

# CHILDREN’S INTEREST—LOST IN TRANSLATION: MAKING THE CASE FOR INVOLVING CHILDREN IN MEDIATION OF CHILD CUSTODY CASES

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## I. THE LAUNDROMAT

Laundry day. We didn’t have a washing machine so to the laundromat we went. Washing clothes for a family of six children was always a day-long task. Mom and Dad had separated four months earlier. Things were difficult. We weren’t living in our family home anymore. We didn’t have to change schools, but changing schools might have been better than having to change bus stops. It seemed like the questions about why we were at a new bus stop would never end. It was embarrassing.

I looked up and Dad was walking through the door of the laundromat. “Hi Dad,” I said with a smile. “Hey kid—” his usual response. He approached Mom and they began talking, and then took their conversation outside the building. Soon, they came back inside and called me over. Mom said, “Your Dad wants you to live with him. What do you want to do?” I stood in shock while so many thoughts rushed through my mind—if I go to my dad’s house, I won’t have to go to the laundromat, ‘cause there’s a washing machine at the house! I can go back to my room, my bed, my home! I could live like an only child, instead of one of six.

I looked at my mother. Her judgmental glare over her folded arms guided me back to reality. That look was all too familiar. I looked at Dad,

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believing that his quiet, sad, and needful eyes were saying, “C’mon kid.” Although I wanted to go with Dad, I turned to Mom and said, “No, I don’t want to stay with Dad.” We were taught that loyalty always trumped personal desires and that we should sacrifice our wants for the greater good of the family. In this situation, the greater good was solidarity against Dad. So I made the choice that I was supposed to, but it was not what I wanted. Dad dropped his head and Mom said, “OK” with the confidence of a warrior winning yet another battle—the war being controlling access to the children.

## II. “WHO DO YOU WANT TO LIVE WITH?” A CHILD’S DILEMMA

“Who do you want to live with?” That question still resounds in my mind three decades following the encounter with my parents in the laundromat. Now that I am an adult, educated, married, and a parent of two, I reflect and wonder whether my personal experience would have been different had there been someone else in the picture to ask me the question. Would I have had the courage to express my concerns and desires to a third-party? Would my relationship with my parents have evolved differently? Would I have been free from thinking every time my father told me “no,” that it wasn’t because I rejected him in the laundromat, but because there was sound parental rationale for the “no” answer?<sup>2</sup> In 1977, formal mediation was not available to my parents, only litigation. I cannot say with assurance what would have helped my siblings and me through that dark period of our lives; yet, I can say for myself that an invitation to join the conversation about what was going to happen to me would have been monumental.<sup>3</sup>

My education, training, and experience as a mediator and attorney have shaped my viewpoint that, as a matter of course, children should be invited to the mediation table. Deeper still, my life experience as a twelve-year old confused child compels me to seek the input of children on questions central to their existence. My approach is not to usurp the authority of parents, but to have a complete and holistic discussion with the family about the family. By doing so, I believe a probable end result will be empowering children by showing them that the most important adults in their lives are listening to them and are working hard to resolve one of the most difficult life issues their family will face. Including children in the divorce-mediation process is an opportunity to fully address the myriad of

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<sup>2</sup> There is no question that the choices my parents made may not have been ideal; however, they did the best they could with what they had available to them at the time.

<sup>3</sup> I realize revealing my personal childhood journey in this forum places me in a vulnerable position and may bring to question my style of mediation and advocacy. However, I embrace this position because the truth of my personal experience gives me credibility and sensitivity from a practical standpoint. It is my hope that my transparency will encourage other practitioners to embrace the possible positive outcomes that can occur if children are involved in the mediation.

issues plaguing the family unit.

Child custody disputes are typically created out of a complex of interactional family dynamics, and they are

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the result will reflect a complete integration of every stakeholder's interest. "Children exposed to continuing parental conflict are predictable casualties of family disputes; in no other area is the welfare of so many morally innocent and socially important nonparticipants so regularly at stake."<sup>6</sup> It is my belief that when children witness first-hand a successful conflict resolution process, they will learn and then perhaps use those positive conflict resolution skills in their own lives.

Our legal system prides itself in having developed a structure that protects the interests of children by assigning defined roles to those involved in the divorce process. When making custody decisions in a divorce case, parents, judges, and attorneys have specific interests and responsibilities.<sup>7</sup> Parents are navigating through the emotional stages of divorce—blaming, mourning, anger, accepting the reality of becoming single, and re-entry (which is the settling-down period).<sup>8</sup> Judges are charged with the challenge of creating a courtroom environment of civility and respect, while exercising patience, empathy, and firmness to manage the emotion of the divorce proceeding.<sup>9</sup> The attorney's role depends on the client. Attorneys representing the parents are bound to provide their clients competent representation, abiding by the clients objectives, and are to do so with reasonable diligence and promptness.<sup>10</sup>

In cases where an attorney is appointed to represent a child, the role of the attorney differs. If the attorney is appointed to represent the independent legal interests of the child, the attorney is considered the "Child's Attorney."<sup>11</sup> If the attorney is appointed to protect the interests of the child and is not bound by the child's directives or objectives, the attorney is considered a "Best Interests Attorney."<sup>12</sup> Many jurisdictions still refer to the "Child's Attorney" or a "Best Interests Attorney" as a Guardian ad Litem (GAL); but, for the purposes of this discussion, I will not use the GAL designation.<sup>13</sup>

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<sup>6</sup> Andrew Schepard, *An Introduction to the Model Standards of Practice for Family and Divorce Mediation*, 35 FAM. L.Q. 1, 2 (2001).

<sup>7</sup> See AM. BAR ASS'N, A JUDGE'S GUIDE: MAKING CHILD-CENTERED DECISIONS IN CUSTODY CASES 6 (Diane Boyd Rauber ed., 2d ed. 2008) [hereinafter JUDGE'S GUIDE]; MODEL RULES OF PROF'L CONDUCT R. 1.1, R. 1.2, R. 1.3 (2010).

<sup>8</sup> Diane Neumann, *The Psychological Stages of Divorce*, DIVORCEMED.COM, <http://www.divorcemed.com/Articles/ArticlesByDiane/The%20Psychological%20Stages%20of%20Divorce.htm> (last visited Mar. 19, 2011).

<sup>9</sup> JUDGE'S GUIDE, *supra* note 7, at 6.

<sup>10</sup> MODEL RULES OF PROF'L CONDUCT R. 1.1, R. 1.2, R. 1.3 (2010).

<sup>11</sup> AM. BAR ASS'N SECTION OF FAMILY LAW SF

It is standard practice that when considering bringing a child into the mediation process, the mediator should confer with the parents, their attorneys, and the attorneys for the children, if the children have been appointed a representative.<sup>14</sup> The developmental considerations that should be reviewed are categorized by the age of the child or the children.<sup>15</sup>

The Toddler-Preschool Aged Child (Eighteen Months to Five Years) – At this stage the child is very sensitive to changes in their routine. The child's limited language and inability to understand what divorce is, makes a child at this age a poor candidate for participating in the mediation.<sup>16</sup>

The Early Elementary School-Aged Child (Five to Seven Years) – Children in this age range tend to blame themselves for the divorce. They see in shades of black and white and find gray areas hard to accept. They are susceptible to manipulation and experience loyalty conflicts.<sup>17</sup> Children in this age category can benefit from participating in the mediation process.

The Older Elementary School-Aged Child (Eight to Ten Years) – The older elementary school-aged child shares the same "I'm-to-blame" belief that the younger elementary child does. However, the older elementary school-aged child has developed the capacity for empathy; they tend to attempt to channel their parents' feelings. This child worries a lot and experiences feelings of insecurity relative to finances, food, clothing, safety, and overall well-being.<sup>18</sup> Beginning at this age, the child is a prime candidate to participate in the mediation process. The child can understand the process and contribute by verbalizing their concerns thereby have their fears addressed.

The Middle School-Aged Child (Eleven to Thirteen Years) – Children in this developmental stage often feel ashamed about their parents' divorce. They tend to hold one parent more responsible for the divorce, while working hard to cover up their feelings of insecurity and fear.<sup>19</sup>

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referee, facilitator, arbitrator, evaluator, mediator and advocate. Asking one Guardian Ad Litem to perform several roles at once, to be all things to all people, is a messy, ineffective expedient." *Id.*

<sup>14</sup> MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION VIII.

<sup>15</sup> See JUDGE'S GUIDE, *supra* note 7, at 50-80.

<sup>16</sup> *Id.* at 55-59.

<sup>17</sup> *Id.* at 59-64.

<sup>18</sup> *Id.* at 64-69.

<sup>19</sup> *Id.* at 69-73.

These children can participate fully in the mediation process and with guidance, assistance, and support, learn communication skills to assist with their relationship with their parents.

The Adolescent or High School-Aged Child (Fourteen to Eighteen Years) – At this stage, the child may feel abandoned, just like the children in the younger stages. Children in this stage can process the intricacies of the divorce without placing blame on one parent or the other. However, these children often assume an adult caretaker role for the parents and younger siblings. They are more susceptible to substance and alcohol use and abuse and other risk-driven behavior.<sup>20</sup> Just like the Middle School-Aged Child, children in this stage can participate fully in the mediation process and will have the opportunity to address issues and hopefully avoid possible destructive behavior choices resulting from circumstances surrounding the change in the child's family dynamic.

In the United States, we have not embraced the child-inclusive mediation approach that has been adopted by many other countries.<sup>21</sup> In Australia, the child-inclusive approach is well established with clear steps of the basic inclusion model:

1. The mediator engages with both parents, and any other family members or support person involved in the mediation . . . .
2. Information is provided to each parent on the child-inclusive process, including any fees, confidentiality, and mandatory reporting of child abuse allegations.
3. Clarification is sought of each parent's understanding, expectations, and commitment to the process[, including who will conduct] the child assessment, [who] will bring the child to the assessment session, and who will be present during the feedback and mediation sessions.
4. [B]oth parents sign a contract to proceed with child-inclusive mediation.
5. A session is [convened so that parents can provide] information to the professional who will be assessing the

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<sup>20</sup> *Id.* at 73-78.

<sup>21</sup> See Amanda Shea Hart, *Child-Inclusive Mediation in Cases of Domestic Violence in Australia*, 27 CONFLICT RESOL. Q. 3, 4 (2009).

child. This includes relevant information about the child's history and specifics on the child's development, special needs, personality, coping strategies, [and] any expressed wishes . . . .

6. Appointments are [scheduled] for the child assessment and for [the parental feedback].

7. The mediator answers any questions the child raises about the process that cannot be adequately addressed by the parents. If the child agrees, he or she then attends the planned assessment session.

8. At the beginning of the child assessment session, an age-appropriate explanation of the assessment and feedback process, including confidentiality, is provided to the child . . . . The assessment is focused and addresses the child's experience of relationships with each parent and other significant family members, as well as the child's experience and understanding of the family separation and of any family conflict or violence. The assessment seeks to develop understanding of the child's situation and the perspectives of the child . . . . The overall focus is on understanding the child as an individual person by identifying what the child's needs, interests, and any wishes or suggested solutions are.

9. Following the individual child assessment, the parents are given feedback . . . . A constructive child-focused approach needs careful and strategic management during this feedback and any following mediation sessions.<sup>22</sup>

The Australian basic model is carefully crafted to protect the parents and children and keeps everyone informed about what is going on at each stage of the process. Further, the Australian basic model solicits formal buy-in from the parents before engaging the child in the mediation process. This model reflects how children can be appropriately integrated in the mediation process to meet the needs of the entire family.

In the United States, the Model Standards state that “[p]rior to including the children in the mediation process, the mediator should consult with the parents and the children’s court-appointed representative about whether the children should participate in the mediation process and the form of that participation.”<sup>23</sup> The provision of the United States Model Standard does not have clearly defined steps like the Australian basic model,

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<sup>22</sup> *Id.* at 5-6.

<sup>23</sup> MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION VIII.15.

but each share the same spirit of informed consent to include the children in the divorce mediation process. However, to develop a child-inclusive model in the United States, the first step should be to develop specialized training in addition to basic family-mediation training. Such training will establish credibility and build trust in parties, who elect to utilize the child-inclusive process, if it is understood that special training and care has been invested to administer the process. My suggestion for an additional training requirement for child-inclusive divorce mediation would mirror the additional training requirement that many states impose upon mediators in divorce cases when domestic abuse has been identified.

Some states have an outright ban on mediating divorce cases if domestic abuse is involved, while others recite specific steps that the mediator must follow when domestic abuse is identified.<sup>24</sup> In Alabama, for example, a court cannot order parties to engage in mediation in an attempt to resolve issues regarding an order of protection.<sup>25</sup> Alabama does not allow mediation relative to custody or visitation if domestic violence has occurred.<sup>26</sup> Lastly, the Alabama rules require a mediator to screen for domestic or family violence, and if domestic violence is identified, the mediation can proceed only if:

1. Mediation is requested by the victim of the alleged domestic or family violence;
2. Mediation is provided by a certified mediator who is trained in domestic and family violence in a specialized manner that protects the safety of the victim; and
3. The victim is permitted to have . . . a [support] person [at the mediation].<sup>27</sup>

It is apparent that for the mediation process to work appropriately with regard to domestic violence and the identification thereof, the mediator must have specific, additional training to recognize the signs and flags that indicate the presence of the abuse. Some contend that mediation cannot work in domestic violence situations, citing the nature of domestic violence and the lack of training for the mediator as the main reasons the mediation process should not be utilized.<sup>28</sup>

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<sup>24</sup> *Mediation in Family Law Matters Where DV is Present*, AMERICAN BAR ASSOCIATION COMMISSION ON DOMESTIC VIOLENCE (Jan 2008), [http://www.americanbar.org/content/dam/aba/migrated/domviol/docs/Mediation\\_1\\_2008.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/domviol/docs/Mediation_1_2008.authcheckdam.pdf).

<sup>25</sup> ALA. CODE § 6-6-20(d) (1996).

<sup>26</sup> *Id.* § 6-6-20(e).

<sup>27</sup> *Id.* § 6-6-20(f).

<sup>28</sup> See Sarah Krieger, Note, *The Dangers of Mediation in Domestic Violence Cases*, 8 CARDOZO WOMEN'S L.J. 235, 246 (2002).



The additional training requirement that I propose for child-inclusive mediations will initiate much debate about the training criteria and the costs and benefits to the overall mediation process. However, I submit, if it is acceptable to mediate cases where there is violence between the parties, why in the absence of such violence should we not include children in the mediation process that directly relates to them?

There has been some discussion about including children in divorce mediations, specifically at certain stages of the mediation. One suggestion is to include the child by holding a separate caucus with the child outside the presence of their parents, bringing the child into the process when the parents strongly disagree on an issue and when the child's opinion can help generate movement with the parents' decision-making.<sup>29</sup>

### III. HOW TO IDENTIFY CASES FOR CHILD-INCLUSIVE MEDIATION

Obviously, not all divorce cases involve a high degree of conflict between the parties, such that the parents are unable to process appropriately how their conduct is negatively affecting their children. In high-conflict situations, special care should be given to include these children, so that they will have a voice in the decisions made about them and also have an opportunity to develop skills to break the unhealthy cycle of high conflict that is exemplified by their parents.

Given the increased number of self-represented parties and the sharp cuts in court funding, it would be extremely helpful to incorporate the needs of these parties when designing a child-inclusive divorce mediation program.<sup>30</sup> It would be efficient to front-load the resources for the entire family, with the goal of reducing the parties' need to return to court to resolve issues that may arise in the future. This is not to say that the courthouse door will be closed to self-represented parties, but my goal would be to empower these parties with the conflict resolution skills to make different choices to resolve many issues on their own.

When parents seek to use the mediation process, mediators can screen the parents to determine if couples and their children are good candidates for the inclusion model. Once that determination is made, the mediator can discuss options with families and their legal representatives, of whether to move forward and include the children. Like the Australian model, I believe that the process should be presented to the parties with a clear explanation so that there will be full and complete understanding about the choice they are making.

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<sup>29</sup> Melissa J. Schoffer, Note, *Bringing Children to the Mediation Table: Defining a Child's Best Interest in Divorce Mediation*, 43 FAM. CT. REV. 323, 326-27 (2005).

<sup>30</sup> Nancy Ver Steegh, *Family Court Reform and ADR: Shifting Values and Expectations Transform the Divorce Process*, 42 FAM. L.Q. 659, 670 (Fall 2008).

#### IV. CONCLUSION

Reflecting on the laundromat encounter with my parents, I believe that if mediation, and more specifically child-inclusive mediation, was available to them, they would have utilized that option. First, the mediation process would have protected their privacy. Second, it is obvious to me that my parents were trying to have a dialogue, but lacked the depth of skills to know how to minimize the harm to their children. Third, we, the children, would have had the benefit of a third-party neutral to explain what was happening to our family, instead of us working to fit details together, which were usually incorrect and not based on the truth of the situation. Fourth, the six of us would have been exposed at an early age to the dynamic of open communication and conflict resolution. Finally, I would not have wasted precious years believing that my father disliked me because I chose not to live with him.

I strongly believe that we should seize the opportunity to include our children in major family decisions that affect them. Our children are sophisticated thinkers and understand much more than we often believe. It is imperative that as parents we examine our personal issues with an open eye to understanding that the family conflict is not a judgment on our parenting skills, but that it is natural and that we have the ability to make better choices when a divorce is involved.