

Family mediation and the role of child in the context of mediation

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Advanced Course on Mediation & Children and Armed Conflict

Outline

1. Family mediation and emerging practice of child inclusive mediation
2. Right of the child to be heard – legal basis and application
3. Rights of child victims
4. Role of children in mediation
5. Some tips from international family mediation

Family mediation and emerging practice of child inclusive mediation

❖ Reasons for family mediation

voluntary choice of out-court resolution

– predictable, less expensive, faster, ownership, compliance, better for family, particularly, children

required by law – judicial culture, judicial economy

❖ Reasons for focus on the role of child in family mediation

children as the common interests

children as the center of conflicts

recognition of children's right to be heard

practical reason

Right of the child to be heard - legal basis and application

- ❖ “Hear child’s voice” - it’s the right of the child

- ❖ UN Convention on the Rights of the Child

 - Adopted by the UN General Assembly (1989)

 - Ratified by 196 States (only US has not ratified)

- ❖ Right of the child to be heard (art. 12)

1. States Parties shall assure to the child who is capable of forming his or her own views **the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.**

2. For this purpose, **the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.**

- ❖ Right to be heard and best interests of the child (art. 3.1)

Application of the right of the child to be heard – CRC GC 12 (2009)

- ❖ UN Committee on the Rights of the Child – human rights monitoring body for the Convention on the Rights of the Child
- ❖ General Comments – interpretation and guidance
- ❖ General Comment No. 12 (2009) on the right of the child to be heard

Divorce and separation

51. In cases of separation and divorce, the children of the relationship are unequivocally affected by decisions of the courts. Issues of maintenance for the child as well as custody and access are determined by the judge either at trial or through court-directed mediation. Many jurisdictions have included in their laws, with respect to the dissolution of a relationship, a provision that the judge must give paramount consideration to the “best interests of the child”.

52. For this reason, all legislation on separation and divorce has to include the right of the child to be heard by decision makers and [in mediation processes](#). Some jurisdictions, either as a matter of policy or legislation, prefer to state an age at which the child is regarded as capable of expressing her or his own views. The Convention, however, anticipates that this matter be determined on a case-by-case basis, since it refers to age and maturity, and for this reason requires an individual assessment of the capacity of the child.

Basic requirements for the implementation of the right of the child to be heard (GC 12)

- ❖ Transparent and informative
- ❖ Voluntary
- ❖ Respectful
- ❖ Relevant
- ❖ Child-friendly
- ❖ Inclusive
- ❖ Supported by training
- ❖ Safe and sensitive to risk
- ❖ Accountable (follow-up)

Rights of child victims

- ❖ Right to physical and psychological recovery and social integration (art. 39 of CRC)
- ❖ Children's rights to access to justice and effective remedies (CRC GC 27 – drafting in progress)
- ❖ Mainstreaming child rights in accountability mechanisms
- ❖ UN Secretary-General's Guidance Note on Child Rights Mainstreaming (2023)

<https://www.ohchr.org/en/documents/tools-and-resources/guidance-note-secretary-general-child-rights-mainstreaming>

- ❖ International Criminal Court, Office of the Prosecutor, New Policy on Children (2023)
- ❖ <https://www.icc-cpi.int/sites/default/files/2023-12/2023-policy-children-en-web.pdf>

Role of children in mediation

- ❖ Children as victims/ persons to be affected
- ❖ Children as parties to mediation
- ❖ Victim – offender mediation as restorative justice
- ❖ Transitional justice and restorative justice

Restorative justice:

any process in which the victim, the offender and/or any other individual or community member affected by a crime actively participates together in the resolution of matters arising from the crime, often with the help of a fair and impartial third party.

For more information on victim-offender mediation, see “Handbook on Restorative justice programmes” (UNODC, 2006)

https://www.unodc.org/pdf/criminal_justice/Handbook_on_Restorative_Justice_Programmes.pdf

Some tips from international family mediation

- ❖ Neutrality – selection of mediator(s), venue, language
- ❖ Co-mediation
- ❖ Understanding and sensitivity to local culture
- ❖ Power balance
- ❖ External influence
- ❖ Options and ideas in hand
- ❖ Building blocks
- ❖ Building trust
- ❖ Identifying common grounds
- ❖ Feasibility check

Thank you for listening

Questions?

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