



Dependency Cases— Litigate or Mediate?

By Sarah Clark Bowers

As an experienced guardian ad litem (GAL) for dependent children, my initial response to the suggestion of dependency mediation was immediately doubtful. Child safety and well being were *not* issues open to mediation for my young clients. It is not unusual for attorneys involved with dependency cases to be initially skeptical regarding mediation and resist participation. Attorneys are trained in the adversarial process. Particularly for those educated before alternative dispute resolution became part of law school curriculums, embracing mediation as a viable means of client representation is unlikely to be a first reaction. Yet the collaborative resolutions that mediation can produce make it a process that deserves the utmost consideration in serving dependent children and their parents or custodians.

In Alabama a child may be adjudicated dependent:

- Whose parent or custodian subjects the child to abuse or neglect;
- Who is without a parent or custodian willing and able to provide for the care, support or education of the child;
- Whose parent or custodian refuses to provide medical care necessary for the health and well-being of the child;
- Whose parent or custodian fails, refuses or neglects to send the child to school in accordance with compulsory attendance laws;
- Whose parent or custodian has abandoned the child;
- Whose parent or custodian is unable or unwilling to discharge his responsibilities to the child;

- Who has been placed for care or adoption in violation of the law; or
- Who, for any other cause, is in need of the care and protection of the state.

See Ala. Code §12-15-102 (8)a.

Once a child is adjudicated dependent by clear and convincing evidence, the court faces the important task of making a disposition in the case. *See Ala. Code § 12-15-311.* Alabama's Juvenile Justice Act of 2008 establishes not only *protection* of the child as a goal, but also preservation and strengthening of the child's home environment, removal from home only if it is in the child's best interest, a timely and safe reunification with parents, and provision of a continuum of services. *See Ala. Code § 12-15-101 (a) and (b).* Where the child will live, who will make decisions regarding medical and educational needs, fulfillment of special care or rehabilitation needs, and right of visitation by parties who do not hold physical custody are all issues that may be addressed by the court in the dispositional phase of the case. Termination of parental rights may be the issue before the court if reasonable efforts have been made and were unsuccessful in maintaining a child in his home. *See Ala. Code § 12-15-301 et. seq.*

There are often multiple parties involved in dependency cases with grandparents opposing parents and parents opposing each other. The Department of Human Resources (DHR) is a party if they file a petition based on a need for protection of the child. Alternatively, DHR may play a role as a service provider. Other cases do not involve DHR, but are brought before the court by a relative or other adult concerned for the child's welfare. It is not unusual for multiple dependency petitions to be pending. As required by Alabama law, the child who is the subject of the case must have an attorney appointed as his GAL to represent his best interest. *See Ala. Code § 12-15-304 (a).* Dependency cases can become

chaotic with many differing perspectives on what is in the best interest of the child. Litigate or mediate? How will the child's best welfare truly be served?

Consider the following fact pattern. It is one, based not on a similar and infamous case involving the late Michael Jackson's children, but on a case currently in my open files. A single young mother lies dead in her bed of a sudden heart attack. Her two young children are found at her side waiting for their mother to wake up. The maternal grandmother who lives nearby immediately takes the children into her home and begins caring for them. She files a dependency petition and requests that custody of the children be placed with her. A presumed father, who lives out of state, appears to request that the petition be dismissed. He intends to take one of the children back to his home state to live with him. A multitude of legal issues are unresolved. Can the father be adjudicated the legal father of one or both of the children? If adjudicated the legal father, will a presumption in favor of a natural parent prevail? How will the court view separation of the children? Does the fact that the father has never provided monetary support for the children and had infrequent contact with them constitute abandonment? Litigate or mediate? If litigated, these children are likely to suffer greater loss as hurtful accusations are made by the parties against each other. The chances that the parties will work together for the benefit of the children will be greatly reduced. For these children to thrive after the traumatic death of their mother, it is imperative that a mutual agreement be reached that allows for the healing process these children so desperately need. Both parties have much to contribute to the wellbeing and safety of the children. Mediation can be a powerful tool to sort out the appropriate role for each of remaining parental figures in the lives of these children.

Although not all dependency cases are appropriate for mediation, the child benefits when all parties are committed to resolving a problem through mediation,

rather than defending a position. My previous assumptions that mediation marginalizes the safety and wellbeing of the child are not true. My practice has shown me that interventions with families and agencies producing an agreed-upon plan for a child strengthens the child's chances for a safe and secure future. Leading national experts in the field concur.¹

The evolution of mediation in dependency proceedings has in many ways been driven by changes in public policy with regard to permanency for children in out-of-home care. The federal Adoption Assistance and Child Welfare Act of 1980 and its subsequent amendments set guidelines and timelines for states to follow with regard to dependent children in out-of-home placement. The Adoption and Safe Families Act passed by Congress in 1997 added more stringent requirements for states to follow, notably a 12-month mandatory timeframe for filing termination of parental rights cases for children in out-of-home care. This put added pressure on courts to resolve dependent cases. Most cases are resolved without a trial even when mediation is not available. However, negotiations are often hindered in dependency cases by the large number of professionals participating, the families' lack of knowledge about the system and the imbalance of power between the family and the professionals involved. Mediation, therefore, becomes a way to move difficult cases through the court system in a timely manner.

Alternative dispute resolution programs for dependency cases have been established in the majority of states. The National Council of Juvenile and Family Court Judges (NCJFCJ) Permanency Planning for Children Department has identified mediation as a best practice. The NCJFCJ notes, "[a]ll juvenile and family court systems should have alternative dispute resolution programs available to the parties so that trials can be avoided whenever possible." There appears to be a growing momentum for dependency cases to be shifted away

from the adversarial model and toward a focus on a mediated agreement.

The growth in dependency mediation can be attributed to many factors. Perhaps the greatest reason for its growth is that *it works*. Agreement is reached on all pending issues in 60 to 80 per cent of dependency cases nationwide. An additional 10 to 20 per cent of mediated cases result in partial agreement.² The high rate of agreement reached in mediation is consistent even though programs vary significantly in their structure regarding mediation models. Yet the benefits for children and their families go far beyond settlements reached.

Benefits

Parental Empowerment. Children and parents often enter the juvenile court system confused, angry and frustrated with the process. Noted mediation authority Nancy Thoennes quotes one guardian ad litem as saying:

“A lot of our parents don’t know what’s going on. Court is really fast. Even if the GAL or... whoever tries to explain things, parents may not believe us. Lots of times they are so confused and scared they wind up fighting about things unnecessarily. In mediation they get to know people, they get to hear the point is to make the child’s life safer.”

An opportunity to meet with an impartial well-trained neutral in mediation gives parents a chance to tell their stories and participate in the process of planning

for their child. They gain a sense of empowerment. The feeling that they are heard and are part of the resolution of problems affecting the welfare of their child makes it much more likely that they will reach an agreement and comply with court orders. People who perceive themselves as valued members of a group are more likely to put self interest aside and act in a way that helps all group members. Relationships that may be irreparably damaged in litigation may be preserved in mediation. Even though the end result of the case may be termination of parental rights, parents leave mediation with a sense of dignity that they would not have in litigation. The best interest of the child is always served when informed parents are able to work with social workers, attorneys, extended family members, and others involved in the case toward a resolution, rather than engage in power struggles that so often hinder progress.

Conservation of Court Resources. Time is required for a successful mediation. Nonetheless, a mediated agreement can produce significant savings of court resources and money as opposed to contested matters that require large blocks of time and that often experience multiple continuances. Mediation can be used at any stage in a dependency case. Referrals can be made upon the filing of the dependency case, adjudication, review, permanency hearing, or termination of parental rights hearing. Rather than routinely referring all cases to mediation at a particular point, mediation can be used as an alternative whenever a case requires a

full-scale trial to move forward. Even if all matters are not resolved in mediation, often the issues are narrowed, thus reducing trial time. Not only is the court’s time conserved by using mediation, but also the time of the social workers, attorneys and other professionals in the case. Clearly, mediation is the highest and best use of the parties’ time as well.

Reduced Time for Permanency. Every child deserves a permanent home achieved in the least time possible. Children in limbo regarding their future suffer the negative emotional effects of dealing with the unknown. Optimal growth and well-being is compromised. In mediation the parties have more control of the schedule and what happens during the time a case remains open. A final disposition in the case may depend on results of psychological evaluations or drug test results that take weeks or months to complete. Parents may need time to establish safe housing, attend parenting classes or take other steps to adequately care for their children. Mediation offers the parties a chance to shape an interim plan before a final agreement is reached. The earlier a case is mediated, the shorter the time frame until case closure and thus permanency.

Improved Case Plans. Mediated case plans can be more detailed and specific with respect to services for both the parents and the children. Mediation provides a setting where input from those involved in the case creates synergy—a system where the final outcome is greater than the sum of its parts. Creative solutions to issues can be produced. It is important that the child’s point of view be understood and given great weight in making a plan for their future.

Depending on the age and developmental stage of the child, they may be included in mediation. The GAL is of paramount importance in deciding if the child client should participate and in explaining the process to the child. Often extended family members or other resource providers are invited to be a part of the mediation. While the inclusion of a greater number of people requires group dynamic skills on the part of the mediator, these extra participants can add a depth and perspective useful in meeting a child’s specific needs.



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The Process

“Mediation is not an exotic process. Mediation is about talking and exchanging ideas in an environment where the discussion is guided by a facilitator,” quips Judge Leonard P. Edwards, the California judge regarded nationally as a pioneer in dependency mediation. Mediation is defined in Alabama as “a process in which a neutral third party assists the parties to a civil action in reaching their own settlement but does not have the authority to force the parties to accept a binding decision.” *Ala. Code* § 6-6-20. Parties in a mediation are first oriented as to the process, then given a chance to explain why they are there and what they would like to accomplish. Facts are shared without the frequently false assumption that everyone has the same information. Once information is shared the parties can turn to issue development and then problem solving.

Child custody cases have been sent to mediation longer than any other cases in

the child-related legal arena. One noted expert in the field makes the observation that it is ironic that juvenile courts have become more adversarial at the same time that family courts have started to rely more and more on the alternative dispute resolution process.³ *In Re Gault*, 387 U.S. (1967), established “fundamental fairness and due process” in juvenile courts. The case spearheaded much needed reform in our juvenile court system. Yet, the shift away from the informal institution existing prior to *Gault* may have gone too far. Given a proper structure, the success in domestic law mediation can be repeated in dependency cases.

Many factors influence whether mediation is successful. Perhaps foremost is the quality of the mediator. The Alabama Center for Dispute Resolution maintains a roster of mediators who have met certain standards and designates those who have had at least forty hours of specialized training in domestic mediation as well as those who have received additional training in

domestic violence. Dependency mediation training is not a currently recognized designation in Alabama. A background in child psychology, social work, or other behavioral science is helpful in understanding child welfare issues for those mediating dependency cases. Similarly, attorneys who frequently practice in domestic or juvenile court often acquire the understanding and skills to be successful dependency mediators. Whether the mediator is a court employee or independent contractor should not influence result. What is important is that those conducting dependency mediation must not only be familiar with the child welfare system, but also respected by the professionals involved and skilled in handling multiple participants in mediation sessions.

Other factors leading to a successful mediation are confidentiality, inclusiveness of all those who have a legitimate interest in the case, sufficient time, a neutral environment, and collaborative time spent with stakeholders in the process. Perhaps the



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most complicated of these factors is confidentiality. In mediation, confidentiality enables parties to express themselves without the fear that what they say will be later used against them in a court proceeding. Notwithstanding confidentiality, Alabama's Child Abuse and Neglect Reporting Act (the Act) *requires* reporting of child abuse and neglect by certain professionals including social workers and mental health professionals "or any person called upon to render aid or medical assistance to any child when the child is known or suspected to be a victim of child abuse or neglect..." *Ala. Code* § 26-14-3(a). Additionally, the Act allows permissive reporting of child abuse or neglect, *Id.* at § 26-14-4, and grants immunity from liability for reporters. *Id.* at § 26-14-9. Dependency cases deal with *reported* allegations of abuse or neglect, however, the Act would apply to any *new* instances of abuse or neglect that surface. Alabama's recent Mediator Confidentiality Act protects a mediator from being compelled to testify in a later hearing regarding statements made

and documents viewed during a mediation. *Ala. Code* § 6-6-25. Nevertheless, mediators remain bound by Alabama's Mediator Code of Ethics that requires confidentiality "except where required by law to disclose information gathered during the mediation." *Ala. Code of Ethics for Mediators*, standard 6(a). *See also Ala. Civ. Ct. Mediation Rules* 11 (1992). Due to the nature of dependency cases and the need to protect vulnerable children, a child protection mediation program may be served best by allowing an op-out of the confidentiality requirement for mediation. This op-out must be thoroughly explained to all parties. Certainly programs need to have clear guidelines regarding confidentiality, and the issue should be addressed with mediation participants as part of the initial orientation.

Often the GAL, though not a neutral, is in a unique position to bring about an agreement in a case. It is the responsibility of the GAL to advocate for the best interest of the child, focusing on the individual needs of the child. This concentration on what is best for the child is a concept with which, at least ideologically, everyone can agree. The finding of common ground is a cornerstone of mediation and should still be pursued even if no formal dependency mediation program exists. Other mediation techniques, such as active listening, reframing, reality checking, collaboration, empowerment, and focusing on the future, can also be used effectively by the GAL or attorneys for the parties involved in the case in bringing about an agreement. All professionals working with child protection cases could benefit from education in ADR processes and tools.

Not all cases are suitable for mediation. "In a proceeding concerning the custody or visitation of a child, if an order for protection is in effect or if the court finds that domestic violence has occurred the court shall not order mediation." *Ala. Code* § 6-6-20(e). It is further mandated that, "[a] mediator who receives a referral or order from a court to conduct mediation shall screen for the occurrence of domestic or family violence between the parties..." *Ala. Code* § 6-6-20(f). Thus, dependency mediators must be knowledgeable in domestic violence screening

techniques and instruments. If domestic violence is found, mediation is allowed to continue only if:

- mediation is requested by the victim of the alleged domestic or family violence;
- 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
- the victim is permitted to have in attendance at mediation a supporting person of his or her choice, including but not limited to an attorney or advocate.

Ala. Code § 6-6-20(f)(1)(2) and (3).

Although the above-referenced *Code* sections deal with only court-ordered or referred mediation, a mediator would be wise to follow the statutory guidelines in all cases.

In dependency cases the Department of Human Resources is often the petitioner. Alabama law provides "[a] court shall not order parties into mediation in any action involving...child protective services wherein the Department of Human Resources is a party to said action". *Ala. Code* § 6-6-20(h). Thus, the participation of DHR in its role as a party must be voluntary. The department may provide beneficial services to families in dependency cases even when it is not a party and should be included in mediation when acting as a service provider.

Additionally, mediation may not be the best course of action in cases involving drug addiction or mental illness of a party. The illegal use of drugs is a growing problem in our society and occurs often in dependency court. In my practice I have found that use of cocaine and crystal methamphetamine are two of the greatest offenders in rendering parents unable to provide care for their children. Even if a parent is in remission from drug usage, often certain brain functioning is altered, making a rational agreement difficult. Similarly, some mental illnesses, particularly personality disorders, make it difficult for a mediation participant to collaborate. Mediate or litigate?

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The answer is not always mediate. The skilled mediator can assess which cases lend themselves to a successful mediation and can guide the parties through the process to produce an agreement in those cases.

Roadblocks

One of the greatest barriers to establishing dependency mediation in juvenile courts is changing a legal culture that is incompatible with mediation. A switch from adversarial to collaborative is not easily made. Education about a mediated approach is essential for mindsets to change. A pilot project that showcases the advantages of dependency mediation could go a long way in re-shaping attitudes. Success of a pilot is used to educate stakeholders in the process, garner enthusiasm and tell the story. Once the legal and social work communities experience benefits from child protection mediation, it is more likely to spread. One of the best ways to educate judges, attorneys, social workers and parents is to have their counter-parts who have participated in dependency mediation talk to them about the benefits of alternative dispute resolution. Each juvenile court jurisdiction has its own character and successful dependency mediation models are as varied as the courts they serve. It is important to tailor a program to fit the unique needs and resources of each jurisdiction.

Securing adequate funding may be a roadblock more challenging to overcome than creating the motivation to implement a dependency mediation program. In some other states mediation programs are established with court improvement money, but often funding is only for a pilot and only lasts a few years. Until a stable and reliable source of funding is identified, it may be difficult to implement or maintain a dependency mediation program. With the use of volunteer mediators, the budget for a pilot dependency mediation project would be modest. Yet the current uncertainty of the national and state economy makes funding even more elusive. Although a funding source for a formal dependency mediation program in Alabama has not been identified, the seeds of child protection mediation have been planted.

Where Does Alabama Stand?

Dependency mediation for suitable cases could be used in Alabama at any stage of the proceeding including the appellate level. *See Ala R. App. P. 55.* The Department of Human Resources is engaging in limited dependency mediation. However, there are no funds dedicated to pay for mediators, and a lack of funding prevents the widespread use of mediation by DHR. One promising vehicle used by DHR as an outcome of the *R.C. v. Walley* consent decree is the Individualized Service Plan (ISP). An ISP must be developed for all children and families for whom the department is providing services and foster care and reviewed periodically. This is accomplished by meeting with the families and others involved in the child's care. The focus of the meeting is to build on family strengths, identify appropriate services for the families, set goals and recognize the steps needed to accomplish these goals. The meetings usually take place away from the court when parties are calmer, and the climate is often more conducive to a mediated agreement. As a participating GAL in these meetings, I have used and observed mediation techniques that result in moving parties toward collaboration for the child's benefit. The ISP has much in common with the family conferencing model of ADR. In family conferencing emphasis is placed on family strengths. The addition of a trained neutral in initial ISPs could save time and costs for the court and child welfare professionals, and speed permanency.

Because statistics uniformly confirm the effectiveness in reaching agreement, cost savings and other benefits to children, dependency mediation programs are worthy of grant money allocation. Discovering a grant source, a proposal writer and program director are the keys to this funding basis. The use of volunteer mediators is also a source that should not be overlooked. Mediators on the Alabama State Court Mediation Roster must agree to provide ten hours of pro bono work. The *Alabama Code of Ethics for Mediators* states "mediators have a professional responsibility to provide competent service to persons ... including those unable to pay ... a mediator should provide mediation services pro bono ... whenever appro-

priate." *Ala. Code of Ethics for Mediators*, standard 8(b). Alabama lawyers volunteer their time each day throughout the state, and those with domestic mediation training are a promising resource for dependency mediation projects.

Mediate or litigate? In appropriately selected cases mediation is viewed as an effective and safe way to give Alabama's abused and neglected children permanency. Frequently children who linger in the child welfare system repeat destructive patterns when they become parents, landing in the same court system that set out to help them when they were minors. The replacement of hallway negotiations and settlements spearheaded by only one of the parties with mediation is a step in the right direction. Mediation facilitated by a trained neutral will greatly enhance a plan for each of Alabama's dependent children as individualized as they are. Dependent, through no fault of their own, these children deserve no less. ▲▼▲

Endnotes

1. *See* Leonard P. Edwards, *Mediation in Child Protection Cases*, 5 J. CFCC 57, 57 (2004). Judge Edwards is a retired superior court judge from Santa Clara County, California and is a pioneer in the advancement of dependency mediation. He continues to speak and write on the subject. *See* Edwards, *Child Protection Mediation: A 25-Year Perspective*, 47 Fam. Ct. Rev. 69 (2009).
2. *See* Nancy Thoennes, *What We Know Now: Findings From Dependency Mediation Research*, 47 Fam. Ct. Rev. 21 (2009).
3. *See* Kelly Browe Olson, *The Importance of Using Alternative Dispute Resolution Techniques and Processes in the Ethical Representation of Children*, 6 NV. L.J. 1333,1343 (2006).



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