American Journal of
Family Law

ASPEN PUBLISHERS VOLUME 23 NUMBER 3 FALL 2009

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Wolters Kluwer
Law & Business

An International Mediation: From Child Abduction to Property Distribution

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Offering mediation in cases of international child abduction has become standard procedure in Germany—recommended by the courts, the central authority (Federal Justice Agency), the International Social Welfare Service and others involved. For many years, there has been a network of mediators, who offer their professional assistance in such proceedings.[1] The mediators operate according to the Breslau Declaration,[2] *i.e.*, in the German-American case described in this article, an American mediator (female) with a professional education background works with a German mediator (male) with a professional legal background.

The initial concern of parents of abducted children is first and foremost the question of the children's future residence: Should the child or children stay with the abducting parent or be returned to the left-behind parent? At the same time, it is also important to ask how the contacts to the other parent, to the other parent's family, to the other culture etc. can be arranged. The range of issues the parties decide to focus on at the beginning of the mediation soon reveals that there are many more questions at stake which must at least be raised and partially—if not completely—solved during the mediation in order to find the basis for a sustainable arrangement. In fact, this is the particular advantage of mediation. In other words, the procedure is not limited to the issues under legal dispute, but rather open to a much wider range of topics the participants need to settle.

We would like to illustrate this point by describing a German-American child abduction case we mediated recently.

ADAM BETWEEN LOS ANGELES AND BERLIN

Adam, the son of Heidi and Sebastian (both in their mid-thirties), is two years old.

Heidi comes from Berlin and initially went to the United States for a year in 1994. In LA she met Sebastian and ended up staying because of him. In 1995, the two of them got married and in 1996 they bought a house. In November 2004 their son Adam was born. While Heidi had managed to work her way up the career ladder to a responsible position at a large German company, Sebastian had not yet found his calling. After four months' maternity leave, Heidi went back to work, while

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Dr. Jamie Walker*, a native of Atlanta, has lived in Germany since 1977. She is an accredited mediator and mediation trainer with the Bundesverband Mediation e.V. (Federal Association of Mediation). She played an instrumental role in establishing school and community mediation in Germany, has published three books and dozens of articles and has broadened her focus to include mediation in international child custody cases. Her involvement in mediation and her recent work as a consultant for the German Technical Cooperative have taken her to Northern Ireland, Russia, Bosnia, Serbia, Sri Lanka and Afghanistan. She currently heads the MediationsBüro Mittee (Central Mediation Bureau) in Berlin. (www.jamiewalker.net)*

Sebastian took responsibility for the household and child. Starting in May 2005 Adam attended nursery school; several months later Sebastian began his training as a nurse and Heidi worked nights at home. A marriage crisis developed when Sebastian had an affair and moved out of their house in May 2006. Adam stayed with Heidi and the parents verbally agreed to take care of him alternately on a 3-month rotation basis.

In October 2006, Heidi travelled with Adam to Berlin to spend four months with her parents, where, shortly after, Sebastian came to visit her. Without informing Sebastian, Heidi agreed with her company that she would work from Berlin in the future and set up house in her own apartment near her parents. Adam began attending a German nursery school. At the beginning of December, Heidi applied for a divorce and withdrew $52,000 from a joint account. Sebastian felt completely overwhelmed by these events and sought information on the Hague Convention proceedings.[3] On a Sunday morning at the beginning of January 2007, he turned up at Heidi's door unannounced, demanding to see his son. She was too afraid to comply with his wish so he came back accompanied by the police.

Heidi was not happy in LA. She was homesick and badly missed her family. Facing the end of her marriage, she wanted to live in Berlin with her son, especially because there she could count on her family's full support. She mistrusted Sebastian and was afraid that he might return to the United States with Adam without her permission. From October onwards, her relationship to Sebastian worsened—she felt stressed by his erratic moods, by his accusations and by his threats. She did not want Adam to be pushed back and forth between his parents and their home countries; rather, she wanted him to feel at home in one place. Adam had settled in quite well and was enjoying spending time with his grandmother.

Sebastian felt guilty about having cheated on Heidi and let her down. At the same time, he did not want to lose his son. He expected to finish his training within a few months, at which point he wanted to take his share of the responsibility for raising Adam. He had applied for joint custody and demanded Heidi's return to LA together with Adam. He had no idea of Heidi's intentions: he accused her or not talking to him about her plans and trying to prevent any contact between him and Adam. Sebastian missed his son very much. He felt a complete stranger in Germany, had no confidence in the German authorities, and was bent on filing Hague Convention proceedings to enforce legally his son's repatriation to the US if necessary.

In the first week of January 2007, the German lawyers of both parents sought information on the possibility of mediation. At the beginning of the second week of January Heidi urgently requested immediate support from the mediators. Sebastian was scheduled to return to LA the following Sunday.

FROM THE BEGINNING OF MEDIATION TO AN INTERMEDIATE AGREEMENT

The first three mediation sessions took place on three consecutive days immediately after the initial contact with the mediators. After a first discussion which was held jointly, we conducted separate sessions, first with Heidi and then with Sebastian. Heidi had been well advised by her lawyer: she knew that a family court would most probably order Adam's repatriation to the United States. The idea of Adam returning to LA without her was inconceivable—but at this point so was the idea of returning to the United States. Full of despair, she described what a separation from her parents in Berlin would mean for her and for Adam's grandparents, who had built a loving relationship with their grandson. Sebastian, however, described his anger and the unbearable situation imposed upon him by Heidi. He was particularly upset by the fact that he had had to request police support to see his son to whom he had devoted such intense care. At the end of the two separate sessions, both parents said independently of each other that the mediation process should primarily deal with the principal question of where Adam was going to live in the future and how his contact with the other parent could be arranged. In the course of a first brainstorming of possible solutions the following ideas were brought forward: Adam lives in Berlin with his mother; Adam lives in LA with his father; Adam rotates between his parents (*i.e.*, he changes his residence every few months); the parents jointly move to a third country. It was quite eye-opening for the parents to imagine such (extreme) possibilities.

Subsequently, we as mediators gave the parents the opportunity to reflect upon the good and bad times of their marriage (or, respectively, their living together) as well as the time during their separation. Both described their relationship to their son and it became clear that Adam had a very good relationship to his American father and to his German mother. Supported by the mediators, both

parents were able to appreciate each other in their parental roles.

In view of his impending departure, Sebastian wanted to spend as much time as possible with his son. As Heidi became aware that the contacts between Adam and his father could lead to a significant easing of tension, she agreed to arrange visits. At the same time, Sebastian became aware of Adam's strong attachment to Heidi's family. We pointed out the grandparents' importance for Adam—a fact which would have to be considered in any parental decision. The parents agreed on exact times and conditions for the meetings between father and son until the next mediation session.

At the end of the first session, we gave both parents the "assignment" to collect any further issues which should be discussed in the course of the mediation, and to seek advice from their lawyers respectively.

The Second Session

At the start of the session, Sebastian and Heidi—first separately, then jointly—reported on the contacts between father and son; Sebastian had spent several hours with Adam and enjoyed relating the experience of reconnecting with his son. The general mood during mediation was relaxed, and we asked if the parties had come up with additional issues. At the flipchart, we jointly made a list of all topics with regard to the separation and divorce as requested by both parents, as well as questions concerning the practical implementation of joint parental custody for Adam and settlement of any proprietary issues.

The wide range of issues illustrated the fact that the parents were not only concerned with the question of Adam's future residence. Aside from this, both parents considered themselves responsible and wished to use the mediation process to reach a comprehensive settlement of their affairs. At the same time, however, it became obvious that such a far-reaching "program" could not be tackled in the three mediation sessions initially agreed upon. We asked both of them to call their lawyers prior to the next session, so that a first intermediate agreement could possibly be reached in the third session.

The Third Session

Once again, Sebastian had extensively used the opportunity to spend time with Adam. Both parents reported on a joint "family excursion" the day before, and the atmosphere was quite relaxed. We reminded both of them that no final decisions would have to be made immediately. Sebastian knew from his lawyer that he could still file a Hague Convention application at a later stage. We agreed to continue the mediation during Sebastian's next visit to Berlin in three weeks. After the first confidence-building steps had been made in the course of the mediation, a partial agreement could be worked out which read as follows:

Intermediate Mediation Agreement

As a result of our mediation sessions on January 10, 11 and 13 with Christoph Paul and Jamie Walker in Berlin we agree to the following:

1. *Our son Adam, born November 2, 2004, is currently residing with his mother in Potsdamer Strasse 33, 12345 Berlin.*
2. *The father is going back to the US tomorrow and will return to Germany on February 1, 2007.*
3. *We will continue the mediation in Berlin on Feb. 2 from 2 to 7 p.m. and on Feb. 3 from 10 a.m. to 4 p.m.*
4. *During these mediation sessions we will strive to find a definitive legally binding solution to the following issues:*
   - *country of residence for the next three years regarding Adam*
   - *legal and physical custody for Adam*
   - *living arrangements*
   - *division of assets*
   - *divorce proceedings*

— *continuity in addressing each other*

— *recognition of Sebastian's role as a father*

— *communication on how to raise Adam.*

We strive for a solution that will allow us both to play a significant role in Adam's life.

5. *Both of us will prepare for the next mediation sessions by putting together a list of concerns, issues and wishes that need to be settled.*
6. *For the next two weeks we agree only to discuss matters concerning Adam's everyday life.*
7. *This agreement has no influence or prejudice for any legal proceedings, including an application under the Hague Convention.*
8. *We request that the mediators fax a copy of this agreement to our lawyers.*

Berlin, January 13, 2007

Heidi R. Sebastian B.

The Fourth Session

Sebastian came to the mediation session full of confidence—he had seen Adam on the morning prior to the session and had experienced that Heidi had kept her promises.

Heidi, however, was desperate at the beginning of this fourth session. Although she had been able to arrange the professional aspects with regard to her return to the United States, she still found the idea of leaving her family in Germany inconceivable. In tears she described that she did not know how to convey to her family the inevitable decision to return to LA. Once again, both parents were given the opportunity to describe their interests, which provided the common ground for the final decision that Heidi would return to the United States with Adam.

After this piece of hard work, we began to address the other issues in the intermediate agreement. Some of them could be resolved quickly and easily, while others needed more time and further consultations with the lawyers. Some of the difficult issues were how to make arrangements for Adam in the event of the death of a parent and the principal valuation of the joint assets. Another tricky issue was which date to use to determine the final assets owned by a spouse at the end of the statutory (matrimonial) property regime: the one used under German law (the delivery of the divorce application) or the one under California law (the day of final separation). Both parents wanted to consult their lawyers by telephone once again before the next session on the following day.

The Fifth Session

Heidi reported on the discussion with her parents, on their tears at the thought of seeing their daughter and grandson move so far away again. Sebastian was relieved to realize that an amicable solution was in sight, and was prepared to meet Heidi half-way with regard to the property questions. We jointly worked out criteria for fair arrangements. Parallel interests became apparent, especially with regard to Adam's education; both parents wanted to support each other in their parental roles. As far as the distribution of assets was concerned, both parties—having consulted their lawyers—settled on the valuation of assets as fixed on the day of the final separation as fair (*i.e.*, they decided to apply California law).

Working jointly with the parties, we wrote the final mediation agreement straight into the laptop. Both parents suggested practicable formulations which we as mediators examined critically before the final formulation was reached.

This last session lasted seven hours, interrupted by brief individual sessions during which Heidi and Sebastian were given the opportunity to articulate any reservations, anxieties or fears. At the end of this session, we drew up a final agreement which both parents wanted to sign. This agreement reads as follows:

Before the agreement was signed, we asked that the lawyers again be consulted. Heidi and Sebastian decided to forgo the clause about the "legal status of the agreement as they felt they had already secured legal protection. The agreement

Mediation Agreement

As a result of the mediation we participated in with Christoph C. Paul and Dr. Jamie Walker regarding our son Adam B., born on November 2nd, 2004, we, Sebastian B and Heidi R., agree:

Return to the United States

Heidi and Adam will return to the United States by April 30, 2007 at the latest.

Residence

For the next three years all three of us will live in Southern California. If, before the end of that time period, circumstances change, we will negotiate anew over where we should live.

Joint custody

We declare that we will continue to practice joint legal and physical custody and financial responsibility concerning issues such as school, health and place of residence.

Child support / expenses for Adam

We intend to share physical and financial responsibility for Adam on a 50/50 basis.

Bicultural upbringing

We want Adam to benefit from the fact that his parents come from different cultural backgrounds.

Parenting class

Upon Heidi's return to the United States we will attend a parenting class together and work out a parenting plan; we will share the cost for the class.

Divorce

We intend to get divorced. We want to settle all the legal aspects as efficiently as possible, time- and money-wise.

Travel with Adam

Heidi may travel with Adam within or out of the United States 12 weeks a year for a maximum of four weeks each time. The trips should be distributed over the year; there should be at least 8 weeks between two trips. Sebastian may travel with Adam within or outside the United States six weeks per year (maximum 4 weeks at a time). This agreement goes into effect as of January 1st, 2008. In 2007 Heidi can go on one 4-week vacation with Adam out of the country.

We will plan trips as far in advance as possible. The dates for each trip must be agreed upon two months ahead of time at the latest.

In addition, travelling with Adam for special occasions such as illness or death is possible.

Holidays and birthdays

Adam will spend Christmas alternately with his father and his mother every other year. He will spend Christmas 2007 with Sebastian.

We will celebrate Adam's birthday together; family is welcome.

We each want Adam to be with us on our birthdays (with the exception of Sebastian's 37th birthday).

Dealing with each other

For Adam's sake we want to find a way to deal with each other with a minimum of stress. We will talk about how to do this in more detail in parenting class.

Extenuating circumstances

If either one of us dies or becomes incapacitated, the other parent will make sure that Adam stays in contact with the other parent's family and culture.

Assets

Sebastian will keep his truck, Heidi will keep her car in California and her German savings account at the Sparkasse.

The cash as of May 28, 2006 (date of our separation) is as follows:

(1) Checking account	*$ 7,600*
(2) IMX	*$14,900*
(3) CD	*$51,600*
(4) Sebastian's IRAs	*$ 6,700*
(5) Heidi's 401K	*between $40,000 and $70,000*

Sebastian already received 1, 2 and 4 and Heidi is in possession of 3 and 5.

House: The house belongs to us 50/50. The mortgage on the house is $109,000 as of today. Sebastian intends to buy Heidi's half of the house from her by December 2007.

The cash and the profit of the house will be divided at a ratio of 60 percent for Heidi and 40 percent for Sebastian. If the difference between Heidi's share and Sebastian's share after the division exceeds $60,000, then the remainder of the difference will be divided on a 50/50 basis.

As an advance of Sebastian's 40 percent Heidi will give him $10,000 by March 1 and $10,000 by April 1, 2007.

Legal status of this agreement

We regard this as a binding agreement.

We are aware of the fact that this agreement must be checked by our lawyers under German and California law. If our lawyers are of the opinion that anything should be added, we will seek a fair solution on the basis of this agreement. If need be, we or our lawyers will consult the mediators in this process.

We request that our lawyers shall turn this agreement into a mirror order within German and US jurisdiction finished by April 15, 2007.

Mediation clause

If there are any problems we will try to solve them through mediation before going to court.

Information

This agreement can be shown to our lawyers.

Berlin, February 3, 2007

was printed out and—upon Heidi's and Sebastian's explicit request—was signed by both parents and by us as mediators.

CONCLUSION

About six months after the end of mediation we received an e-mail from Heidi asking what they would have to do in order to change the arrangement for the following Christmas. In the course of the ensuing correspondence with Heidi and Sebastian we learned that both of them had fully implemented the final agreement: They had divorced, the assets had been distributed and all the arrangements made with regard to Adam had been put into practice as planned.

In the course of mediation, the integration of additional issues such as the distribution of assets

turned out to be quite helpful. Aside from the principal questions regarding their son, Sebastian and Heidi were able to negotiate the relevant issues needed to constitute a comprehensive and fair agreement. Such an agreement, however, was only possible with the sound counsel provided by the legal advisors in the United States and Germany, who actively supported the mediation process.

The fact that the mediation took place *prior* to the possible filing of Hague Convention proceedings and at the parents' explicit request proved to be a definite advantage. On the one hand, the situation was threatening enough to put the parents under pressure to act; on the other hand, it had not escalated to a degree which would have made any joint solution inconceivable. So, it was possible within a short period of time to create an atmosphere in which the parties—instead of fighting against each other—cooperated constructively in order to work out well-balanced and realistic solutions for the problems at hand.

NOTES

1. *www.bafm-mediatoin.de/international/deutsch/liste-der-international-taetigen-mediatorinnen/; [www.mikk-ev.de].*

2. FamRZ 2008, 753 f.

3. Hague Convention on the Civil Aspects of International Child Abduction.