

# FAMILY MEDIATION

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## INTRODUCTION

When we hear the term family mediation, we usually think of the application of alternative dispute resolution techniques to divorce and child custody issues. Yet recent developments warrant expanding our concept of family mediation. Although not without controversy, the use of mediation in divorce and child custody conflicts has grown dramatically. However, mediation has also been used more widely in other disputes between family members—those between parents and children, between non-divorcing spouses, between squabbling heirs, and between caretakers of elderly parents, to name just a few. How is mediation applied in these kinds of cases? Are we being carried away with enthusiasm in applying the techniques of the mediation process or can these techniques be valuable to families throughout the family life cycle?

Before attempting to answer these and related questions, it may be useful to look at several examples of actual cases where mediation was used to resolve non-divorce related issues between family members.

## I

### FAMILY MEDIATION IN PRACTICE

#### *A. Case I: Parents and Children*

Mr. and Mrs. Velachi,<sup>1</sup> New York City residents, felt their fourteen-year old daughter, Maria, was beyond their control. They had received repeated notices that Maria was a truant from school. Maria frequently stayed out late at night without permission, and she lied regarding her whereabouts. Mr. and Mrs. Velachi considered filing a Person in Need of Supervision ("PINS") petition in Family Court, but agreed to try mediation after learning of its availability from an intake worker for a privately sponsored, court-annexed program.

During the first mediation session, the mediator learned that Mr. and Mrs. Velachi were immigrants from Northern Italy. Mr. Velachi was employed full-time as a carpenter, and spoke broken English. Mrs. Velachi was a quiet woman who spoke very little and deferred to her husband. They had one other daughter, aged twelve.

Mr. Velachi said he believed strongly in discipline, close families, and

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1. Names and identifying data in this and subsequent cases have been changed to protect confidentiality.

“staying with your own kind.” He said he was shocked by the freedom of, and what appeared to him to be the promiscuity among, the youth in this country, particularly among young girls. He wanted Maria to come directly home from school every day and to associate only with one or two friends of whom he approved. He was disturbed by what his friends were saying about Maria and feared she would become pregnant. He was also upset by the people with whom Maria spent her time (most of whom he did not know), Maria’s secretive behavior, and her late night phone calls from friends.

Maria was gregarious, pretty, physically mature, and openly rebellious. She said that her many friends were important to her and that she felt trapped by her parents, who did not seem to understand or approve of her behavior. By her own admission, Maria had often skipped school to see her friends, and lied to her parents about where she was and whom she was with. She stayed out overnight on several occasions because she was afraid of what her parents would do if she came home late.

As the session began, Mr. Velachi was adamant about refusing to change what he considered to be appropriate rules for his daughter. Likewise, Maria seemed determined to continue her behavior. While their affection for one another was obvious, they were quick to break into heated argument.

During the first session, the mediator worked to redefine the conflict as a family problem, rather than as one involving only Maria’s rebellious behavior, or as one involving only overly strict or unrealistic parental rules and expectations. Since the situation was creating difficulties which were unpleasant for all family members, it would be important for all of them to consider changes.

Maria clearly wanted more freedom. Mr. Velachi was primarily concerned with where Maria would be going when she was away from home, and with whom. The mediator helped the family work out an agreement for the following week before the next mediation session which would accommodate both these interests, and would allow the family to take several small steps towards resolving their difficulties.

In exchange for being permitted to stay out until nine p.m. on two specific nights during the week, Maria agreed to introduce her parents to the friends she would be with, to be escorted home by those friends, and to obtain permission as to where she might go. Mr. and Mrs. Velachi also agreed to allow Maria to go to a party she was anxious to attend the next Saturday night. Maria consented to have her mother take her to the party and bring her home. Maria also agreed to attend school every day that week.

While Mr. and Mrs. Velachi remained uneasy about this arrangement, given their conviction that Maria could not be trusted, they were willing to try it. Maria did not feel that the agreement gave her sufficient freedom, but understood that it represented more than her parents had previously allowed her, and that if she were able to gain their trust by keeping the curfews agreed upon, her parents might be willing to consider lifting other restrictions.

When the family returned for mediation the following week, the situation

had improved, but their conflicts continued. While Maria had kept her curfew on the first night, she had skipped school one day toward the end of the week. Her parents had responded by making her stay at home on the other night.

The mediator refocused the family's attention towards the positive gains made the previous week. She stressed that mediation was a process which could not solve their conflicts overnight, but could work well with everyone's participation and patience. The mediator also met separately with the parents and the child during this session, to help the parents consider the extent to which controlled and gradual increases in Maria's freedom might be a realistic alternative to Maria's rebellious behavior, and to help Maria consider the extent to which handling these increases in freedom responsibly might meet her own interests.

Upon reconvening, the family reached an agreement providing for a slightly increased extension of Maria's curfew. In return, Maria specified where and with whom she would be on her nights out. Maria also agreed not to have her friends call her after ten o'clock each night, and her parents agreed not to restrict her calls once she had finished her homework. Finally, Maria agreed to introduce to her parents some of her friends they did not know, and her parents agreed to allow her to entertain these friends at home certain days after school.

This approach seemed to have worked well for the family, for they appeared more reconciled during the third mediation session. In addition to continuing to work with the family about curfew issues during this and a final, fourth session, the mediator addressed some of Maria's school needs. Since Maria had missed a substantial number of days at school, she was in danger of being held back the following year. Mr. and Mrs. Velachi agreed to go to Maria's school to talk with her guidance teacher, and Maria agreed to be tutored if that were necessary.

When contacted two months after mediation, the family's reaction to mediation was generally positive. While they continued to experience conflicts, they stated that they were better able to work through their difficulties together.

### *B. Case II: Non-Divorcing Spouses*

Jane and Bill Smith were referred to mediation by their family therapist, who felt that therapy was not producing results and that the Smiths, who were committed to preserving their marriage, could benefit from some other kind of intervention. Jane and Bill had been married for fifteen years and had two children, a girl aged fourteen and a boy aged twelve. Bill, forty-two, owned his own business and was very much "on the go." Jane, thirty-eight, had stopped working when her first child was born, and devoted her time to sports and to raising the children. Financially secure, they maintained an active lifestyle, taking frequent trips and spending time with friends.

During the first mediation session, both Jane and Bill characterized their

relationship as highly competitive and a struggle. They reaffirmed their commitment to their marriage, and expressed a desire to learn how to negotiate with one another. When asked, they stated that the immediate issue causing difficulty between them was the redecoration of their home. They both agreed that their home should be redecorated, but disagreed on how and when to do so. Bill wanted to redecorate the house in a limited way and gradually, finishing rooms which had been started and proceeding only step by step. Jane had a grander scheme of doing over and winterizing the porch, perhaps building a tennis court, using money from other activities to create a hub for family and friends. Their discussion of the issue was filled with recriminations, with Bill blaming Jane for being impractical and Jane blaming Bill for being insensitive.

In order to focus on Jane and Bill's statements that they needed to reassess their lives, and to begin reframing the decorating issue, the mediator suggested that before the next session, each develop two circular "pie charts." One pie should reflect the time each felt had been apportioned to their various activities in the past, and the other should reflect how each would like to see their time apportioned to various activities in the future.

This strategy proved useful in a second mediation session. In the first place, the exercise required Jane and Bill to identify their own needs and interests, rather than to criticize each other for the positions they were taking. Second, it required them to be specific about exactly what those needs and interests were. Third, seeing one another's "pies" was illuminating for each because of their form. While Jane's pie was approximate and somewhat impressionistic, Bill's was executed with precision and percentages, and included time for such items as sleep and commuting. This later led to discussion about styles of communicating with one another. Finally, the "pies" were revealing in terms of their substance. While Bill had allocated exactly half of his "future pie" to work and sleep and Jane the same portion to home activities, the other halves of each of their "pies" were strikingly similar in terms of the amount of time each wanted to travel, socialize, and spend time with their children. Thus, they disagreed less on their priorities than they had thought. In addition, each of the future "pies" projected spending far less time than they had been spending at their second home in Vermont, a discovery which suggested a reallocation of financial resources neither had previously considered.

With the "pies" setting the context, the mediator returned to the specific issue of the home redecoration. Upon further probing, it became apparent that Jane's real concern was her feeling that she had no input into or control over decisions. Bill's major concern was the actual amount of money which would be spent, and his fear of decorators' underestimates. After lengthy discussion, they agreed that Bill would set a ceiling amount to be spent generally on redecorating for that year and the next, and that Jane would decide how this money would be spent. During the following week before the next mediation session, Bill would review their finances, and Jane would meet with their decorator to get specific estimates on various costs.

Jane and Bill came to the third mediation session with their assigned tasks completed, and ready to agree on a specific plan of action for their home. During this and subsequent sessions, the mediator helped them review the process to determine how it was that in mediation they were able to overcome their long-standing and acrimonious impasse on this issue. With this discussion as a background, they addressed another issue which had recently arisen between them relating to the safety of their daughter's travel abroad over the summer. As the mediator helped them work on this issue, they began to recognize a pattern: Bill made decisions on his own because he feared that discussing them would provoke a fight, leading Jane to chafe at what she perceived to be his authoritarian nature and her own powerlessness. Reviewing the mediation process, Bill understood how the framing of issues and the communication of individual needs could permit nonadversarial discussion, and Jane understood Bill's need to have those issues discussed in terms of specific facts and information. They completed mediation expressing confidence in their ability to continue this process on their own.

### *C. Case III: The Squabbling Heirs*

Susan Green, an unmarried woman in her thirties, contacted the mediator for help in a dispute with her mother over her grandparents' estate. Susan's grandfather had died four years earlier, leaving all of his assets to Susan's grandmother. The grandmother, now in her nineties, was suffering from the advanced stages of Alzheimer's disease and living with Susan's sixty-five-year old mother Joyce, who cared for her and managed her affairs. Susan knew that her grandmother's will provided that the estate would be divided equally between her and her mother, but was concerned about how her mother was currently managing that estate on behalf of her grandmother. She was also concerned about how and when the estate would be disposed of, particularly in light of her pressing financial needs and in light of the history of her relationship with her mother.

Susan was raised by her grandparents from the time she was seven weeks old, meeting her mother for the first time at age five, when she and her parents and grandparents moved north to live together in a brownstone in New York. Susan continued to call her grandmother "Mama" and her mother "Joyce." Both Susan and Joyce acknowledged that their relationship had always been a troubled one, with money being both the major tie and the "hot" issue between them.

Joyce's major concern was Susan's "financial irresponsibility." She did not approve of the way in which Susan spent money, her current lack of a steady income, her failure to make what Joyce considered responsible plans for her future, and her frequent and unpredictable demands for money. Because of these concerns, she had consistently evaded Susan's requests for information about the estate, although she had been providing financial help. In

view of the deteriorating relationship between them and their frequent battles over these issues, Joyce agreed to Susan's suggestion that they try mediation.

At the first mediation session, the mediator worked to separate the emotional from the financial issues. In addition, both Susan and Joyce agreed that it made sense to separate the issue of Susan's immediate financial needs, at least initially, from the issues regarding management and disposition of the estate.

Susan's immediate financial needs were occasioned by her recent efforts to start her own business, a move of which Joyce disapproved. Joyce was, however, willing to continue to help Susan so long as the amounts were predictable and limited in size and duration. Susan agreed before the next session to draw up a monthly budget, and to project her expected monthly income. Joyce agreed to review her own financial situation to determine her ability to help Susan.

Susan appeared at the next mediation session with a thorough and detailed financial statement. Together, Susan, Joyce, and the mediator calculated the monthly difference between Susan's expenses and projected income. Susan had projected that she could be fully self-supporting in ten months, and agreed that if Joyce would assist her until then, she would take full responsibility for meeting her expenses if her subsequent projected income fell short. Joyce agreed to send Susan a monthly check equal to her projected average monthly deficit for the ten months if Susan would agree not to ask for any additional financial assistance. Both agreed that this resolution would not preclude Joyce from making additional gifts of money to Susan from time to time at her own initiative.

The next issue discussed was the purchase of a home for Susan, an issue which had been an additional source of friction between the two. Susan wanted a place of her own, both for the emotional security it would provide and because she had been paying a disproportionate amount of her income in rent every month. Joyce agreed that Susan should buy, but she was concerned that Susan's current plan to buy a house with two friends might leave Susan "holding the bag" if the two friends ever decided to move. She was also worried by the substantial upkeep required in owning a house, rather than a condominium. She did not have large sums of money available to help Susan with the purchase, and she continued to be concerned about Susan's financial responsibility.

Susan had priced condominiums and determined that they were out of her price range. She also wanted money available under her sole control so that if she found an appropriate house, she could take immediate steps towards a purchase.

Joyce had met and liked Susan's two friends. She agreed that her concerns about Susan's situation would be allayed if Susan committed herself to negotiate an agreement with her friends to cover the contingency of either of them moving out. Susan also agreed to revise her budget and set aside a cer-

tain amount of money each month in a special account to cover potential upkeep needs.

Based on a detailed schedule of purchase and moving costs which the mediator asked Susan to prepare, Joyce agreed to make a certain sum available from Susan's grandmother's bank account for a down payment on a house. Susan agreed to deposit these funds in a specified account, to use these funds solely for the purchase of a house, and to notify Joyce before withdrawing the funds for this purpose. They both agreed that this money would be deducted from Susan's share of her grandparents' estate.

Discussion of other issues relating to the estate was complicated by Joyce's reluctance to give Susan detailed information with respect to specific amounts in the estate, information to which Susan felt she had a right. Joyce felt defensive about Susan's criticisms of her ability to manage the estate effectively. Susan specifically did not want any responsibility for management, but was concerned about her own tax and other liabilities, as well as her mother's lack of knowledge about probate matters.

Joyce's reluctance to share information was based on her fear that if Susan knew how much she would eventually receive, she would become even less responsible about her finances. Both Joyce and Susan concurred with the mediator's suggestion that some general agreements about the method and timing of the estate's disposition might pave the way to disclosure of its value.

The terms of the will divided the estate equally between Joyce and Susan, and named Joyce as the executor. The estate consisted of three bank accounts, two in the names of the grandmother and Joyce, in trust for Susan, and one in the name of the grandmother only. There were three parcels of land in various locations. Additionally, the grandmother held title to the home in New York where she and Joyce were currently living.

During the course of several mediation sessions, Joyce and Susan agreed that Susan would receive one-fourth of her share of the bank accounts upon her grandmother's death, and the remainder of her share one year later. They agreed on the terms under which the various properties would be sold, and agreed that Susan would trade off the value of her share of the home in New York against the proceeds of sale of other property.

Finally, Joyce agreed to consult with a trusts and estates attorney referred to her by the mediator to learn more in advance about probate of the estate and various tax consequences of disposition. They agreed that if the attorney's advice called for changes in the way the estate was being managed currently, Joyce would follow that advice without interference from Susan.

The last mediation session was spent reviewing the terms of their agreement and completing the process. While Susan and Joyce's relationship is never likely to be free of conflict, with neither agreeing about the ways in which the other conducts her life, they acknowledged that the clarity and planning they had accomplished with respect to their finances would signifi-

cantly decrease the need for mutual interference, at least in that particular area.

#### D. *Common Threads*

In all three cases above, the immediate issues in dispute were clouded by the intricate web of emotion present in the relationship between members of any family. In each case, the problems presented were but the tip of the iceberg of deeper, underlying problems. Unlike the cases dealt with at neighborhood justice centers, such as disputes between neighbors, merchants and consumers, landlords and tenants, and the like, those between family members involve not just one specific incident or a series of incidents, but rather a history of conflict in troubled relationships. Indeed, in family mediation, in contrast to mediation of other types of disputes, it is the relationship, itself, which is the client. The complexity of this kind of mediation leads one to ask: What are the goals of mediation between family members? What are the techniques a mediator can use? How does this type of intervention compare to therapy? When is the intervention of a neutral third party in family conflicts inappropriate? And finally, how does family mediation relate to the legal system?

## II

### CHARACTERISTICS OF FAMILY MEDIATION

#### A. *Goals of Mediation*

At the outset, it is important to recognize that the goal of family mediation is not to improve the relationship between family members. As in mediation of other types of disputes, an improved relationship between the parties may be the *result* of the mediation process, but it is not the *goal*. The mediator's goal is to help parties resolve their conflicts by agreeing to behavior changes in specific problem areas. Improved relationships may result from the process of communication in mediation, as well as from the process of trust-building which occurs when the parties make and keep commitments to one another.

In the mediation field generally, there is debate as to how much knowledge about the subject matter of a dispute a mediator must have in order to be able to conduct the process effectively. For example, if called upon to intervene in a dispute between two contractors, must a mediator have intricate knowledge about the construction industry? Family mediators may be burdened by *too much* knowledge. All of us are members of families ourselves, and have deeply ingrained views of how families should function. Depending upon one's values and culture, one might judge the Velachis' parenting style as overly strict, or believe that Maria required more discipline. A feminist might think Bill Smith could use some enlightenment. In the case of the Greens, one might have differing views on whether a parent should be supporting a grown child, or whether Susan might be making her mother pay for abandoning her



at birth. Mediators, however, cannot afford to allow these values and judgments to interfere with their task. It is not the mediator's job to mold the clients' relationships into something they are not. None of the families described above are the Waltons. The mediator's goal is simply to help family members behave towards one another in ways which work better for them within their existing family structures.

### *B. The Mediator's Techniques*

In all of the cases described above, the first job of the mediator was to separate the emotional from the practical issues. This is not to say that a certain degree of emotional expression was not allowed. The question for the mediator is always the *extent* to which emotional expression is productive. In family cases in particular, emotions are likely to run extremely high, and parties often need to "get things off their chests" before they can begin to address the issues at hand. The point when emotional expression goes beyond that useful purpose is always a sensitive one for the mediator to assess.

The second task for the mediator is to reframe the issues presented by the parties. One of the reasons the parties have reached a stalemate is the way in which they perceive the problem. If a mediator simply accepts the statement of the problem in the terms used by one or the other of the parties, she becomes locked into those same perceptions. Most parties will frame issues in terms of the solution they desire. For example, Mr. Velachi framed one of his issues in terms of whether or not Maria should come home directly after school. Put in these terms, the solution could only be that she should (in which case he "wins"), or that she shouldn't (in which case he "loses"). What the mediator attempts to do is to reframe the issues in terms of the parties' needs and interests. In Mr. Velachi's case, what he was really concerned about was Maria's whereabouts and companions when she was not at home. Those concerns could be met by a solution which would also take into account Maria's needs and interests, namely, spending more time away from home with her friends.

Reframing the issues also changes the shape of the subsequent discussion of those issues, from blaming and recriminations ("you never, you always") to communication of interests and concerns ("I need, I want"). Hence, the third task of the mediator is to get detailed, specific information about each party's needs and interests. In the case of the Smiths, this task was accomplished by having the parties prepare the "pies." For the first time, Bill and Jane were able to stop debating who was right or wrong on the redecorating issue and to begin identifying and specifying their own desires and priorities.

Once the issues have been reframed in terms of the parties' needs and interests, and both they and the mediator clearly understand what those needs and interests are, work can begin toward developing solutions which will accommodate all of those needs and interests or will involve trade-offs between the parties where such accommodation is not possible. Here it is useful for the

mediator to have a good grasp of various persuasive techniques in order to help the parties stay on track and avoid impasse. For example, movement towards agreement between Susan and Joyce Green was constantly obstructed by Joyce's expressions of disapproval about Susan's choice of lifestyle and by Susan's tendency to take "symbolic" positions based on the history of their relationship. The mediator had to work consistently to "separate the people from the problem" and to keep Susan and Joyce focussed on the future rather than on the past.

The final task of the mediator is to draft agreements reflecting the parties' mutually acceptable resolutions, and to ensure that those agreements are realistic, clear, and complete.

### *C. The Relationship Between Mediation and Therapy*

In contrast to divorce mediation, to which it is lawyers who most often voice opposition, expansion of mediation to other family-related matters is most frequently of concern to therapists. Many therapists express the view that where problems center around emotional issues, rather than issues with legal implications, mediators are engaging themselves principally in counseling without adequate clinical training. Mediators respond by drawing distinctions between the two processes, describing mediation as time-limited and task-oriented and counselling as a more free-flowing exploration of feelings. Ultimately, however, to ask how mediation differs from therapy may be to ask the wrong question. Certainly, an effective family mediator must have certain skills in common with a therapist—listening skills and basic helping skills such as reflecting, summarizing, and informing. But perhaps the more useful questions to ask are whether mediation techniques can be helpful to families with problems, and whether mediators should adopt standards limiting both the types of cases they handle and the kinds of issues they address.

While far more research needs to be done, preliminary results as well as feedback from individual clients indicate that the techniques of the mediation process can indeed be very helpful to families experiencing conflicts unrelated to divorce and, in particular, that mediation helps family members communicate more effectively with one another.<sup>2</sup> For example, in research conducted by a privately sponsored, court-annexed, parent-child mediation program, families were contacted two months after their last mediation session and asked to assess the quality of their mediation experience. Nearly one-third of the parents contacted (exactly half of those who reported that mediation had been helpful) mentioned without being asked directly that communication had improved as a result of mediation. As one mother explained, "[b]efore meeting with the mediator, my daughter was very reserved about sharing her feel-

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2. S.E. MERRY, *MEDIATION IN FAMILIES: A STUDY OF THE CHILDREN'S HEARINGS PROJECT* (Children's Hearing Project of Cambridge Family, Ma., and Children's Service) (1985); M. MORRIS, *PARENT-CHILD MEDIATION: AN ALTERNATIVE THAT WORKS* (Children's Aid Society, NY) (1983).

ings with or in front of me. As a result of mediation, communication is now open between us." Another mother reported that she now "discusses things fully with [her] daughter before getting angry and [is] able to meet her half-way." In the words of a third parent, "[m]y son and I talk more. I understand more of his needs and have a different perspective on some of his friends whom I disliked initially."<sup>3</sup>

Such findings indicate that mediation can be an educative process that has a positive effect on the way families will handle conflict and crisis in the future. Indeed, as in the case of Bill and Jane Smith, the mediator can often help the parties walk through the mediation process by which they were able to resolve their conflict and help them understand explicitly how they might apply this same process to the kinds of issues they expect to arise in the future.

If mediation has been shown to be helpful to families experiencing conflicts unrelated to divorce, then perhaps rather than trying to distinguish it from therapy we ought to consider it simply as an alternative kind of intervention, which may or may not, in particular cases, obviate the need for therapy. Undoubtedly there are families or particular family members who do not feel comfortable with "counselling" or, for whatever reason, are less able to benefit from a therapist's approach.<sup>4</sup> At the same time, however, the concerns voiced by therapists should lead us to consider whether there are appropriate limitations to the role of the family mediator.

#### D. *Limitations for the Family Mediator*

As suggested earlier, in most cases involving family members the problems presented to the mediator are but the tip of the iceberg of deeper, more long-standing problems. In approaching the question of appropriate limitations to the family mediator's role, the typology of conflicts Morton Deutsch developed in the introduction to his book, *The Resolution of Conflicts*, is helpful. Specifically, Deutsch distinguishes between manifest and underlying conflicts as follows:

A husband and wife, for example, may quarrel over household bills . . . as a displacement of an unexpressed conflict over sexual relations. The conflict being experienced is the *manifest* conflict, the one that is not being directly expressed is the *underlying* conflict. The manifest conflict will usually express the underlying conflict in a symbolic or idiomatic form; the indirect form is a "safer" way of talking about conflicts that may seem too volatile and dangerous to deal with directly. Or the manifest conflict may simply reflect the general irritability and tension in the relations between the conflict-

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3. M. MORRIS, *supra* note 2, at 55-56.

4. The research cited above questioned families as to their prior experience with some kind of psychological counselling. Interestingly, all of the families who reported that their psychological counselling experience was not helpful also reported that mediation was helpful. *Id.* at 67.

ing parties that result from an unresolved, underlying conflict—the unresolved tension leading each side to be unduly sensitive to slights, to be argumentative, and the like.<sup>5</sup>

Deutsch goes on to discuss resolution of these two types of conflicts:

Often manifest conflict can only be resolved temporarily—unless the underlying conflict is dealt with or unless the manifest conflict can be separated from the underlying conflict and treated in isolation. On the other hand, sometimes the resolution of an underlying conflict is expedited by dealing with it initially in its safer, displaced forms, which often seem more approachable because they are less cosmic in their implications than the underlying conflict.<sup>6</sup>

This analysis is a useful one for family mediators. To put it in concrete terms, consider the difference between the case of the Smiths and that of the Greens. It became apparent in the course of mediation between Bill and Jane Smith that their impasse on the issue of the redecoration of their home was simply the overt manifestation of a deeper issue involving the family's decision-making process. In the case of the Greens, the issue underlying Susan's immediate financial needs and the management and disposition of her grandparents' estate involved the history of her relationship with her mother. In the first case, the underlying conflict could be resolved in mediation, and resolution was expedited by dealing with it initially in its safer, displaced form. In the second case, the manifest conflict had to be separated from the underlying conflict and treated in isolation.

Mediators can analyze the nature of the parties' underlying conflict to determine the appropriate limitations to their role. One key to deciding whether the underlying conflict is resolvable through mediation is to examine the extent to which its resolution requires the participation or cooperation of both of the parties to the mediation process. Clearly, the way decisions were made in the Smith household could only be resolved by changes in behavior by both Jane and Bill. In contrast, Susan's feelings of abandonment by her mother at an early age, and whatever accompanying feelings of guilt Joyce might have been experiencing, could probably not be altered by specific behavioral agreements. It is with respect to the latter kinds of issues that the mediator, unlike the therapist, should not attempt to intervene.

This is not to say that the mediator should ignore these types of issues altogether. Often it may be useful for a mediator to put on her "resource expander" hat. One might explore with Susan, for example, the extent to which she had considered dealing with her unresolved feelings in another process such as therapy, and what resources she might have available to her for that purpose. However, a mediator should not attempt to make these types of

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5. M. DEUTSCH, *THE RESOLUTION OF CONFLICT: CONSTRUCTIVE AND DESTRUCTIVE PROCESSES* 13 (1973).

6. *Id.*

issues the subject of mediation itself. Indeed, there may be certain cases where none of the family problems involve underlying conflicts whose resolution calls for the cooperation or participation of both parties, or where manifest conflicts cannot be separated from the underlying conflicts and treated in isolation. This situation might be present, for example in many domestic violence cases, where it is the batterer, alone, who must change his or her behavior, and where the issues which might call for changes in the behavior of both parties cannot be resolved without addressing the physical abuse. In such situations, the mediator should decline to handle the case.

### *E. Relationship Between Mediation and the Legal Process*

Certain cases involving family members in which mediators are invited to intervene involve disputes which might, alternatively, be handled by the courts. The Velachis, for example, could have tried to address their problems with Maria by filing a petition in the Family Court asking to have Maria adjudged a "Person in Need of Supervision," or status offender. There are many ways in which laws give courts the authority to intervene in family disputes. If the Velachis had proceeded with a PINS petition in New York City, Maria would have been assigned her own lawyer, and her parents would have been required to testify against her to prove the allegations of the petition—a process which could only heighten antagonisms and lead to further alienation between family members. Indeed, research on cases of this nature referred from the Family Court suggests that the further along a family has proceeded in the court system before being referred to mediation, the more difficult it may be to effect a reconciliation.<sup>7</sup>

Mediation is also a self-determining process. With increasing federal and state laws and regulations authorizing intervention into family affairs, we should be empowering families, who have the most intimate knowledge of and investment in their individual needs and interests, to resolve their disputes instead of encouraging them to turn to some outside authority.

Granted, there may be situations where family members are unwilling to negotiate with one another, and where the court may be required to intervene. However, unless family members have no interest in preserving the family unit, their difficulties usually arise from their not knowing how, rather than their not wanting, to communicate productively. Hence, court intervention is less desirable than an intervention such as mediation, which can help the communication process.

Certain other kinds of disputes between family members fall clearly outside the legal net. There were no legal requirements, for example, governing the specific ways in which Joyce Green should manage the estate while Susan's grandmother was alive although incompetent. Mediation can be useful to help family members resolve conflicts around questions such as these.

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7. M. MORRIS, *supra* note 2, at 68.

While certain provisions in the mediation agreements families sign may not be legally enforceable, they may nevertheless be quite effective and significant to the family members. Perhaps, too, it is the process by which those agreements were reached which is of the most enduring value.

#### CONCLUSION

While there are appropriate limitations to a mediator's intervention in family disputes, mediation is a process which can be helpful to families throughout the family life cycle. Much work remains to be done in refining techniques and researching results. However, the time has come to expand our concept of family mediation.