



Litigious Love:
Same-sex Couples and
Mediation in the European Union



Funded by the Civil Justice
Programme of the
European Union

Maria Federica Moscati

SAME-SEX COUPLES AND MEDIATION
a practical handbook





Disclaimer

This publication has been produced with the financial assistance of the European Union, DG Justice, Specific Programme Civil Justice 2007-2013, Grant agreement JUST/2013/JCIV/AG/4667.

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Litigious Love – Same-sex couples and Mediation in the European Union

Project coordinator: Maria Federica Moscati

Author: Maria Federica Moscati

Author of the glossary: Anna Lorenzetti

Partners:



Graphic Design: Flavia Pellegrinelli

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First published in electronic form in February 2015. Available at:

<http://www.litigiouslove.eu>

<http://www.retelenford.it>

www.zagreb-pride.net

<http://en.hatter.hu>

<http://www.bnhre-bg.net/>

ACKNOWLEDGEMENTS

This book could not be possible without the support of the DG Justice of the EU Commission.

Most heartfelt thanks are for Professor Michael Palmer for his precious suggestions on the draft version of this study, and for Anna Lorenzetti, Giacomo Viggiani, Maria Grazia Sangalli and Michele De Chirico for their friendship and invaluable advice. Gratitude goes to *Avvocatura per i Diritti LGBTI - Rete Lenford* for encouraging and supporting the project. Thanks and appreciation go also to the following lawyers, mediators and other informants who kindly agreed to share with me their much valued experience: David Allison, Robin ap Cynan, Allan Barsky, Gill Butler, James Carroll, Emily Doskow, Mylo Egipciano, Frederic Hertz, Richard Hogwood, David Josiah-Lake, Patricia Muzalewski, Dominic Raeside, Richard Roberts, Isabel Robertson, Laura Ronn, Judith Scott, Ruth Smallacombe and Eric Watterson. My sincere gratitude is also extended to Sarah Lloyd and Laura Mackey for helping me to disseminate ideas about the project, and to manage the call for interviews.

I wish to thank all the partners and participants in the project *Litigious Love: Same-Sex Couples and Mediation in the EU*: Professor Barbara Pezzini, Borislava Daskalova, Vladislav Pektov, Marko Jurcic, Natalija Labavic, Tamás Dombos, József Kárpáti, University of Bergamo, Hatter Society, Zagreb Pride, Bulgarian Network for Human Rights Education, Scuola Superiore dell'Avvocatura.

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INTRODUCTION

This Handbook is a result of the research carried out during the development of the project *Litigious Love: Same-Sex Couples and Mediation in the EU*. The project, coordinated by an association of Italian lawyers – Avvocatura per i Diritti LGBTI - Rete Lenford¹ –, started in March 2014 aiming at broaden the mutual understanding among judges, lawyers and mediators in the area of dispute resolution mechanisms involving same-sex couples in selected jurisdictions of the European Union.

The Handbook is addressed mainly to mediators and legal practitioners interested in the study of ADR (Alternative Dispute Resolution) and family mediation as well as to students and researchers concerned with issues and debates related to the rights of lesbian, gay, bisexual, transgender people.² Given the often multi-disciplinary nature of the study of disputes and dispute resolution the Handbook

1 The other partners of the project are: University of Bergamo, Hatter Society, Zagreb Pride, Bulgarian Network for Human Rights Education, Scuola Superiore dell'Avvocatura.

2 Hereinafter LGBT.

should be easily understood by those not familiar with law.

The aim of this Handbook is twofold: first, to examine the nature of intra-family disputes between same-sex partners and the manner in which such disputes are resolved through mediation. Secondly, the study seeks to provide a practical opportunity for professionals of different disciplines to develop more grounded and effective understanding of the nature of disputes between same-sex partners, and of the issues involved in the resolution of such disputes.

Family mediation is an area of study which has attracted important debates concerning for example, 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, how this disputes are resolved, power imbalances between same-sex partners, and the differences between same-sex and heterosexual partners – tend to receive limited attention in the literature, and this should be cause of concern for legal scholars, mediators, lawyers and judges.

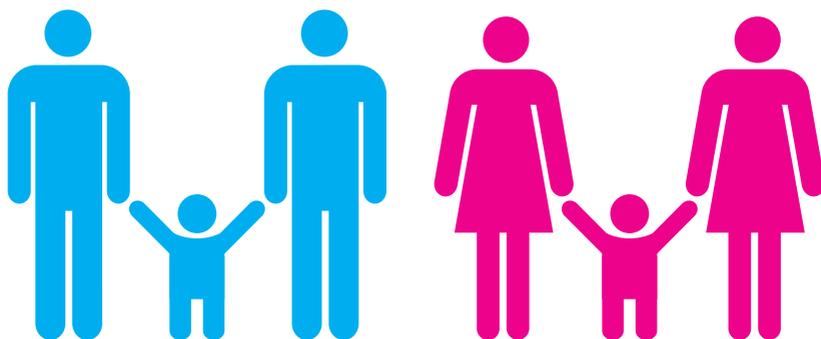
The present Handbook intends to fill this gap and takes a practical approach to the key topics and issues involved in mediation as means for the resolution of disputes between same-sex partners. Providing a comprehensive and easy-to-use guide to the subject, the Handbook focuses on nature of disputes; the role of mediators; and selected issues to be considered during mediation. However, it is not aim of this study to offer a final and generalised overview on the subject.

Methodological and theoretical considerations

The study is firmly based on a selective analysis of empirical and non-empirical data on same-sex couples and their disputes. Data have been obtained from a number of primary and secondary sources, both legal and non-legal. Overall, the Handbook is informed by the general literature on ADR, and family mediation. However, and especially given limited data and resources which specifically deal with same-sex couples and mediation, the present Handbook mainly relies upon empirical data collected by the author during fieldwork semi-structured interviews with mediators and lawyers who practice collaborative law and mediation in England and in the United States. Interviews were conducted from January 2014 to February 2015 through face-to-face meetings, or during Skype consultations. Although the interviews were based on a list of pre-determined questions, each contributor was encouraged to propose further questions and comments, and to focus on a preferred issue. In this sense, the interviews may be said to be 'semi-structured'. Each interview was audio taped, transcribed into print and mediators and lawyers checked the quoted answers. Data has been evaluated from a qualitative perspective. In an effort to present a comprehensive overview of theory and practice, the Handbook presents extracts from the interviews collected during the fieldwork. In addition, some real life same-sex disputes are included in the Handbook. In these cases the name of the parties involved have been changed or concealed in order to protect their privacy.

The theoretical framework adopted in this study includes consideration of discourses and developments of access to justice and

alternative dispute resolution. In particular, the Handbook underpins three well-known approaches to the recourse to alternative dispute resolution. First, the role of the mediator is essentially to facilitate the communication between disputants (Gulliver, 1977). Secondly, disputants should have the possibility to choose among a variety of dispute resolution mechanisms (Cappelletti and Garth, 1978). Mediation, in particular cannot be considered suitable and feasible for all types of dispute. Finally, procedural reforms should be enacted together with reforms of substantive law (Cappelletti and Garth, 1978). The last two aspects are particularly significant with regard to same-sex partners. In the case of same-sex couples, a formal legal recognition of same-sex marriage represents the necessary stage for subsequent legal reforms to Civil Justice aiming at introducing mediation as one of the means for the resolution of family disputes. As this study shows further, in those jurisdictions in which same-sex unions are not legally recognised, mediation represents the only instrument for dealing with intra-family disputes – it is a substitute for the court system.



As far as the literature on mediation between same-sex partners is concerned 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 author of this study has analysed elsewhere the current literature (Moscati, 2014), and it suffices to summarise here that Hertz, Wald and Schuster (2009) and Barsky (2004) have filled a gap in the literature by highlighting several characteristics of mediation for same-sex couples. In particular, Hertz (2008) points out that in the case of same-sex couples the mediator has to be aware of the new challenges that different legal frameworks create. As a result of the changes in the legal sphere, the mediator should be not only well-prepared regarding legal issues, but must also be aware of the expectations that same-sex couples have. In addition, Barsky (2004) emphasises the need for specific attention on the manner in which mediators should approach specific issues related to same-sex couples. The work of and the interviews with Hertz and Barsky, together with the interviews to other mediators, lawyers and same-sex couples, represent significant premises which the presented Handbook starts from.

How to read the Handbook

The book is divided into two parts. Each part can be read as a stand-alone contribution, and attempts to explore various dimensions of disputes and mediation involving same-sex partners. Part A of the study looks at the sources of dispute between same-sex partners, the mechanisms same-sex couples may choose in order to resolve their disputes, and the role that mediators, lawyers and judges play in dealing with disputes between same-sex partners. Part B focuses on the mediation process. It starts an evaluation of the extent to which mediation represents a suitable and feasible method for the resolution of the disputes between same-sex partners. It then considers some selected legal and procedural issues related to mediation and same-sex couples.

PART A:

DISPUTES AND DISPUTE PROCESSES

Sources of dispute between same-sex partners

Intra-family disputes between same-sex partners are considered here as typically polycentric disputes (Fuller, 1971) presenting multiple issues, involving multiple parties, and creating multiple consequences. Such polycentricism often depends on the variety of family structures same-sex partners create and experience – there are intimate relationships based on more than two partners – or in sharing parenthood beyond biological ties. In other cases, the polycentricism depends on whether and how same-sex unions are legally recognised. Indeed, it is the different legal recognition that same-sex relationships and same-sex parenting receive which imposes outputs and consequences to a dispute that are not always entirely supported by law.

Therefore both the nature of disputes and the availability of dispute resolution mechanisms differ significantly depending on jurisdictions and time. For instance, as the Handbook shows further,

some causes of dispute are related to issues external to the couple, such as the lack of an effective legal framework protecting same-sex couples, or social pressure.

A dispute between same-sex partners or/and between same-sex parents can arise from a variety of sources, not always depending only on the partners themselves, and not always ending with a break up. As Felstiner, Abel and Sarat (1981) have pointed out, disputes do not occur in a vacuum, are socially constructed, and are often complex in nature. Therefore political, legal, moral and cultural changes may have influenced relationships, have caused disputes, and have an impact on the way in which the disputes between same-sex partners and parents are best resolved (Barsky, 2004).

Indeed, 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 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 (Hertz et al, 2009; Hanson, 2006; Barsky, 2004; Gunning, 1995; Astor, 1995).

Before we proceed to a more detailed analysis of the sources of disputes between same-sex partners, the reader not familiar with the socio-legal development of same-sex unions, and disputes between same-sex partners, should be acquainted with some relevant aspects concerning the disputes and consequences of disputes and break-ups which create differences with heterosexual couples.

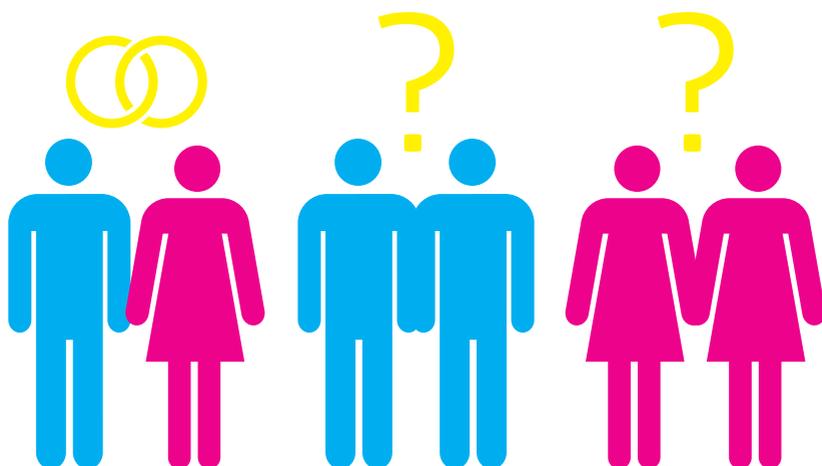
A major difference is to be found in the lack of homogeneous legal recognition for same-sex unions. As Frederick Hertz suggested during an interview with me:

“In a conventional mediation the legal framework is not in dispute. Everybody knows what court to go to; everybody knows which rules of law apply, everybody knows how the trial will happen, and then people argue on a factual dispute with an agreement upon a legal framework. This is the assumption that mediators have and that parties in mediation share: the framework is agreed on, but the facts are in dispute. Well, in almost all same-sex disputes the framework is in dispute because you have people who say we are legally married, but this should not matter because we did it for political purposes or you can have disputes where the partners were not able to get married due to homophobic laws. In addition, you can see in a systemic way that the range of possible outcomes is so much greater in a same-sex dissolution because the boundaries are in disputes whereas in a heterosexual divorce the boundaries are decided by law. or instance, you have couples who went to Canada to get married and at that time their marriage was not recognised in their home country, but then after few months their marriage is recognised in their country. Or they live in Italy and got married in New York. Or they got married after 15 years of cohabitation and that cohabitation is not covered by marriage law.

Mediators should understand that when the framework is in dispute the mediation is more difficult.”

In addition as Barsky pointed out during the interview with me:

“There are actually more commonalities than differences between same-sex and different sex couples. All separating parents have to deal with a complex set of emotional, legal, financial, and parenting issues. So, differences should not be overstated. In terms of legal context, a lot depends on the jurisdiction in which the partners live. Some jurisdictions recognise same-sex relationships, and some jurisdictions do not. In some jurisdictions, a non biological parent may not have standing to go to court and only the biological parent is recognised as having legal rights. Therefore in cases where only one parent has legal standing, the non biological parent has few legal options. The non biological parent might want to go to mediation, but the biological parent could simply refuse to mediate.”



It might be argued that since the law in several jurisdictions does not recognise cohabitation between heterosexual partners, the latter therefore would face the same issues as confront same-sex partners. However, it would be a naïve mistake to think that the lack of legal recognition has the same impact on *de facto* heterosexual couples and same-sex couples – indeed, heterosexual partners can still exercise their choice to get married whereas same-sex partners do not have such choice.

Secondly, regarding the sources of dispute, there are a few significant differences between same-sex couples, and heterosexual couples. As this section explains below, main differences are seen regarding parenting and inheritance disputes and in disputes based on divergences regarding coming out, high expectations (Hertz 2008), homophobia, and the manner in which sexual orientation is performed.

In particular, because of the variety of family structures, and the variety of ways in which children are conceived new sources of dispute generate. These new sources of disputes represent challenges to the patriarchal model of family structures, expectations and division of responsibilities within the family. For instance, in financial disputes between same-sex partners the recurrent dichotomy between man expected of being bread winner and woman as taking care of the house is not found.

Therefore in dealing with intra-family disputes, it is important for mediators, lawyers and judges not to assume that family structures are based on the heterosexual paradigm of the union of a man and a woman; and not to take for granted an automatic application of the law regulating separation and divorce between married heterosexual

partners, or of those laws which recognise same-sex unions in other jurisdictions (Barsky, 2004; Felicio and Sutherland, 2001; Freshman, 1997). There are jurisdictions in which same-sex couples may marry and divorce following the same rules as heterosexual couples; there are countries in which same-sex unions are entitled to limited rights only; and there are jurisdictions 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.

Thirdly, 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 in a relationship (Hertz, 2008) in trying to regulate the consequences and effects of the relations in the lack of the legal framework.

Finally, discrimination influences such disputes. As Allan Barsky advised during an interview:

“Same-sex couples experience discrimination even in simple things such as enrolling their children for school and the school requires a signature from ‘mum’ and ‘dad’.”



Moving to specific sources of disagreement and dispute, the scenario that presents itself is varied and may well include:

Financial disputes:

these include money, and property, and division of common assets; maintenance of one or more partners; financial support for children (children of one or of both partners). Often same-sex partners create own financial arrangements which might be very different from those the law provides, and also very different from the popular idea about division of responsibilities within the family.

Case study from fieldwork: *Gay couple: the rich partner was furious because for ten years his boyfriend tried to make money as a broker but he didn't succeed. During the mediation the rich partner said 'I was against you starting a career as a broker. Now you don't earn so much money and you want me to pay alimony. I am sure that no heterosexual couples would have shared their money in that way.'*

Comments of the mediator: *What was interesting in this dispute was that the partner with lower income was totally ashamed of his situation; he knew that legally he had a right to alimony but unlike many heterosexual women, he was conflicted between his sense as a man who should support himself, and his need for money. So when things became very intense in*

the mediation he would break down in tears. In this situation one of the issues was: could he negotiate without his lawyer being present – not because he was incompetent – actually he was very competent – but because the specific contradictions between his sense as a man and his role in this relationship, and the contradiction between the roles, the social, the legal and the emotional roles. And at various points I had to meet separately with them because the level of anger they had. I had also a critical point in which I had to talk with the lawyers.

Case study from the fieldwork: *A gay couple had been together for 22 years, and are in a registered civil partnership. They separated 6 years after the registration. One partner is 65, is retired and does some part-time work as a garden-designer. The other partner is 47, works in marketing and earns 150,000 [...] a year, purchased the family home and another large flat, and also financially sustains his partner.*

Comments of the mediator: *this dispute presented strong power imbalances based on the different ages and income of the parties. This dispute was not appropriate for mediation because the issues were very technical, and therefore an agreement was reached through negotiation between the parties' lawyers.*

Inheritance disputes:

the issues in this type of dispute can arise: a) when two or more same-sex partners plan what to include in a will; b) between the surviving partner and the family of the deceased partner, in which case there may well be legal issues about inheritance law, as well as emotional issues regarding whether the family the deceased knew about the deceased's homosexuality and about the existence of the same-sex partner; c) when there are more than three same-sex partners who were all financially sustained by the deceased and expect to be entitled to inheritance; d) when there are differing kinds of family and personal relations involved: the interested parties may include 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.

Case study from fieldwork: *A lesbian couple had been together for ten years. They bought a house together, and shared all daily expenses. They never signed any agreement dealing with the consequences of their relationship, nor produced any wills. One of the partners suddenly died in a car accident. After her parents learnt about the accident, they met her partner for the first time. A dispute started about the appropriate role of the same-sex partner of the deceased subsequent to the accident, and about financial issues. Eventually the surviving partner and the parents of the deceased attempted mediation.*

Comment of the lawyer-mediator: *This scenario presented legal and emotional issues. During the pre-mediation meetings I helped the parents to deal with their daughter's homosexuality first, and then to get them to understand better the role of her partner and the nature of the couple's relationship. At the same time as supporting the surviving partner in dealing with prejudice I worked hard to get her to accept the differences between her perceptions as a partner entitled to part of her deceased partner's assets and the strict legal position (in which she had no entitlement).*

Addiction to drugs or alcohol:

disputes arise from the use of drugs or alcohol *per se*, and from the consequence of the use of drug or alcohol on the relationship including domestic violence, and involvement in intimate relationships with other partners are common problems.

Open-relationship:

the cause of dispute can lie in the disagreement which partners might have on whether to allow an open relationship; or a dispute arises because of the divergence on the choice and characteristics that the new partner/s must possess. In addition, competition for the attention of others represents an important source of dispute (Blumstein and Schwartz, 1983).

As Robin ap Cynan suggested during an interview:

“Disputes can arise when one partner wants a closed sexual relationship, and the other wants to open it out to involve third parties. Tensions can emerge since:

- *one partner may be comfortable remaining monogamous whilst the other looks elsewhere for sex;*
- *both may wish to look individually for sex outside their principal relationship (whether or not they continue with their own sexual relationship);*
- *both may want group sex together.”*

Taxes:

these disagreements can include tax planning, and payment of taxes.

Just growing apart:

this happens, as in the case of heterosexual couples, simply because love ends, not necessarily because of cheating.

Coming out:

this includes cases in which one of the partners prefers not to reveal his or her homosexuality and the other partner encourages the 'coming out'; and cases in which one of the partners discloses his or her bisexuality, or gender identity, or expresses his or her desire to undergo gender reassignment.

Barsky: *Outing can be a source of conflict for same-sex couples. Partially, it depends on the jurisdiction and on the social acceptance of homosexuality.*

The way in which each partner expresses his or her sexual orientation and gender identity:

partners might have differing ideas on whether and how sexual orientation should be conveyed. Disputes may occur when one

of the partners indulges in stereotypical behaviour and attitudes linked to homosexuality; or when one of the partners follows the stereotypical model of heterosexual masculinity and femininity and rejecting ‘everything that is too gay.’³

Gender identity post gender reassignment:

this type of dispute involves former heterosexual couple in which one of the partners undertakes gender reassignment or same-sex partners and one of them wishes to undertake gender reassignment.

Case study from the fieldwork: *Elena (formerly Pietro) is 75 and Anna is 56. They married in 1990 and have been separated for several years. Elena had a gender reassignment a few years ago. Elena has not seen their two children, Davide and Ambra, for three years and the first mediation meeting was the first time Anna had seen Elena following her gender reassignment. Elena has a son, Gianni, from a previous relationship and they meet regularly. Anna did not feel that it was her role to encourage contact between ‘his child and his father’ and commented that if the child wrote to Elena then the child would not know to whom to address the letter. Elena also suggested that a good term of address might be ‘Dad’.*

3 From fieldwork 2014. Interview with a same-sex couple.

Comments of the mediator: *this dispute presented issues regarding gender identity; and children. The focus on the best interests of the children contributed to the mediation processes by helping the parties to talk to each other, and limiting anger and rancour. Nevertheless, the mediation failed to resolve the differences between the parties.*

Homophobia and Biphobia:

disputes may arise because of the internalisation of external homophobia and biphobia causing same-sex partners to dislike and to resent their sexual orientation; or there is an external hostile and homophobic environment which perhaps directly influences the relationship between the partners.

HIV/AIDS:

the disease does not represent a source of dispute per se; instead the way in which the disease has been contracted, and the effects that the disease have on the couple (Barsky, 2004).

False expectations:

as Hertz points out, the introduction of a new legal framework for same-sex unions may itself create legal and practical issues (2008). The new legal framework may not correspond to the personal per-

spectives of the disputing parties. On the other hand, there may be some sort of resentment because of the lack of a legal framework within which there could be recognition of the relationship. Sometimes, because same-sex unions are recognised in several jurisdictions, same-sex partners in jurisdictions that do not recognise same-sex unions might nevertheless expect to be protected (in some respects at least) in cases of dissolution of their relationship. Some partners may feel that their duties and rights in the couple should be the same as those of a married couple, but the anxiety created by the consciousness of being outside the law can ferment disputes between the couple. There are also strong symbolic beliefs in the value of marriage, and often these are not confirmed by real life experience.

As Butler suggested during the interview:

“There are some break ups after very short civil partnerships. Perhaps because partners have too many expectations of ‘marriage’.”

Parenting disputes:

the variety of mechanisms adopted to conceive children and the variety of parenting arrangements make parenting disputes between same-sex partners diverse and distinctive (Hertz et al, 2009; McIntyre, 1994; Emnett, 1997; Gunning, 1994). Disputes may and do occur, for example, between two biological homosexual parents (one lesbian mother and one gay father) who might not be partners and just decided to conceive and bear a child; between two

biological parents (lesbian mother and gay father) and the non-biological parents (former and current same-sex partners of the biological parents); between the biological parent and the other parent (who is of the same-sex); between a child's two mothers and the sperm donor; between the two gay parents who have mixed their semen for the insemination; between gay parents and the surrogate mother; and between grandparents and the parents.

Causes of such disputes over children include making a decision on whether to have a child; who in the couple will donate the sperm, or will be the gestational mother, and how and with whom to conceive. In addition, disputes arise regarding the role played by non-biological parents; about contact, residence, 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 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 may arise between biological and non-biological parents.

It must be emphasised that in this type of dispute the best interests of the child is the overarching and leading principle that should inform the resolution of the dispute. In addition, even if the law does not recognise all the parenting structures that same-sex partners have created, nevertheless mediation has the great advantage that it offers all parties

the involved a processual forum with which to express their voice. During the mediation, the mediator should encourage biological and non-biological parents to discuss and analyse the contradiction between what is the parenting arrangement in place, and what the law says.

As the following mediators observe:

Raeside: *Difficulty does indeed arise when the various parents have different expectations regarding their role and rights.*

Smallacombe and Allison: *The level of care that partners have been giving to children might represent source of disputes.*

Case study from fieldwork: *Elva and Maria were in a relationship and their friend Michael agreed to donate his sperm to Elva and father a child. The child is Evan and he was born 12 years ago. A dispute arose in due course over access to Evan between Michael and Elva. Michael was with Robert at the time of the birth. All four parents (biological parents and the partners of the biological parents) participated in Evan's life. In 2007 Elva and Maria separated and through mediation they agreed for Maria to meet Evan every week on Thursdays, and alternate week-ends. In 2008 also the friendly relationship between Elva and Michael deteriorated and court proceedings started because Michael now had no access to Evan.*

The court issued a contact order for Michael so that he could continue to meet Evan. In 2009 Elva started a new relationship with Joanna and they moved to another city bringing Evan with them, and had a daughter (with the assistance of an unknown sperm donor). Elva refused to comply with the court-order in favour of Michael. In addition Elva limits contacts between Evan and Maria. Maria has filed a case requesting a contact order in favour of Michael. In addition Elva limits contacts between Evan and Maria. Maria has filed a case requesting a contact order in respect of Evan for herself. Elva then asked Maria and Michael to attempt mediation.

Comments of the mediator: *This dispute presented several important issues to deal with: parenting; children; court-proceeding; distance. This case required several mediation meetings: one-to-one meetings with each of the parents; joint meeting between biological parents; joint meeting with all parents involved. Court proceedings were withdrawn and limited contact (agreed in mediation) has re-started. A review mediation meeting has been arranged in 6 months time.*

Case study from fieldwork: *two lesbian partners and two gay partners decide to have children together. They agree to conceive children, mixing the semen of both men and then artificially inseminating both women. The plan was to have two children born together with four parents. However, only one child was born, and all four adults then played full parenting role in the life of that child. No written agreement regarding contact was signed by the parties. When the child was three the relationship between the four parents deteriorated and the parents decided to attempt mediation in order to resolve the differences between them.*

Comments of the mediator: *this dispute presented important legal issues regarding the recognition of parenting rights and duties. The mediator made the disputants aware that their common priority was the best interests of the child, and reminding them of this value helped the parties to agree on shared contact.*

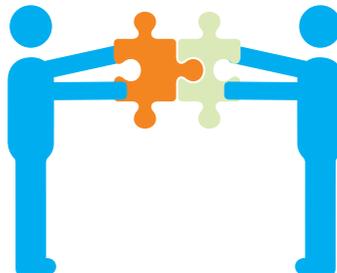
A mix of sources: children, money, bisexuality, drug abuse

Case study from fieldwork: *two lesbian partners decided to have child. One of them – who was also the most wealthy partner – conceived the child with her former fiancé. According to a non-written agreement between the three adult parties, the child would be raised by the two mothers without knowing who the father was. After the birth of the child the biological mother told her same-sex partner that in fact she was in love with the biological father of the child and wanted to start a polyamorous relationship with him while continuing living with her lesbian partner. The lesbian partner felt devastated and very insecure and asked the biological mother to attempt mediation so that their differences might be resolved.*

Dispute resolution mechanisms adopted by same-sex partners

The expression ‘fitting the forum to the fuss’ was coined by Sander and Goldberg (1994, 49) to refer to the search for the most appropriate resolution process for a particular dispute. Several different factors, including the characteristics of the case, and the goals and the characteristics of the parties (Sander and Rozdeiczer, 2005) need to be taken into account in choosing the most appropriate process. Matching cases and dispute resolution procedures should perhaps be the most important aim of a dispute resolution system, yet such a goal is never easy to achieve.

Moreover, in order to fulfil this goal, it is important also that there exists a legal framework entitling individuals to vindicate their rights. It is often the case that it is only when there are legal provisions protecting those rights that have been infringed that the parties to a dispute are able to freely decide whether, and how best, to resolve their dispute. In fact, in the case of same-sex couples recourse to settlement has been, and still, is the only choice in those jurisdictions that lack a legal framework that recognises and regulates same-sex unions.



Depending on the availability of particular dispute resolution mechanisms that each jurisdiction offers, same-sex couples may use several means for the resolution of their disputes. These mechanisms include:

Mediation:

a third neutral and impartial party – the mediator – facilitates the communication between the disputants. In the mediation the parties retain control over their dispute and over the process reaching an agreement by them (Roberts & Palmer, 2005).

Counselling:

mental health intervention based on talking therapy during which a person talks about his or her problems and feelings.

Family Therapy:

considers the family as being the source of pathology and aims to adjust ‘dysfunctional behaviours. It does this by challenging the organization of the family in such a way that the perceptions and experiences of the family members change. The basic assumption of family therapy is one of dysfunction, possibly psychiatric, in the family that requires treatment’ (Roberts, 2014: 25).

Negotiation by lawyers:

lawyers negotiate on behalf of their clients, and the parties do not participate in the negotiation (Roberts, 2014).

Collaborative law:

there are a number of forms that collaborative law may take in practice. The basic model is two clients and two lawyers. But other professionals may be involved according to the needs of the parties. The parties in a dispute attempt negotiation with the support of lawyers. A contract is signed between the parties and the lawyers that binds them to a process of working together towards an agreement. In the event the negotiation fails, the contract to collaborate specifies that neither of the lawyers, nor any member of the lawyer's law firm can represent either party in a future court application (Moscati, 2014; Lande, 2006).

Several factors may be involved when same-sex partners are choosing between mediation and other mechanisms:

Allison: *Well, money might be one aspect and as mediation tends to be cheaper this may have an influence – even though it shouldn't be the main reason for choosing mediation. 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.*

Often same-sex couples follow a pathway inclusive of all or several of the above mentioned methods. It appears from research that if the dispute is about finance or other quantitative goals, then collaborative law and negotiation by lawyers are preferable.

In addition to the resolution of disputes, mediation and collaborative law are considered useful also to prevent disputes or to set the rules for future possible disputes. The number of same-sex couples who sign pre-nuptial agreements, post-nuptial agreements, contracts of cohabitation, and sperm donor/parenting agreements in order to regulate financial and personal consequences of future separation, is increasing. Decisions about the final agreement can be made with the help of a mediator or a lawyer. A lawyer can intervene at a second stage, when the parties have already agreed on the basic contents of the agreement (Bryant, 1992).

Why do same-sex couples choose mediation?

Since the end of 1970s the reasons inspiring same-sex couples to choose to use mediation have been, and still are, various. Together with the well-known general advantages of using mediation such as informality, protection of privacy, lower costs and the opportunity for the parties to control their disputes, (Roberts and Palmer, 2005) the recourse to mediation is encouraged by some specific reasons.

First, mediation might be the only way to resolve an intra-family disputes between same-sex partners. In jurisdictions in which same-sex unions are not legally recognised same-sex partners may only choose mediation or other out of court mechanisms in order to deal with intra-family disputes primarily because the courts will not hear such cases. This of course represents a significant difference with opposite-sex couples, creating several issues of violation of the right to access to justice. It also means that mediation may play a crucial 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.

Secondly, even when access to courts is possible, same-sex couples prefer mediation because of apprehension about homophobia in the court system, including amongst lawyers and court officials.

Thirdly, mediation has been chosen because it has been instrumental in giving value to family arrangements other than those based on opposite-sex marriage (Emnet, 1997) with the effect of empowerment of the entire LGBT community (Hanson, 2006).

Finally, more recently besides personal choices, another impulse to the use of mediation derives from law. Indeed, since the 1970s with the increasingly extensive corpus of laws protecting LGBTI people from homophobia and trans-phobia, and also the legal recognition of same-sex unions, the recourse to mediation is often legally framed. For instance, in jurisdictions where same-sex couples can register their unions, the resort to mediation and other ADR mechanisms is suggested and defined by statute law.

There is, however, in the opinion of the author of the present Handbook, another reason encouraging the use of mediation. This is to be found in the cuts to legal aid for legal services in court that several jurisdictions have introduced during the last five years. Availability of legal aid only for mediation means that in practice mediation is – albeit, indirectly – made compulsory.

In answering a question regarding the reasons inspiring same-sex couples to opt for mediation, mediators and lawyers pointed out in the interviews with me:

Raeside: *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.*

Smallacombe and Allison: *Couples may decide to mediate to keep a control of costs or process and because they do not want to go through court case. They may not wish to involve lawyers in their private discussions particularly where emotions are high; and also because they have children and are very focused on children. They often hope for a better deal for everyone in mediation.*

Although things have changed over the years in terms of acceptance of same-sex relationships many same-sex couples come to mediation preferring the flexibility of the process and a more confidential setting in which their families would not [be morally] judged – in the 1970s, the court system was terribly hostile to such couples and although this has changed the court process can still feel very unfamiliar with the issues they face.

Muzalewski: *Judges have suggested mediation.*

Anonymous mediators: *Couples were directed by judges, or by their lawyers, to attempt mediation.*

Together with investigating the reason for the recourse to mediation, interest arises regarding the reasons for same-sex partners to avoid mediation. During the fieldwork some same-sex couples (who prefer to remain anonymous) were asked to explain the reasons for choosing or not choosing mediation.

Why did you choose mediation: (Answers from the fieldwork)?

- “We needed to come to an agreement that respects our nuclear family.”
- “We wanted to avoid another court hearing.”
- “She has refused to comply with the contact order of the court. I hope that during mediation we will find another solution.”
- “I am here because he [the other partner] has asked me.”
- “We need privacy.”
- “We went through counselling first and the counsellor suggested that we try mediation.”
- “It is the only way to get legal aid.”

Why did you not choose mediation?

- “We are not married, why should we go to mediation?”
- “I thought the issue was not that serious.”
- “We did not want the involvement of anyone else.”
- “Well, I do not know what mediation is.”
- “We were good with the break up – we are not in love anymore – but we needed help with the division of our properties. And our lawyers suggested collaborative law.”

Judges, lawyers and mediators

Judges, lawyers and mediators all play important roles in the resolution of family disputes, including disputes between same-sex partners, and same-sex parents. It is possible that all three types of professional will be involved in the resolution of a single dispute. Therefore some common guidance should be followed when dealing with intra-family disputes between same-sex partners.

The overarching principle is avoiding assumptions about family structures, the roles of partners, and the identity of parents. Same-sex partners can have their own ideas of what constitutes a family and a relationship, which in several jurisdictions do not receive legal recognition. Therefore mediators, judges and lawyers should not approach same-sex relationships as if such relationships were similar to heterosexual marriage and certainly should not approach the dispute with the goal of ‘recreating’ a relationship similar to heterosexual marriage.

Furthermore, as they would in disputes between heterosexual partners, mediators, lawyers and judges should try to liaise, to take into account all issues surrounding the disputes including non-legal aspects; to furnish precise and detailed information regarding several dispute resolution mechanisms, to listen to clients and to ensure confidentiality.

During the interviews, mediators and lawyers were asked to answer the following question: **What would you suggest to a mediator who is handling a same-sex dispute?**

Answers:

Anonymous mediator: *Don't assume anything!*

Hertz: *First, learn the legal history of your particular state and know it, so you can tie it into the personal history of your clients. For example there were couples who got married in San Francisco in 2004 but those marriages were invalidated, then they got married in 2008 and those marriages were appealed, then there are couples who didn't get married because they were out of town.*

You need to know the history for the topography of marriage, so that clients will respect you.

Second, take seriously ethical issues of one homosexual taking advantage of the heterosexual bias in the law – especially where marriage was not recognized or allowed – and how devastating this might be for the other partner.

Thirdly, learn about power dynamics that are different from those between straight partners.

Finally, open your mind up about gender role expectations, including a range of emotional behaviour. Most straight couples going to divorce accept the legitimacy of the legal system for adjudication of their divorce; they know that they have to go through the legal system ('divorce is not just up to you two'), and they believe that in the system, the judge will not be biased against them. Well, over and over again my same-sex clients question why they should go through the legal system, saying that no judge will understand us.

Also if you have a judge biased against gay people, and both parties are gay, you may think, “who will be biased if the parties are both gay.” But actually there are other biases based on class, gender role stereotypes, ethnic background etc that may kick in. The judge may indulge in these prejudices even if her or his preconceptions about ‘gays’ do not apply. The mediator needs to understand these larger dimensions in order to know how to navigate a course through the problems that come up.

Barksy: *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 the 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 complicate to create a plane safe for the family and for the kids.*

Muzalewski: *Listen to your clients*

Raeside: *Have high levels of awareness in terms of family systems, dynamics, and structures; have awareness of law regarding children and parenting; be aware of how you are seen by the parties; maintain your curiosity, and don't think that all families are the same.*

Wattersone: *Acknowledge your bias.*

During his interview with me, Frederick Hertz pointed out a particular aspect of the access to justice dimension in same-sex partners during the mediation process that is the need for the mediator to create an environment in which disputants feel comfortable.

What do clients need in order to feel comfortable about the process?

Hertz: *“I have a perspective, and in some ways even a script that I say to many clients: “As a gay couple you have been fighting for change – and I have been fighting with you and on your behalf. The way things have played out – and the homophobia of the legal system here – during the last twenty years, all make your situation messy in a way that isn’t like what happens with straight couples. I would love to say you are reaping rewards for all this effort. Unfortunately your relationship has broken up, and now you are facing legal troubles – which no one can entirely fix.”*

I try to integrate this narrative in to the story of my clients. For instance, I ask my same-sex clients to explain to me what they agreed to in their wedding ceremony (even if it was a ceremony not recognised by law). It would be wrong to say to the clients: what you celebrated and agreed doesn’t count legally and therefore there is no need to talk about the ceremony or about your oral agreements. I encourage clients to have a debate about the relationship because they need to consider the contradiction between their inner sense of what their relationship was and what the external law says.”

In few words... dos and don'ts:

- Be honest about your personal bias.
- Be honest about your sexual orientation.
- Learn about LGBT people.
- Take into account cultural differences regarding sexual orientation and gender identity, including different words used to characterise the variety of expressions of sexual orientation and gender identity to be found in different cultures (i.e.: words such as gay, lesbian, transgender do not offer a comprehensive overview of all nuances in which sexual orientation and gender identity are expressed).
- Be aware of new legal frameworks (national, foreign, and international) on sexual orientation and gender identity; protection from homophobia and trans-phobia; same-sex unions and same-sex parenting.
- Take into account issues of social acceptance and social stigma in respect of sexual orientation and gender identity.
- Inform clients about the mediation process, and other possible dispute resolution mechanisms.
- Use child-friendly informative material that takes into account sexual orientation, gender identity, and break-up.
- Have guidelines on involving children in the mediation process which considers the variety of family structures, and the several aspects of sexual orientation and gender identity.
- Don't push disputants into mediation.
- Use a gender-neutral and inclusive language. If you don't know how to acknowledge the parties just ask them how to do this.
- Take into account if the disputants are "out" or not, as the case may be.

- Ask parties how they conceptualise their relationship, and their ideas of family and parenting.
- Encourage parties to talk about the nature of their relationship, their expectation, and the differences between the law and what they think of their relationship.
- Listen to disputants and all parties involved (including other partners, and non-biological parents).
- Use gender-neutral informative material.
- Ask whether partners have any private agreements dealing with the consequences of the breakup of their relationship.

PART B:

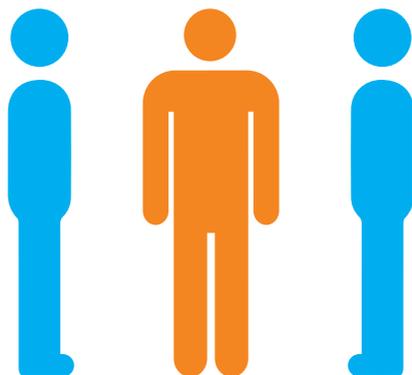
THE MEDIATION PROCESSES

Before and during mediation

The main concern of this section is to analyse some specific issues which may come up during mediation and of which the mediator should be aware. Mediation is a common process arguably found in all societies and at all times (Roberts and Palmer, 2005). It would be a superficial mistake to consider the growth of recourse to mediation as a relatively new phenomenon linked first to the spread of the Alternative Dispute Resolution Movement in the Anglo-American world during the final decades of the twentieth century, or secondly to the European Union initiatives culminated in the Directive 2008/52, and Recommendation No.R (98) 1 1998. Of course such interventions have contributed to increasingly reliance on mediation as a key process for the resolution of several civil, commercial and public disputes. Nevertheless, as Roberts and Palmer point out mediation is found at the core of many African and Asian legal cultures (2005).

The reasons for such recourse include a wide range of factors, some political, some religious and some legal. Indeed, during the last forty years mediation has been often considered as an instrument for avoiding the dysfunctions of the civil justice system, for making dispute resolution quicker and cheaper, and to some extent for saving public funding.

Without doubt, mediation presents several specific advantages for same-sex couples. In particular, because of the variety of family structures and parenting, mediation will give voice to parents and partners who are not entitled by law to start or participate in a court proceeding. However, mediation might present several specific disadvantages for same-sex couples – including a mediator being homophobic or not aware of the legal framework – with the consequence for the parties to come an agreement which is not enforceable. In addition, because of some pressure from the LGBT community to reach an agreement as a way to empower the entire community, and show to the external environment that same-sex couples and same-sex parents ‘function’ same-sex disputants may be encouraged to settle.



There are three overarching principles governing any kind of mediation including mediation between same-sex partners. First, through mediation the disputants aim at freely “achieving a new and shared perception of their relationship” (Fuller, 1971: 305). Secondly, mediation is essentially a negotiation with the help of a third impartial party (Gulliver, 1977; Roberts, 2014; Roberts and Palmer 2005). Therefore the disputants themselves should exercise control and power over the handling of their dispute. This means that the parties themselves decide whether and how to reach an agreement. The mediator then will help the parties smoothly and successfully to proceed through the several phases of the negotiation process. With regard to same-sex couples this aspect of disputants being protagonists of the resolution of their dispute extends to the mediator to give the opportunity to disputants to define the nature and name of the relationship – without the mediator trying to attribute characteristics proper of heterosexual relationships.

As Gulliver has elegantly shown, negotiation 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 therefore supports the parties during the process facilitating the exchange of information through the six phases. With regard to same-sex couples an important task of the mediator – during the six phases – will be to help disputants to become aware, clarify and understand the contradictions between the law and their experience.

Thirdly, mediation occurs in the “shadow of law’ (Mnookin and Kornhauser 1979: 950) and therefore the mediator should be aware that personal, social and cultural settings influence the resolution of a dispute. In the specific case of same-sex couples, the mediator, and the lawyer involved in the resolution of a dispute, should consider in particular the range of rights recognised to same-sex parents, the social acceptance of homosexuality, the support same-sex disputants have from their families and in the workplace, and of course self-confidence disputants have about their sexuality.

Once same-sex partners have decided to attempt mediation, mediators should consider how to deal with some specific issues that this section addresses below. Before that, similar aspects of mediation between same-sex and heterosexual partners must be emphasised here.

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 evaluative⁴, facilitative, transformative⁵, nar-

4 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 and the mediator’ (1994: 111).

5 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).

rative⁶, or a combination of all. Similarly a variety of models of practice ranging from pre-mediation, to joint sessions, to caucus, shuttle mediation, online 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. Finally, the mediator should build trust and create common ground between the parties, will encourage respectful communication, will help to deal with underlying issues, will facilitate the creation of an agreement (if any) which is respectful of the ideas and wishes of all parties involved, will make sure that each of the disputants feel comfortable talking at the presence of the other disputant; and will ensure confidentiality between the parties, and between the parties and the external world.

To some extent, linked to the role of the mediator is the debate of whether and to what extent the sexual orientation of the mediator matters. Data collected during the fieldwork seem to support the argument that the sexual orientation of the mediator is not essential, whereas preparation, knowledge and respect are.

6 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).

Smallacombe: *I don't think is essential. I think that some awareness of issues will be helpful. I think that the important aspect is how clients feel in the mediation and what their view and choice will be. It is the same as for any kind of cultural differences.*

Allison: *No, although it can help credibility in that same-sex partners may think that if the mediator is gay or lesbian he or she will understand them better. However, as mediators are impartial and familiar with a range of family contexts, their sexuality will not be important for many same-sex couples.*

Barsky: *I don't think it's always necessary for same-sex couples to have a lesbian or gay mediator. For some couples it will help because clients will trust the mediator to be neutral and to understand their concerns. Sometimes, same-sex couples prefer to have a mediator who is from outside the community. The important factors are for the mediator to be gay friendly, respectful, familiar with the law, and familiar with the issues which same-sex families may be experiencing.*

Roberts: *The lawyer/mediator needs to be gay or lesbian in order to understand what the partners went through.*

Butler: *It helps.*

Specific issues influencing mediation

Power imbalances

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

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

Muzalewski: *In parenting disputes sources of power imbalance are based on the experience that each of the partners have in bringing up the children, on the time and quality of parenting, and on who is considered the primary carer of the child.*

Mediators who prefer to remain anonymous: *Biological tie; who is the resident parent.*

Frederick Hertz: *Well, one of the negative aspects of mediation is that it requires people to be articulate in a high stressful situation. So one of the biggest imbalances is the functional ability of the parties in the mediation room. There are people who cannot think quickly, or don't feel comfortable talking in front of the partner.*

The other power imbalance has to do with low self-esteem having to do with their oppression as homosexual. 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 the acceptable homosexuals and the unacceptable homosexuals. And there are power imbalances caused by the socio-economic consequences of oppression and lack of acceptance. This is something about how the personal history of oppression translates into how well people function in public society – there are a lot of gay men and lesbian women who don't understand legal systems or corporate systems in a way that has to do with their oppression. Then, when you have a same-sex couple dispute in which one partner knows the law, one has more money, and one has family acceptance, then that party will handle the divorce much better because he or she has a safety net.

Barsky: *Sometimes power imbalances arise in favour of the biological parent, because that parent may have greater legal rights to child custody. In some cases, power balances arise because of differences in knowledge, financial resources, ability to articulate and persuade, or patterns of intimate partner violence.*

Raeside: *Finance; age; professional status; who is more articulate; who has the strongest biological tie with the child.*

Discrimination

Discrimination based on the sexual orientation and gender identity is common in many communities, including the LGBT community. 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 arising from the intersection of sexual orientation, religion, gender, and ethnicity. The mediator should be aware of these types of discrimination, and of his or her own tendencies to discrimination. Same-sex disputants who feel strongly the influence of external discrimination may reduce their expectations and requests during mediation, or may become more aggressive. Therefore it will be task of the mediator to facilitate the recognition of such barriers and to help disputants to feel free to express their wishes and ideas.

Bisexuality

When one of the partners is bisexual the mediator should be aware of some additional issues. Bisexual people often face discrimination within the LGBT community, and suffer the stereotype that 'bisexuality is just a phase'. In addition the bisexuality of one partner can create insecurity in the his or her other partner.

Barksy: *There are special issues here such as high levels of discrimination even within the gay and lesbian community; ideas of whether this person is really bisexual and whether bisexuality even exists; moral judgement involved; more issues regarding let the children know that you are bisexual.*

Mylo: *Well, about bisexuality – I should know some since it has framed my life. There are issues of monogamy vs. bigamy with same-sex and heterosexual partners; there is multiple oppression/discrimination/bi-phobia; erasure from the heterosexual and gay communities; ideas that bisexuality as a transitional stage; serial monogamy with alternating gendered partners; bisexual spectrum/continuum ; the experience of bisexual identity, gender roles, and gender mate awareness/preference.”*

Coming out

When the partners or only one of them has not declared his or her sexual orientation, the mediator should assure the disputants that all information will be kept confidential. An additional problem may arise between heterosexual partners who are in conflict because of the homosexuality of one of them and children are involved. Here the mediator should educate parties to abandon stereotypes, and associated bias.

Barsky: *Outing can be a source of conflict for same-sex couples. Partially, it depends on the jurisdiction and on the social acceptance of homosexuality.*

Gender identity

It might happen that one of the same-sex partners will decide to undertake sexual reassignment and the other partner will not be ready to accept the transition.

Religion

The influence of religion on the resolution of disputes between same-sex partners is still under-investigation by the literature. However, during the fieldwork for this project, the author of this Handbook developed interest in the issue and during the interviews a same-sex couple and a mediator referred to three cases. The names of the mediator, of the partners and the jurisdiction have been concealed to protect the privacy of the parties.

Case studies from fieldwork:

Date of marriage: *in one instance of the spouses was a religious leader of an established religious community. She and her partner had gone through a religious ceremony about 15 years earlier, but they had only gotten married legally about 2 years earlier. The religious leader was the higher earner, and in [...], community property and spousal support only apply to the marital period, not the period of pre-marital cohabitation. The date of marriage was relevant with regard to the splitting of savings accrued pre-marriage (mostly earned by the religious leader), and the duration of support (which in [...] is typically half the length of the marriage, without regard to pre-marital cohabitation. So, in this case the religious leader felt obligated to honour the spirit of the religious ceremony, and accept an earlier date of marriage than the one legally mandated.*

Schools for the children: *the parties were each observant, but in different religions. They had agreed to send their 2 kids to a school aligned with the religion of one of them, but after they broke up, the one aligned with the religion of the kid's school became more devout -- to the point where the kids didn't want to spend time with the other parent, as they felt they were being forced to choose that partner's religion. The alienated spouse felt that the ex was exaggerating the religious affiliation in order to "win over" the loyalty of the kids.*

Renounce to baptism: *this case was referred by same-sex partners in a long-term relationship. One partner was very observant, the other partner was atheist. However, the latter partner was baptised and expressed the wish to formally renounce to baptism. A dispute arose and was resolved by the partners themselves.*

Stereotypes

It is a fact that stereotypes regarding homosexuality, the way in which sexual orientation is expressed, and the ability of homosexual people as parents are present in our societies. The mediator should be aware of external stereotypes, of his or her own stereotypes, and of the stereotypes that parties carry with them, and then encourage himself/herself and the disputants to understand the importance of differences.

Abusing heterosexual bias

It could be the case that during mediation same-sex partners who are not married – but have lived thinking they were married – refer and use the lack of legal recognition of same-sex unions to avoid any financial duty to maintenance or division of property.

Hertz: *If you and I are in business and we are arguing whether American law or Italian law should apply, this is an argument among business people and does not go to the core of our existence; you don't say "you are offending me because I am essentially Italian and you are insulting me by applying American law" – but rather, this is a pragmatic decision. But if you are one partner in a lesbian couple who did not get married and your partner says "we were not allowed to get married because of heterosexual bias, and therefore I don't have to pay you alimony and I am going to take advantage of heterosexual bias and claim that we were not a married couple". But you say "we had a ceremony with all our friends in attendance, and the only reason we didn't get married is because the law doesn't allow us to get married, and now you are taking advantage of heterosexual bias to screw me out of a million dollars... this is an essentialist insult – an example on one homosexual turning on another homosexual, taking advantage of an oppressive legal system. This is devastating and it raises also ethical issues for the mediator.*

Domestic violence

There is domestic violence – including emotional, verbal, psychological, and physical – between same-sex partners.⁷ It is suggested here that mediation is not suitable for domestic violence, and that

⁷ For a detailed analysis of domestic violence in same-sex relationship see Donovan, Hester, Holmes and McCarry (2006).

a screening test must be carried out during all phases of mediation. However if the parties agree an indirect mediation can be attempted.

Case study from fieldwork: *lesbian couple and unmarried. One found the other one in bed with another woman. They were so angry at each other and couldn't be in the same room and in the same building. The mediation was only by telephone with the disputants talking only with the mediator. They settled.*

Understanding the new legal framework

As mentioned above it is important for the mediator to be aware of the legal framework governing decriminalisation of homosexuality, protection from homophobia and trans-phobia, recognition of same-sex relationships, recognition of parenting rights (Hertz, 2008). The legal framework governing legal consequences of same-sex unions is various and not harmonised all over the world. These differences must be taken into account in particular when the agreement is to be finalised and then enforced. If in doubt, it is good practice to ask for legal advice.

Understanding family structures

Same-sex unions are various because same-sex partners create

a variety of family structures or because the legal recognition that same-sex unions receive under state law is not uniform all over the world. For instance these unions include registered partnership, civil partnership, same-sex marriage, domestic partnership, ‘pacte civil de solidarité’, and unregistered cohabitation. Every model of same-sex union brings particular legal consequences – and this is an aspect of such disputes of which the mediator should be aware. In particular, the mediator should not assume that same-sex unions are shaped on the legal model and reproduce the dynamics of heterosexual marriage.

Use of language

Language should be gender-neutral; not be too technical or too legal, or too general. It is good practice, as noted above, to ask parties how they prefer to be addressed.

Barsky: *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. For transgender clients, the safest approach is to ask them how they would like to be addressed. Often, mediators can simply address clients by their names, and not try to put people in a particular category.*

Raeside: *I use their names; or I use the plural: ‘mothers’/fathers’; or I ask them how they want to be called.*

Muzalewski: *f the same-sex parents refer to themselves as mothers, or fathers the mediator should respect this.*

Involvement of children

It is the right of the child to be involved in any proceedings concerning his or her upbringing (article 12, United Nations Convention on the Rights of the Child). If a child wishes to participate in the mediation process informative material should include precise information about sexual orientation, gender identity, about the variety of family structures, and parenting roles, and parents’ break up. In addition accurate child-friendly guidelines inclusive of children of same-sex parents must be developed.

Formulation of the agreement

As noted above same-sex unions do not receive equal recognition all over the world. Often same-sex disputants negotiate “relying on implied or oral contract claims (palimony) of limited viability or community norms of often-disputed applicability” (Hertz, Wald and Shuster 2009: 123). Therefore, in helping the parties to finalise the agreement it is suggested to the mediator to ask disputants if they had an oral agreement, and explain them to seek legal advice in order to be sure that the agreement will not breach the law.

After mediation: putting the agreement into effect

Reaching an agreement represents a possible final phase of the mediation process. In facilitating the parties the mediator will prioritise issues, find common ground, summarise what the parties propose and ask for legal advices if needed.

Two main issues are important to take into account after the agreement has been signed, namely how to put the agreement into effect, and inter-country recognition of the mediated agreement. Both issues change according to national laws whose detailed analysis is out of the scope of the present Handbook. It suffices to say here that regarding the first issue the mediated agreement is legally enforced as contract, receiving the sealing of the court, or as writ of execution. There are also non-legal enforcement measures such as social pressure, and the belief of the parties that the agreement is the best output they can get.



Regarding inter-country recognition of mediated agreements generally speaking these are the issues a mediator or a lawyer needs to consider:⁸

- Whether and how same-sex unions are legally recognised in the jurisdictions involved;
- What the law provides regarding legal recognition of family mediation and mediated agreements;
- Whether the recognition of mediated agreements between same-sex partners will create issues of public policy regarding the nature of same-sex relationships;
- What the law says regarding the enforcement of the mediated agreements.

8 If the dispute involves two disputants who reside in two EU countries then the Directive of the European Parliament and of the European Council of 21 May 2008 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 can derive from prefatory remarks 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 secure legal recognition of the dissolution, in several EU jurisdictions, their mediated agreements will lack cross-border recognition and enforcement.

CONCLUDING THOUGHTS

This Handbook has attempted to offer the first informative, comprehensive and user-friendly guide on the use of mediation between same-sex couples. In doing so, the study has pointed to various similarities between heterosexual and same-sex couple disputes and dispute resolution. However the study has emphasised that there are significant differences created by the lack of substantial legal recognition of the rights of homosexual persons including the right to marry, and by the high levels of discrimination that LGBTI individuals often suffer.

The more general aim of this study is to encourage further research and attention on measures to be taken during mediation between same-sex partners.

In particular:

- Further research is needed on nature of disputes; sources of power imbalances; bisexuality and mediation; gender identity; disputes over children; disputes and surrogacy; enforceability

and inter-country recognition of mediated agreements;

- There is the need to develop guidelines for the involvement of children of same-sex parents in mediation and informative material for children of same-sex partners;
- It is important to develop guidelines dealing with ethics, language, domestic violence screening; and gender-neutral referral forms.

GLOSSARY

Bi-gender – a person who moves between feminine and masculine gender-typed behavior depending on context.

Bisexual – a person who is emotionally and/or sexually attracted to both male and females.

Cisgender – a term used to describe non-transgender individuals.

Coming out – the process of telling others his/her sexual orientation or gender identity.

Cross-dressing – to wear clothing typically associated with members of the other sex.

Drag King/Queen – a person who dresses like a member of the opposite sex, often with the aim to entertain and/or play with sex roles and/or gender expression.

Female to Male (FtM or F2M) – A transgender person born as female who is living as or transitioning to male.

DSM 5, Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition – is the 2013 update to the American Psychiatric Association’s classification and diagnostic tool for mental disorders.

Gay – colloquial term for a person who feels sexual desire exclusively (or predominantly) for individuals of his/her own sex (homosexual).

Gender – a term used in social sciences which defines the social and cultural phenomena associated with biological sex of being male or female.

Gender Dysphoria – the clinical definition of gender identity disorder as to express the negative or conflicting feelings about one’s sex or gender roles.

Gender Expression – how an individual chooses to express his/her gender (dress, behaviour, appearance).

Gender Identity – psychological sense of being male or female (or both or neither).

Gender Identity Disorder – a mental psycho-pathology included in the former Diagnostic and Statistical Manual IV (DSM IV) referring to a gender identity that is inconsistent with one’s biological sex.

Gender Queer (GQ; alternatively non-binary) – a catch-all term referring to people who challenge gender norms associated

with gender binary and cisnormativity and who are not exclusively masculine or feminine.

Gender Questioning – a term referring to people who are unsure of their sexual orientation or gender identity.

Gender/Sex Reassignment Surgery (GRS or SRS) – a medical procedure for changing one's sex characteristics.

Gender Role – the behaviours, traits, thoughts, and dress expected by a culture to belong to the members of a particular sex.

Gender Variance (or gender nonconformity) – a term referring to people who do not match masculine and feminine gender norms.

Heteronormative/Heteronormativity – a norm that takes for granted that there are two separate biological sexes and that we were born into one of them. According to the heteronormativity, there are certain behaviours and sex stereotypes that everybody has to follow. The norm also takes for granted that everyone is heterosexual.

Heterosexual – a person who is emotionally and/or sexually attracted to people of the opposite sex.

Homonegativity – a negative attitude toward homosexuality or LGBT people.

Homophobia – fear of, or anger toward homosexuality and/or homosexual and bisexual people.

Homosexual – a person who is emotionally and/or sexually attracted to people of the same sex.

ICD-10, International Statistical Classification of Diseases and Related Health Problems (Tenth Edition) – is the international standard diagnostic tool for epidemiology, health management and clinical purposes, maintained by the World Health Organization.

Intersexual – a person having ambiguous genitalia.

Lesbian - a woman who is attracted emotionally and physically by another woman.

LGBT – lesbian, gay, bisexual, transgender people Out – being openly lesbian, gay or bisexual Queer – originally an English swearword that meant weird, perverse or different. Today the term is partly used as an identity term for LGBT people and partly as a questioning of norms. A person who is queer questions heteronormativity and does not want to follow traditional categorizations.

Male to Female (MtF or M2F) – A transgender person born as male who is living as or transitioning to female.

Outing – the public disclosure that someone who is assumed to be heterosexual is actually homosexual or bisexual.

Polyamory – Being in more than one intimate relationship with the knowledge and consent of all partners involved.

Queer – historically a derogatory term for LGBT people, but

adopted as a sexual identity by younger gays and lesbians.

Queer Theory – an academic theory analysing society’s views and norms.

Rainbow Family – collective term for same-sex families, generally with children.

Sexual Orientation – sexual attraction to a particular sex (to other sex: heterosexuality; to one’s own sex: homosexuality) or to both (bisexuality).

SOGIE, Sexual Orientation and Gender Identity Expression – After Yogyakarta Declaration, this acronym replaced the former expression LGBT.

Straight – colloquial term for heterosexual.

Transphobia – fear of, or anger toward transsexuality and/or transsexual and transgender people.

Transgender – an umbrella term referring to anyone whose behaviour, thoughts, or traits differ from the societal expectations for his/her biological sex.

Transsexual – a person who lives in a gender role consistent with his/her inner gender identity but in contrast with social expectations associated with his/her biological sex.

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The Handbook examines the nature of intra-family disputes between same-sex partners and some selected issues involved in the mediation process. Relying mainly upon empirical data the Handbook seeks to provide a practical opportunity for professionals of different disciplines to develop more grounded and effective understanding of the nature of disputes between same-sex partners, and of the issues involved in the resolution of such disputes.

MARIA FEDERICA MOSCATI is a Lecturer at the School of Law at the University of Sussex and a member of *Avvocatura per i Diritti LGBTI*. Her main research interests lie in issues relating to ADR, Access to Justice, Comparative Legal Studies, Human Rights with a focus on LGBTI people.

Avvocatura per i Diritti LGBTI - Rete Lenford is the coordinator of Litigious Love project. It is an Italian association founded in 2007 with the purpose to support the rights of LGBTI people in Italy. The members of *Avvocatura* are lawyers and legal practitioners. In addition to the legal assistance, *Avvocatura per i Diritti LGBTI* plays an important role in organising and supporting important training sessions and conferences with national and international experts. Other activities include research, publication of monograph concerned with LGBTI issues and advocacy.
