

Date of Expedition :05/04/2019 Date Acceptance 2019/05/05

FAMILY MEDIATION (SYSTEM OVERVIEW)

الوساطة الأسرية (نبذة عن النظام)

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Abstract

Family mediation is one of the most widely used alternative ways of resolving family disputes, in addition to its positive benefits of alleviating the burden of litigation.

key words: Family Mediation- Turkish Civil Code-Family Law

المخلص: تعد الوساطة الأسرية واحدة من أكثر الطرق البديلة المستخدمة على نطاق واسع لحل النزاعات العائلية ، بالإضافة إلى فوائدها الإيجابية المتمثلة في تخفيف عبء التقاضي.

الكلمات المفتاحية: الوساطة العائلية - القانون المدني التركي - قانون الأسرة

I- GENARALLY

Mediation² is one of the emerging methods of alternative solutions in the world. Easy and fast way to solution. It has been brought to the justice system in order to reduce the burden of the judiciary since 2012. Due to being a peace-based system, serious studies are carried out in our country for the implementation to be effective and to be developed. One of these studies is “Family Mediation”. Family mediation is able to find more practise area in the families in divorce or separation phase and families with children. In this system, the future of the child is taken into account and in the case of divorce and separation, the child is expected to continue with the least damage. In Europe, Family Mediation³ is widely used. Each country has legislation in line with its social structure. At the moment, the mediation system is carried out only by mediators who are graduated from law faculty. Being a family mediator is a special area that requires a separate education and knowledge. For this reason, it is recommended to be carried out with support mechanisms such

as pedagogue, family counselors, psychologist and spouse mediator.

II- BASIC PRINCIPLES MEDIATION

Mediation is a system with its own rules. There are basic principles to maintain the validity of the system while implementing mediation. The legislator regulated these principles in the law. Many rules, from the beginning of the mediation process to the management of the process, are included in the laws and regulations.

In order to be able to learn these rules correctly and to manage the process without any mistake in practice, we can say that the requirement of 84 hours of training with the exam in order to gain this profession is obviously put into effect for this system to function. The basic training in mediation provided by the experts is taught in an interactive way how these rules will work and how they will function within the legal system and they are handled in a completely different way from the status of attorneys, judges, and arbitrators⁴.

While applying mediation, the basic principles should be taken as basis. It is important for the parties to know that both sides are equal in the mediation negotiation as well as whether they participate in the process or not, and that this matter should be said once again by the mediator. Knowing that the process is a secret process also increases the confidence of the mediation. Any third party, except for those participating in mediation negotiations, cannot see and know the decisions taken in this process, the minutes kept and the documents presented in the process.

A- Willingness

The mediation process is a system that is voluntarily carried out and the parties' wills are effective at every stage of the process and sldo where the parties can participate with their own will. as opposed to the court. According to LAW ON MEDIATION IN CIVIL DISPUTES (hereinafter LMCD) article

3; “The parties shall be free to resort to a mediator, to continue or finalize the process, or to renounce such process⁵”.

B- Equality

The mediation system is based on the principle of equality. The parties have equal rights in all matters before the mediator. This principle is applicable to mediation parties without any status differences.

C- Confidentiality

Every stage of mediation is Confidential. It starts from the invitation stage until the end of the mediation process. Confidentiality is also the same for mediators. According to the law, the minutes must be kept confidential by the mediator for 5 years. confidentiality binds all parties, including mediators, and all third parties⁶.

D- Impartiality

The mediation process is carried out by a impartial and independent third party mediator. It is regulated in Article 9 of the LMCD as “The mediator shall perform his/her duty carefully, impartially and personally.”

E- Confidentiality of Declaration and Documents

Non-usability of statements or documents is also regulated in the mediation law. the information submitted by the parties during the mediation process is as important as the documents. Because the parties can choose the way of the court in case of non-agreement. In this case, It will not be possible to evidence a document again in court if it is offered as evidence in the mediation process.

III - DEFINITION OF FAMILY MEDIATION

Family mediation is parents during divorce or separation least damage helps them enter the divorce or separation process. Many people dont want to go to divorce or separation way. They dont choose this way. But life may not go as we want. For thats time child is important. Our children comes before our life. Family mediation is alternative way to court.

Mediation is the process by which families can negotiate about future arrangements for children with the help of a neutral

third party. The mediator does not tell parties what to do, but can help the parties to reach their own agreements amicably, whilst trying to improve communication between them.

The mediator is an impartial 3rd person who acts in a systematic way, but who helps them find solutions to their own family without referring to their family members. Mediation, which is an alternative dispute resolution solution, is an important legal solution for family law. In terms of both the burden of the court and social gain, mediation is a legal remedy that should be preferred. I believe that it will be more beneficial to find a solution by going to the mediator rather than going to the court in order to have families that do not disintegrate and to Furthermore, disputes gain an international direction by the removal of borders and also by the free movement of goods and capital. In this context, alternative dispute resolution methods such as mediation have become crucial. On the other hand, in accordance with the Mediation Law in Civil Disputes (Mediation Law), civil disputes which can be disposed freely by parties of the conflict are within the scope of the mediation. Contrary to this, international regulations have encouraged the implementation of mediation techniques, particularly, in the areas of family law requiring the continuation of the relationship. These arrangements emphasized the importance of the mediation in a custody case, establishment of personal contact (access right) and return of the child to his or her habitual residence within the scope of the Hague Convention of 1980. Particularly, a Guide book was published by Hague Conference explains the implementation of the mediation in family matters in the context of the Hague Convention. Although it has recently become a current legal issue in our country, mediation dates back to at least 30 years ago in developed countries. Mediation practice started around late 1970's in Britain, and its origins in USA dates even before.

This study examines the family mediation dimension of the phenomenon which is assumed to be implemented in every single field where human relations and interaction prevail. The study is comprised of the rationale of family mediation,

conceptualexplanations and the process of practice.

For all these reasons, the parties have begun to seek solution to resolve their disputes extrajudicially. The tendency towards the ending of the disputes among the parties without extrajudicially, has brought with a number of regulations. For this reason, alternative dispute resolution methods have emerged in recent years.

IV- REGULATION OF FAMILY MEDIATION IN THE LAW ON MEDIATION

Family mediation has not yet been regulated by The Turkish Civil Code. Some proposals were submitted to the parliament for legal regulations on this issue, but we can say that there is no progress yet. We can truly say that Family court judges are in a certain effort to not divorce the parties applying for divorce. In fact, some of the applicants can enter into a disputed divorce process, while the other applicant may prefer consensual divorce.

Family Law⁷ and family courts⁸ has its own special arrangements. Family is fundamental for Turkish society. Therefore, the elimination of family unity, the process of divorce is not as easy as marriage, but rather a difficult process. Although consensual divorces are easier, the trial process is still difficult for everyone. For this reason, the areas where mediation finds its application area are customized. Therefore, mediation is not a solution for every dispute. Major issues have been excluded from mediation. One of them is domestic violence.

Family law may be subject to provisions concerning public order. For example, the mediator cannot decide on the status of the family member who has suffered domestic violence or who will remain with the child or cannot guide the family members. Article 1/2 of LMCD clearly states which cases are appropriate for mediation which cases are not.

Article is as follows *“This Law shall be applied in private law disputes, arising solely from the acts or proceedings which the parties may freely dispose, including those possessing the element of foreignness, in so far as disputes containing domestic violence are not suitable for mediation.”* It is obvious

that article explicitly excluded violence from mediation. Violence should not be considered only as physically. There are also psychological, economic and sexual dimensions of violence.

In the light of all these considerations, whoever is subjected to violence and the party who makes the violence is not suitable for mediation even if they regret this situation.

Parties seeking to resolve a legal dispute through mediation can make mediation activities valid by typing the current mediation activities on the mediation agreement. The party or parties wishing to receive annotation of enforceability from the court concerning this agreement shall apply to the court and get the agreement valid as a decision taken from the court. LMCD has a special provision on family mediation. Article 18/3 of LMCD regulation is as follows; *“The issuance of the annotation of enforceability is an undisputed judicial act and the examination concerning this may be carried out through the file. However, in family law disputes suitable for mediation, the examination shall be held in hearings⁹”*

V - FAMILY MEDIATION IN TURKEY

We can say that the admission process of the family mediation will not be the same with the admissions process of mediation in Turkey. Although each family has its own privacy, they usually don't prefer any 3rd person to be involved in family even daily problems. That's why getting help from family mediators during the separation and divorce processes will probably be much more difficult.

Aside from the troubles experienced, the emotional expectations and collapses of family members cannot be heard by others and they cannot make their voices heard. This brings unresolved results to the family.

Children are the most affected members of this situation. For family, for children, court system is a difficult process but family mediation is easier than court process. Therefore we recommend the mediation system.

It is a good choice for family members to apply to family mediators if they want to have a healthy separation or divorce.

Although a new system will not be easy to bring the country's judiciary, Turkey 'judgment is sought to ease heavy burden of judicial system with implementing these innovations step by step. For this reason, family mediation will be brought about after the accepted innovation of "the mediation in labor law". Parental divorce or separation stage of going to family court to initiate legal process is within the scope of the Turkish Civil Code.

In order to protect the best interests of the children, our suggestion for family's is primarily apply to the family mediators and try to find a solution to their financial and moral wishes in front of the family mediator. Should not be forgotten, The child's interest is important.

It may not be easy for the parents, who are considered to have a closed structure, to communicate their problems orally to each other. Facilitators are also expert family mediators.

The family mediation system targeted in Turkey is primarily based on having family mediation specialists completed at least 400 hours of training to take place. Many changes are also targeted, such as the establishment of family centers as a place where the children and parents can feel themselves well in a comfortable environment, as well as providing expert pedagogues and assistance from social workers when necessary

VI - INTERNATIONAL FAMILY MEDIATION REGULATIONS

Family mediation¹¹ legislation has not been regulated yet. It is not included in the Civil Code. We see that family mediation is widely used and effective results are obtained in many European countries and especially in European Union member countries¹².

Aside from mediation, we can say that the functioning of the family mediation system differs from country to country. Regarding the regulations on this subject¹³;

- International Family Mediation Guide (ISS 2014)

- The Hague Convention on the Legal Aspects of International Child Abduction
- Australian Family Law Act 1975
- Family Law Act 1996 in England and Wales
- European Union's 2008/52 Mediation Directive
- Ongoing Parenting Law after Dutch Divorce
- Swiss Unified Law Act
- Council of Europe Committee of Ministers Recommendation R (98) 1 on Family Mediation (CEPEJ).

All these arrangements are based on the best interests of the child. The most important factor in Turkey's implementing mediation system into the legislation is also being European Union candidate country. It is expected that the adoption of Family Mediation will be shaped by legal regulations.

VII - S A RESULT

As a result; In practice, mediation is accepted as a preferred alternative solution rather than a court. Family mediation should also be developed for mediation and studies should be carried out. Both the Ministry of Justice and the Ministry for Women and the Family should do serious work for the legal arrangement of this important solution and this should be adopted as a compulsory solution before the court's decision. In addition to the lawyer identity of the mediator who will carry out a study on this issue, he / she should be able to grasp the meaning of family law and people, establish empathy¹ and most importantly win all the family members with the WIN-WIN method.

Healthy families create happy communities. Solving the problems in the family will be the future of the young people and these will be the stones of the society. For this reason, it will always be useful and correct to prefer "Family Mediation" system that is based on negotiation by talking instead of a court-based separation or divorce.

List of references

1-AKSOY Barış/KOÇ Selahattin/BOZTOSUN Selahattin,
"Türkiye'de Finansal Uyuşmazlıkların Çözümünde

Arabuluculuk Uygulamalarının Analizi”,International Journal of Social Sciences and Education Research, (3) 5, 2017, (P. 1868-1880).

ÇALIŞIR Kurtuluş Tayanç , “**Arabuluculuk**”, Adalet Publisher, Ankara, 2015.

2- DEMİR Şamil, “**Avukatın Uzlaşma Sağlama Yetkisi**”, Adalet Publisher, Ankara, 2011.

3- ERDOĞAN Ersin/ERZURUMLU Nurbanu, “**Hukuk Uyuşmazlıklarında Türkiye’nin Arabuluculuk Tecrübesi ve Zorunlu Arabuluculuk Taslağı**”, SETA, Seta Publisher, İstanbul, 2016.

4- EROL Muammer, “**Türk Hukukunda Arabuluculuk ve Teşkilatlanması**”, Adalet Publisher, Ankara, 2018.

5- GÜLLÜOĞLU Yasemin, “**Aile Arabuluculuğu (Family Mediation)**”, İdeal Hukuk Journal (Aile ve Hukuk ‘Family and Law’), Hukukçular Society Publisher, Bahar 2015, : 4. Year, Number: 3.

6- KARACABEY Kürşat, “**Zorunlu Arabuluculuğun Hukukun Temel İlkelerine Aykırılığı ve Uygulanabilirliğine Dair Sorunlar**”, Ankara , 2016/1, (S. 457-489).

7- KÖSEOĞLU Bilal/KOCAAĞA Köksal, **Aile Hukuku ve Uygulaması**,Ekin Publisher, Bursa, 2011.

MOORE Christopher W.,**Arabuluculuk Süreci (The Mediation Process) Anlaşmazlık Çözümünde Pratik Stratejiler**, Nobel Publisher, Ankara, 2016.

8-ÖZBEK Mustafa, “**Avrupa Birliğinde Alternatif Uyuşmazlık Çözümü**”, TBB(Turkey Lawyer Assosiation)Journal, Number: 68, 2007, s. 268.

9- ÖZEKES Muhammed, “**Uyuşmazlık Çözüm Yolları İçinde Arabuluculuk ve Bir Düzenleme Önerisi**”(HPD, 2006/7, p.40–45).

10-ÖZMUMCU Seda, “**Uzak Doğu’da Arabuluculuk Anlayışı ile Türk Hukuk Sisteminde Arabuluculuk Kurumuna Genel Bir Bakış**”, On İki Levha Publisher, İstanbul , 2013.

11- PARKINSON Lisa , “**Aile Arabuluculuğu, Yeni Aile Adalet Sistemine Dair Uygun Uyuşmazlık Çözüm Yöntemi**”, Ministry of Justice Publisher, Ocak, 2018.

12- ŞAHİN CEYLAN Şule, “**Geleneksel Toplumdan Modern Topluma Alternatif Uyuşmazlık Çözümü**”, XII Levha Publisher, İstanbul 2009.

13- ŞAHİN Hüseyin Güngör, “**Arabuluculuk**”, Mentis Publisher, Ankara 2008.

14- YEŞİLIRMAK Ali, “**Doğrudan Görüşme, Arabuluculuk, Hakem-Bilirkişilik ve Tahkim**”, On İki Levha Publisher, İstanbul, 2011, p. 9-10;

ONLINEREFERENCES

[http://tr-smart.com/hizmetler/fasilitasyon/-](http://tr-smart.com/hizmetler/fasilitasyon/)

[http://facilitationreloaded.com/.](http://facilitationreloaded.com/)

[http://metinreyna.com/39/siddetsiz-iletisim-bir-yasam-dili/ .](http://metinreyna.com/39/siddetsiz-iletisim-bir-yasam-dili/)

http://www.adb.adalet.gov.tr/Sayfalar/soru_gorus_oneriler/index.html#

http://www.adb.adalet.gov.tr/Sayfalar/soru_gorus_oneriler/index.html# Toc361272832

[http://www.adb.adalet.gov.tr/Sayfalar/MEVZUAT/kanun.html .](http://www.adb.adalet.gov.tr/Sayfalar/MEVZUAT/kanun.html)

Marginalization

2 . mediation is an alternative solution method. According to the court fast, easy and cheap system.http://www.adb.adalet.gov.tr/Sayfalar/soru_gorus_oneriler/index.html# ; YEŞİLIRMAK Ali, “**Doğrudan Görüşme, Arabuluculuk, Hakem-Bilirkişilik ve Tahkim**”, On İki Levha Publisher, İstanbul, 2011, p. 9-10; ÖZMUMCU Seda, “**Uzak Doğu’da Arabuluculuk Anlayışı ile Türk Hukuk Sisteminde Arabuluculuk Kurumuna Genel Bir Bakış**”, On İki Levha Publisher, İstanbul , 2013, p. 22.

http://www.adb.adalet.gov.tr/Sayfalar/soru_gorus_oneriler/index.html# Toc361272832 (online 06.07.2018);ÖZEKES Muhammed, “**Uyuşmazlık Çözüm Yolları İçinde Arabuluculuk ve Bir Düzenleme Önerisi**”(HPD, 2006/7, p.40–45), p.43.

3-

http://www.adb.adalet.gov.tr/Sayfalar/soru_gorus_oneriler/index.html# Toc361272832 (online 06.07.2018);ÖZEKES

Muhammed, “Uyuşmazlık Çözüm Yolları İçinde Arabuluculuk ve Bir Düzenleme Önerisi”(HPD, 2006/7, p.40–45), p.43.

4<http://www.adb.adalet.gov.tr/Sayfalar/MEVZUAT/kanun.html> (online- 01.05.2018); *Mediationis is in the english language “mediation” Latin “medius,medium” “mediation” (turkish: arabuluculuk), “conciliation” “reconciliation” , “metitation” see for concepts:*PARKINSON Lisa , “**Aile Arabuluculuğu, Yeni Aile Adalet Sistemine Dair Uygun Uyuşmazlık Çözüm Yöntemi**”,Ministry of Justice Publisher, Ocak, 2018, p. 8-9; ÇALIŞIR Kurtuluş Tayanç , “**Arabuluculuk**”, Adalet Publisher, Ankara, 2015, p. 8; DEMİR Şamil, “**Avukatın Uzlaşma Sağlama Yetkisi**”, Adalet Publisher, Ankara, 2011; ŞAHİN Hüseyin Güngör, “**Arabuluculuk**”, Mentis Publisher, Ankara 2008, S. 45; ÖZBEK Mustafa, “**Avrupa Birliğinde Alternatif Uyuşmazlık Çözümü**”, TBB(Turkey Lawyer Assosiation)Journal, Number: 68, 2007, p. 268; GÜLLÜOĞLU Yasemin, “**Aile Arabuluculuğu (Family Mediation)**”, İdeal Hukuk Journal (Aile ve Hukuk ‘Family and Law’), Hukukçular SocietyPublisher, Bahar 2015,: 4. Year, Number: 3, p. 98.;MOORE Christoper W., **Arabuluculuk Süreci (The Mediation Process) Anlaşmazlık Çözümünde Pratik Stratejiler**, Nobel Publisher, Ankara, 2016, p. 8; KARACABEY Kürşat, “**Zorunlu Arabuluculuğun Hukukun Temel İlkelerine Aykırılığı ve Uygulanabilirliğine Dair Sorunlar**”, Ankara , 2016/1, (S. 457-489), p.458; ERDOĞAN Ersin/ERZURUMLU Nurbanu, “**Hukuk Uyuşmazlıklarında Türkiye’nin Arabuluculuk Tecrübesi ve Zorunlu Arabuluculuk Taslağı**”, SETA, Seta Publisher, İstanbul, 2016, p.9; EROL Muammer, “**Türk Hukukunda Arabuluculuk ve Teşkilatlanması**”, Adalet Publisher, Ankara, 2018, p.7

- 5 -ŞAHİN CEYLAN Şule, “**Geleneksel Toplumdan Modern Topluma Alternatif Uyuşmazlık Çözümü**”, XII Levha Publisher, İstanbul 2009, p.4
- 6 -AKSOY Barış/KOÇ Selahattin/BOZTOSUN Selahattin, “**Türkiye’de Finansal Uyuşmazlıkların Çözümünde Arabuluculuk Uygulamalarının Analizi**”, International Journal of Social Sciences and Education Research, (3) 5, 2017, (P. 1868-1880). p. 1871
- 7 -Parkinson, s. 9.
- 8 -KÖSEOĞLU Bilal/KOCAAĞA Köksal, **Aile Hukuku ve Uygulaması**,Ekin Publisher, Bursa, 2011.p. 353
- 9 -Aksoy/Koç/Boztosun, p. 1871.
- 11 - Parkinson, p. 9.
- 12 - ÖZBEK (AB), p. 265.
- 13 -Aksoy/Koç/Boztosun, p. 1869-1870
- 1- <http://metinreyna.com/39/siddetsiz-iletisim-bir-yasam-dili/>
(online 04.08.2018)