Mediation and fertility law

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Can mediation bring something new to resolving alternative family structure disputes? While the law is complex and technical, and those mediating in this area might well need specialist advice or a co-mediator, there are many scenarios where it can be a powerful process option

I have recently completed my mediation training with Resolution, which complements the nature of the work we do at specialist fertility and family law firm Natalie Gamble Associates. As I have touched upon in previous articles for The Review, we have a particular focus on cases involving alternative family structures and often those which involve children conceived by artificial insemination. This can include civil partnership dissolution and divorce, known donation disputes, surrogacy and co-parenting. These issues are becoming increasingly common in practice but ➤

it is important for mediators to feel equipped to deal with any additional factors or sensitivity that may arise in disputes of this nature. This article is a brief overview of what kind of things could crop up in the context of mediation.

One of the key benefits of family mediation generally is that it provides an open forum for a wide range of family issues and disputes. For example, it is not uncommon to see mediation taking place with wider members of a family such as grandparents or perhaps aunts or uncles. This can be very important as it allows members of the wider family to have their voice heard if this is relevant or going to be helpful for the mediation. The mediator of course has to try to ensure there is a fair balance between the parties in this situation.

The complexity of how a family is structured is something that the mediation can cater for and this can be particularly so for less traditional family structures. A useful example of the context of how this may arise in practice is with known donation disputes involving children.

Whilst no two situations are ever the same, it is often the case with these types of arrangement that there will be two mothers and the biological father of the children who is known to them.

The father may of course have his own partner and perhaps his own family. If a dispute arises over contact with the children involved and the matter is referred to mediation, the mediator will need to consider the family dynamics carefully when taking the initial information. It will be important to consider the potential power imbalances that could exist within the relationship.

For example, in a three-parent relationship there will only ever be two legal parents and two biological parents, and these will not always be the same people. It is not uncommon for someone in this situation to feel marginalised in the process, and the issue over biological parentage can be highly sensitive. It may be that co-mediation could be used very effectively in these scenarios. This could address any perceived imbalance in the mediation and allow the mediators to manage any issues together.

The issue of biological parentage extends beyond the context of known donor disputes and can lend itself to other scenarios. This could apply to relationship breakdown between same-sex couples with donor-conceived children, or perhaps heterosexual couples who have children through surrogacy and only one is the biological parent. This could be an issue that may be an underlying source of conflict and the mediator should decide whether this is something that should be addressed before, during the sessions, or at all.

There are always times when mediation is not appropriate and this can also be a feature of cases with fertility law issues. This is where the issue of who is a legal parent can be very important. For the majority of disputes involving children this is not an issue as it is clear from the start what the parents' basic legal position is.

However, as practitioners will be aware, not everyone has the automatic right to apply to court for an order under s8 of Children Act 1989 and they have to apply for leave.

A perfect example of this is the reported case of *Re G, Re Z (Children: Sperm donors: Leave to apply for Children Act orders)* [2013] EWHC 134 (Fam) – a case I discussed in my article on known donation disputes. Here a known sperm donor had to apply for leave for an application for contact under the Children Act 1989.

The question of whether mediation would be appropriate in such a case is an interesting one. Where one party has no automatic legal remedy through the courts then it may be this issue would be insurmountable for a mediator to deal with effectively. Of course those involved may be happy to mediate and resolve the position regardless of the legal backdrop, but for others there can be a perhaps understandable reluctance to mediate.

On the other hand, there is an argument in favour here of mediation being a more appropriate method of resolving a dispute rather than lengthy and damaging court proceedings just to deal with an application for leave before hearing more substantive arguments. It will be important for the mediator to understand the potentially difficult legal position in this scenario and to assess whether mediation is appropriate.

Whilst in practice surrogacy disputes are rare, there will be times where serious issues can arise. This could be between the intended parents and their surrogate and her family, or more commonly between parents who have had children through surrogacy and have since separated. This can lead to a myriad of legal issues in relation to the legal status of parents who haven't resolved their position by applying for a parental order.

These issues have been highlighted perfectly in the very recent case of *JP v LP & ors* [2014] EWHC 595 (Fam), which is an important case to be aware of. The legal position can be very murky in these types of scenarios so a mediator needs to be aware of any restrictions the law may apply.

However, mediation may be an effective way to help parents who are in conflict and allow them to reach a decision about how they wish to resolve the legal and practical issues. It would be advisable in a situation like this to consider referring the matter to a mediator who has experience in surrogacy cases or consider co-mediation with someone who has more experience.

As with all mediation, understanding the family dynamics at play can be crucial to enable the mediator to handle the mediation effectively for the parties. However, there can be additional factors to consider with fertility law issues, which could have an impact on the mediation.

This does not mean that mediation can be any less effective and, as mentioned above, the flexibility of mediation can lead to positive outcomes and solutions and should be encouraged.

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