevant languages. Since the beginning of 2007, this project has been carried out in cooperation with the Federal Mediation Association (*Bundesverband Mediation, BM*).

These cases are always highly escalated. In addition to a disrupted relationship and the usual disappointment, fear of loss, and financial worries, there are basic decisions to be made concerning the place of residence as well as plans for the professional and personal future, which have far-reaching consequences for the contact between parents and children. Parents who abduct their own children — in Germany, 70% of abductions are carried out by women — are driven by despair. This frequently results in situations which both parents consider almost hopeless. The complicated but necessary legal agreement causes expenses that cannot be calculated in advance and which, in turn, result in fear. The longer the contact between the child and the absent parent is interrupted, the more difficult it becomes to restore it in an impartial way. The younger the child, the more likely it becomes for him or her to lose the language of the absent parent or to fail to learn it in the first place — a fact which makes direct communication more difficult. In addition, it becomes more difficult to practice joint parenthood, especially in view of potentially long distances

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between the given countries — another cost factor, especially where small children are involved who cannot travel on their own. The parties come to feel they have no control over their own destiny. The abducting parent fears that he or she may not receive fair legal treatment in the country of abduction, especially because he or she is often not a citizen of that country. First of all, an interim solution is sought (*e.g.*, repatriation) until a final decision about child custody and visitation is made. This decision can also be negotiated in mediation proceedings.

Drawing on experience in the framework of different model projects for international mediation involving parents and children (Germany/France, Germany/England, and Germany/USA), the following set-up is recommended in such proceedings:

Two mediators of different sex are required in order to take full advantage of co-mediation and to give both parents the opportunity to feel properly understood by a woman or man during the mediation proceedings. A further prerequisite for the composition of the mediation team is differing professions. Owing to the highly escalated conflict potential of such proceedings, one mediator should have a so-called psycho-social or educational profession, including a high degree of relevant experience. At the same time, such proceedings are closely embedded in a legal framework so that profound legal knowledge is indispensable when external legal counsel is involved. Last but not least, the pair of mediators should reflect both parents' cultural background. If, for instance, an American man takes part in mediation proceedings here in Germany (at the child's place of residence), he must be sure that his national and cultural individuality is understood and appreciated — a condition which applies to the German woman as well. This means that both mediators not only have to be bilingual, but must also have personal insight into the other culture.

Even if all the requirements are met, such cases prove a real challenge to experienced mediators. Enormous pressure is put on both the mediators and the conflicting parties by the existential conflict situation, which is tied to a narrow legal framework, and often to a very different sense of justice. Mediation proceedings take place within a limited period, which all the parties experience as quite intense. In order to illustrate the characteristics of such proceedings, we would like to present a case we dealt with recently. We will focus on the following aspects:

- Preparation and framework for the proceedings
- Dynamics, interventions, and turning points in the process
- Attitude of the mediators
- Conclusion and results of the proceedings

## II. CASE STUDY: PHIL'S PARENTS

In 2003, a German married couple temporarily went to the USA for professional reasons. The marriage went through a crisis and the wife

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(Sabine) fell in love with an American (Daniel) with whom she began to live shortly thereafter. Sabine became pregnant, but the relationship between Daniel and Sabine became more and more strained. At the beginning of 2004, they separated. Sabine moved into a house of her own, and, in April 2004, she gave birth to their son, Phil. The following day, Daniel — in Sabine's presence and with her approval — was registered as the child's father in the birth certificate.

Sabine continued to live with Phil in the USA until September 2004. Meanwhile, Sabine's husband had returned to Germany alone. Daniel had occasional contact with his son. At the end of September 2004, Sabine travelled to Germany with Phil. Since then, she has been living with her husband who is the child's father according to German law.

Daniel objected to Phil's move to Germany with his mother Sabine. Accordingly, he commenced proceedings pursuant to the Hague Convention on the Civil Aspects of International Child Abduction (HCA) in the appropriate courts in Germany. These court proceedings were characterized by bitter, reciprocal accusations. In the first instance, the father's repatriation application was rejected, whereupon, two years after Sabine's departure from the USA, the Higher Regional Court (*Oberlandesgericht*) ordered Phil's repatriation in the second instance. At the same time, the court advised the parents to look for a joint solution in the framework of mediation. Owing to the intense commitment of the working group "Child" at the Federal Ministry of Justice in Berlin, both parents agreed to carry out mediation proceedings. An agreement to mediate was concluded together with Sabine's and Daniel's lawyers. At the same time, a search began for mediators suitable for these proceedings.

### III. PREPARATION AND FRAMEWORK FOR THE PROCEEDINGS

This kind of mediation takes place under enormous time pressure owing to the guidance ordered by the court and requires a great deal of logistic preparation. A suitable room must be found at the child's place of residence and both parents must be available for several days to take part in the mediation. One parent (in this case, Daniel) must arrange a flight. The child must be taken care of. Moreover, in our case, accompanied (or supervised) visitation between father and son was organized in advance. (The first contact without the child's mother was to take place with the help of a caseworker.) The content, as well as the legal and financial conditions, of the mediation were laid out in advance in a binding agreement. Discussions with legal counsel and central authorities were held, and, last but not least, both mediators had to be available for several days at short notice to commit themselves to this mediation as comprehensively as possible. For these proceedings, we had to turn our entire schedules upside down in order to be available on four working days at short notice.

For family reasons and in order to document neutrality, the mediation was carried out at a place in Germany where neither of the parties resided.

The mediators, as well as the conflicting parties, made special journeys, and the child's father came from the USA. The sessions took place on four days *en bloc*, and overall we mediated for twenty-three hours. Apart from individual sessions with the child's mother, we carried out the entire mediation in English.

#### IV. DYNAMICS, INTERVENTIONS, AND TURNING POINTS IN THE PROCESS

The tension between the parents became obvious from the moment of welcome. In the course of phase two, when we discussed fairly simple issues, pressure developed to tackle the more controversial points. On the one hand, it was important for all of us to have a "warming up phase," yet, on the other hand, vital questions about people's lives were at stake. Over the next days, amazing dynamics developed. On the second day, we noticed incidentally that the parents were already spending their lunch break together. By the end, they appeared together for the mediation sessions.

Bearing in mind the highly escalated conflict and the short time available for us, we held individual sessions with the parents again and again, *e.g.*, sessions on collecting topics, on clarifying fears, anxieties, and hopes, on clarifying alternatives if the mediation should fail, *etc.*. In these individual sessions, both mediators always talked to each party concerned. This method provided the conflicting parties with emotional relief and ensured them that we had understood them. At the same time, we used these individual sessions as "reality checks," could talk about confidential matters with the parents, and confront them with the possible consequences of certain types of behavior and decisions. Toward the end of the mediation, Daniel himself even asked for an individual session.

The "Reflecting Team" proved to be another effective intervention which we employed spontaneously or according to our sense of the situation. In this method, the mediators exchange their views on the case in the presence of the parties. We used the "Reflecting Team" in highly escalated moments in order to draw attention to the dynamics of the conflict and to introduce our own perspective from a distance including a touch of humor, if possible. We know from experience that the "Reflecting Team" also expresses thoughts on the part of the conflicting parties which have previously been buried.

After two days of intense mediation and a short agreement on how to arrange the father-child-contacts for the future, we entered into a one-day-break, which had become necessary owing to an unavoidable appointment in Berlin. Later, this coincidence turned out to be extremely helpful; the break somehow eased the tension for all of us and enabled the parents to enter into more relaxed communication with each other, including Daniel and his family and Phil. When we met again on the third day of mediation, the appointed caseworker had already become unnecessary.

The inclusion of the child brought about the significant turning point in the mediation. The 2½-year-old Phil — who did not speak any English —

met his father again for the first time in a year, and Daniel — who did not speak any German — could begin to build a relationship to his son during mediation. The first meeting, which Sabine organized spontaneously on the second day, was quite moving for all of us; from one moment to the next, we became acutely aware what the dispute and the sorrow was all about. Through this gesture, Sabine managed to promote confidence, and thus contributed essentially to diffusing the tension. At the same time, Daniel was touchingly concerned about Phil, and— notwithstanding the lack of a common language — he began to establish contact within an hour. In the course of the following days, he also noticed, through intensive encounters, what it meant to be fully responsible for a small child. This, in turn, enabled him to appreciate Sabine's efforts in regard to rearing Phil. So, in spite of some difficulties, a positive atmosphere between the parents gradually developed.

#### V. THE ATTITUDE OF THE MEDIATORS

As in any mediation, not only our interventions, but also our attitudes eventually proved decisive. In such a case, more information than usual is available ahead of time, and there is at least limited contact with the conflicting parties as well as with the lawyers concerned, in this case with the Ministry of Justice, too.

Beforehand, we could not help forming an impression of the parties and of their situation. At the same time, we remained open and curious enough to abandon our ideas when we met Sabine and Daniel and began working with them. Fortunately, we were dealing with two people who are seriously striving for the well-being of their joint child. In contrast to the controversial court proceedings over Phil's repatriation to the USA, in the course of mediation, we could talk about both parents' fears which were associated with the loss of the child or with the loss of parenthood. There had to be room enough for the parents to release their anger and sorrow before they could open up for an arrangement which focuses on both the child's and the parents' interests.

#### VI. CONCLUSION AND RESULTS OF THE PROCEEDINGS

As the child's repatriation proceedings were merely suspended during mediation, a final agreement had to remain strictly within a legal framework. This meant the inclusion of legal counsel and their advice with regard to formulating the final agreement. On the third day, we formulated the agreement in the parents' presence, noted it down at once in the laptop and subsequently forwarded it to the lawyers for any desired changes and supplements. Then the finishing touches were added, and at the end of the fourth working day, both parents signed the agreement.

The agreement between the parents stated that the repatriation order would be suspended until the following summer and that Phil would stay

with his mother until then. The father was to regularly visit Phil in Germany, and, in May 2007, Phil was to travel with his mother to the USA for one week and visit his father. Moreover, arrangements were made for financial support and for Phil's learning English. It was finally also agreed to continue mediation the following summer in order to work out a final solution.

At the end of the mediation, all parties were relieved and even euphoric. After all, at the beginning of the mediation, it was totally unclear what the outcome would be. To show our appreciation of the parents' achievement, we handed them a small symbolic present.

Afterwards, Sabine and Daniel stated that mediation should have been carried out much earlier. In their opinion, the court proceedings had escalated the situation, and mediation "would be the only realistic way in such a case."

Apart from professional training and practical experience, the prerequisites for this kind of mediation include special knowledge that can be gained through further training. The contents of such courses are:

- Presenting current mediation projects;
- Legal questions concerning international disputes involving parents and children, particularly HCA;
- Teaching cultural prerequisites, appreciating cultural differences;
- Experience with such proceedings and their context;
- Specific conditions of bi-national families and migrant families;
- Presenting concrete questions, and;
- Elaborating special "tools" for mediators in international cases.

These two-day training courses are offered at irregular intervals and organized by BM- and BAFM-trainers. Any mediators who wish to cooperate with this project are cordially invited to attend. Anyone interested is welcome to look at the publications under [www.bafm-mediation.de](http://www.bafm-mediation.de). This link also includes a list of mediators according to their command of languages who are interested in such proceedings and who are willing to carry out mediations in this framework. The cooperation between BM and BAFM, which has become clearly visible in many areas over the past months, is brought to life in this particular project.

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