

Mediating Same-Sex Disputes:

Understanding the New Legal and Social Frameworks

by Frederick Hertz¹

The Nature of the Conflicts

Mediating disputes between same-sex partners demands, at the outset, an understanding of the real-life settings in which such conflicts most frequently arise, and then, a recognition of the extent to which these disputes may differ from those that heterosexual spouses face.

Such conflicts are most likely to first emerge for gay couples when the relationship is just beginning, either regarding “pre-nuptial” issues of property, money, or other assets, or with regard to a planned pregnancy or planned adoption. It is important to recognize that for many same-sex couples the stages of the relationship evolve far less formally than for most heterosexual couples. Indeed, even with the emergence of marriage as a new paradigm for gay relationships, same-sex marriage is not legal in most states, and domestic partnership or civil union registration does not have the equivalent social importance or symbolic meaning for parties as marriage does for most straight couples. Thus, most same-sex relationships are far less formal in their transition from dating to long-term commitment. As a result, relationship formation issues typically arise for gay couples in conjunction with a particular financial event, such as a house purchase, rather than being triggered by a predictable legal or societal milestone such as marriage.

By biological necessity, children for same-sex couples are the result of deliberate planning rather than an unintended result of sexual activity. For lesbian couples, questions of insemination and the role of the donor cannot be avoided, nor can the discussion of which partner will be the gestational mother. For gay men, the choice between adoption or sperm and/or egg donation and the use of a surrogate will always be complex, deliberate, and delicate – and thus potentially prone to conflict somewhere along the way.

Long-term gay couples also face challenges that are distinctly different from those of straight couples. The recent extension of marital rights and obligations to gay partners in some states has prompted many couples to re-evaluate and for some, to change their existing informal legal arrangements – either by registering or marrying or signing a written agreement. Most straight relationships have developed against a static legal background and a consistent set of social expectations, whereas same-sex couples are forced to navigate their personal relationships within a rapidly changing framework of social norms and, depending on what state they live in, a shifting set of legal operating rules.

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Dissolutions for same-sex couples also evolve differently and present different issues than those of most straight couples. Those who are unmarried or unregistered will be negotiating in a world of few legal rights and only vaguely-defined legal duties and generally without any mandatory court process. In many states implied or oral contract claims (palimony) or a claim of co-ownership for a jointly-owned residence can be presented, but usually the claimant has only weak legal arguments and little judicial support. And unlike straight unmarried partners who may have consciously rejected marital rules, gay partners may have thought of themselves as married while completely oblivious to the lack of legal recognition of their private commitments. Homophobic laws (such as the non-recognition of a foreign marriage or a ban on gay marriage altogether) may unfairly empower the higher-earning partner, to the other partner's serious detriment in the event of a breakup.

The dissolutions of newly-registered or married gay couples also can present complicated legal issues, arising out of the lack of inter-state or federal recognition of their partnership. In other instances the couple may have resided together for a long time, before their partnership became legally recognized, leaving their pre-registration claims undefined. Oftentimes it is not simple to evaluate the property disputes from a conventional marital-law perspective, given the idiosyncratic arrangements of the relationship. Parents who reside in states that do not allow a second-parent or joint adoption may experience parentage disputes that have no parallel in the straight community.

Mediating same-sex conflicts requires a nuanced awareness of when and how these disputes emerge for the couples, as well as an acknowledgement of how dramatically they may differ legally and emotionally from those of opposite-sex couples. Most critically, it requires a deep understanding of how, as a direct result of these unique legal frameworks and personal histories, the rights and duties of each partner may dramatically differ from that person's subjective expectations, and how those differences will play out in the mediation process.

Understanding the New Legal Rules of Divorce

The most dramatic change in the nature of same-sex dissolutions is the extension of marital rights and obligations to registered or married couples; as of 2008, this has happened in eight states. In California, this expansion included the imposition of marital rules on all state-registered domestic partners (which previously offered only limited benefits), unless either partner unilaterally terminated the partnership within the first year of the new law's passage or the parties had signed a pre-registration agreement. Because registration had been offered for five years previously, the new law retroactively extended marital rights to couples who had signed up at a time when no such rights applied – creating an especially difficult set of dynamics in the event of a dissolution, as well as for those who have registered after the new laws went into effect.

In Vermont, New Hampshire, Connecticut, Oregon, and the District of Columbia, a new legal regime (most often called civil union) was created. In New Jersey, marital rules now apply to those who newly register under the new domestic partnership regime, and not to those who previously registered. In Canada and in Massachusetts, legal marriage is now available for same-sex couples, with no residency requirement for those wishing to marry in Canada, and fairly strict residency rules for Massachusetts marriages.

These new rules have dramatically transformed gay dissolutions in those eight states. But in fact, gay breakups have been transformed not just for those who are registered or married, but in many instances, even for couples who live in states that do not offer registration or marriage, and also, for many who have elected to not register or marry even when they could have done so.

First, tens of thousands of couples are now subject to marital rules they did not fully understand when they registered. In California, most pointedly, the marital rules were not in effect in the early years of domestic partnership registration, and the unilateral opt-out method in 2004 was little understood and rarely invoked. In other states, the campaign for domestic partnership was seen within the gay community primarily as a civil rights fight by gay couples fighting for benefits. It was not seen as a decision to obtain financial rights or take on financial obligations. Unlike most straight couples who are at least vaguely aware of the marital rules, few lesbians or gay men have much awareness of these rules, and especially, on how they will impact them financially in the event of a dissolution. Most observers also believe that the marital rules (especially alimony obligations and community property presumptions) are far less congruent with how the majority of same-sex couples organize their financial lives, than is the case for most straight married spouses.

Second, and further complicating the situation in many dissolutions, most long-term registered or married gay couples were together long before these new legal systems were set up, and in most instances their new legal status as registered or married does not provide a clear method of resolving disputes involving pre-registration assets. The lack of uniformity across state lines also has worsened the legal complexities, as partners may marry in one location (i.e. Canada), register in California, and then end up in New York – which may not recognize either of these “marriages.” Some states are even refusing to dissolve same-sex marriages or partnerships created elsewhere, seeing such adjudication as a form of legal recognition, and thus leaving many couples in a terrible state of legal limbo.

Third, while many thousands of same-sex couples are now recognized as married under their local or state law, federal recognition is still denied. This results in a great many inconsistencies and inequities, some of which can play out in unpredictable ways in the event of a dissolution. Loan obligations, a partner’s rights under federally-recognized pensions and IRAs, and the tax consequences of a financial or property transfer during a partnership or upon dissolution all function differently for same-sex married or registered couples, compared with the privileged status of straight divorcing spouses.

Perhaps most difficult to address, the marriage movement has elevated the expectations of many lesbians and gay men, even in states where they have elected to not register or are not eligible for registration. Economically dependent partners may feel a growing sense of entitlement, equivalent to that of a dependent housewife, in ways that may seem presumptuous or greedy to their partner. More and more couples are raising children, thus giving rise to greater dependency on the part of the primary child-rearer and increasing the burdens of the other partner. For those who have elected to not register or marry because of particular tax or legal problems – many of which are a result of homophobic laws – or for those living in states where registration is not possible, the lack of a legal basis for such expectations may be seen by the dependent partner as a mere “technicality,” thus triggering a deep sense of injustice upon breakup that has no real parallel in a straight dissolution.

For all of these reasons, the genuine expectations of the parties - and most pointedly, the stated expectations of the dependent partner – may dramatically conflict with that partner’s legal position. Deepening this chasm, in many instances the gap may be directly attributable to the legal non-recognition of same-sex marriage. Such discrepancies can result in a legal power imbalance at the time of a breakup, which in turn can intensify the underlying personal power dynamics that frequently exist in the relationship --- thus creating especially daunting challenges to resolving same-sex dissolutions. In this way, the distortions in the legal framework inevitably shape the resolution of the dissolution disputes, in ways that rarely are present in a straight marital divorce.

The Impact of Community Issues

A crucial component of many gay divorces – which has little equivalent in heterosexual divorces – is the looming shadow of the larger social community and the broader political dynamics that can envelope a particular dissolution. Mediators need to be aware of the power of these influences, even when they are lying unseen in the hidden recesses of the immediate dispute.

The first of these is the deep distrust and resentment of the legal system and of lawyers and other professionals may lesbians and gay men feel. For many years the “law” was rarely on the side of lesbians or gay men. Rather, it was a tool of oppression, taking children away from lesbian mothers or prosecuting gay men who tried to explore their sexuality in socially “inappropriate” locales. The recent community appreciation of the legal efforts to obtain the “benefits” of marriage or domestic partnership can for some partners become a legal nightmare, especially when “the law” imposes spousal support or other financial obligations or requires an expensive legal dissolution process, or imposes heavier tax burdens on gay divorces than on straight ones.

This dynamic can be especially heightened when the mediator is straight. One party may suspect that the mediator is unfairly judging the relationship or making money off the dissolution, or is unsympathetic to his or her underlying concerns. A deep sense of being judged harshly by a homophobic society is hard to shake off, even with a sympathetic mediator, and even when the presenting issues are those of money and property and both of the parties are lesbian or gay.

The intensity of these reactions may have little to do with the immediate problems being discussed, but more likely, can arise out of the underlying psychological needs and history of each party. A perception of being judged, even where misperceived, can cause a party to hide important information or feelings from the mediator. If one of the parties is more “atypical” with regard to gender roles or has experienced a greater intensity of discrimination in the past, that party may feel especially vulnerable and thus be resistant to the mediator’s inquiries.

Homophobia can also rear its ugly head in the nature of many of the rules the couple is grappling with, in ways that have few parallels in a straight dissolution. The tax complexities of a same-sex dissolution, for example, are often due to the federal government’s refusal to accept a same-sex partnership as a marriage. A couple forced to spend thousands of dollars on tax counsel or pay more in taxes upon dissolution will react to such burdens in a wholly different manner than would a straight couple facing complex tax problems simply because they own a thriving business. The gay couple’s problems are solely the result of homophobic laws, as opposed to those complexities that are voluntarily brought on by the other couples’ deliberate actions.

So too, when the legal rules are adverse to one of the parties, there is a great tendency to experience this burden as an intensification of broader social oppression – and not just the result of neutral rules that could have affected any married spouse. Even where the partner has not previously experienced any significant discrimination, hitting a wall of legal discrimination can precipitate a very deep sense of anger, compounding the sense of loss that any divorcing partner may experience.

For those who do not marry or register or who live in a state where such is not allowed, the lack of marital rights typically creates a severe dissonance between the “felt” emotional reality and the legal framework of the dissolution. Unmarried straight couples may regret their failure to marry, but they had the option of marriage and they consciously elected to not marry. Most gay couples, by contrast, did not have such options, and so the lack of legal protections reinforces a sense of invalidity and unworthiness for an economically dependent partner.

Conversely, many couples who have partnered or married legally may have had no idea of the legal consequences of their actions – especially those who registered or married more as a political act than as a personal commitment. For some of these partners, being required to pay lawyers to obtain a legal dissolution or pay alimony to an “undeserving” ex-partner may be perceived as an unwanted imposition of alien rules upon their relationship. Heterosexual spouses may regret their marriage or hate their ex, but even those spouses engaged in a voluntary act of marriage and, in general, had an awareness of the basic rules of marriage.

Compounding these problems, many same-sex couples have managed their affairs in unconventional ways, making the dissolutions all the more difficult. In some instances these actions are a direct result of the homophobic laws, such as those affecting transfer taxes or loan qualifications, and in other instances, may be a result of the “marginal” status of the couple. With regard to children, the prohibition of second parent adoptions creates inequities that rarely would ever arise in straight dissolutions. As a result, when these couples break up the assets (or even the children) are often sitting legally in one person’s name alone, with little resemblance to how the couple actually lived and how they viewed their lives prior to their dissolution.

Unique Emotional Dynamics of the Gay Divorce

While every breakup is painful, there are other dimensions to a gay or lesbian dissolution that distinguish it from the dynamics in straight divorces. First, while historically a break-up may have been more readily accepted in the gay community (consider, for example, how the lack of marriage acceptance can alleviate either partner feeling that theirs is a “failed marriage” upon a breakup), the growing emergence of the marriage paradigm within the gay community can put enormous emotional pressure on couples who dissolve a legally recognized relationship. The same-sex partners who were plaintiffs in the marriage lawsuits certainly experienced that pressure, but even less well-recognized couples often feel such anxieties.

For some partners the gender role issues can be especially painful, especially for those in the economically dependent “domestic spouse” role. For a man who has not succeeded financially and has been the weaker partner in terms of societal success, facing the long-term consequences of that role and seeking protection (even when the law provides some protection in

the form of spousal support) can be extremely painful. Old fears of being in the “woman’s” role can play out, and the societal disdain for the unsuccessful man may be felt far more painfully by a gay man than a straight economically dependent husband. Lesbians who are thrust into the “husband” role and are required to provide post-separation support can be enraged in ways that may not be the same as higher-earning heterosexual women are likely to experience.

Women in lesbian relationships may behave very differently than the way straight women have tended to negotiate their breakups, and the dynamics of gay male dissolutions may be very foreign to a mediator who has only worked with straight male spouses.

Parentage conflicts certainly play out differently than in straight divorces. When one parent has no legal status as a result of the inability to marry or obtain a second parent adoption, the feelings of disempowerment will play out differently than what occurs for a lesser-involved but still legal parent in a heterosexual divorce. A two-mom dispute where one mother has been less involved in child-rearing also will be experienced very differently than where the uninvolved parent is a man. And, where only one parent has a genetic connection to the child, the competition over who is the “real” parent (even when both are legal parents) can emerge in ways that have few parallels in the straight divorce.

There are two inter-related tasks in mediation that most pointedly bring to the surface all of these issues: (1) determining what is “fair” in a world where marriage was historically not allowed and where social norms and personal expectations are changing so quickly, and (2) deciding what the role of the law should be where both partners would most likely admit – but for their conflict – that the “straight” divorce law is not the appropriate framework to resolve their conflicts. Neither of these dynamics exist in a straight divorce, where the underlying legal rules are not in dispute and where, for the most part, the broader social rules more closely match the normative conduct and unspoken expectations of the parties.

In so many ways, a straight divorce can be analogized to a contract dispute between two partners of the same culture, who formed their “agreement” under the same rules that now apply and where the underlying rules are perceived by both parties as fair and appropriate. Gay divorces present a layer of personal “contractual” disputes, but by sharp contrast, they are laid upon a shifting ground of changing social and cultural expectations and are most often resolved in a world of inapplicable legal rules constructed by a predominantly homophobic society.

Successful Strategies for Mediating Gay Divorces

The first challenge for every mediator is getting hired for the mediation, and in some instances this will prompt the mediator to address the question of his or her own sexual orientation -- and his or her identity in the larger community. Clients will want to know the mediator’s orientation, and the mediator needs to be open to discussing this issue without judgment or fear. It is not sufficient to simply say “some of my best friends are gay.” The straight mediator who wants to work in this area must clearly demonstrate his or her openness and cultural sensitivity in order to be hired, and must also be open to discovering dynamics of bias and prejudice that have previously remained hidden.

The best place to start is with the rules applicable to couples in your jurisdiction. Being ignorant of the new legal developments in your jurisdiction will brand you as an outsider, but can be avoided if you do the required homework.² Where possible, attend education courses on legal issues facing gay couples, which will enable you to get to know the lawyers who work in this area. If you are active in your local mediation society or bar association, invite an expert on gay issues to do a presentation. If possible, go to lunch with the expert and demonstrate your interest in this emerging and complex field of law. Make the personal connection, and don't hide your awkwardness and confusion as you express your curiosity and compassion.

Come to terms with your own possible biases and take steps to change your attitudes. Ask a gay friend to take you to a social or political event, attend an event of the local gay and lesbian bar or political association, or attend an event that connects with your own interests. If you are involved in a local religious institution, work to make your congregation inclusive of lesbians and gay men. The more you mix with the gay community the more you will be seen and acknowledged, and the more comfortable you will become with those whose business you are seeking. Where appropriate, make a donation to a local gay cause, so that your willingness to "give back" to the community is demonstrated publicly.

So long as you have an open mind and are aware of the legal complications that surround the dissolution that is unfolding around you, your existing mediation skills will serve you well. The basic mediation practices are no different here; what is different is the settings you will find yourself in and the histories and perceptions of those you are helping. In some instances the social behavior you encounter may be unconventional, and the modes of expression and expectations may be different – but the underlying needs and the basic tasks are no different than in any straight divorce.

Be humble about your own uncertainties – and when you don't understand what is going on, ask in a polite way. Sexual affairs may have played out differently than in a straight marriage, and in some instances drug use may be more openly tolerated. Strong displays of emotion may occur, and each partner's inner expectations may be different than what you have observed in the straight men and women you have worked with before. And, the couples may follow along different paths to resolution than what you have seen in your straight divorce mediations.

Remember, accepting differences between people is not a form of discrimination; rather, it is the key to overcoming prejudice. By contrast, being unable to see what is special in the people you are serving and trying to squeeze everyone in to the same social mold constitutes bias and discrimination. Keep an open mind even in difficult situations, recognize that the legal rules that you have used to resolve prior conflicts may not apply to these dissolutions, and allow the parties to resolve their conflicts in unique and personal ways that are consonant with their chosen lives.

With this perspective and with an expanding knowledge of how these particular partners have created their families and organized their emotional and sexual relationships, soon you will be able to successfully mediate even the most challenging gay breakup.

² See, "Mediating Separation of Same-Sex Couples," by Allan Barsky, in Divorce and Family Mediation, edited by J. Folberg, Guilford Press, New York, 2004. A summary of the legal issues nationally can be found in the author's book, Legal Guide for Lesbian & Gay Couples, Nolo Press, Berkeley, 2007.