A New Framework for Custody Mediations

By Neda Mesri

Over the past two decades, with divorce rates reaching unprecedented highs in our nation, courts have increasingly encouraged the mediation of divorce settlements and child custody cases in lieu of litigation. Seen as a viable method of reducing congested court dockets, and hailed for its speed and cost efficiency, mediation has been celebrated for its merits as an effective alternative route to dispute resolution. Mediation is not only being utilized with ever-increasing frequency for divorce and custody disputes, but for all kinds of disputes, making it one of the most popular and prominent components of all the ADR programs. The process aims at using a neutral third party in a non-threatening environment to identify relevant issues and help disputing parties negotiate solutions that best suit their family circumstances. Since divorce cases are often bitterly fought and filled with emotion, making parents incapable of sound decision-making especially when it comes to decisions about their children, the use of an impartial arbiter is integral to ensuring that the best interests of the children involved are upheld. The courts, as *parens patriae*[1], have long played the role of protectors of these interests. However, the lengthy and adversarial nature of litigation is not in the best interest of children involved in custody disputes. And while many may advocate mediation as the best recourse because it eliminates the length and adversity of the process, I believe that the laxness of current custody mediation guidelines fails to uphold the best interest of the child as well. Mediation may still be a better alternative to litigation of child custody cases, but if we are to make it *the best* alternative to litigation, custody mediation must undergo several significant changes.

[1] "Parens patriae" literally means "parent of the country." Black's Law Dictionary 1114 (6th ed. 1990).

There are three specific guidelines that I am suggesting custody mediations need to adopt and adhere to in order to provide the best resolution for custody disputes: (1) the best interest of the children should remain a paramount concern of the mediator throughout the mediation process; (2) the mediation agreement should be binding in nature; and (3) the mediator should be a qualified and trained individual who is knowledgeable in the realms of both law and psychology. The reasons for the necessity of these three guidelines shall be discussed in depth later on.

The "best interests of the child" standard has long been the guiding legal standard for child custody disputes and decisions, where the court deems itself responsible for deciding a custody arrangement that serves the child's welfare and interests. The doctrine of *parens patriae* has its origin in 14th century England, where it gave the king the power to protect those subjects who could not protect themselves,[2] such as "all infants, as well as idiots and lunatics; that is, of all such persons as have not discretion enough to manage their own concerns."[3] This role of protector and sovereign has translated itself into the United States court system, giving jurisdiction the ultimate authority to protect individuals who cannot protect themselves. While courts and commentators have attempted other standards, they believe that the best interest standard remains the guiding legal standard in custody disputes, allowing for custody decisions to be based on the child's needs rather than the parent's rights.

However, to say that the courts truly act in the best interest of the child is somewhat oxymoronic if one considers the nature of litigation. The process of litigation is inherently adversarial, with lawyers hired to attack the "enemy," turning custody cases into custody

[2] H. Clark, The Law of Domestic Relations in the United States at sec. 19.4 (West 2d ed. 1988)
[3] S. Brakel, J. Parry & B. Weiner, The Mentally Disabled and the Law 369 (3d ed. 1985)

"battles." Not only does this erode any possibility of a healthy future relationship between the two parties involved, but it also turns the children involved into bargaining chips for parents fighting to improve their position against the other.

It is not only the adversarial nature of litigation that makes it such a poor avenue for resolving custody disputes, but also its length and financial cost. It can take months, if not years, for custody agreements to be reached in court. This not only costs the parties their time, but also their money.

But while there are hefty financial costs involved in litigation, there are perhaps even greater emotional costs at stake, particularly for the children involved. Studies have shown that the longer children are caught in the middle of a divorce proceeding, the greater psychologically damaging it can be for them.[4] This can result in feelings of abandonment, helplessness, rejection, fear, anger, insecurity, and depression, to name a few.[5]

Obviously litigations has its problems, but perhaps one of its biggest problems is the ease of which court-ordered custody agreements can be appealed. There is evidence that

> as many as four postdivorce motions may be filed for each divorce…The Family Law Supreme Court Steering Committee (2003) stated that family law cases account for more than 40% of court filings and almost 70% of reopenings…Highconflict couples use the court system as a means to continue their disputes, often up to 2 to 3 years postdivorce. This vicious cycle tends to deplete financial resources, use an inordinate amount of the court's time and resources, and alienate the ex-spouse as an enemy, eroding positive communication. Most important, this cycle places the children in the middle of a painful clash between parents.[6]

[4] Marc J. Ackerman, *Clinician's Guide to Child Custody Evaluations*, Wiley 3rd Ed., (2006).
[5] Id.
[6] Mitcham-Smith and Wilma J. Henry, *supra* note 5, 371.

Continually extending the length of the litigation through *de novo* trials does nothing but further psychologically damage and emotionally drain all parties involved. It becomes clear, then, that litigating child custody cases is anything *but* in the best interest of the child.

The shortcomings of litigation in providing what is in the "best interest of the child" therefore lie in 1) its adversarial nature; 2) its length; 3) the psychological toll it takes on the children involved; 4) the ease with which appeals can be made. It is no surprise, then, that more and more people have been seeking ADR to compensate for their dissatisfaction with the formal judicial system. And although divorce mediation does rectify many of the problematic areas of the litigation system, it still falls short with others.

The advantages of mediating child custody cases should not go unnoticed and without praise. For one, mediation provides a non-adversarial forum where parties can meet and exchange their sides in a nonthreatening environment. The parents have much more control over the details of the process than they would in a litigated case, reducing a lot of the stress and anxiety of the experience. This reduced stress will undoubtedly reduce the stress put on the kids involved as well. As Diamond points out, "Once the parents realize that they are not on the battleground [of court] and instead on neutral territory, there are often frequent sighs of relief, smiles, and the beginnings of excellence cooperation."[7] Cooperation and collaboration are perhaps two of the biggest resources that mediation brings to the table in comparison to litigation. In *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition*, Bush and Folger suggest that:

> The private, nonjudgmental character of mediation provides the parties to the dispute with an opportunity to explain and humanize themselves to each other…In the presence of a mediator who is skilled at enhancing interpersonal communication, the disputing

[7] Diamond, *supra* note 16, 144.

> parties often discover that they can feel and express some degree of understanding and concern for one another despite their disagreement.[8]

The mediated session helps the parties develop a mutual understanding of each other's needs and priorities, encouraging the parents to come to an agreement peacefully and amicably, which will not only benefit themselves but benefit the children involved as well.

Furthermore, mediation sessions usually only take about a day or a few days to complete, in contrast to litigation, which can take months if not years. The shorter the process, the better off the parties because they are not only saving money and time, but also avoiding headaches and psychological strains. It becomes obvious, then, that mediation is definitely a better alternative to litigation, particularly when the mental stability and welfare of the children is a paramount concern.

However, with all of its benefits, mediating child custody cases still has its problems. The criticisms of mediating them can be summarized as follows: 1) the efficiency and accessibility of mediation is attained at the cost of sacrificing qualified mediators; 2) a lack of legal standards can compromise the settlement; 3) mediators are not properly trained to uphold the best interest of the children involved; and finally 4) mediation's non-binding nature can have severe ramifications on the psychological wellbeing of the children involved.

State law does not require mediators to be legally trained. Usually, this does not compromise the benefits of mediating disputes. But when children, who do not have a voice in the mediation, are involved, the stakes are much higher, making it necessary for custody mediators to follow specific guidelines and have certain qualifications. This need is even greater since mediators can come from a myriad of professional backgrounds, with absolutely no

[8] Bush, R.A.B. & Folger, J.P. (1994). *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition*. San Francisco: Jossey-Bass, p. 18.

previous professional training or experience mediating whatsoever. How can we make sure, then, that these mediators can encourage an agreement that is actually fair for *all* parties involved?

Some have raised the question of whether divorce mediation should be a practice of law. In the case of custody mediations, I believe that it should. In *Is Divorce Mediation the Practice of Law? A Matter of Perspective*, Morrison explains that "A major advantage of restricting mediation to lawyers is that lawyers are trained to specific standards, subject to supervision through the ABA and legislation, and guided by a set of professional ethics. Such supervision and control affords some protection to the public."[9] I am not suggesting that lawyers need to be present during the mediation process, or that mediators need to be lawyers, but that the mediators should at least be legally trained and have knowledge of the law. According to California Family Code 3161, the purposes of a custody mediation proceeding should be to (a) to reduce acrimony that may exist between the parties, (b) to develop an agreement assuring the child close and continuing contact with both parents that is in the best interest of the child, and (c) to create a settlement of the issue of visitation rights of all parties involved that is in the best interest of the child.[10] But not all mediators can have knowledge of these criteria if they are not properly trained.

Some may argue that incorporating law in mediation will not only make the process adversarial, but also compromise the mediator's neutrality. But it is not the law that creates adversity, but rather the *process* of litigation that does. Having mediators who are legally trained

[9] Andrew S. Morrison, *Is Divorce Mediation the Practice of Law? A Matter of Perspective*, 75 CAL. I., REV. 1122-24 (1987).

[10] California Family Code 3161: The purposes of a mediation proceeding are as follows: (a) To reduce acrimony that may exist between the parties. (b) To develop an agreement assuring the child close and continuing contact with both parents that is in the best interest of the child, consistent with Sections 3011 and 3020. (c) To effect a settlement of the issue of visitation rights of all parties that is in the best interest of the child.

can only help the mediation process by ensuring that the party's best interests are upheld, such as to minimize chances of abuse or neglect. Since mediators can come from many different backgrounds, a clear legal standard for defining a mediator's competence, as well as specific guidelines which provide minimum requirements that need to be met for custody agreements must be created to ensure fairness for all the parties involved. Diamond supports this idea, explaining that:

> the informal nature of the proceedings [in mediation] means there is no established recipe. While the mediator's role is supposed to be that of facilitator rather than director, the mediator's personality can heavily influence the course of the session. In theory mediators are not limited by how a court would decide the issues…and this can pose severe problems. [11]

It becomes clear, then, that there could and should be a place for the law in mediation proceedings.

There has been a lot of research that has shown that mediation is just as closely related to the field of psychology than it is to the law.[12] To function successfully and to uphold the wellbeing of the parties involved, mediators should therefore not only be legally educated but also psychologically trained. Crawford supports this idea, believing that in cases that affect the parties both legally and psychologically, mediators should be trained in both law and psychology. She states that "It is reasonable, then, to assume that…a system that processes legal disputes for clients in psychological crisis would benefit from the knowledge bases in both law and mental health research. To create a new conception of competence in mediation grounded in neither would be shortsighted.[13]

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[11] Diamond, *supra* note 16, 234
[12] Ackerman, *supra* n. 7.
[13] Susan H. Crawford et al., From *Determining Capacity to Facilitating Competencies: A New Mediation Framework*, 10 CONFLICT RESOL. Q. 386 (2003)

An additional issue with mediating child custody cases is that its outcomes are not binding. Although some may argue that its non-binding nature is one of mediation's best features, this is not the case when children are involved. A non-binding feature gives the parents a chance to easily dispute the outcome. This can bounce the children back and forth between each parent's custody and keep their permanent living arrangements up in the air. It is no surprise that this can have severe effects on the psychological wellbeing of the child. It is therefore necessary that mediation awards could not easily be appealed. They should be final and binding unless there are circumstances that arise that are clearly against the child's best interest, such as abuse or neglect. But outside of these circumstances, mediators should encourage parents to stick to the settlement upon which they have agreed by making the agreement final and binding. The ultimate aim of the mediation process should therefore be to produce legally binding contracts.

To solve the problems that current divorce mediation practices pose, mediators should therefore be legally trained to know what constitutes as the "best interest of the child" and be psychologically trained to recognize whether those interests can be met. Furthermore, mediators should require parents to sign binding agreements at the end of mediation sessions to ensure that the settlement cannot be open to constant modifications. With these guidelines in place, mediation may perhaps become the *best* way to solve custody agreements.

How can we make sure that mediators are appropriately trained to delegate the decision making? Different experts I have consulted with have had different suggestions. Perhaps working alongside the American Bar Association to learn how to apply the same substantive laws or rules of evidence that guide litigated custody cases can be a start. But what is clear is that without efforts to change the current guidelines for child custody mediations, we cannot rest

assure that mediators could truly know what constitutes as the parties' best interests, nor can we be sure that the mediators would know to recognize conditions of abuse or neglect. With the proper training and supervision, however, they could be. I am not suggesting here that *all* family and divorce mediations must have this type of training, but rather only those mediations that involve third parties like children.

Divorce is a difficult process in itself without being further burdened by the length, cost, and adversity of the litigation process. Parents are already losing their roles as spouses – the last thing they need is to lose their roles as parents as well. The interests of children in divorce proceedings should remain paramount not only for their sake, but for the sake of the entire family unit. Mediation is undoubtedly the best route for settling custody disputes, albeit with some tweaking and minor modifications. Deciding the fate of children is no light matter, and should not be placed in the hands of just anyone. By ensuring that custody mediators are highly skilled and trained in the realm of custody cases, we can rest assure that everyone's best interest is being upheld. If the U.S. judicial system wants to keep sending their cases to mediation to relieve its own court dockets, then it better require mediators to abide by specific guidelines to ensure that those mediating are competent enough to do so.