



The Right to Privacy in Family Mediation

Confidentiality in mediation is an application of the right to privacy. Prior to mediating, parties must decide whether to maintain or waive confidentiality. Understanding our constitutional right to privacy is not an abstraction, but an issue we are being asked to sort out in our everyday lives. When parents are living separately, each parent's right to privacy may conflict with the other parent's right to know about their child's well-being.

The word *privacy* does not appear in the U.S. Constitution. The Fourth Amendment protects landowners from unreasonable search and seizure by the government. This is the most direct protection of privacy in the Constitution. Freedom of speech granted in the First Amendment, creates a contradiction between privacy and the press, between the right to be let alone and the right to know. In an article in the Harvard Law Review in 1890, Louis Brandeis and Samuel Warren expanded the Fourth Amendment right to privacy by defining a personal right to privacy as separate from property. Brandeis and Warren based the notion of a personal right of privacy on the notion of "inviolable personality." The criterion for protection was the general right to immunity of the individual under tort law, a protection from invasion by others.

The Fourteenth Amendment right of "liberty," has been the basis for family law, giving parents the right to make decisions regarding their children's welfare. It declares that no person will be denied "life, liberty or property, without due process of law." The court reinforced these rights as "deeply rooted in this nation's history and tradition" and "implicit in the concept of ordered liberty such that neither liberty nor justice would exist if sacrificed." These rights include marriage, procreation, contraception, family relationships, child-rearing and education, abortion, and consensual sexual activity between adults. Justice O'Connor reinforced the concept of personal liberty when she said, "...At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." Although seen as fundamental, these rights are not absolute.

As the family has continued to evolve, twenty-first century parents are often exercising their rights not as a family unit, but as separate individuals making decisions about how to raise their child/ren outside the nuclear two-parent family model. What was a shared privacy right of the intact family, becomes the individual privacy rights of the adults who may have established separate households. While children have no privacy rights, when parents separate children are in the difficult position of maintaining the privacy rights of the parents as they go back and forth. What information is necessary for parents to share and what is private? How can children differentiate the two? Without support, children often feel confused and apprehensive about what they can and cannot say to each parent as they attempt to adjust to a variety of shared parenting arrangements.

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