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Family Mediation in International Child Custody Conflicts: The Role of the Consulting Attorneys

CHRISTOPH C. PAUL AND DR. JAMIE WALKER

Since 2002, the BAFM (Bundes-Arbeitsgemeinschaft für Familien-Mediation) has administered a network of mediators who help settle international conflicts involving bi-national parents and their children (in accordance with the *Hague Convention on the Civil Aspects of International Child Abduction (HCA)*). 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 Germany's Federal Mediation Association (*Bundesverband Mediation, BM*). The consulting attorneys take on a special role in this process, helping to guarantee that the legal framework will result in an outcome that is credible.

These cases always have high conflict. In addition to a disrupted relationship, 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 of the parents, which have far-reaching consequences for the contact between them and their children. Parents who abduct their own children—in Germany, 70 percent of abductions are carried out by women—are driven by despair. This frequently results in situations which both parents consider almost hopeless. These complications cause expenses that cannot be calculated in advance and which, in turn, cause fear. The longer the contact between the child and the absent parent is interrupted, the more difficult it becomes to restore without affecting the situation. The younger the child, the more likely it becomes for him/her to forget 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 between the 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/she may not receive fair legal treatment in the country of abduction, especially because he/she is often not a citizen of that country.

Christoph C. Paul was born in Germany and practices as a lawyer and notary, specialising in family law in the law firm Paul & Partner in Berlin. He has worked as a mediator since 1994 dealing mostly with family conflicts and inheritance issues. He is the speaker of the German Association of Family Mediation (BAFM) and works as a trainer. He is an expert in mediating international conflicts involving children such as abduction and custody cases especially involving Germany/UK and Germany/USA; and organises the network of mediators collaborating in these projects and exploring the potential of mediation in child abduction cases.

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 Mitte [Central Mediation Bureau] in Berlin.

AN INTERIM SOLUTION

First of all, an interim solution is sought (e.g., repatriation) until a final decision about child custody and visitation can be 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 sexes are required in order to take full advantage of co-mediation and to give both parents the opportunity to feel properly understood during the mediation. A further prerequisite for the composition of the mediation team is differing professions. Owing to the high level of conflict potential in such proceedings, one mediator should have a "psycho-social" or educational background, including a high degree of relevant experience. At the same time, such proceedings are closely embedded in a legal framework so that a substantial knowledge of the law is indispensable when outside 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 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 insight into the other culture.

CASE STUDY

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 parties by the conflict itself, which can take place in a narrow legal framework and may involve very different senses of justice. Mediation proceedings also take place in a limited period, which the parties experience as quite intense. To illustrate the characteristics of such proceedings, we would like to present a case we dealt with recently, focusing on the following aspects:

- preparation and framework for the proceedings
- dynamics, interventions and turning points in the process

- attitude of the mediators
- the role of the consulting attorneys
- conclusion and results of the proceedings

In 2003, a German married couple temporarily went to the USA for professional reasons. The marriage went through a crisis and the wife (Sabine) fell in love with an American (Daniel) whom she began to live with fairly soon after. 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 lived with her husband who is the child's father according to German law.

Daniel objected to Phil's move to Germany with his mother. He therefore commenced proceedings pursuant to the HCA with 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, then, two years after Sabine's departure from the USA, the Higher Regional Court (*Oberlandesgericht*) ordered Phil's repatriation. At the same time, the court advised the parents to look for a joint solution through mediation. Owing to the intense commitment of the working group "Child" at the Federal Ministry of Justice in Berlin, both parents agreed to pursue mediation. The Ministry's support was crucial insofar as the American lawyers had to be convinced that a mediation in the event of its breakup or failure would have no repercussions on further proceedings in court. Under German law, court proceedings can be resumed at any time and without any prejudice. A mediation agreement was concluded together with Sabine's and Daniel's lawyers. At the same time, a search began for mediators suitable for these proceedings.

PREPARATION AND FRAMEWORK FOR THE PROCEEDINGS

This kind of mediation is conducted under enormous time pressure due to court orders 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 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 the legal counsel and state authorities were held, and both mediators had to be available for several days at short notice to commit themselves to this mediation as much as possible. We had to turn schedules upside down to be available for four working days at short notice.

For family reasons and in order to document a certain neutrality, these proceedings were 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 over four days in a row and, overall, we mediated for 23 hours. Apart from individual discussions with the child's mother, we carried out the entire mediation in English.

DYNAMICS, INTERVENTIONS AND TURNING POINTS IN THE PROCESS

The tension between the parents became obvious from the moment of welcome. In the course of the early phase, 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. During the process, 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 high level of conflict and the short time available to us, we held individual discussions with the parents (e.g., on clarifying fears, anxieties and hopes and on clarifying alternatives if the mediation should fail). In these individual discussions, both mediators always talked to each party. 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 discussions as "reality checks", could

talk about confidential matters with the parents and confront them with the possible consequences of certain types of behaviour and decisions.

The "Reflecting team" proved to be another effective intervention which we used spontaneously or as we deemed necessary. In this method, the mediators exchange their views on the case in the presence of the parties. We used the "Reflecting team" in highly tense moments in order to draw attention to the dynamics of the conflict and to introduce our own perspective from a distance adding a touch of humour where possible. We knew from experience that the "Reflecting team" released thoughts on the part of the conflicting parties, which had previously been buried.

After two days of intense mediation and a short agreement on how to arrange the father-child-contacts until the father's departure after the conclusion of mediation, we had a one-day break, which had become necessary due to outside events. Later, this occurrence turned out to be extremely helpful: the break eased the tension and enabled the parents to enter into more relaxed communication with each other, including Daniel, 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 a 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 with 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 gained insight into the dispute and the sorrow. 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—withstanding 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.

THE ATTITUDE OF THE MEDIATORS

As in every mediation, not only our interventions, but also our attitudes, eventually proved

decisive. We could not help forming, beforehand, an impression of the parties and of their situation. At the same time, we remained open and willing to abandon our first impressions when we got to know Sabine and Daniel and began to cooperate with them. Fortunately, we were dealing with two people seriously striving for the well-being of their joint child. In contrast to the controversial court proceedings about Phil's repatriation to the USA, we could, in the course of mediation, 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 for the parents to vent their anger and express their sorrow before they could be open to an arrangement which focused on both the child's and the parents' interests.

THE ROLE OF THE CONSULTING ATTORNEYS

As the child's repatriation to the USA was merely suspended during mediation, a final agreement had to remain strictly within the existing legal framework. In the preparatory discussions, we had already indicated that the parents could also have contact with their attorneys during the mediation process. This was particularly important for the American father so that he could be sure of the support of his American attorney during the entire process. While clarifying the "best possible alternative" or the "worst alternative", both parents needed to be informed by their attorneys how the possible scenario would look if the dispute was pursued in court. In addition, this mediation took place within the framework of two legal systems, that success would be elusive without profound support by the attorneys. The American father needed to know the status not only of his American, but also of his German, legal position. It was important for the German mother to have the advice of a German lawyer as well as answers to questions about entering the USA with Phil and in particular about securing an unrestricted departure.

In the mediation sessions—the individual as well as the group sessions, we asked both parents to clarify all of these issues with their attorneys and get advice. To our great relief, both parents had attorneys who supported the process and exercised professional discretion.

On the third day, we formulated the agreement in the parents' presence, noted it down at once in a laptop and subsequently forwarded it to the lawyers for any desired changes. The recommendations of the German and American attorneys could be worked into the agreement immediately. Then the finishing touches were added, and at the end of the fourth working day, both parents signed the agreement.

CONCLUSION AND RESULTS OF THE PROCEEDINGS

The agreement between the parents stated that, for the time being, the repatriation order would be suspended until the next summer and that Phil would stay with his mother until then. The father would visit Phil regularly in Germany, and in May 2007, Phil would travel with his mother to the USA for a one week visit with his father. Moreover, arrangements were made for financial support and for Phil's learning English. It was also finally agreed to continue mediation the next summer in order to work out a final solution.

At the end of the mediation, all parties were relieved or even euphoric. After all, at the beginning of the mediation it was totally unclear what the outcome would be. Of course, the agreement had to be cleared with the respective lawyers, in order to enable them to place it in a legal framework. However, it was both parents' explicit wish that both American and the German lawyers accept the agreement as it was and not add points that had not been covered in the mediation. 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 intensified the situation, and mediation "would be the only realistic way in such a case".

This result was only possible because of the willingness for cooperation not only of the parents, but also because of the support of all professionals who participated in the process, namely the court and the consulting attorneys. The legal framework gave the process the necessary stability that was particularly important after so many years of dispute.