RICK V. BRANDESMA- LESSONS IN FAMILY MEDIATION WHERE SPOUSE IS MENTALLY UNSTABLE

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ABSTRACT

The author has studied the judgment of the Supreme Court of Canada in Rick v. Brandesma, a divorce dispute, where the Settlement agreement entered into between the parties was challenged on grounds of unconscionability. The settlement agreement in question was formulated and agreed upon by the parties in the course of mediation with two different mediators. The author has used this case to comment upon mediation in family disputes where one of the parties is mentally unstable; the wife questioning the validity of settlement agreement in Rick was a victim of domestic violence and suffered from mental infirmities.

The main analysis can be divided into two parts; while the first part defines the mediator's approach in similar cases to ensure that each party gets what is right amicably, the second part can be further divided into two heads- firstly, mental capacity of parties to mediation and secondly, making mediation more accessible to people with mental illnesses. The paper concludes with a small paragraph on the job that family mediators can do to keep the children unaffected and untouched from the tussle which ensues between their parents.

The paper aims to generate awareness in the Indian mediation academia by taking cue from the failure of mediation in family dispute in a country which has made it a crucial part of its dispute resolution mechanism.

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1. INTRODUCTION

Rick v. Brandesma is a 2009 Canada Supreme Court (SC) judgment on the distribution of family assets and the element of unconscionability which crept in the separation agreement entered into by the husband and wife. This matter, coming on appeal from the British Columbia Court of Appeal, involved mediation to give effect to the parties' intent to divide their assets equally; however the husband, aware of his wife's fragile mental health, provided misleading financial information during mediation ultimately resulting in unequal asset distribution. An instance of mediation failing to fulfill its real purpose-achieving finality in the dispute-blame can easily be attributable to the experienced, commercially astute husband who concealed material information; however there are lessons to be learnt as a mediator from this case.

1.1. Facts:

The parties in this case, married for 29 years with five children, had acquired a dairy farm together along with other real property and vehicles. On divorce, the parties hired their respective lawyers and engaged the services of a mediator for negotiations on the separation agreement. During mediation, the husband provided false information on assets and liabilities of the dairy farm for asset distribution. As per the MoU prepared by the mediator, the husband was to keep the dairy farm businesses while the wife would receive the family house and a sum of $750,000. On repeated requests by the wife's lawyer, the husband provided the Form 89 financial statement during the fall of 2001 when mediation commenced with a second mediator. The Net Asset Value (NAV) of Brandy Farms as per the statement was a value approximately $300,000 higher than the value presented in the first mediation, which was used to arrive on the $750,000 equalization payment. A second MoU was then agreed upon and signed by the parties in October 2001; however no substantial amendments were made therein. The wife also informed the second mediator about her two-pronged approach, that first she would sign a separation agreement to meet her basic needs and subsequently, obtain justice. A year later, in March 2003, the wife sought to set aside the separation agreement on grounds of unconscionability and misrepresentation and subsequently, claimed relief under Section 65 of the Family Relations Act.[2]

[2] *Family Relations Act* 1996, s.65, (Canada).

The agreement was found to be unconscionable in the Trial Judge's opinion since the husband had deliberately concealed crucial information concerning the farm's net assets during mediation, taking undue advantage of the wife's fragile mental health of which he had prior knowledge. In spite of the parties' express intent to divide their assets equally, misrepresentation on the husband's part meant that the resulting equalization payment failed to meet the requirements under British Columbia's Family Relations Act. The Trial Judge after considering the peculiar circumstances of the case awarded the differential amount to the wife. The Court of Appeal reversed this finding to conclude that even though the wife suffered from mental infirmities, it had been effectively compensated for by the availability of a counsel to assist her throughout the process. However, the Canadian SC reversed this finding and agreed with the Trial Judge's observations while allowing wife's appeal, acknowledging the special care that needs to be taken in distribution of assets arising from a former relationship so that the same is free from informational and psychological exploitation. [3] Since the present agreement is in substantial deviation from the objectives enshrined under the Family Relations Act, the same was held to be unconscionable and hence, unenforceable by the SC.

2. BACKGROUND

Under the Canadian law, the spouses have been given the freedom to enter into separation arrangements like spousal support and asset division on separation; however the judiciary intervenes when such an arrangement is unfair to one of the spouses. *Rick* was one such instance of judicial intervention in an otherwise private affair, where the SC appreciated the difference between a separation agreement and commercial contract in terms of the power relations and gender vulnerabilities. There are no hard-and-fast guidelines determining grounds for judicial intervention in a separation agreement; however the spouses' financial position, power dynamics and informational access are some of the relevant factors which the courts generally look into. In *Rick*, the Canadian SC gave two reasons for declaring the separation agreement unconscionable[4]:-

[3] *Rick* v. *Brandsema*, 2009 SCC 10 (Supreme Court of Canada).

[4] Ibid.

i. Husband taking undue advantage of wife's mental troubles.

ii. Husband concealing material information about finances.

This case is peculiar and thus, requires a second look for another reason. Breakdown of spousal relationships is a time of intense emotional, mental and personal turmoil, which might leave both the husband and wife extremely vulnerable.[5] The situation worsens when there are inherent power imbalances in the relationship. Keeping this in mind, the Canadian SC in *Miglin*[6] recognized the need to treat separation agreements differently from commercial contracts which are often negotiated between parties of equal strength.

The courts have tried to limit their intervention in private matters by giving way to negotiations between parties to arrive at a mutually amicable solution. However, what has happened more often than not in these negotiations is a blatant suppression of the woman's interests due to various socio-economic factors which shape gender roles in the modern world.[7] For instance, a wife in order to maintain a cordial relationship with her children and in some cases, the separating spouse may not take a rigid stance regarding her property and other rights to which she is entitled. It is here that the role of the mediator assumes paramount importance; he, as a neutral, unbiased third party, has to ensure that the weaker party in negotiations isn't bogged down by the gender and family dynamics and is freely able to assert his/her position.

Will is one of the core concerns of contract law; the will theory is based on the notion that contractual duties become binding on a person as they have been freely assumed by him/her. Hence, 'free consent' of both parties is one of the essentials for a valid contract, that is to say parties must agree upon the subject matter of the agreement in the same sense. The law further infers that any agreement induced by fraud, misrepresentation, coercion or mistake would fail to satisfy the 'free consent' test; such contract will be a voidable contract. It is very important to ensure that the separating spouses fulfill their duty of

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5 Ibid.

6 *Miglin* v. *Miglin*, 2003 SCC 24 (Supreme Court of Canada).

7 Case Comment: Rick v. Brandsema, Separation Agreements and Rural Women', OWJN, available at http://owjn.org/owjn_2009/component/content/article/44-rural-women/319-case-comment-rick-v-brandsema-separation-agreements-and-rural-women, (last accessed 24 July 2016).

providing full and honest disclosure of all relevant information to the mediator. At the same time the mediator should, in order to ensure finality in such disputes, keep persuading the parties to divulge by posing questions time and again; this is also important in order for the settlement agreement to become a legally enforceable contract.

A meeting of minds of the parties is of utmost importance in such cases, to ensure that both parties divide their assets equally through a judicious application of their mind, without any constraints of fear, hesitation or gender dynamics. Where misrepresentation happens pertaining to the financials of a company during negotiations over settlement agreement, it becomes impossible to conclude a bargain acceptable to both the parties, which ultimately hampers the finality of a dispute

All facts in a nutshell, the separation agreement entered into between the separating couple was questioned by the wife on the ground of misrepresentation by husband in the financial statements of the dairy business. She is also mentally unstable and hence, as observed by the Trial Judge and subsequently affirmed by the SC, the wife can't understand the commercial nitty-gritties. Precisely this was sought to be exploited by the husband during negotiations, which ultimately led to the judiciary intervening in the wife's favor. In this factual background, the author seeks to explore the ideal approach for the concerned mediator in similar circumstances specifically, and generally in instances of misrepresentation by any/both spouse(s).

3. MEDIATION WITH THE MENTALLY UNSTABLE- LESSONS FROM *RICK*

Mediation, one of the mechanisms of Dispute Resolution, is widely used in family law and property cases in India and throughout the world. It is a process where the separating spouses, either alone or along with their lawyers, meet a neutral facilitator (mediator) to resolve their conflict amicably. The author decided to study *Rick* for two reasons, first, it is different from other mediations in the sense that the wife herein was mentally unstable; hence the circumstances and subsequent judicial intervention on grounds of informational and psychological exploitation are peculiar. Second, the case provides an opportunity to argue for making mediation equally accessible for the mentally challenged. Mediators aren't exactly best-equipped to decide whether a party has the

mental capacity to participate in mediation, hence it is mostly a value-based judgment. However before making such judgment, it is absolutely essential to have an accessible mediation practice, that is to say, a mediator should discuss the access needs with parties suffering from mental disorders before the commencement of mediation.

Before moving on to the main discussion, it is necessary to bring to the reader's attention that the author doesn't intend to examine the SC's decision or opine if the same was right or wrong. The present case has been studied to the extent of picking up relevant facts for the purposes of this paper and the reasons for judicial intervention, since it essentially pointed towards the failure of mediation in the present dispute. The author intends to use the facts of this case as a stepping stone to formulate guidelines for mediators mediating in similar cases, while also placing due reliance on personal experience and limited literature available on this issue.

The first most important thing for the mediator to understand in such cases is the emotionally charged environment following the disintegration of a marriage which forms the backdrop for the negotiation of the separation agreement. Since mediation, post-split, would be the only place where separating spouses would sit down across a table, it would quite often lead to expression of emotions and frustration from both sides. At that time, it becomes extremely important for the mediator to provide a controlled environment for such discussions, since excessive show of frustration by one party might deter the other from negotiating, which will ultimately be a failure of mediation. Such an environment would also ensure that the underlying concerns of the parties are discussed freely which would provide the mediator with an improved perspective of the dispute.

The mediator's role is to facilitate the information exchange between parties as well as explore the various settlement alternatives after identifying the issues and the underlying interests of the disputants. The biggest benefit of mediation is the high client satisfaction rate with the settlement, especially when the parties actively participate in the discussions. Over the course of such mediation, the mediator has to get the parties to think beyond merely securing a personal victory over the other since, more often than not, the biggest casualties in a divorce are the children.

Coming back to the specifics of *Rick*, what can a mediator as a neutral third-party do to ensure that the distribution of assets during negotiations between the spouses is free from informational and psychological exploitation? In the present case, the SC found the settlement agreement to be unconscionable and, as a result, unenforceable since the same was hampered by informational asymmetry. Going back to the mediation in *Rick*, the parties' intent to divide their assets equally is evident. It is also evident from the facts that the MoU prepared by the first mediator kept the equalization payment at $750,000, after placing reliance on the financial information provided by the husband on the dairy farm's assets and liabilities.

On reviewing the MoU, the wife's lawyer made repeated requests for the production of the Form 89 financial statement, however the same was provided much later after the commencement of mediation with a second mediator; this statement listed the company at a value which was $300,000 higher than the one presented in the previous mediation. Though a second MoU was agreed to and signed, it was mostly the same as its previous version along with the $750,000 equalization payment. This anomaly could partly be attributed to the second lawyer who failed to appreciate the inequalities in what was supposed to be an equal distribution of assets.

What can a mediator do in similar situations, instances where one of the parties is a victim of domestic violence, mentally unstable and easily exploitable? First of all, the mediator has to exercise a great deal of caution and carefully strategize for every session since he will be required to maintain a neutral position at all times, even though he might empathize with the wife. However, once it is evident that one of the parties is trying to conceal some crucial information during negotiations, the mediator can 'lose his neutrality' to the extent of getting out all information on the table in order to enable the other side to make an informed decision, with due assistance from the legal counsel available.

One might argue that it is easier said than done. One might also argue that losing neutrality during mediation would be detrimental to the proceeding itself as parties might lose confidence and view the mediator as a partial, biased personality. All these arguments can be refuted two-fold: first, losing neutrality herein doesn't mean that the mediator would favor one party over the other during negotiations but only do so to get crucial information out and avoid any informational asymmetry. Losing

neutrality in a restricted sense becomes necessary since a mediator is a facilitator whose job is to ensure the closure of such disputes. The same can be done by having private sessions with both sides; where the mediator feels that a party is trying to conceal information, attempts should be made to make the party see the logic in not doing so. For example, the mediator can try explaining the drastic consequences of the same, one of which is judicial intervention in cases of unconscionable agreements as in *Rick*, where mediation proved to be a failure since it couldn't provide for the closure of the dispute. At the same time the mediator should ensure, while having a private session with the other party, attendance of counsel as and when required; this is important as a woman who has been a victim of domestic violence and suffers from mental infirmities might be exploited by her husband due to the gender dynamics at play.

At all times, the mediator should keep in mind the circumstances in which the parties have come for mediation. Divorce is the death knell not only for a couple's marriage but also for the hopes and dreams they had shared and seen together, hence parties are on an emotional roller-coaster[8]. Parties in this stressful period feel abandoned and emotionally drained, which eventually gives way to fear, loneliness and vulnerability. Parties turning to the mediator to advice and counsel them through this tumultuous period is common in mediation sessions; hence it becomes very important to choose a mediator who can not only get the parties to amicably settle their differences but also enable them to get their lives back on track.

Such counseling can either happen during a caucus with the parties in one or multiple turns or in the joint session itself, however it is advisable that the role of legal counsels for both parties should be limited to negotiating a fair and equitable settlement. There are multiple approaches which a mediator can adopt for counseling and guiding parties; an effective way to do so is asking open-ended questions which would provide an outlet for the pent-up emotions of the parties. Doing so would not only make the parties more comfortable during mediation but also remove the barriers that have been blockading effective negotiations. Needless to say, the mediator should provide for breaks in his valued judgment if the parties get too emotional during the session.

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8 What is ADR (Alternative Dispute Resolution) and Mediation in Texas?', HG.org, available at https://www.hg.org/article.asp?id=5802, (last accessed 24 July 2016).

However, the mediator should at the same time be aware that such open ended questions during joint session would only lead to mud-slinging and further deterioration of the relationship between parties. In order to avoid the same, the mediator can conduct caucus with individual parties and disclose the statements of one party to the other with the permission of the former.

3.1. Party's capacity to use mediation for settlement:

Time and again, experienced mediators have observed that dispute resolution through mediation may not be that good an idea for the mentally unstable, especially when the law on contracts clearly states that one of the four elements to a contract is the mental capacity of parties.[9] In other words, a person must be mentally capable to enter into a binding legal agreement with a full understanding of its terms. Though there are mediators who double as mental health professionals and thus, have the competence to determine if a particular party is mentally capable to knowledgably enter into a legal agreement, a significant chunk of mediators in India lack the requisite expertise. In this light, it becomes important to have some criteria for mental capacity and guidelines for the mediator to determine the same. This is necessary since the very purpose of having mediation is to arrive on a 'mutually acceptable' solution; achieving this purpose might be hampered where a party suffers from mental infirmities. Where one of the parties is mentally incapable to participate in mediation, the resulting power imbalance would lead to unequal bargaining power in the negotiations. Since a mediator can only act as a facilitator, not much can be done by him in the aforementioned cases where the party itself isn't in a position to decide upon their best interests.

However, let's focus on the issue at hand here. Clearly, not all mediators would be able to determine the status of a party's mental health; however, what is important to ensure for the success of mediation is that the party is able to participate meaningfully in the joint sessions and caucus. A party might state during mediation that he/she is being treated for mental infirmities; however the mediator should steer clear of forming assumptions on the basis of such statements. As long as the party understands the discussions during mediation as well as speaks out his/her mind on his/her own freely, then it can be safely assumed that mental infirmities wouldn't be a roadblock in mediation.

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[9] 'Determining 'Legal Capacity in Mediation', Mediate.com, available at http://mediate. com/articles/linden16.cfm, (last accessed 24 July 2016).

The mediator often assists the parties in determining their self-interests; however the main job in this respect is to be done by the parties themselves, that is, they should be able to put forth their demands in the session and the relevant issues arising therefrom. The power of self-determination is an important component of any mediation proceeding; the mediator is under ethical obligation to ensure that parties have the same. It basically means that parties have the power to determine what is acceptable; the mediator can in no event opine on the acceptability of an agreement formulated in the mediation at hand. Where the mediator is of the opinion that the party(s) will be unable to indicate their acceptability after taking into account their self-interests, then such mediator is under an obligation to impasse the mediation.[10]

Where a party reveals that he/she suffers from mental illness-such a revelation would mostly happen in caucus-the mediator should make an attempt to find out the reasons behind such disclosure. Questions like "How do you think this might impact our conversations together?", "How do you imagine I might be helpful differently, knowing this?"[11] will come in handy, since such disclosure might have been made to the mediator for a specific reason.

To decide whether a person has the mental capacity to participate in mediation is an 'on-the-spot' issue; only psychiatrists and psychologists are best equipped to decide upon the same. However, a mediator, before making a judgment on the mental capacity of a party, should ask three questions[12]:-

i. Does the party receive all information in totality?

ii. Does the party integrate the above-mentioned information rationally?

iii. Is this party able to communicate the results to the mediator?

There are several approaches for determining the mental capabilities of the disputing parties in mediation, such as educational[13], multiple

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10 Ibid.

11 Ibid.

12 Ibid.

13 Educational Theory- Persons entering into a contract must possess knowledge, comprehension and application (decision making).

intelligences[14], critical thinking[15], decision-making[16] and legal[17]; these theories assist the mediator in deciding whether mediation should be continued with or not. Where a party is unable to care for his/her person or property due to mental infirmities, then such party can be said to be legally incompetent to enter into a contract; mediation can't be employed for dispute resolution in such cases.

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[14] Multiple Intelligences- Developed by psychologist Howard Gardner, the theory suggests seven ways in which people perceive and understand the world. Each of these ways constitutes a distinct "intelligence", a set of skills allowing individuals to find and resolve problems they face.

[15] Critical Thinking- Angelo (1995) characterizes critical thinking as "*the intentional application of rational, higher order thinking skills, such as analysis, synthesis, problem recognition and problem solving, inference, and evaluation*". According to Beyer (1995), "*Critical thinking . . . means making reasoned judgments* ".

[16] Decision-making theory- Morton Deutsch, a social psychologist (2000) observes that decision-making is … *to decide on well-considered, well-understood, realistic action toward goals every member wishes to achieve*. Making a decision is just one step in the general problem-solving process of goal-directed groups—but it is a crucial one. To ensure high-quality decision making, each alternative must firstly, receive a complete and fair hearing and secondly, be critically analysed to reveal its strengths and weaknesses.

[17] There are four legal conceptual models:-

(i) The Roth, Meisel, & Lidz Formulation- This model, developed by a psychiatrist, lawyer, and sociologist lays down five different criteria for determining legal capacity:-

(a) Showing choice

(b) Outcome of choice is reasonable

(c) Choice based on "rational" reasons

(d) Ability to Understand

(e) Actual Understanding

(ii) The President's Commission Study- Decision making capacity primarily requires three elements: (1) possession of a set of values and goals; (2) the ability to communicate and understand information; and, (3) the ability to reason and deliberate about one's own choices.

(iii) The Sliding Scale Model- The more serious the mental condition, the more stringent is the capacity considered (Weyrauch, 2000). Accordingly, the standards are higher for the decisions requiring more serious care.

(iv) The MacArthur Treatment Competence Study- The study which began in response to criminal law defenses of insanity sought to determine adjudicative "capacity". Its social contribution was a test to determine "legal insanity."

4. *Making mediation accessible to people with mental infirmities*

This section of the article is the most important section, especially since the main intent of authoring this paper was to talk about how mediation can be made more accessible in India, with specific focus on people with mental disabilities. Due to this very reason, the author chose to analyze *Rick* since it involved mediation where one of the spouses was mentally unstable. The main theme of the paper can be summed up in the following words:- There is no difference between differently abled and ordinary people except for the disability of the former; they are equally likely to find themselves tangled in a kind of dispute where mediation would be the best way forward. Hence, all mediators should understand the nuances of mediation involving mentally challenged people, irrespective of their specialization, in order to have a truly accessible mediation practice.

One of the first lessons in this respect is to have a direct interaction with the differently abled person to discuss access needs rather than making assumptions on what would be most effective. During this interaction, the mediator would explain to the party the manner in which the mediation session would proceed, for him/her to be able to talk about how the same can be made more accessible. This interaction, which can be termed as the planning phase, gives the mentally challenged people an opportunity to have a say on matters impacting their ability to participate in the sessions. For women like Ms. Brandesma, with a history of marital violence and a present marred by mental illness, the mediator should inquire into their ability to deal with stress during mediation. Though access needs are required to be dealt with on a case-to-case basis, prior experience and background knowledge are always helpful for it empowers the mediator to have an effective session. This can be suitably demonstrated with the help of an example.

Catherine is married to Joe. After their relationships hit a few roadblocks, love for each other gave way to bitterness, which forced them to separate. Both parties, along with their lawyers, engaged the services of a mediator to assist them in the negotiations and ultimately, in formulation of the settlement agreement. Now, Catherine suffers from a bipolar disorder due to which she speaks very quickly, jumping from one issue to another, in her manic phase. Her counsel, aware of her disorder, chose a mediator Mr. X who had prior experience in facilitating discussions with such parties. Mr. X gained Catherine's confidence during mediation by summarizing her version frequently

to ensure that she didn't miss something; this also showed that the mediator attached considerable importance to her story.

For parties suffering from stress-related disorders, the mediator should also arrange for a retiring room where the concerned party can retire, in order to get back to normalcy. Certain mental injuries impact the social skills of the affected party, so much so that such party might say something offensive; hard feelings can be avoided in such cases by sharing information on disability with other parties, however only after obtaining an explicit waiver of confidentiality. Often, there are cases where a person doesn't identify himself as having a disability though makes a disability-related request; in such cases it is absolutely necessary for the mediator to take such requests seriously.[18] A failure to do so would have a two-fold impact: not only would the mediator lose the party's trust in him and the process but also jeopardize his/her health.

People with mental infirmities might understand the discussions at a considerably slow pace; to make the session equally accessible for such people the mediator should speak slowly and clearly and use simplified terminologies. Where a party faces difficulties in participating in the mediation session, especially with hidden psychiatric disabilities interfering with such person's ability to comprehend and communicate effectively, the mediator should provide assistance by breaking down complicated ideas into different components.[19] Caucus can be utilized by the mediator in such cases to find further steps that can be taken to facilitate more effective communication between the parties.

Where the party suffers from a severe psychiatric disability, the mediator can arrange for a co-mediator having experience as a mental health professional; this would ensure equal accessibility as well as repose such party's trust in the overall process. The author in the preceding section of the paper indicated that the power of self-determination lies with the parties and that the mediator can, in no situation, decide on behalf of a party; however a mediator can't just impasse the case on becoming aware of the mental illness of a party but rather should give equal access to them in their mediation session. Once equal access has been given, if the mediator is of the opinion that such a party lacks the ability to

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18 'Making Mediation Sessions Accessible to People with Disabilities', Mediate.com, available at http://www.mediate.com/articles/cohen.cfm, (last accessed 1 August 2016).

19 Ibid.

determine what's best for his/her interests, only then can he impasse the case.

5. Avoid 'scapegoating' the children:

Though the SC in *Rick* is silent on this aspect, it is nevertheless important to have a discussion on what the mediator can do to save the children, often the biggest sufferers, since their plight is ignored in the tussle between their parents. In the present case, the separating couple was married for 29 years and had five children; hence we can possibly work on the assumption that the children were mature enough to handle the situation effectively. However, not all cases are this rosy. Children of the separating spouses, especially the younger ones, suffer from immense emotional and mental trauma following the separation; enormous research on the impact of divorce on children and family point towards this bitter truth. According to Steven L Earll, a Professional Counselor specializing in family trauma, children believe that their parents are very competent people who can handle all sorts of troubles; divorce however shatters their basic belief concerning the parents' abilities of making decisions in their best interests.[20]

The first step in this regard that a mediator can take is to have caucus with husband and wife, in order to find out the 'real' reasons for their decision to go separate ways. It is often seen that the parties are hesitant in divulging information during the joint session; mostly since lawyers advise their respective parties to keep their cards close to the chest. In light of this, caucus becomes increasingly important for the mediator to get the real information out from the parties. After identifying the reasons for separation, the mediator should persuade the parties to not continue with their decision to separate, citing the short-term trauma [21] and long-term damage to their children. The concerned mediator can substantiate this point through reliance on literature available on the impact of divorce on children as well as appealing to the

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[20] 'How Could Divorce Affect My Kids? - Focus on the Family', available at http://www.focusonthefamily.com/marriage/divorce-and-infidelity/should-i-get-a-divorce/how-could-divorce-affect-my-kids#ref1, (last accessed 1 August 2016).

[21] Children whose parents are going through a rough divorce engage in behaviours which are designed to help them feel secure. Some of them are denial (especially in younger children), abandonment, anger and hostility, depression, immaturity and hyper-maturity, 'Psychological and Emotional Aspects of Divorce,' Mediate.com, available at http://www.mediate.com/articles/psych.cfm#reactions (last accessed 1 August 2016).

parents' emotions; make them understand the position they hold in their children's eyes, who believe that parents can never do anything wrong and possess superhuman abilities when it comes to safeguarding their interests.

However, this might not be possible in high conflict divorce cases. Successful divorce mediation is one where parents, with assistance from the mediator, contain their ego and emotional distress to focus on the issues that their children might face by virtue of their decision. Johnston and Roseby observe that mediation fails in a high conflict divorce involving highly conflicted couples who are unsure about their separation itself and have severe personality disorders.[22] Such failure can be attributed to the fact that traditional mediation relies on a rational decision-making process which is absent in high-conflict cases. Johnston and Roseby herein call for a different kind of mediation-'impasse-directed'[23] (hereinafter, **ID approach**). It is different from regular mediation in three respects:-

i. The ID approach combines mediation with therapy to get rid of emotional factors that prevent the parents from making rational, child-centered judgments.

ii. The approach educates the parents on children's needs and the necessity to keep them away from the spousal problems for their sound mental growth.

iii. The approach doesn't limit itself merely to the formulation of Settlement agreement but further extends to developing plans in order to help the family through divorce transition period.

Even the ID approach has its boundaries. Experts have probed the problems with usage of mediation in high-conflict situations; Mathis, for one, observes that some couples fight just for the sake of fighting.[24] According to him, mediators in such cases should seize firm control of

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[22] 'High-conflict Separation and Divorce: Options for Consideration', Department of Justice (Government of Canada), available at http://www.justice.gc.ca/eng/rp-pr/fl-lf/divorce/2004_1/p5.html, (last accessed 1 August 2016).

[23] Ibid.

[24] These are parents with low differentiation. These spouses are not adequately differentiated from each other in order to function effectively as individuals. Mathis describes them as 'poor candidates for mediation' and 'couples from hell'. Supra *note* 21.

the session immediately in order to address the issue of poor differentiation; Parkinson also argues for an early and active mediator intervention in such cases, along with a careful planning of all sessions.

6. CONCLUSION

What are the lessons one can take home from this case? Firstly and most importantly, it is very important to ensure finality in divorce disputes; parties employ mediation to settle their issues amicably and formulate a fair settlement agreement. However, where mediation fails to achieve the desired purpose, judiciary intervenes which defeats the whole purpose of settling the outstanding issues 'amicably'. Finality can be ensured through various ways; one of the lessons learnt herein is that the mediator has to put extra effort to get out all material information in order to avoid informational and psychological exploitation of any party. The author's observations on party's mental capacity to use mediation for settlement, power of self-determination, making mediation accessible to people with mental disorders and protecting children from spousal struggle might not be exhaustive; however it still provides a number of guidelines for the mediator's consideration which would ensure finality in disputes and make mediation as such more accessible.