

Family mediation as a form of alternative dispute resolution in Poland

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Abstract

For years, mediation has been unused as an institutionalised form of dispute resolution. The introduction of methods for alternative dispute resolution (ADR) into social life, including the use of impartial mediation in the practice of the Polish justice system, signals some social change. The practice and procedure of mediation is of particular importance in cases regarding close relationships between people. This article explains and promotes family mediation as a form of ADR. Experience shows that mediation in family matters brings a number of benefits to conflicted parties and the justice system.

Keywords: Conflict, dispute, mediation, family.

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1. Introduction

Modern society is characterised by the ongoing development and intensification of social relationships. The number of contacts and relationships we maintain with other people is increasing and relationships are becoming more and more diverse, complex and often of intense and conflicting nature. Nowadays, we are increasingly dependent on others and our needs and desires are sometimes significantly restricted. This leads to conflicts between individuals, social groups or communities. In extreme cases, we can talk about the aggrieved party and the offender. If the detriment is significant, it falls within the area of interest of the justice system and the offender can be punished. Mediation is an effective and increasingly used tool to restore proper relationships between parties to a conflict, including family members, and along with conciliation, arbitration and negotiation, it is a method of conflict resolution rapidly gaining widespread acceptance as an alternative to dispute resolution in the adversarial process.

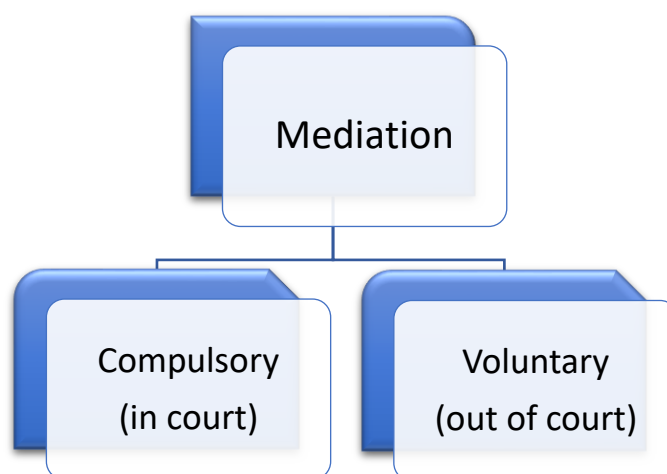


Figure 1. Types of mediation

Family mediation as a professional method of dispute resolution has been used around the world for over 30 years. In many countries, family mediation has gained acceptance among legal professionals and divorcing spouses. The evolution of family mediation in Poland resembles, in many respects, the evolution of this practice in other European countries. Professors Casalsa and Papayannis Diego (2005) argue that the acceptance of family mediation has increased in four similar steps in all European countries. At first, family mediation was discovered with enthusiasm by professionals dealing with family conflicts. After that, these professionals organised themselves in associations for the promotion and practice of mediation.

Next, national legislatures considered mediation to be a useful mechanism for the resolution of conflicts arising out of separation or divorce, a procedure that is to be preferred to adjudication in adversarial proceedings. And finally, family mediation was regulated in more detail and was included in the broader framework of rules regarding mediation in civil and family matters in many countries.

In Poland, the resolution of conflicts and disputes of various natures, including family matters, through mediation has been allowed by legal procedures for several years.

Pursuant to the Act of July 28, 2005, amending the Act – Code of Civil Procedure, and some other acts (Journal of Laws No. 172, item 1,438) which came into force on December 10, 2005, courts can refer for mediation all cases in which a settlement is permitted (Article 10 of the Code of Civil Procedure), and the settlement has the legal force of a court decision with enforceable title (Article 185 of the Code of Civil Procedure). Mediation is a form of justice that can be defined as restorative

justice as opposed to retributive or retaliatory justice. The mediation procedure relies on restorative justice. In criminal justice, the focus is primarily on the crime and the offender, and the victim is not paid special attention. In restorative justice, breaking the law entails repairing the damage and the active role of the victim in making a decision on redress and possible settlement is emphasised (Rekas, 2011, p. 3).

Table 1. Comparison of criminal and restorative justice

Criminal justice	Restorative justice
The crime and the offender are the focus of attention, while the victim’s problems are ignored	The victim’s problems and needs are the focus of attention
The most important people are the judge, prosecutor and defence lawyer	The most important people are the sufferer and the offender
The sufferer is deprived of information	The sufferer receives all information
The arguments of the sufferer are of marginal importance	The sufferer is encouraged to present his/her arguments
The feelings of the sufferer are ignored	Much attention is paid to the sufferer’s feelings
Legal professionals decide on the verdict	The sufferer takes an active role in reaching the settlement
Punishing the offender is the focus of attention	Attention is paid to redress/satisfaction
Justice is brought by punishing the offender	Justice is brought by repairing the damage

Adapted from (Waluk, 2002, p. 25).

2. Theoretical context of the research

Mediation has become an interdisciplinary mechanism and has many definitions. Moore (2012, p. 5) defines *mediation* as: *the intervention in a negotiation or a conflict of an acceptable third party who has limited or no authoritative decision-making power, [and] who assists the involved parties to voluntarily reach a mutually acceptable settlement of the issues in dispute. In addition to addressing substantive issues, mediation may also establish or strengthen relationships of trust and respect between the parties, or terminate relationships in a manner that minimises emotional costs and psychological harm.* In all definitions, regardless of the matters in which mediation is used, this process relies on the intervention of a third party, who is neutral to the issues in dispute, and follows the principles of voluntariness, impartiality, neutrality, confidentiality and acceptability. The above-mentioned principles serve the benefit of parties involved in mediation, as well as the mediator, ensuring optimal conditions for co-operation (Waszkiewicz, 2009, p. 91). The process of mediation creates circumstances and opportunities to understand and learn the feelings of another person, even in a situation when he or she causes a conflict in the family.

Almost all researchers have reported a high (60%–80%) level of satisfaction among clients using a family mediation service, and this concerns both involvement in the process of mediation and the achieved outcome (Golann & Folberg, 2006; Kelly, 1989, 1991; Kressel, 2005, 2007; Pearson & Thoennes, 1985). It turns out that both the satisfaction of clients and success measured by reaching a consensus are interrelated. Results of other studies have confirmed these observations. Satisfaction with mediation was more likely to be declared by couples that had reached a consensus (Johnson, Levine & Richard, 2003; Pearson & Thoennes, 1985). Kelly (1991) found that couples who ended the divorce mediation process by signing an agreement (total or partial) were more satisfied than those who ended the process without reaching a written consensus (this applies to both spouses ending mediation by oral agreement, as well as spouses ending mediation without a consensus).

In Poland, a study conducted by Przybyla-Basista (2015) revealed that the vast majority of divorcing spouses expressed satisfaction about their participation in mediation. About 90% of participants in mediation that ended in reaching a consensus were very satisfied or satisfied. Considering cases that did not end with a consensus, 55.2% of respondents expressed satisfaction from participating in

mediation. Analysis of feedback provided by the spouses showed that for many of them the feeling of being understood and heard was important. This group also included many individuals who appreciated the positive role of mediation for their children (60.9%) and the fact that the assisting mediator was able to empathise with the situation of children (78.3%). Mediation in these cases could be an opportunity to achieve a certain balance when communicating with the spouse. Many participants in the mediation process appreciated the advantages of being able to have a conversation in circumstances controlled by the mediator. However, they realistically separated these advantages from the fact that reaching a consensus was impossible due to the much advanced stage of conflict.

The significant role of mediation in resolving family disputes, especially in divorce cases, has been recognised, for example, in the legal systems of Scandinavia, Great Britain, Germany and France. Research indicates a high rate of consensus (50%–80% of cases) and durability of arrangements, better understanding between family members and above all greater care, particularly about the well-being of minor children whose parents were divorcing (Parkinson, 2002).

In Poland, we observe a slow but steady increase in the use of mediation for resolving family disputes. In 2006–2012, there was a fivefold increase in the number of family cases referred to mediation compared to all family cases examined by district courts. Settlements were more often reached in family matters than in commercial or civil matters (Gojska, 2013, p. 109). This shows that Polish citizens prefer to settle disputes outside the courtroom, in procedures that are informal and aim at compromise. This approach is referred to by other authors as ‘the culture of compromise’. Some studies have also indicated that people choose adjudication in adversarial proceedings as a last resort. Most respondents believe that disputes should be resolved out of court, preferably only between the parties involved in the dispute (Kurczewski & Frieske, 1990; Skapska, 1989). The ideal irenic model, which cannot always be followed in practice, is *flexibility in dispute resolution and the pursuit of mutual consensus and satisfaction* (Kurczewski, 1982, p. 102).

Therefore, mediation is particularly useful in family law in resolving conflicts between close people who are often related. Most conflicts between close relatives are loaded with negative emotions that block proper communication between the disputants. Mediation is most effective in matters that concern family members or other types of close relationships between people. Importantly, the mediation process has to comply with the principle of voluntariness of participation because clients often decide to use mediation services after they have had an unfortunate experience in the courtroom when they failed to get assistance from other institutions. The ultimate goal of mediation is to work out a consensus (Rynkowska & Artymiak, 2014).

Because of the many transformations taking place in the modern family, its organisation and roles performed, there is a transformation of family patterns as well. Family models change; there are legalised marriages with or without children, but also unmarried couples, who often establish new families after a divorce and raise their children together. The roles in marriage become more flexible, interchangeable, and the role of children, who have more and more autonomy, increases. Moreover, a growing number of marriages end with divorce, and an increasing number of children are raised in patchwork families. The specific nature of family conflicts and their possible resolution through mediation indicates that mediation may concern different issues, such as the reconciliation of spouses, satisfying the needs of the family, arrangements on alimonies, child custody after divorce, contacts with children and division of property between spouses. In particular, issues related to child custody after divorce are an important class of cases in which mediation can be used to the benefit of both the divorcing parents and their minor children, and to reduce the caseload of courts.

3. Methods

Studies conducted by other researchers and cited earlier have demonstrated the unquestionable benefits of families using mediation services. Below is an analysis of the range of mediation services provided under the ‘SOS for families’ project at the Municipal Social Assistance Centre in Krasnik, by

the author of this article who also created the questionnaire used in the survey. The main purpose of the survey was to present the situation of families participating in mediation, and to assess the effectiveness of assistance provided to those families.

The project was implemented between October and December 2017 and was addressed to families with various types of dysfunctions caused by breaking of family ties, unemployment and addiction, often resulting in domestic violence. Under this project, 84 family mediation sessions were organised and held for 12 families from the city of Krasnik. The mediation process covered four categories of issues:

- First session – a meeting aimed at providing information and counselling, during which the parties to the conflict got to know each other better. Mediators informed the participants about the process and principles of mediation. This was then followed by a diagnosis of family problems.
- Second session – a meeting with the whole family or only with the family member who was the source of the problem. The purpose of this meeting was to present the problem and its consequences, and to work on motivating the family members to change.
- Third session – a meeting with the whole family, further work on the resolution of family problems with an attempt to reach a consensus.
- Fourth session – a summary of mediation activities was made and further assistance to the family was planned.

These actions were aimed at the education and activation of both the local community and families benefiting from the project.

4. Results and discussion

Overall, 12 families joined the family mediation project, and each family had seven individual mediation sessions organised. The survey involved 27 women (67.5%) and 13 men (32.5%). The mean age of clients using the mediation service was 41 years for men and 38 years for women. All respondents had minor children, under 18 years of age, and had been married for longer than 10 years. Two couples were in the process of divorce, three were divorced, one couple was in informal separation and the other six couples had a difficult and stressful family relationship, mainly caused by alcohol abuse or unemployment.

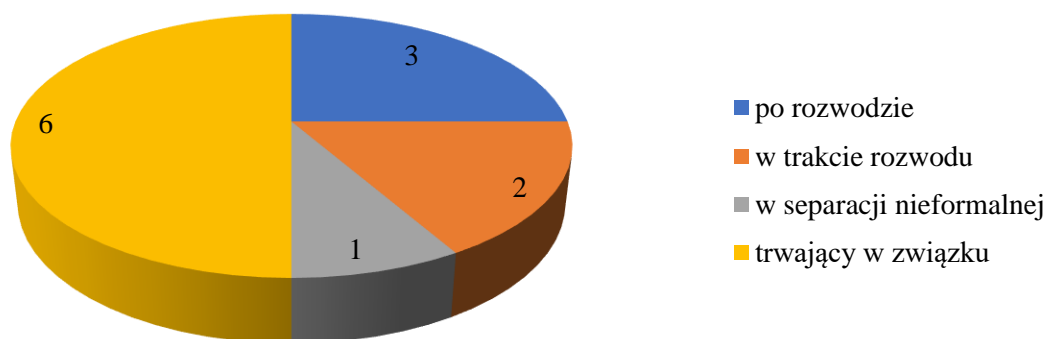


Figure 2. Status of families using the mediation service: divorced/in the process of divorce/ informally separated/still married

Mediation concerned resolving family disputes and aimed at reconciliation of spouses (one family), satisfying the economic needs of the family, alimonies (four families), child custody after divorce (two

families), arrangement of contacts with children (six families) and division of property between spouses (three families). Issues related to child custody after the divorce of parents were the most important class of cases in which mediation turned out to be the best amicable solution, for both divorced parents and their minor children.

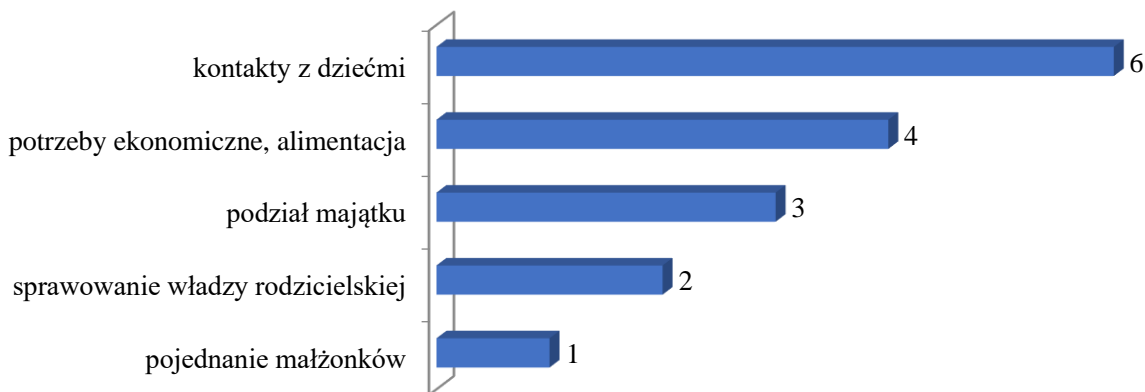


Figure 3. Issues subject to mediation contacts: with children/economic needs, alimonies/division of property/child custody/reconciliation of spouses

The majority of respondents (32 out of 40) declared that the fact they voluntarily joined mediation and had the possibility of withdrawing from it at any time was an important aspect of the entire process. Respondents also pointed to the mediator's neutrality and gentleness during individual mediation sessions as the main advantage of mediation. This aspect was particularly emphasised by women. Most respondents (24 people) indicated trust in the mediator and his/her great help in resolving a difficult situation. Respondents also referred to the most important aspects of family mediation, which included security of minor children, work on the marital relationship and assistance in making arrangements regarding parents' participation in the lives of children (especially those living separately), as well as adequate financial security for the disputants.

Most respondents (34 out of 40) declared that mediation was an effective form of dispute resolution, especially in family matters, another four people considered mediation as a satisfactory method of resolving family disputes and two project beneficiaries had no specific opinion on this issue.

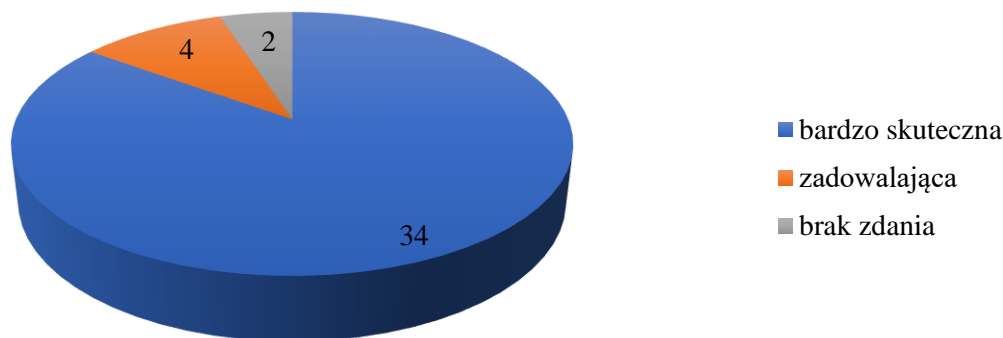


Figure 4. Assessment of the effectiveness of the mediation process by its participants: very effective/satisfactory/no opinion declared

5. Conclusion and implications

Experience shows that the mediation procedure is of particular importance in cases regarding close relationships between people. Family mediation is a specific process, which due to the highly emotional nature of family conflicts is often violent and difficult to control. Family mediation offers the possibility of active confrontation with the parties to the dispute, understanding the motives for their actions and potential forgiveness, obtaining compensation for damage, preventing stigmatisation, reducing guilt. Moreover, if misbehaviour caused detriment to relatives and neighbours, mediation can help restore bonds between conflicted parties who once had very close relationships (marital, parental or brotherly). Mediation helps maintain mutual relationships, keep participants' positive image, helps reduce the level of negative emotions and helps in understanding personal needs and those of the other party, and thus reduces the psychological stress associated with a conflict, which is crucial if the conflict involves minor children for whom divorce and leaving home by one parent is a traumatic experience. Family mediation has immediate benefits (a reached agreement) and long-term benefits. Kelly (1996) listed the following advantages of mediation:

- it is less expensive and less time-consuming compared to litigation;
- parents are more likely to comply with mediation arrangements than with court orders;
- the rates of relitigation are lower for disputants using mediation compared to those using litigation;
- parents who participated in the mediation process are much more satisfied with the reached arrangement than those using litigation;
- parents who used mediation reported having fewer conflicts during separation, divorce and 1 year after divorce.

Family mediation aims at providing a specific type of assistance. It relies on the collaborative resolution of problems by the disputants and gives them a sense of dignity and autonomy. These aspects are strongly emphasised in the presumptions of the alternative dispute resolution, the essence of which is that people should reach their own decisions and have control over how they deal with difficulties and resolve disputes.

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