

Comment,
IT'S A NATURAL FIT: EXPANDING
MEDIATION TO ALLEVIATE CONGESTION
IN THE TROUBLED JUVENILE
COURT SYSTEM

I. Introduction

The juvenile court has reached its 100-year anniversary, but instead of being met with a celebration, the court is under attack.¹ The juvenile court system has been questioned and criticized throughout history, even by the Supreme Court itself.² Despite the criticism, the court continues to survive.

Much of the criticism has been with the courts' attempt to "combine social welfare and criminal social control" into one form of judicial setting.³ Some critics believe that we should abolish the juvenile court, and integrate juvenile offenders into the adult criminal system.⁴ Still realizing that there exists a difference in the culpability of adults and children, proponents of the integrated criminal system suggest that a sliding scale sentencing plan should be implemented, taking into consideration the reduced culpability of children.⁵ This recognition of the differences between adults and children is the very reason that the juvenile courts were originally formed.⁶

Other critics believe that the problem with the juvenile system is lack of uniformity in the courts, across the various jurisdictions.⁷ Much of this variation has been attributed to the differences in the services available, and the bureaucracy and po-

¹ Ira M. Schwartz et al., *Nine Lives and Then Some: Why the Juvenile Court Does Not Roll Over and Die*, 33 WAKE FORREST L. REV. 533 (Fall 1998).

² *Id.* at 534.

³ BARRY C. FELD, *BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT* 8 (Oxford University Press 1999).

⁴ *Id.* at 289. See also Marcia Johnson, *Juvenile Justice*, 17 WHITTIER L. REV., 713, 847 (1996).

⁵ FELD, *supra* note 3, at 289.

⁶ Marianne McConnell, *Mediation-An Alternative Approach for the New Jersey Juvenile Justice System?*, 20 SETON HALL LEGIS. J., 433, 461 (1996).

⁷ Schwartz et al., *supra* note 1, at 535.

litical structure of a given jurisdiction.⁸ It was hoped that the use of procedural safeguards, like those in the adult courts, would help unite the various juvenile court systems.⁹ The juvenile court was designed as a welfare institution, stressing rehabilitation not punishment, and these procedural rights blocked the court's ability to quickly intervene by forcing the court to consider the juvenile delinquent a criminal defendant, rather than a child in need of services.¹⁰ The need for the court to work within its own constraints and resources, led to the injection of the judge's own personality and the personality of those who supported him, into each of the various juvenile courts.¹¹

A totally uniform juvenile court system may not be possible. One commentator states "[t]he justice courts should be only a part of the overall system of juvenile justice. The system must also include mechanisms that help prevent our children from ever entering the court system."¹² Mediation is already present in the family court system, and the majority of states require mediation in child custody cases.¹³ By exploring the history of the development of the juvenile dependency court, this comment will show how mediation is a proper "mechanism" to aid in the attempt to keep children out of the formal juvenile court system. In support of its conclusions, this comment will also present documented success with mediation, in juvenile dependency cases, from courts in California, Ohio, and Connecticut.

II. Evolution of the Juvenile Dependency Court

A. *The Early Years*

Beginning with medieval times, the notion of "childhood" was a concept that had no place in society.¹⁴ Until the advent of formal education, and the need for that education deemed important, do we see the distinction between adults and children

⁸ *Id.*

⁹ FELD, *supra* note 3, at 112.

¹⁰ *Id.* at 107.

¹¹ Schwartz et al., *supra* note 1, at 536.

¹² Marcia Johnson, *Juvenile Justice*, 17 WHITTIER L. REV. 713, 849 (1996).

¹³ Patricia M. Barbarito, *A Look At Mediation*, 184 N.J. LAW., 9, 10 (May 1997).

¹⁴ FELD, *supra* note 3, at 19.

begin to emerge.¹⁵ During the time of the industrial revolution came modernization and crime.¹⁶ The increase in crime and corruption was blamed on immigration, urbanization, and decline of the earlier social order.¹⁷

During the late 1800's young people, who were once dependent on their parents, began moving into the cities to become members of the working class.¹⁸ As children were still deemed "corruptible and innocent", society demanded that women be relegated to the homes in order to protect the children.¹⁹

Along with all these changes came the need to change the way society handled its problems.²⁰ Legislation, such as increasing the time of compulsory education, child labor, and welfare laws was enacted to protect the children.²¹

Along with these protective measures came a group of "child savers" known as the Progressive Movement.²² The focus of the early Progressive Movement, on the juvenile system, was on rehabilitation of the juvenile rather than punishment, as the reformers had the foresight to see that the needs of juveniles were different than those of an adult.²³ Even though the focus of the Progressives was child centered, the real idea was to preserve and further the social and moral values of the Progressives.²⁴ The juvenile court system was a natural offspring of the process of reforming children already existing in the 1800's.²⁵

B. *The First Juvenile Court*

The Illinois Juvenile Court Act of 1899 served as the model for the development of legislation that established juvenile courts

¹⁵ *Id.* at 22.

¹⁶ *Id.* at 24-6.

¹⁷ *Id.* at 24-8.

¹⁸ *Id.* at 28.

¹⁹ FELD, *supra* note 3, at 28.

²⁰ Johnson, *supra* note 12, at 718.

²¹ FELD, *supra* note 3, at 36-44.

²² *Id.* at 34-6.

²³ McConnell, *supra* note 6, at 461.

²⁴ FELD, *supra* note 3, at 34.

²⁵ Schwartz et al., *supra* note 1, at 534 (discussing the House of Refuge Movement, established to reform children—often called the "first great event in child welfare").

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throughout the country.²⁶ The success of the Illinois court led to the duplication of the court throughout the nation.²⁷

The influence of the Progressive reform movement was evident in the definitions that were used by the new court, as this new court also sought to eliminate vagrancy through confinement.²⁸ A delinquent child was defined as:

[A]ny child under age 16 who had violated a law or ordinance, except capital offenses, and dependency and neglect was defined as follows:

1. Any child who for any reason is destitute or homeless or abandoned;
2. Has not had proper parental care or guardianship;
3. Who habitually begs or receives alms;
4. Who is found living in any house of ill fame or with any vicious or disreputable person;
5. Whose home, by reason of neglect, cruelty, or depravity on the part of its parents, guardian or other person in whose care it may be, is an unfit place for such a child;
6. Any child under the age of 8 years who is found peddling or selling any article or singing or playing any musical instrument upon the street or giving any public entertainment.²⁹

The focus of the court was to rehabilitate a child before he could become “criminal”, no matter if he came before the court in a delinquent or dependent status.³⁰ The juvenile court was seen more as a welfare institution, the court using the advice of social workers and child psychologists to achieve the goal of rehabilitation, not punishment—all in the best interest of the child.³¹

C. *Constitutional Intervention Into The Juvenile Courts*

At the time of the court’s inception, there was not a separate processing system for delinquency and dependency cases.³² The separation of the two components began to emerge in the 1960’s

²⁶ Marvin Ventral, *Evolution of the Dependency Component of the Juvenile Court*, JUV. & FAM. CT. J., 17 (Fall 1998).

²⁷ *Id.*

²⁸ *Id.* at 27.

²⁹ *Id.*

³⁰ *Id.* at 17.

³¹ Schwartz et al., *supra* note 1, at 536 (citing Barry C. Feld, *Juvenile (In)justice and the Criminal Court Alternative*, 39 CRIME AND DELINQ. 403, 404-05 (1993)).

³² Ventral, *supra* note 26, at 17.

when the Supreme Court ruled in a series of cases, calling for procedural due process in the juvenile system, that began shifting delinquency proceedings from an inquiry into a child's welfare to a criminal prosecution.³³

In re Gault, 387 U.S. 1 (1967) and *In re Winship*, 397 U.S. 358 (1970) both "endorsed the adversarial model, the right to counsel, the privilege against self-incrimination, the criminal standard of proof beyond a reasonable doubt, and the primacy of factual and legal guilt as a constitutional prerequisite of state intervention."³⁴

Gault struck down the *parens patriae* authority of the delinquency court, but *Gault* did not affect the use of the court's *parens patriae* authority in dealing with juvenile dependency cases.³⁵ Thus, the two systems were separated, allowing the court to continue business as usual in the dependency cases. After *Gault*, the states' dependency codes were changed to encompass a system of child protection through intervention into the family because of child abuse and neglect, rather than codes describing specific social conditions that warranted outside intervention.³⁶

III. The Juvenile Court Today

Critics of the current juvenile system maintain that the present legal system forces social workers, parents, and children into adversarial roles rather than enhancing parental motivation to improve a family situation, or comply with a treatment plan.³⁷ Adjudication tends to focus attention and energy on legal strategy and the adversarial process, rather than the best interests of the child.³⁸

The National Council of Juvenile and Family Court Judges conducted a study of the use of alternative dispute resolution (ADR) in juvenile dependency cases, finding that the use of

³³ FELD, *supra* note 3 at 107.

³⁴ *Id.* at 106-07.

³⁵ Ventral, *supra* note 26, at 28-9.

³⁶ *Id.* at 30. (House of Reform movement believed that poverty was the main cause of juvenile crimes, thus, this type of social condition was the main focus of early child dependency legislation).

³⁷ Jessica Pearson, Ph.D. et al., *Mediation of Child Welfare Cases*, 20(2) FAM. L.Q., 303, 305 (Summer 1986).

³⁸ *Id.*

ADR was consistent with the less adversarial nature of the juvenile justice system, and observed the following: "Although perhaps not foreseen by its Illinois founders in 1899, ADR was essential to the foundation upon which the juvenile court movement was based. The concept of 'adjustment', in the sense of diverting a case from normal adjudicative process, was utilized within the first Juvenile Court Act."³⁹

This is where we currently stand, after 100 years. The juvenile justice system has grown, changed and continues to be criticized, but continues to exist, in spite of itself, in order to serve the best interests of the children. Critics feel that the system cannot continue to use the path of adversarial resolution. Therefore, it is natural that the court would begin to look for a process that benefits the court, but also continues to serve the best interests of the children. Mediation is an obvious choice.

IV. An Overview of Mediation

A. Why Mediation

Why would a court choose mediation over other forms of ADR, such as arbitration? Arbitration is a much more adversarial process in which a third party solves the disputants' problems for them.⁴⁰ Arbitration is too much like the regular judicial system where a judge alone makes the decision. In mediation, the third party does not have the authority to decide the agreement.⁴¹ The third party is, instead, a neutral participant whose sole purpose is to guide the parties in reaching an agreement of their own.⁴²

It is well known that once a matter doesn't have to find its way into the courts that time and money are saved. Mediation manages the court docket by moving cases out of the court sys-

³⁹ Jackson County Family Court, *Abuse, Dependency and Neglect: Case Facilitation/Mediation Workshop*, (date of presentation unknown).

⁴⁰ Glenda L. Cottam, *Mediation and Young People: A Look at How Far We've Come*, 29 CREIGHTON L. REV., 1517, 1518 (June 1996).

⁴¹ *Id.*

⁴² *Id.*

tem quickly and efficiently, and is less costly than traditional litigation.⁴³

Mediation has been considered especially useful in the area of family law, because family law involves feelings as well as facts.⁴⁴ Mediation is neither judgmental, nor about addressing the question of who is right and who is wrong.⁴⁵ The courts are not designed to handle cases where legal notions, such as guilt and responsibility, are of no consequence.⁴⁶ Mediation is about improving the family relationship, and agreeing to a workable solution.⁴⁷ One commentator has suggested that the earlier a solution is reached, in a non-adversarial setting, the sooner the parties can begin treatment programs while still preserving the ability of the court to protect the child.⁴⁸

A. *The Children's Aid Society*

The Children's Aid Society of New York City, conducted a study that concluded that mediation is well suited to those situations where the problems encountered involve parties that have an on-going relationship, such as parent/child, as adverse confrontation tends to work against settlement.⁴⁹ The study attributed this success to the fact that, although the parents' authority should never be undermined, affording the child's concerns as much attention as the adults' allowed both parties to retain their dignity, thus, opening the line of communications, and increasing the likelihood of reaching an agreement.⁵⁰ Mediation is beneficial to both parent and child. By allowing the parties to take control of their lives, compliance with the agreement was higher when all parties concerned participated in the decision making.⁵¹

⁴³ Joanne Fuller & Rose Mary Lyons, *Mediation Guidelines*, 33 WILLAMETTE L. REV., 905, 910 (Fall 1997).

⁴⁴ *Id.* at 907.

⁴⁵ *Id.* at 910.

⁴⁶ McConnell, *supra* note 6, at 460.

⁴⁷ Fuller & Lyons, *supra* note 43, at 907. See also Honorable John F. Varin et al., *Mediation Between Parents and Children: Part of the Twin Falls County Status Offender Program*, 41 ADVOC., 10, 11 (Nov. 1998).

⁴⁸ C. Saunders et al., *Mediation In the Los Angeles County Superior Court Juvenile Dependency Court*, 29(3) FAM. & CON. CT. REV., 259 (1991).

⁴⁹ McConnell, *supra* note 6, at 454 & 460.

⁵⁰ *Id.* at 454.

⁵¹ Fuller & Lyons, *supra* note 43, at 910.

V. Types of Mediation

A. *Facilitative Mediation*

Facilitative mediation is seen as the traditional form of mediation, where the role of the mediator is to help guide the parties in evaluating their own solution by enhancing communication between the parties.⁵² By allowing the parties to make their own choices the facilitative mediator is better able to maintain neutrality.⁵³

The facilitative mediator does not offer advice or opinions, and does not attempt to predict the outcome of the case.⁵⁴ Facilitative mediation focuses on the parties' interests, win-win solutions, and collaboration.⁵⁵

B. *Evaluative Mediation*

The role of the evaluative mediator is just the opposite of the role of the facilitative mediator, as in evaluative mediation the role of the mediator is to give advice, state opinions, predict outcomes, and to press the parties into acceptance of a certain outcome.⁵⁶

By offering his opinions the evaluative mediator has a much harder time maintaining neutrality, as the parties look to the mediator to solve their problems, rather than solving the problem themselves.⁵⁷ Evaluative mediation is much more adversarial in nature, focusing on positions, arguments, and compromise.⁵⁸

C. *Choosing A Method*

Although both methods can work, facilitative mediation, with its focus on interests and collaboration, works best when there is an interest in repairing or maintaining a relationship.⁵⁹ As pointed out earlier, parties tend to conform to agreements in

⁵² Scott H. Hughes, *Facilitative Mediation or Evaluative Mediation: May Your Choice Be A Wise One*, 59 ALA. LAW., 246 (July 1998).

⁵³ *Id.* at 247.

⁵⁴ *Id.*

⁵⁵ *Id.* at 246-47.

⁵⁶ *Id.* at 246.

⁵⁷ Hughes, *supra* note 52, at 246.

⁵⁸ *Id.* at 246-47.

⁵⁹ *Id.* at 249.

which they have had some sort of input. Facilitative mediation is also very effective where there is a lot of prior baggage, such as significant personal issues, to deal with.⁶⁰

VI. Confidentiality: A Critical Component of Mediation

Although, mediation is not considered therapy, mediation serves a therapeutic purpose, through opening the lines of communication, in a non-adversarial setting, allowing the parties the opportunity of share their true feelings, and exchange information.⁶¹ People may speak freely as mediation is a confidential process.⁶² There are no formal reports other than any written agreement, and the sessions are not open to the public.⁶³ Issues discussed in mediation are not admissible in court, and the mediator cannot be forced to testify as to what was discussed.⁶⁴ The issue of confidentiality is paramount to attorneys in child abuse/neglect cases.⁶⁵ To alleviate the concerns of the lawyers as to the risks of parents incriminating themselves the courts have taken steps to ensure that issues discussed at mediation are not subject to discovery.⁶⁶ In most courts, the only exception to the confidentiality rule allows disclosure only when there are any new allegations of child abuse/neglect, or if there are any threats of harm to an individual.⁶⁷

⁶⁰ *Id.*

⁶¹ McConnell, *supra* note 6, at 454.

⁶² Steve Baron, *Dependency Court Mediation: The Roles of the Participants*, 35(2) FAM. & CON. CT. REV., 149, 155 (April 1997).

⁶³ Honorable John F. Varin et al., *Mediation Between Parents and Children: Part of the Twin Falls County Status Offender Program*, 41 ADVOC., 10, 12 (Nov. 1998).

⁶⁴ *Id.*

⁶⁵ William Wesley Patton, *Child Abuse: The Irreconcilable Differences Between Criminal Prosecution and Informal Dependency Court Mediation*, 31 U. LOUISVILLE J. FAM L., 37, 52-3 (Winter 1992/93).

⁶⁶ Cottam, *supra* note 40, at 1533.

⁶⁷ *Id.*

VII. Criticisms of Mediation

A. *Balance of Power*

According to ADR scholars Leonard Riskin and James Westbrook the balance of power is perhaps the greatest problem with mediation, and cases where the balance of power is greatly one sided are inappropriate for mediation.⁶⁸ One would naturally assume that there would be a great power imbalance between parents and children, but in reality the parents' power has actually diminished so much that intervention by a third party is necessary in order to regain control over their child.⁶⁹ As long as the mediator seeks to actively involve the child(ren), and assures both parties that their views are important and essential to finding a workable agreement, the perceived power imbalance should be of little consequence.⁷⁰

B. *Constitutional Issues and Mediation*

Challenging the constitutionality of mediation, by accusing mediation of being a process that denies persons their constitutional right to freely access the courts and all its benefits, is a new argument that some lawyers are using in an attempt to thwart any type of mandatory mediation legislation.⁷¹

Attorneys argue that mandatory mediation deprives an individual of his constitutional due process rights, consisting of discovery, trial, and appeal.⁷² Courts themselves often deny persons judicial services due to the fact that the courts are totally overloaded. Alternatives are needed, and mediation has become a necessity.⁷³ What often happens is that because of the privacy and confidentiality offered by mediation, the parties feel freer to share information, thus, enhancing the discovery process; settling the case faster, and alleviating the need for an appeal because all

⁶⁸ Debra Baker, *Juvenile Mediation: Innovative Dispute Resolution or Bad Faith Bargaining*, 27 U. TOL. L. REV. 897.

⁶⁹ Cottam, *supra* note 40, at 1527.

⁷⁰ *Id.* at 1528-30.

⁷¹ Jay Stein, *Mediation and The Constitution*, 53 DISP. RESOL. J. 22, 26 (May 1998).

⁷² *Id.* at 26.

⁷³ *Id.* at 24.

parties have participated in the reaching of the agreement.⁷⁴ The objectives of our Constitution are 'to establish justice, insure domestic tranquility, and promote the general welfare.'⁷⁵ By helping society to end disputes in a quick and efficient manner, mediation helps to uphold the objectives outlined in the Constitution.⁷⁶ Therefore, in order to be a valid criticism, it would be necessary for critics to show that mediation does not uphold these objectives.⁷⁷

We have always been taught that our constitution is a 'living constitution', a document that can be changed in order to meet the needs of society.⁷⁸ It is doubtful that the framers of the Constitution could anticipate that our court system would become so congested. Perhaps the framers anticipated the possibility of changes when they worded the Declaration of Independence to guarantee us 'life, liberty, and the pursuit of happiness', but in turn listed these rights as being 'among' our inalienable rights.⁷⁹ This wording implies that other rights may be afforded. It would not be hard to imply that these rights include mediation.⁸⁰ Mediation does not take away the right to litigation; mediation is only an expansion of the services already offered by the court.⁸¹

C. Funding Issues

Funding is a major factor in developing and maintaining any type of program. Always the proverbial question of "Who's going to pay for this?" There are many ways to fund the program. Many courts cross-train current mediators, simply expanding their functions.⁸² Courts could also seek the use of fees that are charged for marriage licenses and birth certificates, or seek money from private foundations.⁸³ Another way is to divert funds from the court budget, as the caseload will be decreasing,

⁷⁴ *Id.* at 28.

⁷⁵ *Id.* at 26.

⁷⁶ Stein, *supra* note 71, at 28.

⁷⁷ *Id.* at 26

⁷⁸ *Id.* at 23.

⁷⁹ *Id.* at 27.

⁸⁰ *Id.*

⁸¹ Stein, *supra* note 71, at 28.

⁸² Gregory Firestone, *Dependency Mediation: Where Do We Go From Here?*, 35(2) FAM. & CON. CTS. REV., 223, 232 (April 1997).

⁸³ *Id.* at 235

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therefore, decreasing the court's costs. Other courts look to the state and federal legislatures to obtain funding.⁸⁴

One authority has a few suggestions for those who choose the legislative journey:

1. Get a member of the assembly or senate to sponsor the bill.
2. Ask the judiciary, court administrators, or board of supervisors for recommendations.
3. Identify the key committees in the legislature that will hear the bill.
4. Ask your local representatives for support.
5. Find out which political affiliations will play a significant part in the passage/rejection of your bill.
6. Help your sponsor and their aides educate others on the advantages of your bill.
7. Develop phone/fax lists for important legislative and support personnel.
8. Look to the current members of your local judiciary, county supervisors, county executives, court administrators, and lobbyists for support.
9. Be diligent.⁸⁵

All of the above suggestions will require work, and the support of the legal community in order to assure success. Despite any concerns, the outcomes of mediation and court resolution are the same. Either you produce an appropriate agreement in mediation, or the court will provide one for you.⁸⁶ Failure to follow the agreement, in either case, will result in the risk of the permanent loss of the child(ren).

Mediation benefits everyone. A less congested court docket saves time and money, and allows the court to focus its attention on more critical issues. Parents and children get a voice in the treatment decisions, and are more likely to comply with a program of treatment that they have helped design. All of these benefits serve the best interests of the child by enabling the parties to begin treatment quicker, thus facilitating a more rapid return to an "intact" family status. The court is doing an injustice to itself, as well as to those whom the court serves, by not taking advantage of all that mediation has to offer.

⁸⁴ Megan Orland, *Funding Juvenile Dependency Mediation Through Legislation*, 35(2) *FAM. & CON. CTS. REV.*, 136 (Apr. 1997).

⁸⁵ *Id.* at 201.

⁸⁶ Hughes, *supra* note 52, at 246.

VIII. The Evolution of Child Dependency Mediation

A. Concerns With The Juvenile Court

Proponents of the use of mediation began to have some concerns with the way that cases within the court system were being settled.⁸⁷ Cases were being settled in the halls, without all the relevant parties present; parents did not seem to understand the process, and what they were supposed to do; parents already felt powerless and left out, and these feelings were further enhanced when the parents were not included in the decision making process; these feelings of helplessness led to the parents' distrust of the social worker.⁸⁸ The courts began to look towards mediation for a solution.

B. Expanding Mediation Into Other Areas

Mediation is already in existence in the family courts, as in many states it is mandatory to mediate child custody and divorce issues.⁸⁹ It is only natural that with the success of mediation in family issues, the courts would look to further expand the use of mediation into other appropriate areas of law.⁹⁰ Issues that can be mediated include:

1. Types of service to be provided.
2. Types of service the parents will use.
3. Conditions that must be satisfied before a child returns home.
4. Alternative child care options.
5. The terms of parent-child visitation.
6. Appropriate nonviolent responses to family conflict.
7. Other parenting practices.
8. Termination of parental rights and voluntary, open adoption (if permitted by local law).⁹¹

⁸⁷ Child Dependency Workshop, *Review of the Child Welfare Mediation Experiment*, (presentation date unknown).

⁸⁸ *Id.*

⁸⁹ Barbarito, *supra* note 13, at 10.

⁹⁰ Firestone, *supra* note 82, at 223.

⁹¹ Allan E. Barsky, *Mediation in Child Protection Cases*, in FAMILY MEDIATION – CONTEMPORARY ISSUES (Sage Publications 1995).

C. California Pilot Program

As part of a study, The Center for Dispute Resolution, in Denver, Colorado, began mediating child dependency cases in 1985.⁹² The successful findings from this study led to the initial introduction of child dependency mediation, into the courts of California, through Senate Bill 1420, which also provided for funding of the project by tacking on a three-dollar surcharge to the issuance of birth certificates.⁹³

Five counties were selected to participate in the pilot program: Contra Costa, Los Angeles, Sacramento, Santa Clara, and Tulare.⁹⁴ The study was to be evaluated in the following areas:

1. Is there any certain point, in a case, where mediation is more effective than not?
2. Did the mediation resolve at least seventy percent of the cases quicker than if they had been litigated?
3. What costs are saved when mediation is used?
4. Were more creative settlements used in at least ten percent of the cases?
5. Which model of mediation is the most effective?
6. How effective was the mediation?
7. Did the rate of foster care placements decrease by at least twenty-five percent?
8. Were at least seventy percent of the participants satisfied with the mediation process?
9. Does mediation resolve the case at least seventy percent of the time?⁹⁵

D. Findings

The results of the study indicated that seventy-eight percent of the mediated cases reached full agreement, the agreement was reached approximately one month sooner than those in a typical litigation process, mediation agreements have a greater compliance rate, and there are a lesser number of contested review hearings than was the case with court orders.⁹⁶ The pilot programs were highly successful, and exceeded the expectations that

⁹² Pearson, et al., *supra* note 37, at 303.

⁹³ Nancy Thoennes, Ph.D., *Child Protection Mediation: Where We Started*, 35(2) FAM. & CON. CTS. REV. 136, 196 (Apr. 1997).

⁹⁴ *Id.* at 197.

⁹⁵ *Id.*

⁹⁶ *Id.* at 198.

the legislature had set forth.⁹⁷ These results led to permanent funding, and expansion of the program into other counties.⁹⁸

The desire to use child dependency was also prompted by the tremendous amount of filings of child abuse/neglect cases throughout the 1980's.⁹⁹ This situation prompted the grand jury to recommend that the dependency mediation program become a permanent, and essential part of the juvenile program, in order to protect the children from harm by exposure to the legal system.¹⁰⁰

E. Concerns

The introduction of a new program would not be complete without the voicing of at least a few concerns. The participants seemed wary at first, but soon found that they enjoyed using mediation.¹⁰¹ Case workers found that there was nothing to lose by mediating, children were still protected by the safeguards of the court, and with mediation they were better able to help tie together the roles of helper and investigator.¹⁰² Attorneys found that, although a lot of their time was taken up, more individualized time was spent with the client, the client's communication skills were enhanced, clients more fully understood the situation, and the rights of the parties were well protected.¹⁰³ Parents were very satisfied with the study, happy that someone was listening, and over ninety percent indicated that they were no longer confused as mediation provided clear, understandable information in regards to exactly what needed to be done in order to get the kids back.¹⁰⁴ Of course the group that you need the full support of is the judicial officers. Without their support mediation will not be possible.¹⁰⁵ Although, the initial concern, of the judges

⁹⁷ Orland, *supra* note 84, at 198.

⁹⁸ *Id.*

⁹⁹ *Id.* at 196.

¹⁰⁰ *Id.*

¹⁰¹ Nancy Thoennes, Ph.D. & Jessica Pearson, Ph.D., *Mediation in the Santa Clara County Dependency Court, A REPORT TO THE CALIFORNIA LEGISLATURE*, 1, 20 (Dec. 1995).

¹⁰² *Id.*

¹⁰³ *Id.* at 21.

¹⁰⁴ *Id.* at 23.

¹⁰⁵ Honorable Leonard Edwards, *Dependency Court Mediation: The Role of the Judge*, 35(2) FAM. & CON. CT. REV., 160 (April 1997).

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was losing control over the cases, they came around and were able to see that parents now had a proper forum in which to be heard, and this in turn taught the parties to settle disputes on their own, freeing up some of the judges' time.¹⁰⁶

IX. Expansion of Child Dependency Mediation into Other States

A. Connecticut

In the Connecticut courts, mediation was already in use in court based programs, which include: custody/visitation, minor delinquency cases, and status offenses.¹⁰⁷ The focus of child protection litigation in the 1980's on permanency planning, and reunification led the court to introduce the mediation process into child dependency issues.¹⁰⁸

The positive results of the program have led to at least half of all cases filed being kept from the courts.¹⁰⁹ Of those cases in which the parties did not reach a mediated agreement, the process at least helped to identify and narrow the issues that are to be discussed in court.¹¹⁰

B. Ohio

The Lucas County, Ohio juvenile mediation program has earned national recognition, having been named the "Outstanding Alternative Dispute Resolution Program" by the National College of Juvenile and Family Law.¹¹¹ The juvenile mediation program in Lucas County, Ohio began in 1991, as a result of a study by a doctoral student to ascertain whether or not mediation would help control the court's overloaded docket.¹¹²

¹⁰⁶ Thoennes & Pearson, *supra* note 101, at 22.

¹⁰⁷ MARILOU T. GIOVANNUCCI, CONNECTICUT STATE JUDICIAL BRANCH, *MEDIATION OF CHILD PROTECTION PROCEEDINGS-THE CONNECTICUT JUVENILE COURT'S APPROACH* (1999).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 8.

¹¹⁰ *Id.*

¹¹¹ Baker, *supra* note 68, at 920 n. 14.

¹¹² *Id.* at 900.

The program expanded into the mediation of child dependency cases in 1997.¹¹³ Of the ninety-three cases referred to mediation nine were settled with a partial agreement, fifty-seven were settled with complete agreement, six were not settled due to an impasse, ten were cancelled for no show, and three were listed as undetermined.¹¹⁴ The success of the program has led to a federal grant to expand mediation into the area of the termination of parental rights.¹¹⁵

Hopefully, the continued rates of success with juvenile dependency mediation will continue to rise, sparking a further interest in the programs across the country. As more courts enter into the arena no longer will parties feel confused and helpless, and with this expanded forum there will no longer be a need for disputes to be settled on the steps of the courthouse.

X. Roles of the Parties in Child Dependency Mediation

Although, there is not one specific model upon which to base a program, the majority of courts, conducting child dependency mediation have drawn upon the programs established in California, and have had workshops conducted by the leading authorities on the subject. One authority also suggests that the court should set their own parameters regarding the type of cases mediated, the time frame for mediation, and the extent of review, by the court, of any agreements reached.¹¹⁶ Regardless of the how the program is constructed, participants should include, at a minimum, the parties described below.

A. Mediator

Neutrality of the mediator is essential to the mediation process.¹¹⁷ Due to the emotional issues prevalent in child protection cases, mediators must go beyond their normal role to ensure that

¹¹³ Letter from Gloria Weiss, Programs Assistant, *Court of Common Pleas-Juvenile Division-Lucas County, Ohio* (April 26, 1999) (information from the Basic Mediation Training Manual, on file with the author).

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ Firestone, *supra* note 82, at 225.

¹¹⁷ Barsky, *supra* note 91, at 395.

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the mediation process does not add any undue stress to the families involved, nor endanger the safety of the children, while still meeting the needs of everyone involved.¹¹⁸ The mediator is also an educator, responsible for assuring that all involved understand the process.¹¹⁹ Mediators must add to the credibility of the mediation process by setting the tone of the mediation, and assuring that there is an air of professionalism present.¹²⁰

Mediators must also identify any power imbalances, and work to alleviate them through issue clarification, acknowledgement of the parties' feelings, or through individual conferences.¹²¹ Mediators must be able to determine when the power imbalance is insurmountable, and when the mediation should be suspended, due to such imbalances.¹²²

Questions have been raised as to whether or not dependency mediators should possess specific qualifications and training that is different from those mediating other family court issues.¹²³

Basic mediation skills are not enough. A child dependency mediator needs specialized training to include:

1. Specific knowledge of the child welfare system.
2. Educational background and related work experience that lends itself to the mediator having an understanding of a child's sense of the passing of time.
3. Extensive knowledge of all laws relating to children on both the federal and state levels.
4. Specialized training in mental health, substance abuse, special educational needs of children, physical and sexual abuse, family violence, foster care, adoption, and treatment options/resources.
5. Continuous educational classes, and regular monitoring and evaluation.¹²⁴

A study conducted in Florida, consisting of twenty-five very experienced family mediators, concluded that training of child dependency mediators should be constructed so that all levels of mediation instruction are presented based upon the context of

¹¹⁸ Marilou T. Giovannucci, *Understanding the Role of the Mediator In Child Protection Proceedings*, 35(2) FAM. & CON. CT. REV. 143-44 (April 1997).

¹¹⁹ *Id.* at 145.

¹²⁰ *Id.*

¹²¹ *Id.* at 146.

¹²² *Id.*

¹²³ Firestone, *supra* note 82, at 231.

¹²⁴ Giovannucci, *supra* note 118, at 147.

child protection mediation, and trainers should not assume that family mediators are able to automatically transfer their skills to multiparty child protection mediation.¹²⁵

B. Attorneys In General

Whether or not an attorney is present at any stage of the mediation, it is important that the legal community support the mediation process.¹²⁶ The role of an attorney in mediation includes many of the same tasks as those present in an adjudication such as: preparing the parties for mediation, representing a client's interests, identifying the issues and solutions, among others.¹²⁷

Most attorneys are very involved in the beginning of the mediation, helping to set the stage, and then again at the end, reviewing and finalizing any agreement that is made.¹²⁸ Inbetween these two processes, the attorney should remain available to assist the client, but should, generally, let the mediator handle the rest.¹²⁹

C. Parents and Their Attorneys

Studies have shown that mediation is clearly beneficial to the parents in that mediation helps to assure that the parents concerns and interests are more fully heard in a less adversarial context.¹³⁰ The atmosphere surrounding mediation lends itself to the lessening of the stigma that is attached to an accusation of child abuse/neglect, and the intimidation that can occur when a child is forcibly removed from the home.¹³¹

Attorneys who are overloaded, and often admit that they don't have the time to really get to know their clients, agree that mediation gives the case undivided attention, and the parents walk away with a lot of practical information.¹³² Attorneys have noted that parents like mediation because all parties are on the

¹²⁵ Firestone, *supra* note 82, at 232.

¹²⁶ Baron, *supra* note 62, at 149.

¹²⁷ *Id.* at 150.

¹²⁸ *Id.* at 150-51.

¹²⁹ *Id.* at 151.

¹³⁰ *Id.* at 156.

¹³¹ Baron, *supra* note 62, at 156.

¹³² *Id.*

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same level.¹³³ The parents lose their feelings of intimidation, and begin to feel like they are part of the process rather than an outsider looking in.¹³⁴

D. *Children and Their Attorney*

When appropriate, it is essential that the child participate in the mediation process.¹³⁵ Participation allows the child an opportunity to be heard, a chance to understand family issues, the chance to make decisions that he/she will have to live with, and the opportunity to experience a non-violent problem solving technique based upon communication between the parties.¹³⁶

The extent of the child's involvement depends upon several criteria: the child's age, developmental and emotional status, the case dynamics, the child's wishes, and the function of the child's participation in the mediation.¹³⁷ In all cases, the feelings of the child must be considered. Most children who go through the mediation process feeling as if they are responsible for the present situation.¹³⁸ Children must be made to understand that no matter what their level of participation, in the mediation process, the ultimate responsibility and decision making lies with the adults, and the court.¹³⁹

The presence of the child's attorney is just another safeguard to ensure that everyone involved with the mediation is acting with the best interests of the child(ren) involved.¹⁴⁰ If the child is old enough, and able to ascertain the situation, the attorney should act to advocate any of the child's requests that are consistent with the resolution of the situation.¹⁴¹

E. *Social Workers and the Agency Attorney*

The level of involvement of the social worker varies depending on whether the issues are purely legal, thus, requiring little

¹³³ *Id.* at 157.

¹³⁴ *Id.* at 157-8.

¹³⁵ *Id.* at 152.

¹³⁶ Baron, *supra* note 62, at 152.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ Baron, *supra* note 62, at 152-53.

involvement by the social worker, to issues that require the social worker's undivided attention including those issues directly related to:

1. The agency's view of the safety or best interest of the child.
2. The findings or recommendations of the worker.
3. A conflict that exists between the worker/agency and the child or family.
4. Services to be provided or coordinated by the agency.
5. When the social worker's/agency's consent is sought on agreement reached by the other participants.¹⁴²

One attorney observes that mediation "affords the social worker a much better tool for engaging the family in the helping process than the blunt coerciveness of the adversary process."¹⁴³ The mediation process lends itself to greater cooperation between the parents and social worker, thus, leading to a more likely chance of successful compliance with any agreement reached.¹⁴⁴

The drawback to the mediation process for the social worker tends to occur when the social worker has been lax with his/her professional standards.¹⁴⁵ This situation often comes out in mediation as the investigative reports and recommendations are thoroughly reviewed, and the social worker is held accountable for the quality of the information presented.¹⁴⁶

Where the mediator allows attorneys to be present, most courts have found that it is best to have both the social worker and the agency attorney present at the mediation.¹⁴⁷ The attorney serves a protective function in that he/she is there to offer legal advice to the social worker, to "protect" the social worker from the other side, and to help ensure that the mediator has access to all pertinent information.¹⁴⁸

F. *Role of the Judge*

Although the judge is not a direct participant in the mediation itself, the judge serves an important role since, as leader of the juvenile system, it is likely to be the judge who helps, or at

¹⁴² *Id.* at 155.

¹⁴³ *Id.* at 153.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 154.

¹⁴⁶ Baron, *supra* note 62, at 154.

¹⁴⁷ *Id.* at 153.

¹⁴⁸ *Id.*

least approves the development of a mediation program.¹⁴⁹ Judges are responsible for referring cases to the mediation program, and for reviewing any agreements reached.¹⁵⁰

One judge commented that mediation can address some issues that are often passed over by the courts.¹⁵¹ These issues include the following: confronting the issues that led to the breakdown of the family unit, confronting issues that led to the inability of the family to deal with the child's needs, identifying services needed and how to help the family obtain them, and arranging detailed child visitation agreements¹⁵²

The court benefits from a decreased caseload, and a better resolution of the conflict as the parties have participated in reaching their own agreement.¹⁵³ Some courts allow other participants in the mediation such as court appointed child advocates, interested family members, foster parents, psychiatrists, etc.¹⁵⁴

In a nutshell, all the key participants discussed are necessary to formulate a workable agreement. Working together, parties can ease much of the pain, and concerns that are present anytime there is an accusation of child abuse/neglect. Anyone who has a vested interest in the welfare of the child should be allowed to participate in the mediation. This way we can be assured that the negotiated agreement has a better chance of succeeding.

XI. Conclusion

There is no question that the current juvenile justice system does not meet the needs of society, or the children. Juvenile crime and child abuse/neglect cases are on the upswing. More and more children are coming before the court, therefore, getting the children through the system quickly and efficiently, and seeing that the children get the treatment they need is of paramount importance to the court.

Mediation serves the interest of all parties involved, lowers costs, moves the docket along at a more rapid pace, and, in gen-

¹⁴⁹ Edwards, *supra* note 105, at 160.

¹⁵⁰ *Id.* at 161-62.

¹⁵¹ *Id.* at 161.

¹⁵² *Id.* at 162.

¹⁵³ *Id.* at 163.

¹⁵⁴ Baron, *supra* note 62, at 158.

eral, helps obtain greater success rates with negotiated treatment programs, as opposed to court ordered programs.

There have been many debates as to whether mediation should be voluntary or mandated.¹⁵⁵ The majority of supporters agree that mediation should be required, as if even one party objects, there will be no mediation.¹⁵⁶ Studies have shown that participation in mediation can change attitudes, making it more likely that, in the long run, the program will be successful.¹⁵⁷

In reading the purposes of various juvenile court statutes, it can be safely stated that the best interest of the child is the driving force. No one can argue that it isn't in the best interest of the child to get him/her into a better situation without any undue delay. Mediation exists to help us in furtherance of that goal.

Perhaps Supreme Court Justice Sandra Day O'Connor said it best: "The courts of this country should not be the place where the resolution of disputes begin. They should be the places where the disputes end—after alternative methods of resolving disputes have been considered and tried."¹⁵⁸

Pamela L. Airey

¹⁵⁵ Nancy Thoennes, Ph.D., *Child Protection Mediation In The Juvenile Court*, THE JUDGES' JOURNAL, 14, 19 (Winter 1994).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ McConnell, *supra* note 6, at 456.

