

DOMESTIC VIOLENCE AND MEDIATION: A DIALOGUE

A COMMENT ON WILLIAM J. HOWE AND HUGH MCISAAC'S ARTICLE "FINDING THE BALANCE" PUBLISHED IN THE JANUARY 2008 ISSUE OF *FAMILY COURT REVIEW*

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This article is a response to an article written by William Howe and Hugh McIsaac that questions their recommendations that court-based mediation not be used when certain types of persons appear in court. We assert that it will be very difficult for the court to identify these people. Further, we argue that mediation practice has advanced so far that even these persons (those with serious issues of domestic violence, substance abuse, and mental health) should be given an opportunity to participate in mediation before being referred to the adversarial court process.

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As family law mediators and mediation supporters, we are always pleased when one of our own writes about best practices in *Family Court Review*. Thus, we were delighted when the article "Finding the Balance" by Howe and McIsaac appeared in the January 2008 issue of *FCR*. Our delight was somewhat tempered when we read the following on page 83:

Cautions: Whenever there is significant or persistent domestic violence and significant issues of mental health on the part of one or both parties, or significant levels of chemical abuse, generally the adversarial model is preferable because of procedural and other safeguards it provides to the victim or less capable party. Essentially, non-adversarial decision-making models presuppose rational actors, that is, parties who are generally capable of accurately perceiving their self-interest and acting upon it. Most jurisdictions using alternative means in dispute resolution, such as mediation, private arbitration or any of the models discussed above, have developed elaborate safeguards to filter inappropriate cases, assuring that those requiring the control and muscle of the court are directed to the conventional litigation track.

This paragraph surprised us and led us to sit down and write this perspective. We believe that its recommendations are unwise and that they are based on faulty assumptions and incomplete or inappropriately applied facts. The authors' approach to family court practice is not only unfair to the parties, it also discounts the skills and abilities of mediation professionals. We believe that the better policy is to use alternative dispute resolution procedures (mediation) in all child custody cases unless the mediator deems such procedure unworkable or unsafe.

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McIsaac and Howe are not alone. Few states have demonstrated an unwavering commitment to mediation in child custody matters. Most states permit the parties to opt out of mediation or do not require mediation where there are issues of domestic violence between the parties, substance abuse by one or both of the parties, extreme conflict, severe power imbalances, serious mental health issues, or when the parties or their attorneys do not want to mediate their case.

At first glance it may seem that the reluctance to use mediation in these cases is understandable. Some say that it seems unfair and perhaps unsafe to conduct mediation when there is a perceived power imbalance or when it appears that one or both parties are not rational actors. Moreover, there is reluctance for courts to order mediation in the face of resistance from the parties or their attorneys. Often there is a belief that the court can do just as effective a job with its normal litigation procedures. After all, the judges and lawyers who run the court system were trained in the adversarial process. Most of them believe that the adversarial process is more than adequate to produce good results for families in court. These professionals know that they have control over the proceedings in the adversarial process and that they can figure out the best answers in the courtroom.

We believe that these opt-out options do not serve the parties or their children well. The policy of automatically excluding parties from mediation makes a number of generic and false assumptions that have unintended consequences. First, the opt-out or exclusion policy disempowers rather than empowers parents. It makes the unfounded and broad assumption that parents experiencing these types of issues and problems are automatically and substantially disabled with regard to their ability to participate in mediation, even with highly trained mediators who have protocols, protections, and checks and balances for dealing with the issues in question. It also assumes that all such parents are incapable of recognizing and asserting the needs and the best interests of their children and of acknowledging, when present, their own limitations and the need and ability to accept assistance. In short, it is an unwarranted expression of paternalism on the part of those who run the court process.

Second, such a policy does not acknowledge the benefits of participation in a well and safely conducted mediation that exist in addition to and beyond potential conflict resolution. Such benefits can and should include education, problem identification, boundary setting, support, safety planning, and service referral. As the national policy publication *Effective Intervention In Domestic Violence & Child Maltreatment Cases: Guidelines for Policy and Practice* pointed out

... where mediation is mandated or permitted, if it is conducted in accordance with the guidelines described in this section, the process can effectively empower victims of violence and enhance their safety as well as the safety of their children and other family members.¹

Third, as a number of domestic violence researchers have indicated, the one-size-fits-all approach "... meet(s) neither the goals of fairness nor public safety."²

... [N]ot all violence by intimate partners follows the systematic pattern of control, intimidation, and domination that is typical of battering. Grasping that there are important differences in partner violence is crucial for researchers, practitioners, and advocates since this understanding would guide the forging of effective interventions for victims and perpetrators. To design appropriate intervention programs, we need to distinguish who is doing what to whom and with what impact.³

... [I]t has become increasingly apparent to advocates and practitioners in the domestic violence field that to treat everyone exactly alike can ultimately do more harm than good.⁴

Kelly and Johnson agree that there are different types of intimate partner violence and that different strategies should be utilized depending on the type of violence. Regarding mediation they point out that

court-based mediation programs have become increasingly responsive to the legitimate challenges and questions raised by women's advocates, and incorporated a variety of new screening and service procedures to protect victims of partner violence, including separate sessions, different arrival and departure times, metal detectors, referrals to appropriate agencies, presence of support persons, and monitoring of no contact orders.⁵

For most types of intimate partner violence the authors find that couples "are not only capable of mediating, but can do so safely and productively with appropriate safeguards."⁶ Even in those types of violence the authors describe as "more problematic," they write that mediation can be effectively used so long as safety procedures are in place.

Finally, the recommended policy does not recognize that participation in a mediation process does not preclude the use of other processes, including investigation and adversarial hearings when necessary.

As a practical matter, McIsaac and Howe's policy recommendations are difficult to implement. How are cases to be identified? How is the court system going to "filter out inappropriate cases" and determine when there is "significant or persistent domestic violence," "significant issues of mental health," or "significant levels of chemical abuse"? The identification process will surely lead to over- or underidentification and will encourage the parties to include negative information about each other in their reports to the court system. Instead of conducting a premediation process to identify who should be excluded from mediation, we suggest that the mediator begin the mediation process with appropriate safeguards and procedures and then permit the parties, the mediator, and the process to determine whether or how mediation may be beneficial to them.

More importantly, McIsaac and Howe seem to have some confidence that the adversarial process and the accompanying "control and muscle of the court" can provide positive results for families. We believe that the adversarial process can be damaging to family relationships. With its emphasis on deficits and its focus on winning and losing, this process should be a last resort when all else, including mediation, has failed. As Judge Mary Ann Grilli, an experienced and well-respected family law judge in the California Superior Court, County of Santa Clara, told us:

After years of experience in cases involving parents, domestic violence, and child custody, I have concluded that if properly designed and operated, mediation provides a safe, effective way of resolving these custody disputes. What many people forget is that the court process does not offer a better environment for the resolution of these cases. The parties have to appear together in the same courtroom, and there is much less time for the judge to hear evidence and understand the family dynamics. Moreover, in the courtroom there will be no opportunity for the parties to exchange proposals and to have some level of control over what happens to their children.⁷

In a videotaped interview Commissioner Kristine McCarthy of the Santa Clara County Juvenile Dependency Court said that at first she did not believe that mediation could produce better results than what she could do as a fact-finding judicial officer. She then went on to say that, after examining the results of mediated agreements, she concluded that mediation produced more comprehensive plans for the parents and children.

Judge Louis Trosch Jr. of Mecklenberg County, North Carolina participated in a study of mediated and nonmediated cases involving family issues. The orders from an equal number of judicially determined cases and mediated agreements were shuffled together and then given to a group of professionals (judges, social workers, attorneys) who were asked: Was this order the result of mediation or litigation? Well over 90% correctly identified the mediated agreements as more detailed and nuanced.⁸

The adversarial process produces winners and losers. But winning and losing are bad for families. As Robert Emery has shown in his research, mediated agreements are much more likely to result in continued contact from the noncustodial parent (usually the father) than litigated custody cases. In fact, Emery's research indicates that litigation often results in no further contact between the father and the children years later. He points out that mediation permits parties to problem solve and look to the future of family relations, albeit in separate homes.⁹

National policy commentators agree that, if properly conducted, mediation is appropriate in child custody cases even when issues of domestic violence are present. In 1994, the National Council of Juvenile and Family Court Judges published *Family Violence: A Model State Code*, containing recommendations for state legislators regarding cases involving domestic violence. The *Model Code* has been adopted in whole or in part by a majority of states across the country. Section 408(b) states:

1. In a proceeding concerning the custody or visitation of a child, if an order for protection is in effect or if there is an allegation of domestic or family violence, the court shall not order mediation or refer either party to mediation unless the court finds that:
 - (a) The mediation is provided by a certified mediator who is trained in the dynamics of domestic and family violence; and
 - (b) The mediator or mediation service provides procedures to protect the victim from intimidation by the alleged perpetrator in accordance with subsection 2.
2. Procedures to protect the victim must include but are not limited to:
 - (a) Permission for the victim to have in attendance at mediation a supporting person of his or her choice, including but not limited to an attorney or advocate; and
 - (b) Any other procedure deemed necessary by the court to protect the victim from intimidation from the alleged perpetrator.¹⁰

Survey data also indicate that clients prefer mediation to litigation. They feel respected and heard in mediation. They feel rushed and ordered in the court process. California conducted an exhaustive study of client satisfaction with the court process. Clients expressed their displeasure with the family court courtroom process, referring to it as assembly-line justice. They were quite pleased with mediation, finding that they were able to explain their position and concerns fully and were listened to respectfully.¹¹ In fact, the clients were pleased with the mediation process even when they did not prevail when an agreement was reached. It was the process, not the result, that was most important to them.¹²

Contrary to McIsaac and Howe, we believe that, instead of establishing categories of those to be excluded from mediation, the court process should permit the parties in every custody case to participate in mediation, but a mediation process that includes screening, education, safety procedures, and well-trained mediators. This position is not wishful thinking or dreaming. For over twenty-five years California law has mandated mediation in all child custody disputes. Each year data have been collected, studies conducted, and training provided. The result is a sophisticated mediation system that identifies problem cases, maintains safety

in the mediation process, and provides results that satisfy the great majority of clients. So, for example, in domestic violence cases the parties can meet separately with the mediator or by telephone, or choose to have a support person participate in the process. Moreover, mediators are skilled in addressing so-called power imbalances. The fail-safe in the mediation process is that, if the mediator believes that mediation is not possible or dangerous, the case is then returned to the court for the normal litigation process. That this happens infrequently is recognition of the mediators' skill and the power of the mediation process.

California Rules of Court 5.210 and 5.215 offer examples of the policies and procedures developed over twenty-five years and that mandate information gathering that one should not assume exist to any extent in the adversarial process. These rules of court require, among many additional safeguards, that

- + all court connected custody mediators, in addition to a minimum of 40 hours of specific mediator training and other requirements, complete a minimum of 16 hours of specific advanced domestic violence training the first year and 4 hours of domestic violence training each year thereafter; (incidentally, this is probably more domestic violence training than most judicial officers deciding custody cases with domestic violence issues).
- + mediators provide information to families about the effects of domestic violence on adults and children;
- + court connected mediation programs use a detailed intake process that, prior to any mediation, screens for the existence of domestic violence, any restraining orders or safety-related issues affecting any party or child named in the proceedings, and conduct a thorough differential domestic violence assessment in domestic violence cases;
- + when domestic violence is identified or alleged, mediation staff must consult with the party alleging the domestic violence out of the presence of the other party and discuss the existence of or need for a safety plan;
- + in the mediation process the mediator must control for potential power imbalances between the parties with the use of measures including, but not limited to, the use of separate sessions and support persons as provided by law;
- + the mediator maintain an overriding concern to integrate the child's best interest within the family context and make reasonable efforts to ensure the safety of victims, children, and other parties when they are participating in any services including mediation;
- + mediation be terminated if the mediator believes that he or she is unable to achieve a balanced discussion between the parties;
- + family members be referred to appropriate services including, but not limited to, programs for perpetrators, counseling and education for children, parent education, services for victims, and legal resources, such as family law facilitators.¹³

Some may find it understandable that most family courts have not made a significant commitment to mediation in child custody disputes. Unless the state legislature mandates mediation, it is unlikely that judges and attorneys will agree to turn to mediation for the resolution of the cases McIsaac and Howe have singled out for the reasons stated above. However, times are changing. Collaborative law has expanded in many jurisdictions, more and more attorneys have become mediators and shunned courtroom practice, and many retired judges find themselves turning to mediation.

The evidence indicates that mediation results in settlement of cases at far higher rates than the adversarial process, that settlement through the mediation process takes place sooner than in the adversarial process, that the cost to the litigants is less than the costs of

the adversarial process, that the parties are more satisfied with the outcomes of the mediation process, and that child–parent relationships are stronger when mediation is used. Research and practice also indicate that, with the proper practices and procedures, there are no reasons why mediation should not be used in every child custody case.

We believe that the court system has a responsibility to families to get them through the difficult child custody litigation process safely without destroying the connections that family members have with their children. Mediation accomplishes this goal much better than litigation. With over twenty-five years of experience, we conclude that mediation should be mandated. When it fails, the adversarial process is available as the necessary, but least preferred alternative.

NOTES

1. SUSAN SCHECHTER & JEFFREY L. EDELSON, EFFECTIVE INTERVENTION IN DOMESTIC VIOLENCE & CHILD MALTREATMENT CASES: GUIDELINES FOR POLICY AND PRACTICE, 42, available at http://www.childrensprogram.org/media/pdf/green_book.pdf (last visited Apr. 1, 2008).

2. ELLEN PENCE & SHAMITA DAS DASGUPTA, RE-EXAMINING “BATTERING”: ARE ALL ACTS OF VIOLENCE AGAINST INTIMATE PARTNERS THE SAME?, OFFICE ON VIOLENCE AGAINST WOMEN (Praxis Int’l Inc. 2006).

3. *Id.* at 2.

4. *Id.* at 5.

5. Joan B. Kelly & Michael P. Johnson, *Differentiation Among Types of Intimate Partner Violence: Research Update and Implications for Interventions*, 46 FAM. CT. REV. 492 (2008).

6. *Id.*

7. Leonard Edwards, *Comments on the Miller Commission Report: A California Perspective*, 27 PACE L. REV. 627, 663–64 (2007).

8. A copy of the study is available from the author.

9. Robert E. Emery et al., *Divorce Mediation: Research and Reflections*, 43 FAM. CT. REV. 22, 22–37 (2005).

10. MODEL CODE ON DOMESTIC AND FAM. VIOLENCE § 408(b) (1994).

11. DAVID B. ROTTMAN, TRUST AND CONFIDENCE IN THE CALIFORNIA COURTS: A SURVEY OF PUBLIC AND ATTORNEYS (Judicial Council of California/Administrative Office of the Courts 2005).

12. *Id.*

13. For full text of the rules, look to CAL. R. CT. 5.210, available at <http://www.courtinfo.ca.gov/rules/index.cfm?title=five&linked=rule5.210>, and CAL. R. CT. 5.215, available at <http://www.courtinfo.ca.gov/rules/index.cfm?title=five&linkid=rule5.215>.

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