

Integrated Approaches to Resolving Same-Sex Dissolutions

FREDERICK HERTZ

DEBORAH WALD

STACEY SHUSTER

Mediating same-sex dissolutions requires a nuanced awareness of how dramatically the legal landscape for lesbian and gay couples has changed in recent years, as well as an ability to demonstrably appreciate and respond to the complex emotional issues at stake in such mediations. The newly emerging norms of same-sex marriage, domestic partnership, and co-parenting arrangements lead to changing expectations in the context of these social and legal frameworks, but they have also created challenges resulting from the patchwork of changing and inconsistent laws. This article explores how mediators can best integrate the recurring emotional dynamics of such dissolutions in their mediation practice.

The mediation of same-sex break-ups raises many issues that are different from those typically arising in straight divorces. Unmarried or unregistered couples negotiate in a framework with few well-defined legal rights and without any mandatory court process, relying on implied or oral contract claims (palimony) of limited viability or community norms of often-disputed applicability. More than a dozen states currently allow or sanction same-sex marriages, domestic partnerships, or civil unions, but these relationships lack federal recognition. Because there are few court precedents and often-unclear rules of implementation, custody disputes frequently involve unconventional parentage arrangements, presenting complex legal dynamics. Separations between same-sex partners therefore



challenge mediators to operate in a world not only of unfamiliar social relationships but of legal uncertainty as well.

This legal uncertainty affects couples emotionally too. It is widely recognized that many gay partners consider themselves married despite lack of legal recognition, while others may have shunned any formal notion of “commitment” or “marriage” despite living intertwined lives (Astor, 1995). Further compounding these dichotomies, many lesbians and gay men conceptualize their relationships and the role of each partner differently from what is typical in straight marriages, even with the recent emergence of legally recognized unions. Unresolved issues of financial dependency or sexual monogamy during the course of the relationship, for example, can be exacerbated during a high-conflict dissolution. Making matters worse, discriminatory laws (such as the absence of legal recognition of the partnership or parentage in many states and at the federal level) that have an impact on both partners equally in an intact relationship may, in a dissolution setting, unfairly empower one of the partners.

For all these reasons, mediating same-sex breakups requires nuanced awareness of how they differ from heterosexual divorces, both legally and emotionally, and how the applicable laws can shape the rights and duties of each partner.

This article explores these issues through the lens of integration of emotional dynamics into the mediation process, both as a background contextualization for the mediator and as an active component of the mediation process. The benefits and risks to the parties and the mediator are discussed, with practical suggestions as to how best to integrate these nonlegal concerns into the mediation process.

Understanding the New Legal Rules of Gay Divorce

The legal framework for same-sex dissolutions has changed dramatically in the past ten years, in a way that was not anticipated in the “first generation” of writings on this topic (Felicio and Sutherland, 2001; Freshman, 1997). Rather than being universally excluded from the family court system, as was the case until recently, registered or married couples are now subject to marital rights and obligations (including presumptions regarding parentage) in Maine, Vermont, New Hampshire, Massachusetts, Connecticut, New York, the District of Columbia, New Jersey, Iowa, Washington, Oregon, Nevada, and California. With six states and Canada allowing same-sex couples to

marry regardless of their residency, marriage is now an option for gay couples living anywhere—though with uncertainty as to whether other states will recognize such marriages. A current summary of the marriage rights for same-sex couples can be found at www.lambdalegal.org.

The states' approaches have differed in ways that can significantly influence the dissolution process; ironically, disparate application of legal remedies is creating its own difficulties. In California, for example, marital rules were imposed in 2005 on newly registered and all previously registered partners, unless either partner terminated the partnership prior to the implementation date; marriage became available in June 2008, even for nonresidents, and was then prohibited under a constitutional initiative that has been upheld by the California Supreme Court, leaving the California marriages performed prior to November 2008 valid and recognized. In six states marriage is allowed, and in six other states a new legal regime (most often called civil union) was created. In New Jersey, marital rules apply to those who register under the new domestic partnership regime but not to those who previously registered. Canada allows any same-sex couple to marry regardless of nationality, while in Massachusetts at the outset only state residents (or those from states that have no ban on same-sex marriage) could marry, but as of summer 2008 couples from any state can marry there and in the other marriage states.

This patchwork of new rules has dramatically transformed the nature of many gay dissolutions, not just for those validly married or registered but also for couples living in states that do not offer or recognize partner registration or marriage. To a degree, this is also the case for couples electing to not register or marry when they could have done so.

The changes play out on many levels. First, a break-up may expose a previously unacknowledged disconnect between one partner's motivation for registering and the legal consequences of a dissolution, especially in light of the extent to which marriage was viewed as a civil rights fight by gay couples demanding benefits with little attention paid to financial consequences. To a high degree, many lesbians or gay men have had limited awareness of how the marital rules could play out in a dissolution, especially where such rules may be at odds with how they organized their financial lives, and where the circumstances of registration or marriage may have had little to do with the private understandings or intentions of the parties.

Furthermore, many couples who registered or married had lived together long before any marital rules applied to them, and in a number of jurisdictions there is no clear method of resolving disputes involving preregistration

assets. Although similar conflicts can arise for cohabiting opposite-sex couples who later marry, nonmarital cohabitation was by necessity the norm for all same-sex couples until recently, and so the legal complexity can be especially prevalent. The lack of uniformity across state lines further complicates the situation; some who married in one location (Canada, Massachusetts, California) may live in a state that does not recognize their marriage. Some states (most recently Rhode Island and Oklahoma) even refuse to dissolve same-sex marriages created elsewhere, viewing such adjudication as a form of legal recognition, thus leaving many couples in a legal limbo. Worse still, as of late 2009 there is no federal recognition of these partnerships, resulting in severe tax inequities that can have unpredictable and complicated consequences in a dissolution.

It's not simply that there are couples covered by marital law who did not intend to be; lawyers and mediators are increasingly noticing that the marriage movement has elevated the expectations of many lesbians and gay men who are not legally partnered. Anecdotal evidence suggests that economically dependent partners express a growing sense of entitlement, equivalent to that of a dependent housewife, in a way that may seem greedy to their partners and that may not be legally recognized. More same-sex couples are raising children together, giving rise to greater dependency of one partner and increasing the financial burden of the other. Conversely, for those who have elected to not register or marry because of particular legal problems, many of which are as a result of discriminatory laws, or for those living in states where registration is not possible or where one partner could not become a legal co-parent of their child, the couple may have viewed the lack of legal status as a mere technicality. This might trigger a profound sense of injustice when they discover consequences at the breakup that have no real parallel in a straight dissolution. For others, the legal burdens imposed by marital law may be experienced as an unfair and unreasonable imposition of "straight" law on their gay lives, perhaps distinctly different from the feelings of straight spouses.

As a result of these multifaceted transformations, the parties' underlying expectations will often be at odds with their legal status. Such discrepancies then may be magnified by a legal power imbalance, which itself is bound to intensify any deeper personal struggles—creating particularly daunting challenges for the mediator. Indeed, to the extent that marital law differentially covers some but not all couples, the oft-discussed issue of mediating disputes where parties are not "bargaining in the shadow of the law" has now become dauntingly complex (Hanson, 2006).

As a result, the irregular and often discriminatory legal framework can, in effect, hamper the resolution of the disputes in a way simply not found in a straight divorce. Moreover, discriminatory laws that on their face are biased against both partners at the outset often adversely harm one more than the other, when it comes to a dissolution of the partners' relationship.

The Impact of the Social Context

Previous authors have observed how the looming shadow of broader community issues can shape the parties' conduct unpredictably, but rarely has there been much discussion of the specifics (Barsky, 2004; Hanson, 2006). Mediators need to have detailed awareness of the power of these influences, even when they are not readily apparent in the immediacy of the dispute.

First, laws motivated by homophobia and hostility often frame the dissolution so as to be particularly harmful to one or both parties. In states where marriage or domestic partnership is not allowed, there is often a resulting sense of delegitimization of the relationship, and for partners whose relationships have not been honored by their friends or family or coworkers a dissolution can be a painful reminder of this invisibility (Gunning, 1995). Where one partner has no real legal rights, the pain of negotiating over the "crumbs" of cohabitation claims can be overwhelming. This is not just a private relationship failure as experienced by most straight couples; in some instances the dissolution serves as perceived confirmation of the impossibility of making a long-term gay relationship work, combined with a sense of having been betrayed by one's only "comrade." It is rare for "the law" to be experienced as a *disempowering* force, but for many lesbians and gay men this is precisely the case.

The situation is far worse in parenting disputes: if only one partner is a legal parent the other partner may be left with no legal recourse for addressing custody, visitation, or support issues regarding a child that she or he has been parenting for many years, causing a wrenching sense of injustice that cannot be ignored. Prior analyses of mediating lesbian and gay custody battles have focused primarily on disputes that gay parents may have with straight former spouses—an entirely different situation from disputes between same-sex co-parents (McIntyre, 1994).

The long-recognized distrust of the court system, lawyers, and other professionals may have lessened lately, but it has not entirely abated. 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 for their sexual activities. Ironically, therefore, the requirement of a court divorce has for some couples become a new form of legal nightmare, especially when the law imposes spousal support, requires expensive dissolution, or imposes a heavy tax burden. This underlying distrust can cause parties in a same-sex dispute to overreact and feel wronged by the dissolution process, with no direct parallel in heterosexual dissolution where the parties typically have greater trust in the legitimacy of the legal system.

As discussed at length by Hanson (2006), this tension may be heightened if the mediator is straight, especially if either party suspects that the mediator is unfairly judging the relationship, making money off the dissolution, or unsympathetic to the parties' underlying concerns. The intensity of these reactions may have little to do with the immediate problems being discussed, but more likely it will arise out of the underlying psychological needs of each party (Bryant, 1992). If one of the parties is more "atypical" with regard to gender roles or has experienced greater discrimination in the past, that party may feel especially vulnerable, especially if the relationship does not meet conventional notions of intimacy or if the mediator pathologizes behavior that is entirely normal with this social minority (Felicio and Sutherland, 2001).

Most pointedly, homophobia can rear its ugly head in the nature of the very rules the couple is grappling with, something that has few parallels in a straight dissolution. The tax complexities of a same-sex dissolution are due almost entirely to the federal government's nonrecognition of same-sex marriage, and a couple forced to pay more in taxes will react to such burdens wholly differently than would a straight couple who simply have high tax debt. Taxation of property transfers, retirement account transfers, and spousal support payments is the result of discriminatory laws, as opposed to being a complexity brought on by the couple's voluntary actions, and so even where these rules penalize both partners this dynamic can affect the mediation process.

Frequently the rules are adverse to one party alone, and there may be a tendency to experience this as a consequence or intensification of broader social oppression rather than as the result of neutral rules that could have affected either spouse. Thus, a financially dependent gay man who is denied partner support may respond with a deep sense of societal injustice unlike what is felt by an unmarried straight woman who regrets having remained unmarried while her boyfriend supported her. Even where the partner has not previously experienced any significant oppression, hitting this wall of discrimination can precipitate a sense of anger that unleashes a

disabling sense of social rejection, compounding the personal sense of loss that any divorcing partner will experience.

Conversely, many recently partnered or married same-sex couples were ignorant of the legal consequences of their actions, and so being required to pay lawyers to obtain a legal dissolution or pay alimony to an ex-partner may be perceived as an unwanted imposition of alien rules. Again, although heterosexual spouses may regret their marriage or despise their spouse, even the angriest of spouses engaged in a voluntary act of marriage and, in general, was aware of its legal effect. The rapidly evolving set of legal rules applicable to same-sex partners has left many couples in a kind of “musical chairs,” where the financial obligations are experienced as random consequences of a churning merry-go-round of legal changes.

Compounding these problems, many same-sex couples have managed their affairs unconventionally, making dissolution all the more difficult. In some instances these actions are a direct result of the absence of legal recognition of same-sex partnership, such as where one partner has stayed off title solely because of discriminatory transfer tax rules. In other instances, the problems may be a dimension of their “marginal” status, where they have organized their assets without regard to their “true” feelings, hidden assets in a partner’s name out of a sense of exclusion from mainstream society, or been unable to obtain a second parent adoption. It could be difficult to disentangle the many reasons behind any particular financial arrangement, years later and in the context of a dissolution, where each side has a vested interest in any particular interpretation. But as a result, upon a break-up the assets (or even the children) are often “titled” in one partner’s name alone, with little resemblance to how the couple previously viewed their relationship.

Understanding this background requires sympathetic knowledge of the gay community’s social and legal history and sensitivity to how a history of discrimination can cloud the dissolution process. Moreover, the mediator must be able to demonstrate this awareness and show compassion to both parties, coupled with a realistic approach to resolving the particular problems facing the couple. This must be done in light of the intractable legal constraints that often cannot be circumvented.

Issues of Parentage and Custody

Resolving parentage and custody disputes requires thorough understanding of the legal and practical complexities that frame these disputes. Traditionally, there have only been two ways of establishing parentage: birth or

adoption. For women, parentage has traditionally been established by giving birth or by adopting, and for men by being married to a woman who gave birth or by adopting. Because it is only recently that genetic parents could be identified with any degree of scientific certainty, public policy and the law have always played a role in determining parentage.

Statutes governing parentage developed before DNA identification focused mostly on applying various presumptions to hold men responsible for paying child support and on supporting traditional marital families. Underlying the traditional “marital presumption”—the husband of a wife who gives birth to a child is the legal father of the child even if not the genetic father—is the basic policy that if a child is born into a marital family and the husband is not the genetic father, the government does not want to know about it.

Traditionally, parentage could not be established or terminated by contract. The rights of parentage are vested in the child, and wherever possible it is the strong public policy of many states that children have two parents. Thus contracts attempting to create or negate parentage have generally been void for public policy reasons, with parentage instead being determined by application of relevant statutes and case law. This made sense in part because the children affected by the contracts were not parties to those contracts. However, as applied to lesbian and gay male parents these policies may have unanticipated consequences.

Legal practices around egg donation, sperm donation, and surrogacy, all of which are generally based on contract law, seek to change this fundamental precept of family law, and especially so for same-sex parents, who must necessarily partake in such contractual activities. However, many courts remain ambivalent about application of contract law to determination of parentage and the practices of adoption, even where it is prohibited for both parents to jointly adopt.

Briefly stated, legal parentage involves consideration of four factors: (1) biology and genetics, (2) procreative intent, (3) parental conduct, and (4) the marital or domestic partner or civil union presumptions (Wald, 2007, and cases and articles cited therein). All of these factors need to be considered in determining the parentage of children, and in many dissolution situations the facts do not lead to an obvious or undisputed conclusion. Although custody disputes can arise in all types of dissolutions, disputes over legal parentage are far more common in same-sex dissolutions—simply because same-sex couples generally need third-party assistance to become parents, whether through adoption or assisted reproduction. Recognizing

this unique background is crucial to being able to mediate same-sex parentage disputes.

Parentage disputes generally arise in one of three situations. The first is where there are two adults who have functioned as parents, but only one of them is a legal parent. This can happen when one lesbian partner has given birth and there is no adoption of the child by the other partner, or where only one partner undertook adoption of the child (as in states that don't allow joint adoption by unmarried couples, and all international adoptions) and the second partner did not subsequently also adopt the child. The second and more complicated problem arises when there is a third party (sperm or egg donor, surrogate mother, or involved family member) seeking parentage rights. In the third situation, the couple obtain a legal judgment rendering them both parents but one partner is now trying to disavow this arrangement or set aside an otherwise valid adoption or parentage judgment in a dissolution dispute.

Fortunately, approximately half the states now recognize parentage based on parental conduct and significant bonding with the child. The name for the status of these parents varies from state to state. They may be "equitable" parents, "de facto" parents, "presumed" parents, parents "by estoppel," or "psychological" parents. In the other half of the states, if no adoption has been completed the biological parent will be the sole legal parent.

The leading national standard for determining when a nonbiological mother should have continued access to a child born to a lesbian couple comes from Wisconsin, in the case of *Holtzman v. Knott*, 533 N.W.2d 419, 421 (Wis. 1995):

To demonstrate the existence of the petitioner's parent-like relationship with the child, the petitioner must prove four elements: (1) that the biological or adoptive parent consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child; (2) that the petitioner and the child lived together in the same household; (3) that the petitioner assumed the obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributing towards the child's support, without expectation of financial compensation . . . and (4) that the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature.

Until recently, California denied any parentage rights to the nonadoptive or nonbiological parents of children born into lesbian relationships in the absence of a legal adoption, and in 2005 the California Supreme Court modified this harsh stance. The new rules apply where the nonbiological mother participated in the child's conception with the intent to be a parent, where this mother voluntarily assumed the responsibilities of parenthood after the child was born, and where there is no competing claim that someone else is the child's second legal parent. See *Elisa B. v. Superior Court of El Dorado County* (2005), 37 Cal. 4th 108. However, given the common use of known sperm donors who may have a claim to parental rights and given the historic lack of recognition by the courts, even in states such as Wisconsin and California many couples remain distrustful that the court system will "understand" their families. These couples may wish to negotiate a resolution without having to initiate a court action, and for those parties mediation is most appropriate.

This is especially true for couples who have conceived children nontraditionally, as when a known donor was used who has remained actively involved with the child, or when the child has been raised in a nonnuclear family modeled on alternative concepts of family, long popular in segments of the lesbian and gay community.

Even attorneys and mediators familiar with custody disputes can be caught off guard by parentage disputes, especially because the court never addresses the "best interest of the children" standard where there is only one legal parent. Many courts reviewing same-sex parentage disputes around the country have concluded that although the children are undeniably and profoundly bonded to a nonbiological nonlegal parent, the court has no legal basis for imposing custody or visitation where the fit, legal parent no longer wants an ex-partner to participate in child rearing. This creates an "all or nothing" dynamic that will be foreign to most custody attorneys and mediators.

In states where the law recognizes legal rights of nonbiological "presumed," "de facto," or "psychological" parents, the issue of parentage often needs to be resolved in court before mediation can address custody and visitation issues. It is not uncommon for the biological parent (the "power parent") to refuse to negotiate until someone—typically a court—has convinced the person that the children really do have two legal parents. Even so, skilled mediators with a solid grasp of the law may be able to save everyone the financial and emotional hardship of a contested parentage action by persuading both parents to focus on the best interest of the children

from the outset. Awareness of the law in this area is critical to success in these cases.

In states where the law does not grant legal rights to a nonbiological second parent absent an adoption, a mediator will have to rely on a completely different set of skills to resolve a parentage or custody dispute. The tools in a mediator's toolbox in these states are not legal, *per se*; instead, the mediator will be called on to tap the literature on attachment and the long-term impact on children from disruption of stable attachments in early childhood. Success in mediating a parentage dispute in a nonrecognition state will therefore hinge on the professional's ability to persuade the legal power parent to see that it is in her or his child's best interest to accord rights to the nonlegal parent that a court would not give that parent—a daunting task, but one that can be effective with a parent whose hatred for the ex-partner is not greater than his or her concern for the long-term well-being of their child. As opposed to the highly legalistic approach that may be needed to break down barriers in a recognition state, in these cases a child-centered nonlegalistic approach has the best chance of producing an outcome that will serve the long-term needs of the parties and their children.

Even in disputes when both partners are legal parents, the issues in same-sex custody disputes are unlike those generally encountered in heterosexual custody cases, simply because the psychological dynamics can be so different. As a general rule in marital custody disputes, the parents will be fundamentally equivalent in their biological (if not psychological and emotional) relationship with their children. This means both husband and wife will be genetic parents, or both husband and wife will be adoptive parents. Such is rarely the case in lesbian and gay custody disputes, where only one parent is biologically related to the child. It is common for the underlying inequality between a biological and a nonbiological parent to surface in a custody dispute, with one partner claiming to be the “real” parent and seeking preferential custody or decision-making authority or automatic entitlement to a greater percentage of the child's time. Even where the nonbiological parent has been the primary caretaker, in a break-up the biological parent is likely to have a particular sense of entitlement based on her or his genetic connection to the child. Sensitivity to all of these issues is essential to effective mediation of these cases.

Finally, mediation in such situations offers a range of long-recognized indirect benefits, including privacy for the disputing couple, reference to community norms in lieu of a legalistic analysis, and avoidance of encountering

the homophobic biases of a hostile judge. Such benefits can be stressed to the participants if the commitment to mediation appears to be waning (Emett, 1997).

Unique Emotional Dynamics of the Gay Divorce

With the emergence of marriage and marriage-like rights, lesbian and gay couples find themselves experiencing enormous change in their internalized views of their own relationships. As recently as a generation ago, the vast majority of same-sex relationships had to be secreted from family, coworkers, neighbors and even friends, but some kind of governmental validation now exists in many states—if not marriage, then civil union or domestic partner registration, as well as antidiscrimination legislation, all of which allow these relationships to be “out” and more visible. This spectrum of external affirmation allows couples to experience a new range of attitudes toward their own relationships, rendering outdated most earlier observations or studies and changing the benefits that mediation can offer.

External validation of same-sex relationships is only one of the many significant factors that have an impact on a couple in conceptualizing their relationship. The degree of visibility in the heterosexual world of work, neighborhood, and families; the duration and definition of the relationship; and co-ownership of property or co-parenting of children all have differing impacts on a couple. In past decades couples were unlikely to experience a mirroring of their relationships by the larger society and thus felt devalued, often contributing to difficulty in maintaining the relationship in times of stress. It was common for at least one member of a couple to be reluctant to be out in at least one significant arena of the couple’s life, which often led to strife and conflict.

In contrast, today’s couples are more likely to value their relationships in new ways, and then as a result feel entitled to marriage-like benefits; ironically, they may even feel pressured to remain together because of a responsibility to show the heterosexual world the viability of their relationship. Certainly, recent media stories of long-term same-sex couples fervently desiring to validate their ties via marriage contribute to a portrait of relationships that are content in all ways, despite the prior lack of governmental sanction.

Although it is too early to know exactly how same-sex couples will be affected by the advent of societal and governmental support, it is likely that increased validation of these relationships in the eyes of the mainstream

community will change how couples regard themselves. If twenty-five years ago couples regularly dealt with secrecy and shame, feeling outside the law and the larger culture, today's couples more frequently feel pressure to live up to the image of model couples. More pointedly, those who felt unmirrored by the culture around them may have been less likely to adopt concepts that go along with heterosexual relationships, such as pooling money, holding assets jointly, or community property. This will certainly have consequences when partnered or married couples find themselves dealing with concepts previously associated with the heterosexual world of divorce, including lawyers, spousal support, and child support.

With the benefits of marriage and the new model of relationships also will come gender-role issues, particularly when there are income disparities between partners. Having grown up in a world in which individuals had to forge their own rules, both the economically dependent and the more affluent partner now can find themselves in a framework of legally imposed rules of economic interdependence, and many same-sex couples are not accustomed to this way of thinking. A lower-earning man who has been seen as the weaker partner in terms of social status may now reconceptualize himself in terms of the powerlessness experienced by lower-earning wives in heterosexual marriages, just as higher-earning men may experience themselves as more dominant and powerful in the relationship. Lesbians with income disparities may be uncomfortable with such power imbalances and attempt to deny them, until a dissolution forces them to acknowledge otherwise. A couple may be largely unaware of any difficulties associated with these imbalances during their relationship, though they may come into play surprisingly and upsettingly when the relationship fails and financial disputes arise.

It is inevitable that the intense psychological ramifications of such realizations will emerge in the context of legal mediation. If a couple entered into a domestic partnership just so they could share in insurance benefits or gain social sanction, the higher-earning partner's discovery at the time of a dissolution that he or she is expected to pay spousal support will trigger a reframing that dramatically affects the mediation process. So too for the gay or lesbian partners who for many years lived outside the law and are now expected to conform to the laws and expectations of heterosexual couples, without having entered into such an agreement or even held this intent when they chose to register.

Consider, for example, the story of Kate and Lisa (pseudonyms), a California lesbian couple in their early forties who have been together for

twelve years. Kate is a successful corporate executive in a company in which she feels it is too risky to be out, and for the past six years Kate and Lisa worked out an arrangement (though no written agreement) whereby Kate supported the household while Lisa suspended her professional career and acted as homemaker. She furnished their home, shopped, cooked, and managed the household, while writing her first novel. Kate and Lisa perceived this division of labor as fair, giving each of them a level of personal and professional comfort. They did not register as domestic partners precisely because Kate was uncomfortable being out. All went well until the couple broke up. Now, Lisa feels entitled to spousal support because she has been supporting the household with her labor, while Kate consults an attorney who advises her that she owes Lisa nothing because they are not registered domestic partners.

This example goes to the heart of the dilemma in working with contemporary same-sex couples. Lisa feels that she is owed spousal support because she did not press for legal recognition and protection in deference to Kate, which is counterbalanced by Kate maintaining that she does not owe Lisa continued support because she did not make that kind of commitment to the relationship. Such a dispute will not be readily resolved.

Even in situations where it is clear that the rules of community property dissolution should apply, there can be disputes over how to apply them, with strong feelings on both sides. For example, if Matt and Norm were together for twenty-five years, moved in together five years into their relationship, and registered as domestic partners ten years later (the earliest that the option was available to them as a same-sex couple), what is the duration of their legal relationship? If Norm, the lower-earning partner, insists on their cohabitation as beginning with the “date of marriage” and Matt contends that the law only recognizes the registration date, how should the mediator approach this conflict? The absence of a uniformly recognized legal sanction of the relationship has an enormous impact on how the couple now view their commitment.

Differences in each partner’s understanding of the commitment to the other can have great practical significance in any kind of postdissolution settlement. It is not uncommon for individuals in a break-up to feel that their long-held views of the relationship appear insignificant to the other, thus fostering wounded feelings that affect willingness to negotiate in mediation. Couples with no recourse to legal validation of their relationship will commonly use the means that are available to them to affirm their partnerships, such as where a homeowner puts his boyfriend on title to the

house as a form of legal recognition of their partnership, or where a mother allows her new partner to co-adopt the child they are beginning to parent together as an expression of her optimism that the family they are creating will endure (a heterosexual woman wishing to express this optimism and commitment to a new relationship would almost certainly marry her new mate before she suggested he adopt her child). The absence of clear external recognition of the partnership bond leads to creative but legally complicated ways of affirming relationships, and complications and misunderstandings if the couple breaks up.

There are two interrelated tasks in mediation that most pointedly raise 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 it. Aside from their conflict, straight divorce law is not the appropriate framework to resolve their conflict. Neither of these dynamics exists in a heterosexual 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. Lesbian and gay divorces certainly present a set of personal “contractual” disputes, but in sharp contrast they hover above a shifting ground of changing social and cultural expectations, increasingly subject to a world of legal rules constructed by a historically homophobic society.

Successful Strategies for Mediating Gay Divorces

Getting Hired

The first challenge for every mediator is getting hired, which may require addressing his or her own sexual orientation and values. Clients will want to know the mediator’s orientation, and the mediator needs to be open to discussing this issue. It is not sufficient to simply say “some of my best friends are gay”; the straight mediator must clearly demonstrate an openness and sensitivity to the effects of discrimination as well as genuine familiarity with the issues and complexities facing the couple. Most prior commentators

suggested that a straight mediator would not likely be effective in resolving these disputes; however, as same-sex couples increasingly find themselves in the marital law system, it is more likely that their disputes will—and can—be resolved by a straight mediator or judge.

The best place to start is to learn the rules applicable to couples in your jurisdiction (Hertz, 2008, 2009). Attend relevant education courses, which also enable you to get to know the lawyers who work in this field. If you are active in your local mediation society or bar association, invite an expert on gay legal issues to do a presentation, make a personal connection with the local experts, and don't mask any awkwardness and confusion as you express your curiosity and compassion. Attend an event of the local gay and lesbian law or political association, and if you are involved in a local religious institution, work to make your congregation inclusive of lesbians and gay men. Where appropriate, make a donation to a local gay cause, so that your willingness to give back to the community is demonstrated publicly. In other words, walk the talk.

Be humble about your own uncertainties. When you don't understand what is going on, ask nonjudgmentally. For example, if you are dealing with someone whose gender identity is not obvious, you may need to ask whether the person prefers to be referred to by the male or female pronoun. Asking will rarely cause a person to take offense, but making the wrong assumption can undermine trust. Strong displays of emotion may occur, the parties' expectations may be different from what you have observed in straight divorces, and a couple may follow their own path to resolution, so bear in mind that accepting differences is not a form of discrimination; rather, it is the key to overcoming prejudice. Keep an open mind even in difficult situations, recognize that the legal rules you have used to resolve prior conflicts may not apply to these dissolutions, and allow the parties' resolution of their conflict to be consonant with their lives.

Convening the Mediation

The convening process can be especially problematic for couples not accustomed to dealing with the legal system. In some instances including lawyers in the process will be resisted, and in other situations the notion of mediation as "compromise" will be foreign. The timing of the mediation can become a source of conflict in itself, where one party is eager to resolve all issues immediately, without much patience for a partner who feels bereft, is not eager to move on, and does not understand the larger issues of the conflict or the relevant legal procedures.

Addressing Issues of Fairness and the Law

Mediations often revolve around assessment of the likely legal outcomes if not settled, and at the same time an evaluation of what is fair. For all the reasons discussed in this article, establishing these standards can be difficult in the context of a same-sex dissolution. Because marriage and legal parentage may not have been available to the couple, one cannot simply apply the default legal system to analyze the claims and needs of the parties without appearing unfair to one of the parties. In most instances, an evaluative mediation based on applicable legal rules would be inappropriate and unhelpful, whereas a more open-textured facilitative style will be more effective.

Moreover, the absence of gender roles in same-sex relationships demands an analysis of obligations within the context of the relationship itself, not framed in conventional social terms such as husband or wife. At the same time, the very meaning of the relationship may be in question, manifesting itself in the mediation differently than in many straight dissolutions. For example, if a couple has never reached consensus as to whether their assets would be combined as a family or kept separate as two unmarried partners, a dispute over allocation of proceeds from the sale of the residence where the partners contributed unequally to its maintenance will trigger again the same fundamental questions that plagued the relationship from the outset.

Disputes over fairness initially may amplify the underlying conflicts of the relationship, which can lead to heightened disagreement and rejection by one party of the other's notion of fairness. This can be far different from what occurs so often in a straight divorce, where accepted notions of marital obligations were more likely to have been integrated into the couple's relationship.

Integrating the Relationship Narrative into the Resolution Process

Rather than seeking to avoid these deeper issues, resolution often can be found by surfacing these competing assumptions nonjudgmentally, and helping the parties acknowledge that their dispute is itself a reflection of these underlying tensions. In effect, the dispute does not arise after the relationship is over; rather, it is the final chapter of a relationship during which these long-simmering issues are now exposed. Revealing these tensions should enable the parties to better understand why they are in disagreement, and hopefully see the validity of both points of view without having to agree about who is right. With this new insight, they are more likely to view their dispute as a legitimate disagreement between two reasonable people, each

with valid hopes and disappointments, as opposed to a battle over who is right and who is wrong. Oftentimes, it is not easy for the parties to see that compromise is possible without “adjudicating” which narrative is the “correct” one; but if the partners can understand the underlying social and legal restrictions and the deeper social and emotional expectations that have led to their problematic situation, it may be possible for them to reach a practical resolution that honors both points of view, without endorsing either one exclusively.

Relationship Roles and Identity Issues

Same-sex dissolutions often present unique relationship issues that can have legal and financial impact. To a degree that is often far greater than in heterosexual dissolutions, conflicts over the roles of breadwinner, primary parent, or supportive spouse can play out unusually in the dissolution process. A competent mediator must be aware of how these issues are intertwined with legal disputes, and avoid squeezing these relationships into a heteronormative framework.

As we have seen, the most pronounced issue arises when one parent has a biological connection to a child raised by the parties and the other parent lacks the biological connection, and typically the legal connection as well. This most frequently occurs with lesbian co-parents (where one mom has both the genetic connection and the birthing experience), but it also can occur for gay male parents, where only one dad is the biological or the legal dad.

Further conflict can stem from profound misunderstanding about the sexual expectations of the partners. Even though many married couples have to grapple with the sense of betrayal associated with one spouse sexually straying outside the marriage, both spouses will generally have understood that monogamy was the rule of the marriage, whereas same-sex couples who registered as domestic partners to gain access to health insurance or as an act of political or civil defiance may not have assumed that monogamy would be expected.

Far more often than with heterosexual married couples, same-sex legal couples (whether in domestic partnership, civil union, or even marriage) may lack a common agreement as to what the sexual rules of their relationship were unless these rules were actually discussed and negotiated. This lack of common understanding of the fundamental rules of engagement of the union is likely to create a challenge in dissolution that cannot be ignored. Again, the challenge for the mediator, and particularly the straight mediator, is to have sufficient familiarity and comfort with gay

sexual norms and practices so that these issues can be aired without judgment, neutrally and appropriately (Hanson, 2006).

Finally, intense conflict can arise where one partner has been the primary financial support for the family, differing from similar straight dissolution conflicts, whether or not the couple is registered or married. Although furnishing financial support during the good times may have been an acceptable “arrangement” for the couple, the notion of paying alimony or sharing savings acquired by the higher-earning partner is often resisted passionately. Where the couple is registered or married, the economically dominant partner will be the outraged party, astounded that the mere fact of registering or marrying could result in such onerous obligations; if the couple has not registered or married, the dependent partner will be devastated to learn how difficult it is to win any kind of palimony award or sharing of the richer partner’s assets.

Heterosexual husbands have been complaining about these burdens for centuries; the outrage of the lesbian and gay “husbands” is of a wholly different dimension. Straight husbands have been socialized to provide for their wives, and they knew, even if vaguely, the consequences of a legal marriage. By contrast, same-gender partners have not been socialized in the same way, and most frequently the economic dependency is not a result of a joint decision to raise children. As a result, the legal news is often perceived as an utterly unfair burden. Where there are no legal rights, the power imbalance is seen as a manifestation of a homophobic culture that devalues the contributions of the lesbian or gay “wife.”

Documenting and Finalizing the Settlement

Finalization of a settlement may itself play out differently in same-sex dissolutions regarding tax issues, the role of the courts, and the role of the attorneys.

Because same-sex partners are not federally recognized spouses (even if they were married in Canada or elsewhere), asset transfers between partners on dissolution are not statutorily exempt from federal taxation. This can create serious burdens, only some of which are avoidable. In some situations, the transfers can be lawfully characterized to minimize the tax consequences, as with the sale of an interest in a personal residence or where the transfer can be construed as distribution of an already-shared asset, even where the settlement is of a nonmarital palimony claim. For lower-asset dissolutions, the annual gift tax exclusion may be available, and where more than one investment real property is owned a §1031 tax-deferred

exchange may be feasible. If none of these options are available, the couple may need to take the time to analyze the present and future tax liabilities and then decide how they will be allocated.

In some situations the agreement cannot be finalized until these tax issues are resolved, which may require consultation with a tax expert (who can be hard to locate in some cities). One partner may be far more willing to take tax risks than the other, and so reaching a compromise can be difficult—and where the tax problems are significant, the tentative agreement may unravel. If the mediator or the attorney is unfamiliar with this dimension of a same-sex dissolution, these tasks may be inadvertently neglected, with potentially disastrous results.

The role of the courts may also be different. In many instances, court filings will not be required, and for those couples there is no readily available enforcement process. As a result, the agreement itself needs to establish an enforcement mechanism, either by a newly filed court action or by some kind of arbitration process. Where a court dissolution is required, the parties may be resistant to meeting court requirements; judicial supervision of the dissolution is a foreign concept for same-sex couples, and so filling out complex forms and paying court fees can be problematic.

The role of attorneys also can be troublesome in the agreement finalization process. For many lesbians and gay men, the law is a foreign and hostile dimension, and turning to lawyers to negotiate or review an agreement can trigger resistance. In many situations, the parties may have reached an informal agreement before obtaining legal advice, and if a legal consultation results in a change of position, this itself can be seen as an act of betrayal. This is especially true where marital and domestic partnership rules have only recently extended marital protections to same-sex partnerships, and where the partners have little notion of what the law provides. At the same time, the mediator may feel a need for a legal review of the proposed agreement, in light of the uncertainties about tax ramifications and the widespread uncertainties regarding legal rules for these dissolutions.

Conclusion

Mediating same-sex dissolutions can be challenging, especially where effectiveness requires understanding of an evolving legal framework and the underlying social realities of the relationship. At the same time, for those who gain the requisite knowledge, develop the necessary emotional skills, and integrate the psychological and legal concerns respectfully and

comprehensively, the rewards to the mediator, and most especially to the parties, can be substantial.

References

- Astor, H. "Mediation of Intra-Lesbian Disputes." *Melbourne Law Review*, 1995, 20, 953–978.
- Barsky, A. "Mediating Separation of Same-Sex Couples." In J. Folberg (ed.), *Divorce & Family Mediation*. New York: Guilford Press, 2004.
- Bryant, S. "Mediation for Lesbian & Gay Families." *Mediation Quarterly*, 1992, 9(4), 391–395.
- Emett, W. "Queer Conflicts: Mediating Parenting Disputes Within the Gay Community." *Georgia Law Journal*, 1997, 86, 443–440.
- Felicio, D., and Sutherland, M. "Beyond the Dominant Narrative: Intimacy and Conflict in Lesbian Relationships." *Mediation Quarterly*, 2001, 18(4), 363–376.
- Freshman, C. "Privatizing Same-Sex Marriage Through Alternative Dispute Resolution." *UCLA Law Review*, 1997, 4, 1687–1719.
- Gunning, I. "Mediation as an Alternative to Court for Lesbian and Gay Families." *Mediation Quarterly*, 1995, 13, 47–50.
- Hanson, M. "Moving Forward Together: The LGBT Community and the Family Mediation Field." *Pepperdine Dispute Resolution Law Journal*, 2006, 6(2), 295–310.
- Hertz, F. *A Legal Guide for Lesbian and Gay Couples*. Berkeley, Calif.: Nolo Press, 2008.
- Hertz, F. *Making It Legal: A Guide to Same-Sex Marriage, Domestic Partnerships & Civil Unions*. Berkeley, Calif.: Nolo Press, 2009.
- McIntyre, D. "Gay Parents and Child Custody: A Struggle Under the Legal System." *Mediation Quarterly*, 1994, 12(2), 135–149.
- Wald, D. "The Parentage Puzzle." *Journal of Gender, Social Policy & Law*, 2007, 15(3), 379–412.

Frederick Hertz is an attorney and mediator in Oakland, California, specializing in formation and dissolution of same-sex partnerships, and co-author of *A Legal Guide for Lesbian and Gay Couples* and *Making It Legal: A Guide to Same-Sex Marriage, Domestic Partnership and Civil Unions*.

Deborah Wald is an attorney in San Francisco serving families in the areas of assisted reproduction and adoption as well as dissolution and contested parentage at both the trial and appellate levels; she is an adjunct professor at the University of San Francisco.

Stacey Shuster is a psychologist who offers psychotherapy and mediation in San Francisco.