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COMMENT

CHILD CUSTODY MEDIATION: A PROPOSED ALTERNATIVE TO LITIGATION

I. INTRODUCTION

A dramatic increase in the number of divorces over the past two decades¹ has created a national movement to encourage mediation for divorcing couples involved in child custody disputes.² Mediation is defined as a "cooperative dispute resolution process in which a neutral party attempts to keep contested parties talking until they reach a settlement of their differences."³ This process is in opposition to the existing litigation laws in which the court assumes the role of *parens patriae*⁴ and determines who shall have custody of the children and under what conditions.⁵

In the child custody setting, the purpose of mediation is to facilitate cooperation and communication between family members so as to encourage maximum contact with the child by both parents, while helping the parties develop a custody plan specifically tailored to their child's individual interests.⁶ Mediation, unlike adjudication, emphasizes not who is right or

1. See Bureau of the Census, *STATISTICAL ABSTRACT OF THE UNITED STATES 1988*, Annual Report (1988). Divorce in the United States increased from 1970 to 1980 by 481,000 couples per year. This figure nearly doubled the amount of yearly divorces from 1970 to 1980. In 1980, the divorce rate was 1,189,000 couples per year. Since 1980, the divorce rate has slightly declined. 1,159,000 couples per year were divorced in 1986.

2. Shepard, *Ground Rules for Custody Mediation and Modification*, 48 ALB. L. REV. 616, 663 (1984).

3. Pearson, *Child Custody: Why Not Let The Parents Decide?*, 20 JUDGES J. 4, 5 (1981).

4. See Paquin, *Protecting the Interests of Children on Divorce Mediation*, 26 J. FAM. L. 279 (1984).

The court as "*parens patriae*" may attempt to represent the child's interest by independent investigation, or they may accept the parents' evidence but take the child's point of view in determining the outcome. The information of the child reaches the court through in camera testimony of the child, social service evaluations by experts, or representation by a guardian ad litem whose position is to provide information to the court.

Id.

5. See generally Spencer & Zammit, *Mediation-Arbitration: A Proposal For Private Resolution of Disputes Between Divorced and Separated Parents*, 1976 DUKE L. J. 911 (1976).

6. Shepard, *supra* note 2, at 626.

wrong, but rather establishes a workable solution that best meets the family's unique needs,⁷ focusing on the "best interest of the child."⁸ The child's best interest is thought to be served by maximizing his contact with both parents in the post-divorce family, while ensuring each parent a meaningful role in the child's future.⁹ This concept is the basis for the model of joint custody.¹⁰ While litigation results in sixty-nine percent of custody awards solely to the mother, mediation results in joint custody awards sixty-three percent of the time.¹¹ Custody mediation is also said to enhance communication, maximize the exploration of alternatives, address the needs of the parents and children, and formulate an agreement that satisfies all parties involved.¹²

Section II of this article describes the historical framework from which child custody mediation has developed. Section III discusses the process and procedures normally followed by a mediator in order to assure maximum, effective results. Section IV explains the role of the mediator including ethical considerations and problems faced by attorneys who wish to mediate the custody disputes of divorcing couples. Section V sets forth the results and conclusions of the Denver Custody Mediation Project (Denver Project), an influential study that has become the basis of encouraging mediation throughout the nation. Finally, Section VI discusses the advantages and disadvantages of mediating child custody disputes.

7. Coombs, *Noncourt-Connected Mediation and Counseling in Child-Custody Disputes*, 17 FAM. L. Q. 469, 469 (1984).

8. Schepard, *supra* note 2, at 624. The ABA Family Law Sections Standards For Family Mediation do not provide any guidelines for the "best interest of the child." However, the Uniform Marriage And Divorce Act, currently enacted in 44 states, provides the court shall consider all relevant factors including:

- (a) The wishes of the child's parents as to custody;
- (b) The wishes of the child as to custody;
- (c) The interaction and interrelationship of the child with his parents, his siblings, and any person who may significantly affect the child's best interest;
- (d) The child's adjustment to his home, school and community;
- (e) The mental and physical health of all individuals involved.

See UNIFORM MARRIAGE & DIVORCE ACT, 9(a) U.L.A. 91 (1976).

9. Schepard, *supra* note 2, at 625.

10. *Id.*

11. *Id.*

12. Foldberg, *Mediation of Child Custody Disputes*, 19 COLUM. J. OF L. & SOC. PROBS. 413, 415 (1985).

II. HISTORY

Mediation has been an institutionalized form of resolving disputes in China from the time of Confucius until the present.¹³ Its being is rooted in African moots, socialist comrades courts, psychotherapy, and labor disputes.¹⁴ From the past until the present, mediation has been based upon honesty, informality, open and direct communication, expression of emotion, attention to the underlying causes of disputes, reinforcement of positive bonds, and avoidance of blame.¹⁵

Child custody mediation is the outgrowth of several factors. First, with the adoption of the no-fault divorce system in the 1970's,¹⁶ attitudes began to shift from focusing on reconciliation of divorcing couples to divorce and custody counseling.¹⁷ The courts turned to mediation as a way of reducing conflict and ensuring a custody and visitation agreement on which all parties could agree.¹⁸ Where there exists goodwill between the parting husband and wife, the necessity for state intervention or paternalism is less clear.¹⁹ The parties will often benefit from a contract in which they both substantially contribute to the outcome.²⁰ In spite of the advantages of such a contract, the courts today are basically free to affirm or deny any agreement that the parties create.²¹ Courts have responded in both ways.²² As the law now

13. Foldberg, *A Mediation Overview: History and Dimensions of Practice*, 1 *MEDIATION Q.* 15, 19 (1983).

14. Pearson, *supra* note 3, at 5.

15. *Id.*

16. *Id.* See also Mnookin, *Bargaining in the Shadow of the Law*, 88 *YALE L. J.* 950, 953 (1979). Decisions to end a marriage are now considered a matter of private choice.

17. Paquin, *supra* note 4, at 285.

18. *Id.* at 280.

19. Spencer & Zammit, *supra* note 5, at 912.

20. *Id.*

21. *Id.*

22. In *Hill v. Hill*, 199 Misc. 1035, 104 N.Y.S.2d 755 (N. Y. Fam. Ct. 1951), the court determined that as *parens patriae*, they were best suited to determine the questions of custody according to the best interests of the child. *Id.* Parents were therefore not allowed to contract regarding custody matters. See also *Wertlake v. Wertlake*, 127 N.J. Super. 595, 599, 318 A.2d 446, 448 (1974); *Emrich v. McNeil*, 126 F.2d 841, 844 (D.C. Cir. 1942).

In a more recent New York decision, the court outlined a new policy, favoring non-judicial separation agreements. *Sheets v. Sheets*, 22 A.D. 176, 254 N.Y.S.2d 320 (N. Y. App. Div. 1964). The court determined that a contract would only be set aside if the court concluded that the best interests of the child were not satisfied by the agreement. From this result, the court encouraged parties to voluntarily mediate. The court based their standard of review on the fact that parents are generally in the best position to determine the best interest of their children, and courts should support parents who are willing to make decisions about custody issues. *Id.*; see also, *Kutz v. Kutz*, 341 N.E.2d 682 (1972).

stands in all jurisdictions, the enforceability of mediation agreements must be determined on a case-by-case basis.²³

Child custody mediation is also an outgrowth of court congestion.²⁴ Courts are overwhelmed with the number of divorce cases to be litigated.²⁵ Over half of the cases filed in all trial courts today are concerned with matrimonial actions.²⁶ Courts are so overloaded with cases that delays of nine to ten months are common for no-fault divorces, and delays of a year or two are common for contested divorce cases.²⁷ This congestion has increased the number of cases that have attempted to utilize the mediation method as an alternative to litigation.

Finally, a new philosophy that highlights the problems of the adversarial approach has led individuals to mediation. The litigation method is said to increase trauma and escalate conflict.²⁸ This type of activity definitely runs counter to the best interest of the child.²⁹ Lawyers are often accused of inadequate training to deal with custody issues, and are frequently accused of encouraging their clients to take extreme positions that are unnecessary.³⁰ When this occurs, parties involved in the dispute are less likely to agree upon a common solution. The adversarial proceeding is also said to result in agreements that fail to enhance cooperation, communication, and commitment to the parties.³¹ Because these factors highlight the goals of mediation, many individuals have turned to mediation as an alternative.

III. PROCEDURE

Although the stages of mediation may vary among individuals, there are basically five stages of the mediation process.³² The first stage involves an introduction or orientation to the system.³³ The mediator begins with an

23. Meroney, *Mediation And Arbitration Of Separation And Divorce Agreements*, 15 WAKE FOREST L. REV. 467, 484 (1979).

24. Pearson & Thoennes, *Mediating and Litigating Custody Disputes: A Longitudinal Evaluation*, 17 FAM. L. Q. 496 (1984).

25. *Id.* at 497.

26. *Id.*

27. *Id.*

28. *Id.* at 498.

29. *Id.*

30. Cavanaugh, *The Unauthorized Practice of Law and Pro Se Divorce: An Empirical Analysis*, 86 YALE L.J. 104 (1976).

31. Herman, *Mediation and Arbitration Applied to Family Conflict Resolution: The Divorce Settlement*, 34 ARB. J. 17 (1979).

32. Folberg, *supra* note 12, at 415.

33. *Id.*

informal interview of the parents.³⁴ This is to determine if the couple would benefit from the mediation process. Normally, there must not be a history of physical abuse, family violence, or psychopathology.³⁵ The mediator must then determine if the child will participate in the negotiation.³⁶ Through mediation, the child may be given a direct role to defend his position concerning the divorce.³⁷ Several considerations include the child's age, mental capacity, ability to make reasonable decisions regarding the dispute, and the emotional trauma resulting from the direct confrontation with the parents.³⁸ If the mediator concludes it is not to the advantage of the child to participate, the mediator must then decide whether the child will need representation of outside counsel, or whether the parents' attitude alone will further the child's best interest.³⁹ The mediator must also advise the parents of their right to seek outside counsel.⁴⁰ The mediator may choose to exclude counsel from the actual meetings, but must advise the parents that outside representation may be advantageous.⁴¹ In almost every case, an advisory attorney is selected to approve the final settlement.⁴² If counsel is allowed to participate in the actual negotiation, they are usually requested to act as a future advisor, and not as an advocate during the actual mediation.⁴³ Finally, in stage one, the mediator must orient the parents on the applicable law concerning the custody procedure.⁴⁴ The mediator should include an explanation of the best interest of the child, a summary of the applicable rules of procedure and evidence, and a basic discussion as to future mediation techniques.⁴⁵

The second stage of the mediation process is the fact finding and disclosure stage.⁴⁶ This procedure should result in the full disclosure of finances, income tax returns, and all information that may aid in the final

34. Paquin, *supra* note 4, at 314.

35. Woolley, *Courtroom Mediation-A Viable Alternative to the Child Custody Trial*, 1986 JUV. & FAM. CT. J. 1, 3 (1986).

36. *Id.*

37. Paquin, *supra* note 4, at 286.

38. *Id.* at 314.

39. *Id.* at 315.

40. *Id.*

41. *Id.*

42. Meroney, *supra* note 23, at 477.

43. Paquin, *supra* note 4, at 315.

44. *Id.*

45. *Id.*

46. Folberg, *supra* note 12, at 415.

settlement.⁴⁷ In order to determine the ultimate issue of custody, the parents must reveal information necessary to allow an informed decision.⁴⁸ Factors to be considered include the extent of child care each parent is willing to assume, the future plans of the parents, the geographical proximity of both parents, and the presence of siblings or stepparents.⁴⁹

The third stage of the mediation process is often labeled as isolation and definition of issues.⁵⁰ The couple agrees to leave fault out of the meeting and submits specific areas of dispute which they wish to negotiate.⁵¹ The parties normally agree to limit their communication to the mediation sessions, and refrain from discussing mediation matters with third parties.⁵²

The fourth stage is the identification of the parties' interests and needs.⁵³ One party normally initiates the mediation by giving notice to the other party, including notice of the amount and remedy sought.⁵⁴ This phase is often considered the most difficult.⁵⁵ Parents must be reminded that they are to react as parents, and not as husband and wife.⁵⁶

The fifth stage is the generation and negotiation of alternatives.⁵⁷ Parents are often asked to role-play in order to develop a better understanding of the ultimate custody plan.⁵⁸ Once parents have reached an agreement of compromise, advisory attorneys are selected by the parties to draft a final settlement.⁵⁹ The agreement is eventually filed with the court and incorporated into the court's decree of divorce.⁶⁰ Mediators may or may not concur in the agreement of the parties.⁶¹ While concurrence indicates

47. Meroney, *supra* note 23, at 476.

48. *Id.*

49. Shepard, *supra* note 2, at 626.

50. Folberg, *supra* note 12, at 415.

51. Meroney, *supra* note 23, at 476. Such areas may include the division of property, spousal maintenance, child support, advisory attorney fees and the cost of mediation. *See also* Woolley *supra* note 35, at 4. The goal of this phase is to allow parents the opportunity to express their fears, concerns and feelings. A trial of these issues would not allow that kind of expression or statements.

52. *Id.*

53. Folberg, *supra* note 12, at 415.

54. Meroney, *supra* note 23, at 477.

55. Wooley, *supra* note 35, at 4.

56. *Id.*

57. Folberg, *supra* note 12, at 415.

58. Woolley, *supra* note 35, at 4.

59. Meroney, *supra* note 23, at 477.

60. *Id.*

61. *Id.*

that the mediator believes the settlement is fair and equitable, nonconcurrency alerts the court to scrutinize the agreement closely.⁶² Finally, a future dispute resolution clause, resembling an arbitration clause, is often added in order to give the couple a mechanism for resolving disagreements without resorting to the courtroom.⁶³

IV. THE ROLES AND STANDARDS OF THE MEDIATOR

The mediator has a vital role in the family custody mediation process. Not only must he be qualified to mediate; he must also be able to conduct the negotiation in such a way as to avoid violating ethical rules of conduct. Many mediators are attorneys and have a duty to protect the integrity of the law and the legal process.⁶⁴ Standards must be developed in order to provide a model or norm for the conduct of such activity.⁶⁵ While many mediators are not lawyers, everyone who mediates affects the legal process.⁶⁶ The Family Law Section has adopted several standards to help aid the lawyer or non-lawyer mediator.⁶⁷ Although the American Bar Association has not yet adopted these standards, they serve as a basis to highlight certain areas of concern and interest.⁶⁸

A. *Standard I: The Mediators Duty to Define and Describe the Process*

Before the actual mediation session begins, the mediator must conduct an orientation session to present an overview of the process.⁶⁹ The mediator is required to discuss the basic rules of the negotiation process.⁷⁰

62. *Id.*

63. Shepard, *supra* note 2, at 654. The agreement is often automatically reevaluated upon the happening of several events. These include:

- (a) A contemplated move by either parent;
- (b) Cohabitation or remarriage of either parent;
- (c) Major illness, disability or extended hospitalization of either parent or child;
- (d) Significant financial change.

Id.

64. Bishop, *The Standards of Practice for Family Mediators: An Individual Interpretation and Comments*, 17 FAM. L. Q. 461 (1984).

65. *Id.* at 462.

66. *Id.* at 462.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

Several examples that may be of interest include the process of withdrawal, the fee arrangement, the employment of individual counsel, and the couples' and mediator's willingness to mediate.⁷¹

B. *Standard II: Confidentiality*

The first step is to reach an agreement in writing that requires confidentiality of all information obtained through the mediation process, with the exception of allowing disclosure upon the consent of both parties.⁷² The court would more likely enforce such a privilege if the terms were set forth in writing.⁷³ In addition to the confidentiality requirement, the mediator must stress that the final agreement reached by the parties may not be enforceable.⁷⁴ This provides the participants with the expectation that the information revealed in mediation may later have to be repeated in court.⁷⁵

C. *Standard III: Impartiality*

A lawyer-mediator is never allowed to represent either party during or after the mediation process in any legal matter.⁷⁶ A mental health professional who acts as a mediator is not allowed to provide counseling to either party during or after the mediation.⁷⁷ A mediator is further required to disclose any bias relating to the issues to be mediated.⁷⁸ Finally, a mediator has the duty to promote the best interest of the child.⁷⁹ This would include an examination of the child's needs separate and apart from the needs of the parents.⁸⁰

71. *Id.* at 465.

72. Note, *Standards of Practice For Family Mediators*, 17 *FAM. L. Q.* 455, 456 (1984).

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 456.

77. *Id.*

78. *Id.* at 457.

79. *Id.*

80. *Id.*

*D. Standard IV: Duty to Assure That Decisions
Are Based on Sufficient Information and Knowledge*

This standard reflects the belief that an agreement based on inadequate or incomplete data is not a reasonable agreement.⁸¹ In addition to simple exposure to the data, the mediator must evaluate the information to promote understanding of the material.⁸² This consideration may require the mediator to obtain expert consultation or the advice of an outside attorney.⁸³ In this context, the lawyer-mediator must take special precautions to assure that the participants do not view his suggestions as an alternative to obtaining separate legal advice.⁸⁴

E. Standard V: The Duty to Suspend or Terminate Mediation

Standard five provides an outlet for unsuccessful mediation. A mediator is required to suspend the process when it becomes counterproductive.⁸⁵ A mediator may terminate the sessions if either participant is unwilling or unable to proceed.⁸⁶ In addition, there is a duty to prevent the process from becoming destructive.⁸⁷

The above standards provide only a reference in which a mediator may turn to for guidance. Each mediator may adjust the standards to his own mediation session.⁸⁸

V. THE DENVER CUSTODY MEDIATION PROJECT

The Denver Project began in March of 1979 in order to evaluate the short-term and long-term effects of mediation as a method of resolving contested child custody issues.⁸⁹ In order to compare mediation with the adversary system, judges were asked to refer all suspected cases of contested

81. *Id.*

82. *Id.* at 458.

83. Bishop, *supra* note 63, at 467.

84. *Id.*

85. *Id.*

86. Standards, *supra* note 72, at 459.

87. Pearson & Thoennes, *supra* note 24, at 497.

88. *Id.*

89. *Id.* at 501.

child custody to the study lab.⁹⁰ Once referred, the cases were randomly assigned to a mediation or control group status.⁹¹

Upon being chosen for mediation, individuals were assigned to male-female teams comprised of lawyers and mental health professionals trained in mediation techniques.⁹² Any of the couples who rejected the mediation service were labeled the "reject-group."⁹³ The effects of mediation and adjudication were measured in six areas: (1) Agreement Making; (2) Users' Ratings; (3) Compliance and Relitigation; (4) Relationships Between Ex-Spouses; (5) Parent-Child Interactions; and (6) Savings In Time and Money.⁹⁴ Finally, the mediation group was broken down into successful mediators and unsuccessful mediators.⁹⁵ The following six sections discuss the results of the Denver Project.

A. Agreement Making

On the average, it was determined that 60% of all clients who mediated reached an agreement.⁹⁶ Of those couples who did not reach an agreement (labeled unsuccessful mediators), 65% later reached an agreement prior to their court hearings.⁹⁷ In other words, only 15% of all couples who chose to mediate ultimately relied on the court for resolving their custody issues.⁹⁸ About 60% of adversarial samples stipulated to an agreement before going to court.⁹⁹ Viewed from another angle, over 80% of all those who were exposed to mediation produced their own custody agreement before court,

90. *Id.*

91. *Id.* Control-group participants were contacted by letter and telephone and interviewed for research purposes only. Consenting individuals were interviewed three times: as soon as they filed a custody dispute with the court, upon the court's promulgation of a final order of custody, and six to twelve months later.

Mediation-group participants were contacted in the same matter and offered free mediation services. They were interviewed at the same intervals as the control-group participants.

92. *Id.*

93. *Id.* The reject-group was also interviewed at the same intervals as the control-groups and the mediation-groups.

94. *Id.* at 504.

95. *Id.*

96. *Id.*

97. Folberg, *supra* note 12, at 422. Among the more experienced mediators, agreement rates were 80% or better.

98. *Id.*

99. Pearson & Thoennes at 504.

while only around half of those who were not exposed to mediation produced an agreement before adjudication.¹⁰⁰

It was also determined that successful mediators were more likely to feel that they could resolve subsequent problems without resorting to adjudication.¹⁰¹ Seventy-percent of successful mediators believed that they could work out modified agreements with their spouses either in mediation or on their own.¹⁰² In contrast, only 30% of the adversarial samples and unsuccessful mediator samples expected to stay out of court to make needed changes.¹⁰³

B. Users' Ratings and Reactions

It was determined that mediation generated user satisfaction.¹⁰⁴ Ninety-two percent of all successful mediators appeared to be satisfied with the process, and would mediate again in the future or recommend it to a friend.¹⁰⁵ Even 61% of the unsuccessful mediators would recommend the process to a friend.¹⁰⁶ Successful mediators also tended to report the greatest satisfaction with their final agreements.¹⁰⁷ Seventy-five percent reported that they were satisfied with the ultimate results, while only 60% in the remaining groups were satisfied with the final order.¹⁰⁸ Mediators also tended to perceive mediation as an equitable way of resolving custody disputes.¹⁰⁹ Ninety percent of all successful mediators agreed that mediation was a fair way to resolve disputes, while only 60% in the remaining groups believed that their method was basically fair.¹¹⁰

C. Compliance and Relitigation

It was reported that 85% of all individuals who successfully mediated were "generally" complying with the terms of their agreement.¹¹¹ Only 60%

100. *Id.*

101. *Id.*

102. *Id.* at 505.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

in each of the remaining groups reported compliance.¹¹² Among those who successfully mediated, only 14% reported that serious disagreements had already arisen over the terms of the settlement.¹¹³ Thirty to forty percent of the remaining groups reported such problems.¹¹⁴ The results suggested that mediation awards would not plague the courts with post-settlement motions.¹¹⁵ Because the parents in mediation participated in their own agreements, they appeared to share a personal obligation to uphold the agreement.¹¹⁶

D. Relationships Between Ex-Spouses

Mediation appeared to improve the parties' communication and understanding.¹¹⁷ Sixty-one percent of successful and 31% of unsuccessful couples reported that the mediation procedure improved inter-spousal communication.¹¹⁸ Only 17% of couples in the control group experienced improved communication with their spouses.¹¹⁹ Although mediation has limited benefits for spousal relationships, it is not perceived to be as harmful as the court process.¹²⁰ The study further indicated that mediation improved communication, improved understanding, reduced anger, and improved cooperation.¹²¹

E. Parent-Child Interaction

There was a definite difference in the types of custody produced by mediation as opposed to the types of custody produced by the adversary system.¹²² Seventy percent of those in mediation reached an agreement involving joint legal custody.¹²³ Only 20% selected traditional mother custody arrangements.¹²⁴ Mediated joint custody agreements appeared to

112. *Id.*

113. *Id.*

114. *Id.*

115. Foldberg, *supra* note 12, at 426.

116. *Id.*

117. *Id.* at 425.

118. *Id.*

119. *Id.*

120. Pearson & Theonnes, *supra* note 24, at 506.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

recognize that both parents were fit and had a legal responsibility for the care of the children.¹²⁵ In this sense, the father or non-custodian parent in successful mediation generally saw their children 7.7 days per month, while visitation time for the non-custodial reject and control group members was 4.9 days per month.¹²⁶

F. Savings In Time and Money

Successful mediation allowed clients to move through the court system faster than their adversarial opposites.¹²⁷ The average number of months between the initiation of the proceedings and the reaching of a final order was 9.7 months for successful mediators.¹²⁸ In purely adversarial samples, it generally took around eleven months to reach a final settlement.¹²⁹ The group that appeared to advance the slowest was the unsuccessful mediators.¹³⁰ The average number of months between initiation and final settlement for the unsuccessful group was generally 13.4 months.¹³¹ This could have been the result of the adversarial postponement of investigation and continuation of a hearing on custody.¹³²

As for attorneys' fees, the average legal fee paid by the successful mediation group was \$1,630.¹³³ For the unsuccessful mediation group, the total was approximately \$2,000.¹³⁴ Finally, for the rejecting and control group, the fee was an average of \$1,800 and \$2,360, respectively.¹³⁵

The Denver Project provided several relevant facts and conclusions about the mediation method. It appeared to show that mediation generated user satisfaction, as well as improved relationships between the parties. Clients of successful mediation also reported more satisfaction and compliance with their agreements. Non-custodial successful mediators, through joint custody provisions, developed agreements to spend more time

125. *Id.*

126. *Id.* at 507.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* It is unclear why individuals in the rejecting group pay lower legal fees than those in the control and unsuccessful mediation groups.

with their children. Finally, they moved through the system more rapidly, which resulted in the saving of attorney's fees.

VI. THE ADVANTAGES AND DISADVANTAGES OF CUSTODY MEDIATION

A. *Advantages of Custody Mediation*

The most obvious advantage of custody mediation arises from the primary criticisms of the judicial system. First of all, it is often feared that judges do not have the time to examine custody disputes thoroughly because of crowded dockets and a pressure to proceed quickly.¹³⁶ In addition, judges as a group possess no qualities that make them more capable than parents to make decisions as to the child's best interest.¹³⁷ Parents should have primary responsibility for their children.¹³⁸ As a matter of fact, parents bring up their children and are better able to evaluate a plan of custody that will be the most efficient and beneficial. Parents should not be forced into allowing a judge to make such important decisions. If the parents cannot agree as to a plan of action, they should at least have the right to choose a decision maker whose values are similar to their own.¹³⁹ Many mediators believe that the only limitation on parental rights should be that parental conduct does not constitute negligence.¹⁴⁰

Next, domestic issues should be resolved privately.¹⁴¹ Insuring privacy may reduce negative disputes which, in turn, reduces negative impact on the parents and children involved in the process.¹⁴² Most importantly, it removes the dispute from a forum traditionally seen as an adversary proceeding, thus avoiding the inference that there is a winner and a loser, that one partner has been "right" and one has been "wrong".¹⁴³ In addition, the legal system is not able to supervise or enforce the fragile and complex relationships between parents, and such a relationship will continue long after the court has interfered.¹⁴⁴

136. Meroney, *supra* note 23, at 469.

137. *Id.*

138. Spencer, *supra* note 5, at 912.

139. *Id.* at 919.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. Cantor & Ferguson, *Family Counseling in the Conciliation Court: An Alternative to Custody Litigation*, Sept. 1976 CONCILIATION CTS. REV. 1.

Thirdly, there is an added advantage to having a lawyer or a mental health professional as a mediator. The lawyer's knowledge of the law may help guide couples to reach an agreement which a judge is more likely to approve.¹⁴⁵ In addition, knowledge of the legal aspects can save couples time because they will not waste time trying to work out a settlement with options that the lawyer-mediator knows the court will reject. If the mediator is a mental health professional, there is also an added advantage. Such an individual is trained to deal with emotional issues.¹⁴⁶ Because divorce is such a highly emotional situation, such expertise may be highly advantageous. Parents, by formulating their own agreement, invest emotionally in its success so that they are more likely to adhere to the terms.¹⁴⁷

Finally, as the Denver Project indicates, mediation can result in the saving of time and money for its clients, as well as for American taxpayers.¹⁴⁸ The emphasis on speed is especially important from the child's point of view. For the child, uncertainty and delay can be the most difficult aspect of the entire divorce process.¹⁴⁹

B. *Disadvantages of Custody Mediation*

There are several disadvantages facing the lawyer-mediator. One of the biggest disadvantages is the risk of potential ethics code violations.¹⁵⁰ The lawyer must avoid representing either client to the detriment of the other. A neutral position may not always be easy. Furthermore, if independent counsel is needed for advice, the parents may incur an added expense as well as an increase the amount of time needed to reach the final settlement.¹⁵¹

A lawyer-mediator's reputation and professional esteem may be based on reaching as many agreements as possible.¹⁵² In this sense, a mediator may push the parties to reach an agreement even if they are not fully ready

145. Coombs, *supra* note 7, at 491.

146. Paquin, *supra* note 4, at 302.

147. Folberg, *supra*, note 12, at 421.

148. *Family Disputes: Time & Money*, ALTERNATIVE DISPUTE RESOLUTION REP. (BNA) Vol. 1, No. 13 at 246 (Oct. 15, 1987). The average costs involved in the litigation of such suits being in excess of \$900 per day. *Id.*

149. *Id.*

150. Paquin, *supra* note 4, at 302.

151. *Id.* at 303.

152. *Id.*

to do so.¹⁵³ It is also from this goal that a lawyer may miss signs of one party's dominance over the other.¹⁵⁴

Mediation may not always be cheaper than litigation. Often, it is necessary to contact outside counsel, especially in complex cases. The cost may then equal or exceed that of two attorneys negotiating as adversaries.¹⁵⁵ One study in Oregon concluded that court-provided counseling and mediation services were more expensive to the county than typical adjudication.¹⁵⁶ This is especially true for unsuccessful mediators. Not only must they absorb the cost of mediation, but they must then pay for the cost of future litigation.

Because mediation represents an alternative to litigation, it lacks the checks and balances that are the primary advantages of the adjudication system.¹⁵⁷ Mediation creates a constant risk of overreaching by the attorney or mental health professional who acts as mediator as well as overreaching by the parties involved. The attorney-mediator may step outside his realm of authority when he advises the client on legal issues, rather than simply serving as a mediator. The mental health professional may also violate rules of law in the same manner, resulting in the unauthorized practice of the legal profession.¹⁵⁸ Questions of certification, licensing and standards are still unanswered.¹⁵⁹ Furthermore, the more dominant party may have an edge over the other party, leading to unfair or unjust results. As a consequence, mediation may require even more court consideration before final approval.

Finally, there are certain cases that are simply not appropriate for mediation. These situations include cases involving children who have been or are alleged to be physically abused or neglected; cases that involve multiple social agency and psychiatric problems; cases involving bitter conflict between the parties and a history of repeated court appearances; and cases in which one or more of the adults has experienced serious psychological problems or has demonstrated erratic, violent, or severely antisocial modes of behavior.¹⁶⁰

153. *Id.*

154. *Id.*

155. Friedman, *Chairperson Column*, 26 ILL. ST. BAR ASSOC. FAM. L. NEWSL. 5 (Mar. 1983).

156. Cohen, *The Diversion Study: A Preliminary Report*, (unpublished paper 1981).

157. Folberg, *supra* note 12, at 432.

158. *Id.*

159. *Id.*

160. Salius, *The Use of Mediation in Contested Custody and Visitation Cases in the Family Relations Court*, (an unpublished manuscript, Hartford, Connecticut: Superior Court, 1978).

VII. CONCLUSION

Mediation for child custody disputes is rapidly developing as an alternative to litigation. Research has begun to show that mediation promotes peaceful settlement between parting parents, allowing them to focus on the needs of their children. In addition, it has been shown that these agreements promote cooperation and may lessen the burden of an already overloaded court system. Ideally, the courts should scrutinize all agreements from the viewpoint of the child, focusing on the fairness of the ultimate provisions. This protection would provide the least intrusive means available to assure the protection of the best interest of the child.

TERRI GARNER

