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Family Court Mediation Services

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Mediation and the Family Court

One objective of the family court model is to implement procedures that provide alternatives to the adversarial model when it is appropriate and consistent with constitutional safeguards.¹ Many, if not most, family court cases are resolved short of trial; however, the standard court-based assumption of adversarial relationships may encourage parties to polarize their positions. (For instance, child custody battles during divorce proceedings ill-prepare parents, once a court decree is made, to cooperate with one another regarding visitation.) Without question, full litigation maximizes the trauma for children and their families.² Hence, the availability of mediation services is an essential component of most family courts.

Mediation is an informal, confidential, and non-adversarial process facilitated by a trained mediator. Mediation conferences are conducted prior to a trial or final hearing to allow parties to negotiate and resolve their case without the stress or additional expense of a trial – or leaving the matter completely up to the judge’s discretion. Parties enter mediation either by court order or voluntarily. Many courts use mediation for motions and post decree cases as well.

Mediation opens lines of communication, assists parties in identifying issues, fosters joint problem solving, and explores settlement alternatives. The mediation process is confidential and at arms-length from the court. If the parties reach an agreement, the mediator writes the points of agreement for the parties and their lawyers to review. The agreement is then filed with the court for review and approval by the judge hearing the case, or sometimes the lawyers redraft the agreement into the final settlement documents. When an agreement is not reached, the mediator files a notice with the court only to that effect, providing no details regarding the mediation proceedings.³

Mediation within the family court setting can involve a wide range of case types. Given the level of expertise required, mediators must have the necessary training and/or certification to undertake specialized mediation case-work.⁴ Typical mediation within the family court includes divorce and custody matters, child/parent conflict, as well as victim/offender mediation. Mediation services may also be provided in school-based settings to deal with disputes among children, as well as with truancy and school behavior issues. Specialized mediation may also be used in child protection/dependency and domestic violence cases – obviously involving strong skills and specific expertise on the part of the mediator.

Child Protection Mediation

Mediation is gaining increased acceptance as a valuable tool to resolve a wide range of issues that arise in child protection cases filed with the court. Mediation can be used to resolve petition allegations, facilitate early resolution of issues related to placement, visitation, and services, and make permanency decisions, including termination of parental rights. Questions voiced about the intervention include:

- ❑ Does the process safeguard children? Will mediated solutions offer the best, or even adequate, protection of the abused or neglected child?
- ❑ Does it protect parents’ rights? How is the imbalance of power between parents and the representative of child protective services and the legal system managed?
- ❑ Is mediation a duplication of other settlement efforts? How does mediation differ from the informal efforts of caseworkers as they work with parents?
- ❑ Are there sufficient negotiable issues in child protection cases? That is, are there substantive issues to mediate, such as whether in-patient substance abuse treatment is needed or are issues

for mediation more routine, such as which services provider to use.⁵

Experiences to date indicate that these concerns can be addressed and that "...early resolution of the court cases in a non-adversarial and problem-solving manner allows the child and the family to commence treatment and counseling programs at the earliest opportunity while still preserving the power of the court's authority to protect the child."⁶

The Mediation Committee of the Association of Family and Conciliation Courts (AFCC) regularly hosts national training seminars and conferences in child protection mediation. The AFCC, in collaboration with the ABA/AFCC/SPIDR, has developed Model Standards of Practice for divorce and family mediators that include standards regarding domestic violence cases (download at <http://www.afccnet.org>). In addition, a number of courts (including Santa Clara County, CA and Pima County, AZ) have developed protocols for case screening and management.⁷

Drawing from research and program evaluation in the field⁸, Firestone (1997)⁹ suggests the following guidelines for child protection mediation programs and mediators:

- 1) Mediation programs should be court-based or court-supervised and have strong judicial and interdisciplinary support. Policies should be established to ensure that the resolution of child abuse and neglect cases meets statutory and regulatory time standards.
- 2) Mediators must be highly trained, experienced, and skilled professionals. They must be neutral to the dispute and be perceived by all parties as neutral. Mediators must have credibility with the court and related professionals, and they must be perceived by all parties as having the best interests of the child and family at heart.
- 3) Mediation is appropriate in only a selected number of cases; however, participation should be mandatory when the court orders mediation. Mediation can help resolve dispositional, postdispositional, and some jurisdictional issues.
- 4) Guidelines for referral to mediation should be developed that include: determination of the parties' ability to effectively consider the best interests of the child; the presence of domestic violence, which could potentially compromise the mediation process; and the psychological capacity of the parents to participate in mediation effectively. Guidelines should also address timing of the referral to mediation and issues related to compliance with a court-ordered referral.

5) Guidelines must also be established regarding participation in the mediation process, including: appearance of the child; the role of parents in mediation; the presence of legal counsel; the participation of nonparties; and the presence of the guardian ad litem. Primary considerations are legal considerations, preventing possible harm to the child, and ensuring the mediation process proceeds with the best interests of the child.

6) With few exceptions, mediation in Ohio is a confidential process where parties meet, exchange information, and solve problems without fear that any settlement conference discussions will be disclosed outside mediation (see O.R.C. 2317.023). On the other hand, child abuse reporting laws typically require the reporting of allegations of child abuse and neglect. It is important that all parties are appropriately informed of the extent to which mediation is confidential and the extent to which there may be exceptions to confidentiality.

7) Mediated agreements should become part of the court record. It is appropriate for the judicial officer to review these arrangements and make some determination that all parties understand the agreement, that all parties voluntarily agree and understand the consequences of failure to perform, that all parties have been advised of their right to counsel, and that – most importantly – the agreement serves the best interests of the child.¹⁰

8) The availability and use of community resources is essential. Dealing with the complex needs of children and parents in abusive families requires intensive professional intervention, such as: family therapy, mental health services, and substance abuse treatment. Mediation becomes futile if the services at issue are not readily available. Close case management and collaboration among service providers is also critical.

9) Adequate program evaluation, integrated into the operation of child protection mediation programs, is important. There is still a great deal to learn about this specialized area of mediation practice. In addition, programs should be supervised closely to ensure that they meet the needs of children, families, and the court. If funding is available, in-depth longitudinal studies of program effectiveness should be carried out.

Family court mediators should regularly screen all cases to identify those with overlapping issues involving domestic violence and/or sexual abuse. Specialized training is required to deal with these families in mediation. Some cases involving domestic violence or sexual abuse are not

suitable for mediation because of safety, control, and intimidation issues. Research in Ohio and Maine suggests that participation of attorneys in divorce and parenting agreement mediation can address some issues of power imbalances created by domestic violence. Parties within the mediation process must be able to participate freely, as well as be mature and healthy enough to focus on the best interests of the child.¹¹

PROJECT UPDATES

Each of the four family court pilot sites in Ohio is involved in developing and/or expanding the mediation services available to children and families. The following project updates provide details regarding those efforts.

Lorain County Domestic Relations Division and Juvenile Branch

The court has traditionally offered services to families to reduce conflict and encourage settlement through alternative dispute resolution in domestic cases. Since 1985, the court's Department of Family Divorce Services has offered mediation where it is currently supported and complemented by mandatory parent education for separating parents, home study services, and facilities for supervised family visits and visitation assessment.

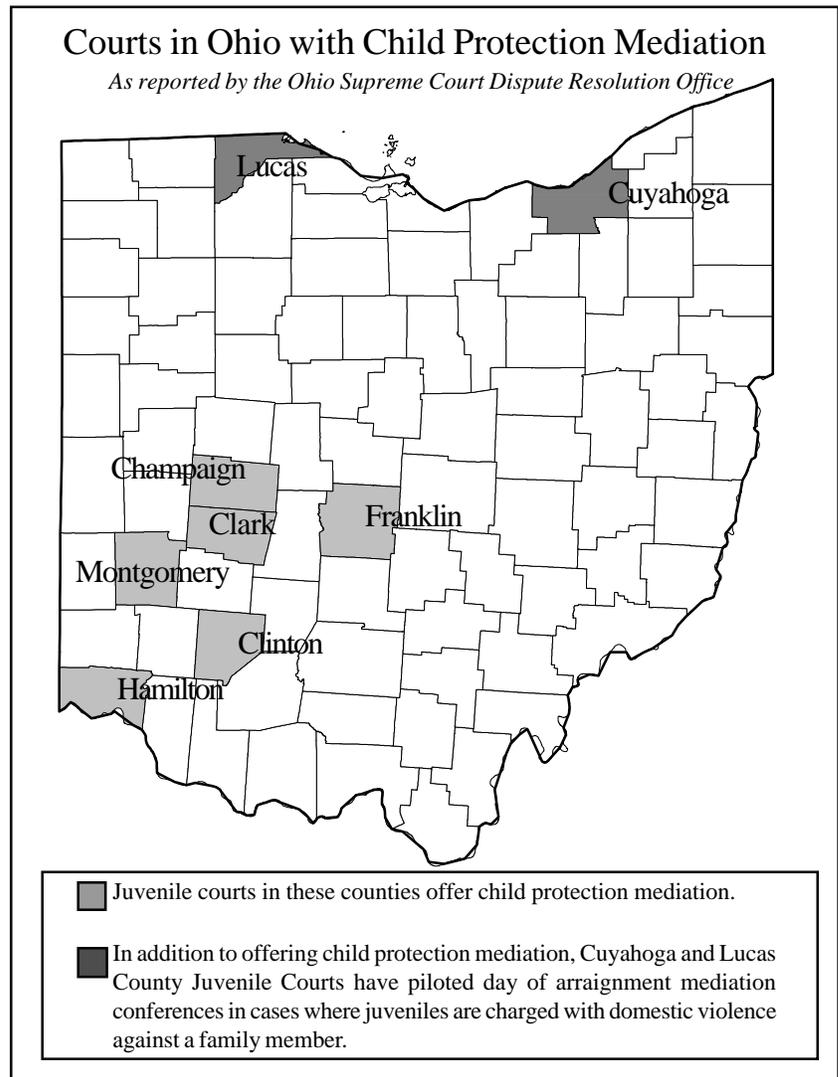
Under the family court pilot project, the court is expanding to serve the never married population by hiring an additional certified mediator and expanding and improving their in-house facilities for family visits. To reach families with information about mediation services, they are developing a parent education seminar specifically tailored to the needs of the never married. A primary goal of the new seminar is to increase family access to the Department's expanded supervised visitation and parenting mediation services. The seminar is being modeled on the court's successful experience with mandatory education for separating parents who are married. To learn more about the access and visitation needs of the never married, the court has worked with NCJJ to gather examples of parent education from

Illinois and Michigan. A video tool currently is in production to support the seminar and will feature the experiences of families who have been through the process in Lorain County.

Clermont County Domestic Relations Court in Partnership with the Clermont County Juvenile Court

The Domestic Relations Court offers mediation in custody and visitation cases with in-house assessment services and certified mediators on staff. The Juvenile Court offers mediation through contract services with local providers.

Under the pilot project, both courts are expanding their capacity to mediate family cases by organizing the resources of trained mediators in the community, each with a special area of expertise or range of cases they will accept. Through the effort, additional capacity is established under the pilot project without being wholly dependent on the grant funding for its existence. Therefore, the resources





can be sustained with more certainty than adding additional court staff under a pilot.

Mercer County Common Pleas Court

In April and May 2000, Mercer County will provide both a short and extended version of mediation training for judges, prosecutors, attorneys and other interested parties. The shorter, 16-hour program to be held in April will consist of an overview of mediation and how the process may be implemented. The longer program will consist of 40 hours of advanced mediation training. Participants will acquire the skills necessary to mediate custody and visitation, child support, and domestic relations issues. A total of 50.5 CLE credits may be awarded and scholarships are available. For more information, contact Valerie Gerlach at O.U.R. Home Family Resource Center at 419-586-4663.

Fayette County Probate and Juvenile Court, in partnership with the Fayette County Common Pleas Court and the Fayette County Municipal Court

Increasing the capacity of the Court Mediation Program is one of the objectives of the Family Court Project in Fayette County. Prior to this initiative, one full-time mediator divided her time between cases referred by the Probate/Juvenile Court and Court of Common Pleas and informal responsibilities as a receptionist for the Domestic Relations Magistrate (the latter being a function of shared office space).

With funding from the Family Court project, the Fayette Court will hire another full-time mediator, who will take over responsibility for handling referrals, scheduling appointments, and other administrative tasks, as well as carrying a mediation caseload. This will allow the senior mediator to expand the number of cases she can handle, with particular focus on cases involving children and their families referred by the Probate/Juvenile Court Judge.

The Court has addressed several issues prior to expanding its mediation services. These have included:

- a) finding and receiving approval to lease much needed office space outside of the courthouse;

- b) recruiting qualified staff in a rural community;
- c) training the senior mediator to expand her expertise in family court mediation matters;
- d) reviewing and developing new protocols regarding confidentiality and the sharing of information between mediation services and the court;
- e) developing formalized procedures to allow the new Family Court Intake Coordinator to screen cases and refer them directly to mediation;
- f) managing the challenges of change in a small court; and
- g) educating the community regarding mediation and its role in the family court. Support from the Ohio Supreme Court Dispute Resolution Office has been secured in the form of staff training and technical assistance.

Hiring Mediators vs. Contracting for Mediation Services

Courts considering the development or expansion of mediation services may wish to consider contracting with an outside provider rather than establishing or expanding court-based mediation. There are advantages and disadvantages to both options.

Contracting with an established service provider may: **reduce costs** (particularly overhead, if additional office space and clerical support are required); **enhance the flexibility and diversity of services provided** (respond to changing demand or one-time need for services, such as mediation of international custody disputes); **provide access to expertise not locally available** (e.g., bringing specialized services to the court one day per week); **allow expansion of services with “soft money”** without incurring the obligation of hiring permanent full-time staff; **provide specialized supervision of mediation services** outside the expertise of the court administrator; and **allow the court to focus on its main business** – the administration of justice.

Where outsourcing is under consideration, courts should consider the implications of contracting with a for-profit vs. a non-profit organization, the length of contract and the ability to renegotiate mid-term, how issues of confidentiality will be handled, and how service quality will be monitored and reported. Contracting with an existing non-profit service collaborative as a way of expanding both court and community resources may be an entirely different proposition than taking the lowest-bid contract offered by a private firm from another city. Either could be highly successful or a nightmare, depending on the circumstances.

Developing a court's in-house mediation program may: **build local expertise** by hiring and supporting the professional development of local professionals; **provide program stability** through hiring of permanent, full-time staff; **improve communication** by having mediation staff be part of the court team; **maintain control of the program** through direct supervision of staff; **provide flexibility for public education** and other services that in-house staff can deliver in the community; and **allow the court to take a leadership role in developing community services**. The issue of who pays for mediation services (the court, the community, the client) and in what circumstances is one that also needs to be addressed.

There are risks and considerations in the development of court mediation programs. The Ohio Supreme Court Dispute Resolution Office (Eileen Pruett, Coordinator, 614-752-4700) provides resources and consultation. It is, of course, advisable to hire mediation staff who are formally trained and have experience in the types of mediation that your court intends to deliver. Formal policies and procedures for the mediation program and its interface with the court need to be developed. Also, interface with and training of the local bar, as well as collateral service providers, is necessary.

Endnotes

- ¹ Katz, S.N. and Kuhn, J.A. (1991). *Recommendations for a Model Family Court: A Report from the National Family Court Symposium*. Reno, NV: National Council of Juvenile and Family Court Judges.
- ² Szymanski, L., Homisak, T., and Hurst, E.H. III. (undated). *Policy Alternatives and Current Practice in the Special Problem Areas of Jurisdiction over the Family*. Pittsburgh, PA: National Center for Juvenile Justice.
- ³ NOTE: O.R.C. 3109.052 provides for court-connected mediation of parenting issues only. Private mediators and some court programs do offer mediation to resolve all issues in the case. The statute also addresses the confidentiality of mediation proceedings.
- ⁴ NOTE: See Rule 16 - Rules of Superintendence for the Courts of Ohio. Although the Supreme Court Dispute Resolution Office certifies trainings, it does not certify mediators. Any certification of mediators is handled by the local court pursuant to local rule.
- ⁵ Thoennes, N. (1997). "Child Protection Mediation: Where We Started." *Family and Conciliation Courts Review* 35(2): 138.
- ⁶ Saunder, C., Baker-Jackson, M., Flicker, B., and McIssac, H. (1991). "Mediation in the Los Angeles County Superior Court Juvenile Dependency Court." *Family and Conciliation Courts Review* 29: 259.
- ⁷ NOTE: Juvenile Courts in Champaign, Clark, Clinton, Cuyahoga, Franklin, Hamilton, Lucas, and Montgomery Counties offer child protection mediation. Cuyahoga and Lucas County Juvenile Courts have also piloted day of arraignment mediation conferences in cases where juveniles are charged with domestic violence against a family member.
- ⁸ Including: Edward, L. and Baron, S. (1995). "Alternatives to Contested Litigation in Child Abuse and Neglect Cases." *Family and Conciliation Courts Review* 33: 285.
- ⁹ Firestone, G. (1997). "Dependency Mediation: Where Do We Go from Here?" *Family and Conciliation Courts Review* 35(2): 224-5.
- ¹⁰ NOTE: Some child protection mediation programs have the entire agreement as part of the record. This raises concerns about the enforceability of gratuitous promises that would not be honored as part of an adoption.
- ¹¹ Wissler, Roselle L., (undated). *Trapping the Data: An Assessment of Domestic Relations Mediation in Maine and Ohio*. Supreme Court of Ohio, SJI Grant 95-03C-A-152.

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