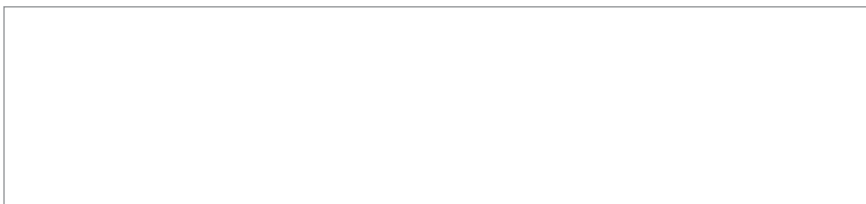


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Gender Balanced Co-Mediation in Family-Centered Conflict

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Introduction

Situations involving multiple parties, experiences, and perspectives require skilled mediators who bring with them a finely tuned equilibrium, presence, and insight. A gender balanced, co-mediation team brings all three qualities to the resolution of family-centered conflict (domestic relations disputes, family firm disputes, and probate disputes).

These disputes share common qualities: ever changing *family dynamics* and a paralyzing emotional trinity: *grief, anger and fear*.¹ Gender balanced co-mediation, using a transparent, open, and positive approach, provides families with a more pro-active, creative and balanced process to resolve family-centered disputes.² It offers a more efficient and cost effective way to address global family concerns. With well-rounded “life experience” symmetry, these mediators help diffuse the underlying emotional barriers impeding progress, thereby creating the foundation for constructive, enduring relationships within the family structure.

The Ties that Bind: Common Threads of Family-Centered Conflict

The only rock I know that stays steady, the only institution I know that works is the family.

~ Lee Iacocca

I. Family Dynamics

Friends are God’s apology for relations.

~ Hugh Kingsmill

The emotional complexities involved in family-centered disputes can lay waste to a clan; conflict awash by a perfect storm of grief, anger, and fear. Unmanaged, emotions

hamstring resolution, despite the need for positive, ongoing relationships (co-parenting after divorce, families dealing with the death of a loved one, or the unfulfilled expectations involved in continuing a family business). Unaddressed, these emotions can plunge a family into years of litigation and hostility, with little chance of reconciliation.

A. Domestic Relations:

Family quarrels are bitter things. They don’t go by any rules. They’re not like aches or wounds; they’re more like splits in the skin that won’t heal because there’s not enough material. ~ F. Scott Fitzgerald

The dismantling of a nuclear family is always difficult; more so if children are a part of the equation. The dream of “till death do us part” is dashed, and the participants are left to pick up the emotional, financial and physical pieces. Assets and liabilities are divided, friends and family are forced to choose sides, and all-out war is waged - usually with attorneys leading the charge. Unless the emotional aspects of this catastrophic change of circumstances can be addressed and diffused, the family and its progeny may forever be changed.

B. Probate and Estate Planning:

Our most basic instinct is not for survival but for family. Most of us would give our own life for the survival of a family member, yet we lead our daily life too often as if we take our family for granted.

~ Paul Pearshall

It’s a rare occasion when heirs take part in a testator’s estate planning: no one wants to think about the death of a beloved family member. Few **healthy** testators want to take on emotionally charged discussions of property disbursements with their heirs.³ So, they make decisions

based upon what they **think** their adult children want or need, with little correlation to what those individuals would **actually** want, had they the courage to say so up front.

Once the will is read, the heirs are left to their own devices. Family members scrutinize the emotional balance sheet before them: siblings bemoan “favoritism” of one child over another. Grandchildren feel undervalued as they secretly juxtapose their efforts towards the ailing testator, to the pittance received from the estate. Spouses from previous or blended families complain about the unjust offerings of a departed relative. Without emotional management, it is a recipe for ongoing litigation between the executor, trustees and the beneficiaries. The result is a family-wide emotional chasm.

C. Family Businesses

We all grow up with the weight of history on us. Our ancestors dwell in the attics of our brains as they do in the spiraling chains of knowledge hidden in every cell of our bodies. ~ Shirley Abbott

The Corleone Family knew it: you never **really** leave the family business. Founding matriarchs/patriarchs still breathe life into a company, regardless of how long ago they started the business. They may retire or die, but their presence is felt by the family members left to carry on. The expectations of these ghosts can be overwhelming. So, what of those left behind? How to choose the successor, and in what direction shall the company go? How do you deal with partner friction involving family members and outsiders within the organization? What if the “chosen family member” has a different vision for the company? The emotions and

logistics involved in handing the family business reins to another can destroy the company, along with the family ties.

Experienced mediators acknowledge the family dynamics and emotional forces involved in family-centered disputes like the examples above. Doing so, they empower parties, create a legitimate sense of control and fairness, and create an opportunity to restore, preserve, or enhance family relationships.⁴ Perceptive mediators help unlock the door to key motivations, interests, and needs facing parties. It may be that with careful listening, a shared experience may be revealed, enhancing a developing bond between mediator and participant.⁵ Family members *deserve* mediators, who will exercise patience, understanding, dignity and respect; who address both the emotional as well as the rational components of a conflict.⁶

II. Grief, Anger, and Fear

Family quarrels have a total bitterness unmatched by others. Yet it sometimes happens that they also have a kind of tang, pleasantness beneath the unpleasantness, based on the tacit understanding that this is not for keeps; that any limb you climb out on will still be there later for you to climb back.

~ Mignon McLaughlin,

THE NEUROTIC’S NOTEBOOK, 1960

Common to all three types of family conflict is the inescapable element of **emotion**: powerful issues of grief, anger, and fear.⁷ In situations involving family-centered disputes, the enduring emotion of *love* may be just under the surface of the other three, and should be considered (and validated) if drawn out. The overwhelming love for a lost child or

parent, a business built by the hands of a beloved grandfather, the treasured memory of a long ago wedding waltz – all may play a part in the emotional dynamic affecting the conflict.

Emotions govern much of our “rational” decision making process, causing us to instinctually act or react before we can engage in a balanced analysis.⁸ Unless acknowledged appropriately, this emotional vortex will eat away at the resolution process. Mediators need to be aware of this dynamic and listen - **really listen** - with a compassionate ear, respecting the emotional currents steering all family members in such situations.⁹

III. Gender Balanced Co-Mediation and Family-Centered Conflict

To be successful, a mediator must explore the nature of the existing conflict, the underlying interests and purported goals of each family member.¹⁰ In the process, he or she uncovers vital emotional information.¹¹ When there are multiple family members, this becomes a herculean task for one mediator to successfully accomplish. We believe that mediators working in tandem provide a greater ability to address the needs and goals of all parties.

Experienced mediators translate nonverbal cues (fidgeting, long sighs, facial expressions), giving meaning to unspoken feelings.¹² Without adequate *mindfulness* to the verbal and non-verbal cues of high emotion, mediators can miss information underscoring the conflict.¹³ By having two sets of eyes and ears assisting parties, the chances of missing this information are diminished. While one mediator may listen to a distraught family member, a co-mediator may regard another member for critical non-verbal

responses to the story told. These subtle cues could unlock long festering pressure points, opening up dialogue that is more positive.¹⁴

By having a *gender balanced* mediation team, each party to a family-centered conflict has the opportunity to be safely *seen* through the lens of the same gender; they may be *heard and understood* by “one of their own.” As each family member lends voice to their emotion, which then is acknowledged and validated by a mediator of the same gender, the process is allowed to continue towards a productive resolution.¹⁵

IV. Gender Balance is Important in Co-Mediating Family-Centered Conflict

A. Each Mediator Brings Gender-Different Life Experiences to the Table, Thereby Increasing the Opportunity for Better Rapport and Greater Trust among the Family

How one understands the world around them guides his or her individual behavior. How the world understands the stereotypical behavior of men and women reinforces this individual behavior.¹⁶ For the most part, men and women have been taught to think, act and communicate differently.¹⁷ As mediators, we too, are vulnerable to “perceived” behavior expectations.¹⁸ Women “tend” to focus on the person and the relationships; men “tend” to focus on the problem and its solution.¹⁹

Male and female mediators each bring to mediation a different perspective regarding the world around them – allowing them to inherently be mindful of the same

gendered parties. This gives family members an emotional cushion: they may be free to express a sentiment or concern they would not otherwise express to a mediator of the opposite gender, in fear of judgment or embarrassment. Doing so, they may expose an issue not previously known or previously misconstrued, allowing a dialogue to take place. A deeper rapport develops between mediator and family member, increasing trust in them and the process.²⁰

B. Parties Perceive a Greater Sense of Fairness When Mediation is Gender Balanced

Family-centered conflict is comprised of multiple parties who perceive and experience conflict and mediation differently, partially because of their gender.²¹ Mediators must create an environment that encourages the parties to process *all* information, verbal and emotional, expressed by other participants;²² they must assist all parties to be heard, understood and not judged. A recent study²³ confirms that female disputants are more comfortable with female mediators, and male disputants are more comfortable with male mediators.²⁴ Where the mediator was the same gender as the participant, the participant felt heard, understood, and he or she believed the mediator listened without judging. The ultimate experience was more positive, and there was a greater perception of fairness in the process.²⁵

C. Gender Balanced Co-Mediations allow for More Proactive, Cost Efficient, and Creative Dialogues between Family Members

Through gender balanced co-mediation, each mediator brings with them different life experiences, talents and

expertise to help family members determine the path the mediation process will take to resolve their dispute. Although seemingly redundant, this “doubling up” actually translates into a cost effective savings for a multi-party family in conflict.²⁶

Just as physicians encourage their patients to make healthy eating choices in the hopes of preventative health maintenance, mediators encourage parties to consider proactive mediation, in hopes of conflict prevention. Pro-active mediation brings energy and creativity to the mediation process even before the parties get to the table.²⁷ A pre-mediation caucus with family members gives mediators an opportunity to develop trust and rapport, and to identify important issues (legal, factual, and personal) before the actual mediation.²⁸ By engaging with same gender mediators before any formal mediations take place, family members can safely address individual or collective concerns/goals that they may not otherwise publicly expose through the ultimate mediation or possible litigation process²⁹ – as every family has at least one skeleton in its closet. Misunderstandings may be cleared up; terms may be agreed upon up front, obviating the need for protracted sessions, or maybe any sessions at all.

Additionally, one of the biggest complaints mediators face in multi-party mediations involves the “dead time” experienced while waiting for the mediator to join the various caucuses.³⁰ Too much dead time increases the chance for parties to become impatient or rigid—or engage in backsliding.³¹ Co-mediation, however, enhances the pace of the mediation and reduces problems

associated with dead time.³² By having male and female co-mediators, more family members remain simultaneously engaged in the process; the mediation team has a greater opportunity to build trust, listen and learn from the parties, while providing quicker feedback. This reduces the time in mediation, resulting in a cost benefit to the family.³³ A co-mediator's ability to observe and brainstorm encourages enhanced strategic planning, greater creativity, and more risk-taking during the course of the mediation.³⁴ When we add the gender dynamic to the mix, the advantages are compounded: a female co-mediator listening to a male family member may **also** be aware of non-verbal reactions by his sister or mother, which may escape the male mediator – and vice versa.

Finally, gender balanced co-mediation cultivates work product efficiency, as the mediators can divide the work before, during, and if necessary, after the mediation.³⁵ Where needed, male family members may feel safer to speak more freely over the phone with a male mediator - and vice versa. A young female family member may not feel as secure discussing her business hopes and dreams with a male mediator, who may not fully appreciate the “glass ceiling,” as easily as a female mediator.

Obviously, each mediator needs to remain neutral, avoiding the perception of becoming a “mediator advocate” for any particular party.³⁶ The more experience the co-mediators have working together, the better the process is likely to work, as good chemistry and coordination tend to produce positive results.³⁷

V. “TOP” Mediation in Family-Centered Conflict

“TOP” Mediation is a **transparent, open and positive** approach to mediation; it allows parties to discuss the underlying interests and motivations they wish to address in a particular dispute.³⁸ This strategy combines various forms of caucuses, guided discussions and evaluative intervention, to provide the best opportunity for success in family conflict environments.³⁹ It focuses on creating open dialogue, a transparent process, and a positive communication format allowing family members to express their needs, interests, goals and expectations in a safe and respectful atmosphere.

When combined with a gender balanced co-mediation team, this approach offers multi-party family disputes the chance to proactively, honestly and safely deal with all facets of the issues hindering a positive, respectful family dynamic.⁴⁰

Conclusion

*Call it a clan, call it a network,
call it a tribe, call it a family.
Whatever you call it, whoever you
are, you need one. ~ Jane Howard*

Love it or hate it, **your family is your family**. Conflict develops among family members more commonly because of misunderstanding than nefarious objectives. Catastrophic losses or changes in circumstances can create havoc in a normally respectful clan. With the help of an experienced, gender balanced co-mediation team utilizing transparency, open dialogue and positive framing, mediators can help make the creation and ultimate

execution of estate plans, domestic resolutions or future business plans as painless as possible. Working in tandem, gender balanced co-mediators cast a wider net for information gathering; we offer two sets of eyes, ears *and hearts* with which to truly listen and understand the issues; we can work faster, more efficiently and more comprehensively, resulting in less time, energy and financial waste.

Family members can feel heard, understood and acknowledged fairly and honestly. Families can move beyond the emotion and focus on alternatives that work for everyone, now and in the future. We, as mediators, can help make that happen. ▲▲▲

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Joe Epstein, president of Conflict Resolution Services, Inc. (CRS), is a fellow and former vice president of the International Academy of Mediators, has enjoyed a distinguished career as an attorney, a legal educator, and as a mediator. He has mediated over 3500 cases in many areas of litigation. His peers regularly rate him one of Colorado's top mediators as a Colorado Super Lawyer, Best Lawyers in America, and AV Preeminent by Martindale-Hubbell.

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Endnotes

- ¹ Joseph Epstein with Susan Epstein, *Grief, Anger and Fear in Mediation*, TRIAL TALK (June/July 2010) [hereinafter *Grief*] at 37-42.
- ² Joseph Epstein & Scott Baroway, *Top Mediation in Trust and Estate Planning*, TRIAL TALK (June/July 2009) [hereafter *Top Mediation*] at 21; Joseph Epstein & Susan Epstein, *Co-Mediation*, THE COLORADO LAWYER (June 2006) at 21-23 [hereinafter *Co-Mediation*].
- ³ *Top Mediation*, *supra* n. 2 at 21, 22; David Gage & John Gromala, *Mediation in Estate Planning: A Strategy for Everyone's Benefit*, ELDER'S ADVISOR (Fall 2002); Laura Bachle, *Estate Planning and Family Business Mediation*, ADR REPORT, Vol. 5, No. 6, at 11-14 (Copyright by Pike and Fisher, Inc.); DOUGLAS STONE, ET AL., *DIFFICULT CONVERSATIONS: HOW TO DISCUSS WHAT MATTERS MOST* (2000).

- ⁴ *Grief*, *supra* n. 1 at 37; *Co-Mediation*, *supra* n. 2 at 22-23; *Special Report: Manage Conflict on the Job and at Home* at 4-5, Program on Negotiation, Harvard University, 2009 (adapted from Susan Hackley, *How to Say What Matters Most*, NEGOTIATION (August 2005)); *Special Report: Manage Conflict on the Job and at Home* at 4-5, Program on Negotiation, Harvard University, 2009 (adapted from Frank E.A. Sander & Robert C. Bordone, *All in the Family: Managing Disputes with Relatives*, NEGOTIATION, (March, 2006)); *Top Mediation*, *supra* n. 2 at 22.
- ⁵ *Grief*, *supra* n. 1 at 37-39.
- ⁶ *Id.* at 40.
- ⁷ *Id.*
- ⁸ *Id.*
- ⁹ *Grief*, *supra* n. 1 at 39.

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- ¹⁰ *Top Mediation*, *supra* n. 2 at 22; *See also*, Patrick Muller, et al., *Mediation in Hierarchical Conflicts: The Role of Gender and Anger* (Nov. 9, 2008) at 7, 22, IACM 21ST ANNUAL CONF. PAPER. Available at SSRN: <http://ssrn.com/abstract=1298621>.
- ¹¹ Muller, *supra*, n. 10 at 22; *Top Mediation*, *supra* n. 2 at 22.
- ¹² *Id.*
- ¹³ *Id.*; *See also*, Melissa G. Morrissett & Alice F. Stuhlmacher, *Males and Females as Mediators: Disputant Perceptions*, IACM 2006 MEETINGS PAPER, available at SSRN: <http://ssrn.com/abstract=913737>. *See, generally*, LEONARD L. RISKIN, *Knowing Yourself: Mindfulness*, THE NEGOTIATOR'S FIELDBOOK: THE DESK REFERENCE FOR THE EXPERIENCED NEGOTIATOR (Andrea Kupfer Schneider & Christopher Honeyman eds., 2006).
- ¹⁴ *Co-Mediation*, *supra* n. 2 at 22-23; *Grief*, *supra* n. 1 at 38, 41.
- ¹⁵ Lorig Charkoudian & Ellen Kabcenell Wayne, *Fairness, Understanding, and Satisfaction: Impact of Mediator and Participant Race and Gender on Participants' Perception of Mediation*, CONFLICT RESOLUTION QUARTERLY, 28: 23-52 (2010), *Top Mediation*, *supra* n. 2 at 22-23; *Co-Mediation*, *supra* n. 2 at 21.
- ¹⁶ Charkoudian & Wayne, *supra* n. 15 at 25.
- ¹⁷ *Id.* p. 26; Michael W. Morris and Michelle J. Gelfand, *Cultural Differences and Cognitive Dynamics: Expanding the Cognitive Perspective on Negotiation*, THE HANDBOOK OF NEGOTIATION AND CULTURE, Chap. 2 (Michelle J. Gelfand & Jeanne M. Brett, eds., 2004); Deborah M. Kolb & Linda L. Putnam, *Negotiation through a Gender Lens*, THE HANDBOOK OF DISPUTE RESOLUTION 136-137 (Michael L. Moffitt & Robert C. Bordone eds., 2005).
- ¹⁸ Charkoudian & Wayne, *supra* n. 15 at 26.
- ¹⁹ *Id.*; Victor Gotbaum, *NEGOTIATING IN THE REAL WORLD* 129-132 (1999).
- ²⁰ *Co-Mediation*, *supra* n. 2 at 21-22; Kolb & Putnam *supra* n. 17 at 143-144.
- ²¹ Muller, *supra*, n. 10 at 22; Kolb & Putnam *supra* n. 17.
- ²² *Id.*
- ²³ Charkoudian & Wayne, *supra* n. 15 at 42-47.
- ²⁴ *Id.*
- ²⁵ *Id.*
- ²⁶ *Co-Mediation*, *supra* n. 2 at 21-22; *Top Mediation*, *supra* n. 2.
- ²⁷ *Co-Mediation*, *supra* n. 2 at pp. 23.
- ²⁸ *Id.*
- ²⁹ *Id.*
- ³⁰ *Co-Mediation*, *supra* n. 2 at 22-23.
- ³¹ *Id.*
- ³² *Id.*
- ³³ *Id.*
- ³⁴ *Id.*
- ³⁵ *Id.*
- ³⁶ *Id.*
- ³⁷ *Id.*
- ³⁸ *Top Mediation*, *supra* n. 2 at 21.
- ³⁹ *Id.* at p. 22-23.
- ⁴⁰ *Id.*

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