

An Introduction to Alternative Dispute Resolution for the LGBT Community

By Nancy Kramer

“Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, and expenses, and waste of time.”

Abraham Lincoln

Litigation in this country is a lengthy and expensive proposition; a stressful process that destroys relationships. Lawyers seeking to best serve their clients who have legal disputes should consider other forms of resolution which are faster, less expensive and less disruptive. Mediation and arbitration, which are responsive to party needs in ways not possible in court proceedings, are the two most frequently utilized forms of dispute resolution. They have particular applicability in disputes involving the LGBT (Lesbian, Gay, Bisexual and Transgender) community, where confidentiality and discretion may be of particular interest to the parties and where courts may be insensitive or even hostile to parties. In LGBT family issues there is a dearth of applicable law and traditional family law can be inapplicable.

Members of the LGBT community experience disputes and may have recourse to dispute resolution techniques in virtually any situation, including situations in which the fact that the parties are lesbian, gay, bisexual or transgender is of no or passing significance to the underlying dispute. In estate matters (where the document governs), real estate transactions, business deals, etc., members of the LGBT community are in a position little distinguished from non-LGBT community people. However, there are two particular areas where unique issues and concerns for LGBT parties arise and where mediation may be particularly attractive. The first is employment discrimination claims based on the employee’s actual or perceived connection to the LGBT community. The second is the whole panoply of family law matters—creation and dissolution of couples; procreation, adoption, separations, custody/visitation issues, etc. In these disputes mediation has proven to be invaluable.

Employment Discrimination

LGBT employees may experience discrimination of various kinds based on their sexual preference or orientation or their non-gender conforming appearance. These claims include creation of a hostile work environment; being disciplined unfairly; being terminated; being passed over for raises or promotions or denied training opportunities that might lead to them. In many of these situations the employee may prefer that her/his personal life (orientation or transgendering status, for example) be kept as private as is possible in the workplace—or that aspects of that life or identity be explained at a certain point or in a certain way. The privacy of a confidential dispute resolution process is invaluable in such a case.

Furthermore, a management person or team accused of insensitivity, at best, or actionable behavior, at worst, may be better able to listen and understand the situation in the private and low-key setting of a mediation. Management might be influenced by an increased familiarity with the legal protections offered in New York State. Non-discrimination rights are conferred by the New York State Human Rights Law (NYS Executive Law, Article 15) and supplemented by some more inclusive local laws as New York City’s Human Rights Law (Title 8 of the Administrative Code of the City of New York).

An open discussion of the problem can enable someone unaware of it to focus on issues s/he was not familiar or comfortable with. Ideally such a person might be brought to see the employee’s complaint as legally viable and/or valid and offer some workplace changes. Changes in management attitudes and behavior are difficult to bring about. However, they are more likely to occur when management persons are not put on the defensive, as happens in litigation. Furthermore, the employee might come to see and understand something about the employer’s viewpoint.

Family Law

LGBT families face the same wrenching emotional issues as non-LGBT families when separating and additional issues when dealing with adoptions, custody, surrogacy, etc. The problems of custody and visitation and property division are similar,¹ but the LGBT community has traditionally been excluded from the legal system governing other families. There was no legal structure nor expectations governing their coming together as permanent couples nor their dissolution of such bonds. In essence, the LGBT community has had to create its own extra-legal family structure. And mediators, both from and outside the community, helped clarify certain recurring family issues.

For a long time there were no laws or even guidelines for when a couple dissolved a union—for the division of assets; provision of support for a financially dependent partner or custody and visitation provisions for the non-custodial parent. Nor for a long time did state adoption laws contemplate single or couple gay adoptions (single, couple or second parent). As one mediator put it, “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.”²

This is changing, slowly. And bringing gay couple relationships into the framework of traditional family law raises as many issues as it answers. For one example, take the situation of a gay couple who lived together and shared their lives and assets fully for 35 years, marrying two years ago when that became possible. If they divorce after two years of legal marriage, how would traditional divorce law, which takes into account the duration of the marriage, apply? Surely the fact that they lived as married, but were not able to acquire that legal status until late in the relationship, is of major relevance.

Some have posited that many LGBT couples have a deep distrust of the legal system which has ignored or been hostile to their needs and issues. In fact, they may have benefitted from relying largely on mediation to resolve personal disputes.³ The absence of a set and rigid system of family expectations, rituals and laws may have resulted in the molding of solutions more individually tailored to the people involved and their particular situation—which is one of the great benefits of mediation.

Successful LGBT Community Mediation Stories— And Who Knows What Might Have Happened In Litigation (True mediation cases with a few identifying facts changed to protect confidentiality)

***** Two men were romantically involved and lived together briefly (less than three years) with no domestic partnership, no marriage, and no explicit understanding. There was a big difference in their professional stature and earning capability—Ted was a successful big firm lawyer and Billy a former construction worker now enrolled in college in order to become a school teacher. During their short and tempestuous relationship together they adopted one daughter. As the relationship deteriorated, Ted adopted another daughter on his own. The two men considered the girls to be sisters and Ted’s extended family provided love and back-up care for the girls, who were two and four years old at the time of the mediation. Both men viewed their romantic relationship as long over. Both were deeply committed to their roles as fathers and to raising the children as sisters.

They came to mediation (Ted with great skepticism) to try to formulate a living plan that would last. At that point the two little girls lived with Ted in his brownstone with a full-time nanny available during the days. Billy had moved into a small shared apartment but frequently visited and sometimes stayed over at Ted’s house. Billy had one more year of college to complete and asked for financial help from Ted for that one year to become financially independent. Two mediation sessions worked it out (this was a rare poster case situation—more sessions are often necessary). Ted agreed to help Billy financially and to give him almost unlimited access to the children as long as they remained living with him.

I have heard from one of them since and was told that the family continues to do well. Both girls live with Ted, with fre-

quent visitation by and to Billy, who now teaches elementary school in Brooklyn and has much more free time than Ted to spend with the kids.

These two men created an atypical but highly functional family. Who knows what would have happened in court.

***** Another case involved a long-term lesbian couple, women who had spent all their life together since they were teenagers and had thought that would continue forever. The women had two children: Karen gave birth to the first child, a daughter, and 10 years later, Brenda gave birth to a son. Karen and Brenda had conflicts but were very committed to each other and their family—until Karen fell out of love with Brenda and into love with someone else.

Brenda had adopted the daughter shortly after she was born. It had been intended that Karen would adopt the son, but this had not taken place before the two parents split up and Karen moved out of the family apartment.

When they started mediation, at the suggestion of a family therapist, Brenda had not fully accepted the situation. Some drama and what looked like a potential reconciliation between them followed, but eventually they stayed separated and Karen’s new partner came into the children’s lives. Both women were clear that the children should be raised together and they had to and would co-parent them. Also, Brenda had a successful corporate career that necessitated a great deal of travel. She had relied on Karen to provide stability and child care to back her up and she wanted this to continue.

After a long series of sessions, they worked out a fluid joint custody, with the children moving between their two apartments which were one block from each other. Assets, including a country home, were divided, as were considerable debts.

Also, and very key, the parents managed to have the second adoption take place after disclosing to the court that they had dissolved their relationship. At the parties’ request, the mediator wrote a statement to the court discussing her sense of the strong family structure and supporting approval of the adoption. Again, one wonders what a litigated resolution would have entailed—and at what cost.

Endnotes

1. Nancy Kramer, *The Same But Different: Mediating Separations of Same-Sex Couples* (ACResolution Summer 2005).
2. Frederick Hertz, *Mediating Same-Sex Disputes: Understanding the New Legal and Social Frameworks* (to be published in upcoming issue of Massachusetts Family Mediation Quarterly).
3. Mark J. Hanson, *Moving Forward Together: The LGBT Community And The Family Mediation Field* (Pepperdine Dispute Resolution Law Journal 2006).

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