

## **CHAPTER I: MEDIATION AND SAME-SEX COUPLES: AN OVERVIEW**

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This Section examines the features and premises of mediation that are commonly adopted for the resolution of intra-family disputes between same-sex partners.<sup>1</sup> It is argued here that the analysis of the nature of disputes and the recourse to mediation for same-sex partners adds new momentum to the study of family mediation. However, differences in the processes of family mediation as between same-sex and opposite-sex couples must not be overlooked. While it is true that there are similar aspects, especially in the styles and models of practice that mediators adopt, which characterise all mediations, this Section will also highlight salient differences. In offering a comprehensive overview of the topic and surrounding issues, this Chapter starts with an analysis of the sources of dispute between same-sex partners, proceeds to a consideration of the mechanisms same-sex partners use to resolve their disputes, and then turns to some specific issues that may occur during mediation between same-sex partners.

### **Sources of dispute**

Together with the ending of love, disputes between same-sex partners may arise from several emotional, practical and social sources. Frequent causes of dispute include disagreement regarding children, finance, coming out, whether and how to have an open relationship, domestic abuse, internalised homophobia and a mix of all the above. More specifically, parenting disputes may occur when partners decide whether and with whom to conceive children, the manner in which parenting roles are performed and financial maintenance for the children.

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<sup>1</sup> This Section is based on some of the findings published by the same author in *Same-Sex Couples and Mediation: a Practical Handbook* (2015).

There are three particular aspects that disputes between same-sex partners present and that contribute to differentiate disputes between same-sex partners from those between opposite-sex partners. First, family structures, in which disputes arise, are wide-ranging. The variety of family structures also includes a diversity of ways in which children are conceived and raised. As a consequence, in same-sex relationships, new types of disputes arise. For instance, a parenting dispute between a lesbian mother and a gay father who are not in a relationship but nevertheless decide to have a child; between two biological parents and their current same-sex partners who nevertheless play (or want to play) a full parenting role; between the biological parent and his/her partner; between a lesbian couple and the sperm donor; between a gay couple and the surrogate mother; between two sperm-donors who have mixed their semen for the artificial insemination; between the grandparents and parents (biological and/or non-biological) of the child.

As a consequence of the variety of family arrangements, the number of disputants will likely be greater when compared to disputes between opposite-sex couples. For instance, inheritance disputes may involve a former heterosexual married and divorced partner of the deceased, the children of the deceased, the same-sex married or the cohabiting same-sex partner of the deceased, as well as occasional partners. In addition, the perception of roles and expectations of those involved in the family as partners and parents may be somewhat different from the perception carried within the formal legal framework (Hertz, 2008). Thus, for example, in financial disputes same-sex partners who live in jurisdictions that do not recognise same-sex unions, or provide limited financial rights for same-sex partners, may nevertheless feel entitled to financial maintenance at the same levels as opposite-sex divorcing partners.

Secondly, regarding the timing of the disputes and the recourse to mediation, same-sex partners often have disputes and use mediation before deciding to live together or conceive a child. In particular, same-sex partners see mediation – together with collaborative law – as instrumental to prevent

disputes, to find ways to accommodate the consequences of their relationship or end of relationship, and to agree on how future disputes will be dealt with (Hertz et al, 2009; Moscati, 2015).

Finally, some disputes find their source in the socio-legal framework - or lack of such framework regarding homosexuality, same-sex unions and same-sex parenting (Moscati, 2015; Hertz et al, 2009; Hanson, 2006; Barsky, 2004; Felicio and Sutherland, 2001; Astor, 1995). In particular, social disapproval of homosexuality and lack of homogeneous legal framework protecting the rights of LGBTI<sup>2</sup> people and the rights of same-sex couples encourage disputes, affect the mediation process, and limit the consequences of a mediated agreement (Barsky, 2004; Hertz et al, 2009; Moscati, 2015).

As a cause of dispute, social disapproval of homosexuality often triggers a lack of self-confidence in the partners and contributes to internalised homophobia, which in turn might exacerbate pre-existing disagreement between the partners, or might itself create disputes. For instance, a dispute may arise because one of the partners does not want to reveal his/her homosexuality for the fear of being discriminated. Alternatively, social stereotypes about the manner in which homosexuality and gender roles are performed may represent a source of dispute. Indeed, during the fieldwork for this book, some same-sex partners, who prefer to remain anonymous, reported that they had disputes because one partner in the couple 'was too gay'.

Such socio-legal lack of acceptance is likely to have an impact on the mediation process as well. For instance, as Frederick Hertz and Allan Barsky referred during interviews for this study, power imbalances between the partners may well depend on the personal history of social oppression as homosexual, and on the limited legal recognition of parental responsibility of non-biological same-sex parents.

In addition, discrimination and oppression experienced by LGBTI people may reduce the positive effects that mediation has on the disputants,

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<sup>2</sup> Lesbian, gay, bisexual, trans-gender, intersexual.

thereby raising two main concerns. First, the way in which disputants perform during mediation may change. Disputants may become more aggressive or may on the other hand reduce their demands during mediation. Secondly, some disputants may well manipulate social bias against same-sex marriage. As Hertz and other mediators suggested during our interviews, it may happen that *de facto* same-sex partners who have lived together and assuming that their relationship effectively was a marriage, refer and use the absence of legal recognition of same-sex marriage to avoid financial burdens and to limit the role of the non-biological parent.

Two issues deserve clarification when looking at how socio-legal limits to recognition of same-sex couples affect the results of a mediated agreement. First, during the formulation of the agreement particular attention must be given to framing creative solutions according to law or at least that do not infringe the law.

Secondly, the enforcement of the law and inter-country recognition of the mediated agreement will inevitably be limited by national law and public policy regarding same-sex unions. For instance, if the dispute involves two disputants who reside in two EU countries then the Directive of the European Parliament on Certain Aspects of Mediation in Civil and Commercial Matters (2008/52) represents a key instrument for encouraging amicable resolution. However, a barrier to cross-border recognition within the EU may derive from the wording in recital 10 stating that: “However, it [the Directive] should not apply to rights and obligations on which the parties are not free to decide themselves under the relevant applicable law. Such rights and obligations are particularly frequent in family and employment law.” Therefore it appears that because same-sex partners are not free to conclude their relationship in such a way as to ensure legal recognition of the dissolution, in several EU jurisdictions, their mediated agreements will not necessarily be able to secure cross-border recognition and enforcement.

## **Dispute resolution mechanisms and same-sex couples**

There are several ways by which same-sex partners commonly deal with their family disputes. These ways do not always involve professionals -- indeed it is common for same-sex partners to ask friends for advice and support, either as partisans or as neutral interveners. From the findings presented in other Sections of this book and current literature it can be inferred that same-sex partners have experienced resolution through community-based mediation, counselling, family therapy, collaborative law and mediation. The disputants' choice regarding the type of intervention to use depends on several factors including the nature of disputes, a felt need to retain control over the dispute, availability of money, and awareness about the characteristics of the process. In particular, my fieldwork has shown that financial aspects may determine the choice in two ways. On the one hand, wealthy partners who have to deal with financial disputes often opt for collaborative law; on the other hand, mediation seems to be generally preferred because is cheaper than collaborative law or court proceeding, and because in several jurisdictions legal aid is provided for mediation.

The wish to avoid discrimination has often encouraged, and continues to encourage, same-sex partners to opt for that form of impartial intervention called community-based mediation.<sup>3</sup> When structured within a mediation service, the community-based mediation presents the following characteristics: involvement of trained volunteers; free access; funding by public institutions or private donors; and attention to all the differences that the LGBTI community can present (Bryant, 1992). This type of intervention has been considered to be instrumental in giving value to LGBTI families and the LGBTI community (Emnet, 1997; Hanson, 2006) - mediation within the community empowers same-sex couples, their children and the entire LGBTI community as well (Hanson, 2006).

During the fieldwork for the preparation of this Chapter some interviewees affirmed that the intervention from the community or from the

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<sup>3</sup> In particular in 1970s is New York and San Francisco with the San Francisco Community Board. For an account on the San Francisco Community Board see Merry and Milner (1995).

members of LGBTI organisation can also occur informally. In particular, associations (including religious ones) created by LGBTI people have weekly meetings during which same-sex partners who experience a dispute share their experience with other couples and attempt to find a solution to their problems. A counsellor may assist as well.

Community-based mediation is a creative and a protective environment for all parties: it can also help same-sex couples to feel '*understood*' and more inclined to talk and mediate. At the same time community-based mediation can be inconvenient. As Freshman (1996) argues, the risk can be that the mediator prioritizes the interests, values and ideas of the community instead of those of the parties. Therefore, same-sex disputants might feel that they are compelled to mediate. In addition, the attention to sexual orientation can omit from the analysis other elements, such as culture, social status, or religion that are very important for the resolution of the dispute. Freshman is more inclined to follow the community-enabling mediation which, based on the LGBTI community values, stimulates the parties to look for and follow the principles of other communities if they fit better with the couple's needs. Conversely to the enabling mediation model, community-enhancing mediation is strictly linked to the values and rules of a particular community, and does not offer enough autonomy to the parties.

Other instruments chosen by same-sex partners include counselling, family therapy, collaborative law and mediation. A detailed analysis of the features and approaches to counselling and schools of family therapy is beyond of the scope of the present Section. Therefore it suffices to say here that counselling is a form of therapeutic intervention developing in meetings during which the partners talk about their issues (Roberts, 2014); family therapy considers the family to be the source of pathology and therefore the intervention of the therapist concentrates on the family structure. As pointed out by Roberts, however, both counselling and family therapy are significantly different from mediation.

Collaborative law is another form of intervention that same-sex couples may well be willing to try. Collaborative law, as method for the resolution of family disputes, was created in North America at the beginning of the 2000s. It is based on a four-actor model: the two clients in negotiation are advised and supported by their respective lawyers. According to the characteristics of the dispute, the requests and needs of the parties, other professionals such as child or financial consultants may be involved. At the core of collaborative law there are two agreements: the participation agreement and the disqualification agreement. The participation agreement sets out the aims and principles of the collaborative law process binding the parties to work together to come to an agreement. The disqualification agreement focuses on and limits the role that lawyers will play in future - if any - court proceedings. According to the disqualification agreement, in the event the disputants who attempted the collaborative process will not settle and decide to recourse to court, then the lawyers who were involved in the collaborative process may not represent the same clients during court-proceedings (Roberts, 2014; Moscati, 2014; Lande, 2006).

Several factors may be involved when same-sex partners are choosing between mediation and other mechanisms for resolution of their differences. As David Allison pointed out during one interview:

*"Money might be one aspect and, as mediation tends to be cheaper, this may have an influence. It may also depend on the level of legal or other support they might need during the discussions. Some people feel more supported and hence better able to discuss things with their lawyer present: they would most likely prefer collaborative law" (Moscati, 2015).*

As the Chapter on England will show further, it appears that wealthy same-sex partners are often keen to prefer collaborative law to mediation for settling financial disputes.

## **Mediation and same-sex couples**

Same-sex partners tend to choose mediation as typical form of third party intervention. Generally speaking, during mediation a third and impartial party - called the mediator - facilitates the communication between the parties in order for them to find an agreement regarding their dispute (Roberts and Palmer, 2005; Roberts 2014). The level of intervention, the role and the characteristics of the mediator may change according to the context (Roberts and Palmer, 2005). Indeed, the fieldwork for the preparation of this Chapter shows that the third party chosen by same-sex partners may be a professional mediator, a lawyer, a friend, a spiritual consultant, or someone who plays a role as director of charity or association devoted to the support of LGBTI people.

There are several characteristics of family mediation that extend to mediation between same-sex partners. At the same time disputes between same-sex partners require the mediator to be more receptive to a variety of specific aspects that these disputes present.

It is maintained here that as for any other type of mediation, mediation between same-sex partners is essentially based on negotiation. As Gulliver has demonstrated, negotiation is characterised by exchange of information and learning and it is essentially a process that develops throughout six phases (1979). The phases are: an initial search for an arena; a phase of agenda formation in which issues are articulated, communicated and assimilated; a phase in which differences are explored and a field of possibilities reviewed; a phase in which issues are narrowed and prioritised; a phase of bargaining; and finally a phase in which agreement is formulated and ritually affirmed.

The mediator, then, will assist the parties to smoothly and successfully proceed through the several phases of the negotiation process (Roberts, 2014). With regard to same-sex couples, there are two important tasks that mediator – during the six phases – is called on to fulfil. First, the mediator will help disputants to describe the nature of their relationship and the role



each of the partners plays regarding financial contribution and parenting. Secondly, because of the lack of harmonised legal recognition of same-sex unions, the mediator will accompany the parties and to become aware, clarify and understand the contradictions - if any - between their idea of family and what the law provides.

During the six phases, challenges are posed to the mediator regarding the nature of the relationship between the parties, the language he/she will use to address the parties, the sources of power imbalance, and the formulation of the agreement. Regarding the nature of the relationship between the disputants, the mediator may well understand that the relationship created and the roles performed by same-sex partners are very different from the model of marriage based on the union of a man and a woman. In addition, those jurisdictions that have law granting legal consequences to same-sex unions follow several models. There are jurisdictions such as England and Wales in which same-sex couples may marry and divorce in accordance with the same rules as heterosexual couples; there are countries such as Croatia and Hungary in which same-sex unions confer on the parties limited rights only; and there are jurisdictions such as Italy and Bulgaria in which same-sex unions are not protected by law, and therefore same-sex partners create their own arrangements regarding the likely consequences of their relationship.

Therefore, the mediator is encouraged to learn about national and international legal frameworks governing same-sex relationships (Hertz, 2008). This general knowledge of national and international frameworks will support the mediator in helping the parties to come to an agreement which will be enforceable. At the same time, the mediators who agreed to be interviewed for this project, warned against making the mistake of attributing to same-sex relationships the same set of values, expectations and rules that inform and govern opposite-sex relationships. The latter aspects bring us to emphasise the importance for the mediator to use a gender-neutral language and to ask disputants how they prefer to be addressed.

As Allan Barksy suggested during an interview:

*"Mediators should be client-centred and ask the clients how they want to be called. They should avoid language that is demeaning such as, "You are the real parent and you are just the adoptive parent or the not real parent." Mediators should consider how people identify themselves - you may think that a client is gay but he/she prefers to be identified as bisexual. It's more respectful to use the language preferred by the clients. Often, mediators can simply address clients by their names, and not try to put people in a particular category"* (Moscati, 2015).

Moving from one phase of negotiation to another, power imbalances between the parties may become evident. Of course power imbalances characterise all types of relationship. As Ruth Smallacombe and David Allison pointed out during one interview:

*"Everything potentially can create a power imbalance: from money to the level of care a person has been giving to children, to who is the more articulate one in the relationship. An important role of the mediator is to address any power imbalance"* (Moscati, 2015).

However, the causes of such imbalances between same-sex partners deserve attention (Hertz et al, 2009). Some power imbalances are based on 'objective' factors such as a different financial situation, educational background and biological ties with the children. Other sources of power imbalances, however, may rely on self-confidence about personal sexual orientation, and the support that each of the partners receive from his/her family, friends, and the LGBTI community. In particular, when one of the

partners is bisexual additional discrimination and oppression may be experienced even within the LGBTI community. Such additional discrimination creates sources of power imbalance. As Frederick Hertz affirmed in an interview:

*"There can be a power imbalance in homosexual couples based on history of personal oppression, which is often not visible when you meet the couple. There is a sort of psychological disability caused by a personal history of oppression, and this is an essential part of power imbalance. Another cause of power imbalance is the societal rejection of 'butch' lesbians and 'feminine' gays – i.e. there are the acceptable homosexuals and the unacceptable homosexuals. And there are power imbalances caused by the socio-economic consequences of oppression and lack of acceptance" (Moscati, 2015).*

Looking at similarities that mediation between same-sex and opposite-sex partners present, mediators dealing with same-sex intra-family disputes have the same range of processual choice as in family mediation between heterosexual partners. They may adopt one or more of several styles of practice including evaluative,<sup>4</sup> facilitative, transformative,<sup>5</sup> narrative,<sup>6</sup> or a combination of all. Similarly, a variety of models of practice ranging from pre-mediation, to joint sessions, to caucus, shuttle mediation, online

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<sup>4</sup> In an evaluative mediation, the mediator adopts a pro-active, directive approach, offers recommendations and formulates options for the parties. In a facilitative mediation, the mediator does not take a directive approach. He/she enhances communication between the parties; helps disputants to clarify issues and leave to the parties the control over the output of mediation. As Riskin puts it 'Each orientation derives from assumption about the mediator's role. The evaluative mediator assumes that the participants want and need the mediator to provide some direction [...]. The facilitative mediator assumes the parties are intelligent, able to work with their counterparts, and capable of understanding their situation better than either their lawyers or the mediator' (1994: 111).

<sup>5</sup> The transformative mediation aims at transforming disputes into positive experience with the consequence that the parties will be empowered and will mutually recognise each other (Bush and Folger, 2005).

<sup>6</sup> According to Winslade and Monk 'the narrative approach concentrates on developing a relationship that is incompatible with conflict and that is built on stories of understanding, respect and collaboration. Parties are invited to reflect on the effects that the stories have had on them before they are asked to address the matters that cause separation' (2000: XI).

devices, and use of telephone with the parties exchanging messages only through the mediator, are considered. In addition, regardless sexual orientation of the disputants both co-mediation (or two mediators, or a mediator and a lawyer) and the involvement of other professionals for technical advices are common.

At this point the reader may well raise questions about the positive aspects of mediation for same-sex partners and the reasons inspiring same-sex partners to choose mediation.

Mediation presents several advantages for same-sex partners. Generally speaking, mediation is an informal process which gives the parties the opportunity to control the handling of their disputes and create the output which better suits their needs. At the same time, mediation protects the privacy of the parties and children involved and has low costs (Roberts and Palmer, 2005). There are some additional favourable conditions that mediation offers to same-sex partners. For instance, it has been argued that mediation potentially offers a friendlier environment than the courts, as it does not carry the same risks for the partners of discrimination on the basis of their sexual orientation (Hanson, 2004). As McIntyre (1994) points out, offensive stereotypes regarding gay life and homosexuals as parents have infused a number of judicial decisions. However, in the opinion of the author of this paper, discrimination may well also infiltrate the mediation process, and in addition may contribute to encourage a sense of the 'invisibility' of LGBTI people (Astor, 1995-1996).

In several jurisdictions, mediation has the key advantage of being the only mechanism same-sex partners may adopt. In jurisdictions where same-sex couples can register their unions, possible disputes can be obviously resolved with recourse to courts. However, in jurisdictions in which same-sex unions are not legally recognised, same-sex partners have very limited access to courts and therefore may feel that they have to choose mediation or some other out of court mechanism in order to deal with all the issues arising from intra-family disputes. This means that mediation may play an important role: those partners and parents who are not legally recognised as

such are likely to have an opportunity in the mediation to express their wishes in a way that would otherwise be denied to them.

Motivations encouraging decisions on whether to use mediation are varied. As Dominic Raeside told me during one interview:

*"[There are] various motives - a mix of not wishing to go to court because of the costs and timing; because of the need to keep control over the issues and dissolution; because mediation resonates with their culture; because they want to use a private arena" (Moscati, 2014).*

Personal choice based on knowledge and awareness of the positive aspects of mediation seems to be the main reason for making the decision to go to mediation. Often personal choice regarding mediation is encouraged by culture, by the wish to avoid further court hearing and to feel protected from discrimination, by lawyers or by the law itself. The law can direct the decision for the partners to adopt mediation mainly in three ways, and a combination of them. The first option is for the law to make mediation compulsory; the second legal approach consists in providing legal aid only for mediation, and the third legal alternative is to require disputants to attend an information meeting in which they will learn about the several mechanisms available for the resolution of their dispute. As the Chapter on England shows the last two approaches have been adopted in the civil justice system of England and Wales. In the opinion of the writer of this Chapter none of the three legal ways in which the law encourages disputants to opt for mediation enhance access to justice. All three approaches in reality create limits to the availability of dispute resolution processes and to choice of the parties. In particular, one of the key characteristics of mediation is that it is based on the free decision of the parties. However, cutting legal aid for legal representation in court appears as a coercive - although indirect - way to make mediation compulsory in reality.

Notwithstanding the several advantages of mediation and numerous efforts that national and European legislators do claim for mediation, same-sex partner recourse to the mediatory process is still limited. Some explanations for this disjuncture between legislative promotion of mediation and its use can be drawn from the fieldwork conducted for the writing of this Section. In particular, interviews with same-sex couples disclosed that four main concerns dissuaded partners from trying mediation. A first reason derives from the lack of knowledge about mediation and from a misunderstanding that mediation would be available only for married couples. Secondly, when the dispute was not perceived as serious enough to ask for external help then the partners interviewed preferred to ask friends or a family therapist to help, or to avoid any external help. A third explanation for desisting from mediation is the wish to maintain everything concerning the relationship very private. Finally, in several cases the dispute required some specific and technical knowledge (mostly finance) rendering (as the disputants saw the matter) mediation an unsuitable decision-making process for the dispute.

## **Conclusion**

This Chapter has aimed at offering a comprehensive overview of issues surrounding the resolution through mediation of intra-family disputes between same-sex partners. Based on the current literature and on fieldwork this Section has shown that mediation between same-sex couples presents some features that deserve attention from the mediator. In particular, the lack of homogeneous legal recognition for same-sex unions influences sources of dispute and the mediation process. Moreover, regarding the sources of dispute, attention must be put on parenting and inheritance disputes and on disputes based on divergences regarding coming out, high expectations (Hertz 2008), homophobia, and the manner in which sexual orientation is manifested. Indeed, Allan Barksy has made the following suggestions to mediators:

*"Learning about the dynamics in same-sex couples; learning about safety and power imbalances (people often assume that if there are two men or two women there aren't issues of violence); know what the local law says about same-sex relationships; know how to law treats the non-biological parent; learning about issues regarding grand-parents access; be aware of the high incidence of HIV/Aids with gay men and aware of the issues which can come up; consider whether there is drug abuse and alcoholism in the family which make more complicated to create a plane safe for the family and for the kids" (Moscati, 2015).*

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