

PSYCHOLOGICAL ISSUES IN FAMILY MEDIATION*

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Abstract. *The aim of this paper is to point out to certain problems that may appear in the course of family mediation, whose overcoming does not require only legal but also psychological knowledge and skills on the mediator's part. The causes of multiple barriers to mutually agreed family dispute resolutions are recognized in the effect of psychological factors, such as excessive optimism, degree of tolerance, risk or loss aversion, reactive devaluation, insisting on the personal understanding of justice, etc. At the end of the paper, the concrete approaches to family disputes are offered to potential mediators.*

Key words: *mediation, family dispute, psychology, agreement*

1. LEGAL FRAMEWORK FOR FAMILY MEDIATION

Mediation is an alternative method of family dispute resolution. The legal practitioners' experience shows that the exclusive participation of lawyers and judges, besides the experts of the social services authorities, does not bring about desirable results in the effort to end family disputes by mutual agreement. This could be attributed to the fact that these professionals are not adapted or competent enough to meet the challenges they encounter in the course of family dispute resolution, which is the consequence of being constrained by the inflexible traditional procedure.

Family mediation aims to encourage communication and to reduce conflict to the least possible measure. In the course of this procedure, the parties should arrange their relationship with the assistance of a neutral third party – the mediator, who does not have the authority to render any decisions or to impose the way the dispute should be resolved.

In Serbian law, this is an original procedure to which the parties adhere freely. The ultimate objective is reaching an agreement by which the termination of marriage by divorce would be prevented or the important post-divorce issues should be resolved, which

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would result in keeping the child's good relations with parents and other family members, as well as in child's better adaptation to parents' separation.

This method of family dispute resolution is based on the consensuality principle; hence, its' success depends entirely on the will of the spouses. Should one or both spouses not agree to mediation, or should it be deemed purposeless (e.g. if the will of one of the spouses is not legally relevant or it cannot be expressed), the mediation would not take place.

The procedure is, as a rule, within the jurisdiction of the court. However, mediation could be entrusted to the social services authorities, marital or family counsel, or some other institution specialized in mediation in family relations.

If the mediation takes place in front of the court, it would be held by a single judge, who could not participate in rendering the decision in the subsequent family litigation, by which the dispute is finally resolved on the merits, except in the case that the mediation had been successful in resolving the dispute.

After receiving a claim for annulment of marriage or divorce, the court schedules the mediation session. If both parties fail to appear, the mediation will not take place. In this case, the dispute would be resolved in the course of a civil proceeding. If both parties do come to the session, the mediation process can be conducted.

The judge who conducts the mediation process is obliged to recommend to the spouses the psycho-social counseling. Only if the spouses accept this recommendation, the mediation process is conferred to the social services authorities, marital or family counsel, or some other institution specialized in mediation in family relations

The mediation procedure includes two phases. The first one, disregarding the identity of the mediator, is referred to as *the procedure for attempted conciliation* (conciliation). The conciliation is conducted only if the lawsuit for divorce has been filed, and not if the proceeding has been initiated by the joint motion for divorce. The aim of conciliation is to overcome existing marital problems without conflict and by avoiding divorce. The second phase is called *the procedure for attempted mutually agreeable termination of conflict*. The purpose of reaching agreement in the course of this procedure is to improve the disturbed relations between the spouses so that they could function normally and without conflict after their marriage is over.

2. RATIONALITY IN NEGOTIATIONS

Litigants and their representatives in civil law disputes are generally aware of the basic principles of rational decision making. According to this model, the careful examination of possible risks, benefits and expenses should result in the economically justified decision on entering or non-entering into certain agreement or undertaking some other activity. In the majority of cases this approach proves efficient, especially if the involved players are more skilful in the economic analysis and are not emotionally burdened with the outcome. With the increase of emotional stakes, however, the rational decision-making becomes more of a challenge. This is contributed by the invisible, non-economic factors, pertinent to many other spheres of social life, and especially to family legal relationships.

The starting point of the rational approach to decision-making is depicted in the postulate that any given outcome is corresponded by the appropriate monetary equivalent. The study published in 1984 by Priest and Klein shows that the willingness of a claimant to accept the offer to settle a dispute may adequately be represented by a simple equation. This equation is:

$$Pp(J) - Cp + Sp = \text{monetary benefit from the negotiated agreement.}$$

In this equation, **Pp** represents the assessment of claimant's own chances of winning in litigation; **J** is the amount to be won in litigation; **Cp** stands for the claimant's eventual costs of litigation; and **Sp** stands for the costs of settling the dispute outside the court (Priest and Klein, 1984: 3-6)

This rationalistic model is applied in the theory of alternative dispute resolution through the construction of BATNA (*Best Alternative to a Negotiated Agreement*), and WATNA (*Worse Alternative to a Negotiated Agreement*) concepts.

However, it has been shown that some other factors significantly influence actual reaching of the agreement. Among others, the claimant's assessment of the respondent's willingness to settle stands out, as well as the savings that would be made by settling the dispute outside the court and the amounts that one side claims and the other does not admit to owe.

Kiser and others, in preparing their valuable analysis, have studied four thousand cases, for the period of forty four years, in which one of the parties refused the proposal to settle (Kiser, Asher, McShane, pp. 551-9). It turned out that 61 % of claimants and 21-24% of respondents reached worse results in litigation to those that would have been attained by means of settlement which they had been offered and which they refused. Although similar researches referring to family law cases have not been conducted so far, the undoubted complexity of disputes, beside numerous other problems, evidently encumbers the assessment of the potential success in litigation. Hence, Martin Asher, the economy professor at the University of Pennsylvania, noticed that the psychological factors, such as: risk aversion or loss aversion, definitely play significant role in assessing the possible outcomes of the court proceedings (Glater, 2008).

3. PSYCHOLOGICAL ASPECT OF NEGOTIATION

The social science scholars have thoroughly studied for a long time now the psychological dimensions of the process of negotiations. Since the conflict, as a psychologically complex phenomenon, stands in the core of this process, numerous psychological processes are inherent to negotiation and mediation as amicable methods of dispute resolution. The new field of research was opened by Pruitt in 1981 with the examination of the psychological dimension of the negotiation process (Pruitt, 1981). This scientist suggested the model to approach negotiation based on learning, emotions and motivation.

The social psychology offers models of motivation, which many, including Mook (Mook, 2000), have expanded and applied to negotiations. In 1982, Howard Raiffa examined negotiations from the conceptual perspective which, besides rational, included also behavioral moment, by which the models of probable human behavior were constructed (Raiffa, 1982). Comprehensive research was conducted as well as studies on how cognitive maps and prejudices, such as framing, attaching end excessive optimism, induce derailments from the rational model (Neale, 1991).

People are not always capable of recognizing and processing the facts necessary for giving rational responses to social challenges and, therefore, they make assessments and guesses by applying their own prejudices to the experienced stimulus. These assessments and guesses are based on their own experiences. Cognitive theories have created lists of foreseeable prejudices which produce unoptimal decision making and wrongful tactics

(Morris, Gelfand, 2004: 45-66). These prejudices are often determinative in family law disputes, which are, among other features, characterized by high emotional charge.

People have limited ability of understanding their own emotions, let alone the emotions of others (Lowenstein, Schkade, 1999: 85-105). Often times they can't understand the feelings of others and the background of such emotions (Ekman, 1993: 384-392) and often erroneously assess their intensity (Keltner, Robinson, 1993: 249-262). The negotiations many times fail because of the excessive confidence of one party in its own capability to predict the emotional reactions of the other party (Dunning, Griffin, Mijokovic, Ross, 1990: 568-58). Besides, there is a long sequence of complex processes which take place in the course of negotiations, including communication, style of addressing the other party, balance of powers of the negotiation positions, external influences, etc. Negotiation is made even more complex by the influence of the context in which it takes place, which may include the affiliations to certain groups, the influence of third parties, accessibility of technology and similar factors (Kramer, 1995). There are some other factors in negotiations which are mainly the product of calculation and intention, by which the parties try to maximize the outcome and enlarge the advantages related to the outcome or the course of negotiations.

At this point, we shall not examine these factors but attempt to contribute to the understanding of the problem and to enhancing the skills crucial for overcoming the common obstacles and barriers, which may stand in the way of reaching an agreement and which cause frustrations and dissatisfaction in the process of negotiations. The attempts to understand these barriers have resulted in their different categorizations. In this paper, we will deal with some of those, such as justice seeking, reactive devaluation, loss aversion, excessive belief in the correctness of one's own judgment and prejudices toward the other side. These categories have already been identified in literature, where the results of research conducted in the last thirty years have been published.

Legal scholars, practitioners and social scientists have not yet reached an agreement on the comprehensive contextual framework for all the diversity of behavioral manifestations of psychological obstacles to reaching agreement through negotiations. On one occasion, one of the U.S. Supreme Court judges (Potter Stewart) stated that although the obscenity was difficult to define, he knew it when he saw it. Therefore, although lawyers still do not have adequate name or explanation for certain behaviors, they should all the same be capable of recognizing them when they see them.

4. EXCESSIVELY OPTIMISTIC EXPECTATIONS

This category of exaggerated self-confidence may take different forms. The excessive optimism is a natural feature of human character. The research studies have shown that people are generally excessive optimists when it comes to predicting the outcome of a trial and/or the likelihood of reaching an agreement. This result was marked as "one of the most robust discoveries in psychological research" (Armour, Taylor, 2002: 334). The excessive optimism leads to erroneous predictions of future events, as well as wrong assessment of the likelihood of the positive or negative events in the future. The optimistic overconfidence in predicting future events may have its causes in the nature of attention that a person attributes to positive and negative facts – e.g. more emphasis is placed on the facts accordant to the desired outcome – as well as in the inclinations to overestimate

someone's own capabilities. A good example thereof is the fact that in the United States the frequency of divorce is approximately 50%, and that couples who intend to enter into marriage assess the chances of divorce in the future at 0%!

The accessibility of information also plays an important role; to each party much closer and more recognizable are those elements of the case that make its position stronger and the likelihood of success greater, as compared to those factors that weaken their positions or may jeopardize their success. Therefore, the parties to a dispute, naturally, underestimate the significance of the unknown, which largely encumbers the informed assessment of the probability of certain outcome. Finally, the urge to control own environment, as a basic human need, leads to overestimated assessment of capabilities to control future events and outcomes of one's own enterprises. It is very difficult for lawyers to deal with these issues, and therefore, the hesitations in making concessions, the expression of disagreements and misunderstandings may be taken as the lack of enthusiasm or the aggressive representation of clients. In any case, it is indisputable that people are often excessively optimistic when it comes to their own capability to control their optimism.

5. RISK TOLERANCE AND RISK AVERSION

Our projection of future satisfaction with certain result in some cases depends on whether the suggested outcome represents a gain or a loss. The sociological research show that individuals are less ready to accept the identical outcomes if they represent a loss for them than if they mean a gain (Mnookin, Ross, 1995). On the other hand, the decision makers put more bearing on the possibility of loss than on the equivalent likelihood of gain.

Simply speaking, the framework of most disputes to be resolved in front of the courts includes a claimant, who claims something, and a respondent, who does not want to pay or give anything. Therefore, how each party views paying/receiving, or giving/taking, is of crucial importance for the significance they would attribute to certain concessions. When people are given the options to choose between a chance of 25% to win 1.000,00 dinars (which is mathematically worth 250,00 dinars) and a certain win of 240,00 dinars, most would opt for the latter. If the scenario is reversed, i.e. when they are offered a choice between certain loss of 750,00 dinars and 75% chance of winning 1.000,00 dinars, although both these options have an equal mathematical value, most people would go for the risk of greater loss. Hence, it can be concluded that people are ready to accept less as a guaranteed gain, but they would not make the same concession to avoid a greater loss (Kahneman, Tversky, 1979: 263). This is especially manifested with parties who more willingly choose to go to trial than to settle the dispute out-of-court because they are more prone to take the risk of losing than to have a smaller gain. On the other side, there are those who would rather settle and take a smaller gain than go to trial for the larger but uncertain gain.

6. REACTIVE DEVALUATION

Reactive devaluation is a confirmed psychological manifestation of the inductive resistance theory. It presupposes that the limitations of freedom of an individual produce an affective reaction. More concretely, it deems that the more an option becomes inaccessible, its affective value rises (Brehm, 1966). In the opposite direction, and this is of crucial importance for negotiations, reaching an agreement is encumbered by the fact that a party

believes that if the other makes an offer, compromise or concession with regards to anything, the object of concession must bear much lesser value than it seemed to have had before. The old saying that “the grass is always greener on the other side of the fence” may be expanded to say that the moment that greener grass gets to our side of the fence, it is not as green any more. There are many reasons for deeming the offer, concession or compromise less valuable if it is made by the other party. Firstly, it is natural to see the opponent’s willingness to offer, rather than to keep something, as an indication of the small value of the object in question. It is supposed that the other party knows something more than we do, and therefore, it has led us to misunderstanding the real value of a certain object.

The small value is attributed to some objects for the simple reason that we do not like the person who is offering them. There are also explanations according to which, given that the proposal comes from the opponent towards whom a party has negative feelings, the rejection derives exclusively from the desire that the opponent does not get what he is trying to accomplish (some call this “spite”). Finally, hard negotiators may undervalue certain concessions only because they have managed to get it.

Spite implies that the person who turns an offer down simply does not want the other party to get what he/she wants. This is a common case in family law disputes.

Hard negotiators may reject an offer because they see it as a sign that the other party is ready to make even greater concessions. This aspiration element, in fact, means that making concessions may lead to the increase of the opponent’s appetites because of the expressed willingness to compromise (Korobkin, 2006: 281).

Each of these grounds for negative reactions contains an emotional component. The context of family law is charged with emotions, such as: anger, jealousy, revenge, emotional pain, etc. Because of that, the reactive resistance in these cases may become a predominant trait in the assessment of interests. Making large concessions can easily lead to the increase of aspirations and inflation of goals of the other party, which would provoke the rise of appetites for even larger gain as well as a much more aggressive approach to negotiations. This establishes the following nexus: small concessions are deemed unimportant and large ones are seen as indicators of willingness to give away even more, which ultimately means that whatever the settlement seeking party does, he/she would lose.

In the classical study from 1980, the positions of American citizens on the proposition to reduce the number of nuclear weapons possessed by the Soviet Union and the United States were examined. The participants were asked to give their opinion on the acceptability of the proposal to reduce the number of nuclear warheads, initially by 50% and later even more. When they were told that the proposal came from a neutral person or the American President Ronald Regan, their reaction was much different from the position they expressed when they were told that the proponent was the Russian President Michail Gorbatchov. The positive attitude on the identical proposal had 90% of the participants when they thought the proposal came from Ronald Regan, 80% when it was presented as an offer made by the third party, and only 44% when the Russian President Gorbatchov was seen as a proponent (Ross, 1995: 26-28).

7. THE ROLE OF NAIVE REALISM

It is in human nature to see one’s own behavior as a reflection of the normal perception of the objective reality; therefore, the subjective goals and attitudes are seen as categories

based on the relatively unbiased and honest reaction to the world that surrounds us, on the information we receive, and on the problems we encounter. Further on, we believe that other people as well, under the condition that they are rational and benevolent, see things the same way we do if they have all the information we have, and that that they would need the same time to process the information. Finally, even if some person does not share our view on things, we would deem that it is because he/she lacks information, and that the problem would be solved by making sufficient body of information available to such a person.

Otherwise, we would take that this other person is incapable of or unwilling to see things in an acceptable way, to see them from the purely objective angle and to reach reasonable conclusions, due to the fact that he/she is not interested in justice, or lacks the common sense, or that the person is biased for some other reason so that he/she cannot accept reality as it really is. This leads to what Ross and Wards called “the naïve conviction that others share our views – especially if such conviction is adopted consciously and selectively, and not reasonably and without discrimination.” (Ross, Ward, 1995: 26-28).

This approach generally results in reactions to stress, troubles and problems based on the personal perceptions of the sources of the other parties’ intentions. Consequently, our reactions will depend on whether we see the acts of the other party as based on its character, or as the reactions to external factors. The research shows that the reactions such as anger, hostility or doubt are often the result of assessment that the negative behavior of others is caused by their nature or views, and not by the external factors. The causes of bitterness inherent in the majority of family law disputes certainly include such conceptions.

Even if the same sort of injury has been suffered, the reaction would be different if it is understood that the reason or the motivation for inflicting it is in the external factors, as compared to that which would follow when it is about the incapability or lack of will on the side of the perpetrator to understand the reality the way we do and to act accordingly (Korobkin, 2006). The consequence is the diminished ability to reach an agreement, since the victim does not only want to realize its legitimate objectives but also to have retribution by inflicting pain to the other party for its bad behavior.

In majority of cases we think that, when others are trying to hurt us, they do it out of vicious motives or because they are simply bad guys who cause senseless conflicts. The disputes which would otherwise be very easy to resolve may become extremely difficult to overcome because the negotiation field becomes very limited when the parties see each other in such a way. Specifically, the offers to settle are treated skeptically, with distrust and with disproportionately strong desire to get more concessions from the other party than justifiable. Each party may think that the other is obliged to give more and make more concessions, and when it fails to accomplish that, the already existing prejudices are reaffirmed and reinforced, which results in even more distrust and hostility.

8. JUSTICE SEEKING

The following function of the so-called naive realism is the perception of one disputing party that the problems and conflicts are not the result of a disagreement but of injustice. As long as a party deems the efforts to attain justice important, the chances for the negotiations to derail and miss their goal are increasing. In this case, the consequence may be the rejection of offers which would be of indisputable benefit for the party, even when the chances of winning in trial are minimal.

Such reaction is a product of the injured sense of justice. This behavioral trait is also the consequence of the attitude that our world view is the only right one, and that all those who do not share it are uninformed, misdirected or simply misanthropic. That leads to situations when one party to a dispute (and often both of them) thinks that the steps that need to be taken towards the settlement should not be the same for both parties, but that the other side has the moral duty to make greater concessions due to the inequality of their positions related to the justice ideal. The parties deem that the projected moving towards the mutually agreeable solution of a dispute should be the function of their assessment of the strengths of the justice arguments on the sides of each party. Therefore, since each party much better knows its own position than the weaknesses of its arguments, and since one's own arguments are always seen as just and correct, the parties naturally ascribe a disproportional section of justice to their own positions, which practically means that they ask disproportionately larger concessions from the other party (Loewenstein et al., 1989: 426; Walster et al., 1973: 151).

This problem may be incremented by the influence of numerous circumstances. When the subject matter of a dispute does not involve only facts but also values (as in the case of raising a child), the conflict is extremely difficult to solve, since two kinds of prejudices are in action. In family law matters, as much as the individual interests of parties can be more successfully translated into the interests of the child or into the common interests of parents and children, the parties will feel less pressed to search for justice and will be more capable of understanding the importance of maintaining good relations in the future.

Incorporating the child's best interest in the long-term agreements between parents, taking into consideration the subjective senses of justice of both parties, may prove to be very difficult, but once such an agreement is reached, it has much better chances of being sustainable, i.e. long-lasting. However, sometimes it is better not to take such an objective, since insisting on justice may lead to polarization between parties and reduce the chances for reaching an agreement.

The outcomes which do not meet the implicitly or explicitly made demands for justice will be less acceptable to a party whose sense of justice is not satisfied.

Efforts to create or redistribute justice often lead to situations when an economically viable and totally acceptable and rational model of solution becomes unacceptable from the point of view of personal emotions and relations. When both parties deem that the justice is on their side, it is quite common that none of them is satisfied with the equal part in the resource distribution.

9. CONCLUDING REMARKS

There is more than one approach to resolving the described problems. However, the first and the most useful one is that the representatives or the mediators should recognize that the conflict is caused not only by rational reasons or personality derangements and deviations but also by the previously described psychological principles, inherent to most people. Recognizing and accepting that some of these principles may be in play will open the possibilities for applying some useful approaches and means for intervention into the dispute.

One of the approaches is to help the parties understand and get insight into their own prejudices and misconceptions. Most individuals think of themselves as rational beings and would rather not face the fact that the way they come to decisions does not fall under the manners of rationality. Therefore, the representative or mediator should find the right way to open the specific issue that prevents reaching an agreement.

If the naive realism inhibits one party to understand the actions of another positively, it would be wrong to have the other party or the mediator trying to convince him/her in the good intentions of the opponent. Once formed ideas and prejudices are very difficult to change. Hence, a better approach which is more likely to succeed may include the Ostrom's postulate that the simplest explanation is often the right one. It may emphasize the fact that most people are in fact good people, guided by the principles grounded on good intentions, and that the conflict is most probably not the consequence of one's character but of the situation in which the other party is involved.

The representative or the mediator may also suggest some of the possible situations in which the actions of the other party would be understood as harmless or guided by circumstances. The purpose would not be to convince the party in the opponent's good intentions but to simply induce doubt and the need to reconsider the parties' own ideas and conceptions.

The interventions in situations when one party is excessively optimistic might prove difficult, since very little can be accomplished by warnings pointing out to one's optimistic overconfidence. Most people are excessively optimistic with regards to their own capability to avoid excessive optimism. By discussing the prejudices and by giving examples from other cases, the parties might be prompted to check if they have such prejudices themselves. Although it does not often lead to a radical turn away from the already taken positions, it might affect the parties' judgment.

Another strategy that mediator could apply is to make the parties or their representatives speak about weaknesses of their positions. This approach, however, rarely gives results with lawyers. Alternatively, mediators can ask the lawyers to present the other party's arguments to their clients. In this way, the loss aversion may become crucial.

The next strategy is to ask a disputing party to assume the position of a judge in the dispute, by asking questions such as: "how would a judge, on a bad day, value that argument?" By making parties think in the categories of "maybe", the excessive optimism with respect to the outcome of a conflict may be minimized because more attention is paid to those things that can weaken, rather than strengthen, their positions.

Finally, most lawyers would accept at certain point that the arguments of the party they represent have certain weaknesses. The parties and their representatives may be gradually guided to focus on and closely inspect these weaknesses. In such a way, one of the basic causes of the optimistic overconfidence is being removed.

Interventions in the realm of reactive devaluation are much more complex since there are much more sources of this phenomenon. If doubt is caused by a lack of information, the representative or the mediator may make efforts to overcome this problem by asking one party to provide the necessary information and presenting it to the other party. If reactive devaluation is manifested in the increased appetite of a disputing party, the representative or the mediator may warn that specific party that the other party is getting very close to the maximum of its settlement capacities. This is often attributed to mediators as skepticism because both parties know that the opponent would try to cheat the mediator in this respect. However, such an approach often proves to be effective and may bear significant weight in terms of reducing the expectations and raising the level of concern for the outcome of the dispute. The mediator may preclude the problem by suggesting the way to reach a settlement, but that may cause negative reactions of both parties; if a party feels that its trust has been unjustly misused, it will obviously be less willing to accept the mediator's suggestions.

The parties' representatives may also offer the so-called "what if" scenario, which would suggest the mutual exchange of benefits, or through which the party is motivated to determine the value of different concessions even before the negotiation or mediation commences.

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PSIHOLOŠKA PITANJA U PORODIČNOM POSREDOVANJU

Svrha ovog rada je ukazivanje na određene probleme koji se mogu pojaviti tokom postupka posredovanja u porodičnim sporovima, a čije prevazilaženje ne podrazumeva isključivo pravnička, već i psihološka znanja i veštine na strani medijatora. Uzroci mnogobrojnih prepreka postizanju sporazuma kojim bi se rešio jedan porodičnopravni spor autor vidi u delovanju psiholoških čimilaca, kao što su preterani optimizam, tolerancija prema riziku, odnosno averzija prema gubitku, reaktivna devaluacija, traganje za pravdom, i sl. Na kraju rada, potencijalnim medijatorima u porodičnim sporovima nude se neki specifični pristupi njihovom rešavanju.

Ključne reči: medijacija, porodičnopravni spor, psihologija, sporazum