ADR Bulletin
ADR Bulletin

Volume 9 | Number 5 Article 3

2-1-2007

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Recommended Citation

Paul, Christoph C. and Kaesler, Steffi (2007) "Mediation within the framework of a German-English child abduction," *ADR Bulletin*: Vol. 9: No. 5, Article 3.
Available at: http://epublications.bond.edu.au/adr/vol9/iss5/3

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Case study in ADR

Mediation within the framework of a German-English child abduction

Christoph C Paul and **Steffi Kaesler**

Any mediation with regard to child abduction is subject to an enormous pressure: the abducting parent is afraid 'to lose' the child, while the parent left behind hopes to work out alternatives for the child's repatriation during the mediation sessions.[1]

Preparation

In this case the contact with the mediator was established through the list (published on the internet) available for international conflicts involving parents and children (<www.bafm-mediation.de/international>).

The father who lived in England had sought advice through the Advice-Line of REUNITE in London. There he had been informed about the possibility of involving the central authorities in Great Britain and in Germany (Federal Public Prosecutor), along with the possibility of mediation proceedings.

A staff member working for the Federal Public Prosecutor provided information that, almost a year previously, the German mother had travelled to Germany together with the child (which by then was about two years old) and that the English father had not had any contact with the mother for quite some time. The father who lived near London had agreed to a mediation. Through the Federal Public Prosecutor the mediator received the email addresses of the father and of the mother's lawyer.

The first contact was established by telephone to the father and to the mother's lawyer; both were offered the possibility of a mediation along with some information material.

In view of the expiry of the one-year period (compare art 12.1 Hague Convention on Abduction (HCA)[2]), the central authority had advised the father to make an application for repatriation in terms of the HCA with the competent family court in Berlin. Thereupon the father instructed a lawyer, who made the relevant application. The judge at the family court in Berlin had immediately fixed the first hearing and summoned both the parties and the child. At this court hearing the father was able to meet his son for the first time in almost a year. On the date of the hearing the judge had also recommended to the parents and their lawyers the implementation of mediation proceedings, which both parents accepted.

Prior to this the father had declared that he was only prepared to pay for *one* mediator. This meant the exclusion of a second mediator within the framework of the usual practice.[3] However, to ensure the principles of co-mediation in such proceedings, the mediator called in a 'Rechtsreferendarin' (person receiving practical training in judicial work after having passed the first state examination) who had studied psychology in London and was currently working for him. By involving this 'assistant', the female, psychological and English participation in the mediation proceedings was at least marginally ensured.

Three mediation sessions were agreed with both parents via email. Everyone agreed to conduct the mediation exclusively in English. Prior to this the parents were asked to arrange for their lawyers' availability on the telephone during the entire mediation to be able to seek immediate legal advice if necessary.

Sunday afternoon — Mediation phases I and II

When the parents appeared for the first agreed session, the cultural

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difference between the parents (which their names had not revealed initially) became visible. The mother was a central-European-looking woman, while the father could easily be identified as a British citizen of Asian descent.

Before mediation began, the parents, who were sitting in the waiting room, remained extremely aloof and silent towards each other. Initially, both parents did not want to make use of an offer to conduct separate sessions if needed. The parents reported on the current family situation as follows:

> The parents had come to know each other in a student hostel during their studies in England. After one year they had moved in together, and after another year (both of them are single) their son Simon had been born. Being an only child, the mother had been closely integrated into her original family.
> The birth (which the father had attended personally) had taken place in Germany, and after about seven weeks the family had returned to England.
> Subsequently the mother had regularly travelled with Simon to see her parents in Germany. From her visit in the summer of 2005 she had not returned to England. The father had visited the mother and Simon in Berlin once before losing contact with the mother.

At this point the parents' accounts differ:

> The mother reported that the relationship between the two of them had reached zero level and that she had clearly wanted a separation. When she had communicated this to the father, he had not wanted any contact with her or Simon.
> The father, however, reported that he had frequently tried to make contact with the mother, by telephone or by email, in order to keep in touch. His emails had not been answered, he had had no current address for the mother, and even the parents of the mother had not cooperated in this matter. After trying in vain for several months to build up contact, he had turned to REUNITE and asked for advice at the beginning of 2006.

In order to clearly define the frame of mediation, the 'Agreement to Mediate' which had been used in similar cases[4] was presented to the parents. Both parents were asked to read this agreement after the mediation session and to return it, with their signatures, on the following day. The father declared that he wanted to sign the agreement only after seeking advice from REUNITE.

Subsequently, there was a discussion on the costs of mediation and the necessity to reach an agreement on this matter. The mother offered to pay 25 per cent of the costs of mediation, and the father agreed to pay the remaining 75 per cent.

Initially the range of topics included issues familiar in these proceedings, for example the child's residence, contacts with the other parent, arrangements for vacations, birthdays and holidays, ensuring language instruction, religion, travel expenses and child support for Simon.

The range of topics ended with the issue of 'trust' which was introduced by the father. Both parents were given the 'homework' of thinking about suitable ways to regain their mutual trust.

Monday morning — Mediation phase III

At the beginning of the session the father asked some questions about the 'Agreement to Mediate' with regard to the obligation for mutual disclosure of financial resources. This question raised the central issue of 'trust'. Proceeding from here, the parents' interests and needs were carefully worked out and the topics were weighted. It became clear that the central and most important issue for the parents was the question who Simon was going to live with in the future.

To clarify this issue, four options were worked out and recorded on the flipchart:

1. Simon travels to England with his father and the mother stays in Berlin.
2. Both parents travel jointly to England and work out, in peace, how they want to deal with Simon's residence.
3. Simon stays in Berlin with his mother and the father returns to London and visits his son in Berlin.
4. The father follows the mother and his son to Berlin. This last option was quickly dismissed by the parents, as the father does not speak German.

When the parents appeared for the first agreed session, the cultural difference between the parents (which their names had not revealed initially) became visible. The mother was a central-European-looking woman, while the father could easily be identified as a British citizen of Asian descent.

With regard to the first three options, the parents were asked to work out mutually what they could possibly offer to the other parent.

The flipchart carefully recorded a large number of 'offers' which soon revealed that both parents were prepared to ensure generous contacts between Simon and the other parent. Identical positions became quickly visible, for instance, with regard to regular trips and school education. The mother offered to the father that his large family (Simon's paternal grandparents have more than 10 brothers and sisters each) could also have regular contact with Simon. The travel expenses were discussed, and the mother declared that, in view of the

considerable expenses for travelling and accommodation (which were to be paid by the father), she would disclaim any child support.

When asked to characterise their son, both parents displayed considerable pride — beaming with happiness they described him as an active and cheerful child. The father stated that his son was his spitting image. The mediator thanked both parents for their frankness and for the generous offers that they had made to each other.

When the mediator stated that he could just imagine what the father must have felt during the long separation from his beloved little son, the father burst into tears. At the same time the mediators could also appreciate the mother's responsible attitude for the child's welfare, as she fought back her tears at the thought of leaving her child back in England. These reactions led to further efforts to intensify the awareness of the needs and interests. Before the lunch break the parents were given the task to work out additional options (see 1 to 3 above).

Monday afternoon — Mediation phases IV and V

In the meantime, the father had been in touch with REUNITE and both parents signed the 'Agreement to Mediate'.

The question concerning additional options was denied by the parents. To be on the safe side, it was pointed out that, initially, many parents want to make short-term arrangements for their children, so that after a trial period they can possibly look for alternatives.

Subsequently, two aspects were mentioned to the parents for extra consideration:

- On one hand, the possible legal outcome of the proceedings, with regard to both the repatriation proceedings according to the HCA and subsequent custody proceedings (in England or in Germany), as well as the related time-period and costs of all these proceedings.
- On the other hand, what was the 'reality' for the two-year-old son who had lived exclusively with his mother and who wasn't able to speak a single word of English? Attempts were made to clarify the parents' ideas about their arrangements with regard to Simon's practical and everyday care. In view of Simon's Asian appearance it was also pointed out how important it was for Simon to maintain a good relationship with his father for the strengthening of his personality.

After a long silence, the father declared that he could well imagine Simon staying with his mother in Berlin if the mother fully cooperated with him otherwise.

After this consensus had been reached, the mood between the parents brightened and all the aspects were carefully discussed, one-by-one, which were going be important for the third option referred to above.

The parents quickly agreed on the contact visits between father and son, on the flight arrangements, on the mutual participation in their son's development, as well as on questions of education, school attendance, religion and finance. A discussion took place on state child benefits and on advance maintenance payment that had been claimed by the mother so far. The father was prepared to pay all the flight expenses (for himself, the mother and Simon). On this basis the mother was immediately prepared to disclaim further child maintenance and to exempt the father accordingly.

After discussing every detail, the parents were accompanied to the waiting-room for a short break, while the team of mediators drew up a memorandum. This was delayed by a computer error which, however, turned out to be a blessing. Both parents were observed to be sitting in the waiting room, content and relaxed, with the mother showing photos of Simon to the father.

Subsequently the agreement was examined together point-by-point. Any changes were discussed and inserted at once. For the time being, the agreement was to be signed by the mediator only. This was to ensure that the agreement would only become binding after both lawyers had examined it. In the presence of both parents a translation was dictated into German. Both parents were handed the agreement in English. The agreement was forwarded immediately via fax to both lawyers, to the central authorities in Germany and England, and to REUNITE/London.

The parents' agreement reads as follows:

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Memorandum of Understanding

(Privileged Summary of Proposals)
Between (father) and (mother)

Mediators: Christoph C Paul, lawyer, and Stephanie Kaesler, psychologist, Berlin, Germany

The mother and the father of Simon, born … 2004, took part in mediation proceedings. They had 3 mediation sessions on the 21st and 22nd May 2006, during which they identified the issues to be resolved with regard to their son.

In the course of mediation, the following issues were discussed on which the two parents made proposals acceptable to both of them:

1. Both parents expressed their concern for Simon's best interest, and wish to resolve their differences without further litigation if possible. Both parents will take parental responsibility for their son Simon.
2. Their son Simon will stay in Berlin with his mother.
3. Simon will reside in Berlin with his mother, while his father will live in a house in Essex. He will have short periods of contact over the course of the year and a frequent contact with his son. Simon will see his father as follows:
   - Four weeks of summer holidays
   - Visits for a couple of days
   - Every other Easter holidays or fall holidays (October), every other Christmas holidays rotating with the mother
   - Father's birthday and Simon's birthday if they do not interfere with school schedule (eg after school)
   - Visits of the father and the father's family in Berlin on full days (not only a couple of hours), it is up to the father to decide where he wants to spend the holidays.

   Both parents agree that a relationship between the son and the father has to be built up slowly (for eg, from a couple of days to a couple of weeks).
4. The parties agree that, until Simon can travel by plane on his own, his mother will accompany him to England and his father will return him to Germany. But the handing-over procedure is subject to changes depending on the particular circumstances.
5. The mother promises to provide all necessary information with regard to their son including his development, his state of health, his school reports, his social contacts and his extra-school activities. She will send photographs of Simon to his father in order to keep him involved in his son's development. Additionally, she guarantees to put up photos of his father and his father's family in Simon's room. The parties agree that they will take responsibility for Simon's wellbeing including his social contacts. His father will be included in school activities (sports day, festivities etc).
6. Also, a regular contact between Simon, his father and his family will be guaranteed by frequent phone calls and by email contact. The parties agree that an honest communication will be in Simon's best interest. Furthermore, a contact to any new partner of the father or the mother will be attempted.
7. The mother promises to ensure that Simon can attend an English speaking school to be able to communicate with his father easily over the phone. Also a pre-school training in the English language is provided by the mother.
8. They also agree that they will raise Simon under no specific religion, since it will be his own choice to be religious or not. The mother will try to raise Simon against his father's cultural and ethical background; the father will do vice versa.
9. The father will financially support Simon's and his mother's flights to London. The father will also be responsible for his own flight expenses. In return, the mother guarantees to find accommodation close to the flat where her son lives.

   The mother will not claim any maintenance; she will withdraw her application. The child's allowance (154 € per month) will be paid to the mother. The father will pay 50 pounds sterling per month into a bank account for the benefit of Simon's education until the age of 18. The father will not be able to financially support the mother in any other way due to the travelling costs caused by the frequent visits. The mother declares a general release concerning maintenance for Simon. The father accepts the exemption.
10. The parties agree that, if one party should under any circumstances get severely ill or die, Simon will live with the other party, which will have full responsibility for Simon.
11. Furthermore, the parties agree that they might be open to changes considering the residency of Simon when he gets older. At a certain age, he should be able to decide by himself where he wants to live. The parties will jointly explain the situation to Simon.
12. The parties agree that they will speak nicely about the other parent.
13. Both parents wish to have their proposals subject to their legal advice made into a consent order in Germany and a mirror order in Germany and England.
14. The father promises to withdraw his application under the Hague Convention at the Amtsgericht Pankow/Weißensee Familiengericht (Local Court Pankow/Weißensee Family Court) and both parties declare to pay their own costs. Any outstanding money will be paid back by the parties.
15. The mediator will provide a German translation of this agreement to both lawyers of the parties.

Date: 22nd of May 2006

Signed by Christoph C Paul, Mediator

Conclusion

This family mediation offered a chance for conflict settlement which successfully led to the parties' satisfaction in this highly emotional area.

Mediation proceedings with such a limited time frame required a strict time management. This was initially explained to the parents; a flipchart outlined the time frame and the several phases of the mediation proceedings which had to

be gone through within the respective sessions. This enabled the parents to make a precise estimate on the time still available for each of the forthcoming mediation phases.

The critical process of considering the suitability of mediation for this particular couple required some 'advertising' elements on the mediator's part. Nevertheless, the voluntariness of participation along with the parties' true will to reach an agreement and to find a solution had to be ensured in the first place.

There is no doubt that information and material proved to be helpful in these proceedings. Everyone benefited from the fact that the father had received extensive information on mediation proceedings through an Advice-Line in London and that the team of mediators had already won over at least one of the parents for these proceedings.

The firm integration of the mediation proceedings into the court proceedings, the fixing of a first hearing and the adjournment agreed upon had a decidedly favourable effect on the proceedings. It is true that, on principle, mediation proceedings should be started as early as possible, preferably well before court proceedings. However, in this particular case the pressure initiated by the court proceedings proved to be rather helpful. The parents had been informed that, if mediation should break down, a court decision would be forthcoming fairly soon, and the mother knew that her position in the proceedings according to HCA would be rather weak.

The principle that a final agreement should become binding only after both lawyers had examined and confirmed it, was of utmost importance, as it took away any pressure from the proceedings which, otherwise, would have caused disproportionate strain and obstruction.

Finally, it was certainly important for the parents to be offered a possible continuation of the mediation, if required, on the occasion of the father's prospective visit to Berlin. This reference to the future and the assurance that things would be allowed to change caused the mood to relax considerably.

Summing up, this mediation proved to be extremely successful as it could be carried out to the parents' full satisfaction and brought about a desirable conflict settlement — in spite of the limited time frame. Most certainly, such a consensus between the parties would not have been reached through a court decision and the child's future would not have been served adequately. It would be desirable if similar cases could benefit from the advantages of mediation proceedings. ●

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Endnotes

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