

Mediation of Divorce Disputes — Is This the Solution?



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The concern about litigating child issues in a divorce action has been around for many years. The concern has led some to suggest and organize mediation programs. Many of these efforts were at the local level rather than state-wide action. Many of these mediation programs are limited to child issues. The majority only take child custody and visitation disputes.¹ Slowly child support and property division issues are being added.² The prevalence of the availability of mediation is really a product of the 1990's.³ In Florida, the number of mediated cases went from 34,000 in 1989 to 50,000 in 1991.⁴

Former Chief Justice Warren Burger wrote in 1982 “[t]he notion that ordinary people want black-robed judges, well-dressed lawyers, and fine courtrooms as settings to resolve their disputes is not correct. People with problems, like people with pains, want relief and they want it as quickly and inexpensively as possible.”⁵

The suggestion is that mediation provides specific benefits that litigation does not. First, in the mediation, the parties, not lawyers or the Judge, are the ones to make their agreement. Especially if both sides are represented by lawyers, this does not typically take place

1. Mary Kay Kisthardt, *The Use of Mediation and Arbitration for Resolving Family Conflicts: What Lawyers Think About Them*, 14 J. AM. ACAD. MATRIMONIAL L. 353 (1997). This is a report from a survey of American Academy of Matrimonial Lawyers in the fall of 1996. One hundred twenty-three surveys were returned to the editor. One hundred and four reported mediation of child custody and visitation. Of this number fifty-three noted spousal support was included and fifty-six indicated that property division was also included. *Id.* at 356. Kisthardt reported that these numbers are consistent with information provided by the National Center for State Courts. In 1991 it reported that of the two hundred and five court-related divorce mediation programs for which it had data, one hundred and nine focused exclusively on custody and visitation. Another ninety-six included spousal support and property division issues as well. *Id.* n. 9.

2. *Id.* at 356 (noting that fifty of the respondents reported child support was also included).

3. Alison Gerencser & Megan Kelly, *Family Mediation: An Alternative to Litigation*, 68 FLA. B.J. 49 (1994).

4. *Id.* The first mediation program started in Florida in 1979 so they were in the vanguard. As was true in many states, the mediation programs started in individual counties and Florida's experience started this way. Even today not all counties have a mediation program in Florida. *Id.*

5. Deborah Gaber & Denise Foley, *The Case for Mediation in Family Law Practice*, 17 PENN. LAW. 23, 24 (1995).

in traditional litigation. Secondly, the agreement made between the parties is aided by the mediator. This mediator is not like a judge with the power to impose a result on the parties. This mediator is not like lawyers because the mediator does not represent either of the disputants. The mediator's goal is to help the parties work out their own problems. It is suggested that if people work out disputed issues on their own, they will be more likely to abide by their compromises.

Proponents suggest that mediation also works better with the mental and emotional side effects of the divorce process. A study by Jessica Pearson and Nancy Thoennes examined three issues.⁶ First they examined compliance of the parents with their agreement. Second, they examined perceptions of the equity of the compromises. Last they examined the satisfaction with the settlement the parties had worked out.⁷ They examined these issues among three types of parents. First were the parents that settled in mediation. Second were the parents who did not reach a settlement in mediation. The third group were those parents that never were exposed to mediation. Pearson and Thoennes found more favorable outcomes for parties who settled in mediation on all three points.⁸ The abil-

ity of the parents to communicate is the key. Pearson and Thoennes found that if the parents said they were not "on speaking terms," that these were the parents whose outcomes were the same whether in mediation or the court system.⁹ Pearson and Thoennes note their results are consistent with earlier studies. One of these mentioned is by Felstiner and Williams which reported that even eight to fourteen months after mediation of the difficult issues of assault, battery and harassment disputes, seventy-eight percent were pleased they had used mediation, and fifty percent thought the mediation had helped.¹⁰

In contrast, is the dissatisfaction parents in custody or visitation disputes have with the adversarial system and the anger they have toward their lawyers.¹¹ We, in the legal system, should pay attention to dissatisfied customers. How much of the blame is on the adversarial system and how much is on the individual lawyers is not discussed. I suspect dissatisfaction with both are involved in the animosity shown toward the parties' lawyers.

It should be noted that a survey of matrimonial lawyers contained one concern about mediation. They were concerned that an agreement arrived at in mediation was

6. Jessica Pearson & Nancy Thoennes, *Divorce Mediation: Reflections on a Decade of Research*, MEDIATION RESEARCH: THE PROCESSES AND EFFECTIVENESS OF THIRD-PARTY INTERVENTION, 9 (Kenneth Kressel & Dean G. Pruitt eds., Josey-Bass 1989). This article discusses three different studies and one of these is from data collected from three different parts of the country. The one study in Denver is not court-based mediation. The second study uses data collected from the Los Angeles Conciliation Court, the Domestic Relations Division of Hennepin County, Minneapolis and the Family Relations Division of the Connecticut Superior Court. The data collected in this study involve court-based mediation. The third study was of Delaware mediation of child support. *Id.* at 9-10. The first two studies were mediation of custody and visitation disputes.

7. *Id.* at 26.

8. *Id.*

9. *Id.*

10. *Id.* at 27.

11. Marsha Kline Pruett, & Tamara D. Jackson, *Perspectives on the Divorce Process: Parental Perceptions of the Legal System and Its Impact on Family Relations*, 29 J. AM. ACAD. PSYCHIATRY & L. 18, 23-25 (2001). Pearson & Thonnes, *supra* note 44 at 27, also found dissatisfaction with divorce issues handled in the court adversarial system.

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unlikely to change even if the client's lawyer thought it needed to be changed.¹² If the mediator is not a lawyer or trained like one and lawyers are not present at the mediation there is a danger that clients in unequal bargaining will enter into unfair agreements and will be resistant to change them even on advice of their lawyer.

About two thirds of the parents who mediate, settle in full or in part when going through mediation. In Florida, one study done in the early part of the 1990's found that seventy percent of the parents settled in mediation. Nearly all of the remaining thirty percent settled before trial.¹³ A study in Hawaii found that sixty-two percent of the parents settled.¹⁴ A study of Oregon's state-wide program as applied in one county found that sixty-one percent reached full agreement through mediation. Another twelve percent reached a partial agreement. Thus, seventy-three percent of this study reaches some agreement in mediation. Another six percent reached a full or partial agreement that subsequently failed. This left twenty-two percent of parents who went through mediation who

did not reach any agreement.¹⁵ It should be noted that at the time this study was gathering data, state-wide mediation legislation mandated that all child custody and visitation disputes be mediated.¹⁶ A recent amendment to the Oregon legislation now leaves mediation up to the judge's discretion.¹⁷

In the Oregon study, the parents had slightly below two children on average and were largely in their late twenties and early thirties.¹⁸ The number of issues that the parties had to resolve increased with the magnitude of the parties' failure to reach agreement. In the cases that reached an agreement, the parties had on average 3.1 issues per mediation. In contrast, the twenty-two percent of parents that did not settle in mediation had on average 6.25 issues per mediation. The parents that reached either partial resolution, or partial or full resolution that ultimately failed, had on average 4.68 and 5.46 respectively.¹⁹ When the parents did not settle, the most commonly raised questions were over parenting style/capacity, domestic violence, and harassment. Yet, with the exception of harassment these were also the most

12. Mary Kay Kisthardt, *The Use of Mediation and Arbitration for Resolving Family Conflicts: What Lawyers Think About Them*, 14 J. AM. ACAD. MATRIMONIAL L. 353, 374-75 (1997). This study involves a survey of members of the American Academy of Matrimonial Lawyers. It found that attorneys were concerned that parents who had worked out a mediated agreement were reluctant to change the agreement even on the advice of their attorney. This was true even when it was clear that the agreement was not binding until the lawyers reviewed the agreement. They reported that when they tell their client that their agreement has problems, their clients start viewing their lawyer as the problem.

13. Alison Gerencser & Megan Kelly, *Family Mediation: An Alternative To Litigation*, 68 FLA. B.J. 49 (1994).

14. Bradley A. Coates, *Family Law Mediation*, 3 HAW. B.J. 6 (1999).

15. Kathy T. Graham, *Child Custody In The New Millennium: ALI's Model Contrasted With Oregon's Law*, 35 WILLAMETTE L. REV. 523, 552 (1999). Oregon's law is considered a model in part because initially it was mandated state wide. "(1) In a domestic relations suit, where it appears on the face of one or more pleadings, appearances, petitions or motions, including any form of application for the setting aside, alteration or modification of an order or decree, that custody, parenting time or visitation of a child is contested, the court shall refer the matter for mediation of the contested issues prior to or concurrent with the setting of the matter for hearing." OR. REV. STAT. § 107.755 (1997). Note that the referral to mediation is made by the judge late in the divorce proceeding.

16. *Id.* at 551.

17. *Id.* at 552.

18. *Id.* at 553-54.

19. *Id.* at 554.

frequently raised issues in the cases that settled. Thus, in this study, the number of issues rather than the type of issues seemed more indicative of success or failure.²⁰

However, there were specific complaints that were more frequently raised in cases that did not settle. For example, sexual abuse appeared as an issue in twenty-two percent of the cases that did not settle but only four percent of the cases that did settle.²¹ Imbalance of power and extensive litigation were mentioned in sixteen percent of the cases that did not settle and only three percent of the cases that did settle.²²

The concern about domestic abuse and the imbalance of power has increasingly been identified as a problem for mediation. Some believe that mediation, when these issues are present, can result in harming one of the parties.²³ When the Oregon program was amended to remove mandatory mediation and place referral to mediation in the hands of a judge,

the legislation created a screening process to enable mediators to determine whether domestic violence or similar issues are present.²⁴

The other problem identified by those concerned with mediation is the fact that mediators vary widely in the way they conduct the mediation. On February 19, 2001 the House of Delegates of the American Bar Association adopted the Model Standards of Practice for Family and Divorce Mediation. This adoption was recommended by both the Family and Dispute Resolution Sections of the American Bar Association.²⁵ In 1984 the American Bar Association promulgated Standards of Practice for Lawyer Mediation in Family Law Disputes.²⁶ In 1996 the Family Law Section decided that the 1984 Standards needed to be revised. A major limitation to the 1984 Standards was the fact that they were limited to lawyer mediators.²⁷ Many mediators are not lawyers. The language of the 1984

20. *Id.* at 554-55.

21. *Id.* at 555.

22. *Id.*

23. *Id.* at 556, 564. Attorneys who are members of the American Academy of Matrimonial Lawyers were surveyed in the fall of 1996. These lawyers were concerned about "power imbalances". They saw these power imbalances as creating victims which mediation has little power to change. Mary Kay Kisthardt, *The Use of Mediation and Arbitration for Resolving Family Conflicts: What Lawyers Think About Them*, 14 J. AM. ACAD. MATRIMONIAL L. 353, 384-85.

24. *Id.* at 556-57.

25. Andrew Schepard, *An Introduction to the Model Standards of Practice for Family and Divorce Mediation*, 35 FAM. L. Q. 1 (2001). This article includes the Model Standards at the end of the Article. *Id.* at 27. The article notes that the American Bar Association approved just the standards and not the accompanying commentary. There are also published standards for mediation in general. These standards called Model Standards of Conduct for Mediators, 1995 were put together by the American Arbitration Association, Councils of the American Bar Association's Sections of Litigation and Dispute Resolution and the Society of Professionals in Dispute Resolution (SPIDR). SPIDR has now joined with the Academy of Family Mediators and the Conflict Resolution Education Network to form the Association of Conflict Resolution. Judy M. Filner, *New Trends Will Mediator Credentialing Assure Quality and Competency?*, 3 DISPUTE RESOLUTION MAGAZINE (Fall 2001). These standards for mediators were again worked on starting in 2002 and adopted by the House of Delegates of the American Bar Association on August 2005. <http://www.abanet.org/dispute/webpolicy.html> (last visited June 5, 2005). This cite also includes a comparison of the standards from 1994 with the one from 2005.

26. *Id.* at 9.

27. *Id.* at 10 Many of the issues relating to the mediation of abuse charges and domestic violence were also not addressed in the 1984 Standards. *Id.*

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Standards also conflicted with other guidelines for the conduct of mediation.²⁸ The work on the new standards was begun in 1998.²⁹ More than eighty proposals for change were submitted.³⁰

The Standards are based on a dispute resolution process not to be confused with mental health therapy, counseling, or legal representation. They place on the mediator a duty to inform participants in the mediation of this distinction. These standards allow the mediator, with the consent of the parties, to draft the agreement. Not surprisingly, the Standards do not deal with the unauthorized practice of the law.³¹ The Standards leave to other rules the resolution of this question.

Relying on studies suggesting that participation in the mediation by lawyers is a good thing the Standards provide for the lawyers to be present in the mediation, if the parties consent.³² One of these studies compared Maine lawyers who participate in that state's mandated family mediation and New

Hampshire lawyers who are not obligated to participate in the mediators.³³

Some are concerned with power imbalances between women and men and the standards do not do much to ensure a fair result. For example, one study suggests that support amounts in mediated agreements are lower than those ordered by a court.³⁴ Since women are still by far the custodial parent in most of the cases, this, at the very least, suggests a disadvantage to the custodial parent. The Standards do contain an unconscionability standard, but Schepard suggests that this standard be narrowly applied. He suggests that it should be something like the standard for shocking the conscience of the court.³⁵ This standard suggests that the mediator will be concerned with fairness only at the extreme. This certainly would not protect a person in a power imbalance. This alone suggests that lawyers should be involved in the mediation.

The standards do address the concern for domestic violence.³⁶ They term it domestic

28. *Id.*

29. *Id.* at 11.

30. *Id.*

31. *Id.* at 16.

32. *Id.*

33. Craig A. McEwen, Nancy H. Rogers, and Richard J. Maiman, *Bring in the Lawyers: Challenging the Dominant Approaches to Insuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317, 1367-68 (1995). The discussion of their empirical research in Main and New Hampshire begins on page 1357. This research was done by McEwen, Maiman and Lynn Mather. *Id.* at 1317 note *. Eighty-eight Maine lawyers and seventy-five "comparable" lawyers in New Hampshire were interviewed by the researchers. *Id.* at 1358. In addition, the researchers took information from divorces in 2001 in three counties in New Hampshire. In Maine, information was taken from 4790 files in four years from the late 1970's to 1988. *Id.* at 1358-9 n.244. The study was not focused on divorce mediation per se. But the information they gathered dealt with attorneys and others in mediation. Maine at the time required mediation of divorce matters and includes within these matters property division and support rights in addition to custody and visitation. This is an inclusive standard that I think is the best. All family disputes are harmful to children, whether it is over property or child support or other child issues.

34. Person and Thoennes, *supra* note 6 at 18 (finding that mediated child support amounts, in a Delaware study, were lower than amounts awarded by a master or judge for families of comparable economic position).

35. Schepard, *supra* note 169 at 15.

36. *Id.* at 20-1.

abuse and this in turn is defined more broadly than domestic violence.³⁷ Two of the standards seem the most important. First, the Standards require that mediators get special training so they can recognize and deal with domestic abuse issues. It is a question whether judges dealing with domestic relations cases have such special training. Second, the Standards require the mediator to use reasonable efforts in order to screen for the presence of domestic abuse.³⁸ The mediator is not required to follow any specified standards in screening since none were agreed to by the experts drawing up the Standards. There is no obligation to screen for child abuse and neglect.³⁹

Although a number of groups are thinking about the topic, there is no uniform credentialing of mediators. There is no mediation license. Mediators rely on other degrees they have, rosters that include them that do some form of screening. One of the problems in creating a credentialing program is that mediators disagree about how the skills are developed. One side sees as important mediation law with its own body of knowledge

in which an individual must specialize. The other side sees this as unimportant because mediation skills are so amorphous they are part of a non measurable "life stance."⁴⁰

Of interest in this paper is whether mediation is better than court settlement or trial in reducing returns to court. Returns to court is one way of testing continuing fighting. Avoiding relitigation would be one way of having a positive impact on the divorcing process from the child's perspective. Unfortunately not that many studies have been undertaken that ask this question.

The Pearson and Thoennes studies examine the relitigation issue.⁴¹ In the Colorado study in which the mediation was not connected with a court order, the parents were interviewed at three points in time. First was referral to mediation, and the second was after final orders were issued and then again six months after that. In addition, seventeen months after the final orders, the court files were examined to detect relitigation.⁴²

In the Colorado study, six months after the final order, the study found eighty percent of the parents with mediated agreements were

37. *Id.* (defining domestic abuse to include issues of control and intimidation).

38. *Id.* Also included is a requirement for the mediator to take measures to ensure the safety of those involved in the mediation. Last is a required statement at the beginning of the mediation that tells the participants that confidentiality will not preclude informing authorities about ethically and legally mandated disclosures such child abuse.

39. *Id.* at 21.

40. Juliana Birkoff and Robert Rack, *Points of View: Is Mediation Really a Profession?*, 10 DISP. RESOL. MAG. (Fall 2001).

41. Pearson and Thoennes, *supra* note 6 at 21-2.

42. *Id.* at 21.

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complying with their agreement. This compares with sixty percent of the non mediated settlements having compliance.⁴³ More than one third of the parents with non mediated settlements reported serious disagreements over their settlements, whereas only ten percent of parents with mediated settlements were having such disagreements.⁴⁴ This same disparity was less sharp but observed in their Los Angeles, Minneapolis, and Connecticut study (three-cities study).⁴⁵

On the relitigation issue, the Colorado study and the three-city study come up with somewhat different results. The Colorado study found a thirteen percent return to court among the mediated settlement parents. Thirty-five percent of the non mediated settlement parents returned to court during the seventeen months after the final decree.⁴⁶ The three-city study found at the time of the last interview that relitigation rates between the parents who mediated their agreement had twenty-one percent return to court. In contrast, the adversarial group returned to court

at a rate of thirty-six percent.⁴⁷ However, the three cities study did a five year analysis of a sample of their original sample and found a relitigation rate of about twenty-five percent in both the mediation families and the adversarial families.⁴⁸ Perhaps by five years later, the parents are tired of fighting.

Unfortunately, but not surprisingly, the children in the mediating families did not do significantly better on a one hundred and twelve question behavioral rating test filled out by their parents in the three-cities study.⁴⁹ The children in families that mediated did do better on questions based on family dynamics and parent-child relationships, however.⁵⁰

The study found eight factors that contributed the most to successful child adjustment. These included the age of the child. Younger children were rated by their parents as better adjusted. Second was the absence of physical violence during the marriage. Third were the high levels of cooperation between the parents. Fourth were a minimal amount of changes in the child's life. This includes

43. *Id.* The Colorado study involved parents with custody problems that were flagged by the Colorado courts. These parents were then randomly sent either to mediation or a control group. A third group of parents fell into a third group. These were the parents assigned to mediation who chose not to participate. There were 217 clients that participated in mediation, 113 who rejected mediation and 89 folks who used the traditional adversarial process. *Id.* at 10-11. The parents in the three groups were interviewed. It is interesting to see the characteristics of the parents who rejected mediation when compared with the parents who accepted their assignment to mediation. The mediation parents were on average more educated and had better paying jobs. Current ability to communicate with the other spouse was a telling factor between the two groups. Sixty percent of those men rejecting mediation said that they were not presently communicating with their spouse. In comparison, only 15 % of the men who chose to mediate reported this. *Id.* at 13.

44. *Id.* at 21.

45. *Id.* Recall that the Los Angeles, Connecticut, and Minneapolis studies were all court-bases systems of mediation. Unlike the Colorado study, there apparently was no attempt to randomize the parents into control and non control groups. *Id.* at 11-12.

46. *Id.* at 21-22. Recall that the researchers examined court files for these parents to determine how much relitigation was going on in the different groups.

47. *Id.* at 22.

48. *Id.* at 21 In both groups over a five year period, 25% of the parents returned to court to relitigate. The Delaware study of child-support mediation also found no difference with relitigation rates between the two groups. *Id.* at 22.

49. *Id.* at 23. The test the study used is called the Achenbach-Edelbrock Behavior Checklist.

50. *Id.*

things like moving and changing school. Fifth was an agreement between the parents on basic child raising practices. Sixth was the lower awareness of the children of their parent's anger. Seventh was the close proximity of mom and dad's houses. Last was the frequent visitation that was present the first time the researchers talked with the family.⁵¹

A more recent study examined mediated custody and questioned the statistical validity of earlier studies. This study, by Dillon and Emery did phone interviews nine years after the divorce.⁵² They point out that most of the research on this subject does not involve a random sample.⁵³ No doubt a random sample is important in properly making statistical inferences to a population. Dillon and Emery point out that allowing parents to voluntarily select mediation or the adversarial approach may find differences between the two groups that existed before any mediation. In other words, parents who select mediation may be able to communicate better, may have more concern for the impact of the divorce on their children, and may be more likely to cooperate than fight. The parents in Dillon and Emery's study were randomly assigned mediation and court.⁵⁴ Since the parents could reject mediation even in this study, it is no more random than the Colorado study of Pearson and Thoennes. As Dillon and Emery point out, forcing parents to stay in mediation against their will would not be ethical.⁵⁵ Letting parents leave destroys the randomness of the sample.

Perfection would randomly assign parents to mediation and adversarial methods and the parents would have to stay. Given that this cannot be done, all the results of these studies must keep this in mind. Certainly, an argument can be made that taking a non randomized sample and controlling statistically for factors that would influence parental choice of mediation over litigation is a better way to proceed if a random sample cannot be obtained. Thus, Dillon and Emery should not so easily dismiss earlier studies that take this approach.

Dillon and Emery point out that they are the only study to examine the issues more than two years after the divorce of the children's parents. The nine-year examination they use has its own problems with faulty memories. On the important question of whether mediation reduced returns to the courthouse, the former wives and husbands had different memories in some of their sample.⁵⁶ Even these authors had to make an assumption, and they make it. This assumption is that parties would be more likely over nine years to forget some returns to the divorce courthouse. Based on this assumption, the researchers took the higher number of returns to court reported by one of the parents as the true returns to court for that former marital unit. Given this assumption, they find no significant difference between the mediation and litigation group in the number of times the parents returned to court.

51. *Id.*

52. Peter A. Dillon & Robert E. Emery, *Divorce Mediation and Resolution of Child Custody Disputes: Long-Term Effects*, 66 AM. J. ORTHOPSYCHIATRY 131(1996).

53. *Id.* at 133.

54. *Id.*

55. *Id.*

56. *Id.* at 136. Note, that their assumption that parents would be more likely to forget returns to court might affect this result. Since they took the parental estimate with the higher numbers of return to court this may have over estimated the number of returns to court. If the parents with different memories were more likely to have landed in mediation than the parents who took the adversarial method, then it would affect the lack of a difference found in the study in the relitigation rate.

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In contrast with the relitigation analysis, the two groups in the sample were different in the frequency and recentness of the non-custodial parents visits with the children. The non-custodial parents in the mediation groups were more likely to have visited weekly or more frequently. The litigation non-custodial parent was more likely to have visited in the last year or not at all. The mediation non-custodial parent was more likely to have visited the children within one month of the survey. The litigation non-custodial parent was more likely to have visited within the year or more prior to the survey.⁵⁷

The evaluative studies that do not use a random sample, try to statistically control for the factors that may well exist before the mediation in each of the two groups of divorcing families. For example in a study by Joan Kelly, she found that parents who mediated their disputes reported fewer conflicts than the litigation group at the time of the divorce.⁵⁸ During the divorce, the mediation group also reported less conflict about visitation and child support issues. The mediation and litigation samples were not randomized. It is entirely possible that the differences found were really caused by differences in the two groups that existed while the parents were married. This would mean that the resulting differences were not the result of mediation over adjudication. Statistically these

researchers had to add as independent variables as many of the pre-divorce differences between the two groups they could think of. In Kelly's study, she controlled for baseline differences between the two groups on four relevant variables. These were child-specific cooperation, spousal fair-mindedness, parental ability, and spousal involvement in the child's life during the marriage.⁵⁹ The mediation sample was taken from parents who came to their office. The litigation sample included those called by the researchers who agreed to participate. This was 43% of those called.⁶⁰ The sample was not a random one.

Controlling for these other variables that affect the level of conflict is required in this model because the couples were not randomly assigned to the mediation or adversarial groups. Regression on a group that has been randomized is the gold standard. But, by including observations on the four pre-divorce relevant variables in the regression model along with whether the couple was in the mediation or litigation groups, the net impact of mediation versus litigation can be estimated. In the recent study by Dillon and Emory, couples were randomized into litigation or mediation but had the option of switching out of mediation into litigation.⁶¹ Because of this option, the causality that can be ascribed to statistically significant results from randomized studies is lacking. While this

57. *Id.* at 137. The correlation values for each of these regressions is good. They are .01, .02, .04, and .02 respectively. Remember that regression correlations .05 and below indicate relationships that are related at the 95% confidence level and above.

58. Joan B. Kelly, *Parent Interaction After Divorce: Comparison of Mediated and Adversarial Divorce Processes*, 9 BEHAV. SCI. & L. 387 (1991).

59. *Id.* at 388.

60. *Id.* at 399.

61. Peter A. Dillon & Robert E. Emory, *supra* note 52 at 133. This certainly suggests that their method is superior. This depends on whether Kelly has been able to gather data and include as independent variables all pre-divorce factors related to post-divorce fighting. If she leaves out something that is related to post-divorce fighting, then the predictive powers of her model are lessened.

flaw is undesirable, no experiment involving human subjects where consent must be obtained is completely free of statistical selection bias. Thus, the alternative of adding, as independent variables, pre-divorce differences between the two groups that might affect post-divorce fighting is a good way to isolate the effect of mediation as opposed to adjudication on post-divorce fighting.

Kelly's study is different from the previously mentioned studies because all divorce issues were mediated or litigated. In other words, property division and liability allocation were mediated or litigated along with support questions and visitation and child custody.⁶² The parents in the two samples answered questionnaires at five points in time. The first time was when the mediation started for the mediation parents. The adversarial group was first questioned approximately two months after the divorce had begun. The second time for the questions was when mediation finished for the mediation parents and six months after the divorce filing for the adversarial parents sample. The third time the parents in both groups were questioned was when the divorce was finalized. The fourth and fifth times the parents in both groups

were questioned were one and two years after the divorce.⁶³ Except for the initial meeting with the adversarial sample, correspondence was through the mail.⁶⁴

The two groups were similar in length of marriage, time since separation, reported level of marital conflict and quality of marital communication.⁶⁵ There were differences in that the mediation sample had more years of education, were on average three years younger and were more likely to have children of minor age.⁶⁶ The mediation participants were more likely to be more depressed and guilty. They were more likely to view their spouses as fair-minded. They also perceived themselves as more capable of cooperation, specifically in regard to their children.⁶⁷ Note that these last two differences, fair-minded viewing and child-specific cooperation are added in Kelly's model to control for the effect of those two pre-divorce characteristics.

One of the hypotheses that Kelly was examining was whether mediation parents were less likely to fight either during the divorce or within two years after the divorce. She found that at the time of the divorce, mediation parents reported significantly fewer conflicts in the six months preceding the final

62. Joan B. Kelly, *Parent Interaction After Divorce: Comparison of Mediated and Adversarial Divorce Processes*, 9 BEHAV. SCI. & L. 387, 388 (1991).

63. *Id.* at 390.

64. *Id.* at 388.

65. *Id.* at 390. Men in both samples were more interested in reconciliation. The women in both samples were more angry at their spouses and were more dissatisfied with their marriages.

66. *Id.* As discussed in the next citation, one of the two independent variables that has statistical significance in predicting post-divorce fighting is length of marriage. The shorter the marriage the more likely the parties were to fight. Kelly's sample has differences. The mediation group is three years younger than the adversarial group. This may mean that the mediation group is in marriages of less duration and that more of them would be in marriages under seven years. Kelly reports that the sample groups are comparable on how long they have been married. This is a surprise given that the mediation sample was both younger and they had younger children. In the sample in this paper, the age of the parents was not disclosed by the filed cases. Thus, the age of the parents was not included in the divorce files. Only the length of the marriage was tested.

67. *Id.* at 391.

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divorce than did the adversarial parents.⁶⁸ On the Ahron's Coparental Communication scale, mediation parents reported fewer arguments, less tension and a less hostile atmosphere than did adversarial parents.

The effect of the four pre-divorce variables is interesting here. The significance of the Ahron's scale differences remained even when controlling for fair mindedness, parental ability and spousal involvement. But when pre-divorce parental cooperation was included, the mediation group's scores on the Ahron's scale were no longer statistically significant at the ninety-five percent confidence level.⁶⁹ This suggests that effect of the pre-divorce parental cooperation may be the real reason the parents in mediation had fewer arguments, less tension and a less hostile environment rather than the fact that they went through mediation. Nonetheless, the mediation group had fewer fights during the six months prior to the end of the divorce even when the authors controlled statistically for all four pre-divorce variables.

One year after the divorce, the mediation parents reported less conflict on medical/dental issues and religious and moral issues. They did not, however, report less conflict on topics of education, child rearing or recreational activities and lessons.⁷⁰ The mediation parents were lower in co-parental anger than the adversarial parents. The adversarial parents reported significantly higher scores on an "anger toward spouse scale" than did the mediation parents. This included their own anger and their rating of their spouse's anger.⁷¹ This high level of anger was not evident at the beginning of the divorce in the adversarial group.⁷² Adversarial parents were also more likely to say that the process had increased their anger when compared with the mediation parents.⁷³

All better conflict performance noted above for the mediation parents disappears when the parents answer the questions two years after divorce.⁷⁴ Mediation parents also had significantly more contact with the other spouse than did the adversarial parents dur-

68. *Id.* at 393. This is even after controlling for the four pre-divorce variable differences. Mediation parents reported less conflict in visiting or parenting arrangements and child support issues when compared with adversarial parents. *Id.*

69. The p value was reduced to .09. This means that mediation as an explanatory variable was significant at the ninety-one percent level. Scientific conventional wisdom which uses the ninety-five percent confidence level as the cut off point of statistical significance would call this insignificant or significant at the ninety-percent level.

70. *Id.* at 393.

71. *Id.* at 393-4.

72. *Id.* at 394.

73. *Id.* It should be remembered here that the anger created by the adversarial process tends to be directed at the parent's lawyer as well. Marsha Kline Pruett, & Tamara D. Jackson, *supra* note 11 at 23-4. The attorneys who were appreciated the most were those who provided information about the process, who helped stabilize the process and reduce conflict, those who provided emotional sustenance in the form of listening and encouragement. They also liked their lawyer's advocacy efforts. *Id.* at 21-2.

74. Kelly, *supra* note 62 at 394. (noting the conflict superiority that existed in the mediation group during the divorce and one year after disappeared when the two-year analysis was made).

ing the first year. This also disappears at the two-year mark. Mediation parents had significantly more cooperation with the other spouse one year after the divorce but this too disappears at the two-year mark.⁷⁵

It is important to note that the one to two years following a divorce is often the most difficult time for the child. Having more parental cooperation, less conflict and more contact during this crucial two-year period should help a child go through the psychological tasks of adjusting to the divorce more easily. It has been said that resolution of the loss of the family group is the hardest for the child to accomplish.

On the economic front, mediation parents were “overwhelmingly” more likely to provide for college expenses for their children than did the adversarial parents. Adversarial parents reported that their attorneys told them this was not recoverable.⁷⁶ This is an interesting result given the Pearson and Thoennes study of child support in Delaware which found that mediated settlements on child support resulted in lower amounts of support than did the adjudicated cases before a master or judge.⁷⁷ Recall, that the economic standing of the parents was comparable in that Delaware study.

A recent study from Australia was comparing mediating parents who were focused on children with mediating parents who also

worked with a specialist who had separately worked with the parent’s child or children.⁷⁸ The first group was called the child focused group. The second group was called the child intervention group. The groups were tested immediately, three months after the mediation and one year after the mediation.⁷⁹ The children were not involved directly in the mediation, but the second group had the specialist who represented the children’s concerns to the parents in the mediation. One year later, 55% of the parents in the first study could not remember what had helped their mediation progress whereas only 28% of the second group fell in this “I cannot remember” area. Only 8% of the first group credited success with their focus on the children. In the second group, 43% responded that hearing from their children was what they credited with helping with the mediation.⁸⁰ Fathers were especially impressed.⁸¹

One year later both groups showed benefit in solving problems from the mediation. But the child involvement group was more likely to have repaired parental relationships. The attachment relationship was improved and “produced developmentally sensitive living arrangements that tended to favor stability of residence, and resulted in greater contentment with living arrangements among both parents and children”⁸²

75. *Id.*

76. *Id.* at 396.

77. Pearson and Thoennes *supra* note 6 at 18. Perhaps this is because the non custodial parent was providing money for other things like a college education. Pearson and Thoennes do not discuss this. It may also reflect the fact that their study of mediation just looked at child support and Kelly’s study of mediation looked at the total property/support/custody issues.

78. Jennifer E. McIntosh, Yvonne E. Wells, Bruce M. Smith, and Caroline M. Long, *Child-Focused and Child-inclusive Divorce Mediation: Comparative Outcomes from a Prospective Study of Post Separation Adjustment* 46 FAM. CT. REV. 105 (2008).

79. *Id.*

80. *Id.* at Table 5 pg. 116.

81. *Id.* at 117-18.

82. *Id.* at 120.

MEDIATION OF DIVORCE DISPUTES

A fifth study examined multifamily mediation. Most mediation is done with one couple at a time. Multifamily mediation is quite different. Janet R. Johnston and Linda E.G. Campbell have a study comparing single family mediation with multifamily mediation and comes to some surprising results.⁸³ Their report on their study which also interviewed the families two to three years after the divorce.⁸⁴ The parents in this study were especially difficult. They were all locked in an unresolved custody battle that was so bad that their attorneys and a court mediator had been unable to help them. "In fact, at intake they had met many of the criteria used to predict poor prognosis in mediation: they had been enmeshed in conflict, litigious, exhibited high levels of anger and violence and were ambivalent about their separation."⁸⁵

The study put half of the families in multifamily mediation and half in individual mediation. The two groups were similar in demographic characteristics. These included ethnicity, occupation, employment status, and income.⁸⁶ They were also similar in dispute-related data. This included length of separation, length of parental dispute over child, content of dispute, and conflict tactics.⁸⁷ Part of the study was to examine the effectiveness of mediation. Another part of the study was to compare the effectiveness of mediation between the individualized mediating parents and the parents who mediated in a group. The group mediations included five families in each group mediation.⁸⁸ Each group was balanced to provide different perspectives among the mixed-sex group. For the first four of the seven sessions, the parents are put in

83. JANET R. JOHNSTON & LINDA E.G. CAMPBELL, *IMPASSES OF DIVORCE: THE DYNAMICS AND RESOLUTION OF FAMILY CONFLICT* (1988).

84. *Id.* at 245.

85. *Id.* at 255.

86. *Id.* at 247.

87. *Id.* at 246-47. One of the main purposes of all of these studies is to extrapolate the findings from the sample analyzed to the population of divorcing families fighting over children. To extrapolate from the sample to the population, the analysis must be statistically sound. The data in Johnson and Campbell's study were probably placed in the two groups by pairing. This is not randomizing the sample. Pairing is a matching of individual parents with the stated characteristics of demographic data, length of separation, length of parental dispute over the child, content of the dispute, and conflict tactics. This is done so that both groups will have parents with similar characteristics. Once the individuals are paired, then they then must be put in the two groups randomly. The article does not indicate this was done one way or another. Compare the pairing technique with randomizing the couples into the two groups and then the technique which controls for the variables used in the study in a regression analysis. In other words, control in the regression equation for demographic data, length of parental separation, length of parental dispute over the child, content of the dispute, and conflict tactics. Since the study used pairing, they did not need to do a regression analysis and could state their results in means and standard deviations from the means which is what Johnson and Campbell did. A lot of these psychological and psychiatric studies use the pairing technique. Which technique is superior? When the sample size is small, and this sample had forty couples per group, pairing avoids some of the problems that a regression analysis could have. Essential for the pairing to be successful, the researchers must have identified all of the independent variables that might have an impact on parental behavior in order to do accurate pairing. This can be also a problem with regression analysis and the data collected.

88. *Id.* at 223. Each group mediation used two group leaders. They also had an interdisciplinary group of clinical psychologist, sociologist, mediator and attorney available. At the time the parents were mediating, their children were also meeting with a trained therapist. *Id.*

different but concurrently running sessions. These first four sessions were considered the pre-negotiation phase while the parents are separated.⁸⁹ The researchers found that the other members of the group become almost a “transitional family.”⁹⁰ As each person’s problem is addressed, the others listen, and these listening parents support, confront and serve as models for new ways of relating.⁹¹ The group also brain stormed and would at time propose new ways of seeing the problem. For the last three sessions, the parents were in the same room with other parents trying to work out a marital settlement agreement for the issues dealing with their children.⁹² In the combined sessions, parents in an impasse were encouraged to take time out and watch other couples work out their differences. It is important to note that these mediations involved at least two mediators and their staff expertise included clinical psychologists, sociologists, mediators and attorneys.⁹³

It is important to note that the multifamily mediations took on average 17.3 hours per family while the individualized mediations took on average 27.6 hours of mediation. The multifamily-mediated parents maintained contact with the Center for on average 6.4 months and the individually-mediated parents stayed in contact with the Center for on average 12.1 months. This made the multi-

family mediations more than forty percent less expensive then the individual mediation.⁹⁴ It seems that the dynamics of the multifamily mediations had the other families helping one another out. This is a question of cost. Multifamily mediation if it is as effective as individual mediation, is the direction to head. Perhaps this type of intensive mediation can only be used on the most troubled of custodial families. Multifamily mediation should be the model used.

The multifamily mediations in this study were just as effective as the individual mediations. Success was measured by how many parents had made an agreement and how many used their skills learned in mediation to renegotiate their agreement compared with those who were in conflict again. This was 85 percent of the multifamily mediating parents and 80 percent of the individual mediating parents initially.⁹⁵ Six months later, the number had dropped to 75 percent for the multifamily group and 70 percent for the individual group. Two years later, 44 percent were still working with their original plan. An additional 16 percent had renegotiated their agreement and were living with that. This meant that 64 percent of the multifamily group were cooperating and 63 percent of the individual group were cooperating. Almost two thirds of the families were able to work

89. *Id.* at 223-24. The first four sessions, where the parents are in different groups, are designed to increase each parent’s realization of the nature of their impasse, of the harm their conflict created for their children, of the need for a sound parenting plan, and of the need to ground their demands in reality.

90. *Id.* at 224.

91. *Id.* at 225. The authors report that one husband arrived with a gun and said that if he were provoked by the mother’s lover again Dad would shoot him. The group was able to persuade Dad to give the gun to a trusted “friend” in the group and out of Dad’s hands. Another Dad who got up with an angry outburst was quieted by two other men in the group.

92. *Id.* at 234-38.

93. *Id.* at 223.

94. *Id.* at 250.

95. *Id.* at 246-47.

on their own after the mediation. Thirty-six couples went back to court mediation or a judge.⁹⁶ The recidivism rate of the two groups was statistically the same.⁹⁷

Initially the parents were contacted six months after the mediation ended to check the rate of recidivism. All of the families were located at this six-month mark. Two to three years later, the families were contacted again, seventy-seven of the original eighty families were located at this time. Thus, the group was found largely intact.⁹⁸

During the two to three years after the mediation interview, the sample was tested on the Straus Conflict Tactics Scale. The parent's score on the test was compared with their score on the earlier administration of the Scale. The researchers found that verbal aggression had decreased from, on average, once a week initially to once a month, and physical aggression had decreased from once a month to, on average, once a year by the later time period.⁹⁹ The researchers note that these scores are more commensurate with the average divorcing population. When the couple had begun the mediation process, they were not at all like the average divorcing couple with children. Improvement in parental relationships was found more often in the multifamily me-

diation group than the individual mediation group. But the Achenbach Behavior Problem Checklist and Social Competence Scale found the children's adjustment of the two groups to be about the same.¹⁰⁰ This, perhaps is not a surprise. Johnson and Campbell concluded that the outcome may not be measurably better for the children on how the parents mediated, but the clear economic difference should have policy makers looking at a multifamily mediation role.

This study did not compare the mediated group with non mediated parents as the earlier studies have done. But they do calculate a recidivism rate and this can be compared with the recidivism rate reported by other studies. What does recidivism mean? This may vary and make comparisons hard but it would at least cover returning to court. In Johnson and Campbell's study thirty-six percentage of couples went back to court.¹⁰¹ They define court as court mandated mediation or a judge. The parents went to a judge only after additional mediation failed. Recall that these parents had a very long and intensive mediation experience. They also were parents more at one another's throats. All of the parents had failed in court-mandated mediation before the study commenced. Pearson and Thoennes

96. *Id.* at 246.

97. *Id.* at 247. Given this fact, the increased efficiency of multifamily mediation should be seriously considered. One of the authors, Janet R. Johnston, is the Executive Director of the Judith Wallerstein Center for the Family in Transition, Corte Madera, California. She is also an Associate Professor at San Jose State University. This center would be a good place to get information about multi-family mediation if this is a direction a state or mediation supporters wish to go.

98. *Id.* at 245.

99. *Id.* at 246.

100. *Id.* at 247.

101. *Id.* at 246.

found that between thirteen and twenty-one percent of their mediating families returned to court.¹⁰² The examination of relitigation in this study was done seventeen months after the promulgation of the final orders.¹⁰³

Seventeen hours of mediation with a group of experts with wide ranging skills perhaps cannot be the model for mediation for the average divorcing parents with children. It would be very expensive. Johnson and Campbell are suggesting that no matter who is mediating and how long it takes, multifamily mediation may be more efficient. Recall that for their study they made the two groups similar in terms of demographics and dispute-related data. This might have made the multifamily mediation more effective. The authors do not discuss this. If multifamily mediation is used in a state, how administratively would this be set up? Are the sessions with the parents separated and sessions with them back together necessary for success. Many issues need to be resolved. However, multifamily mediation should certainly be considered. One of the goals of the mediation movement is reduction of costs for the parents going through the divorce.

Even if a state has a commitment to mediation, one of the problems in suggesting mediation is determining the parents who will benefit the most from the experience. All parents could be sent to mediation but this has

not been the case in any state yet other than Oregon and they have changed to judge initiated mediation. If all of divorcing parents with children are not sent, which parents should be sent? Many states leave the sending decision to the Judge. But the problem with waiting for the Judge to send the parents to mediation is that this may be too late. "The consensus in the mediation community is that the earlier the court can intervene in these cases, the less likely the parties will harden their positions and refuse to discuss their future in a problem-solving mode."¹⁰⁴

Conclusion

This makes my *Law Notes* article last year on factors that were correlated with post divorce fighting important.¹⁰⁵ These two factors can be found within the first thirty days after filing for divorce, and right in the divorce case file. Recall, the two variables that were significant were having parties married fewer than seven years and having the respondent file a counterclaim. Recall that for a statistically significant result all disputes need to be included, not just child custody. This includes property fights as well as all disputes over child or spousal support and child visitation and custody. The beauty of the results reported last year is that they will enable a state to select future fighting parents with

102. Pearson and Thoennes, *supra* note 6 at 21-22. Recall that most of the studies on which they reported compared the mediated family relitigation rate with a contrasting sample of parents who went through a traditional litigated divorce and their relitigation rate.

103. *Id.* at 11.

104. Judge Marietta Shipley, *Family Mediation In Tennessee*, 26 U. TENN. L. REV. 1085, 1101 (1996).

105. Janet A. Flaccus, *Post Divorce Fighting – Can It Be Predicted? Divorce and Children at Risk*, 2008 ARK. L. NOTES 17.

children within the time for filing a counterclaim under state law. The time parties have been married can be calculated from the petition itself. This would get parents into mediation very shortly after the divorce was filed. It is not indicated in the mediation studies how and when the parties in mediation were selected. The studies that indicate when parents are placed in mediation tend to place the parents in mediation late in the process. As noted above, early selection is best. This suggests that the parties may need less mediation since their positions may not have been hardened yet by the litigation process. This is speculation on my part. Of course divorcing parties may opt out of mediation and this is where some education of parents may help. In Arkansas with our high divorce rate, can we afford to ignore this beneficial way of dealing with the conflict and anger that just turn out to injure the children. Recall my 2003 *Law Notes* article about what can happen to the children of divorced parents.¹⁰⁶ Reducing the conflict between the parents is a major way of making the divorcing process easier on the

children. Perhaps a pilot study can be started. Find parents with the two risk variables of being married fewer than seven years and a responsive counterclaim. Put some in mediation and others in litigation and follow them for several years to see if the mediation group has less future conflict. If this is the case perhaps this can be done on a larger scale. So far we have done little to help the children of divorcing families. Should that not change?

The effect of divorce on children is bad enough.¹⁰⁷ The state cannot avoid this result unless it keeps families from divorcing so easily. If the state cannot or will not keep the parents from divorcing at least the state can and should try to keep the parents from fighting in the future. Future fighting only makes the problems with the children worse. It is hoped the results reported here as well as my two earlier *Law Notes* articles will be useful in fashioning this process. This is a national problem. We in Arkansas can take the lead in using these variables in selecting the parties for mediation. The sooner it is addressed the better.

106. Janet A. Flaccus, *Children and Divorce: A Bad Combination and How to Make it Better*, 2003 ARK. L. NOTES 13.

107. A British study asked whether children from divorced families and children from intact families were more likely to have health problems as young adults. The good news is that in general the two groups did not differ in hostility, somatic complaints and health-care visits. But children who reported a more negative experience with the divorce were the ones with more hostility, somatic complaints and health-care visits. Linda J. Luecken, and William V. Fabricius, *Physical health vulnerability in adult children from divorced and intact families*, 55 J. PSYCHOSOMATIC RESEARCH 221, at 225-6 (2003).