

A watercolor illustration of two hands shaking in a firm grip. The hands are rendered in warm, earthy tones of brown, red, and orange. The background is a soft, painterly sky with shades of blue, purple, and white, suggesting clouds. The overall style is artistic and expressive.

# *Mediating Family and Divorce Cases in Louisiana*

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**M**ediation has become a popular tool for resolving child custody and visitation disputes in Louisiana. The mediation of these types of disputes reduces conflict between parents and helps them to communicate more effectively when they are resolving disputes and when their disputes end.<sup>1</sup> Mediation allows divorcing or separating parents to resolve personal and complex issues in private, outside the courtroom environment, without the presence of outsiders who have no interest in the dispute.<sup>2</sup> When compared to litigation, which can be a costly endeavor for the parents, the mediation of child custody and visitation disputes saves the parties considerable time and money.<sup>3</sup>

Because a large number of litigants in family courts in Louisiana are not represented by attorneys, family court judges, who are allowed to order the parties to mediation under La. R.S. 9:332, should always consider whether it is appropriate to order mediation — even if neither party has requested it. Even when parties have excellent attorneys, mediation is often proper in domestic cases considering the overcrowding of dockets, the length of time between court dates, and the emotional issues involved in family law matters.

Additionally, family mediators, who are qualified to mediate these cases under La. R.S. 9:334, have an ethical duty to be impartial and to advise each of the parties participating in the mediation to obtain review by an attorney of any agreement reached as a result of the mediation prior to signing such an agreement.<sup>4</sup> While having a duty to be impartial, the family mediator cannot serve as a lawyer for the unrepresented litigants or ensure that the unrepresented litigants have enough information to make an informed decision. Moreover, because mediation is often effective in high-conflict cases, family court judges should consider the use of mediation in these cases.

## Court-Ordered Mediation

Courts have been authorized to order mediation in custody and visitation proceedings since 1984.<sup>5</sup> Three decades later, mediation in these proceedings is slowly becoming accepted by the courts, lawyers and litigants.<sup>6</sup> Empirical studies are showing that mediation is effective and results in settlement of some or all of the issues in family law matters between 40-80 percent of the time.<sup>7</sup>

Judges can order mediation of custody and visitation matters upon the motion of either party or on the court's own motion.<sup>8</sup> Unlike in civil cases, mediation can be ordered even if a party objects. If the parties do not agree upon a mediator, then the court has the authority to appoint any mediator on the Louisiana State Bar Association ADR Section's Child Custody and Visitation Mediator Registry.<sup>9</sup>

If an agreement is reached during the mediation, the mediator drafts a written, signed and dated agreement, commonly referred to as a Memorandum of Understanding. A consent judgment incorporating the agreement is later submitted to the court for approval.<sup>10</sup> When at least one of the parties is represented, the party's attorney drafts this judgment. When the parties are unrepresented, the parties are responsible for drafting the judgment. Some legal aid offices and clerks of court have forms that parties can use to prepare orders adopting the agreement reached as a judgment of the court. Some mediators provide these forms to unrepresented parties to prepare and file. Some judges in north Louisiana allow mediators to present agreements reached before them to the court when the parties are not represented.

Court-ordered mediation is also appropriate and should be ordered in cases even when both parties are represented by counsel. In the past, lawyers have been hesitant to request mediation in family law cases for multiple reasons, including the fear of removing them from the equation.

However, many mediators, particularly attorney mediators, welcome attorney participation during and/or after mediation conferences. If the attorneys are present and participate in the mediation, any agreement reached will be an enforceable agreement. If the attorneys do not participate, they still need to review any agreement reached, advise their client whether to finalize the agreement, draft the judgment, and present same to the court.

Surveys show that lawyers have found participating in mediation "increases efficiency, decreases communication problems, enhances client involvement and understanding of the process, increases information for attorneys, and dignifies the divorce process for many clients. Unlike many of the theoretical models of negotiation, actual negotiations over divorce cases are discontinuous and fragmented. By gathering everyone together at the same place and time to give sustained attention to settlement, the 'months [or more] of diddling back and forth between lawyers' can be diminished."<sup>11</sup> In family law cases, clients often just want an objective person to listen to what they have to say before they can rationally consider resolutions recommended by their own attorneys. Lawyer participation in mediation can help clients actually understand the relevant law and procedures and help them accept that things which are important to them mean little to the judge who will make a decision if the parties do not reach an agreement. No matter how many times a lawyer may tell a client something, it sometimes sinks in when the client hears it from another person.

Mediation in family law cases is becoming the standard nationwide as more states mandate mediation — either in all cases or upon motion of the parties. Court-ordered mediation provides an opportunity for the parties to resolve their differences in private and to address the everyday issues that the court system does not have time



to consider, provides parties with an ownership in the agreement instead of having it dictated to them, and gives lawyers a better chance at helping their clients be satisfied with the outcome.

## **The Ethics of Mediating with Pro Se Litigants**

There is no code of ethics for mediators in child support and visitation cases in Louisiana. However, ethical issues arise when a mediator mediates with one or more pro se litigants. How does the mediator address the many legal issues that arise in mediations? How does the mediator ensure that pro se litigants have enough information to make an informed decision? These questions are easily answered when one realizes that the primary responsibility of a mediator is to be a neutral third-party facilitator who does not give legal advice.

While many child custody mediators are attorneys,<sup>12</sup> mediators are not serving as attorneys when they are mediating. Thus, the duty of the mediator is not to give legal advice. While it is appropriate for the mediator to provide legal information, it is not appropriate for the mediator to give legal advice. For example, a mediator can provide information such as the fact that Louisiana is a community property state, but the mediator cannot advise the parties about specific property in issue being community property or separate property. The former would be providing legal information and the latter would be providing legal advice. Rule 2.4 of the Louisiana Rules of Professional Conduct states that a lawyer serving as a mediator shall inform unrepresented parties that the lawyer is not representing them and that, when a party does not understand that role, the lawyer-mediator should explain the difference between the lawyer's role as a mediator and a lawyer's role as one who represents a client.<sup>13</sup> Because a lawyer who is serving as a mediator is acting as a third-party neutral and is not representing a client,<sup>14</sup> the lawyer should not give legal advice. When non-lawyers serve as mediators in Louisiana, they also should not give legal advice because they may violate La. R.S. 37:212 and 37:213, the laws regulating the unauthorized practice

of law in Louisiana.<sup>15</sup>

What about when both parties to a child custody or visitation mediation are unrepresented and cannot or will not obtain legal counsel? Should the mediator then provide legal advice to the parties so that the parties do not miss important legal issues and arrive at an unfair and unbalanced agreement? The answer is still no. The mediator has no duty to ensure that an agreement is fair. If the parties arrive at a child custody or visitation mediation without lawyers, it is not the responsibility of the mediator to fill in the void left by the absence of attorneys. Even if the mediator can sympathize with the parties' need for legal counsel and feels the need to offer legal advice, the mediator must not assume the additional responsibility of being a legal advisor.

What if the mediator mediates in a district where most of the litigants in family mediations are unrepresented and have critical needs for legal services? How should the mediator respond to these litigants? The fact that litigants in family mediations need the advice of lawyers does not place the burden on the mediator. The burden of providing legal services in Louisiana is the responsibility of others, not that of the mediator.

Statutorily, in Louisiana, the duties of a child custody and visitation mediator are to develop and execute an agreement to mediate which identifies the issues to be resolved, which affirms the parties' intent to mediate, and the circumstances under which the mediation may terminate.<sup>16</sup> The mediator also has a duty to advise each of the parties participating in the mediation to obtain review by an attorney of any agreement reached as a result of the mediation prior to signing such an agreement.<sup>17</sup> While the mediator can explain procedurally what will happen before, during and after the mediation process, the mediation process, legal terms or procedures, ethically, the mediator cannot offer legal advice to the parties.

## **The Mediation of High-Conflict Cases**

The most emotional and highly contested disputes in courts today often involve

parents who cannot agree on custody and visitation issues. Mediating custody and visitation cases that are highly conflicted in nature is rarely considered by Louisiana courts. Too often, the attorneys and the courts default to the process that they know—litigation. While mediating high-conflict cases may sound oxymoronic, it can be effective. The future of family court issues involving custody and visitation involves mediation, not litigation.

Courts are burdened with more divorce cases involving conflicted issues of custody and visitation. The caseload of conflicted cases grows larger every year. In 1980, a study revealed that almost 30 percent of divorcing parents with children continued to have serious conflicts three to five years after the divorce was rendered.<sup>18</sup>

A highly conflicted case consumes a great deal of the court's time. Professionals who may be appointed by the court to assist with the processing of custody and visitation cases include parenting coordinators<sup>19</sup> and mental health experts, such as custody evaluators.<sup>20</sup> Appointment of these experts is often considered by the court because the parents cannot stop fighting with each other. Utilizing these experts is not only expensive for the parties, but their involvement also can lengthen the litigation process and, in doing so, create more and increasing conflict between the parents. Often, when a court appoints a mental health expert, that expert is sometimes perceived as a threat by one or both of the parties.

Attorneys often reject the idea of mediating a high-conflict case. The reasons mediation is not more utilized in contested custody and visitation cases vary. Sometimes, the attorneys and the courts are unfamiliar with mediation. There also exists a mindset among some lawyers and judges that mediation is not suitable in these types of cases. Mediation of highly conflicted cases may take several sessions; however, it can be far more effective and less expensive to the parties than litigation. Moreover, the mediation of these cases can assist the courts who are laboring under an ever-increasing caseload of conflicted cases.

The court has its own ideas of what is best for children. This opinion is often based upon the judge's life experiences



as a parent, child, son or daughter. In determining what is in the best interest of the children, the court may defer to a mental health expert who has met with the parents and the children for several hours over several sessions. However, the court can never know all that has happened between the parents and the children. Yet, the court must make its most important decision, *i.e.*, which parent becomes the domiciliary parent and how much time the non-domiciliary parent has with the children, based upon a tiny smidgeon of available information. What the court has learned from other cases may not be applicable to the case in litigation before it now; however, the court will sometimes use prior cases as a guidepost in making these decisions.

Mediating a high-conflict case may involve working with parents who have personality disorders. These individuals often cannot see themselves as others see them and they can be inflexible in their demands. A trained mediator is not there to provide a diagnosis; however, he can recognize potential patterns and adapt the approach to mediation accordingly.

The mediation of high-conflict cases requires the mediator to be extremely patient. High-conflict people are invested in their positions and they are not easily moved. A mediation involving high-conflict people must be structured and focused. The focus of the mediation should always be the best interest of the children. High-conflict people are often angry and fearful of the court. By maintaining a calm demeanor, the mediator can try to keep the parties focused on achieving an agreement. A mediator who is experienced in mediation with high-conflict people can be an asset to the court and to the parties. When the parties are able to craft their own agreement, it is better for all concerned.

High-conflict people are not going away. They will continue to file petitions for custody and visitation. The court's existing framework needs to be expanded to include mediation in the early stages of the dispute. Mandatory mediation should be considered. Courts should also allow litigants to choose mediation at the time of filing. Mediation is the future of child custody and visitation and the courts should embrace it now.

## Conclusion

Mediation is a proven means of alternative dispute resolution. As the courts see an increasing number of self-represented or pro se litigants and more cases involving highly conflicted parties and/or attorneys, mediation is a tool that the courts should implement on a more frequent basis. When parties are placed with an appropriately trained mediator in the early stages of the proceeding, there is an opportunity to avoid protracted and harmful litigation. The goal is always to do what is in the best interest of the child. When parents are removed from their adversarial positions and craft their own custody agreement, there is higher chance of keeping them out of court. We need to embrace alternatives to the traditional litigation structure of the courts. Mediation can be cost-effective and it can alleviate some of the ever-increasing caseload of the courts while still keeping lawyers involved. It is now time to add mediation to the existing toolkits used by the courts to resolve custody matters.

## FOOTNOTES

1. Bobby Marzine Harges, "Mediator Qualifications: The Trend Toward Professionalization," 1997 B.Y.U. L. Rev. 687, 688 (1997).

2. *Id.*

3. *Id.*

4. La. R.S. 9:333.

5. Kenneth J. Rigby, "Symposium: Family Law: Alternate Dispute Resolution," 44 La. L. Rev. 1725, 1752, n 107 (1984).

6. Rebecca Hinton, "Comment: Giving Children a Right to Be Heard: Suggested Reforms to Provide Louisiana Children a Voice in Child Custody Disputes," 65 La. L. Rev. 1539, 1565 (2005). Mediation is mandatory in Orleans Parish. Some judges in Caddo and Bossier Parishes are ordering mediation on a frequent basis.

7. Stephen G. Bullock and Linda Rose Gallagher, "Surveying the State of the Mediative Art: A Guide to Institutionalizing Mediation in Louisiana," 57 La. L. Rev. 885, 919-920 (1997); and Hon. Howard H. Dana, Jr., "Court-Connected Alternative Dispute Resolution in Maine," 57 Me. L. Rev. 349, 367 (2005).

8. La. R.S. 9:332(A).

9. The Louisiana Child Custody and Visitation Mediator Registry can be found online at: <http://files.lsba.org/documents/Committees/louisianamediatorregistry.pdf>.

10. La. R.S. 9:332(B).

11. Craig A. McEwen, Nancy H. Rogers and Richard J. Maiman, "Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fair-

ness in Divorce Mediation," 79 Minn. L. Rev. 1317 (1995).

12. Under La. R.S. 9:334, lawyers, psychiatrists, psychologists, social workers, marriage and family counselors, professional counselors, clergymen and other professions who receive the requisite training can serve as child custody mediators in Louisiana.

13. Rule 2.4 of the Louisiana Rules of Professional Conduct.

14. *Id.*

15. La. R.S. 37:213 prohibits anyone from rendering or furnishing legal services or advice to another unless that person is licensed or approved to do so by the Louisiana Supreme Court.

16. La. R.S. 9:333.

17. La. R.S. 9:332.

18. J. Wallerstein and J. Kelly, *Surviving the Breakup: How Children and Parents Cope with Divorce* (New York: Basic Books, 1980).

19. See La. R.S. 9:358.1.

20. See La. R.S. 9:331.

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