

# Family Mediation in Europe

1 The family is changing	pag. 2
2 Divorces, separations and the Catholic Church	pag. 6
3 Versus a family mediation on behalf of the children	pag. 7
4 Some concepts of reference	pag. 13
5 Comparative tables of Family Mediation in the Partner countries	pag. 17
6 European legislation	pag. 27

# FAMILY MEDIATION IN EUROPE

## 1 The family is changing

The promotion of minors' rights calls for, above all, recognition and support for the child's primary social environment: the family. The notable changes that have occurred in recent years have led to profound changes in strategies of raising, socialising and educating children. Relationships and ways of living within the family have changed; parents' roles have changed, relationships between generations have changed – and these changes call for a re-organisation of tasks and times, within and outside of the family.

Over the last twenty years, the so-called “multiplication of family forms” has confirmed itself as a phenomenon present in all modern societies, reflecting the growing number of lifestyles and forms of family structure. One thinks of single-parent families, of the more or less stable situations of hetero-sexual couples, of separated people living together with their respective children, and of homosexual couples: if only because they have adopted some forms of what has traditionally constituted the symbolic code of the family, these are often still called and treated as “families.”

Therefore, beyond the problem – which will not be discussed in this setting – of defining the family, certainly there has been an unstoppable multiplication and fragmentation of diverse family structures, unlike those which are called “traditional families,” and which therefore have a juridical-institutional definition.

At the basis of this plurality of family forms is the diversity of relationships that have been changing over these last twenty years, among family members who belong to or make up a part of “traditional family units”: such as the relationships between couples and intergenerational relationships between parents and children or grandchildren. Generally, in fact, throughout Europe one notes the phenomenon of “**de-marriage**,” which consists in a weakening of the couple's bond as a foundation for the family, often in favour of generational ties.

- In Europe in the course of the last 20 years, the couple's bond has stretched so far as to be weakened. This can be deduced above all in the **reduced number of marriages**. Today in Italy, Spain and France, fewer than five marriages per 1000 inhabitants are registered per year (an average which is lower than that of the European Union overall); while in Germany and in the United Kingdom this number is slightly higher. In Italy from 1970 to 1994, the number of marriages descended to 28%. Analogous conclusions can be reached for the other countries of the European Union, where in the same period the overall number of marriages descended from 2.3 to 1.8 million.
- At the same time, an **overall growth in the number of divorces and separations** has been noted. The number of divorces per 100 marriages in Europe today is on the average 35.4. This means that every year a divorce occurs in 3 marriages celebrated in the same period, for an average duration of matrimony of 12.4 years. The European countries with the highest propensity for divorce are the United Kingdom (53.2), France (46.0), and Germany (41.1), while the situation is different in the countries of the Mediterranean area. In fact, in Spain there are 16.5 and Italy has the lowest level: 11.7. In Italy marriages last on the average 4-5 years longer than the European Union average, that is, more than 17 years.

- Still, the trend is towards progressive and constant growth in marital separations. From 1960 until today, the number of divorces in Europe has more than quintupled. In Italy, where divorce was introduced later than in other European countries, the phenomenon has grown in the course of the 1990's. In a five-year period (from 1993 to 1998) it has grown from 9 to more than 12 divorces per 100 marriages. According to ISTAT data, in 1999 there were more than 90,000 children of separated parents and two thirds of these were minors. Approximately 40% of legal separations never become divorces. Marital instability is higher among college graduates and those in higher economic positions. Furthermore, young married couples who are employed or have higher diplomas of study show a greater tendency to bargain, resulting in a higher number of consensual separations and jointly requested divorces.
- The situation of greater marital stability in Mediterranean countries is confirmed by other data, such as the number of families with only one adult (single-parent families) and with a child under 15 years of age, representing 2.3% of all the families in the European Union. This statistic is far below that of the United Kingdom, with 4.7% and on the other extreme, above the 1% in Italy and 0.7% in Spain. The French and German are closer to the European average, with 2.4 and 2.1% respectively. In particular, the subjects who most feel the separation economically are adult women who have invested much in the family and who don't have, as a result, significant professional training. They have little possibility of finding themselves in the working world, as do mothers with small children. Separation causes economic, social and relational impoverishment, which can lead to isolation. To this is added the resistance of the non-custodial parent to transfer a part of his own income to the spouse from whom he has just separated, leaving to the latter the management, without delegate and without accounting. In Italy the poverty level in families with children having a mother alone is more than double that of the families with children where both parents are present. In Europe, above all in cases of single parents with one or more children, the percentage of families who say they have *difficulty* and *a lot of difficulty* in terms of the economic situation is very high, reaching a European average of 38.0%, which is exceeded in some countries like France (33.1%), Spain (38.5%) and the United Kingdom (39.2%). In conclusion, single-parent families where the mother has obtained custody of children are the most vulnerable in social and economic terms, because the unexpected reduction of income brings a lowering in the standard of living. Work proves to be difficult to reconcile with the time required for the children's care, and the network of social protection is reduced.
- In terms of **child custody**, in cases of separation, statistics referring to 1996 show that in Italy, in 92.1% of the cases, the children the mother received custody of the mother; only in 5.5% of the cases did the father receive custody. This statistic has gone down in correspondence with an increase in alternating custody (to the father and the mother, 1.9%, and to others, 0.4%). In case of divorce, the father obtains custody 7.4% of the time (a statistic in flux compared to preceding years; in fact in 1987 the percentage was 10.9%). Mothers have sole custody in 90.1% of divorces, and in alternation 1.9% (with 0.7%, other). The imbalance that often occurs in situations of single-parent custody has led to supporting the possibility of joint custody. This has been strongly supported and carried out in North America and Northern Europe. It pre-supposes custody for both parents, who decide together about the most important aspects in the child's life. This makes it possible for the child to feel less discomfort from the family break-up, and to maintain better relationships with both parents. In joint custody, in fact, the well being of the child is put at the centre. This can be achieved if the parents manage to maintain communication, to

carry out a balanced sharing of educational tasks. Still, the strong conflictuality usually noted in couples undergoing separation leads to a small number of joint custodies.

- **“Re-constituted” families**, made up of separated or divorced parents, are a recent phenomenon in our country, but are already well established in other European countries and overseas. According to 1998 ISTAT statistics, in Western European countries, where marital instability has existed for a longer time, about a third of married people achieve a second marriage. In the case of the United States, about 40% marry twice. This means that if 45% of the American children under 12 years of age experience their parents’ separation, 35% live with a “successively acquired” parent. Of these, 20% experience a successive separation or divorce before 18 years of age. Presently in Italy fewer than 50% of divorced people re-marry and second marriages are 5% of all marriages. The families that are “re-constituted” after one of the two partners have experienced separation, divorce, or death of the partner, have been defined through the Multiscope Study of 1993. In Italy there are estimated to be 603 000, corresponding to 4.2% of the couples. Of these 73.5% are married and 26.5% are *de facto* unions. Among re-constituted families, most couples have only one child and fewer have at least three (while in non-reconstituted families, couples with one or two children are equal in number). In the case of *de facto* unions, most are without children. It is a significant fact that of 105 000 re-constituted families, the children living in these families are children of only one of the partners (30.3% of the re-constituted couples with children). And here the problem is posed, of re-defining the roles and relationships among family members. In these cases there is not only a separation to be managed, but also an increase in relationships.
- From an original family, others can be created: a single-parent family composed of a parent who has custody of the children, and a single-person family, which often leads to new marriages, *de facto* couples, more unstable situations and often legal, religious, sociological, psychological and pedagogical implications. Therefore, we can affirm that there is now a multiplication of family structures, creating a constellation of family types that are very diverse from each other and from the traditional family unit.
- But even traditional family units have experienced substantial changes, above all in those countries where the instability of the marital bond (separations and divorces) is still low, as in countries in the Mediterranean area. Even here, there are evident signs of increased slackening of “horizontal” marital bonds, and at the same time strengthening of “vertical,” that is, inter-generational bonds. The explanation for such a phenomenon can be sought in many ways. Above all, in these countries, especially in the Mediterranean area, where divorce is a more recent phenomenon and therefore families of origin exist still unchanged up to the present, that is, without separations and divorces, leading through time to a more flexible re-definition of family relationships). Adult children and “new” families made up of children and grandchildren seem to be especially “tied” to the families of origin (grandparents). The generational bond is also strengthened by the added effect of other phenomena, such as lengthening of the average life-span and the greater economic well-being of the elderly, which favour, in some ways, a better social and relational integration within families themselves, and with separate family units. So the phenomenon of “de-marrying,” understood as reinforcement of the “vertical” bond (parents/children), above all in Italy, is marked by the children as well as the grandparents of the original family remaining, thus adding a new re-definition of the roles, where new parents are still “children,” offering support when these too, in their turn, create an autonomous family. The help of the grandparents usually goes to the new “children” (that is, to the grandchildren) or to both (children and grandchildren) even when they separate or divorce.

- The phenomenon of the “**extended family**” thus seems to be a distinctive characteristic above all of Mediterranean societies (such as Italy and Spain), in contrast to other European societies, where one enters “independent” life at a much younger age. Although in all European countries, we can notice a general tendency to delay the moment of leaving the original family unit, rather than becoming autonomous in order to truly create the life of a couple. To think that in Italy today about 80% of the young people between 15 and 29 years in age live with their own parents, and this independently of whether or not they have finished their studies and have a stable employment. Another significant fact concerning young couples is given by their choice of having a home within 5 kilometres distance from one of the two original families. This shows how much the “extended family” is favoured or how strictly they are connected and conditioned by the preceding situation of family stability, which constitutes a point of reference for children even after their marriage.
- Italy is the oldest country in Europe, in that the young are proportionally few compared to the elderly. In Italy the percentage of children under 15 years of age is 14.6% compared to 17.3 for the European Union, while children under the age of 18 years of age is below 18%, compared to 21% for the European Union. France and the United Kingdom have higher values (which are respectively around 19% and 23%), while Germany and Spain have lower values, closer to the Italian ones (both around 16% and 19-20%).
- The **average number of children per woman** is around 1.22 for Italy and around 1.36 for Germany: an inferior number compared to the European Union average (1.4 children per woman), while in France and the United Kingdom (where the number of divorces is higher) the European averages are exceeded. This means that families tend to be ever smaller, with fewer children, brothers and cousins. And that the children can experience contrasts and socialisation only within social and educational structures and services, while confrontation with the other, useful for defining one’s own identity, occurs increasingly with adults. Children find themselves at the centre, with the life of parents and grandparents rotating around them. The filial relationship thus becomes ever more central to the very idea of the family, becoming the discriminating criteria for defining the family system.
- The **negative birth rate** in Italy and Spain and the increase in the average lifespan leads to an increase in the index of elderly (defined as the number of elderly people over 65 years of age, for every 100 children between 0-14 years of age), respectively 120 and 100, while in the European Union it is a little over 90 and in the United Kingdom it is around 80.

In conclusion, beside the phenomenon of “de-marriage,” common in all the European countries, there is a diversity in the frequency and types of expression, loosening the “horizontal” bond of the couple, and strengthening the “vertical” inter-generational bond uniting parents, children, grandchildren and grandparents. The multiplication of family forms and their various transformations, have been interpreted by some not so much as signs of “family crisis,” but as the spread of the family into the entire social context, a kind of “big bang” of the family that re-designs and re-defines itself within a difficult initial situation. These processes create new relationships in the public and private sectors, new types of interpersonal and social relationships, calling for adequate policies of support so that “the world of the families can be more human.”

## **2 Divorces, separations and the Catholic Church**

The path leading to separation is very painful, marked by feelings of failure both in terms of the couple's life and in terms of one's own personal identity. Besides sentiments of regret, anger, fear, and remorse, never experienced the same way by any individual, there are different degrees of suffering, and different capacities for reacting or distancing oneself, in beginning a new life.

Further accentuating the suffering is the social fabric and relationships which the couples have. Sympathies, biases and gossip lead to crises in relationships, in networks of friendship, and sometimes in working environments.

The Office for Family Ministry of the CEI has demonstrated particular sensibility towards this problem, which is inexorably increasing. While reaffirming the value of the indissoluble bond of matrimony, it states that "the actual life of the couple can register moments of misunderstanding and grave difficulty, that make it practically impossible for them to live together," demonstrating their need for a path of hospitality and spiritual assistance.

Such recognition does not deny the value of marital indissolubility as a sacrament, having its roots in the relationship Christ-Church, but "asks not to judge, because in the intimacy of the conscience only God sees and judges."

Still, couples who separate experience their situation as a failure that cannot be remedied and a defeat to be blamed. They rarely consider it legitimate to ask for help, therefore we note a limited participation in those institutional services offered, able to offer support and assistance in cases in which couples separate.

The difficulty and distrust that people live through are caused by a judging and rooted culture which involves the original families, friendships and context surrounding the spouses.

The Church's attentive and renewed position, matured in recent magisterial documents (compared to a tradition that considered separated and divorced people as "public sinners") and the attempt of the public services to respond to needs, is often counterbalanced by a widespread way of thinking that considers this problem only with feelings of accusation, blaming the couples in crisis. This makes it difficult for those who live through moments of crisis to cultivate feelings of hope and to look at the future without regret and closure, at a difficult moment in their life. "Self-esteem is put into crisis; the personal identity that previously found a point of reference in the spouse and family, is often broken and needs serious efforts to be re-built. Reaction to the sense of failure requires a painful and necessary path of re-thinking about oneself, involving a change that means working through the conflict and failure."

Separated parents should not give up in the face of family crisis, but should become promoters of a new planning, for themselves and for the children, who need support for growth, and in the same context, to work through, with much difficulty the mourning of the parents' separation.

At the same time, people close to couples in difficulty have the duty of understanding, of continuing to respect them, of intensifying their hospitality, and for believers, of offering Christian love.

In fact, spouses find themselves living through the conflict of separation and at the same time being responsible for maintaining their educational task toward the children. Each parent needs a strong sense of equilibrium to manage the conflicts of separation, above all if they want to recover the function of parenting, after the loss of the marital bond.

To achieve this, informal solidarity is needed, promoted and supported by the educational agencies in which the families are involved: social services, school, Church, voluntary sector - in order to support self-help or mutual-help, among the various members, and "to enrich their emotional and affective growth through meetings and experiences of great human, social and spiritual value."

Children, in fact, above all the youngest, cannot translate into words their pain, but they express this with attitudes of regression, which in childhood evolve into feelings of guilt and anger, sentiments

caused by their powerlessness regarding the parents' abandonment. Children living through a separation during adolescence experience more problematic suffering. They cannot project their own future through the parents', either with sexual identification or in terms of faith and investment in a relationship, developing a more disenchanting attitude about life.

In order to deal with the children's need for parents who maintain their educational role, support can be offered to couples in crisis by services present in the area. In this way, parents can manage conflicts, while maintaining their role in an unchanged way.

The couple that separates is so occupied with resolving legal questions, verifying and facing economic problems, and overcoming difficulties due to relational aspects with family and friends, that often in fact they forget to dedicate enough attention to the children.

In this environment, family mediation takes place, playing a necessary role, permitting them to face highly charged conflictual attitudes and favouring a communication among those involved that is at least acceptable.

### **3 Versus a family mediation on behalf of the children**

#### Family Mediation in America

The success of Family Mediation in the American and Canadian context has often been associated with the fact that the majority of couples in crisis who have turned to Family Mediation services, have reached an agreement.

In American practice, "informative meetings" are held in the Family Mediation Centres, for all those who request an intervention by the judge to proceed to separation, and who have children in common. This is the only way that in Canada information regarding legal, economic and parental situations can be furnished to spouses in a detailed way, and it has favoured a complete agreement for 72% of the cases, partial for 12%, with only 28% not reaching an agreement. More than 50% of the couples who, after the informative phase, have decided to try the Family Mediation service have reached a complete agreement, also concerning their future parental role in terms of their children.

For many years in the United States and in Canada, the type of family mediation that normally is carried out has been "conciliatory," that is, a kind of Family Mediation initiated above all by the judge. In fact, the courts have been among the first to request and to initiate such interventions, aimed principally at using a valid support, above all for their work, at the moment of judgement. Already in 1939 the Los Angeles County Court of Conciliation made the first conciliatory family mediation interventions. In this informal procedure a neutral third party facilitated an agreement about the issues in the dispute, through separate meetings with the two conflicting parties. The conciliator, through intense in-depth meetings, tried to reduce the tensions, to clarify the positions and to understand the respective points of view. The conciliatory procedure can be an end in itself and lead to resolving the controversy, or it can also be a first step in facilitating a subsequent process of mediation in which the parties accept a direct confrontation.

Conciliatory mediation (Finer Report, 1974) "tends to reduce the basis of the conflict to custody, food, access, education of the children, and all questions calling for decisions about how to organise themselves in the future."

With time, American family mediation models have evolved, been refined, differentiated. Coogler, who in 1974 founded the Family Mediation Center at Atlanta, Georgia, and then the Family Mediation Association in 1975, was inspired by the law profession and by his personal experience with divorce, proposed a more "structured" type of family mediation that called for collaboration

between lawyer and mediator and a written draft of what was agreed upon. This type of mediation spread widely in the United States, supporting or constituting a more organised evolution of the conciliatory type of mediation. In a period of only ten years, that is, in the 1980's, over three hundred organisations were created for working in this sector.

In the American model of family mediation, the mediator maintains a function of vouching for respect of values and desires of the spouses in dispute. This seems to be the prevalent model, but the mediator is also authorised to react according to "his" judgement. This favours negotiations in which the mediator is in fact a conductor, because he is the one who organises the discussion, decides which subjects to deal with, and in some way directs the confrontation.

The United States model of family mediation is thus based on an evolution of the "conciliatory" model, using methods and techniques typical of conflict mediation in the work environment, aiming at reaching an understanding between the parties, furnishing all the information necessary for deciding and for reaching an agreement or negotiation, which is in some way facilitated by the mediator. In the more "structured" form of mediation, which tends to stimulate co-operation between the parties (rather than competition and conflict), all the areas subject to possible disagreements and thus needing negotiation are defined in detail, establishing with accuracy the single steps to be achieved. The objective is to give the user the assurance that the mediator will deal with every question considered important by each of the parties, laying things out in a clear and understandable way. The United States model of mediation thus proposes outlining areas of agreement and specifying the logical order in which the agreed upon questions will be confronted, in order to both reassure the partners and permit them to follow scientifically the stages of the process. This helps the mediator to limit the field of discussion in order to make it as effective and productive as possible. Basic elements of this type of family mediation are:

- the neutrality of the mediator (quite different from the lawyer's role)
- outlining and defining the area of negotiation (defining the problem)
- equality and self-determination of the parties (ex-spouses), not delegating their choices to the mediator
- including all the issues connected to the separation or divorce (division of property, etc.)
- facilitating information and communication between ex-spouses
- reducing the negative impact of emotional factors

The process of carrying out this kind of mediation is thus based on four fundamental factors:

1. definition of the problem (defining the areas of disagreement)
2. gathering of information (which serves to clarify the boundaries of the problem, including associated feelings and concerns)
3. formulation of options (possible solutions, specifying all the consequences of each)
4. choice of appropriate option for both spouses, considered the best possible in terms of the problem.

In this approach to family mediation, therefore, "pragmatic" objectives tend to prevail, which can be defined in the search for agreements. These in most cases concern parenting, but can also concern other aspects of the separation, defining the area and favouring negotiated and "reasonable" choices.

It should be pointed out, however, that if the model of Family Mediation defined above is prevalent in the United States and above all in Canada, other forms of Family Mediation have also been used, to a lesser degree. These other models of Family Mediation have had different objectives, more

“therapeutic” in nature – that is, connected to emotional-affective aspects of the event of separation. In 1978, H. Irving, psychotherapist and professor of Social Sciences and Jurisprudence at the University of Toronto, coined a model of Family Mediation that can be defined primarily as the therapeutic type. In fact, even with this therapeutic mediation there is a period of negotiation, but preceded by a phase of preparing couples who seem most in difficulty to enter into mediation in an effective way. This begins with an evaluation by the mediator, regarding the availability and problems of the couple. Successively there is a pre-mediation phase, intended to facilitate the interaction of the couples undergoing separation. In this type of mediation a follow-up phase is also called for; that is, a routine check about six weeks after the process ends, with the aim of checking the couple’s progress and evaluating how well the agreements reached in mediation have been respected.

### Family mediation in Europe

What are the “technical” characteristics of Family Mediation, which has affirmed itself in Europe?

Above all, this constitutes an “inheritance” of the American experience, which however has been partially reinterpreted in the European version. In Europe mediation began to be spread in the 1980’s. The first service was opened in Bristol in 1979 through the Courts, calling for a “family conciliation service” before the court itself would make a decision.

The “success” of the American experience of Family Mediation led several countries to also consider adopting mediation in a mandatory way, by law. In Great Britain, in 1996 the Family Law Act modified the legal regulations for divorce in favour of couples and allowed a deeper understanding of the consequences of divorce, above all in terms of the children. This required that both information and assistance be provided by qualified mediators. Article 8 of the FLA (Family Law Act) established that information should be given to “couples in crisis” if they had children, and also called for or recommended periods of transition and reflection, before they could choose to enter into Family Mediation.

Following the American experience, in some European countries mediation, above all in the initial phase, was proposed as a tool at the service of the judge. For example, in Austria the new divorce bill calls for mediation, after a mandatory informative phase as in Great Britain, with the participation of a psychologist, appointed by the judge as an expert.

The spread of Family Mediation services has also been notable in France. Presently there are more than 80 centres in existence. Among these, many are private with public funding. In 1995, French law included Family Mediation in national legal regulations. Perhaps also for this reason the first and most important European association of family mediators, the APMF (Association for the Promotion of Family Mediation), was established in France. In 1992, it drew up the European charter for the training of family mediators in situations of divorce and separation, and in 1998, the code of standards for Family Mediation.

In Italy the first experiences carried out were those of the GeA Association and the GeA Centre (“Genitori Ancora” or Parents Still) promoted by the City of Milan in 1987. In 1988, collaboration was begun between the Centre for Studies in Legal Psychology for youth and the family, at the University of Rome – La Sapienza and the Office of Protection of the Magistrate in Rome. In 1993 the first international convention for “Family Mediation in separation and divorce” was held in Rome, to discuss the present situation and the future of Family Mediation in Europe.

It can thus be seen that, especially in the last ten to fifteen years, a rapid experimentation in schools and practices of Family Mediation has flourished in many European countries, also very different from one another, both in the public sector and in the private or private-social sector. Since 1998, the Recommendation of the European Council in terms of Family Mediation, to which we refer in other parts of this text, has tended to promote mediation, by furnishing a homogeneous framework of reference for European countries, and supporting the usefulness of this tool for intervening in family conflicts, underscoring in many instances "the need to ensure the protection of the superior interests of the child and the child's well-being...."

We can, however, assert that in Europe models of Family Mediation can be found in various practices in different countries, always made up of a mixture, though always with the original outline, deriving from a combination of the American "conciliatory" model, in its many different forms, and a more recent model, that we call "relational." The latter is more typically European, especially placing emphasis upon the need for the couple to "evolve" and upon the superior interest (relationship right) of the children.

Within each model of Family Mediation there are always, in fact, two objectives: the more "pragmatic" one connected to negotiating the various subjects of contention, and the more "relational" one tied to the separation itself, to re-define family relationships as they evolve into different forms. Is mediation therefore a more contracted space, or an environment characterised by a more elaborating function? Recently, in many European countries, including Italy, the second aspect has seemed to prevail over the first. The different models try to resolve, in various ways, the risks connected with the prevalence of one or the other aspect within mediation, and of one position or another for the mediator, to seek new, flexible equilibriums related to specific situations in different family contexts. Probably Family Mediation in Europe will need to confront this challenge in the near future, though moving more from agreements reached "here and now" to wider and longer lasting processes, which lead to a constant process of reciprocal clarification between ex-spouses, who still remain parents, in the superior interest of the children, regarding their problems.

Accentuating the differences, we can thus identify the two basic models of Family Mediation, which we have called "**relational**" and "**conciliatory**" In the first, the thrust of the mediation is towards support for parenting, in this way to safeguard the right of the children, as a superior interest to that of the parents themselves. In the second, on the other hand, the search for shared agreements between parents, in terms of the various subjects about which they are in dispute, prevails, so that the controversies, including those concerning the children, are resolved in the fastest and most efficient way.

	<b>Relational</b>	<b>Conciliatory</b>
<b>The conflict</b>	The conflict is an opportunity for growth, transformation and reciprocal understanding. The conflict often tends to be a long-term process	The conflict is a problem that requires a solution. The conflict is a situation that can be resolved in a short time.
<b>The response to the conflict</b>	To facilitate personal enrichment, recognition of others, living together in diversity	To collaborate in order to reach a solution to problems, maximising advantages and minimising duties

<b>The aim of the mediation</b>	Encouraging and recognising both parties as valid and “irreplaceable” parents	Decision regarding the dispute
<b>The role of the mediator</b>	The mediator is sensitive to the needs of the parties. The parties in conflict are seen as the “experts” with capacity to resolve their own problems if their competencies are recognised as being of value.	The mediator is the expert, the one who guides the process of solving the conflict, helping the parties in this effort. I
<b>The actions of the mediator</b>	The mediator explains the concept of mediation, but lets the parties establish the aims and direction of the process. The mediator encourages the discussion of all important questions, without always considering whether or not they are easily negotiable. The mediators encourage the reciprocal recognition of questions about the relationship, as well as needs and interests. The mediators thus solicit an examination of the past as a way of stimulating the recognition of the other.  Emotions are seen as an integral part of the process of conflict resolution and mediators encourage their expression where necessary.	The mediator explains that the aim of the mediation is that of reaching an agreement, defining the basic rules and procedures. The mediator categorises the dispute, adapting it to the disputants. He directs the discussion, dropping questions that are non-negotiable (for example questions of relationship or identity), concentrating on negotiable interests. The mediators guide the discussion, distancing the past and concentrating on the present and future, trying to resolve problems.  Emotions are seen as extraneous to the real issues and are strictly controlled whenever they appear.
<b>The objective of the mediator</b>	The mediators interact with the parties, looking for opportunities for development and recognition of the other, valuing the parental function	The mediators bring into focus the interests of the parties, looking for solutions in order to reach reciprocally-advantageous agreements
<b>The use of time</b>	There are no rigidly pre-established phases	The mediators establish a time limit, encouraging the parties to find a common agreement

<b>The success of the mediation</b>	Small results count, such as the capacity for communication and the recognition of the parties	Success is achieved with each mutually-acceptable agreement
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### Family Mediation on behalf of the children

Only since the 1970's has there been progress in recognising, by way of various regulations, that the child, as a person undergoing development, is entitled to and bears authentic right. The subject in his growing years is not only the child of a family, not the property of parents, but an autonomous person whose just expectations and attitudes should be recognised and respected. He is not a "thing," a sort of empty box that should be shaped and filled, by adults, but a human being having an autonomous personality, even if not yet fully developed, to be encouraged and valued. The child's apparent weakness is not a potential danger for society, thus something to be controlled, but rather a richness to be developed. Furthermore, to educate, in the original Latin sense of the word, means precisely "*educere*," to draw forth the potential and richness, certainly not to put in something different and to control the person. The right of the minor is therefore also the right of the person to grow through learning and in such a way it becomes a perfect subjective right, as are the needs of the adult.

A series of individual rights have thus been recognised for the minor, also in light of the Convention on the rights of the child of the United Nations, such as "the right to education and to a valid family environment that allows adequate development of the personality." The Convention on the rights of the child of the United Nations, in 1989, in art. 3, expressly sanctions that "in all actions regarding children initiated by institutions of social assistance, be they be private or public, tribunal, administrative authority, or legislative bodies, the best interests of the child should constitute the object of primary importance." The same European Convention in 1995 furthermore reaffirmed the concept, defining the need to protect the continuity and stability of the affective and relational environment in which children are raised, assuring them continuity of affection and maintenance of relationships with both parents and with the respective families of origin.

In family relationships and particularly in relationships between parents and children, the category of subjective rights should not be posed in contrasting terms. If two people of the same family environment are in conflict, it is not the task of the judge to evaluate which of the two rights in opposition are more worthy of protection, but rather to identify new and more adequate ways of creating the same relationship right, stressing the interest of the growing person, to re-equilibrate a relationship that otherwise would be strongly unbalanced in favour of the adult. Furthermore, even the parental authority is attributed to parents so that they can carry out as completely as possible their function as educators: not in their personal interest nor in the interest of the nuclear family, but exclusively in the interest of the children. Thus the power of the parents is recognised not "over" their children, but "for" their children. Therefore, according to this interpretation, parental authority is not a parental right, but a duty used for the educational aim that has been attributed to them.

This means that Family Mediation, above all since the 1990's, has also found a new impulse within this renewed type of social sensibility and the regulatory framework concerning the rights of minors, which certainly has given new impulse to the "relational" model of family mediation, in which the needs (and thus the relationship rights) of the children prevail over parental agreements concerning their relationships.

The difficult task of constantly recalling the attention of the spouses in conflict to the superior needs and interests of the children over their own is up to the mediator, therefore, as well as the judge. The objective is to create family relationships favourable above all to the children themselves. Finally, all - parents, mediators and judges- are placed above all “on the side of the children.”

The question that many mediators ask themselves is whether or not this also implies the usefulness of involving the children in the mediation sessions. Some feel that encouraging the presence of the children allows them to actively participate in the process of analysing of the family relationships. The mediation may bring about family decisions of crucial importance for their history, which they might otherwise remain excluded from. On the other hand, it is felt that the parents might better understand, through sessions of joint mediation with their children, their developing needs, interests, preferences and emotions. In conclusion, some feel that including children and adolescents in the mediation process can have a positive effect both on minors and on parents. To exclude minors from the mediation process can represent, on the other hand, further confirmation of the isolation to which they are frequently subjected, and indirectly confirm their sense of not being understood, or worse, not being important.

Other mediators feel that this choice is useless, if not damaging, because it further involves the children in dynamics that have already created personal and relational difficulties. Furthermore, the strong desire and illusion of having the role of peace-making can lead to more strong disappointments and insecurities. Some mediators therefore feel that to keeping them outside of the confrontation can have more positive effects than having them involved, and avoids the risk that parents may continue to use the children against each other.

Beyond the issue of whether or not children should be present at family mediation sessions, jointly or separately from their parents, the true question that is posed is to what degree can mediation effectively reconstruct or construct valid and effective relationships between ex-spouses, while maintaining the primary importance of the children’s needs. These needs come before those of the parents, who often consider the children “theirs,” or worse still, the property of one spouse or the other, rather than autonomous persons growing up with their own needs and rights that should be respected and protected while also experimenting with new and diverse paths such as family mediation.

#### **4 Some concepts of reference**

##### **a. What Family Mediation is not**

Family mediation is different from technical consulting. The technical consultant in fact evaluates the parent’s suitability and the family dynamics, giving indications regarding custody and criteria for determining who should be the custodial parent. Family mediation, on the other hand, intervenes to support couples’ therapy, to help the subjects involved to resolve issues that make it difficult to continue the relationship. Family mediation also supports psychotherapeutic interventions directed toward single individuals and helps to re-elaborate the issues tied to the discomfort and personality of each individual. It can be used either before or after the separation. Family mediation is not a path to “solving” the conflict, nor for establishing who “is right” and who “is wrong,” but rather for helping couples to exit from blocked situations and reducing the effects of destructive conflict. The mediator is not an arbitrator, because the mediator does not make decisions in the place of the disputants. It is up to the couple to bring about the decision-making process. The mediator in fact is a facilitator of communication, not a consultant who can substitute for lawyers, judges, doctors, psychologists, or psychotherapists.

b. How mediation is carried out

Before entering mediation, the couple participates in two or three conversations (also individually) of verification, to consider the individual responsiveness, and the rules and context in which they will work. Some cases exist where mediation is not advisable, because beyond the verbal conflicts, there is also physical violence, excessive involvement of third parties, or serious personality disturbances in one of the spouses.

The “negotiation” takes place within defined limits, formulated in a precise way, beginning with less serious problems, in order for mediator and couple to move ahead together towards increased reciprocal trust.

Some feel that global mediation is possible, referring to subjects of controversy such as child custody, educational models, economic and financial resources, and responsibility for education of the children, especially in the initial phase of the separation.

c. What are the results of Family Mediation

The basic trust of the members of the couple towards the mediator is essential. This is an indispensable presupposition for bringing the process of mediation to a conclusion.

The final understanding between the parties can lead to a written agreement that has value only for the parties themselves. A lawyer chosen by the parents, if requested, can subsequently write and formalise agreements.

Mediation is therefore not a substitution for the legal system.

If the Mediation goes badly:

If conditions for the mediation are not favourable and parents in a context of separation or divorce are not capable of resolving their conflicts, the Judge of the Tribunal will decide about issues like custody or visiting rights. Some parents have less difficulty accepting the impositions of a “higher authority,” than freely finding their own position. Family Mediation, however, favours dialogue and reciprocal understanding between the spouses.

If the Mediation goes well:

In cases where parents manage to resolve their conflicts with the help of mediation, they have the satisfaction of assuming responsibility for their own life. The established solutions established are generally accepted and parents acquire the ability to work out conflicts. This can be extended to new problems that may occur, so that parents can resolve them autonomously. In this way, it can be stated that Family Mediation has achieved its aims: not only an agreement concerning certain points, but also a new dialogue among members of the “divided” family.

d. Who can serve as Mediator?

The mediation can be carried out only by someone who has already acquired competency in the area of family relationships, or has specific training in family mediation, usually furnished by specialised schools and Family Mediation Centres.

The essential knowledge for a mediator includes concepts of psychology and developmental psychology, law and economics, referring to the separation. The Mediator should thus be a professionally qualified person who guarantees the “neutrality” and impartiality of the role, and in pursuing the aim of finding a consensual agreement between parties.

e. Who can request an intervention of Family Mediation?

A spouse or a member of the family can ask for Family Mediation. It may be that only spouses already favourable to Mediation will resort to the Family Mediation services. These are people who are already “ready” to confront the subjects of their dispute in a less conflictual way. It is therefore important that periods of “support” and preparation be planned for families, so that Family Mediation can also reach those who would not resort spontaneously to this service. For this, voluntary organisations working with family problems have a fundamental role.

f. Why undergo Family Mediation?

Family Mediation offers parents a space for listening, dialogue and negotiation, to carry out parental functions, allowing them to escape from a logic of winners and losers. It allows them to maintain an effective and stable channel of communication, to manage conflicts autonomously, choosing concrete solutions for problems generated by the separation.

It offers children the possibility of feeling reassured and supported by both parents in their growth and in their projects.

It implies that every change, no matter how painful, presupposes growth, and consequently that growth always follows change.

g. When is Family Mediation carried how and what is its timeframe?

Usually Family Mediation takes place while the legal proceeding is temporarily suspended, if this has already begun in the expectation of separation and divorce. But Family Mediation can be requested independently from the separation: in moments of serious family crisis or even when, after divorce, problems arise when people are not in agreement.

The mediation lasts on the average for 3 months, although it is not easy to define the time needed for the process. This should be flexible and individualised, tied to specific needs demonstrated by each couple during mediation.

Mediation should not, however, exceed 6 months. Approximately 10 to 12 one-hour meetings are planned.

h. How?

During the entire mediation process, the mediator should preserve and maintain professional secrecy regarding the contents of the negotiations, naturally respecting the relevant laws in this area. Any information that the mediator acquires should in fact be considered confidential and private and should not be revealed without the written consent of all parties involved in the mediation process. Furthermore, the mediator is obliged to guarantee impartiality and integrity, reserving for himself alone the task of supporting communication, legal correctness and equity.

Participation in mediation should be voluntary, as should the agreements between parties.

i. Where?

Usually Family Mediation is a public service, falling under the services offered by local organisation in the education and social-health fields, making use of consultants, social co-operatives or mediation associations for the functional management of the services. Family Mediation services are free or call for a modest participation in expenses (about 10 Euro). At the same time, there are also private services that, above all in other European nations, can be particularly expensive.

j. With whom?

In Italy some maintain that the children should participate in the mediation, so they can express their desires and preoccupations. Parents can be helped to better understand children's needs in a neutral context, in which information is less confused and contradictory, and more correct. On the other hand, some feel that witnessing parental conflict is a condition of extreme suffering for children, and therefore that it is preferable for them not to be present at the meetings.

## 5 Comparative tables of Family Mediation in the Parteners countries

FAMILY MEDIATION	EUROPEAN COMMUNITY	ITALY	SPAIN			GERMANY
			Catalonia	Valencia	Galizia	
<b>LAWS OF REFERENCE</b>	Recommendation of the Committee of Ministers to Member States regarding Family Mediation 21.10.1998	Bill: 2.10.1999	Law no. 1 15.03.2001	Valencia: Bill, 2001	Galizia: Bill, 1999	/
<b>DEFINITION</b>	“Method according to which a third party, the mediator, impartial and neutral, putting him(her)self above the conflict, helps the parties to negotiate and to reach a common agreement”	“Way of re-organising relationships among separated or separating parents in a structured context, autonomous in regard to the legal context, with the help of a neutral mediator with specific training who, solicited by the parties and with the guarantee of professional secrecy, allows them to develop a plan for practising shared parental responsibility in a way that is satisfactory both for them and for the children”	The law does not contain any definition of mediation	“Voluntary proceeding in which a qualified professional, impartial and without power to substitute for the decisions of the parties, helps family members in situations of conflict, with the aim of facilitating dialogue and searching for a common agreement”	Intervention of a third party already freely requested and accepted by the parties. The mediator will operate by offering collaboration and help to those who have or had a family relationship, to offer a negotiated solution to a marital or couple’s problem	

<b>SUBJECT</b>	Mediator: the existence of a selection procedure should be assured; training and qualification of the mediator	Mediator: consulted within or outside the Tribunal (ASL or private) in a subsidised system	- Family Mediation Centre of Catalonia (connected to the Department of Justice) - Professional Rolls TRAINING: The mediator should practice as lawyer, psychologist, social worker, social educator, or teacher, included in the professional Rolls	- Mediation centres: non-juridical entities connected with the Management of the family and adoptions - Roll of lawyers of Valencia - Official Roll of Psychologists TRAINING: lawyer or psychologist with professional experience and specific training by their own professional association	- Family Mediation Service of Galizia	Private professionals: lawyers, psychologists or sociologists ▪ BAFM, Federal Association for Family Mediation, “certifies” those who take a 200-hour training course ▪ BM, Mediators born from the peace movement, organises courses open to all • Federal lawyers associations propose short courses (DAV, BRAK). The courses can be organised by anyone, however.
<b>OBJECT (area of intervention)</b>	The Mediation can be applied to all disputes among members of the same family, related either by blood or by marriage, and those who live or have lived in family relationships, as defined by the national legislation	The mediator operates in cases of separation and/or divorce between couples with minor children, between couples with children or with adult children, with <i>de facto</i> families and natural children, or in disputes in the area of inter-family relationships			All questions deriving from personal relationships or parent-child relationships that are susceptible to legal discussion	Mediation is intended as a method or technique for resolving all kinds of conflict (work, family, etc.)
<b>OBJECTIVE S</b>	- Improve communication among family members and		Means of support for the family and method of conflict	Help to families in situations of conflict, avoiding	Function of help or assistance to negotiations	To reach the self-sufficient regulation of psychosocial or legal

	<p>reduce conflict among the disputing parties</p> <ul style="list-style-type: none"> <li>- Create friendly agreements</li> <li>- Continuity of personal contacts between parents and children</li> <li>- Reduce social and economic costs of the separation and divorce for the parties and for the States</li> <li>- Reduce time needed to resolve the conflict</li> </ul>		<p>resolution, to avoid judicial proceedings and bring an end to those already underway</p>	<p>legal procedures, putting an end to those underway, in such a way that the solution reached through Mediation can obtain approval of the legal authority</p>	<p>between the parties, in order to obtain an agreement or rapprochement between the parties in conflict regarding agreements about separation, divorce, annulment, or dissolution of the union, to the benefit of the members of the nuclear family</p>	<p>problems, maintaining the autonomy of the clients. To find a regulation that is binding for the parties.</p>
<b>SERVICIES ACTIVATED</b>	<ul style="list-style-type: none"> <li>- The mediation service can be organised through either the public or the private sector</li> </ul>					<ul style="list-style-type: none"> <li>▪ Private professionals (approx. 80%)</li> <li>▪ Office of Assistance for Minors(10%) <ul style="list-style-type: none"> <li>▪ Non-profit associations(10%)</li> </ul> </li> </ul>
<b>CHARACTERISTICS</b>	<ul style="list-style-type: none"> <li>- The mediation should not be obligatory</li> </ul>	<p>Mediation is resorted to when requested by the judge, with the consensus of the couple</p>	<p>Voluntary, Impartial, Private, Free</p>			<p>Voluntary, private, neutral; openness and willingness of the couples to resort to them</p>
<b>RELATIONSHIP TO THE LEGAL PROCEEDINGS</b>	<ul style="list-style-type: none"> <li>- Autonomy of the mediation, which can take place before, during or after the legal proceeding</li> <li>- Possibility of</li> </ul>	<p>Mediation is resorted to upon suggestion of the judge, during the hearing for separation/divorce. The hearing is suspended for</p>				<p>Complete autonomy, most of the cases no connection with the legal proceeding. The judge can suspend the trial while waiting for</p>

	interrupting the legal proceeding in order to carry out the mediation - Need to facilitate approval by the legal authority of agreements reached at the request of the parties	a maximum period of 3 months. The mediation can take place even outside of the hearing				results from the mediation. The agreement can be transmitted to the notary to be ratified and to acquire legal value.
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	<b>SERVICE OF FAMILY MEDIATION</b>	<b>ITALY</b>	<b>SPAIN</b>			<b>GERMANY</b>
			Catalonia	Valencia	Galizia	
1	<b>ENTITY THAT MANAGES THE SERVICE</b>	Community public service (example Il Melograno – Sesto Fiorentino, Town of Lucca, Town of Viareggio, Agency No. 8 and Towns of the Valdarno area, Neutral Space of the CBM, Milan – ALFID Trento*)		Entity connected to the General Management of the Family and Adoptions	Mediation Service of Galizia	Office of Assistance for Minors
	<b>DEFINITION, OBJECTIVES, CHARACTERISTICS OF THE SERVICE</b>	Service for the prevention of child suffering due to a bad separation. To give back to parents the responsibility of decision-making regarding their children.				. Divore and seperation consulting Service present in all towns in Germany with elements of mediation, familymediation as full offer only in few., often transfer to mediation offers of nonprofit organisations or private studios after the first meeting

	<b>LEGAL REFERENCES</b>	L. 285/97 – Support to the family in terms of education, support to the parents in their parental function, beginning not so much from their difficulties and deficits, as from their resources and competencies. *L. specific Province has special statute		Bill 2000	Preliminary bill, October 1999	SGB VIII, § 17,18 §17, 18
	<b>SUBJECTS INVOLVED</b>	Families				Couples with children
	<b>WHO BEARS THE COST OF THE SERVICE</b>	Town (sometimes with a small contribution from the family)				No cost for families
2	<b>ENTITY THAT MANAGES THE SERVICE</b>		Family Mediation Centre of Catalonia, together with the Department of Justice			
	<b>DEFINITION, OBJECTIVES, CHARACTERISTICS OF THE SERVICE</b>					
	<b>LEGAL REFERENCES</b>		L.1/2001			
	<b>SUBJECTS INVOLVED</b>					
	<b>WHO BEARS THE COST OF THE SERVICE</b>					

3	<b>ENTITY THAT MANAGES THE SERVICE</b>	Associations in the voluntary and social sector (example Coop. Emmeci Torino – Electra Arezzo, GeA Association of Milan)	(ACDMA Barcelona has interrupted the activity with volunteers because of conflicts with the public administration)			Associations in the voluntary and social sector (church social services, non-profit organisations)
	<b>DEFINITION, OBJECTIVES, CHARACTERISTICS OF THE SERVICE</b>	Way of re-organising family relationships for the future or following separation or divorce				Mediation is much insisted upon, separation is not discussed. Training of the mediator can be very different. Sometimes these persons work together with the Office for Assistance to Minors
	<b>LEGAL REFERENCES</b>					
	<b>SUBJECTS INVOLVED</b>	Couples undergoing separation, separated or divorced with children				Couples with children or without (depending on the organisation)
	<b>WHO BEARS THE COST OF THE SERVICE</b>	Family				Normally absent or small participation in the costs
4	<b>ENTITY THAT MANAGES THE SERVICE</b>	Institutions and private entities	Professional Rolls (example, ACDMA Barcelona)	Official Roll of psychologists		Private studio or psycho-social consultation

	<b>DEFINITION, OBJECTIVES, CHARACTERISTICS OF THE SERVICE</b>	Therapeutic aim, in collaboration with the lawyers for both sides, to deal with all aspects connected to the couple's separation	The service intends to support an assisted negotiation. (Besides Family Mediation, the association deals with penal mediation for adults, juvenile justice, community, scholastic)			Couples with problems, married or not married. In 80% of cases, the family mediation service is offered by private professionals.
	<b>LEGAL REFERENCES</b>		L.1/2001	Bill, 2000		
	<b>SUBJECTS INVOLVED</b>	Families facing separation				Couples with or without children
	<b>WHO BEARS THE COST OF THE SERVICE</b>	The Family				Entire cost, very high. Aim is a partial reimbursement from the mutual service can be requested
5	<b>ENTITY THAT MANAGES THE SERVICE</b>	Institutes and private centres (example, Facciamo pace – Rome)	Professional Rolls (example, ACDMA Barcelona)	Roll of Lawyers of Valencia		Private studio or legal consultation
	<b>DEFINITION, OBJECTIVES, CHARACTERISTICS OF THE SERVICE</b>	Consultation and support for harmonious separation				Married or unmarried couples
	<b>LEGAL REFERENCES</b>		L.1/2001	Bill, 2000		In 80% of the cases, the family mediation is offered by private professionals

<b>SUBJECTS INVOLVED</b>	Families				Couples with or without children
<b>WHO BEARS THE COST OF THE SERVICE</b>	Families				Fixed charge or entire payment according to pre-established legal fee. Very expensive. Help from the State can be requested for the costs of the trial. Because of the principle of co-mediation they work often together with non profit organisations or psycho-social consultation

### **SIMILARITIES AND DIFFERENCES**

Family mediation has been of great international interest for some years now, as demonstrated both by the practical reality in many countries and by the legislative activity that has aimed at disciplining and defining the field in terms of operations, professionalism, institutional headquarters, etc.

The European situation is rather amorphous and is definitely behind in terms of specifying legal frameworks in each State: of Italy, Germany and Spain, only the latter has adopted, in Catalonia, a legal regulation.

In the absence of a legal framework, the practices of the three States can be reduced to two fundamental models:

- A “conciliatory model,” which aims at reducing the volume of disputes handled by the civil courts, when these can be the object of negotiated, extra-legal agreements; but there is still a high responsibility for children and the wish of parents to make divorce easier for the children, when they find as parents to cooperation. So there is also the intention to care for a responsible relation to children.
- An “relational model,” which centres on the need to more effectively protect minors in cases of separation or divorce, when these show a high degree of conflict that can be resolved through an intervention that is more psychological and relational in orientation, with the judge contemporaneously suspending the legal proceeding.

The first of the two models seems to have inspired Germany, where mediation is intended as a method or technique applicable in various environments – family, school, work – with the aim of favouring encounters between the parties in conflict to give them back their responsibility in the “confrontation” that opposes them, offering them an opportunity for accompanied management of their conflict. This practice of regulating conflict gives the third party, the mediator, a position of neutrality, a regulatory role, calling upon them to “provoke” an agreement between the parties. These mediation spaces are managed by private professionals, such as lawyers, psychologists, who have undergone a specific training program recognised by a Roll of Mediators.

The bills presented in Italy and Spain seem on the other hand to adhere to the second model, which brings Mediation back to its classical setting. The basic idea is that as far as possible conflicts should be taken out of the legal sphere and returned to a cultural of solidarity and co-operation rather than competition. The desire to motivate the self-determined settlement of conflicts is not viewed only as a means of reducing the civil dispute, but also and above all as an instrument for enlarging the area of help offered to the rights of citizens.

### **TREND OF DEVELOPMENT**

- To work with the families (and not on the families), recognising in the relationship with parents their central role as protagonist in their changes. The contents to be transmitted are not excluded a priori as in certain psychoanalytic models, but are proposed on the basis of the needs and objectives of individuals, from whom the project always originates, and not on whom it is proposed. Remaining aware that each parent is different and each child is different, the objectives of the intervention programme therefore should be flexible and differentiated. The ways of working with families should be varied and appropriate, the approach individualised, the objectives of interventions regarding children compatible with those of the parents, the workers showing respect towards the parents and involving them in the decision-making processes that concern them, with the aim however of favouring the interest of the minor.
- The approach should identify parents' strong points and build on these, maintaining awareness of couples' specific needs, avoiding the risk of treating them as patients.

### **OPEN ISSUES**

- What training and competencies are necessary for the workers?
- What real integration between subjects and territory?
- The position of family mediation services in terms of social services: public (as specific service or within already-existing services) or private?
- Relationship between mediation and other forms of intervention (e.g. consultation, therapy, psychosocial support, etc.)?
- Co-ordination among interventions by various professionals (lawyers, mediators, psychotherapists, judges, office consultants, etc.)?

### **SUGGESTIONS**

- To structure an informative network that guarantees the possibility of a well-informed evaluation of various possibilities for conflict resolution, both in terms of legal structures and other structures, activating ways of informing couples of the family mediation route, without violating the principle of voluntary access.
- The professionals should have qualified training: if on the one hand legal knowledge does not replace the technical quality required in the procedures of mediation, it is true that because of the need for defining the legal content of agreements that can conclude mediation proceedings, legal training is a necessary complement to knowledge of mediation techniques.
- Establishment of a roll of mediators, or of a national registry of associations or entities through which mediation procedures can be carried out.

- The impartiality and professional qualification of the mediator who manages the procedure should also be assured in the mediation proceedings.
- Establishment of an organisation to control and plan on a national level, constituting a kind of permanent observatory of a reality that is naturally in evolution and therefore subject to legislative modifications and corrections in the supportive administrative activity.
- Place attention on a true evaluation of the interventions so that the repercussions of the interventions that are carried out will not be negative. It is necessary to understand that the intervention can risk making the situation worse, instead of better (both in terms of inter-family relationships and in terms of the risk of creating dependency on the workers). What are the theoretical principles of these interventions; is it always a good idea to intervene; how can effects, whether positive or negative, be measured, etc.?

## **6 European legislation**

In the context of European legislation the major document which tackles and governs family mediation is Recommendation R. (98) I of the Committee of Ministers of the Member States on family mediation, adopted by the Committee of Ministers on January 21, 1998 at the 616<sup>th</sup> meeting of the Delegates of Ministers.

The Recommendation, inasmuch it is a recommendation, is not in the nature of an order and is not binding for the Member States, but it is a document, which contains general directives and presupposes a subsequent statutory intervention within the single Member States, which should issue a law on the subject taking in the suggestions contained in the directive.

After having placed on record the high number of family conflicts arising particularly from divorces and separations between spouses and their prejudicial effects on children, identifies in family mediation the tool to reduce family conflicts and thus to guarantee the protection of the child's prominent interests.

Among the potentials inherent in family mediation, the Recommendation particularly identifies the capacity of:

- improving communication among the members of the family,
- reduce the conflict between the disputing parties,
- bring about friendly agreements,
- give continuity to personal contacts between parents and children,
- decrease social and economic costs of separation and divorce for the parties and the States,
- reduce the time necessary for the solution of the conflict.

It is therefore based on the necessity to guarantee to the minor, also at the stage of the family crisis, the double parenthood that must be maintained in the child's interests over and above the breakdown of the marriage relationship.

This requirement has been incidentally confirmed recently at the European Council in Nice on 7/9 December 2000, in the context of the Chart of Fundamental Rights, which condenses in one text the civil, political, economic and social rights expressed in various sources, whether international, European and national.

### **RECOMMENDATION CONCERNING FAMILY MEDIATION**

#### **ACTIVITY OF THE COUNSEL OF EUROPE**

#### **Recommendation n.R(98)1 of the Committee of Ministers of the Member States concerning family mediation**

**Adopted by the Committee of Ministers 21 January 1998 at the 616<sup>th</sup> meeting of the Delegation of Ministers**

1. The Committee of Ministers, following Article 15.b of the Statute of the European Council.
2. Considering the growing number of family disputes, especially those deriving from separations or divorces, and noting the negative consequences of the conflict for families and the high cost for the States in social and economic terms;

3. Considering the need to guarantee protection of the superior interest of the child and his well-being, as called for by international measures, especially considering the problems that separation and divorce pose in terms of custody and visiting rights.
4. Taking into consideration the development of means tending to resolve disputes in a consensual way and in view of the need for reducing the conflicts of interest of all members of the family;
5. Recognising the unique characteristics of family disputes, that is:
  - The fact that family disputes involve people who, by definition, have inter-dependent and continuous relationships;
  - The fact that the family disputes are created in a context of painful emotions and that these increase;
  - The fact that separation and divorce have an impact on all members of the family, especially on children;
6. In reference to the European Agreement on the Exercise of the Rights of Children and in particular to article 13 of this Agreement, dealing with mediation or other measures taken to resolve disputes that affect children;
7. Considering the results of the study about the use of mediation and of the ? and in this area in different countries, which show that the use of family mediation has the potentiality of:
  - improving communication among family members, reducing the conflict among the disputing parties;
  - creating amicable agreements;
  - continuity in personal contacts between parents and children;
  - reducing the social and economic costs of separation and divorce for the parties and for the States;
  - reducing the time needed for solving the conflict;
8. Emphasising the growing internationalisation of family relationships and the very particular problems associated with the phenomenon in question;
9. In light of the fact that various States are considering the introduction of family mediation;
10. Convinced of the need to increase the use of family mediation, a method in which a third party, the mediator, who is impartial and neutral, helps the parties to negotiate, placing himself above the conflict, to reach a common agreement;
11. Recommend to the governments of the Member States:
  - to introduce or promote family mediation or, where necessary, to further the existing work of family mediation;
  - to adopt or reinforce measures considered necessary for applying the following principles and to promote family mediation as an appropriate instrument for solving family disputes.

## PRINCIPLES OF FAMILY MEDIATION

- I. Area of action of the mediation
  - a. Family mediation can be applied to all disputes among members of a single family, related either by ties of blood or by matrimony, and for those who live or have lived in family relationships as defined by the national legislation.
  - b. In any case, the States are free to determine the controversies and specific cases in which family mediation can be applied.
- II. Organisation of the mediation service
  - a. The mediation by principle should not be obligatory
  - b. The States are free to organise and distribute the mediation service as they feel opportune, either through the public sector or the private sector
  - c. Apart from means of distribution and organisation of the mediation, the States should arrange for appropriate mechanisms in order to assure the existence of:
    - procedures for selection, training and qualification of mediators,
    - standard that should be reached and maintained by mediators.
- III. Methods of mediation. The States should guarantee appropriate mechanisms that allow them to manage the methods of mediation according to the following principles:
  - the mediator is impartial with the parties;
  - the mediator is neutral in regard to the result of the mediation process;
  - the mediator respects the opinions of the parties and defends the equality of their positions in the agreement;
  - the mediator does not have the power to impose a solution on the parties;
  - family mediation should take place in conditions that guarantee privacy;
  - discussions that take place during mediation are confidential in character and cannot be used successively, except by agreement between parties or in cases allowed for by national law;
  - the mediator should, when opportune, inform the parties of the possibility of resorting to marital counselling or other forms of consultation as a means of resolving marital or family problems;
  - the mediator should give particular attention to the well-being and superior interest of the children, should encourage parents to focus on children's needs and should remind them of their priority responsibility to the children in terms of well-being and the necessity of informing them and consulting with them;
  - the mediator should give particular attention to the possibility that there may have been, or may be in the future, episodes of violence among the parties, and the effects that these can have on the parties' positions in terms of the negotiation, and should evaluate whether, in the presence of such circumstances, the mediation is useful.
  - The mediator should furnish information of a legal character but should not provide legal consultation. It should, when opportune, inform the parties of the possibility of consulting a lawyer or other professional who is competent in the subject.
- IV. The legal value of the agreement reached through mediation. The States should facilitate ratification of mediated agreements by the judicial authority or other competent authority

when the parties request this, and should arrange for mechanisms to reinforce such agreements according to national law.

- V. The relationship between the mediation and the legal proceedings in confrontation with legal or other competent authorities
- a. The States should recognise the autonomy of the mediation and the possibility that this can take place before, during or after legal proceedings;
  - b. The States should institute mechanisms with the aim of: \*allowing interruption of legal proceedings so that mediation can take place;
- guarantee that in such cases the legal or other competent authority maintain the power of taking urgent decisions in order to protect the parties, their children, or their property;\*
  - inform the legal or other competent authority about whether the parties will the mediation or not and whether an agreement has been reached.
- VI. Promotion of and access to mediation
- a. The States should promote the development of family mediation, in particular through informative programmes aimed at the public in order to allow better understanding of the consensual methods of resolving disputes.
  - b. The State are free to establish mechanisms in particular cases to furnish information inherent in the mediation, as an alternative method for resolving family disputes (for example, obliging the parties to meet with a mediator), in this way allowing parties to evaluate whether it is possible and useful to mediate the questions in dispute.
  - c. The States should also agree to adopt necessary measures in order to permit access to family mediation, including international mediation, to contribute to the development of this method of consensual resolution of family disputes.
- VII. Other instruments of conflict resolution. The States can evaluate whether it is useful to apply, in an appropriate way, the principles for mediation contained in this Recommendation, also to other instruments for resolving disputes.
- VIII. Questions of an international nature
- a. The States should consider the possibility of instituting mechanisms for using the mediation, when opportune, in cases that present elements of an international character, especially in questions regarding children, and in particular regarding custody and visiting rights when parents live or plan to live in different States.
  - b. International mediation should be considered as an appropriate method in order to allow parents to establish and review the terms of custody and visiting rights, or to resolve disputes arising in consequence of decisions taken in terms of such questions. However, in the presence of illegal removal or if a parent illegally retains the child, international mediation should not be used if it can delay the prompt return of the child.
  - c. All the principles listed above are applicable to international mediation.
  - d. The States should, as far as possible, promote co-operation among existing services that deal with of family mediation, in order to facilitate the use of international mediation.
  - e. Taking into consideration the unusual nature of international mediation, it should be anticipated that international mediators undergo a specific training.