

Same-sex couples, disputes and dispute resolution

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A new cross-European study is looking at same-sex mediation, where interplays of social pressures, legal rights, power imbalances and children issues can arise

Family mediation is an area of study which has attracted important debates - for example on the style and models of mediation; the role of mediators, lawyers and judges in mediation; compulsory mediation; gender imbalances between the parties; the involvement of children and so on.

However, other important questions - such as the nature of disputes between same-sex partners, power imbalances, differences between same-sex and heterosexual partners - receive limited attention, and this should be of concern for legal scholars, mediators, lawyers and judges.

Same-sex couples in a number of jurisdictions started to opt for mediation - including therapeutic family mediation and community-based mediation - towards the end of the 1970s. More recently, besides personal choices, impulse to the use of mediation derives from law. Indeed, since 1970s with the increasing body of laws protecting LGBT people from homophobia and trans-phobia, and legal recognition of same-sex unions, the recourse to mediation is often legally framed.

Notwithstanding the above-mentioned diffusion of mediation, there is still little empirical data and research regarding the real use, effects and dynamics of this process of dispute settlement among same-sex couples worldwide. The project 'Litigious Love: same-sex couples and disputes in the EU' intends to fill this gap.

The research project

Litigious Love aims to broaden the knowledge of issues surrounding dispute resolution mechanisms adopted by same-sex couples to resolve their intra-family disputes. The project started in March 2014, will end in September 2015, and is financially supported by the Department of Civil Justice of the European Commission. It is co-ordinated by an association of Italian lawyers - *Avvocatura per i Diritti LGBTI*, and involves partners from Croatia, Hungary and Bulgaria.

The objectives of the projects are, first, to analyse the causes of disputes between same-sex partners and the mechanisms adopted to resolve them. Secondly, to look at selected issues which influence the mediation process. And finally, the project will consider to what extent and in what ways differences in the legal recognition of same-sex unions affect cross-border recognition of mediated agreements between same-sex couples.

The project responds to four common needs at the European level:

- To gather information on the manner in which same-sex partners face family disputes during their relationship.
- To improve knowledge regarding specific issues and characteristics of mediation in same-sex partner disputes.
- To develop mediation techniques in intra-family disputes, including cross-border cases, involving same-sex partners.
- To address differences in transnational enforcement of mediated agreements.

In addition, the project is inspired by the need to address issues of access to justice in those jurisdictions, such as Italy, in which same-sex unions do not receive legal recognition, and therefore same-sex partners might see mediation as the only mechanism to resolve their disputes.

The expected results of the project are:

- comparative research analysing issues regarding mediation adopted by same-sex couples;
- international central training for legal professionals and mediators on this area;
- national trainings for judges, practitioners, and mediators related to mediation techniques for same-sex partners;
- a conference;
- a book on the issues addressed by the research; and
- a handbook for legal practitioners, and mediators on mediation and same-sex couples.

Same-Sex Couples and Mediation: a Practical Handbook

An important part of the project is collecting data on the nature of disputes between same-sex partners and on issues surrounding mediation between same-sex partners. A comparative analysis of data collected in Italy, England, Bulgaria, Hungary and Croatia will be published in May. In addition, a practical handbook - which is the main source for this article - has been published and is available online at www.litigiouslove.eu.

The handbook is addressed mainly to mediators and legal practitioners interested in the study of DR and family mediation as well as to students and researchers concerned with issues and debates related to the rights of lesbian, gay, bisexual, transgender (LGBT) people.

The handbook examines the nature of such disputes and the manner in which they are resolved through mediation. It is based on a selective analysis of empirical and non-empirical data on same-sex couples and their disputes. However, given the limited data and resources which specifically deal with same-sex couples and mediation, the handbook mainly relies upon empirical data collected by the author during fieldwork and semi-structured interviews with mediators and lawyers in different countries.

Some findings

Before analysing some of the findings of my research, it must be emphasised that both the nature of disputes and the availability of dispute resolution mechanisms differ significantly depending on jurisdictions and time. It is important for mediators and lawyers to be aware that legal framework governing decriminalisation of homosexuality, protection from homophobia and trans-phobia, recognition of same-sex relationships, and recognition of parenting rights is not harmonised all over the world. The puzzling legal recognition that same-sex relationships receive in the EU and outside the EU influences the nature of disputes and the entire dispute resolution process. Often during the mediation process mediators will help disputants to deal with the contradiction between what the law provides and what the partners feel about the nature of their relationship and the rights they are entitled to. In particular, with regards to sources of disputes, there are sources of conflict that are rooted in the socio-legal setting in which same-sex partners and parents live. Social pressure, internalised social homophobia, lack of self-confidence depending on social disapproval about homosexuality, and lack of a homogeneous legal framework protecting the rights of same-sex partners and same-sex parents might create dispute between partners, or might exacerbate disagreements already present between the partners. In addition, with regards to the methods adopted for resolution, recourse to mediation or other out-of-court dispute resolution mechanisms has been and still is the only choice in those jurisdictions that lack a legal framework that recognises and regulates same-sex unions. The differences in the legal recognition of same-sex unions must be taken into account, in particular when the mediated agreement is to be finalised and then enforced in disputes involving partners from different countries.

Causes of disputes

Typical causes of disputes include finance, children, inheritance, open relationship, coming out, high expectations, homophobia, sexual orientation (for instance if one partner is bisexual) and

the manner in which sexual orientation is performed. Although the analysis of each source of dispute is out of the scope of the present article, it suffices to point out here that the timing of disputes regarding finance, or children, or inheritance can be different when compared to heterosexual couples. Often same-sex couples have such disputes before entering into a relationship.

In addition, parenting disputes present important aspects which mediators and lawyers should be aware of. The variety of mechanisms adopted to conceive children and the variety of parenting arrangements make parenting disputes between same-sex partners diverse and distinctive. Disputes can occur between two biological parents (one lesbian mother and one gay father) who might not be partners and just decide to conceive and bear a child; or between two biological parents and the other non-biological parents. Cases can also involve a biological parent and the other same-sex parent; two mothers and the sperm donor; gay parents and the surrogate mother; same-sex biological parents who have mixed their semen and used it in DIY insemination; or grandparents and the parents.

Causes of disputes over children include making a decision on whether to have a child; how and with whom to conceive a child; the exercise of parenting rights; decisions regarding the role played by non-biological parents; decisions over contact, residence, and the upbringing of the child; child support; child maintenance; and fear of being excluded from the life of the child.

Parenting disputes between same-sex partners are strongly influenced by the impact of artificial insemination, surrogacy and adoption, and by the lack of harmonised legislation. When the law does not recognise the role of the non-biological parent, two issues may arise: first there are differences between what the law says about parenting rights and duties, and what the parents have planned in their private oral or written agreements. Secondly, serious power imbalances are created between biological and non-biological parents.

It is important to remind that in this type of dispute the best interests of the child is the overarching principle. Therefore, even if the law may not recognise all the parenting structures that same-sex partners have created, mediation represents an opportunity for all parties involved in the life of the child to express their voice.

Discrimination and power imbalances

During mediation power imbalances and discrimination often play an important role for the resolution of a dispute. There are some causes of power imbalances and some types of

discrimination which affect mediation between same-sex partners more than mediation between opposite-sex partners.

Sources of power imbalance include age, financial situation, biological ties with the children (if any), educational background, self-confidence about personal sexual orientation, a history of personal oppression, socio-economic consequences of personal oppression, support from the family, and the ability to function during mediation.

Discrimination based on the sexual orientation and gender identity is common in many communities, including within the LGBT community (for instance against bisexual people). In addition to social discrimination, homosexual persons face discrimination to be found in law in countries in which homosexuality is a crime, or in jurisdictions in which some rights are not extended to LGBT people (such as marriage). Often homosexual individuals are victims of multiple discrimination from the intersection of sexual orientation, religion, gender and ethnicity.

For the future

Practical steps should be considered in order to inform mediators, lawyers and judges on how to be prepared to deal with disputes between same-sex partners, and on how to create an environment in which same-sex partners and their children feel comfortable. Some of the key points to emerge here, based on interviews with mediators and lawyers who have experience of disputes between same-sex partners and same-sex parents, are as follows:

- Don't assume anything.
- Be honest about your personal bias.
- Be honest about your sexual orientation.
- Learn about LGBT people.
- Be aware of new legal frameworks (national and international) on sexual orientation and gender identity; protection from homophobia and trans-phobia; same-sex unions and same-sex parenting.
- Take into account social acceptance and social stigma in respect of sexual orientation and gender identity.
- Use child-friendly informative material that takes into account sexual orientation, gender identity, and break-up of same-sex partners/parents.

- Have guidelines on involving children in the mediation process which consider the variety of family structures, and the several aspects of sexual orientation and gender identity.
- Use gender-neutral and inclusive language, information materials and referral forms.
- Take into account if the disputants are “out”.
- Ask parties how they conceptualise their relationship and parenting roles.
- Encourage parties to talk about the nature of their relationship, their expectations, and the differences between the law and what they think of their relationship.

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