

The Mediation Miracle



In the past few decades, California has led a national shift in paradigms for family conflict resolution that has freed trial courts to do what they do best—ensure due process of law and serve as the court of last resort.

**By
Leonard P. Edwards**

When mandatory child custody mediation was enacted into California law in 1981, there was great hope that this new way of resolving family conflicts would make dispute resolution more efficient and family-friendly. Now, 25 years later, we can confidently say this hope has been realized, with a profound shift away from the traditional adversarial model of dispute resolution in family matters and toward a system that supports the private ordering of these issues—a shift that’s arguably the most significant legal development affecting family life in 20th-century American jurisprudence.

For this we must thank a small but organized group of California leaders whose pioneering work led to sweeping legislative reforms that expanded the courts’ options for resolving family legal issues during separation or divorce.

California was the first state to make this bold leap to a legal process that engages families in

a meaningful way and gives them the right to determine the structure of their future relationships. The 25th anniversary of the nation’s first mandatory mediation law seems like an appropriate opportunity to reflect on how this was achieved.

The Way We Were

Before 1970, laws on marriage and divorce in California, as in all states, were modeled on age-old legal and religious traditions. Divorce between married persons was permitted but only if one party was at fault, thus providing a legal justification for court action. The law gave family courts the power to determine the post-divorce living patterns for the parties, including financial and child custody arrangements. Divorce trials sometimes resembled criminal prosecutions; they often included evidence from

private investigators hired to spy on one or both of the parties, as well as claims of misconduct made by each parent against the other. Attorneys brought all of their advocacy and adversarial tools to the family court along with the high costs of litigation—both financial and emotional. The party “at fault” was often punished by the court for the actions leading to the divorce. Children, for example, were rarely required by the court to live with the “at-fault” parent.

There were many critics of this approach. They argued that the adversarial process did great damage to families: the strained parental relations caused suffering to children both during and after the divorce, and many family relationships never recovered from the legal proceedings. The critics held that each parent ought to have a continuing relationship with the children and that the adversarial, fault-finding process often destroyed parent-child relationships and made it more difficult for parents to work together for their children after the divorce. Some criticism came from legal scholars, some from attorneys, and some from the litigants themselves. All held that the system had to be changed for the sake of the court system and the families who appeared in it.

Enter Trained Counselors

Before 1980, California had a modest tradition of attempting to support families in distress. The California Conciliation Court Act of 1939 was enacted to provide “conciliation courts” with counseling services in the state. One motivation for the legislation was to encourage parents to work out their differences and preserve marriages, but the most significant result of the conciliation courts was the introduction of trained counselors into the divorce process.

At first, only 16 counties were able to afford such counselors. Those counties’ courts immediately recognized the problems divorcing families faced and the harm that the adversarial process

inflicted on them. Soon they began to make suggestions to improve the family court system as a whole. Gradually, conciliation courts were established in more counties.

No-Fault Divorce Becomes Law

In 1966 the *Report of the Governor’s Commission on the Family* was issued—the product of a panel of judges, family law practitioners, researchers, and experts in family law proceedings. The report recommended significant revisions in California law and resulted in passage of the California Family Law Act of 1970, establishing no-fault divorce in this state. Under that law, parties needed to prove not that one or the other was at fault but only that irreconcilable differences had arisen, making continuation of the marriage impossible. This law was the first step in giving parents more control of their relationships.

Marital dissolutions increased dramatically in the 1970s and 1980s, as did the population of California. Several courts began using the conciliation court counselors in creative ways. In 1973 the Los Angeles, Santa Clara, San Diego, Alameda, and San Francisco County conciliation courts, along with other conciliation courts, began experimenting with family counseling in child custody proceedings. Counselors reported that parents could reach agreements in a great majority of the cases referred to them. These counselors—led by Hugh McIsaac from the Los Angeles Conciliation Court, Jeanne Ames from San Francisco, Murray Bloom from San Diego, Warren Weiss from Santa Clara, Elizabeth O’Neill from Alameda, and many others—believed parents and children would be well served if mediation were a part of every child custody proceeding. Judge Donald King in San Francisco and Judge Christian Markey in Los Angeles found that referring parties to conciliation court before trial resolved many contested cases. The support of these charismatic and respected judi-

cial officers was instrumental in convincing the practicing family law bar to participate constructively in the mediation process.

The no-fault divorce law attracted the interest of researchers, including Judith Wallerstein, Joan Kelly, and Dorothy Huntington of the Center for Families in Transition in Marin County, who focused much of their research on the impacts of marital dissolution on children. Stan Cohen, Jay Folberg, and the Association of Family and Conciliation Courts (AFCC) also were instrumental in providing ideas and support for reforms related to the no-fault divorce law. Professor Robert Mnookin, whose classic article “Bargaining in the Shadow of the Law: The Case of Divorce in the Courts” was published in the April 1979 *Yale Law Journal*, also deserves credit for providing a theoretical underpinning for the mediation process.

Mediation Becomes Mandatory

Experiences in the first counties that used mediation in child custody cases led to a movement to require mediation in all counties. With strong support from the California chapter of the AFCC, as well as from key judges and counselors, legislation was introduced in 1979 to achieve that goal. It took two years, but in 1981 Senate Bill 961 (Sieroty) was passed into law and established mandatory mediation in all child custody matters in California family courts.

The new law required parents to attempt to resolve their differences on issues of child custody or visitation with the assistance of a trained mediator before resorting to litigation. This legislation was a reflection of a growing consensus that families and children would be better served if couples were given an opportunity to resolve their disputes in a mediated setting.

Mandatory mediation was the most significant step in the movement toward family self-determination, or “private ordering,” which aimed to

give parents more control of their lives when they separated. The legislation included an increase in filing fees to finance additional mediators and their mandated training.

Uniform Standards Adopted

In 1984 Assembly Bill 2445 (Farr) authorized the creation of a statewide office for research on family court services and identified resources for funding its work. The Statewide Office of Family Court Services, officially established in 1986, was made a unit of the Administrative Office of the Courts (AOC) in 1987; Isolina Ricci, a well-known author, mediator, and researcher, was named its first director. In 1991 the office reported that mediation was in great demand throughout the state: research showed that the yearly number of mediated cases had increased from 49,474 in 1988 to 65,494 in 1991.

Over the years, custody mediation practice has been modified to address oversight of the statewide effort and to improve standards of practice. In 1991 the Judicial Council adopted statewide uniform standards of practice for court-connected child custody mediation. These standards addressed such issues as mediator training, protocols for conducting mediation, and equalizing the power relationship between parties. The standards were adopted as a rule of court (Cal. Rules of Court, rule 5.210) in 2001.

As child custody mediation spread statewide, practitioners and researchers increasingly identified domestic violence as a crucial factor in numerous families' participation in mediation. Many courts began implementing local procedures to address safety concerns. The Judicial Council later adopted a statewide domestic violence protocol for family court services (Cal. Rules of Court, rule 5.215, adopted in 2002).

In 2000 the Statewide Office of Family Court Services and the Judicial Council's Center for Children and the Courts merged to form the Center for Families, Children & the Courts

(CFCC), operating as part of the AOC. With more than 400 full-time and contract mediators currently conducting more than 100,000 mediations per year statewide, mediation has become a major part of California's system of family courts.

Client Satisfaction— and Caseloads—High

Mandatory mediation was the right idea from the beginning. It had been practiced in several conciliation courts with excellent results. Evaluations through the years have demonstrated that a high percentage of cases reach settlement without trial, resulting in reduced court workloads; that client satisfaction is high; and that children are well served.

Nevertheless, many family court services offices in the state are underfunded, are understaffed, and do not obtain sufficient resources to do the work the Legislature has asked them to perform. There is a great risk that the energy and enthusiasm that mediators bring to their work may be weakened by the crush of caseloads.

Mediation Expands to Dependency

Mandatory mediation in family court inspired the spread of alternative dispute resolution (ADR) techniques throughout California, where today 23 dependency mediation programs operate in the state's juvenile courts.

The history of juvenile dependency mediation in this state in some ways parallels that of family court custody mediation. At first, two counties—Los Angeles and Orange—experimented with dependency mediation. They initiated the process during the 1980s essentially for the same reasons that family court counselors used it—to cope with overcrowded calendars—and it worked. However, some critics were concerned that mediation in child maltreatment cases would result in unsafe plans for children.

That has not proven to be the case, for several reasons. First, in addition

to the mediator, an attorney for the child participates in the mediation process, providing extra protection for the child's safety. Second, in juvenile dependency mediation, the facts of the abuse or neglect are not mediated. All other issues can be subjects of discussion and resolution.

Based on the successes in Los Angeles and Orange Counties, in July 1992 Senate Bill 1420 (Russell) was passed, with language encouraging the creation of dependency mediation in California's juvenile dependency courts.



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This legislation authorized several pilot counties to use dependency mediation. In 1996 Senate Bill 1675 (Russell) encouraged all juvenile courts to develop mediation programs. Section 350 of the Welfare and Institutions Code was amended to read:

Each juvenile court is encouraged to develop a dependency mediation program to provide a problem-solving forum for all interested persons to develop a plan in the best interests of the child, emphasizing family preservation and strengthening. The Legislature finds that mediation of these matters assists the court in resolving conflict, and helps the court to intervene in a constructive manner in those cases where court intervention is necessary.

Reduced Hardships for Courts, Kids

Research has confirmed that dependency mediation, throughout its history, has helped families and courts by reducing both the amount of time children spend in foster care and the costs for courts and agencies. For example, in Santa Clara County, where dependency mediation has been practiced for 12 years, 79 percent of referred cases resolve all issues, 12 percent resolve some of the contested issues, and only 9 percent fail to resolve anything.

Moreover, in juvenile dependency court, mediation is not necessarily confined to child custody disputes, as it is in family court. In many programs, such as in Santa Clara County, mediation includes all issues before the juvenile dependency court, including whether the petition is true, what the service plan should be, how visitation should be arranged, what the permanent plan for the child should be, and any other issue that might have to be litigated. Mediation is a problem-solving forum, one that can work out details that are often neglected by the formal court process.

Path Paved for ADR


Following the lead of those who developed child custody mediation rules, the Judicial Council crafted rules of court for dependency mediation. In 2004, standards of practice for court-connected dependency mediation were adopted as rule 1405.5. This rule addressed numerous issues, including the court's responsibility to oversee dependency mediation services; the development of local mediation practices, such as a protocol for cases involving domestic violence; and the qualifications and training requirements for dependency mediators.

Family mediation laid the groundwork for courts to embrace other forms of alternative dispute resolution. Such innovations as family group decision making, collaborative justice, and team decision making are currently being

used to resolve family problems. The legal profession has joined the movement away from the adversarial model. Many lawyers are turning to a collaborative practice, dedicating their law practice to keeping families out of court and to working with them to settle disputes without the use of adversarial tactics. These practices have saved families lots of money.

The experience in some juvenile courts is that mediation has had an impact on the local court culture. When attorneys learn that the results of the mediation process are better and longer-lasting than those of a trial, they begin to prefer mediation as a process for resolving cases. This shift has improved attorney-attorney relations. When attorneys working side by side in the dependency mediation process realize that each has good suggestions for a positive outcome, they are much more likely to work cooperatively even when the matter has to go to trial. There is less posturing, less finger pointing, more straightforward presentation of evidence, and an honest exchange of ideas.

A Better Way

There will always be litigation. Some parents will always need a judge to make the final custody orders or other orders relating to their children. The lesson we have learned, after 25 years of using mediation in both family and juvenile courts, is that mediation works better than the adversarial process to resolve family and children's issues. We know the orders that judges make after hearing evidence are not as effective or as long-lasting as mediated agreements. And we know mediation offers our best opportunity to remind parents of their obligations to their children that continue even after they separate. 

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