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COUNCIL OF EUROPE  
COMMITTEE OF MINISTERS

## EXPLANATORY MEMORANDUM

to Recommendation No. R (98) 1  
of the Committee of Ministers to member states  
on family mediation

(Adopted by the Committee of Ministers on 21 January 1998  
at the 616th meeting of the Ministers' Deputies)

**A. General considerations**

1. The Third European Conference on family law on the subject "Family Law in the Future" (Cadiz, Spain, 20-22 April 1995) recommended that the Council of Europe give consideration to the question of family mediation or other processes to resolve family disputes in the light of the conclusions of this conference, and examine the possible preparation of an international instrument containing principles relating to mediation or other processes to resolve family disputes.

2. Following this proposal, the Committee of Experts on Family Law (CJ-FA), under the authority of the European Committee on Legal Co-operation (CDCJ), was instructed "to draw up a report on principles relating to mediation or other processes to resolve family disputes and, if appropriate, to make proposals to the CDCJ concerning the possible preparation of an international instrument in this field". In order to carry out its terms of reference, the CJ-FA set up the Working Party on Mediation and Other Processes to Resolve Family Disputes (CJ-FA-GT2).

3. The Working Party on Mediation and Other Processes to Resolve Family Disputes, under the authority of the CJ-FA, held three meetings at which it proposed a draft recommendation on family mediation. The CJ-FA completed its work on the draft recommendation during its

30th meeting which was subsequently revised by the CDCJ and adopted by the Committee of Ministers on 21 January 1998 as Recommendation No. R (98).<sup>[1]</sup>

**B. Comments on the recommendation**

4. The use of family mediation and other dispute resolution processes related to family matters, as alternatives to judicial or administrative decision-making, is a relatively new process in the member states of the Council of Europe and there is no international legal instrument which established the main directions concerning family mediation as well as the basic principles applicable to this process of dispute resolution. Therefore, the aim of Recommendation No. R (98) 1 is to fill this gap, and above all to assist and provide states with a basis and framework

for the establishment and regulation of the alternative processes for the resolution of family disputes, within a number of guiding principles.

5. This recommendation deals with systems relating to the resolution of family disputes, particularly those arising during the process of separation and divorce, in order:

- to promote consensual approaches, thereby reducing conflict in the interest of all family members;
- to protect the best interests and welfare of children in particular by reaching appropriate arrangements concerning custody and access;
- to minimise the detrimental consequences of family disruption and marital dissolution;
- to support continuing relationships between family members, especially those between parents and their children;
- to reduce the economic and social costs of separation and divorce, both to families and to states.

6. Extensive academic research on the nature and impact of family disputes shows that ongoing conflicts can undermine parenting abilities and cause significant difficulties for children. In high conflict families, when communication between family members is at its poorest, more prolonged disturbance may develop. As a result, a heavy responsibility is placed on those seeking to settle disputes which can otherwise escalate in the intense emotional context of separation and divorce.

7. Research in Europe, North America, Australia and New Zealand suggests that family mediation is better suited than more formal legal mechanisms to the settlement of sensitive, emotional issues surrounding family matters. Reaching agreements in mediation has been shown to be a vital component in making and maintaining co-operative relationships between divorcing parents: it reduces conflict, and encourages continuing contact between children and both their parents. Parents who are able to make their own decisions about arrangements for the residence of their children, and for contact between children and the non-residential parent, are more likely to make these arrangements work and less likely to ignore or break them. It is known that many parents experience difficulties in complying with decisions which are imposed by the judicial or other competent authority, thus causing further disputes and an unsatisfactory situation for children, whereas decisions reached consensually by the parents have a better chance of standing the test of time, thus protecting the best interests of children.

8. Furthermore, if agreements can be reached in mediation, there is the possibility that the complexity and duration of any subsequent legal proceedings may be reduced. This can have the effect of reducing the financial costs associated with the divorce process, particularly those related to the costs of the legal proceedings. The reduction of costs should not, therefore, be considered to be the principal rationale for promoting mediation as an alternative dispute resolution process. Rather, the reduction of costs should be seen as an important benefit when it is achieved.

9. In any event, although providing empirical evidence is not straightforward, there is general consensus that reducing conflict and improving communication in families which are disrupted by marital separation and divorce results in significant benefits which reduce the social and psychological costs, reflected in improved well-being, physical and mental health, and work and school performance. By contrast, unresolved disputes can cause severe stress, which in turn may undermine or threaten the stability of the separated family, new adult attachments, remarriage, and stepfamily life.

10. Having regard to the United Nations Convention on the Rights of the Child, and the European Convention on the Exercise of Children's Rights, the Committee of Experts on Family Law (CJ-FA) noted:

- the principles and standards for treatment of children, for laws, policies and practice which affect children and for both formal and informal relationships with children;
- the importance of family life to children and the need for broad social support for both parents, as they each have common responsibilities for the upbringing of children;
- that in the event of conflict it is desirable for families to try to reach agreement before bringing the matter before a judicial or other competent authority;
- the great emphasis placed on the importance of recognising children as people with human rights, and of facilitating the exercise of these rights by ensuring that children are themselves, or through others, informed of, and allowed to participate in, family proceedings which affect them, and in particular, in matters involving the exercise of parental responsibilities such as residence of, and access to, children. It is expected that due weight should be given to the views expressed by the child;
- that mediation and other processes to resolve disputes should be encouraged.

11. During the work which led to the preparation of the recommendation, it was acknowledged that concerns about the increasing number of marriages ending in divorce have led states to introduce and support a variety of means of resolving family disputes amicably. Not all of these are referred to specifically as "family mediation", although their aims and objectives may be similar. These methods may include, for instance, conciliation, conciliation counselling, family counselling, and so on. These processes are likely to have a number of characteristics in common with family mediation: for example, they usually involve bringing the parties together to talk through their difficulties and disputes; they normally involve a skilled professional facilitating the discussions; and their aim is to help the parties reach solutions amicably.

12. In order to examine the various aspects and issues concerning the use of family mediation as a means of resolving disputes in a consensual manner, information was requested from member states of the Council of Europe and subsequently a report was prepared for the CJ-FA.

- Overall, family mediation as an alternative dispute resolution process is relatively new in many states, with certain states having no such process available.
- In certain states there are provisions for family mediation during separation and divorce. While the emphasis in all of them is on making arrangements for children (i.e. custody and access matters), in nearly all states, parties may settle other disputes, such as those relating to finance and property, with mediation.
- Mediation is considered to be a process which parties should enter voluntarily. In Norway it is compulsory to meet with a mediator before separation or divorce proceedings, or as a prerequisite for court proceedings regarding parental responsibilities, custody or access.
- In all states, parties retain the right to seek independent legal advice, but lawyers usually do not attend mediation.

13. It would appear that where family mediation has been, or is being, introduced, the ways in which it is developing are consistent across states. Mediation is developing both within legal proceedings and extra-judicially.

14. For the most part, in states where mediation has been developed, the principles in the recommendation are already being upheld. This recommendation encourages states to develop

and extend alternative means of amicable dispute resolution and mediation, and to consider the desirability of applying the principles of the recommendation to them.

15. Family disputes have a number of special characteristics which must be taken into account in mediation:

- a. there are usually continuing and interdependent relationships. The dispute settlement process should facilitate constructive relationships for the future in addition to enabling the resolution of current disputes;
- b. family disputes usually involve emotional and personal relationships in which feelings can exacerbate the difficulties, or disguise the true nature of the conflicts and disagreements. It is usually considered appropriate for these feelings to be acknowledged and understood by parties and by the mediator;
- c. disputes which arise in the process of separation and divorce impact on other family members, notably children who may not be included directly in the mediation process, but whose interests may be considered paramount and therefore relevant to the process.

16. This recommendation considers mediation to be a process in which a third party, who has no vested interest in the matters in dispute, facilitates discussion between the parties in order to help them to resolve their difficulties and reach agreements. Mediation is not a new process – it has been used for a long time in traditional societies for the resolution of disputes within communities and kinship systems, and more recently in western societies for the resolution of industrial disputes. Mediation is considered to have a number of unique characteristics: in particular, the mediator has no authority to impose a solution on the parties but should remain both neutral and impartial. The mediator's role is to help the parties negotiate together and to reach their own joint agreements. The mediator is not expected to give advice to the parties, particularly legal advice which remains the proper remit of independent lawyers who may be appointed by each party to represent his or her individual interests. It is not the role of the mediator to influence the decision-making process, nor to put pressure on the parties to reach any particular agreement. Agreements reached under pressure are more likely to be disregarded and broken.

17. Also, because it is an important principle that parties should enter mediation voluntarily, they should be willing to mediate their disputes. Research has demonstrated that pressure to mediate against the will of one or all parties is not effective and may increase hostility. Making it compulsory for parties to meet with a mediator to explore the relevance and benefits of mediation is not inconsistent with this principle.

18. It is now commonly accepted that more traditional legal processes are not well suited to the resolution of sensitive, emotional issues in family disputes, and that mediation offers a more constructive approach.

19. Notwithstanding the desirability of promoting amicable settlements, the development of mediation and other alternative means of dispute resolution should not prevent every citizen's right of access to justice. The judicial or other competent authority in each state exists to protect its citizens and to ensure that principles of fairness, justice and due process are applied at all times and in all aspects of family law.

20. The increasing internationalisation of family relationships renders it important to create a mechanism for co-operation between states and to encourage the use of mediation and other means of resolving disputes, when parents are living or expect to live in different states, in all matters relating to children, and in particular to resolve disputes which may arise in respect of transfrontier access and custody issues.

21. Mediation has been used as a preferred method of dispute resolution in many international conflicts, particularly between governments. In principle, then, there is every reason to believe that family disputes with an international dimension should be amenable to mediation. Although there is relatively little experience of international mediation in Europe, a body of mediators in France has substantial experience of mediation in child abduction cases across Europe and mediators in other states are extending their skills in this area. In North America, inter-state or US-Canadian divorce disputes are commonly mediated despite wide variations in divorce legislation and procedures, and much can be learned in Europe from this experience.

### C. Comments on the principles

#### *Principle I: Scope of mediation*

22. As its name implies, family mediation deals primarily with disputes between members of the same family. This does not prevent states from setting up, should they so wish, mediation systems designed to resolve disputes between the state and the individual. However, when mediation is used in the non-private sphere, the state should take account of the interests of children and comply with its duty to protect them. In any event the mediator should ensure that the child is not at risk (see paragraph 42 below) and that the child is informed about the mediation in appropriate cases (see paragraph 45 below).

23. The notion of family is a broad one, going beyond the family unit based on blood or marriage ties, so as to give states greater latitude and enable them to include family situations as defined in their respective domestic legislation.

24. It is generally accepted that all aspects of a family dispute should be open to consideration during the mediation process. In order to ensure realistic and appropriate application of mediation, states are free to determine the specific issues or cases covered by family mediation. Some states, for example, may wish to limit mediation to aspects of the dispute which are justiciable or to problems concerning separation and divorce.

25. Mediation in separation and divorce normally includes disputes relating to:

- custody: where and with whom a child should reside (the notion of "custody" is increasingly referred to as "residence")
- access: the contact the child may have with the parent who is no longer living with the child on a daily basis, or with other close family members such as grandparents (the notion of "access" is increasingly referred to as "contact")
- economic matters: the assets available, and how these might be shared by the parties to meet their own respective needs and circumstances after divorce; dispositions concerning the matrimonial home and its contents.

In the course of mediating these issues, however, arrangements for children's education and health and for contact with wider kinship networks may be discussed, and agreements reached.

26. To avoid injustice or to protect one or more family members, states may wish to limit the use of family mediation in certain circumstances. Research shows that, where there have been incidents of domestic violence or threats to the safety of one partner by the other, mediation may not be suitable. Discussions in mediation should always be conducted in a safe atmosphere without fear of harm or intimidation.

#### *Principle II: Organisation of mediation*

27. It is generally agreed that mediation is an alternative means of resolving disputes which must be entered into voluntarily by each party. Research shows that enforced mediation can result in agreements being made which are not necessarily reached through consensual decision-making. Such agreements are less likely to be long-lasting.

28. On the other hand, there is evidence that many people do not understand what is meant by "mediation", nor what the process entails, and so they do not consider whether it might be appropriate for them, but seek other ways of resolving disputes. In order to promote the use of mediation, states may wish to improve information programmes in general and/or methods of providing information in individual cases. States may wish to make it compulsory for parties to meet with a mediator for the purpose of having the process of mediation and its benefits explained to them. Research indicates that such a meeting can be beneficial, and that parties appreciate the opportunity to resolve disputes amicably which such a meeting affords them. Nevertheless the essence of mediation itself rests in its voluntary character and on the fact that the parties themselves try to reach an agreement and if they refuse or feel unable to mediate, it is counter-productive to attempt to compel them.

29. States, under this principle, are free to organise the provision of mediation as they wish, but as far as possible, states should ensure that there are mechanisms in place in order to maintain standards at an acceptable level.

30. Within many states mediation is provided by private and public sectors working in collaboration or, conversely, in direct competition. At the present time, certain states are responsible for providing mediation services such as Andorra, Finland, Norway, Poland, Slovenia, Sweden and in some cases Germany. In some of these states, the municipal authorities are responsible. In all these states a mediation service is provided free of charge.

31. In certain states such as Austria, France, Germany and the United Kingdom, mediation is primarily provided by institutions or individuals independent of the state. These mediators are not attached to courts, but may be attached to counselling, welfare or youth services. Any fees charged must be met by the parties themselves. The case of England and Wales is interesting as the Family Law Act 1996 makes provision for state funding for legal aid on a means-tested basis, and mediation agencies who wish to offer state-funded mediation must apply to be franchised for this purpose through the Legal Aid Board. In France legal aid is available to finance mediation requested by the court.

32. Whatever the organisational arrangements, mediation should be available to all without any discrimination on the grounds of race, colour, language, religion or ethnicity. This may require mediation to be provided in a range of languages, or for interpreters to be available. Cultural differences must also be understood and respected.

33. In addition, the Committee of Experts on Family Law (CJ-FA) considered questions relating to the selection, training and qualifications of mediators, believing that mediators should have previous qualifications and experience in relation to the matters to be dealt with as well as specific training in mediation. It was noted however, that it is desirable to allow a high degree of flexibility in relation to previous qualifications and experience, although most often mediators are drawn from the professions of social work, psychology and law.

34. States should, wherever possible, ensure that there are appropriate procedures for the selection, training and qualifications of mediators, and for setting the standards to be achieved and maintained by mediators. Such procedures exist in some states. As there are two separate matters – selection, training and qualifications on the one hand, and the setting of standards on the other – not all states will have provisions for both.

35. The characteristics of training will differ between states, although there is an increasing respect for training which includes the teaching of theoretical and specialist knowledge and also the opportunity to practice under expert supervision. In many states systems for the accreditation and professional registration of family mediators are being established. Experiments concerning education and training are being carried out in both the public and private sector in certain states.

36. Although mediation is not yet regarded as a separate profession in all states, many states are developing guidelines for good practice, and establishing codes of conduct. It is probably premature to implement more formal requirements in this area until mediation is more widely practised at a European level. However, in the context of actions by states to ensure efficient and professional organisation for family mediation, there is nothing to prevent states if they so wish, from laying down provisions governing the activities and professional conduct of mediators.

#### *Principle III: Process of mediation*

37. It is now widely agreed that mediation should be conducted according to certain principles which mark it out from other interventions or dispute-resolution mechanisms. This principle sets out these guidelines of practice in some detail.

38. "Impartiality" of the mediator requires that the mediator does not take sides or favour the position of one party over the other. The views of each party should be respected, although the mediator has a duty to ensure that one party is not disadvantaged through fear of harm or threat of violence. The mediator should conduct the process in such a way as to redress, as far as possible, any imbalance in power between the parties, and should seek to prevent manipulative, threatening or intimidating behaviour by either of them. Unlike a lawyer, who acts for one of the parties and represents that party's point of view, the mediator is not acting for either party, nor should there be a previous or existing professional or personal relationship between the mediator and one of the parties.

39. "Neutrality" of the mediator requires that the mediator does not impose settlements or guide the parties to reach particular solutions. It is up to the parties to reach their own agreed, joint decisions, and the mediator's role is to facilitate this process. Parties may make decisions which they consider to be appropriate to their own particular circumstances. This recognises the power of the parties to reach their own agreements about their own affairs in a way that suits them best. However, it is clear from paragraph 49 that when courts are asked to endorse or ratify such a private agreement then it will be necessary that courts are satisfied that the settlements comply with current legislation and do not infringe either party's legitimate interests.

40. Mediation should be conducted in private, and the discussions should be regarded as confidential. This means that the mediator should not disclose any information about, or obtained during the process of, mediation to anyone without either the express consent of each party or in cases allowed by national law. Whether a mediator has a right to refuse to give evidence in court is left to national law. The mediator should not be obliged to make official reports as to the content and discussions in mediation, although mediators may be expected to provide a report agreed by the parties to the judicial or other competent authority noting the agreements reached.

41. It is usually expected that the parties should agree that the discussions and negotiations are not to be referred to in any subsequent legal proceedings. Such confidentiality is normally referred to as "privilege". The privilege belongs to the parties jointly, not to the mediator or the process. It can be waived by the parties and the mediator could be compelled to testify in legal proceedings. Mediators are likely to be bound by professional codes of conduct in relation to confidentiality but it is the parties who own privilege. This is a matter which states will wish to consider in the light of national law and standards of professional conduct.

42. It is usually accepted that free and frank disclosure is necessary in mediation if obstacles to settlement are to be overcome. It is important, therefore, for the limits of confidentiality to be understood at the outset. At the beginning of mediation, parties should be informed that confidentiality cannot be absolute. Statements made during the course of mediation which indicate that a child has suffered or is at risk of suffering serious harm or abuse may be disclosed by the mediator and the parties may be encouraged to seek help from an appropriate agency or authority. In such circumstances, the child's best interests and welfare take priority over the considerations in respect of confidentiality. Member states may wish to specify other circumstances or cases in which confidentiality should be waived.

43. During the process of separation and divorce, parties may benefit from the services of professionals other than mediators and lawyers. It is important, therefore, that the couples are made aware of other agencies who might offer them support, or particular types of help such as marital counselling. Bearing in mind the significant development and growth of alternative dispute-resolution mechanisms, the mediator should be aware of the options, and in appropriate cases, inform the parties about them.

44. There appears to be a professional consensus that mediators should be sensitive to the issue of domestic violence. Mediators increasingly ensure that mechanisms are in place to ascertain the existence of an abusive relationship before agreeing to mediate. If one party is in fear of another party, bargaining positions will be unequal and the mediator may wish to terminate the mediation process. There is research evidence, however, which suggests that the fact that violence has been a feature of the relationship in the past should not automatically preclude the possibility that mediation is an appropriate process. States will wish to consider this matter in the light of national law relating to domestic violence.

45. Since most mediation is about making suitable and appropriate arrangements for children, mediators should have a special concern for the welfare and best interests of children whilst respecting their impartiality and neutrality and should remind parents of the need to inform and consult their children about what is happening, and that family disputes and prolonged conflict have a severe negative impact on children. In some states, mediators include children in the mediation process, usually at the end in order to let them hear about the arrangements which have been agreed between the parents. There are provisions in some states for children to attend mediation if this is thought to be in their interests. There is increasing emphasis on hearing the voice of the child in proceedings which affect him or her, and some mediation services provide children's counselling support, or contact centres where children can meet with their parents when access is difficult. States should be free to encourage the development of support services for children and young people whose parents are separating (see also paragraphs 55 and 59 below).

46. During its deliberations, the Committee of Experts on Family Law (CJ-FA) considered the limitations of the mediator's role, particularly with regard to the giving of legal information and legal advice. It is agreed that a distinction should be made between advice and information, and that it is appropriate for mediators to provide legal information if this is requested or considered to be appropriate during the mediation process. Information-giving involves maintaining a relationship of impartiality with the parties. Information is given as a resource without any attempt to recommend how it should be acted upon. For example, it may be helpful for parties to know what legal steps might be taken to resolve disputes if agreements cannot be reached in mediation; or what factors a judge might take into consideration when making a decision about custody, access or child maintenance.

47. On the other hand, advice-giving is in contradiction with one of the principles of mediation, namely impartiality. Advice-giving includes the evaluation of particular circumstances and the recommendation of a specific course of action. Lawyers give both legal information and legal advice to their clients but mediators would be compromising their neutrality and impartiality if they were to give legal advice. Lawyers and mediators have complementary roles, and mediators will suggest, if necessary, that parties should seek legal advice from their lawyers, who are trained to recommend actions which are in each party's best interests. In states where mediation is well developed, mediators usually advise parties to seek independent legal advice before reaching any legally binding agreement.

48. There is no requirement in the recommendation in relation to the duration of mediation. It will vary depending on the number and nature of issues in dispute and the complexity involved. Nevertheless, mediation is expected to be a relatively brief intervention, and not an opportunity for ongoing or longer-term professional support. Usually, the mediators and the parties agree on the matters to be discussed in mediation, and the number of mediation meetings which might take place. It is a matter for individual states to decide whether they wish to regulate the length of the mediation process, or to ensure that mediation cannot be used by one party purely as a means of delaying the divorce process.

#### *Principle IV: The status of mediated agreements*

49. In most states, the agreements reached in mediation are recorded and copies given to the parties who might then take them to their lawyers. Such agreements are not normally legally binding, although there is considerable variation between states on this matter at the present time. Even where the agreements are legally binding however, as in Germany and Norway for example, they are not usually enforceable unless and until they have been endorsed by the appropriate judicial or other competent authority. One of the methods of complying with these principles would be for the judicial or other competent authority to incorporate the results of mediation into its own decision. In endorsing or ratifying agreements, a judicial or other competent authority must check that the settlements comply with current legislation and do not infringe on either party's legitimate interests, and in particular that the best interests of children are protected.

50. Since research in the United Kingdom and other countries has shown that some people who use mediation are disappointed when their agreements do not carry the same weight or authority as court-imposed solutions, it is recommended that states should facilitate the possibility of approval by a judicial or other competent authority within the framework of their own family legislation. In this regard, it should be possible for the mediator to assist parties to draw up a statement of agreements in a manner that renders it acceptable by the judicial or other competent authority as a relevant "legal" document for the purposes of ratification and approval.

51. If parties do not choose to ask a judicial or other competent authority to endorse their agreement, the agreement will have the same legal status as any other private law contract and will last only as long as the parties apply it. On the other hand, where the agreement is approved by a judicial or other competent authority at the request of parties, one party can bring proceedings before this authority if the other party fails to comply with it.

52. In recommending that states facilitate the approval of mediated agreements by the relevant authority and provide mechanisms for the enforcement of such agreements, it was noted that the establishment of such mechanisms could contribute significantly to the credibility of, and respect for, mediation.

53. Any mechanism for securing approval by the judicial or other competent authority should not lead to delay or excessive costs.

#### *Principle V: Relationships between mediation and the proceedings before the judicial or other competent authority*

54. Other competent authorities have been included in the recommendation in addition to the judicial authorities as the powers which belong to courts are also, in some states, exercised by administrative authorities for certain types of family proceedings.

55. As regards the right of access to the courts, it is possible for the parties to mediation to waive the exercise of this right provided that such a waiver is unequivocal and voluntary (see paragraph 1 of Article 6 of the European Convention on Human Rights and the case law on this article).

56. This principle reaffirms the belief that mediation should be an entirely autonomous process. As such, mediation can take place before, during or after legal proceedings, although it is commonly accepted that mediation is more effective if it can take place before, or early in legal proceedings. Mediating disputes is generally more difficult if the conflict has escalated and the disputes are of long duration. Before legal proceedings are commenced, parties are less likely to have adopted fixed positions on disputes from which it is hard for them to shift or to make compromises, and they may be more amenable to negotiating agreements.

57. When mediation takes place during legal proceedings, those legal proceedings should be interrupted, constituting a temporary adjournment or suspension of the process. As mediation is a voluntary process, each party should normally give agreement for legal proceedings to be suspended. This avoids one party using mediation as a way of causing delays in legal proceedings. Unnecessary delays in the decision-making process are considered to be harmful, particularly for children. Time delays may also increase the financial costs to the parties and to the state.

58. When proceedings are suspended for the purpose of enabling parties to seek mediation, however, the judicial or other competent authority retains the power at all times to make urgent decisions in order to protect the parties, their children, or their property.

59. When proceedings are interrupted, then mechanisms should exist to inform the judicial or other competent authority when mediation is complete, and for the mediator to report on the outcomes and agreements reached, and for this authority to review whether these agreements are protecting the best interests of children.

60. Judges and the courts need to retain their ultimate authority in the legal process, and may be required to consider the facts, make decisions and impose a solution which protects and upholds individual human rights, the best interests of children, and ensures access to justice.

61. After proceedings have been completed, whether agreements have been mediated, or decisions imposed by the judicial or other competent authority, new disputes may arise, previous disputes may re-emerge, or one or all parties may seek to change existing arrangements due to changed circumstances. In these cases, it may be appropriate to return to mediation, or go to mediation for the first time, in order to attempt to reach a settlement without recourse to instituting further legal proceedings. At all times, mediation should be entered into voluntarily.

62. Nothing in this principle implies that the court has the power to appoint a mediator.

#### *Principle VI: Promotion of, and access to, mediation*

63. In establishing this principle it was acknowledged that mediation has not been well understood or well used in most states. Surveys have shown that, when asked, people think that resolving disputes amicably is preferable to litigation, but few have heard of mediation services, or mediators.

64. In order to improve knowledge and understanding about mediation, states should promote mechanisms for informing the public through information programmes, written materials, and the media. It is particularly important to ensure that lawyers and the judicial or other competent authorities understand the mediation process and can provide accurate information to parties who may wish to use it.

65. While there is some information available in most states about mediation services, only in Andorra and Norway have there been national campaigns to provide information. In England and Wales, the Family Law Act 1996 requires attendance by the party wishing to initiate divorce proceedings, at an information meeting during which verbal, written and other information will be provided on a number of matters, including mediation. It will also be possible, if a party is seeking legal aid for legal representation, to require attendance at a meeting with a mediator in order that the suitability of the case for mediation can be considered and the mediation process and potential benefits explained. Attendance at such meetings may be compulsory, and states are free to consider the advantages of such a procedure.

66. It is a fundamental principle that if mediation is introduced as an alternative dispute-resolution process, it should be available to all who might wish to use it. Access to mediation could be promoted by states for example, by providing some financial support for mediation services directly, or by providing legal aid to parties on the same basis as for legal proceedings.

#### *Principle VII: Other means of resolving disputes*

67. The recommendation clearly recognises that mediation is not the only process available for settling disputes in an amicable, consensual way. Others include:

- a. conciliation, or conciliation counselling, which are frequently used as alternative terms for mediation. It describes a process of orderly discussion under the guidance of a neutral third party, known as a conciliator.

b. family counselling, although more commonly describing a process in which a neutral third party helps parties to understand and work through difficulties with a view to saving or restoring a relationship, can assist parties to make agreements about a future life apart.

68. As all such means of resolving disputes without recourse to the courts and litigation are to be encouraged, the recommendation indicates that states may examine the desirability of applying the principles of mediation, as laid out in this recommendation, to these other processes. However, no two processes of dispute resolution should be ongoing simultaneously, since this may cause interference or confusion for the parties, and thus undermine the benefits of the different processes.

*Principle VIII: International matters*

69. This principle recognises the increasing number of family disputes, particularly concerning custody and access, in which there is an international element. It recognises also that in these cases international mediation should be considered as an appropriate process.

70. During the discussions, the following situations were considered:

- a. the fixing of conditions for access;
- b. access to a child who has been returned after an improper removal;
- c. the cases where there has been a refusal to return the child by a court decision;
- d. the cases where the child is opposed to access or custody.

71. International mediation should be considered as an appropriate process in order to help parents to organise or re-organise custody and/or access, or to resolve disputes arising after decisions have been made in cases where parents are resident in different states. Such disputes are frequently the most difficult to manage because of the transfrontier nature, and the involvement of more than one judicial or other competent authority.

72. Family mediation could be a useful process in order to fix the conditions for access, in particular safeguards and guarantees that in cases of transfrontier access the child is returned at the end of the access period, before any decision has been reached when parents are living or plan to live in different states.

73. Mediation could also be useful in the following situations:

- a. cases where the recognition or enforcement of the decision relating to custody is refused by the court of the state addressed (this is the state to which the child has been removed) on the basis of a ground of refusal established in an international instrument (for instance, grounds of refusal established in Article 10 of the European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children of 1980), and the applicant parent requested the institution of fresh proceedings concerning the substance of the case (Article 5, paragraph 4 of the Custody Convention);
- b. cases when the applicant (custodian parent) accepts the refusal by the court of the state addressed to recognise and enforce the decision relating to custody but requests the central authority of that state to apply to the court for granting access (Article 11, paragraph 3 of the Custody Convention).

74. All the principles of mediation in this recommendation apply to international mediation. In addition there are some specific considerations in international cases:

- a. there may be good reasons why the parties may wish to mediate in a particular state (country/culture of origin, for example) and wherever possible, parties should be free to choose where mediation takes place. States should look at the issues and work together co-operatively to ensure that the best possible opportunities for mediation exist for parties experiencing transfrontier disputes. It may be that a third state might provide a more neutral territory for mediation when parties are resident in different states.
- b. the need for specific additional training for international mediators in order to take account of a number of specific factors. International mediators will have to take account of the family law systems pertaining to the states where parents are or will be habitually resident and the essential principles of international instruments relating to custody, access and child abduction. In addition consideration will have to be given to the particular difficulties parents will encounter when they are making arrangements for access across national boundaries and geographical distances and the fears of custodial parents in respect of child abduction, which may be heightened as a result of the non-custodial parent living in another state and jurisdiction. Any special risks and consequences of child abduction will also have to be considered. International mediators will also have to take account of different cultural expectations in the countries in which the parties are going to be resident which may impact on how the parties perceive their responsibilities as parents, and how they may respond to changing circumstances. Account will also have to be taken of the cultural influences of extended family members, in particular grandparents, in respect of arrangements for access and the upbringing of a child. International mediators will need to work flexibly (using a variety of models, for example shuttle mediation, video conferencing and so on) in order to mediate across distances and will need the knowledge of foreign languages or the competency and training in the appropriate use of interpreters and other experts as deemed necessary in any specific case.

75. International mediation may require different forms of mediation, such as shuttle mediation for example. Shuttle mediation refers to the way the mediator may act as a go-between, shuttling between the two parties who remain physically apart. The mediator may pass messages between them, or actively negotiate on behalf of the parties. It is a common method in international mediation. There are disadvantages, however, particularly if the mediator does all the negotiating, and is at risk of compromising neutrality and impartiality.

76. In some cases it may be necessary to conduct a mediation meeting by tele-conference, or to involve more than one mediator. Co-mediation may offer distinct advantages where there is particularly intense conflict, or difficult circumstances, as are frequently found in international disputes.

77. In the case of transfrontier access, international mediation has advantages over other procedures:

- a. it gives the responsibility of making arrangements about custody and access to the parents themselves;
- b. it facilitates the work of the judge in what can be very difficult cases;
- c. it can reduce the costs of litigation.

78. In cases of wrongful removal or retention of a child, mediation may not be advisable during pending return proceedings. There is an obligation based on international instruments to return the child immediately and therefore there must not be any delay. In such proceedings, however, mediation could be used for dilatory tactics. Furthermore in cases of wrongful removal or retention, states which have made use of the possibility given by Principle VI.b of the recommendation should normally not require the parent, whose right has been infringed, to meet a mediator before deciding on the return of the child. Moreover, mediation may not be appropriate because the wrongful removal or retention of a child adversely affects the equality of the parties' bargaining positions. After the end of the return proceedings mediation could be useful in re-establishing negotiations with a view to finding solutions in order to continue access in the best interests of the child.

79. International mediation should be encouraged, therefore, but should not be mandatory. If parents are to be encouraged to mediate transfrontier disputes, there is a need to increase the information available for parents, and encourage co-operation between mediators in different states.

[1] Conciliation counselling is mediation which includes some counselling

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