Mediation in Child Protection Cases

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Superior Court of California, County of Santa Clara

A petition filed with the child protection court alleges that Mary, a 5-year-old child, needs the court's protection. Mary's mother is addicted to methamphetamine, which prevents her from adequately caring for her daughter: she has been unable to protect Mary from witnessing the ongoing domestic violence that the father has inflicted on her; she refuses to leave the father's home despite offers of assistance; and the home is so dirty that it is unsafe for the child to live there. Both mother and father appear in court and deny the allegations. The court appoints each parent an attorney and appoints Mary an attorney who will also serve as her guardian ad litem. At the first hearing, the court places Mary in the temporary care of her maternal grandparents.

At the next hearing the parents request a trial regarding the truth of the allegations made by the social worker in the petition. The court refers the parties and attorneys to mediation. The parents, the maternal grandparents, the social worker, and the attorneys all participate in the mediation session. A domestic violence victim advocate accompanies the mother. After the mediation session, the parties return to court and some changes are made to the petition. Thereafter, the parties admit to the court that the allegations in the petition are true, thus resolving the jurisdictional issues. They also agree with the dispositional recommendations and the case plan for each parent that was developed in the course of the mediation process.

The court declares the child to be under the protection of the juvenile court, and each parent is ordered to receive family reunification services. Mary is placed with her grandparents. The court sets a review date in the future to monitor Mary's well-being and the progress made by her parents in addressing their separate case plans. The mother's case plan states that she will live separately from the father and will enter a substance abuse treatment program. The father's case plan states that he will participate in a domestic violence intervention program. The court further orders that both Mary and the mother participate in individual counseling.

This example illustrates the use of mediation in child protection (juvenile dependency) cases, a practice that has increased substantially in America's juvenile courts over the past five years. There are several reasons for its growing popularity, but the principal one is that it works: mediation produces agreements that are acceptable to all parties, do not sacrifice child safety, and are more effective and longer lasting than court orders after contested hearings.

The use of court-based mediation in child protection (juvenile dependency) cases has spread widely over the past five years. As a substitute for contested judicial hearings, mediation produces more effective, longer-lasting agreements that protect child safety on terms acceptable to all the parties. Mediation also offers participants opportunities unavailable in contested hearings. Parents, attorneys, social workers, and others work together, asking and answering questions, airing concerns, and ultimately crafting a resolution of the family's unique problems.

Following an overview of child protection proceedings and their goals, this article describes the legal structure and judicial role in those proceedings, and then details the shortcomings of the traditional adversarial process in resolving child protection and related family issues. The article offers mediation as a salutary alternative to judicial proceedings, discussing mediation's growth and impact on both

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the parties and the court system and recommending best practices for a successful mediation program.

The author wishes to thank Steve Baron, Brendan Cunning, Sharon Bashan, and Jennie Winter for assistance in preparing this article. ■

But mediation accomplishes much more. Unlike a contested hearing, the mediation process offers parents the opportunity to say what is on their minds, air their grievances, and grieve the losses that they have been experiencing. It gives the attorneys a forum in which they can work together to identify and solve problems without pressure from the court process or the hindrance of evidentiary rules. Other family members can participate in the mediation process to help determine the best plan for the child. Mediation offers a context in which to work out the details of a child safety plan and thereby tailor an effective resolution addressing the family's unique needs. It enables everyone to complete the process with a sense of accomplishment—a feeling that their combined efforts have produced something of value for the child and family—as well as a stake in the outcome that they had a hand in creating.

The first sections of this article discuss child protection proceedings, the goals they attempt to accomplish, their legal framework, and the shortcomings of the traditional adversarial process in resolving child protection and related family issues. Next, the article discusses the impact of court-based child protection mediation[1] on both the parties and the court system and recommends best practices for a successful mediation program. This section also describes the growth of mediation from the perspectives of participants in the child protection system. The article concludes by arguing that mediation has the potential to change the environment in which the court system addresses child protection cases to the benefit of all concerned.

CHILD PROTECTION PROCEEDINGS

Child protection proceedings[2] are state-initiated legal actions undertaken to address the needs of children who have been abused or neglected by their parents or caretakers and who require protection and safe, permanent homes. These proceedings typically are heard in the juvenile or family courts of a court system.[3] Federal and state laws govern child protection proceedings. The federal Child Abuse Prevention and Treatment Act of 1974 (CAPTA),[4] the Adoption Assistance and Child Welfare Act of 1980 (AACWA),[5] and the Adoption and Safe Families Act of 1997 (ASFA)[6] establish the federal funding structures for state child protection systems and mandate that those systems seek to protect abused and neglected children, provide services to them and to their families, and establish permanent homes for them in a timely fashion.

State statutes define how state child protection and child welfare agencies shall provide protection for children, deliver preventive services to families in need so that children need not be unnecessarily removed from their homes, and provide services to families whose children have been removed so that the family can be safely reunited. State statutes also establish time frames for the determination of a permanent plan for the child. The permanent plans in both federal and state laws are the return of a child to a parent, adoption, guardianship, or a placement in a permanent, stable home (such as the home of a relative

or a foster or group home). Placement in a foster or group home is the least-favored permanent plan.

Under this statutory structure the state agents (child protection and social workers) have multiple roles. They must protect children; investigate suspected abuse or neglect; provide services to families to prevent removal of the child; prevent further harm to the child; and, if removal is necessary, facilitate reunification or, when required, a permanent placement in a timely fashion. These multiple roles are potentially in conflict with one another and present unique challenges to these state agents.

THE LEGAL STRUCTURE OF CHILD PROTECTION CASES

Both federal and state laws direct that the juvenile court provide oversight for the implementation of child protection laws. With the passage of the AACWA in 1980, the juvenile court gained a significantly greater role in the nation's child protection system. Under the AACWA, as amended, the court must review any action taken by the child protection agency to remove a child from parental care without the parent's consent to ensure that such a removal was necessary to protect the child's welfare.[7] In addition, the court must determine whether the agency is fulfilling its legal mandates throughout each case from beginning to end. This oversight responsibility requires the court to make findings regarding the adequacy of services provided by the agency to the family. These so-called reasonable efforts findings[8] must be made throughout the entire case, including (1) when a child is removed, to determine whether the family received adequate preventive services to prevent removal; (2) when a case is reviewed after removal, to determine whether the family received adequate reunification services; and (3) when a permanent plan has been established, to determine whether the agency has taken adequate steps to reach a timely permanent plan.[9]

The judge also has to perform more traditional judicial functions, making factual and legal findings and ensuring that the parties receive due process throughout the court proceedings. In this regard the judge must make findings regarding notice to all parties, legal representation, trial rights, admissibility and sufficiency of evidence, and the right to appeal the court's decisions.

JUDICIAL PROCEEDINGS IN CHILD PROTECTION CASES

Child protection proceedings are complex, involving numerous parties and attorneys, multiple hearings, and unique legal issues. The parties include the parents, the child, and the agency that has initiated the legal action on the child's behalf.[10] Each of these parties may be represented by an attorney; the child is represented by an attorney, a guardian ad litem, or both.[11] Other interested persons may participate in the proceedings, including relatives, foster parents or caretakers, legal guardians, stepparents, boyfriends or girlfriends, de facto (psychological) parents, the child's Court Appointed Special Advocate (CASA), service providers, and representatives from Indian tribes to whom the family is related. Some of these interested persons may have attorneys representing them.

As described in the case history beginning this article, if a child has been removed from parental care, the first hearing is the shelter care or removal hearing.[12] This usually takes place within a few days after the child's removal. At this hearing the judge reads and explains the legal papers (the petition) that have been filed on behalf of the child; reviews the legal process with the parties; ensures that each party, including the child, is represented; determines where the child will live until the next hearing; inquires about possible Indian heritage;[13] and determines what visitation parents and other family members will have with the child if the court orders removal of the child from parental care.

At the next hearing, the jurisdictional or adjudication hearing, the judge determines whether the statements in the petition are true.[14] It is similar to the trial stage in other legal proceedings. Before the hearing is held, the social worker has usually prepared a report documenting the reasons that the child needs the protection of the court. The parents or guardian may agree with the allegations in the

petition and, after an inquiry by the court regarding legal rights, the court may find that the statements in the petition are true.[15] If the parents disagree with some or all of the allegations, they may ask for a trial, at which the judge hears evidence, including reports and testimony, and then rules whether the allegations are true.

If the petition is found to be true, the case then proceeds to a dispositional hearing, at which the court addresses the plan for the child and parents.[16] The judge decides whether the child will be declared to be under the protection of the juvenile court, whether the child will be removed from the care of one or both of the parents, and, if removed, where the child will be placed. The judge also decides what visitation parents and relatives will have with the child and what services, if any, each parent should complete to address the issues that brought the child to the attention of the court.[17]

To oversee the parents' efforts to reunify with their child and the agency's efforts to assist in the reunification process, the court reviews the case every six months or, if necessary, more frequently.[18] At these review hearings the court monitors all aspects of the case, including the parents' progress, the child's well-being, visitation with the parents and other family members, and the agency's efforts to assist the parents and fulfill other court orders.

The law mandates that a child removed from parental care must have a permanent home within one year of removal if possible. But if the child cannot be returned to either parent during that time, the juvenile court must hold a hearing to determine the child's permanent home.[19] The preferred permanent plan is an adoptive home (after termination of parental rights). The next preferred permanent plan is creation of a legal guardianship. If the child cannot be returned to either parent, and adoption and guardianship are not possible, the court may have to place the child in a foster or group home. This is the least preferred permanent plan and requires continued court oversight of the child until a permanent home is identified or until the child becomes an adult.

THE IMPACT OF JUVENILE COURT OVERSIGHT

Juvenile court oversight of child protection cases has both positive and negative aspects. Court oversight has brought standards and accountability to the child protection system. The court now reviews social worker decisions regarding removal and placement of children and services for families according to legal standards, and all parties have a forum in which their complaints can be heard and reviewed. Court oversight of permanency has resulted in increased permanent plans for children, particularly adoptions, and shorter periods of time in foster care in many cases.

On the other hand, court oversight is both expensive and cumbersome. The cost of hiring lawyers and having social workers spend a substantial part of their workday in court is significant. The legal process takes time, and, often, permanency is not achieved in a timely fashion because of legal delays. Furthermore, there has been no appreciable decline in the numbers of children in out-of-home care since the juvenile court assumed oversight responsibility of child protection cases—in fact, the numbers have risen.[20]

The legal process is also ill suited to address the social and family problems that are the essence of child protection cases. The Anglo-American legal system is founded on the adversarial process, a process that seeks truth from the presentation to the judge of different positions by contesting parties. The adversarial process provides an opportunity for each party to present his or her position to the judge and also for each party to examine the other party and any witnesses regarding their position. During cross-examination, a party (usually through an attorney) can ask questions of witnesses or parties in an effort to demonstrate the weaknesses in their testimony.

But the adversarial process, and cross-examination in particular, can be a brutal and terrifying experience, especially for someone inexperienced in the law. Simply testifying in court is difficult, especially for nonprofessionals. To be asked questions, at times in an aggressive or sarcastic tone, about personal

problems and family matters compounds the difficulty. When the ultimate issues that the court will decide are whether allegations of abuse or neglect are true, whether parents have been performing well in their efforts to reunify with their child, and whether parental rights to a child should be terminated, the court process and cross-examination can be a nightmare. Some commentators argue that the adversarial process seeks neither truth nor the best answer for the parties before the court.[21]

THE ROLE OF THE CHILD WELFARE AGENCY

Until the passage of the AACWA in 1980, the juvenile court was seldom involved in child protection proceedings. In many jurisdictions the juvenile court became involved with a family only if the child welfare agency decided to terminate parental rights. Otherwise, the removal of children, the delivery of service, and the time frame for permanency all remained within the discretion of the agency.

The AACWA significantly changed the goals of the child welfare system, the federal funding of foster care at the state level, and the federal government's expectations of agency operations. It also required child welfare agencies to justify many of their decisions in proceedings before the juvenile court. It is difficult to estimate which branch of government was less pleased with the new relationship created by the AACWA—the agencies or the juvenile court—but the agencies clearly were more profoundly affected.[22] Not only were they required to change the ways in which they were conducting their child protection and child welfare operations, but they were also required to justify their actions to another branch of government in a new environment.

The court system presents problems for child protection agencies that they continue to struggle with today. First, in order to participate in court proceedings, they have had to create and maintain staff familiar with the law. This has meant hiring lawyers to present the agency position in court as well as developing legal expertise among the social worker staff to interpret court orders. Second, to obtain approval for their actions, child protection agencies have been required to learn how legal decisions are made, how evidence must be gathered, and how court procedures dictate the presentation of evidence. Third, they have had to learn about the formality of court proceedings, the power of the judge, and the power that attorneys have to shape court proceedings.

For the line social worker, the formality of court proceedings and the adversarial process have presented the most difficult problems. Nothing in their training prepares social workers for evidence collection, report writing, and direct and cross-examination under the rules of evidence. Many social workers find the court process to be an overly formal setting, demeaning and inhospitable, where the truth is sacrificed for procedural rules and the free exchange of information and ideas is difficult, if not impossible.[23] Some have concluded that, in practice, court proceedings work as a barrier to achieving the goals of the law.[24]

THE ROLE OF MEDIATION

Even though courts and agencies have struggled for years to implement the federal law, there has been noticeable success in the last 10 years. Those courts that have proven to be the most successful in meeting the mandates have followed identified best practices[25] and have developed collaborative relationships with their local child protection agencies.[26] Often a lead judge or an agency director has reached out to form a working partnership between the court and agency. On occasion, judicial leadership has resulted in court improvement and better results for the children and families appearing before the court. Under either scenario, these model courts have been able to improve court practices and administrative procedures, introduced model programs—including mediation—and developed positive working relationships among all members of the court system. They have also been successful in reducing the numbers of children under court supervision and the time it takes to place children in permanent homes.[27]

CHILD PROTECTION MEDIATION

Child protection mediation is a process in which specially trained neutral professionals facilitate the resolution of child abuse and neglect issues by bringing together, in a confidential setting, the family, social workers, attorneys, and others involved in a case.[28] The creation and expansion of child protection mediation has been one of the most significant developments in national court improvement efforts. It has had a positive impact on the overwhelming majority of courts that have introduced it and made it a part of the court process.[29]

At the Superior Court of California, County of Santa Clara, where the author sits as a judge, three juvenile court judicial officers preside over the cases of approximately 3,000 children. Child protection mediation has been practiced in this large urban court for more than 10 years.[30] In the Santa Clara juvenile dependency court, all parties and attorneys participate in mediation. Family members, significant friends, and professionals are also invited to participate.

Any case can be referred to mediation at any stage of the proceedings from the initial hearing up to and including the establishment of a permanent plan including termination of parental rights. No cases are excluded in principle from the mediation process. Mediation is based on a very simple premise: a confidential discussion among the parties may lead to positive results. As the director of the Santa Clara County Family Court Services has observed, "It can't do any harm to talk about the case, and it may produce some positive results."[31] In practice, however, the court does not refer all cases to mediation—only those where difficult issues have been identified and the case may end up in trial.

The Santa Clara County court practices confidential mediation. Except for the reporting of new allegations of child abuse or neglect, all communications in the mediation session are confidential and inadmissible in any subsequent court proceedings. Two mediators, a man and a woman, conduct each mediation. The mediators explain to all parties the mediation process and its goal, which is to come up with a plan that all the parties, attorneys, social worker, and CASA agree is best for the child and safe for all involved participants. In this sense, the mediation process is goal oriented and not a process seeking agreement for its own sake.

To ensure a high-quality mediation process, Santa Clara County mediators are well-qualified professionals who have undergone extensive training.[32] The court sets aside three and a half hours for each mediation session, and the parties may return on two or three occasions to complete the process. Sometimes a case will be set for an entire day if the issues are particularly complex. The court requires all attorneys and parties to attend each session. If the child can make an informed choice, he or she has the right to participate in the mediation process.[33] Otherwise, the attorney–guardian ad litem appears on the child's behalf. The Santa Clara County mediation process is also safe and fair for all participants. Several years ago, Family Court Services staff (mediators) met with leaders from the domestic violence advocacy community to discuss protocols and procedures that would enable victims of domestic violence or intimidation to participate in mediation safely. Local protocols were developed and have now been used for more than five years.[34] Child protection mediation in Santa Clara County operates in a manner consistent with national and state guidelines.[35]

The mediation process at the Santa Clara County court consists of four stages: (1) orientation to the process, (2) fact finding and issue development, (3) problem solving, and (4) agreement/disagreement and closure. Although the mediators expect to hear out each participant fully, when solutions and agreements are being addressed, they consistently ask each party whether the agreement will serve the best interest of the children involved.[36]

There are several different models of mediation across the country. The key elements that distinguish these models are the participants in the process, the types of cases that qualify for mediation, the aspects of the mediation process that may be disclosed to nonparticipants, the ability of mediators to make recommendations to the juvenile court, the number of participating mediators, and the mediators' degree

of neutrality, including their ability to set goals for the participants. Other factors affecting the quality of a particular mediation program include the mediators' training and experience, the length of each mediation session, the number of sessions before the case returns to court, local practice protocols that ensure a fair and safe mediation process (particularly for participants involved in domestic violence), the required participants, and the time parties must wait before participating in mediation.

Over the past decade best-practice standards have been developed to help provide guidance to new and growing programs. In 1995, the California Juvenile Dependency Court Mediation Association recommended standards of practice for court-connected juvenile dependency mediation. These standards helped the development of more than 20 county-based juvenile dependency mediation programs in California. The Judicial Council of California adopted these practice standards first as a standard of judicial administration and then incorporated them into a rule of court, which became effective January 1, 2004.[37]

GROWTH OF MEDIATION

Formal mediation in the court system has a relatively short history. Mediation in child protection cases has been used in several court systems, including Miami, Florida, and the state of Connecticut, for almost two decades. California passed the first mandatory mediation statute in child custody cases in 1980.[38] Los Angeles, Orange, and Santa Clara Counties have long used mediation,[39] yet it was not an accepted best practice until recently. One of the first acknowledgments that alternative dispute resolution techniques, and mediation in particular, were appropriate for child protection cases occurred in 1995 with the publication of the *Resource Guidelines* by the National Council of Juvenile and Family Court Judges (NCJFCJ).[40]

Once mediation became more widely known, it quickly became a recognized best practice. Mediation in child protection proceedings has grown in popularity over the past 10 years and has been implemented in court systems throughout the country.[41] This occurred for a number of reasons. First, mediation works. Almost all court systems that have implemented mediation report excellent results.[42] Second, mediation has been carefully evaluated by a number of commentators and court systems.[43] For example, in the Santa Clara County court, 75 percent of the cases referred to mediation resulted in complete resolution of all issues, 17 percent resulted in resolution of part of the issues, and only 8 percent did not have resolution of any issue.[44] Third, there is general satisfaction among all participants in the mediation process,[45] including both the parents and professionals.[46]

The use of mediation in child protection cases has widespread support. The NCJFCJ's Permanency Planning for Children Department has identified mediation as a best practice.[47] Mediation has also been involved in many court improvement initiatives in states across the country.[48] The recognition that mediation is a best practice has resulted in significant national and state interest in the mediation program at the Superior Court of Santa Clara County.[49] As a part of the Model Courts Project,[50] the Permanency Planning Department has provided technical assistance to many courts around the country, including site visits to the Santa Clara County court by numerous court teams. The Model Courts Project of the Permanency Planning Department includes 25 courts of varying sizes throughout the nation. At this time, 23 out of 25 courts have implemented a mediation program in child protection cases.[51] Furthermore, several state legislatures have identified mediation as a best practice and encouraged its development in local juvenile court systems.[52]

MEDIATION'S IMPACT

Child protection mediation is much more than an alternative dispute resolution technique that helps to resolve difficult child protection cases. For the child protection court system in the Santa Clara County court, mediation has profoundly changed the legal culture. It has changed the way in which the participants in the court system approach child protection cases, the way that these participants relate to each

other, and their attitudes toward the resolution of issues. Mediation has revealed some of the deficiencies of the traditional court process, particularly the adversarial process, which can lead to inferior results for children and families. Mediation is now a credible method of addressing child protection issues in the Santa Clara County juvenile court.

The impact of mediation in Santa Clara County was not instantaneous. Many participants in the child protection system had doubts about the efficacy of mediation. Some believed that mediation would sacrifice child safety in the interest of making agreements. Others believed that the court process, with settlement conferences and trials, was a preferable means of resolving these cases. Some attorneys and judicial officers admitted that they did not want to give up their control of the process. Many social workers were fearful of any process that involved attorneys.[53]

As more parties participated in mediation and the results proved satisfactory to all members of the court system, mediation became firmly established as an important part of the court process. Legendary stories of cases that "could not possibly settle" were frequently discussed, testifying to the effectiveness of the process. In one case, just before the commencement of a scheduled five-day trial, the judge ordered the parties to participate in a mediation session. The attorneys resisted, claiming that the case could not settle. After the mediation, the attorneys returned to the judicial officer and apologized for their earlier resistance. The attorneys were somewhat chagrined to discover that not one of them had understood all the facts in the case. Once all of the facts were revealed during mediation, the case rapidly settled.[54]

As the mediation process compiled more successes over time, the court culture began changing. Attorneys, social workers, and judicial officers began to ask for mediation. Instead of insisting on their position and demanding a trial to vindicate that position, attorneys began to look to the mediation process as a means to identify a solution that would satisfy all parties and produce better, longer-lasting results for everyone.

Not all cases referred to mediation settled, but even for those few that did not, mediation had a positive impact on both the parties and the attorneys. As a result of mediation, the issues that were tried in court were more carefully identified, and the emotional overlay was reduced because the parties already had a full opportunity to express their grievances and concerns. Testimony at trial was more focused and to the point because the mediation process had sharpened the issues for both attorneys and the parties.

The culture change has extended beyond the processing of cases. Personal relationships among attorneys are much more friendly and respectful than before the advent of mediation.[55] This is understandable. The attorneys regularly participate in mediations together and are able to share in the success of an agreement that is satisfactory for each of their clients. They also have a hand in shaping the final agreement that the family will live by in the months and years to come. Perhaps more significantly, from the perspective of court operations, relations between attorneys and social workers have improved. Mediation enables social workers to engage in problem solving with the other members of the court system. They, too, have more positive experiences working with attorneys to resolve difficult factual issues and design better, more effective case plans and workable visitation arrangements. Instead of the harsh experience of being cross-examined at trial on their efforts, social workers find attorneys in mediation to be respectful of their work.[56] The mediation process also helps social workers develop better relationships with their clients. The informal atmosphere in the mediation setting fosters better communication between social workers and parents and helps the parents understand the role of the social worker.

Judges in Santa Clara County have found that mediation is helpful from a number of perspectives. First, it resolves most cases with detailed solutions that would be difficult, if not impossible, to reach in the context of a trial. Second, it saves court resources. Third, it helps set a more positive tone in the juvenile court environment, where difficult and emotional issues are addressed on a daily basis. Fourth,

by providing a setting open to questions from any participant, it makes the court process easier to understand for all participants, particularly the parents.[57] Perhaps most significantly, the parents have expressed their satisfaction with the mediation process. They report that, unlike courtroom proceedings, mediation enables them to be heard and understood, often for the only time in the court process.[58]

CONCLUSION

The past 25 years have seen dramatic changes in the laws regarding child protection, family reunification, and permanent placement. America's juvenile and family courts now oversee and monitor child protection cases from beginning to end. These changes have led to the growth of large child protection court systems, with more judges, staff, attorneys, and guardians ad litem. There have also been significant changes within child protection and social service agencies as they have had to adjust to increased involvement in the court process.

It has become clear since the passage of the AACWA in 1980 that traditional court processes are not ideal for the resolution of family problems. The adversarial process, which involves cross-examination of witnesses, evidentiary rules, and other legal procedures, does not provide an environment conducive to truth finding or to the effective resolution of cases. Moreover, the process is perceived as hostile and uncaring by the parties and leads them to believe that they are not being heard or understood by decision-makers.

Child protection mediation, particularly when it is implemented according to best practices, can provide an opportunity for families and professionals to discuss difficult, emotion-laden issues in a protected setting with professional assistance. In mediation, family members can express their pain and concerns in a manner unavailable in the court process. They can then join with professionals and begin to make decisions about what is best for their children.

Child protection mediation has been successful from all perspectives. It resolves most cases referred by the court, and even those that do not resolve come back to court in a better posture for trial or further settlement discussions. The resolutions reached in mediation are more detailed and better tailored to the needs of the family and children than decisions that a court might render after a trial. Participants find the mediation process productive and helpful. In addition, mediation has a positive impact on the court environment. Relationships among attorneys, and between attorneys and social workers, have improved because of their participation in mediation. Parents are more satisfied because the process allows them to air their grievances and concerns. Finally, mediation produces better results for children. When all of the adults in their lives, including the professionals who have been assigned to work on their cases, come to an agreement on the best plan for a child, this means that everyone will be working together toward a common goal. Mediation is a significantly positive process for child protection cases, one that has quickly grown to become a national best practice for juvenile courts.

NOTES

1. Court-based child protection mediation is different from social service–based child welfare mediation, in which the child protection agency meets with the parents and a mediator in an effort to determine a permanent plan for the child. *See* Jeanne Etter & Diana Roberts, Child Welfare Mediation as a Permanency Tool (TFC Press 1996).

2. A variety of terms are used to refer to child protection proceedings: juvenile dependency, juvenile court, child welfare, and children-in-need-of-protection (CHIPs) proceedings. This article uses the term "child protection proceedings."

3. In this article, the term "juvenile court" is used to refer to the court with oversight responsibility for child protection cases. In some jurisdictions the family court, children's court, or dependency court is designated as the court with the oversight responsibility.

4. Child Abuse Prevention and Treatment Act of 1974 (CAPTA), Pub. L. No. 93-247, 88 Stat. 4 (codified as amended in scattered sections of 42 U.S.C.).

NOTES

5. Adoption Assistance and Child Welfare Act of 1980 (AACWA), Pub. L. No. 96-272, 94 Stat. 500 (codified as amended in scattered sections of 42 U.S.C.).

6. Adoption and Safe Families Act of 1997 (ASFA), Pub. L. No. 105–89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C.).

7. *See* 42 U.S.C. § 672(a)(1) (2000 & Supp. 2004).

8. "Reasonable efforts" is a term of art referring to the quantity and quality of services rendered by the child protection or social service agency in fulfilling the law's requirements. What is considered reasonable in each factual situation will be different. The judge determines whether the agency has met the community's standards for reasonableness. Leonard P. Edwards, *Improving Implementation of the Federal Adoption Assistance and Child Welfare Act of 1980,* 45 Juv. & Fam. Ct. J. 3, 6 (1994) [hereinafter *Improving Implementation*]. *See* 42 U.S.C. § 671(a)(15)(B) (2000 & Supp. 2004) (requiring every state to have a plan providing that *reasonable efforts* shall be made to preserve and reunify the family before placing a child in foster care and to make it possible for a child to safely return home).

9. *Id.* at 4–6.

10. The name of the agency varies in different jurisdictions (e.g., Department of Children's Services, Department of Human Services, Department of Family and Children's Services, Department of Family Services).

11. A guardian ad litem (GAL) is appointed to represent the child's best interest as opposed to the child's desires. CAPTA, *supra* note 4, requires that all children who are the subject of child protection proceedings be represented by a GAL. CAPTA, Pub. L. No. 93-247, § 4(B)(2)(G), 88 Stat. 4, 7 (codified as amended at 42 U.S.C. § 5106a(b)(2)(A)(xiii) (2000 & Supp. 2004)). In some states, an attorney also represents the child or the child's interests. In others, the attorney performs both the attorney and GAL functions. *See* Leonard P. Edwards, *Improving Juvenile Dependency Courts: Twenty-Three Steps,* 48 Juv. & Fam. Ct. J. 1, 7–8 (1997); Leonard P. Edwards & Inger Sagatun, *Who Speaks for the Child?,* 2 U. Chi. L. Sch. Roundtable 67, 70 (1995).

12. Nat'l Council of Juvenile & Family Court Judges (NCJFCJ), Resource Guidelines: Improving Court Practice in Child Abuse & Neglect Cases 29–44 (1995) [hereinafter Resource Guidelines]. This book describes in detail each hearing in the court process.

13. Indian Child Welfare Act of 1978 (ICWA), Pub. L. 95-608, 92 Stat. 3069 (codified at 25 U.S.C. §§ 1901–1963 (2000 & Supp. 2004)).

14. Resource Guidelines, *supra* note 12, at 45–52. For an example, see the case history beginning this article.

15. This was the result in the case history beginning this article. The resolution resulted from discussions at the mediation session. The changes in the petition language resulted in the removal of allegations with which the parents disagreed. After the changes, there were still sufficient facts to justify state intervention on behalf of the child.

16. Resource Guidelines, *supra* note 12, at 53–63.

17. In the case history the parents were given separate case plans with different goals. These were developed in the context of the mediation session, with full input from each parent and the attorneys.

18. Resource Guidelines, *supra* note 12, at 65–76.

19. *Id.* at 77–86. *See* 42 U.S.C. § 675(5)(C) (2000 & Supp. 2004) (requiring a permanency hearing to be held no later than 12 months after a child enters foster care, and not less frequently than every 12 months thereafter).

20. Approximately 250,000 children were in foster care in the early 1980s. Children's Bureau, U.S. Dep't of Health & Human Servs., Population Flow Exhibit 8, Substitute Care Trends 1980–1994 (2001), *at* www.acf.hhs.gov/programs/cb/dis/vcis/ii08.htm. In 2001 there were almost 550,000. Children's Bureau, U.S. Dep't of Health & Human Servs., The AFCARS Report 1 (Mar. 2003), *at* www.acf.hhs.gov/programs/cb/publications/afcars/report8.pdf.

21. "[C]ounsel having objected to a piece of documentary evidence, which appeared to be relevant to the case but inadmissible in law, the judge asked: 'Am I not to hear the truth?,' an enquiry which sounds reasonable enough, but which attracted the somewhat startling answer: 'No, Your Lordship is to hear the evidence.'" Peter Murphy, Murphy on Evidence 1 (Blackstone Press 5th ed. 1995).

22. "There's a lot of tension between CPS and the court. CPS workers are somewhat enraged with the court. They have trouble accepting that the court can't act on 'I want' or 'I feel.' Workers sometimes wind up resentful of the court because it imposes deadlines, requires reports, orders appearances, and they feel overwhelmed. . . .

"[Caseworkers] have a history of poor relationships with the court. When it goes to court everyone reads the caseworker's report and says 'Where's the proof?' When things are dropped in the petition, the workers

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say 'Doesn't anyone read our reports?' Caseworkers aren't thinking about evidence and legal limits." Ctr. for Policy Research, Alternatives to Adjudication in Child Abuse and Neglect Cases 20 (1992).

23. "Some judges think they know more about each case than the social worker who has handled it. And some agencies routinely frustrate judges by giving out too little information on the cases at hand." Edna McConnell Clark Found., Keeping Families Together: The Case for Family Preservation 34 (1985).

24. *See, e.g.,* Leonard P. Edwards & Steve Baron, *Alternatives to Contested Litigation in Child Abuse and Neglect Cases,* 33 Fam. & Conciliation Cts. Rev. 275 (1995), *reprinted in* Resource Guidelines, *supra* note 12, app. B at 131, 133.

25. Many of these best practices were collected in the Resource Guidelines, *supra* note 12. *See also* Edwards, *Improving Juvenile Dependency Courts, supra* note 11.

26. The literature has described some of the courts that have been successful. *See generally* Am. Bar Ass'n, Ctr. on Children & the Law, One Court That Works (1993); Am. Bar Ass'n, Ctr. on Children & the Law, A Second Court That Works (1995); Permanency Planning for Children Dep't, Nat'l Council of Juvenile & Family Court Judges, Status Report 2002: A Snapshot of the Child Victims Act Model Courts Project (2003) [hereinafter NCJFCJ Status Report]; Edwards, *Improving Implementation, supra* note 8.

27. Mary Mentaberry, U.S. Dep't of Justice, Model Courts Serve Abused and Neglected Children (1999) (OJJDP Fact Sheet No. 90), *available at* www.ncjrs.org/txtfiles1/fs-9990.txt.

28. Cal. R. Ct. 1405.5(b)(1) (2004). "'Dependency mediation' is a confidential process conducted by specially trained, neutral third-party mediators who have no decision-making power. Dependency mediation provides a nonadversarial setting in which a mediator assists the parties in reaching a fully informed and mutually acceptable resolution that focuses on the child's safety and best interest and the safety of all family members. Dependency mediation is concerned with any and all issues related to child protection." *Id. See also* Alice B. Ott, Nat'l Resource Ctr. for Foster Care & Permanency Planning, Tools for Permanency, Tool No. 3: Child Welfare Mediation, *at* www.hunter.cuny.edu/socwork/nrcfcpp/downloads/tools/cwm-tool.pdf. "[P]arties engage in a mutual effort to discover solutions that will maximize the degree to which everyone's interests are met, rather than attempting to obtain their objectives by promoting their own positions, rebutting others' arguments, and threatening to bring their power to bear on each other . . . ." *Id.*

29. The benefits of mediation are numerous: (1) there is full or partial agreement in at least 70 percent of the cases, (2) participants strongly believe mediation saves time and money, (3) mediated case plans—with more detailed service and visitation arrangements—are more creative than litigated case plans, (4) participants prefer mediation to litigation, (5) parents find that mediation gives them an opportunity to be heard and understood, and (6) professionals also support mediation, sometimes after initial resistance. John Lande, Nat'l Ctr. for State Courts, Child Protection Mediation, *available at* www.ncsconline.org/D_ICM/readings/icmerroom_Lande.pdf.

30. For a more comprehensive description of child protection mediation in Santa Clara County, *see* Leonard P. Edwards et al., *Mediation in Juvenile Dependency Court: Multiple Perspectives,* 53 Juv. & Fam. Ct. J. 49 (Fall 2002) [hereinafter *Multiple Perspectives*].

31. *Id.* at 51. Steve Baron is director of Family Court Services in Santa Clara County and the person most responsible for starting child protection mediation in the county. He began mediating child protection cases in 1990 on an experimental basis with cases originating in the author's juvenile dependency court. In addition, he says, "You can talk about essentially anything as long as the participants are capable of articulating their interests and desires. Talking does not equal agreeing, but talking and listening to one another usually produces constructive results even in the absence of an agreement. Mediation usually results in families experiencing a lowered sense of hostility and alienation and a heightened sense of participation and inclusion as well as a greater sense of understanding of the child's needs, the workings of the system, and the points of view of the other participants." *Id.*

32. Minimum experience and training requirements for California dependency mediators are described in Rule 1405.5(e) of the California Rules of Court (2004).

33. *Id.* at 1405.5(d)(2)(B) (2004). "The child has a right to participate in the dependency mediation process accompanied by his or her attorney. If the child makes an informed decision not to participate, then the child's attorney may participate. If the child is unable to make an informed choice, then the child's attorney may participate." *Id.*

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34. For a domestic violence advocate's perspective on child protection mediation in Santa Clara County, see *Multiple Perspectives, supra* note 30, at 61.

35. Cal. R. Ct. 1405.5 (2004); Susan Schechter & Jeffrey L. Edleson, Family Violence Dep't, Nat'l Council of Juvenile & Family Court Judges, Effective Intervention in Domestic Violence and Child Maltreatment Cases: Guidelines for Policy and Procedure §§ 23, 48 (1998), *available at* www.ncjfcj.org/dept/fvd/publications/main.cfm?Action=PUBGET&Filename=eftvintr.pdf.

36. *Multiple Perspectives, supra* note 30, at 51. "After everyone feels heard, it is helpful for mediators to keep bringing the participants back to the issue of what is best for the child, i.e., 'How do you think we can resolve this particular issue in a way that is best for the child? … Please talk about how you think your plan will affect the child …. Tell us what your concerns are about the child.'" *Id.* This approach is different from some mediation models in which the mediator is seen as entirely neutral and having no stake in the outcome. *See* Bernard Mayer, *Conflict Resolution in Child Protection and Adoption,* 7 Mediation Q. 69 (1985).

37. Cal. R. Ct. 1405.5 (2004).

38. 1980 Cal. Stat. 48, § 5, codified as amended at Cal. Fam. Code § 3160 et seq. (West 2004).

39. The Superior Courts of Los Angeles and Orange Counties first used mediation in child protection cases in, respectively, 1983 and 1987. For a history of the 21 mediation programs in California counties, *see* Judicial Council of Cal., Admin. Office of the Courts, Court-Based Juvenile Dependency Mediation in California, Research Update, at 1 (Mar. 2003) [hereinafter Research Update]. For the growth of child protection mediation in other states, *see* Gregory Firestone, *Dependency Mediation: Where Do We Go From Here?,* 35 Fam. & Conciliation Cts. Rev. 223 (1997).

40. The *Resource Guidelines* included a short article on alternative dispute resolution techniques in an appendix. *See* Edwards & Baron, *supra* note 24.

41. "A majority of jurisdictions have implemented various alternative dispute resolution models." Am. Bar Ass'n, Ctr. on Children & the Law, Court Improvement Progress Report: 2003 National Summary 25 (2003) [hereinafter Court Improvement Progress Report].

42. *See, e.g.,* Lou Trosch et al., *Child Abuse, Neglect, and Dependency Mediation Pilot Project,* 53 Juv. & Fam. Ct. J. 67 (Fall 2002); Sharon Townsend et al., *System Change Through Collaboration: Eight Steps for Getting From There to Here,* 53 Juv. & Fam. Ct. J. 19 (Fall 2002); Research Update, *supra* note 39, at 2–3.

43. Nancy Thoennes & Jessica Pearson, Ctr. for Policy Research, Mediation in Five California Dependency Courts: A Cross-Site Comparison 11–12 (1995).

44. *Multiple Perspectives, supra* note 30, at 52.

45. *Id.*

46. Barbara Davies et al., *A Study of Client Satisfaction With Family Court Counseling in Cases Involving Domestic Violence,* 33 Fam. & Conciliation Cts. Rev. 324 (1995); Trosch et al., *supra* note 42, at 74.

47. Mentaberry, *supra* note 27; *see also* Nat'l Council of Juvenile & Family Court Judges, Adoption and Permanency Guidelines: Improving Court Practice in Child Abuse and Neglect Cases 7, 28, 31 (2000) ("Family group conferencing and mediation programs have been incorporated into many Model Court jurisdictions").

48. NCJFCJ Status Report, *supra* note 26, at 272–75; Court Improvement Progress Report, *supra* note 41.

49. *See, e.g.,* Letter from Susan Storcel, director of child protection mediation in the Circuit Court of Cook County, Illinois, to Leonard P. Edwards (Nov. 13, 2003) (on file with author): "Our mediation program was formally launched in February 2001, but it actually was conceived in August 2000, in Santa Clara County, when Judge Bishop, Gina Abbatemarco, and I made a site visit …. The growth of our program is astonishing. In calendar year 2003, we will have received more than 300 referrals compared to 106 in 2002. The program has been embraced by judges, most attorneys in the building, and our Department of Children and Family Services and private social service agencies." *See also* The Child Protection Mediation Program, Child Protection Division, Circuit Court of Cook County, *at* www.CAADRS.org/adr/CookChildPro.htm.

50. The Child Victims Act Model Courts Project is funded by the Office of Juvenile Justice and Delinquency Prevention in the U.S Department of Justice. A model court is defined as a "real-time 'laboratory' for implementing and evaluating court improvements. Like change itself, 'Model Court' is more a process than a 'thing.' The Model Courts provide an opportunity for practices, collaborations, innovations, and other systems changes to be pilot-tested and refined as part of ongoing systems change efforts." NCJFCJ Status Report, *supra* note 26, at 1.

51. *Id.*

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52. *See, e.g.,* Cal. Welf. & Inst. Code § 350(a)(2) (West 2004). Each juvenile court is encouraged to develop a dependency mediation program that acts as a problem-solving forum in which all interested persons develop a plan in the best interest of the child that emphasizes family preservation and strengthening. The Legislature finds that mediation of these matters assists the court in resolving conflict and helps the court intervene in a constructive manner in those cases where court intervention is necessary.

53. *Multiple Perspectives, supra* note 30, at 56.

54. *Id.* at 51. "Just getting all the key participants together at the same place and time in a structured setting to sit down and, with the help of skilled mediators, systematically talk things through, exchange the most current, accurate, and relevant case information, and clear up misinformation, serves to resolve a lot of problems." *Id.* (quoting Steve Baron).

55. *Id.* at 58. "Another significant factor in the success of dependency mediation is the cooperative attitude towards mediation that has developed over the years between the various attorney offices." *Id.* (quoting Mike Clark).

56. *Id.* at 56. "It has been my experience and that of other social workers that mediation can resolve contested issues in a manner satisfactory to all parties even with cases that appear destined for trial. The use of mediation allows all parties, especially the parents, to feel heard and to leave the process with their dignity and self-respect intact. It also goes a long way towards preserving the relationship between the Agency and the parents, which ultimately most benefits the children." *Id.* (quoting Nicole Gould).

57. *Id.* at 63–64.

58. *Id.* at 59. "I felt so much better about everything after the mediation." "The mediation was a good thing." "I think that without the mediation it would be a long time before I could really be civilized with them." *Id.* (quoting parents); *see also* The Essex County Child Welfare Mediation Program: Evaluation Results and Recommendations, 5 Technical Assistance Bull. 41 (Dec. 2001) ("'I think they were all willing to work with me and I really appreciated it and also the great concern they showed for my children.'" "'It was my first mediation and I want to comment on how well I feel they treated me and handled the situation. They were very helpful to me and very nice people.'")