

Children & The Mediation Room



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The Prologue

The recent judgment of the Hon'ble Supreme Court of India in *Perry Kasangra v. Smriti Madan Kasangra* in C.A. No. 1694 of 2019, Dt. 15/02/2019, speaks of the difference between 'normal' mode and 'parens patriae' mode when Courts deal with child custody issues and the variance in the degree of confidentiality in the mediation process – Much to the relief of the Mediators across the country – who were hitherto whispering to their peers – trying to withstand the ethical dilemma in some exceptional cases involving children. Unable to spill out, as is forbidden by the firm grip of confidentiality and incapable of digesting, these issues were lying choked like the venom in *Neelkant's* throat. Now that the Hon'ble Supreme Court has just shook the lid, here goes the whistle.

The Judgment

A family conflict involving child custody was referred to mediation. A professional Counselor of the Family Court was to assist in the process. Mediation Failed. Pending mediation, the Counselor submitted a report to Court in sealed cover recording certain responses by the child. The question was whether the report should be relied upon or will be covered under the confidentiality rule applicable to mediation. The Supreme Court held that while the confidentiality rule is to be adhered to absolutely in ordinary matters, where the court is the parens patriae in child custody issues, to an extent the rule has to be relaxed. The report relating to the responses of the child in the ordinary conversation with the professional Counselor, though happened during the process of mediation, can be looked into. The court also drew support from Family Court Rules relating to counseling. The judgment offers some answers to the questions of ethical dilemma for mediators in child custody issues.

Flagging the Issues

Do we need children in the mediation room? The answer is “Yes” in a majority of cases. Mediation will not succeed by keeping the stakeholders outside the room. I have had the benefit of the feedback from many mediators as to how the presence of a child helped in many ways, though in some cases, their presence is to be avoided. So, what's the problem? We have also heard of these exceptional cases:

Case 1: The child aged 14 was with the mother. Mother was living only for the child and taking good care all long singularly in the past 10 years of separation. Quietly, during the process of mediation, father promises latest smart phone for the child and the child is suddenly bent upon going with the father. The mediation room, witnesses the horrendous weep of the mother. Should this fact which happened during mediation should be brought to the notice of the Court?

Case 2: The girl child is aged 15. Mother needs urgent divorce. Willing to part the custody to the Father. Child seeks a separate session with the Mediator. Confides with the mediator about the bad touches of her father.

Case 3: The boy aged 12 conveniently wants to go with the Mother when father wants him to train in sports and with the Father during 'class test' days as the Mother would insist on studying.

Case 4: Where there was an intense battle claiming custody in court, both parents were insisting that the other should take custody of the child, so much so, that the Mediator was afraid that they will leave the child on the mediation table.

Cases like these are exceptional, but need attention. Mediators, in these cases, feel the dire need of doing something. Ironically, only because of the rule of confidentiality, more such behaviours, facts and attitudes come out in Mediation.

The Solution

1. As aptly pronounced by the Supreme Court, even in mediations involving children, CONFIDENTIALITY shall be the rule as the issues are being spoken transparently and openly only because of CONFIDENTIALITY and opening up by itself is half the solution and in many cases the mediators through the Mediation process can put it to the parties to come up with appropriate solution and this should be the 99% Choice.
2. Only in cases which meet both factors:
 - a) where nothing could be worked out in Mediation or what is being offered as solution may be so detrimental to the welfare of the Minor; and
 - b) the facts which have come to light, or the attitude or behavior of the concerned child or parent; or the situation of the case – should be such that the Mediator is neither able to swallow and digest nor able to spill out, it is advisable that the matter be brought to the notice of the 'parens patriae' - the Hon'ble Court.
3. A proper sealed cover procedure should be formulated for these cases after proper and extensive deliberation of the concerned experts/stakeholders.
4. A proper expert study – may be by way of inputs of mediators throughout the country – and collating the data and examination may be of help in formulating such sealed cover procedure.

The Epilogue

The river of mediation, gentle and full of life, as it flows, we the eternal students of mediation, watch the courses and shapes it take – After all, there can be no conflict between the twin objectives of utmost welfare of the minor children and resolution of conflict to the utmost will of the parties themselves!