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Adoption Mediation

Gary A. Debele, Esq.*

I. Introduction

Alternative dispute resolution, frequently referred to as “ADR”, is a catchall phrase used to describe various methods of dispute resolution other than the traditional use of courts, motion practice and litigation. Various types of alternative dispute resolution are being practiced in virtually all areas of law and in all types of disputes. These include familiar and well developed processes such as arbitration, neutral or expert evaluations, the use of special magistrates, and other judicially supervised settlement procedures. In recent years it seems that the most widespread form of alternative dispute resolution has become mediation.

While many jurisdictions now mandate that some type of alternative dispute resolution be attempted before parties use traditional court procedures, one of the last frontiers for the expansion and use of mediation has been the area of adoption law and adoption disputes. While mediation has long been a staple in the divorce and child custody area, there has been a rather curious delay in extending mediation to the area of adoption law. This author speculates that the reason for this delay is that adoption disputes present their own unique challenges unlike those found in any other area of the law, including most divorce and child custody disputes.

* Gary Debele is an attorney licensed in the state of Minnesota and a shareholder and president of the Minneapolis-based law firm of Walling & Berg, P.A. His practice is devoted exclusively to all aspects of family and juvenile law, adoption and assisted reproduction technology issues, drafting co-habitation and pre-nuptial agreements, and professional licensing board investigations. He appears in administrative, state, federal, and tribal courts, has an extensive appellate practice and is a trained mediator who does mediations in all areas of his practice. He is a member of the American Academy of Adoption Attorneys, American Academy of Matrimonial Lawyers, The Best Lawyers in America, The National Association of Counsel for Children, and is active in the Hennepin County, Minnesota, Minnesota American Indian, and American Bar Associations. He has written numerous articles and lectured to various professional groups on the areas of his practice. Mr. Debele is a graduate of St. Olaf College and the University of Minnesota Law School and Graduate School.

The substantive law of adoptions has become increasingly complex over the years, and indeed, the area of adoption law has become so specialized that many family law practitioners will no longer deal with adoption matters and refer them out to adoption specialists.¹ Indeed, there are now numerous types of adoptions with their own unique requirements and challenges. These include agency adoptions performed under the supervision and direction of a private adoption agency; state ward adoptions where parental rights have been terminated as a result of state intervention, the children become wards of the state, and the state places the children for adoption; independent or direct placement adoptions where birth parents select their own adoptive parents and the adoption occurs with little adoption agency involvement; step-parent and relative adoptions; and international adoptions. Each type of adoption has its own unique legal requirements, and each state has its own statutory and regulatory codes governing adoption. Interstate and inter-country movements of people complicate matters further, as does the ever evolving nature of the family (e.g. single parents, same-sex parents, multi-racial families). In such a complicated area of law and human behavior, disputes are certain to occur—disputes between birth parents, adoptive parents, adoption agencies, and state child welfare agencies. Mediation can be effectively applied to all such disputes wherever and whenever they may arise in the adoption process.

In any of these types of adoptions, the ultimate goal is the adoption of a child whereby the child becomes recognized as the legal child of the adoptive parent or parents. Because of this uniquely final outcome, adoptions as legal disputes are difficult to resolve because of the perceived “winner take all” outcome. While it is increasingly common for adoptions to be “open

¹For example, there is a group of attorneys specializing in adoption law known as the American Academy of Adoption Attorneys. See their website at www.adoptionattorneys.org, especially noting their list of certified adoption mediators, one of whom is the author of this chapter.

adoptions” with varying degrees of ongoing contact or shared identifying information between birth parents and adoptive parents, even with such information or contact, there is a certain amount of permanency between the adopted child and the adoptive parents that is absent in many other family disputes. Furthermore, an adoption dispute, unlike a contract, property, or financial dispute, is one where the stakes are very high from an emotional and personal stand point; pain and loss cannot readily be compensated by quantifiable financial awards. Furthermore, it is possible that disputes, disagreements, and difficulties between a whole variety of participants in the adoption process may occur many years after the adoption is finalized. These legal and emotional complexities make disputes in the area of adoption particularly intractable; it is clearly an area of the law where mediation can be especially useful.

The purpose of this chapter is to provide a person not familiar with mediation with an overview of what mediation is. This will then be followed by a discussion of the types of disputes that occur in the area adoption that could be amenable to resolution by mediation. Finally, three models of mediation in adoption practice will be discussed, hopefully providing practitioners, mediators, and other participants in the adoption process with some tools to apply in addressing adoption disputes wherever the disputes may arise in the on-going adoption process.

II. Mediation Fundamentals

Mediation is defined as a process by which parties attempt to settle a dispute with the assistance of a neutral third party. Mediation provides a forum in which the neutral third party facilitates communication between the parties in an effort to promote settlement. Unlike arbitration, mediation involves no evidentiary hearing and no decision imposed on the parties by a neutral. Mediation does not necessarily replace negotiations between the parties; rather, it is a

more structured and directed process led by a trained professional whose primary goal is assisting the parties in reaching a mutually acceptable settlement of their differences.²

A. Advantages of Mediation

Mediation has several potential advantages over litigation approaches to dispute resolution. In contrast to litigation, mediation poses less risks to the parties, as no legal rights are forgone and no one is forced to settle. Unlike litigation, which is usually public, all mediation proceedings are private. While this is not always the case, mediation is perceived by many to be less expensive than litigation. This is probably true if the mediation is successful in a relatively quick period of time and it prevents all future litigation. Mediation can be scheduled at any time, unlike litigation which must fit in a court's busy calendar. Depending on the complexity of the issues, a dispute may be mediated in a half day or a day. Unlike litigation, there are no appeals following a mediated settlement agreement. Because the disposition is deemed to be consensual, this may make settlement and enforcement more likely. It may also prove to be less damaging to long term relationships, which is often critical in adoption disputes. Finally, mediation allows the participants to control their own destiny and determine their own results. It often allows parties to maintain dignity and self-respect.

B. Disadvantages of Mediation

Mediation is not, however, without its disadvantages. It requires compromise, and in certain situations, compromise is not an option. Further, certain aggrieved parties may feel they did not have their day in court and will ultimately be unhappy with the results because of that. If

² Most of this information about mediation fundamentals has been gleaned from the author's own experiences over the years as a mediator, trainer of mediators, and attorney representing participants in mediations. There are many resources available on mediation that discuss these and similar mediation fundamentals. In the author's opinion, one of the best is Theodore W. Kheel, *The Keys to Conflict Resolution: Proven Methods of Resolving Disputes Voluntarily* (New York, 1999).

mediation does not work, hindsight may label it has a unnecessary step that exacerbated the delays and increased the expense of litigation.

C. The Role of the Mediator

The role of the mediator is quite similar in virtually all types of mediations. That person, or persons if you choose to use co-mediators, needs to immediately establish confidence in himself or herself and in his or her abilities. A mediator can help encourage a settlement by keeping the parties communicating with each other and encouraging movement without compromising the parties' basic positions. A mediator sets the tone of the meetings, helps identify what is important, and helps translate issues or concerns into understandable and legitimate terms. In short, a mediator is an impartial third party who explains the process and guides the parties to a negotiated and hopefully successful agreement.

While each mediator is different in how he or she sets up and conducts a mediation, among the techniques used by mediators to establish credibility is to fully explain the mediator's presence and role. The mediator needs to demonstrate through actions and words a willingness to learn from the parties, be objective and impartial towards everyone, and avoid making value judgments. The mediator also needs to convey empathy and respect to each party's problems and concerns. The mediator needs to control the sessions in order to facilitate agreements and needs to maintain a quality of status and situational power between and with the parties. One experienced mediator characterizes the roles occupied by the mediator as follows: (1) housekeeper (sets ground rules, keeps records); (2) ringmaster (manages the process); (3) educator (informing the participants of the legal and other issues yet without giving advice); (4)

communicator (facilitate true and effective communications between the parties as to the issues); and (5) innovator (suggests new approaches to the issues in dispute).³

The mediator also has several rather mundane procedural functions that need to be considered. These include arranging an initial meeting, setting a time and appropriate setting for the meeting, recessing meetings where necessary, arranging joint and separate meetings where appropriate, and influencing the climate and duration of the meetings. The mediator must chair the meeting, maintain order, and control the sequences of discussions and the grouping of ideas. Most seasoned mediators will admit that this is among the most emotionally draining tasks they have performed as it requires being aware of so many different considerations at any given time. Yet, the rewards are significant both for the mediator personally in terms of professional satisfaction, and more importantly, for the participants if a good result is achieved.

A mediator must be effective in facilitating numerous communicative functions. The mediator must open channels of communication where parties may not be talking to each other, or where tensions need to be reduced, distortions removed, and inflammatory rhetoric and hostile actions eliminated or significantly controlled. The mediator must also take responsibility for translating and transmitting information between and among the parties. This often entails translating positions and proposals into acceptable and understandable terms. Frequently, the mediator must overcome differences in perceptions, expectations, backgrounds and cultures between the parties which interfere with negotiations. As part of this communication function, the mediator must explore alternative solutions being advanced by the parties and through this, determine what the real issues and priorities of the parties are. The mediator must ultimately assess and communicate the parties' commitment to agreements that are reached and provide

³ Kheel at 59-81

assurances to all participants that the other parties will abide by the agreements reached. Because mediations frequently breakdown if the parties perceive that no progress is being made, the mediator must communicate movement on issues, regardless of how slight, in a way that is not deceptive, yet continues to give the parties hope that movement is occurring. It is also critical to provide positive reinforcements so as to compel the parties to continue their settlement discussions.

In terms of other substantive functions of the mediator, the mediator must determine the priorities of the parties--often in situations where the parties themselves may not have ranked or prioritized the issues according to their needs. This may require rather significant amounts of preparation work prior to the first session. The mediator must always do a certain amount of reality testing based simply on the mediator's experience and substantive knowledge. This will involve probing, testing and challenging the validity of the parties' positions on the issues. It must be emphasized, however, that the mediator is not to serve as an advocate, but rather as an agent of reality. This distinction is critical if the mediator is to proceed in an ethical and appropriate fashion. The goal is to make each party think through his or her demands or priorities and to consider the views and rationales of the other side, as well as consider any alternatives. The mediator must, where appropriate, deflate extreme positions. The mediator must help the parties develop habits of agreement where often the participants may not have any skills in that regard, or may have personalities or individual situations that militate against habits of agreement. Based on the mediator's experience and substantive knowledge, the mediator must offer specific suggestions after thoroughly understanding the needs and positions of the parties. The mediator's suggestions often are the single most important part of the mediation, stimulating movement towards a final resolution of the dispute.

It will be critical for the mediator to assess the consequences of an impasse against the values of remaining issues. Frequently parties must make hard decisions as negotiations approach a critical time or deadline. The parties must decide the importance of reaching an agreement without going to their bottom line position on the last issues. The threshold question that the mediator must determine from the parties is whether the values of the remaining issues are worth the costs of the impasse and possible litigation. It is critical for the mediator to make sure that the parties are fully aware of the implications of the decisions that they each must make.⁴

III. Unique Aspects of Adoption Mediation⁵

In adoption, as in other family law disputes, whether an agreement can be converted to a court order is often key to the success of any resolution. Unlike a real estate, contract, or business dispute where there often simply needs to be a cash restitution payment or some other type of private arrangement, in adoption and other family disputes, a court order that is legally enforceable or some other permanent and legally recognized decision will be the ultimate goal. Hence, mediators working in the adoption area need a significant amount of legal expertise so as to know what kinds of terms and conditions will be required or approved by a court. In addition to be competent in this area a good understanding of bonding and attachment theory, a basic understanding of child development, and knowledge of family dynamics is especially helpful.

⁴ For a discussion of this critical role of the mediator and for fundamentals of negotiation strategy, see the classic text by Roger Fisher and William Ury, *Getting to Yes: Negotiating Agreement Without Giving In* (New York, 1981)

⁵ While the growing interests in the use of mediation for adoption disputes is a fairly recent development, one of the early authors and trainers in this area has been Jeanne Etter. See her article Use of Mediated Agreements in Adoptions, 22 *Mediation Quarterly* 83 (Winter 1988).

There are certain special considerations that exist in the mediation of any type of family dispute, including adoption issues. These issues include gender issues, power imbalances, differing cultural values, and racial issues.

A. Gender Issues

With regard to gender issues, because issues regarding the rearing of children are still very frequently fraught with gender stereotypes, mediators working in this area must be particularly aware of whether the mediator's gender is impacting his or her performance as a mediator. The mediator must also be aware of any perceptions by participants of the process being in any way gender biased. Balanced eye contact, balanced body language, and careful consideration given to physical position of the mediator in the mediation sessions is critical, as is eye contact. Balanced oral communication is also critical and a mediator must be especially careful to avoid making statements or observations that embody gender stereotypes.

B. Power Imbalances

With regard to power imbalances, it is critical for the mediator to identify the existence of power imbalances and high risk participants in the mediation process. Given the demographics of adoptions vesting enormous power and control with birth parents in private adoptions and with the significant power of the state in state ward adoptions, the mediator must carefully consider the power and influence of the various participants in each adoption mediation. It is critical for the mediator to understand the backgrounds of all of the participants, their traditional roles in the system of adoption and family disputes, and how this could affect the mediation. Among the other factors that need to be considered with regard to power imbalances are income

disparities between the participants, educational and occupational differences, emotional states, relationship patterns, and belief systems.⁶

C. Culture, Race, Age Issues

As with all family disputes, adoption disputes frequently involve issues of culture, race, gender and age as well the rapidly changing nature of family structures. Because every human being has been a member of a family of one type or another and involved in some type of parent-child relationship, individuals of necessity carry the baggage of their upbringing and all of their other life experiences to adoption disputes. Family structure in the United States is evolving at an incredibly fast rate and significant disputes exist not only among experts who study family systems, but among persons involved in the family structure, as to what a “family” is, what a person’s role in the family structure is, and how disputes will be resolved in this always changing structure. Adoptions frequently involve complex transracial situations, as well as adoptions by single parents, elderly persons, and gay and lesbian couples. Relatives and step-parents may seek to adopt, often in the face of difficult family dynamics. Adoptions of necessity will frequently involve mediating with more than two parties. Thus, a mediator working in this area will need to have skills in bringing together people from different lifestyles, socio-economic, racial and cultural backgrounds, and a wide variety of personal life experiences.⁷

⁶ See e.g.; Carrie Menkel-Meadow, What Trina Taught Me: Reflections on Mediation, Equality, Teaching and Life 81 Minn. L. Rev. 1413(1997); Carol Bohmer and Marilyn L. Ray, Effects of Alternative Dispute Resolution on Women and Children After Divorce, 28 Family L. Q. 223(1994); Trina Grillo, The Mediation Alternative: Process Dangers for Women, 100 Yale L. J. 1545(1991); Cynthia A. Savage, Culture and Mediation: A Red Herring, 5 J. of Gender and the Law 269(Fall 1996)

⁷ See, e.g., June Carbone, From Partners to Parents: The Second Revolution in Family Law (New York 2000); Arlene Skolnick, Embattled Paradise: The American Family in an Age of Uncertainty (New York 1991) See also, Sharon K. Houseknecht and Jaya Sastry, Family “Decline” and Child Well Being, 58 J. of Marriage and the Family 726 (August 1996); James Garbaring, A Vision of Family Policy for the Twenty-first Century, 52 J. of Social Issues 197(1996) See e.g. Robert D. Benjamin, Negotiation and Evil: The Sources of Religious and Moral Resistance to

D. The Role of Children

Adoption mediation will almost always involve children. An experienced adoption mediator will need to know something about the legal standing of children in these types of disputes, and be especially sensitive to making sure that the children are heard and their interests represented in the disputes. This is true whether or not the children are actually involved in the mediation, and whether the children's interest is represented by lawyers, guardians ad litem, or no one at all. There will also be special needs children involved who bring such issues as reactive attachment disorders, oppositional defiant disorders, attention deficit disorders, learning disabilities, and physical handicaps.⁸

E. Multi-party Nature of the Dispute

The multiparty nature of the dispute will almost always involve an "adoption triad." While this term is currently considered somewhat archaic in adoption circles, it is useful in depicting an adoption dispute at its most basic level: at issue will usually be a child being adopted, one or more birth parents, and one or more adoptive parents. Depending on the type of adoption, you may or may not have a private adoption agency, an adoption agency in a foreign country, or a foreign government itself, a government social worker, county attorneys, court appointed guardians ad litem, and the individuals may or may not be represented by attorneys.

F. Grief and Loss Issues

the Settlement Conflicts, 15 *Mediation Quarterly* 245(spring 1998); Richard Delgado, Fairness and Formality: Minimizing the Risk of Prejudice and Alternate Dispute Resolution, 1995 *Wisconsin L.Rev.* 1359; Susanne J. Schmidtz, Mediation and the Elderly: What Mediators Need to Know, 16 *Mediation Quarterly* 71 (Fall 1998); Robert Yazzie, "Life Comes from it": Navajo Justice Concepts, 24 *New Mexico L. Rev* 175(spring 1994); Cynthia R. Mabry, African Americans "Are not Carbon Copies" of White Americans—The Role of African American Culture in Mediation of Family Disputes, 13 *Ohio State J. On Dispute Resolution* 405(1998)

⁸ Donna T. Lansky, Leslie H. Swift, E. Elizabeth Manley, Amy Elmore, Christine Gerety, The Role of Children in Mediation, 14 *Mediation Quarterly* 147 (winter 1996).

There will also be grief and loss issues faced not only by the birth parent or parents giving up the child, but extended family members related to the birth parent or parents. The adoptive parents may also be coming to the dispute with significant infertility issues and all of the grief and loss that accompany such issues. There may also be financial stress involved, as adoptions are generally quite expensive undertakings. The mediator should be prepared to explain to the prospective adoptive parent why mediation may be a helpful procedure, even though it may add one more layer of expense to an already expensive process.

G. Confidentiality

There may also be significant confidentiality issues in any type of adoption dispute that the mediator must carefully consider. These could include complex state and federal data privacy statutes, as well as the increasingly complex area of privacy rights regarding medical records. Also, even though many adoptions now have some aspect of openness to them, the birth parent or the adoptive parents may want to have some aspects of their lives kept confidential from the other party. The mediator will need to juggle these concerns throughout the process.⁹

H. Gay and Lesbian Adoption

Because of the changing nature of family structures in our society, adoption mediation may also raise sensitive issues involving gay and lesbian adoptions. Same sex adoptions are more and more frequently allowed in many jurisdictions. Mediators involved in adoption disputes will need to consider their own personal views on these types of adoptions and also be sensitive to the politics of the issue in the jurisdiction where the mediation occurs. Mediation may be the best way to address these issues without public scrutiny and judicial review.

⁹ For a discussion and study of open adoptions, see Jeanne Etter, Levels of Cooperation and Satisfaction in Fifty-six Open Adoptions, 72 Child Welfare 257(May-June 1993); Jeanne Etter and Martin Giovannini, Adoption Mediation: Applying Preventive Conflict Management to Open Adoption Planning, 21 Mediation Quarterly 51(Fall 1988).

Mediation allows more creative solutions, although again, it must be emphasized that you generally must obtain court approval of any agreement reached by the parties in most adoption disputes. However, many courts will be more comfortable ratifying such agreements if they are worked out by the parties in mediation and it is not the court itself that is coming up with the potentially controversial solution.¹⁰

I. Foster Parents

The whole issue of foster parents and their role in mediation is one that is increasingly more common given that the federal Adoption and Safe Families Act, enacted in 1997, encourages states to use “concurrent planning” in their state ward cases.¹¹ This simply means that when children must be removed from their biological parents’ homes because of child abuse, neglect, or abandonment, and when the state agency is seeking foster parents for such placements, the foster parents may also be considered as a permanent adoptive placement if the children are unable to return home within the time allotted by the statute. Foster parents have long been treated negatively by the judicial systems of this country; they were frequently told to not become too closely attached to the children placed in their care, as they were generally never allowed to adopt or keep them permanently. Now foster parents are increasingly viewed as a positive and appropriate permanent placement resource. Thus, more foster parents are initiating adoption proceedings, or they may be central players in adoption disputes. As foster parents have often had the most day to day contact with the children who are the subject of the proceeding,

¹⁰ Allan Campbell, Mediation of Children Issues When One Parent is Gay: A Cultural Perspective, 14 *Mediation Quarterly* 79(Fall 1996); William Manson Emmett, Queer Conflicts: Mediating Parenting Disputes Within a Gay Community, 86 *Georgetown L. J.* 434(1997); Isabelle R. Gunning, Mediation as an Alternative to Court for Lesbian and Gay Families: Some Thoughts on Douglas McIntyre’s Article, 13 *Mediation Quarterly* 47(fall 1995);

¹¹ The Adoption and Safe Families Act of 1997, P.L.105-89

they will certainly be a valuable source of information for any adoption mediation where they are involved.

J. Guardians ad Litem

Adoption mediation may also involve a guardian ad litem who is appointed by the court to provide an independent investigation and to advocate for the children's best interests. Mediators who are working in the adoption area who have not had significant contact with guardians ad litem need to have clear understanding of what the guardian ad litem's role is. The role is not simply to be an advocate for the child's point of view, but rather to independently assess the child's needs. The guardian ad litem in these cases usually receives some type of formal training before being appointed and most have experience working with children. The quality of their contribution to the mediation process will depend to a great extent on their involvement in the matter and expertise that they bring. They can be especially helpful and play a large role in adoption mediation.

K. Government Employees and Attorneys

Finally, in cases where the state is involved and the children are wards of the state, it is almost certain that some of the parties involved in the mediation process will be government attorneys. This will include attorneys representing the state and often public defenders representing the birth parents. Social workers who have worked with the family and psychologists who may have been appointed to do an assessment of the children or the parents may also be involved in the mediation. The mediator working in this area will need to understand

that there are often significant turf battles and power skirmishes going on between the various governmental entities involved in the dispute.¹²

As is apparent when reviewing these numerous special considerations in adoption mediation, this type of mediation is extremely complex and multifaceted. While divorce and custody mediations have their own complexities with regard to the power imbalances and the emotional issues, adoption mediation may involve even more complex issues because of the legal complexities, the permanent and long term implications of an adoption itself, the inherent termination of parental rights that lies at the root of an adoption, the importance of facilitating ongoing relationships between the disputants, and the developmental impact of the adoption process on the involved child. While the fundamental skills that any mediator develops in a basic mediation training course and experience obtained from conducting mediations is critical, the adoption mediator must have an even higher level of skill and expertise including a sophisticated knowledge of the complex legal issues involved as well as a working and experiential knowledge of the complex emotional, child development, and inter-family relationship issues that are inherent in any adoption dispute.

¹² There is a growing body of literature and many developing models emerging across the nation for doing state ward mediations. While state ward adoption disputes will be discussed later in this chapter in greater detail, for a selected list of articles and models dealing with state ward mediation, see e.g. the following articles: Deborah Baker, Juvenile Mediation: Innovative Dispute Resolution or Bad Faith Bargaining? 27 University of Toledo L. Rev. 87 (1996); Allen E. Barsky, Mediation and Empowerment in Child Protection Cases, 14 Mediation Quarterly 111 (winter 1996); Robert D. Benjamin, Mediative Strategies and the Management of Child Sexual Abuse Matters, 29 Family and Conciliation Courts Review 21(July 1991); Leonard P. Edwards, Improving Juvenile Dependency Courts, Juvenile and Family Court Journal 126 (November 1997); Gregory Firestone, Dependency Mediation: Where Do We Go From Here, 35 Family and Conciliation Courts Review 223 (April 1997); June Maresca, Mediating Child Welfare Cases, 74 Child Welfare (May-June 1995); Sally Palmer, Mediation and Child Protection Cases: An Alternative to the Adversary System, 68 Child Welfare 21(1998); Jessica Pearson, Nancy Thoennes, Bernard Mayer, and Mary Margaret Golten, Mediation of Child Welfare Cases, 20 Family L.Q. 303(Summer 1986); George R. Savoury , Harold L. Beals and Joan M. Parks, Mediation and Child Protection: Facilitating the Resolution of Disputes, 74 Child Welfare 743(May-June 1995); Nancy Thoennes, Mediation and Dependency Court: The Controversy and the Three Courts Experiences, 29 Family and Conciliation Courts Review 246(July 1991); Nancy Thoennes, An Evaluation of Child Protection Mediation in Five California Courts, 35 Family and Conciliation Courts and Review 184(April 1997)

IV. Types of Adoption Mediation

In an attempt to analyze the unique issues in adoption mediations, it makes sense from a conceptual frame work to consider three broad categories of adoptions. These three categories include private adoptions, state ward adoptions, and while not technically a type of adoption, the adoption issues that arise in assisted reproduction technology.

Private adoptions are unique in that they involve important and sometimes complex relationships between birth parents, adoptive parents, extended family members, and of course, the child. There are many different types of adoptions that come within the category of private adoptions, and those will be discussed in some detail below. State ward adoptions are unique in that these adoptions stem from an intervention by the state into a family system where a child has been neglected, abandoned, or abused in some way by the birth family. Because of the sheer numbers of these types of disputes, it is in this category of adoption dispute where there are the greatest needs for adoption mediation. Finally, in the disputes that are arising in the area of assisted reproduction technology, not much has been written nor has this area of dispute been extensively studied. However, it is this author's belief that this is probably an area where there will be a growing need for mediation as these technologies move us beyond traditional artificial insemination arrangements to egg donations, embryo donations, complex gestational carrier arrangements, and all of the legal, ethical, medical, and psychological complexities that go along with that trend.

A. Private Adoptions

By definition, private adoptions are all types of adoptions other than adoptions of children who are in the state ward system being placed for adoption by either the local or state governmental entity following a termination of parental rights. Private adoptions may involve

step-parent adoptions, relative adoptions, international adoptions, private adoption agencies placing children for adoption with prospective adoptive parents selected either by the agency itself or the birth parent or parents, and the direct placement or independent adoption whereby a birth parent finds prospective adoptive parents themselves and they agree to do the adoption with minimal agency involvement.

The types of dispute that arise between the participants in any of these private adoptions often result from the failure of having all necessary parties involved in the adoption plan. For example, a birth father may not have been given appropriate notice or may not have been involved at all in the adoption plan. Upon learning of the adoption, he may attempt to stop the process. It may also be a maternal or paternal grandparent of the child being adopted who is upset by the adoption and steps in to try and stop the adoption from occurring. A dispute may also arise when a birth parent changes his or her adoption plan. If the time to revoke a consent to the adoption has expired, often allegations are made of fraud or some other type of alleged wrongdoing. This then creates a factual and legal dispute that needs to be resolved.

In states that allow ongoing contact between adoptive parents and birth parents or other birth relatives, there may be disputes over the terms of the contact either before or after the adoption is finalized. There may also be disputes over whether complete medical information, pre-natal care, and potential risk factors were disclosed by birth parents or an agency involved in the adoption. In these cases there may be a lawsuit brought by the adoptive parents against the persons or entities who withheld important information. The case might also involve an Indian child where all of the exacting provisions of the Indian Child Welfare Act have not been vigorously complied with. This also could lead to litigation, often involving Indian tribes, tribal members, and relatives.

Perhaps the most difficult litigation that may arise in any of the above types of disputes in private adoptions is when there is more than one person or couple seeking to adopt a child. Here the litigation involves competing adoption petitions where a court must decide how the trial will be conducted and whether any of the petitioners has a legal preference over the other petitioners. These disputes involving competing adoption petitioners are very similar to difficult custody disputes in which the court and involved experts try to determine which adoptive placement would be in the child's best interests. However, this litigation may be more difficult than the worst custody dispute because with many adoptions, the persons who do not prevail may never see the child again.

With these types of disputes, an adversarial attitude often results from participants' views of each other rather than anyone seriously considering the best interest in the child who is being fought over. It is certainly a significant function of the mediator in such private adoption disputes to keep the participants focused on the best interests of the child. Effectively keeping the parties focused on the needs and best interests of the child may facilitate a creative solution that will work best for the child.

In many private adoption disputes, birth fathers and their rights are often central to the dispute. It will be critical for the mediator to understand the many legal categories of potential fathers (e.g. putative fathers, presumed fathers, potential fathers) and their rights to notice, involvement in the adoption, whether their consent must be obtained, or potential parental rights terminated. There may be statutes of limitation on paternity adjudications and fathers registries that affect a potential father's ability to have legally recognized and enforceable participation in the adoption dispute. The mediator needs to have an understanding of the legal requirements for

valid consents to adoption or terminations of parental rights— the two primary means by which children are legally freed for adoption.

Mediators involved in private adoption disputes need to understand that if the birth parent with legally recognized parental status withdraws his or her consent within the statutorily mandated time, which varies quite significantly from state to state, or it is impossible to terminate parental rights, that may be the end of the legal dispute and the child will need to be returned to the birth parent. There is, however, the possibility of third-party custody being placed with potential adoptive parents if the child has been in the care of those persons for a significant period of time or a significant relationship has developed between the child and the proposed adoptive parents. The existence and nature of third-party custody statutes varies from state to state, but such a placement arrangement or similar legal construct such as a guardianship, may become a settlement option for the parties and mediation to consider. This is especially true if there is clearly a question of whether the child's welfare would be protected and furthered by being placed with the birth parents.

With regard to open adoptions and contact agreements, here again the mediator must have a good working knowledge of state laws regarding the enforceability of such agreements. Openness in adoptions varies significantly from adoption to adoption – ranging for occasional pictures and letters as to the child's development to recurring visits between birth parents and the adopted child. While openness is now more common in all types of adoption, many states have not enacted specific statutes that allow for the enforcement of open adoption arrangements and contact agreements. Here again, the mediator needs to understand the law in the state where the mediation is to occur as to the enforceability of such arrangements, as they may be a significant tool in resolving adoption disputes. The mediator must understand the timing requirements for

when contact agreements must be entered into, what provisions must be in writing, the types of agreements that can be enforced, and possible mechanisms for making adjustments to the access arrangement once the adoption is completed. There also needs to be some understanding of what the consequence is for a violation of the agreement or arrangement after the adoption has been finalized. Many states explicitly state in their statutes that failure to abide by the terms of a contact agreement is not a basis for vacating the adoption, but rather a remedy might be court-ordered access to information or the child.¹³

When there are private adoption agencies involved in an adoption, significant issues of responsibility and liability arise. The mediator must be clear as to who the agency represents and what the agency's interest is in the dispute. Agencies themselves must be clear as to who is the client and what are the clients' expectations of the agency's involvement. There must also be a clear understanding of who is responsible for disclosing pre-natal and birth information, as well as potential risks to the child based on the child's genetic history and early life circumstances. Often times there will be disputes about the nature of the disclosure of such information by the agency. The mediator must have an understanding as to what contracts and other arrangements have been entered into by the various parties with the agency, what the agency's practices are in terms of sharing information, and what state law requires agencies to disclose. There also needs to be an understanding as to what the agency's responsibility is for making sure that a consent or termination of parental rights procedure is effective, binding and legal.

B. State Ward Adoptions

State ward adoptions are frequently very complicated situations given the nature of the situation that led to the state intervention in the first place, the often difficult interplay of the

¹³ As an example of one such statute allowing for legally enforceable open adoptions and contract arrangements, see Minn. Stat. § 259.58.

participants given the history of the case following state intervention, and the frequently significant number of players involved in these disputes. The area of state ward adoption is where there is the greatest need for mediation given the high volume of these cases and the enormous drain on governmental resources these disputes entail. Simply put, a state ward adoption is one where the state or local child protection entity has intervened with a family in order to protect the welfare of the child. Typically, this may be the result of child neglect, child abandonment, or worse yet, some type of child abuse.

The mediator working in this area must have a very sophisticated knowledge of state and local laws and practices that apply to these types of disputes which can lead to the removal of children from the home. Once a child has been removed from the home, certain actions must be commenced, case plans provided, and if appropriate, efforts at reunification attempted for a limited amount of time. The mediator must be aware that there are federal statutory mandates with stringent timelines that come into play once a child who has been removed from the family home. If returning home is not feasible within these timelines, there is a mandated move toward a permanent placement that may include a transfer of permanent custody, termination of parental rights and adoption, or placement in permanent foster care.

Disputes in state ward cases, with the focus being on case planning, monitoring, and providing services, are well suited to mediations that allow family involvement, service design, and decision making to be addressed at any stage in the process. A permanency plan for a child is difficult to work out in a strictly adversarial mode. Family members in particular are more apt to be fully engaged in the process if they feel they are involved in addressing all aspects of the process through mediation. Such mediation processes should be available as part of the court's repertoire for achieving case resolution in these difficult state ward proceedings.

Mediation could be effectively used at many stages in the proceeding. Mediation could be used at the time a child is being removed from the home, prior to the filing of a petition when the case plan is being prepared, at the time of adjudication, or at disposition. A final resolution of adoption of the child and perhaps on-going contact between the child and the birth family is but one possible outcome where mediation techniques can be employed from the time of the state's initial intervention to the final resolution of the case, including at the point of termination of parental rights and placement.

There are certain fundamental issues that mediators should address in any state ward mediation. First, mediations in state ward cases require careful planning and a consideration of many issues. For example, it will need to be determined if court rules apply in these mediations and whether mediation is mandated or strictly voluntary. These issues will determine the formality and could affect the demeanor of the participants. The mediator will need to know if certain qualifications for the mediator are required. An understanding of the funding source for the program would be helpful, as would knowledge of quality control and judicial oversight. The mediator should also determine what amount of collaboration there will be between the court, the lawyers, child protection workers, and the community.

Inherent complexities and challenges will exist because in state ward cases there are frequently large numbers of interested participants (e.g.: birth families of all varieties, social workers, psychologists, state or county attorneys, public defenders, private attorneys, guardians ad litem, foster parents, grandparents and other relatives). Parties will come from different educational, socio-economic, and cultural backgrounds. There may be multiple issues giving rise to the state involvement, which may change over time. Monumental communication problems may exist, and there may be much positional bargaining between the players. It will be critical to

address power dynamics between these diverse participants and a great need to manage the players interactions in a collaborative fashion.

There may also be significant and complex confidentiality and data privacy issues. Mandated reporters will need to be protected in the process. State and federal data privacy laws must be complied with. The history of state involvement and family or cultural background might affect the willingness of family member to openly share information in the mediation process.

Often these cases are fraught with domestic violence and child abuse. The participants, and indeed the mediator, will need to be acutely aware of the impact of possible power imbalances between the state, the child's family, and the potential adoptive parents. There will also need to be a recognition by parties that some of the actions taken by the state are coercive in nature; there needs to be a discussion as to the validity of such coercion. There also needs to be a recognition of the complex relationship between child abuse and spousal abuse, as both may exist in the dispute before the mediator.

The mediator needs to know about concurrent planning arrangements whereby promises – real or perceived– have been made by the state to foster parents regarding adoption plans. Such plans or promises may be very different from the hopes and dreams of the birth family. Such a situation could create an immediate clash as to who has the final say on that issue. As with virtually all adoption mediations, in these state ward cases, relationships will be developed or destroyed during the mediation process. This can affect the participants for a long time after the mediation is completed.

Most mediators who have attended a basic mediation training program have been trained to think that the focus of a mediation ought to be on the future and not on the past. However,

state ward cases are unique in that the mediator simply cannot ignore the past; it was the past actions of the biological family that is often driving the case at all stages of the dispute. The state has intervened for a reason, and it is this intervention that has placed the participants in this current relationship. Thus, there is frequently a need to revisit the past, address those issues, make assurances that they are being addressed, and then move towards planning for the future.

Maintaining the appearance of neutrality is especially challenging in these cases. The parties may view the mediator as a just another person from the vast bureaucracy of the state out to control and meddle in their lives. The professionals, whether aligned with the state or retained as expert witnesses for a participant, may view the mediator as someone who will be telling them how to do their job and what they are doing wrong. The common mediation tool of “caucusing”—where the mediator meets separately with participants—may present many difficulties in state ward mediations. This is true because many of the family members who are involuntarily involved in the process will fear that the state is once again making decisions behind closed doors about their family situation and that the mediator is siding with the state. A mediator in this type of case will need to strike a balance between not being overly friendly to one participant but yet not too distant. Too much distance will make the mediation ineffective-- simply creating a situation similar to what often happens when the matter proceeds to litigation. It will be important for the mediator to acknowledge the professionals without alienating the family members. The mediator will need to disassociate from the “system” for the benefit of family participants, yet also reassure the professionals and government participants that the mediator is not critical of their work, but rather simply helping all parties to see all options.

It will be especially critical for the mediator to make sure that the parties all understand that the mediator is not a decisionmaker or the fact gatherer, but rather a facilitator. The mediator

will need to gauge whether an informal atmosphere will work best, or based on the history and the nature of the relationships, whether a more formal, structured approach will be more effective.

As some participants in state ward mediations may be mandated participants, it will be important for the mediator to stress the ability of the participants to take part in the final outcome through the mediation process even if it is mandated. The mediator needs to convince the participants that their views and input do matter and that mediation of this dispute is preferred to litigation.

The mediator will need to assess the case and determine whether it would be best to address the smaller, less controversial issues first, or address the big issues head on at the outset. Frequently in state ward cases there are enormous and emotionally charged issues that everyone is thinking about. Perhaps if those issues can address first, the parties will be able to determine early on in the process whether mediation will even work in the matter.

Very frequently in state ward mediation the families involved are from challenged socio-economic situations. They may be less educated and less sophisticated than government participants and often less knowledgeable about the system than governmental participants. They may feel inferior or intimidated by the process. The mediator needs to be sensitive to this and try to adjust to any such power imbalances. Family members often feel that they are victims of overwhelming state power and authority; such attitudes may be enhanced by actions and words of the state participants. That situation is perhaps the single greatest challenge to the mediator in these types of cases. Family members have often been told and often feel that they have absolutely no control over what happens with their children on a day-to-day basis. One of the

selling points for mediation in this process is that it is a way to share information, to bring everyone to the table, and to empower all of the participants in a positive fashion.

The mediator working in state ward cases will also notice that there is frequently a tendency on the part of the family members to vent much anger, while the professionals may have a tendency to keep their emotions inside, leaving frustration on both sides. Attorney participation in these cases may enhance the mediation process. Legal advocates may help family members feel somewhat empowered and they may also be able to reign in state professionals who may be over confident and over zealous in asserting their power and authority. Attorney advocates may also keep the parties on a realistic level as to expectations, be open to exploring resolution because negotiation is part of their typical professional function, and they may also be able to speak knowledgeably to various options being explored in mediation based on their experience and expertise.

It is critical in these cases to keep discussions in terms that all parties understand. The mediator should often assume the role of asking the obvious questions to make sure that all of the participants understand the terms and processes. The mediator should not assume that all parties understand the items that are being addressed. All of the parties should be given equal time to talk and participate in the process. Just as the family members may be extremely emotional and upset, it is also critical for the mediator not to underestimate the professionals in these cases. They often are as hesitant as family members in asserting and protecting their positions.

Ultimately, as in any adoption-related mediation, in state ward mediations it is critical for a mediator to avoid drawing his or her own conclusions as to what is in the best interest of the

children involved. Often the case has many more facets than meet the eye or ever come out in the mediation.

Generally, the ultimate legal goal in a state ward mediation is a permanent placement of a child if that child is not able to be returned home within the time parameters set out by law. Adoption is only one of several permanency options—but it is a significant one and the mediator should have an understanding of how adoptions are achieved under the applicable law and what types of adoptions are available in the jurisdiction of the dispute. For example, the adoption may or may not be open, with enforceability dependant on state law. Very frequently in state ward cases, the children are older than in a private adoptions where infant adoptions are common. With older children, it is safe to assume that they have had some relationship with, or a knowledge of, the family origin. Therefore, ongoing contact may or may not be appropriate for the welfare of the child. Often the issue of ongoing contact with a birth family is a point of contention in the mediation and it is often the determining factor as to whether the matter can be resolved with a mediated adoption arrangement.

C. ARTS Mediation

While the area assisted reproduction technology may not be an obvious area of the law where adoption mediation could be used, there are significant opportunities for adoption mediation in ARTS disputes. ARTS encompasses a variety of legal procedures—including adoptions, paternity proceedings and maternity proceedings— whereby a legally recognized parent-child relationship is obtained. Medical procedures may include artificial insemination, egg donation, surrogacy arrangements, and the use of gestational carriers. It is well beyond the scope of the chapter to discuss all of these complicated medical procedures involved in ARTS, to say nothing of the complicated legal and ethical issues that arise in these area. However, this is one

of the fastest growing areas of family law where new and unusual legal disputes are continuing to emerge, and often the procedure may require an adoption or paternity/maternity determination.

While much of the legal work in this area involves contract negotiation and putting together agreements between the participants, frequently disputes will arise in determining the terms of the agreements and their enforceability. Especially where gestational carriers and egg donations are used there will need to be adoptions, paternity, or even a maternity proceedings initiated in order to establish the legal relationship between intended parents and the child born of these procedures. It is in these proceedings and the resulting disputes where adoption mediation techniques could be used.

The same considerations for the mediator that exist in private adoption disputes and state ward matters exist in these disputes. What these matters require, however, is another level of sophistication by the mediator as to the legal requirements in this area and the enormous medical, ethical and mental health issues that exist for all of the persons involved. The biological developments in this field have fast outpaced legal developments. A mediator working in this area may find situations where there are virtually no statutes or appellate cases directly addressing the legal issues. Often the only legal guidance will exist in rules regarding contract construction and enforcement. There will also be significant public policy considerations.

We are only now beginning to understand and carefully consider the child development implications for children born of these processes. We have many years of experience dealing with children who have been adopted, but ARTS cases raise issues even beyond that, including access to genetic information in situation where there have been anonymous donations of eggs, sperm, and embryos. There are also rather complicated mental, physical, and emotional issues for the donors, the gestational carriers, and even the intended parents—especially where difficult

infertility issues have been experienced by intended parents. Good psychological screening, mental health services, and counseling opportunities are critical for all participants; the mediator working in this area needs to have access to such resources and such information.

Mediation can come into play in this area throughout the entire ARTS process. Mediators could be involved in working with the parties when they begin negotiating the terms of contracts and reducing them to writing. Mediation could also occur when disputes arise as to enforcement or interpretation once the ARTS agreement is in place. Issues for mediation may arise after a child is born and the intended parents, the donors or gestational carrier want to change the arrangement. Other frequently contested issues include insurance coverage and payment issues, the need for mental health screenings, and the storage or possession of reproductive materials following death or divorce. This list of potential issues is not exhaustive, but it does illustrate the potentially significant usefulness of mediation in this area of the law.

V. Models of Mediation

At the present time, there are several potential models for adoption mediation that participants in adoption disputes could consider. One model is “lawyer mediation” which is the type of mediation that occurs in many mediations today. A second approach seems to be quite unique to adoption and is often referred to as “clinical mediation”. A third would be a combination of these two approaches into a hybrid model.

A. Lawyer Mediation

The lawyer mediator model is similar to mediation that one finds in other areas of family law or in property and financial disputes. In these mediations it is a lawyer-trained mediator who runs the mediation and whose ultimate goal is to reach a resolution that, in the case of an adoption, can be reduced to a court order resolving all issues. Very frequently the focus of this

type of mediation is working the parties through a process where they explain what their concerns are, delineate the legal issues, assess the potential legal outcomes, and then reach a resolution that could be approved by a court. This type of mediation is focused primarily on reaching an end result that is legally recognized parent-child relationship.

B. Clinical Mediation

Clinical mediation, in contrast, is typically done with a mediator who is trained in mental health therapy and counseling. The primary goal of a clinical mediator may be to make the participants aware of the long term psychological and emotional implications of any of the possible outcomes and to facilitate healthy and ongoing relationships for all of the participants long after the initial dispute is resolved. Clinical mediation provides a therapeutic, problem solving structure and process with a heavy emphasis on making sure everyone involved is listened to and on-going relationships are built, strengthened, and nurtured whenever possible. As with lawyer mediation, a clinical mediator does not make decisions for the parties, but rather works to educate the participants, alerting them to possible problems down the road. Such a mediator may also attempt to give the participants tools to address not only the current problem, but future problems. The goal is often to create an emotionally healthy environment for the child who is the subject of the dispute. Another goal might be to give all of the participants the tools that they will need to address child's developmental, emotional, and physical needs in the years to come. Clinical mediators are not providing therapy in the traditional sense of the concept, but rather helping the parties resolve problem using mediation techniques.

The tools of a clinical mediator are quite different from the tools a lawyer mediator uses. There might be requests for psychological testing and other evaluations used by mental health professional to assess the situation and to determine the needs of the participants. A significant

function of the clinical mediator may be to refer the participants for psychological evaluations or to involve in some fashion various mental health resources in order to obtain the necessary information to reach the ultimate goal of a healthy, ongoing relationship for the participants after the dispute is resolved.¹⁴

It has been the author's experience that a good clinical mediator recognizes the importance of lawyers independently representing the participants and making sure the participants understand the legal issues and ramifications. Similarly, a good lawyer mediator will recognize the significant mental health issues involved in these types of disputes and recognize the need to involve mental health professionals where appropriate.

Therefore, if the parties can afford the services, a mediation involving aspects of both lawyer mediation and clinical mediation might be the best arrangement for adoption disputes. Regardless of the model used, the ultimate goal is really the same: the parties want a legally, enforceable outcome which protects the best interests of the child, along with healthy ongoing relationships between all parties.

VI. Conclusion

One of the last frontiers for the extension of mediation to resolve legal disputes involves the area of adoption law and practice. Whether these disputes involve private adoptions, state

¹⁴ For a discussion of clinical mediation, see the following articles: Madelyn Freundlich, Clinical Mediation: Preventing and Resolving Adoption Disputes—Part I, 15 Decree (American Adoption Congress) 10(Summer 1998); Madelyn Freundlich, Clinical Mediation: Preventing and Resolving Adoption Disputes—Part II; 15 Decree (American Adoption Congress) 7(Fall 1998) One of the leading practitioners of clinical mediation is Dr. Joyce Maguire Pavao with the Center for Family Connections, in Cambridge, Massachusetts. Her Center for Family Connections is a non-profit corporation designed to serve families touched by adoptions, foster care, guardianship, kinship, divorce, and reproductive technologies, and to serve professionals that work with these families. In addition to conducting clinical mediations, her Center also has a training program for clinicians and other professionals involved in family therapy with complex family situations. She also is the founder and director of the Adoption Resource Center, also located in Cambridge, Massachusetts. This entity provides training, supervision, and consulting to professionals in adoption-related work. Dr. Pavao has written numerous book chapters and articles on adoption practice and adoption mediation. She has a forthcoming book to be co-authored with Susan Dillard, called Creating and Mediating an Open Adoption to be published by the Child Welfare League of America.

ward adoptions, or adoption issues that arise in the burgeoning area of assisted reproductive technologies, the need for mediation in adoption disputes will continue to grow. Mediators who wish to practice in this area need not only basic mediation training, experience, and skills, but they need a heightened understanding of the complex legal issues, child development concepts, and family dynamics that underlie all adoptions. Hopefully this chapter will serve to raise the awareness of persons involved in any aspect of an adoption dispute as to the potentially positive benefits of mediation techniques, regardless of the models used, for resolving these types of disputes in a way that will be best for the child involved.