

Mediation experience

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Cross-border relocation cases are challenging under the best of circumstances, as any agreement or judgment to allow relocation results with a child living in a different country than a parent. The 2010 Washington Declaration on International Family Relocation outlined a series of agreements for principles that should apply to cross-border family relocation. As part of those agreements, Paragraph 4 identified twelve specific factors that a court should consider in exercising discretion along with a catch-all provision allowing the court to consider "any other circumstances deemed to be relevant by the judge." The focus of this paper is to outline how two of those factors, namely family violence and the views of the child, can be considered and addressed while trying to resolve a cross-border dispute through mediation.

The Association of Family and Conciliation Courts ("AFCC"), in conjunction with the American Bar Associations Sections on Dispute Resolution and Family Law, the Association for Conflict Resolution and Academy of Professional Family Mediators in 2025 approved Model Standards for Family and Divorce Mediation ("Model Standards").¹ The Model Standards describe mediation as "a participant-centered process grounded in the values of integrity and fairness and designed to ensure that all participants are supported, respected, and valued. It aims to promote safety and wellbeing; achieve realistic outcomes; and support equity and full participant engagement regardless of gender, age, culture, religion, immigration status, or socio-economic status." In practical terms, mediation can be more cost effective – both financially and emotionally – than litigation. It is also normally a faster process than a litigated one and, more importantly, if an agreement is reached both parties have more of a vested interest in the successful implementation of the result. Mediation, as a process, respects the parties' self-determination.

The Model Standards are comprised of sixteen different standards that seek to provide guidance for mediators regarding responsible practice and to inform participants about what they can expect in the mediation process. While the definitions and various standards can help frame how both domestic violence and the voice of a child can be successfully addressed in a mediation context.

Family Violence

One of the agreed upon factors relevant to decisions on international relocation from the 2010 Washington Declaration is whether there is "any history of family violence abuse, whether physical or psychological." Over the years there have been different schools about participation in mediation when family violence is present. One school of thought is that such cases should never be mediated as the victims are forced to negotiate with an abuser. Another school of thought is that such cases should always be mediated so that there is a forum outside of court so that victims of family violence are not left alone to navigate the situation. It is respectfully suggested that a more nuanced path be taken, one to understand the scope

¹ <https://www.afccnet.org/Portals/0/PDF/Model-Standards-for-Family-and-Divorce-Mediation-Updated%202025-7-22.pdf?ver=5LBqekcLCogrISo3SVYwqA%3d%3d> (last accessed 15 September 2025).

and spectrum of behavior to determine whether the situation is indeed one that is viable for mediation or not, and, if it is viable for mediation, what type of process should be used.

Given the topic, it is important to start by defining terms. As different jurisdictions have different definitions and considerations for family violence, for purposes of this discussion, the definition of the term "domestic abuse" is offered as one lens through which the topic can be considered.

The Model Standards define domestic abuse as follows:

"Domestic abuse involves physically, sexually, economically, psychologically, and coercively controlling behaviors directed by or against current or former family or household members. These behaviors may occur alone or in combination. They vary from family to family in terms of frequency, recency, severity, manner, directionality, pattern, intention, circumstance, and consequence. (People may also refer to domestic abuse as domestic violence, family violence, or intimate partner violence).

- Physically aggressive behaviors involve the intentional use of physical force with the potential to cause injury, harm, disability, or death.
- Sexually aggressive behaviors involve unwanted sexual activity that occurs without consent through the use of force, threats, deception, or exploitation.
- Economically aggressive behaviors involve the use of financial resources to intentionally diminish or deprive another of economic security, stability, standing, or self-sufficiency.
- Psychologically aggressive behaviors involve intentional infliction of harm to emotional safety, security, or wellbeing.
- Coercively controlling behaviors involve harmful conduct that subordinates the will of another through violence, intimidation, intrusiveness, isolation, or control."

This definition clearly covers a wide variety of behavior.

Standard V of the Model Standards expressly addresses domestic abuse. It states "[t]he mediator shall screen for domestic abuse, assess the nature and context of the abuse, and, in consultation with each party, determine whether a mediation process can be designed to address barriers to self-determination and informed decision-making." The Model Standard elaborates as follows:

- A. The mediator shall screen each prospective party, separately and confidentially, for the possible existence of past or present domestic abuse, including but not limited to coercive control, prior to seeking their informed consent to mediate. The mediator shall screen and monitor for indications of domestic abuse throughout the mediation process, whether or not it was identified at the outset.
- B. When domestic abuse is identified as a possible issue, the mediator shall examine the nature and context of the abuse and help each party assess its impact on their meaningful participation in the mediation. The mediator shall inquire separately and confidentially if parties believe they will be safe and able to make autonomous decisions; will be able to participate in good faith; and will have access to information, the applicable law, and their procedural options. The mediator shall help the parties determine what, if any, safeguards and process modifications will effectively address specific concerns. If barriers to effective participation can't be remediated, the mediator shall help the parties explore other available options for dispute resolution.

- C. The mediator shall not undertake mediation without specific training on identifying the nature, context, and dynamics of domestic abuse, including but not limited to coercive control, and its impact on parenting, co-parenting, children, and the mediation process. Mediators shall obtain ongoing and updated training on these topics.
- D. The mediator shall facilitate the participants' formulation of parenting plans that protect the physical safety and psychological wellbeing of the parties and their children.

The Model Standards use the term shall to describe the screening process, thus emphasizing the importance of what is considered mandatory action by the mediator.

The first step is thus for the mediator to screen for domestic abuse. There are a variety of tools to use to conduct the screening: the Mediator's Assessment of Safety Issues and Concerns (or "MASIC"); the Family Law Doors Program; or SAFeR are just several examples of screening protocols. The mediator should ensure that they are adequately trained to conduct such screening.

The screening for domestic abuse should be both intentional and continuing throughout the mediation process. The purpose of screening is to determine whether or not the potential participants are able to engage in the mediation process without coercion or control. The mediator ought to be considering if the participants can effectively advocate for their needs and the needs of their children, safely participate – both during and after the mediation process – and can voluntarily agree to the outcomes.²

Assuming that the decision is made to move forward with mediation, it is important to consider what that process looks like. Are the participants in the same room? Are they in the same physical space but in different rooms utilizing shuttle diplomacy? One option to consider is making sure that the physical space is set up to be more conducive to safety – such as setting up an office with meeting spaces on different sides of the office along with separate entrances. Another consideration is potential encounters before or after the mediation session. Consideration ought to be given as to whether to stagger arrivals and departures to avoid chance encounters with the other party. Perhaps mediation is possible but with the added protection of conducting it in a courthouse, where there is security present and individuals entering are screened for weapons.

Another consideration is whether the mediation process ought to be conducted virtually. There is research to suggest that online mediation is not as effective as in person mediation. If the mediation is going to take place virtually, it is important to establish additional safeguards for the process to make sure that participants have access to the necessary technology and that there are not others present out of the screen that could be influencing the mediation or, with the case of a child, potentially inappropriately overhearing the discussion.

The answers to those questions will help define what the process looks like and how a mediation process can be done effectively when domestic abuse is present. That is not to say that mediation should always take place when domestic abuse is present. There is no amount

² For a much more detailed discussion of the role of family violence in mediation, Chapter 13, written by Professor Kelly Browne Olson, entitled *Intimate Partner Violence and Family Dispute Resolution in Family Dispute Resolution*, edited by Peter Salem and Kelly Browne Olson (Oxford University Press, 2024) provides a much more comprehensive discussion on this topic.

of experience that a mediator can have, nor are there any techniques or safeguards that can be put in place when the power imbalance between two individuals is so great or the domestic abuse is of such magnitude that one participant effectively lacks self-determination. In such cases, mediation should be either screened out or, if mediation has commenced, the mediation ought to be terminated.

The views of the child having regard to the child's age and maturity.

The 2010 Washington Declaration further noted that one of the factors for the exercise of judicial discretion to allow or deny relocation are a consideration of "[t]he views of the child having regard to the child's age and maturity." There is, however, no specific defined process on how the child's views are to be obtained and assessed. Different jurisdictions have taken a wide variety of approaches on how that information is to be obtained, ranging from judicial interviews to attorneys representing children as a participant in the adversarial process to having the children interviewed by a third party such as a mental health professional appointed by the Court to obtain that information. If not done correctly (or even if done correctly) there is the potential risk of including the child directly in the decision-making process. In the context of international relocation, a child could be left with the feeling that they are being forced to choose between their parents or if they express an opinion that they are responsible for the outcome.

The Model Standards provide some guidance on how to integrate a child's voice in the mediation process. Specifically, Standard X states "The mediator shall assist participants in discussing the best interests of the child and determining how to include a child's voice in the mediation process when one or more children are involved." Entitled Child-Centered Process, Standard X states the following:

- A. The mediator should encourage the participants to explore options available for parenting arrangements as well as their costs and benefits. The topics for discussion should include, among others, the following:
 - 1. an age-appropriate parenting plan addressing the child's time-sharing schedule and the parental decision-making responsibilities, with appropriate levels of detail as agreed to by the parties. Inclusion of or referral to a child development specialist may be appropriate;
 - 2. a plan for revising parenting plans, including but not limited to dispute resolution mechanisms, as the developmental needs of the child and the circumstances of the parents evolve over time;
 - 3. the effects on the child's development of continuing parental conduct, including but not limited to domestic abuse, child maltreatment, and persistent parental conflict, and how to ameliorate the effects on the child; and
 - 4. information about community resources and programs that could help families cope with the consequences of family reorganization, parental conflict, domestic abuse, and child maltreatment.
- B. The mediator should be trained about the impact of culture and religion on parenting philosophy and other parenting decisions, as well as their impact on the mediation process.

- C. The mediator shall inform any court-appointed child representative that the mediation is taking place. If the representative participates, the mediator should, at the outset, discuss with that representative the effects of their participation on the mediation process and the confidentiality of the mediation. Whether the representative participates in the mediation session or not, the mediator shall provide the representative with the resulting agreements insofar as they relate to the child.
- D. The mediator should inform the parents and court-appointed child representative about the options for the child's input, including but not limited to the child's direct participation.
- E. Prior to any child participation or input in the mediation process, the mediator should consult with the parents and the child's court-appointed representative about whether the child will participate and the form of their participation. This should include a discussion of the benefits, financial costs, and emotional risks of the child's participation based on the child's age.
- F. The mediator should inform the participants that the child does not decide the parenting plan but that their input can be useful as a factor to consider in a child-centered parenting plan. The mediator should explain the positive and negative consequences of the child's input.

As with structuring the mediation process with domestic abuse is present, thought should be given to how to structure the mediation process to include the child's voice. or instance, is the child old enough and mature enough to express their views about the mediation process? If they are, who is going to elicit that information? Does the person eliciting the information from the child have the adequate training to do so (as there is a wide variety of research available on how to effectively interview children and more importantly, how not to interview them)? Where is a child interviewed? If necessary, who brings the child to and from the interviews? An individual can be a highly skilled mediator with adults but not have the requisite training on how to interview children, including children of different ages.

Once the information is obtained, the next question is what is to be done with that information. Parents often have strong beliefs as to what they believe that their children want, beliefs that are often incorrect or that reflect their own biases as to the ultimate outcome. It can be a powerful experience for parents to hear information from their children, presented by a neutral who has gathered that information in a thoughtful detailed way, about what a child is thinking or feeling about a particular situation. It would not be unprecedented for the child to have more insight into the entire situation – both with respect to the challenges that the parents face, the impact that potential outcomes can have on the child, and options for resolution – than either parent has. It would also not be unprecedented for parents, when learning their child's perspective, to see another path forward and the importance of compromise. It can be both surprising and result in successful outcomes with parents that hear what their child thinks and feels, particularly in a confidential mediation process. If successfully done, the litigation positions can fall by the wayside and the parents, armed with newfound information about their child's perspective and needs, can work together to address a child's needs in a more collaborative way. Hearing their child's voice can help them see things from a different perspective, one that they could not consider without new information.

With or without resolution, there ought to be consideration given to closing the loop with the child after the mediation process. There should be a plan in place to articulate to the child what is going to be done with the information that they provide, how that information is going to be shared with their parents, and that the child is not going to be the ultimate decision

maker about what happens but that their input can be considered by their parent. There should also be a plan on how to give the child feedback after the mediation takes place about what happens with the information they shared, whether an agreement is reached or not.

Conclusion

Mediation, if done correctly, can be a powerful and transformative process that can help individuals resolve what can otherwise appear to be intractable disputes. As a personal aside, after having conducted mediations over a number of years, it is repeatedly surprising how much faith individuals put in a process that is managed by a stranger, albeit a skilled one. They are able to discuss topics that they have not been able to talk about – never mind being able to resolve – with a stranger who is helping them manage the process. Thus, even with a seemingly intractable problem such as international relocation, with the right process and open minds, paths forward can be forged where there otherwise does not seem to be one.