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Give Peace a Chance: A Guide to Mediating Child Welfare Cases

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Give Peace a Chance: A Guide to Mediating Child Welfare Cases

By Jennifer Baum

Would you like to speed up your cases, achieve more satisfying results for your clients, and cut back on needlessly polarizing motion practice? Since its introduction in the 1980s, child welfare mediation has helped attorneys do just that by facilitating resolutions in child protective disputes more quickly, less contentiously, and with more acceptance from stakeholders than its courtroom alternative, adversarial litigation.

If you've handled dependency cases for any length of time, you are already familiar with the crushing caseloads, emotional volatility, and high-stakes decision-making that are the hallmarks of child welfare litigation. In a growing number of jurisdictions, attorneys are increasingly turning to mediation to help move these difficult cases forward.

Mediation Success Story from Queens, New York

In his article, "Child Protection Mediation: A 25-Year Perspective," 47 *Fam. Ct. Rev.* 609 (2009), Judge Leonard Edwards from California describes "the angriest woman I had ever seen in my courtroom": "She walked into the court aggressively, looking around at everyone angrily with disgust. She refused to talk with the attorney who had been appointed to represent her and ignored the court assistant who tried to explain what the court proceedings were all about." However, a few days later, the judge observed a complete reversal of the hostility. After

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returning to the courtroom following a single mediation session, the woman was "a different person." She declared that the mediation "was a positive experience—the only one I have had in this entire process." *Id.* at 69.

My own office's recent experience with mediation, though less dramatic than Judge Edwards's, nonetheless bears witness to the same phenomenon: Litigants need to be heard. Litigants need to be understood. Litigants need to be respected. When they feel powerless and unheard, litigants become angry and withdrawn. When they feel that they are not invisible or completely powerless, progress can be made.

My law clinic, which represents children, requested a mediation to resolve several thorny permanency issues in a four-year-old case. The case involved four children under five years old who were in two separate non-kinship homes and who had experienced repeated removals and re-removals. There were no fewer than a dozen maternal and paternal relatives and contract foster parents in various stages of competition with one another for the kids; the parents were in and out of compliance with services; and there were a half dozen caseworkers in two states, two Queens County judges and a Queens County referee, three (or more) city attorneys simultaneously, two Interstate Compacts, and a hair ball of court dates, conferences, and agency deadlines.

As you might imagine, the communication failures among the (too) many professionals in this case were not just unfortunate; they were debilitating. Investigating caseworkers failed to communicate with family services caseworkers. Court clerks failed to identify critical information about the family, resulting in the case being erroneously split into two. Once the case was carved up, multiple decision-makers (two judges and a referee) independently created plans for the family's services, goals, and court dates. Caseworkers repeatedly failed to communicate with relatives, phone numbers went in and out of service, resources appeared and disappeared, siblings were separated. Long-term planning for the children seemed unimaginable because even short-term stability seemed completely out of reach.

By the spring of 2010, emotions in the case(s) were running high. We would eventually learn just how high around a big oak table in an overcrowded conference room tucked away in a corner of the Queens Family Courthouse. This was the mediation my office had requested.

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To begin, the mediator noted that we were the largest mediation group he had ever hosted. There were caseworkers, relatives, parties, lawyers, law students, and two mediators. Methodically, however, our mediator made sure that every person was introduced and had an opportunity to say what he or she hoped to gain from the mediation. The introductions alone consumed a significant chunk of our reserved time, but our mediator quickly assisted those assembled in identifying common goals and individual needs. After a short while more, a turning point came when one of the relatives was able to voice her outrage at recent actions by one of the caseworkers. The caseworker in question had testified at an earlier court date that the "the paternal relatives were suddenly coming out of the woodwork." When this particular paternal relative repeated those words at the mediation table, she spat them out with disgust, adding "we're not cockroaches," wiggling her arched fingers across the table to mimic an insect. For this relative, all of the powerlessness and frustration she had experienced in this case over the course of several years was represented by the caseworker calling her a cockroach in open court.

For her part, the caseworker seemed genuinely surprised by this response. Stepping up, she indicated she hadn't intended to insult, only to defend herself. The most recent emergency removal of the children (from a paternal relative) had resulted in an overwhelming number of additional paternal relatives coming forward to request the children. She had not had time to investigate each of the relatives, she explained, and had felt attacked in court. But, perhaps most significantly, this caseworker would soon be seen holding back tears when describing the conditions under which she found the children living with their last kinship placement. She conceded that she felt partially responsible for their most recent maltreatment because she had cleared that home just a few months earlier. As for paternal relatives, it was just as obvious that this caseworker was now operating under the principle of "once bitten, twice shy." It was equally clear that she was doing so not out of some misguided sense of agency policy, but because she personally felt partly responsible for the latest neglect. Her voice cracked as she described removing the children, again,

from their family. It was humbling—the caseworker was not evil; she was human, and she cared about these children, too.

In this manner, the "cockroach incident" became the vehicle by which both sides were able to express their years of frustration, anxiety, and fear. The mediator allowed both sides to air their grievances fully. Follow-up questions were asked. Interruptions were turned away. And in the end, each side had a far more humanized view of the other: Having received the caseworker's apology and feeling heard at last, the paternal relative was now willing to work cooperatively with the caseworker; having aired her fears about child safety and her feelings of betrayal, this caseworker was now able to proactively explore a new paternal placement for the children. (Also, the agency attorneys agreed to reduce their numbers from three to two, and the split cases were eventually reunited before one judge who would hear the cases together.)

Total cost: three hours in a crowded room with water, cookies, and a skilled pair of mediators. Total savings: countless hours of drafting, filing, and appearing on emergency applications; untold numbers of court-ordered reports and investigations; and perhaps weeks or, more likely, months of litigation delay.

And there was another thoroughly surprising benefit from the mediation. Immediately following the mediation, the mother reenrolled in services for the first time in years and is now following through on all referrals and services; unsupervised visits are about to begin. The mother seemed to have no trouble reading the writing on the wall of the mediation room, even though she had not seen what was written on the courtroom wall for several years. I have since learned that increased parental compliance with services and participation in the litigation is not uncommon following mediation. It seems the mother, who said little but listened closely, found what she needed to hear in mediation as well. While this case is not yet completed, the mother has been granted a suspended judgment in the termination of parental rights case filed over the summer, and she is very close to getting her children back at last.

Why Mediate?

Child welfare mediation is a powerful tool. It can amplify the most underrepresented voice, efficiently slice away bureaucratic red tape, advance distant litigation goals, and unearth previously hidden options, all while circumnavigating the time trap of adversarial litigation. As an added bonus, mediation can also de-escalate simmering tensions by providing a safety valve for volatility (on all sides), empower marginalized players by "bringing them back to the table," and—without a doubt—alter the course of a family's history.

Child welfare mediation is growing in popularity but, unfortunately, not as quickly as mediation in other fields is growing. Child welfare lawyers who favor alternative dispute resolution (ADR) still face considerable institutional resistance to nonadversarial decision making. Many lawyers, it seems, are scared away from attempting to mediate all or part of a child protective case, believing that it is simply unsafe to negotiate child welfare issues outside the courtroom even though nearly three decades of experience has shown that children's safety is not compromised by mediation. *See* "Child Protection Mediation: A 25-Year Perspective," *supra*, at 75. The mere mention of mediation sends many child welfare professionals running in the opposite direction.

Historically, there has been strong resistance to the idea of mediation among lawyers. General opposition to consensus-based conflict resolution can be traced back to law school, where the focus has traditionally been placed on tools of the adversary system. Law school curricula are rich in litigation-related course offerings but have only recently begun expanding beyond negotiation basics. As demand for ADR increases in the lawyering marketplace, however, so too does employer demand for graduates trained in mediation and other consensus-based conflict resolution. As one commentator has observed, "effective negotiation and settlement skills are becoming increasingly central to the practice of law and occupy more of lawyers' real time and attention than adversarial trial lawyering." J. Macfarlane, "The Evolution of the New Lawyer: How Lawyers Are Reshaping the Practice of Law," 2008 *J. Disp. Resol.* 61. Remember that, in reality, only a small fraction of cases—civil or criminal—are ever resolved through trial; the rest settle with an agreement of one kind or another, some agreements brought about more skillfully than others. To meet the demands of a practice that is increasingly reliant on negotiation and settlement skills, law schools are offering more ADR courses, and more students are seeking them out. Today's law graduates are better trained in dispute resolution than ever before.

This is welcome news because mediation can accomplish much in the child welfare context. The National Council of Juvenile and Family Court Judges notes that mediation can remedy the "partial and incomplete exchanges of information" that take place in hallway conferences, by providing "all relevant parties . . . a full exchange of information." National Council of Juvenile and Family Court Judges, *Resource Guidelines: Improving Court Practice in Child Abuse & Neglect Cases* 133 (1995).

Mediation can also demystify the court process, which in turn promotes a better understanding of the benefits to be gained from more fully participating in the underlying litigation. Mediation is also felt by participants to be more friendly and less adversarial, with the mediator correcting for power imbalances, explaining acronyms and terminology, ensuring turn-taking, and so forth. "The active involvement of mediators can protect against imbalances of power between participants resulting from various levels

of skill, experience, professional status or cultural differences." *Id.*, app. B, at 134.

But are mediations "successful?" A 2009 survey reported that in the vast majority of cases, a full or partial agreement was reached. J. Kathol, "Trends in Child Protective Ends in Child Protection Mediation: Results of the Think Tank Survey and Interviews," 47 *Fam. Ct. Rev.* 116 (2009). Reaching no agreement on anything, according to the survey, happened only rarely. While mediation may never render litigation completely obsolete, it can and does eliminate the need for motion practice over many issues, even if the ultimate issue on the case is not resolved. *Id.* at 122–23.

Mediation may or may not be available in your jurisdiction. Mediation is not limited to model courts, but it is encouraged in them. There are currently 32 model courts nationwide. (The full list is available at www.ncjfcj.org/content/blogcategory/112/151.)

Why Does Mediation Work?

The literature of negotiation theory is rich, and a full treatment is beyond the scope of this article, but the essential difference between litigation and negotiation, say negotiation theorists, is that in litigation, the parties are placed into direct conflict with each other, generating polarization and negative emotions. These negative emotions distract the parties from their goals and interfere with consensus building. A negotiation, on the other hand, provides a "vent" for strong emotions, which, once aired, can be cleared to make room for more positive emotions. This allows the parties to work together with a third person to advance everyone's interests, which can lead to agreements. Your mileage may vary, but there is no doubt that negotiation does work in the child welfare context. The National Council of Juvenile and Family Court Judges put it this way:

> Mediation provides an avenue for revisiting past conflicts and issues which have created roadblocks to constructive communication and problem-solving. When such impasses are addressed and resolved, or even when they are merely validated, resistance and defensiveness are often reduced to a degree which permits settlement of some or all issues. Participants also find that negative preconceptions are sometimes significantly reduced during mediation discussions, thereby permitting consideration of options formerly ruled out or never considered. As another benefit of mediation, less resistance may ultimately be encountered in holding family members accountable for commitments they have made in a mediation process in which they have been active participants. *Resource Guidelines: Improving Court Practice in Child Abuse & Neglect Cases*, *supra*, at 134–35.

How Does Child Welfare Mediation Work?

Child welfare mediation is a facilitated, confidential process in which persons with an interest in the welfare of a family can exchange information and ideas with other persons about issues central to a court case. The purpose of mediation is to reach a voluntary agreement about some or all of the subject of the litigation. Judge Edwards, a retired family court judge from Santa Clara County, California, and a child welfare mediation champion since the 1980s, notes that "[m]ediation is not an exotic, complicated process. Mediation is about talking and exchanging ideas in an environment where the discussion is guided by a facilitator." "Child Protection Mediation: A 25-Year Perspective," *supra*, at 609. A mediation dialogue can involve the parties (parents, caseworkers, subject children), family members and family friends, kin and non-kin foster parents, guardians ad litem, advocates and attorneys, agency and service provider personnel, and community members, all coming together to propose and discuss ideas or tease out thorny issues, legal or practical.

Mediation is a voluntary process, though in some jurisdictions a court-ordered referral might jumpstart the process by requiring litigants to attend a mediation information session. Because participants self-select, they are generally more motivated to participate in the process. Mediation can seem time-consuming in its early stages, but in the end it can pay you back double. Two thirds of child welfare mediations last just one session, and four out of five sessions last between two and three hours. A quarter of all child protective mediations require two sessions. "Think Tank Survey," *supra*, at 119.

While rules governing courtroom access in dependency cases can vary from state to state, in mediation, the participants themselves decide who sits at the table. Age-appropriate children might be present. Just as in litigation, participation in decision-making through mediation can have a powerful impact on children's understanding of, and ability to contribute meaningfully to, the course of a case that is about them. Through mediation, subject children are heard, educated, and empowered to contribute to the decision-making process. Participating in mediation can also address children's feelings of powerlessness, anger, and despair over events over which they often have no control. As one author put it, "Denying the child a voice . . . reinforces . . . the lessons learned most thoroughly by abused and neglected children, that [they] should not expect to have any control over [their] fate." L. Taylor, "A Lawyer for Every Child: Client-Directed Representation in Dependency Cases," 47 *Fam. Ct. Rev.* 605 (2009) (citing Emily Buss, "Confronting Developmental Barriers to the Empowerment of Child Clients," 84 *Cornell L. Rev.* (1999)).

Mediation can tackle any number of subjects, from legal issues on the underlying case to the details of a visitation plan. The Think Tank Survey notes that "topics that were always on the table for discussion at mediations were living

arrangements, parental visitation, and permanency planning. Other topics covered in mediation were treatment plans, relinquishment, kinship care arrangements, adoption, and many other unspecified issues." "Think Tank Survey," *supra*, at 120.

A 2007 report by the New York State Office of Children and Family Services observed that child welfare permanency mediation benefits not just families but also the systems that serve them in the form of "heightened family engagement and empowerment; increased information gathering and sharing; joint decision-making; creation of comprehensive and creative agreements/service plans; increased family and service provider compliance; time and monetary savings for court and social services staff; and decreased time to permanency." *Child Permanency Mediation Pilot Project: Multi-Site Process and Outcome Evaluation Study* 3 (Mar. 2007).

Who Are the Mediators?

A child welfare mediator is a neutral third party with substantive knowledge of the local child protective system. The mediator wields no independent decision-making power but "facilitates the [mediation] process and provides the structure the group needs [...], sets a tone of cooperation, demonstrates good communication and dispute resolution skills, raises unrepresented interests, and assists in reality testing possible agreements." *See* M. Giovannucci, & K. Largent, "A Guide to Effective Child Protection Mediation: Lessons from 25 Years of Practice," 47 *Fam. Ct. Rev.* 38, 43 (2009).

One New York State report noted that most mediators are employees of court-based mediation programs, though many mediators also hail from child welfare agencies or professional mediation organizations, or are trained community volunteers. New York State, for example, employs a combination of court-based staff, child welfare agencies, and professional mediators, depending on the county. (New York City uses the Family Court and the Society for the Prevention of Cruelty to Children; Albany uses Mediation Matters; Oneida County uses the Peacemaker Program; and Niagara uses Catholic Charities of Western New York, to name just a few.) *Child Permanency Mediation Pilot Project: Multi-Site Process and Outcome Evaluation Study*, *supra*.

Conclusion

Mediation skills among litigators are in demand and can be used to negotiate successfully in the mediation room, in the hallway, and in any other venue. Mediation can move child protective cases forward in ways that litigation often cannot, and much more quickly than motion practice. While no license or special training is needed to take part in a successful mediation (indeed, that is what the trained mediator is for), understanding basic negotiation principles can assist the dependency lawyer in overcoming institutional resistance to mediation and also in understanding the nonadversarial role of the mediation participant.

Perhaps the most important tip would be to seek opportunities to mediate the issues in your cases. Challenge your own preconceived notions about mediation and consider anew how best to develop strategies for court-involved families. Peace begins with dialogue, and mediators ensure that this dialogue is conducted safely and productively. Give peace a chance, and see what it can do for you. ■

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MEDIATION TIPS

Before heading into a mediation, consider submitting to the mediator (and circulating among counsel, the parties, or both) a mediation background memo. Such a document could be used as a road map to the mediation issues; at the very least, it informs the mediator and other parties of your client's views and needs.

Consider also meeting with the mediator privately and in advance of the mediation to share your objectives and your understanding of the roadblocks to achieving those objectives. (In New York City, mediators reach out to the parties and their counsel individually before bringing everyone together in the same room, so that they have an understanding of the interests important to each of the participants.)

In gaining the acceptance of reluctant participants, consider reminding them that mediation is a way to avoid ancillary litigation and speed up outcomes, not replace the underlying litigation (though the parties are certainly free to reach an agreement on the underlying litigation as well, if that seems possible).

Try to avoid using legalese and courthouse jargon in the mediation room. It exacerbates the power imbalance by functionally excluding persons unfamiliar with that terminology.

Try to be as inclusive as possible when drawing up a proposed participant list.

Make a genuine effort to use good listening skills in the mediation room. The more you listen, the more the other side feels (and is) heard, creating conditions conducive to consensus building.