

# MEDIATION OF JUVENILE COURT ISSUES, THIRD PARTY ISSUES, GRANDPARENT ISSUES, AND OTHER UNUSUAL FAMILY LAW MATTERS

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- A. Overview of non-traditional family law areas for mediation.
1. Adoption.
    - (a) Does Rule 114 of the General Rules of Practice for the District Courts apply to adoption proceedings? (Adoptions, while they are venued in Juvenile Court, are deemed to be governed by the Rules of Civil Procedure, although the Minnesota Supreme Court Task Force rewriting the Juvenile Court Child Protection Rules is suggesting that there be separate rules that apply for adoptions.)
    - (b) Minn. Stat. §259.58, which deals with communication or contact agreements specifically provides that "if there is a dispute under an open adoption agreement, the matter is to be enforced through a petition or motion in family court, which must be accompanied by an affidavit stating that the parties have mediated or attempted to mediate any dispute under the agreement."
    - (c) Infant adoptions vs. adoptions involving children who are wards of the state and/or have special needs.
    - (d) Mediation of adoption subsidy agreements.
    - (e) Mediation of consent or termination of parental rights issues.
    - (f) Examples of mediation in adoption cases.
    - (g) See, Joyce Maguire Pavao and Susan Dillard, [Creating and Mediating Open adoption](#) (1998).
  2. Assisted Reproductive Technology Issues.
    - (a) A growing area of practice raising extraordinarily complex legal and ethical issues.
    - (b) This area involves contract-type negotiations.

- (c) Mediation can occur when setting up the contract, or after the contract has been put into place, the child arrives, and disputes arise.
  - (d) Mediators in this area need a knowledge of adoption law, family law, estate planning, and contract law.
3. Juvenile Court Disputes such as CHIPS proceedings and Terminations of Parental Rights.
- (a) Pilot programs are being considered.
  - (b) Mediation can be quite helpful in these cases.
  - (c) Many potential stages in the process where mediation could be used: permanency planning; prior to arraignment hearing; adjudicating stage; dispositional stage.
  - (d) Extraordinarily complex and unusual power imbalances between victim vs. perpetrator, state vs. parents; social worker vs. parent, and the role of the guardian ad litem.
  - (e) A rich literature is developing in this area: See, e.g., Debra Baker, Juvenile Mediation: Innovative Dispute Resolution or Bad Faith Bargaining? 27 U. of Toledo L. Rev. 897 (1996); Robert D. Benjamin, Mediative Strategies in the Management of Child Sexual Abuse Matters, Family and Conciliation Courts Review, Vol. 29, No. 3, July 1991, 221-245 (1991); Howard Davidson, J.D., Changing Government Policies to Promote Dispute Resolution in Child Protection Cases. Presented at the Children in Conflict Symposium: "Mediations Strategies for a Better World, St. Thomas, U.S. Virgin Islands, July 28, 1995; Mary M. Elizabeth, M.S.W., M.A., The Use of Mediation in Child Protective Services Cases: Summaries of Research and Program Evaluations, Texas Dept. of Protective and Regulatory Services, Texas Justice Act Project, (April 1995); S'Lee A. Hinshaw II, Juvenile Diversion: An Alternative to Juvenile Court, Journal of Dispute Resolution, Vol. 1993, No. 2, pp. 305-321 (1993); June Maresca, Mediating Child Welfare Cases, Child Welfare, Vol. LXXIV, No. 3, May-June (1995); and Sally Palmer, Mediation in Child Protection Cases: An Alternative to the Adversary System, Child Welfare, Volume 68, pp. 21-31 (1989).
4. Cohabitation and Antenuptial Agreements.
- (a) Two cases currently pending before the Minnesota Supreme Court where Minn. Stat. §513.075, .076 will be interpreted (Obert v. Dahl, Finance & Commerce, February 17, 1998, at 11; In Re Estate of John Michael Palmer, Finance & Commerce, February 27, 1998, at 13).

(b) These disputes involve also contract negotiations and interpretation.

(c) Mediation can be effective both up front in trying to negotiate the agreements and afterwards when a dispute as to intent and operation develops.

5. Third Party Custody.

(a) Under Minn. Stat. §518.156, a person other than a parent is specifically allowed to seek custody, either by motion where a court has previously addressed custody, or by bringing a custody petition where the child is a resident or where the child is found.

(b) Minn. Stat. §518.158 specifically allows relatives to petition ex-parte for custody of a minor child who has resided with the relative for a period of twelve months or more.

(c) Often these are very hotly contested disputes between well-meaning family members, often with grandparents who have cared for a grandchild when the parents have had chemical abuse issues.

(d) Often after the ex-parte order has been obtained, the matter escalates into litigation, and then parties attempt to work out a settlement.

(e) A mediator in this area must understand the unique provisions contained in Minn. Stat. §518.158 which more or less creates a CHIPS proceeding in family court where a "case plan" is to be created by the family court which sets conditions that the parent must meet in order to obtain custody.

(f) In many of these cases, the relative, typically the grandparent, does not wish to have permanent custody and raise the child, but rather they simply wish to protect the child while the parents are working out their issues.

(g) Mediation can be very effective in these cases, assuming the biological parents are in a position to enter into mediation and the relatives are open to the child returning to the parents, or working towards a settlement.

6. Grandparent Visitation.

(a) This area is governed by Minn. Stat. §257.022.

(b) Similar to mediation of other visitation disputes, except for the family dynamics between the generations may be different and there may be difficult feelings between parents and in-laws that are enmeshed with bigger family issues.

(c) It is important to understand how 257.022 works, the nature of proceedings where visitation requests can be brought, and what factors are to be considered.

(d) The factors that are to be considered are as follows:

(i) Would visitation rights be in the best interests of the child?

(ii) Would visitation rights interfere with the relationship between the custodial parent and the child?

(iii) What amount of personal contact between the parents or grandparents of the party and child has occurred prior to the application.

B. Special Considerations for Mediators Involved in Non-Traditional Family Law Matters.

1. The nature of the family unit and changing views of "the family".

(a) Family law disputes involve highly personal and highly emotional issues that are at the very core of our society.

(b) Every human being has been a member of a family and involved in a parent/child relationship at some time or another.

(c) Individuals carry the baggage from their upbringing and all of their other life experiences to family law disputes in a way that is different from all other disputes.

(d) Significant issues of gender, family roles, child rearing, personal financial practices and the like are inherent in every family law dispute.

(e) Family structure in the United States is evolving at an incredibly fast rate and significant disputes exist among not only experts, but among persons involved in a family structure, as to what a "family" is, what a person's role in a family structure is, and how disputes will be resolved in that ever-evolving structure. See Gary A. Debele, Adoption Law and the Family: Facing the 21<sup>st</sup> Century, LIV Bench and Bar 37 (December 1997) (Attached).

(f) Increasing numbers of third-party and relative custody and visitation disputes. (See e.g., Minn. Stat. §257.022; 518.175; 518.158).

2. Gender Issues.

(a) Mediator self-awareness: is my gender impacting my performance as a mediator?

(b) Party perceptions of the process/mediator.

(c) Party perceptions of the issues: why is this so important to the party and who knows more about the issue?

(d) Eye contact is critical.

(e) The gender of the mediator is critical and male/female co-mediators may be necessary.

(f) Balanced eye contact, body language, and physical position of the mediator is critical.

(g) Balanced oral communication is critical.

(h) One must be careful to not make statements or observations that embody gender stereotypes.

(i) Even the process for taking breaks and using the restrooms must be considered.

(j) Much literature on this topic. See, e.g., Carol Bohmer and Marilyn L. Ray, Effects of Different Dispute Resolutions on Women and Children After Divorce, 28 Fam. L. Q. 223 (1994); Trina Grillo, The Mediation Alternative: Process Dangers for Women, 100 Yale L.J. 1545 (1991).

3. Power imbalances.

(a) It is critical for the mediator to identify the existence of power imbalances and high risk participants in the mediation process. Among the factors to consider are such tangible factors as income, education and occupation; intangible factors such as personal characteristics, emotional states, relationship patterns, and belief systems. Personal characteristics that influence negotiating power include intelligence, status, and attitudes towards risk. Emotional states that might influence a participant's negotiating power would include an exaggerated need for psychological closure, guilt, depression, low self-esteem, and low expectations. Relationship patterns to be watching for include dominance, dependency,

physical and emotional abuse. For a further discussion of techniques for identifying power imbalances, see, e.g., Penelope Eileen Bryan, Reclaiming Professionalism, the Lawyer's Role in Divorce Mediation, 28 Fam. L.Q. 177 (Summer 1994).

(b) There is a rich and fascinating body of literature that discusses power imbalances in the mediation process. If you intend to work in the mediation area, a perusal of this literature will not only be interesting to you, but informative. See, e.g., Carrie Menkel-Meadow, Whose Dispute Is It Anyway? A Philosophical and Democratic Defense of Settlement (in some cases), 83 Geo. L.J. 2619 (1995); Carrie Menkel-Meadow, What Trina Taught Me: Reflections on Mediation, Inequality, Teaching and Life, 81 Minn. L. Rev. 1413 (1997); Tina Grillo, The Mediation Alternative: Process Dangers for Women, 100 Yale L.J. 1545 (1991); Richard Delgado, Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution, 1985 Wis. L. Rev. 1359.

(c) Query: should the mediator try to correct power imbalances? Is that your role?

(d) Suggestions for addressing power imbalances:

(i) As the mediator, avoid inadvertently manipulating the process to produce the substantive result you as the mediator yourself may prefer and which may in fact favor one participant over the other.

(ii) Be cognizant of the fact that while mediation is intended to focus on context and particularity, rather than formal legal rights and procedures, this emphasis may in fact disempower the claims of the participants and appeal to individual standards.

(iii) While there is an emphasis in mediation on focusing on the future and not the past, recognize that certain individuals who participate in the mediation process may feel the need for morale accountability and responsibility and thus may feel a need to discuss past history, including hurts, anger, transgressions, and sadness. You should not fully eliminate this discussion, which could result in there being important principles not fully considered, nor a context as a basis for the decisions that are being made.

(iv) Very carefully assess the role each participant has occupied in relationship to the other participant in the mediation session, as well as with the children involved in the dispute.

(v) Assess the educational levels and employment backgrounds of the participants, and determine what skills the participants may or may not possess that would either assist them or hinder them in the mediation process.

(vi) Note the possibility of meddling grandparents, siblings, friends, and relatives who might be coaching participants and providing them with information, perhaps inaccurate, and work to figure out where this information is coming from and the impact that it has on the participants.

(vii) In addition to the formal educational levels and employment experiences, also observe whether either of the participants may have difficulties in communication, whether one person is more articulate than the other, and whether one party is represented by counsel while the other may not be.

(viii) You need to consider what you can do to encourage or restructure the discussion to achieve better balance, and if necessary, use caucuses as a means of moving the mediation forward.

(ix) You may ultimately reach the conclusion that because of power imbalances that are so extreme, the mediation should be terminated.

(e) For an interesting discussion of the role of the mediator's conduct and the concept of "transparency", See Michael Moffitt, Casting Light on the Black Box of Mediation: Should Mediators Make their Conduct more Transparent? 13 Ohio St. J. on Disp. Res. 1 (1997).

#### 4. Culture and Values.

(a) Mediator self-awareness of self.

(b) Mediator knowledge of culture.

(i) Robert Yazzie, Life Comes From It: Navajo Justice Concepts, 24 New Mexico Law Review 175 (1994). (Appendix at A-96).

(ii) David Gooden and Alminta Galvin, Mediation with Latinos: Selective Results of a Survey, 17 Newsletter of the Association of Family and Conciliation Courts 8 (Winter 1998). (Appendix at A-106).

(c) There appears to be wide agreement on three points concerning culture: (1) that culture affects people's values, beliefs, perceptions, and behavior; (2) that both individual and cultural differences contribute to differences in values, beliefs, perceptions, and behaviors; and (3) that the degree of interculturalness is a continuum rather than a dichotomy. See, Cynthia A. Savage, Culture and Mediation: A Red Herring, 5 J. of Gender & the Law, 269 (1996). (Appendix at A-63).

(d) Impact of cultural and values of the process:

(i) How parties present themselves.

(ii) What is important to them.

(iii) Resolutions that make sense to them.

5. Children in Mediation.

(a) Mediators vary in their response to the question of whether children should be involved in mediation concerning their custody and visitation.

(b) Each mediator must evaluate this question based on his or her comfort level of having the children present, the views expressed by the participants, the age of the children, and the unique issues that are before the mediator.

6. The Elderly in Mediation.

(i) Susan N. Gary, Mediation and the Elderly: Using Mediation to Resolve Probate Disputes Over Guardianship and Inheritance, 32 Wake Forest L. Rev. 397 (1997). (Appendix at A-107).

7. Gays and Lesbians in Mediation.

(i) William Mason Emmett, Queer Conflicts: Mediating Parenting Disputes within the Gay Community, 86 The Georgetown L. J. 433 (1997). (Appendix at A-87).

8. Foster Parents in Mediation.

9. The Role of the Guardian ad Litem in Mediation.

10. The Role of Government Attorneys, Social Workers, and Psychologists in Mediation.



11. Public Defenders in Mediation.