



vrije Universiteit amsterdam

Mr. drs. B.E.S. Chin-A-Fat

Dr. M.J. Steketee

Bemiddeling in uitvoering

EVALUATIE EXPERIMENTEN
SCHEIDINGS- EN
OMGANGSBEMIDDELING

Verwey-
Jonker
Instituut

gen van de kinderen worden volgens hen goed gewaarborgd omdat de kinderen er baat bij hebben als de ouders onderling afspraken maken en niet met elkaar in gevecht zijn.

Men kan concluderen dat in de bemiddelingsprocedure de belangen van de minderjarige kinderen voldoende gewaarborgd worden. De bemiddelaars gaan op een zeer zorgvuldige wijze om met de belangen van het kind in de bemiddeling, zij het op een indirecte manier via de ouders.

Toch wil een kwart van de jongeren-respondenten van 12 jaar en ouder van wie de ouders een scheidings- of een omgangsbemiddeling hebben doorlopen, graag een uitnodiging krijgen om hun mening in te brengen. Niet omdat zij het niet eens zijn met de afspraken zoals hun ouders die gemaakt hebben, maar de jongeren geven aan dat zij partij zijn in deze en daarom graag gehoord willen worden.

Als scheiden via bemiddeling en dus buiten de rechter om mogelijk wordt, betekent dit dat kinderen van twaalf jaar en ouder niet meer door de rechter worden opgeroepen. Dit geldt ook voor de omgangsbemiddeling waarbij de zaak ingetrokken wordt als men tot overeenstemming is gekomen. Omdat er geen verlies van rechten mag optreden in vergelijking met een gerechtelijke procedure zouden kinderen van 12 jaar en ouder, in ieder geval schriftelijk, uitgenodigd moeten worden hun mening naar voren te brengen. Daarnaast is het aan te bevelen om in de opleidingen tot mediation aandacht te besteden aan de mogelijkheden om kinderen – ook degene jonger dan 12 jaar – te betrekken bij de bemiddeling.

Summary

Introduction

Mediation is an increasingly popular tool for finding solutions to conflicts between people or companies, and in other situations. In 1999, the Dutch Ministry of Justice started two experiments: one for divorce mediation and another for access mediation. The purpose of the divorce mediation experiment was to investigate the possibility of introducing covenant-based out-of-court divorce settlements, and the purpose of the access mediation experiment was to investigate whether participation of parties in a professional mediation process, upon referral by court, would have a positive effect on the result of the mediation process in regard to solving conflicts relating to access to children. A key precondition for both experiments was the presence of sufficient guarantees to safeguard the interests of the child and, in a more general sense, the interests of the weaker party involved in the procedure.

The experiments started in the jurisdictions of Amsterdam, Leeuwarden, 's-Hertogenbosch, and, starting in 2000, in The Hague. They were evaluated by the Verwey-Jonker Institute and the Free University (Vrije Universiteit Amsterdam). The purpose of the study was to collect information on the progress as well as the direct and long-term effects of each mediation experiment in order to obtain a better understanding of the conditions under which this form of assistance could supplement current assistance arrangements.

The problem definition of the evaluation was as follows: *“Under what circumstances could an institutionalised form of mediation assistance, in comparison with regular legal assistance, help to settle divorce and access conflicts without jeopardizing the balanced protection of the interests of all parties involved, and underage children in particular?”*

The Experiments

In early 1999, divorce and access mediation experiments started in three jurisdictions: Amsterdam, Leeuwarden, and 's-Hertogenbosch. The duration of each experiment was two years. The jurisdiction of The Hague joined the experiment halfway through its scheduled duration. The legal assistance councils were responsible for organizing the experiments. A guidance committee was also established for each experiment. Their task was to serve as a sounding board for the design of each experiment and to provide guidance during the study. The guidance committees also verified whether the action plans of the legal assistance councils were consistent. A project manager appointed for each jurisdiction was responsible for the actual organization of each experiment within the specified boundaries.

The Mediators

A total of 83 mediators participated in the experiments. Most of the mediators handled both divorce and access mediation cases, although some mediators were only involved in divorce or access mediation. The mediators had different professional backgrounds, varying from social workers and psychologists to lawyers and notaries. More lawyers than non-lawyers participated as mediators in each experiment, and most divorce mediation cases were therefore handled by lawyers acting as mediators. Most access mediation cases, however, were handled by non-lawyers acting as mediators. More female than male mediators participated in the experiments.

All mediators received official mediator training. Most of the lawyers received their mediator training through the Association for Lawyer/Divorce Mediators (VAS), and the non-lawyers attended a training programme recognized by the Dutch Institute of Mediation (NMI). Some mediators completed more than one mediation training programme. Most mediators were over 40 years of age and had previous experience in mediation.

The Divorce Mediation Experiment

The Target Group of the Experiment

Which group used the divorce mediation experiment? Most people chose divorce mediation since this was suggested to them during their initial visit to their lawyer or legal advice centre. Only a small group learned about the possibility of mediation through the media or through friends with previous mediation experience and then specifically selected this option.

The experiment was intended for clients who had decided to get a divorce and who had not yet started a legal procedure. At a later stage during the experiment, it was decided to extend the scope by adding, at the time of preliminary provisions, a court referral to a professional mediator.

People chose mediation because they expected this to have a better effect on their relationship than a legal procedure where each party has its own lawyer. Participants also expected that the other party would be more likely to honour agreements if these would be based upon mutual consent. They believed that this would especially be in the best interests of the children, but if no children were involved, they were generally interested in preventing their relationship from being jeopardised unnecessarily due to legal procedures.

The majority of the participants in the divorce mediation experiment had children, and only a small percentage had no children. The participants varied in age from 20 to 81. Most of them were between 30 and 50 years old, with 40 being the average age. Proportionately, the men were slightly older than the women. A small percentage of the participants were of a different ethnic background. For analysis of the participants in each experiment, a comparison was made with a previous study on divorce in the Netherlands (SIN). People who chose mediation were found to be more highly educated and slightly younger than divorced people in the Netherlands. No difference was found with regard to income, ethnicity, or employment situation.

Despite the fact that a divorce is a very emotional process in which people have decided that they no longer wish to live together, the study showed that people participating in divorce mediation are still on reasonably good terms with each other. In most cases, communication was not seriously disrupted and there were no indications of

intimidating or undesirable behaviour. Rather than serious conflict situations, these were situations in which people were negotiating to solve their problem as fairly as possible.

The Results of Divorce Mediation

Mediation as an alternative to a legal procedure has proven to be successful. The vast majority of divorce mediation cases showed very positive results. Most people were very satisfied, and only a small percentage of those mediated were dissatisfied with mediation as a procedure. People did not perceive mediation as an easier solution. Sitting down and trying once again to come to agreements proved to be very difficult and confrontational at times. Each session typically took about 90 minutes, and usually more than three sessions were needed before an agreement could be reached. During the mediation session, all divorce-related issues were discussed. These included agreements regarding the children (if any), housing, division of possessions, maintenance payments, etc. In general, all issues to be settled in any divorce case were discussed. The parties also had the feeling that they themselves were making the agreements. Those mediated indicated that it was important for them to know that they settled the divorce successfully and without any fighting.

The majority was satisfied with the mediation results. More than 75% of all mediation cases ended with an agreement on all relevant issues. In some mediation cases, certain issues still needed to be resolved before a covenant could be drawn up—for example, an access arrangement that could not yet be formalized due to an unclear employment situation. In a very small number of mediation cases, no agreement could be made so that the participants decided to take their case to court.

An important factor in the mediation process proved to be the mediator him/herself. The task of the mediator is to protect the interests of both parties while maintaining a neutral, impartial position. The respondents were very pleased with the mediator and the way he/she operated.

Although most people indicated prior to mediation that they had a reasonably good relationship with their partner, the experiment showed that this was no guarantee for an unimpeded process. The main impediment was that people still had not properly dealt with, or accepted, the divorce. Especially if the divorce was the decision of one party and the other party did not want a divorce at all, both parties had feelings of powerlessness, hurt, bitterness, or even guilt emotions which may impede the mediation process. Communication is therefore a key issue during the mediation process. Certainly if children are involved, both parties will have to continue dealing with each other, and it is important for them as parents to be able to communicate about the children. Participants who indicated that they were satisfied with their level of communication and their relationship did not believe that this is due to the mediation process.

One of the main expectations from mediation was that agreements would be more lasting because agreements would be made by the parties themselves instead of by a lawyer or a court. An analysis was therefore conducted to find out whether people were still pleased with the mediation one year after mediation and whether the agreements had been carried out as intended. Agreements drawn up in a covenant at the end of the mediation period proved to be lasting. None of the people who concluded complete or partial agreements at the end of the mediation process went to court or went to their lawyers during the past year. Most agreements were carried out as intended. Alterations, if any, were primarily related to access arrangements since these may need to be adapted to changes in the living arrangements of children or parents. In a few cases, one parent was dissatisfied with these changes because they wanted to see the children more often or longer than permitted by the other parent. This caused dissatisfaction or resentment but did not lead to any legal procedures. Some people in retrospect found that decisions had been made too quickly. Since people wanted to settle their divorce as quickly as possible, they may have found in retrospect that they had given up too much or had met too many of the requirements of the other party and that they had therefore received a raw deal. An overwhelming majority of those mediated, however, was still pleased that they had chosen mediation rather than a legal procedure where each party has its own lawyer protecting its interests.

The study involved an investigation into whether the success of mediation can be correlated with the different background variables of those mediated or the mediator—in other words, whether there is a specific group of people for whom divorce mediation is more or less successful. To this end, the results of the mediation were assessed by determining whether the parties succeeded in making agreements or whether they started a legal procedure after all. No specific criteria such as income, ethnicity, religion or education could be identified to determine why mediation was successful for some and unsuccessful for others. The involvement of children, and the question as to whether or not people requested preliminary provisions, however, were found to adversely affect the success of mediation. People without children were more likely to conclude a covenant than people with children. Furthermore, the stage of the conflict was found to be a key issue, especially with regard to people's ratings of the mediation process, their opinion of their relationship, and the success of the mediation process. It is therefore important that mediation occur as early as possible, preferably before initiating a legal procedure (preliminary provision).

The experiment showed that the background and level of experience of the mediator, as well as the duration of the mediation process, was not related to the effects of the mediation process. The professional background of the mediator did determine how the mediation process was rated by men and women. Women tended to rate lawyers as mediators slightly higher, whereas men gave higher ratings to non-lawyers such as social workers, psychologists and others who were acting as mediators. The percentage of mediation cases ending with a covenant was very high for all mediators, whether lawyer or non-lawyer. The success rate was slightly lower for social workers, but even they concluded most cases with a covenant.

The Access Mediation Experiment

The Target Group of the Experiment

People participating in access mediation did not do so voluntarily, but upon referral by the court. These cases involved a conflict between two parties regarding access to their children, and the parties had

started a legal procedure. Referral by the court could occur as part of a divorce procedure or as part of a separate access procedure if compliance, alteration or termination of access arrangements had been requested. This meant that people participating in access mediation may or may not have been divorced. Participation in the access mediation experiment was free of charge to parties referred.

A difference in age was the only factor distinguishing participants in the access mediation experiment from the overall population of divorced people in the Netherlands (comparison made with the SIN study), since people participating in mediation are mainly parents with children under 12. Most parents had one or two children, and the average age of the parents was 37 with the men being slightly older than the women. A minority of the parents was of foreign descent although this figure was no different for the overall population of divorced people.

Most of the people who participated in access mediation did so upon referral by the court. Although parents were not obliged to participate in mediation, the court used its authority to convince the parents of the usefulness of mediation. Parents were reasonably motivated to participate. More than half of them had positive expectations and felt that mediation would especially help to make agreements that would be in the children's best interests and to increase the chances of their ex-partners honouring the agreements made.

The relationship between former partners at the beginning of the mediation process varied from bad to very bad, and communication in all cases left much to be desired, regardless of whether people were already divorced or still going through their divorce. The upbringing and place of residence of their children, as well as their contact with the children, proved to be a constant source of conflict and tension between the parents. The fathers, more so than the mothers, felt that they had too little contact with the children, whereas the mothers more often felt that the fathers saw the children too frequently. The fathers more often felt negative about the agreements regarding their contact with their children and where their children were living, and the mothers more often felt negative about the agreements regarding child support. Non-observance of child support agreements was found to be common.

The Results of Access Mediation

Considering the problems parents had with each other, it seems fair to conclude that access mediation was reasonably successful. Access mediation clearly helped to solve access problems. Despite the fact that not everyone reached an agreement, the benefits were clear.

The results of access mediation can be considered positive for more than half of the parents involved: agreements were made, communication improved for some, access arrangements were adapted, and child-parent relations improved. Some of the parents partially succeeded in making agreements and will be returning to their lawyers and to the court to settle the issues for which no agreements could be made. Fewer than one third of those mediated unsuccessfully tried to make agreements and will bring their conflict before the court. Participants rated mediation very differently. A majority was satisfied with mediation as a procedure and would recommend it to others. The number of people satisfied with the results of mediation roughly equalled the number of those who were dissatisfied. A majority was clearly satisfied with the role of the mediator. They generally perceived the mediator as knowledgeable, professional and impartial. Respondents who were dissatisfied with the mediator felt that he or she was too non-committal and had expected a less neutral attitude.

The mediation process involved an average of 3-4 sessions of one and a half to two hours each. Distrust of one's partner proved to be a major impediment during the mediation sessions. People had no faith in the way the other parent were raising the children nor in the parenting responsibilities of the other parent. Resentment, anger and hurt about their broken relationship also proved to be major obstacles. The mediators tried to revive communication by focusing on the children's interests and by emphasizing the parent-child relationship rather than the relationship between the two parents. This was successful in 25% of the cases, but half of all parents felt that their way of communicating had not changed.

Parents felt pleased with their level of input during the mediation process, and most respondents felt that they themselves made the agreements. Nonetheless, people remained distrustful of their partners and doubted whether their partners would honour the agreements made. However, the agreements proved to be more

lasting than expected. None of the people who initially concluded either complete or partial agreements went to see their lawyers, or went to court, during the past year. Nearly half of the people were still honouring their agreements one year after mediation. Some agreements were adapted, but this was perceived as positive since child-raising calls for some flexibility. Some of the parents were disappointed because they saw their children less often than they wanted to or than they had agreed on. In retrospect, most of the mediated people were still pleased with the mediation and the results. A vast majority would again choose mediation rather than a legal procedure.

No specific characteristics could be identified in access mediation that might affect the success or failure of mediation for certain parents or in certain situations. The phase of the legal procedures in terms of when referral to a mediator was made was also found to be irrelevant. Results were equally successful or unsuccessful no matter when referral was made. Those mediated blamed either themselves or in more cases their ex-partners whenever mediation failed. Many cases involved a fierce and lasting conflict with serious distrust of one's partner, especially in regard to the other person's parenting capabilities. People themselves felt that the results would have been better if mediation had occurred earlier and if more time had been available for mediation. Although the study results did not demonstrate that the stage of the conflict affects the results of mediation, it would seem advisable to refer people to a mediator at an early stage and to improve the provision of information about mediation so that people can consider this option at an earlier time. It would also be important to make access mediation as accessible as possible as well as making it available free of charge.

The characteristics of mediators were also found to have no effect on the results of mediation. Neither was the level of experience and the professional background of the mediator found to be related to people's ratings, mediation results, and people's relationship after mediation.

The Position of the Weaker Party in the Mediation Process

One essential precondition in both experiments was the presence of adequate guarantees in order to protect the interests of the child and, more generally, the interests of the weaker party involved. The study entailed an analysis to determine whether a weaker party could be identified among those who were directly involved in the mediation process. Mediators as well as those mediated themselves considered emotional and mental inequalities, and the place of residence of the children, to be key indicators for determining the weaker party in the mediation process. The person's socio-economic position was hardly a factor in this respect. The level of emotional inequality was primarily related to who had taken the initiative to get a divorce and to what extent people had agreed with the decision to get a divorce. Where the children were living was also found to be an important indicator, especially for access mediation. It was the perception of both parents that the parent with whom the child was living had more power in regard to decisions about access arrangements. These indicators were found to equally affect men and women in their perception of being the weaker party. Access mediation showed that women experience the same feeling of powerlessness if the children live with their father. In practice, however, most children tended to live with their mothers rather than their fathers. It was also true that it was usually the women who had decided to get a divorce and the men who had more often disagreed with this decision and were still trying to deal with the effects of the divorce.

Neither the parties themselves nor the mediator consider a person's socio-economic position to be a major indicator for being the weaker party. Although more women were in a less attractive economic position due to lower earnings and fewer working hours, women were considered the weaker party only if the decision to get a divorce had been made by the male partner, or if the children were living with their father. Remarkably, women, despite their economically inferior position, usually refused maintenance payments. They refused to be permanently dependent upon their ex-husbands. These women indicated that they would prefer to get a job themselves or to work longer hours so that they could be independent.

In divorce mediation cases, mediators believe that both parties are equal in 75% of the cases, and that one party is weaker in 25% of the cases. The weaker party is often the husband, primarily with regard to issues involving the children. In access mediation cases, mediators believe that both parties are equal in only 25% of all cases. Again, the husband tends to be the weaker party.

Since emotional inequality between parties is often an impediment in mediation processes, this issue should be given proper attention in mediator training in order to guarantee that the interests of the weaker party are properly protected.

In both experiments, the parents as well as the mediators believed that the children should not be involved in the mediation process. Most children were too young to be heard and the parties furthermore indicated that this was about a conflict between parents in which the children should not become a party. It was believed that children often have difficulties with divorce as it is, and any loyalty conflict should be prevented. Parents believed that it is their responsibility to point out the needs of the children during the mediation process. They believed that the interests of the children were being properly protected because children benefit if parents make agreements instead of fighting with each other.

It can be concluded that the interests of underage children should be guaranteed in any mediation procedure. The mediators handled the interests of the child very carefully, albeit indirectly through the parents. Nonetheless, 25% of young respondents aged 12 and over, whose parents have participated in divorce or access mediation, would like to be invited to give their opinion—not because they disagree with the agreements made by their parents, but because they consider themselves a party to the conflict and that they should therefore be heard. If out-of-court divorce, i.e. divorce through mediation, becomes possible, children aged 12 and over will no longer be called to appear in court. This would also apply to access mediation: a case would be cancelled if an agreement were to be reached. In order to avoid any loss of rights, when compared to a legal procedure, children aged 12 and over should be invited to give their opinion, at least in writing. Furthermore, it is recommended that possibilities to include children in the mediation process, even if they are younger than 12, be discussed during mediator training.