

Effective Child Protection Mediation and Domestic Violence

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Summary

Mediation and other forms of alternative dispute resolution must address issues that can make the decision-making process unfair or unsafe. The developments of the past 25 years have resulted in practices that promote a fair and safe process for all involved.

Child protection mediation and other forms of alternative dispute resolution (ADR) have been resisted by a number of professionals, domestic violence advocates and other people for decades. Many lawyers and judges believe that going to court is the preferred way of dealing with all legal problems. Having been trained in the adversarial process, some have a suspicion that mediation will reduce their control over the outcome of cases, believe that it is less efficient, and think that safety of the parties may be compromised. Some domestic violence advocates believe that the victim (usually a woman) will be participating in an unfair process that will subject her to the power and control of her abuser. Still other critics believe mediation and other forms of ADR are inappropriate for people with serious substance abuse or mental health problems because their disability prevents them from fully participating in the process. They argue that power imbalances prevent the process from being fair to all sides.¹

All of these concerns have been addressed by practitioners over the past 25 years. We can now confidently state that properly conducted mediation and other forms of ADR can be safe for all parties, can effectively address so-called power imbalances, and will produce better, longer-lasting results for the parties.² These conclusions have been affirmed by national policy documents.³

We start from the proposition that the mediation process must be safe for everyone. Child protection cases often involve substance abuse, domestic violence, mental health, child abuse and similar issues. While mediators are trained to deal with interpersonal dynamics so that everyone's voice is heard in the mediation process, parties may be intimidated by other family members. These realities have led to the development of protocols and practices that enable mediation to take place even when there are issues of domestic violence or when one party has mental health challenges.⁴

Nancy Marshall, a domestic violence victim advocate and a marriage and family counselor, has advocated for hundreds of victims of violence and has also participated in many child protection mediation sessions. She has written that "[m]ediation should be done separately, for safety reasons, in most domestic violence cases...Mediation should always start with the victim of domestic violence being seen separately."⁵ Throughout her comments on working with the victim of domestic violence, Marshall stresses the importance of providing basic education about domestic violence to the victim so that she is able to make informed decisions about what is safe for her.

Marshall agrees with most commentators that domestic violence protocols and practices must be in place when establishing a child protection mediation program.⁶ These include the necessity of having mediators who are trained in the dynamics of domestic violence and who also have continuing education in that area, as well as in substance abuse and mental health issues. She concludes that mediation practiced in the proper environment:

"...can enhance survivor safety, empowerment and self-esteem when the mediators understand domestic violence, provide separate mediation for the parents, work with a domestic violence protocol, and have the support of the court."⁷

Some argue that mediation and other forms of ADR are inappropriate for child protection cases because child abuse cannot be mediated or marginalized. This argument has been dispelled by over 20 years of practice and consistent findings that child safety is not jeopardized with properly conducted mediation. Several protections are built into the mediation process including participation by a GAL and/or attorney for the child; the presence of the social worker; facilitation by trained mediators who are focused on the best interests of the child; and, finally, judicial review of all proposed agreements. More importantly, everyone in the mediation process understands that the issue of child abuse or neglect cannot be mediated or marginalized. All circumstances surrounding the allegations can, however, be discussed and heard, as can all issues related to the safety and best interest of the child and the safety of the family members. After all, talking about issues, listening and being heard and understood are often helpful in focusing attention on the safety and best interest of the children and reducing

overall acrimony and increasing cooperation between the participants, whether or not an agreement is reached. Indeed, that is the power of mediation.

The protocols and practices for all forms of ADR must address issues relating to the safe arrival at and departure from the courthouse or other setting where the ADR is to take place. Moreover, just being in the courthouse does not ensure safety from threats or intimidation by a batterer. In fact, the courthouse environment may increase the possibility of such violence or threats of violence. Separate waiting rooms and the availability of law enforcement trained in the dynamics of domestic violence are recognized best practices.

Domestic violence protocols were late in coming to some types of ADR. In Santa Clara County, the local domestic violence advocates worked with court professionals to develop domestic violence protocols for team decision making and family group conferencing.⁸ These have been widely distributed to other jurisdictions.

Conclusion: Mediation and other forms of ADR must address issues that can make the decision-making process unfair or unsafe. The development of protocols and practices over the past 25 years has resulted in a fair and safe process for all involved.

Footnotes:

1. Howe, W., and McIsaac, H., "Finding the Balance," *Family Court Review*, vol. 46, no. 2, January, 2008. See Edwards, L., Baron, S., and Ferrick, G., "A Comment on William J. Howe and Hugh McIsaac's Article 'Finding the Balance'" and "Surreply" *Family Court Review*, vol. 46, no. 4, October, 2008, at pp 586-591 and 595-597.
2. Trosch, L., et.al., "Child Abuse, Neglect, and Dependency Mediation Pilot Project," (nationalcasa.org/download/Judges_Page/notes-1008/0810-ChildAbuseNeglectDependency-0019.pdf) *Juvenile and Family Court Journal*, vol. 53, no. 4 (Fall, 2002) at pp 67-77; Kelly, J., & Johnson, M., "Differentiation Among Types of Intimate Partner Violence: Research Update and Implications for Interventions," *Family Court Review*, vol. 46 X (Forthcoming, October 2008); Emery, R., Sbarra, D., & Grover, T., "Divorce Mediation: Research and Reflections," *Family Court Review*, vol. 39, (Jan. 2005) at p. 37. Trosch, Kelly, and Emery here.
3. Where mandated or permitted, mediation and similar approaches such as family group conferencing, should be used only in settings that develop protocols on its appropriate and safe use, conduct appropriate agency training, and regularly supervise staff about victim safety needs. *Effective Intervention in Domestic Violence & Child Maltreatment Cases: Guidelines for Policy and Practice*, ("Greenbook"), 1998, NCJFCJ, Reno, p. 67. Also see Pages 101-102; Sections 408(A) & (B), *Family Violence: A Model State Code*, NCJFCJ, Reno, 1994, at pp 36-37.
4. See for example, California Rules of Court 5.518(d), 1405.5, and 5.135. For a full discussion of why mediation can be safely conducted even when there are issues of domestic violence, see Edwards, L., "Achieving Timely Permanency in Child Protection Courts: The Importance of Frontloading the Court Process," (nationalcasa.org/download/Judges_Page/notes-1008/0810-AchievingTimelyPermanency-0019.pdf) (*Juvenile and Family Court Journal*, vol. 58, no. 2, Spring, 2007, at pp 1-37 at pp. 12-13.
5. Edwards, L., et.al., "Mediation in Juvenile Dependency Court: Multiple Perspectives," (nationalcasa.org/download/Judges_Page/notes-1008/0810-MediationInJuvenile-0019.pdf) *Juvenile and Family Court Journal*, vol. 53, no. 4, Fall, 2002, pp 49-65, at p. 61.
6. *Id.*
7. *Id.*, at p. 62.
8. For a discussion of other types of ADR used in child protection cases, see Edwards, L., and Sagatun, I., "The Transition to Group Decision Making in Child Protection Cases: Obtaining Better Results for Children and Families," (nationalcasa.org/download/Judges_Page/notes-1008/0810-TransitiontoGroupDecision-0019.pdf) *Juvenile and Family Court Journal*, vol. 58, no. 1 (Winter 2007) (available by link to this edition of *The Judge's Page*)