REPORT OF THE
JOINT SUBCOMMITTEE STUDYING

Mediation of Child Support, Custody and Visitation

TO THE GOVERNOR AND
THE GENERAL ASSEMBLY OF VIRGINIA

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Report of the
Joint Subcommittee Studying
Mediation of Child Support, Custody and Visitation
To
The Governor and the General Assembly of Virginia
Richmond, Virginia
January, 1989

To: Honorable Gerald L. Baliles, Governor of Virginia,
and
The General Assembly of Virginia

AUTHORITY FOR THE STUDY

House Joint Resolution No. 246, agreed to by the 1987 Session, directs a joint subcommittee to study issues related to the mediation of child support, custody and visitation. The study is to include an investigation of the quality and effectiveness of mediation services in the Commonwealth, availability and coordination of these services, and standards for programs and for education and training of mediators. The joint subcommittee is also directed to consider certain legal issues raised by mediation, including the binding nature of such agreements, confidentiality of information revealed, liability of mediators, and court-ordered participation. The joint subcommittee is to consult with the judiciary, the Bar and existing mediation services in the Commonwealth. The study is to be completed by November 15, 1988, with the submission of an interim report to the 1988 Session of the General Assembly (see Appendix).

INTRODUCTION

Mediation can be defined as the process by which the disputants themselves attempt to reach a mutually satisfactory agreement on issues in dispute with the assistance of a neutral party or parties. It is not intended to be therapeutic; it is goal-oriented, looking toward resolution rather than at causes of conflict. It differs from arbitration in that the resolution is that of the disputants, while arbitration is adjudicatory, with the neutral third party deciding on a binding resolution of the issues.

Mediation was first widely used as an alternative dispute resolution technique in labor-management disputes. It was useful in this arena in which relationships are long term and future cooperation is essential, in contrast to situations in which it may be appropriate to assign fault and designate a winner and loser who will have no future dealings with each other. The use of mediation in domestic relations as an alternative to litigation developed with the advent of no-fault divorce in the early 1970's. In 1985, there were about 300 divorce mediation services in eighteen states. Services were provided by statute or court rule in Alaska, Delaware, Iowa, Maine, Michigan, Oregon and California; divorce mediation is mandatory in California, Delaware and Maine.

MEDIATION IN VIRGINIA

Mediation services are provided in Virginia in a variety of settings. There are 25 programs offered through the 34 court service units in the Commonwealth, utilizing 107 trained mediators who are probation officers, supervisors, intake officers and family counselors. Judges usually provide referrals to these services. Some courts contract with local departments of social services for mediation. These programs usually focus on custody and visitation matters rather than financial support. Mediation services are also provided by nonprofit programs receiving private, grant or local funding. Clients are referred by the court or by the private bar. Several profit-making programs are also providing mediation services.

The Governor's Commission on Child Support in 1985 recommended mandatory availability of mediation and counseling services throughout the state as a means of reducing separation trauma for children and their parents by promoting parental cooperation and encouraging future compliance with custody, visitation and support arrangements. The recommendation was one of several formulated to approach the ultimate goal of serving the best interests of the child by providing him with nurturing care through access to both parents. The Commission suggested that existing voluntary programs should serve as models for a statewide system.

ACTIVITIES OF THE JOINT SUBCOMMITTEE

The joint subcommittee met three times during 1987. Mediators practicing in a variety of settings described their programs and addressed mediation issues. Mediators appearing before the joint subcommittee included JoAnn Jackson of the Sixteenth District Juvenile Court Service Unit in Charlottesville. Karen Asaro of the Virginia Beach Department of Social Services described her agency's mandatory mediation program, begun in 1980 in cooperation with the local judiciary. Representatives of the Community Mediation Center, a community-supported program in Harrisonburg, described that unique program. Representing private mediation programs, Taswell Hubard described his divorce mediation activities within his law practice in Norfolk, and Emily Brown, licensed clinical social worker and Director of the Divorce and Marital Stress Clinic in Arlington, reviewed the mediation activities of her program and addressed mediation issues. Ms. Brown, chair of the Education Committee for the Academy of Family Mediators, also discussed the issue of training standards for mediators.

The joint subcommittee consulted with the Virginia Mediation Network, organized two years ago as a vehicle for professionals to interact on mediation policies and procedures. The Network now includes 400 members, including attorneys, private practitioners, family therapists, court service workers, and social workers. The Network's resources, particularly its survey of mediation policies and procedures statewide and its national survey of mediation legislation, have assisted the joint subcommittee.

The joint subcommittee invited members of the judiciary to relate their experiences with child custody and support mediation and to comment on mediation issues. Appearing before the joint subcommittee were the Honorable Beverly Bowers of the Rockingham County Juvenile Court, the Honorable Jannene Shannon of the Charlottesville Juvenile Court, and the Honorable Marvin Garner of the Chesterfield Juvenile Court.

The joint subcommittee solicited the comments of members of the Bar. The joint subcommittee heard testimony from Frank Morrison, a Lynchburg attorney with a family law practice. Mr. Morrison serves as a substitute judge in the juvenile court and as commissioner in chancery in Lynchburg and served on the Bar Council's Legal Ethics Committee, on which he participated in the writing of ethical opinions on mediation by attorneys. Mr. Morrison is also trained as a mediator by the Academy of Family Mediators. The joint subcommittee also heard the comments of Mr. Richard Balnave, professor of law at the University of Virginia and director of the Virginia Dispute Resolution Center, supported by the Virginia Bar Association and the Virginia State Bar Joint Committee on Dispute Resolution. The Virginia State Bar and its Family Law Section and the Virginia Bar Association and its Domestic Relations Committee were kept apprised of the joint subcommittee's activities.

Two couples who mediated their child custody agreements when they divorced shared their experiences with and impressions of mediation with the joint subcommittee.

The joint subcommittee focused its attention in 1988 on the issues of confidentiality, mandating mediation, qualifications of mediators, and the court's authority to refer parties to mediation. It reviewed legislation passed by the General Assembly in 1988 which protects the confidentiality of materials and communications produced in mediation and provides civil immunity for mediators. Karen Donegan, executive director of the Alternative Dispute Resolution Center in Richmond, addressed the joint subcommittee on the background of the legislation and its provisions and on confidentiality issues generally.

FINDINGS OF THE JOINT SUBCOMMITTEE

Benefits of Mediation

Participants in the mediation process have cited numerous benefits of mediation over litigation in resolving custody, visitation and support issues. Mediation encourages communication between disputants and allows them to reach their own agreements rather than having decisions imposed upon them. Studies have thus found that visitation and support elements of mediated custody agreements are more often complied with than those reached in litigated cases. The Denver Custody Mediation Project found partial or total compliance in 80% of its cases. Dane County, Wisconsin, reported that between 1976 and 1978, 34.3% of families determining

custody traditionally returned to the court, while only 10.5% of mediation families returned. A study reported in 1987 by the University of Virginia compared families who were randomly assigned to mediation or to litigation to resolve divorce issues. The study showed that mediation partners reported that at intervals up to a year after settlement their relationship had improved, they were more satisfied with the settlement process and viewed it as fairer, and they believed mediation to be less biased and more suited to the family than adversary procedures. The joint subcommittee received testimony that in Chesterfield County, only about 5% of parties mediating custody returned within one year after entry of the order. The Community Mediation Center in Harrisonburg reported compliance with 90% of the agreements reached in its program after three months.

Mediation's nonadversarial, neutral, future-oriented nature can discourage faultfinding and preserve future relationships. Therefore, parties are better equipped to resolve future disputes themselves. The adjustment of children whose custody is at issue is believed to be enhanced through the promotion of parental cooperation and the reinforcement of parent-child bonds. Mediation allows privacy in reaching an agreement, keeping family issues within the family. At the same time, each discipline is allowed to do what it does best--attorneys representing the parties in mediation can advocate, the mediator can deal with long-term relationships of the parties and the judicial officer can oversee the process and provide a decision should mediation fail.

Mediation may be particularly well-suited to the resolution of child-related divorce issues because of the difficulty in application of the accepted standard of the best interests of the child. The standard is vague and subjective, requiring judges to make difficult predictions and measurements of character. Use of sex-neutral standards rather than the traditional maternal preference standard has further complicated judicial decision-making in child custody cases. Also, judges and attorneys are not necessarily trained to recognize or deal with the psychological aspects of divorce. Mediation can provide an expanded role for experts in this area. Some parents believe that judges' decisions regarding their child's best interests are infused with the judge's own biases and values. The information provided by each participant in the mediation process can assist parents in reaching their own decision and thus one which they believe to be fair.

Cost savings of mediation over litigation have been documented. Two localities in California, where mediation is mandatory, researched outcomes. San Francisco found that from 1977 to 1980, full custody hearings diminished from 275 per year to three per year. No mediated case returned for modification or enforcement. Los Angeles saved more than $280,000 in litigation costs in 1979 and saved $990,000 in 1982. In 1978, a Los Angeles study showed that mediation took about three hours at $20.50 per hour, while the cost of a trial court was $725 per day; each dispute resolved by mediation saved about half a court day. The Denver mediation project in 1980 found that bench time and custody investigations cost the state about

$1600 per case, while mediation cost about $135 to $270 per case. The studies showed that awards continued to favor the mother, so results were believed to be substantially the same as those reached by the court.

The joint subcommittee heard testimony from a juvenile court judge suggesting that mediation may decrease the number of CHINS petitions filed because the process returns to parents the power they lose to their children when parents are fighting over child custody.

The Virginia Department for Children in 1987 surveyed 75 circuit court judges and 75 attorneys in the Family Law Section of the Virginia State Bar, with a 65% response rate. The Department found that 80% of the judicial respondents support the use of mediation in resolving custody disputes and believe that mediation should be made available in all localities in Virginia. Fifty-five percent support statutorily authorizing the court to order mediation at its discretion. The attorneys were open to the concept of mediation, but believed that it should be approached with caution, preserving the discretion of the judge to determine when it will work.

The advantages of mediation were described for the joint subcommittee by two couples who recounted their experiences with mediation. The couples reported that they reached agreements that they believed were better than arrangements which would have been forged in court, where the judge would only have been marginally acquainted with their families. The couples both started out with some hostility and disagreement on basic issues. They reached agreements that satisfied them and their children, have abided by them, and have resolved subsequent issues themselves.

Problems with Mediation

There is concern that parties may enter into enforceable contracts without full information regarding their legal rights when they are not represented by an attorney other than a mediator. Mediation poses a risk of dominance of one party over the other. Without prescribed training and certification standards for mediators, disputants may retain the services of an incompetent mediator. Certain legal ethical issues are raised, such as whether nonattorney mediators are engaged in the unauthorized practice of law, whether attorneys are in violation of proscribed business relations with nonattorney mediators, conflicts of interests for attorneys mediating with two disputing parties, and confidentiality issues. Mediation may not be appropriate in all custody cases, and its inappropriate use may prolong the divorce process to the detriment of all parties, including children, or lead to harmful agreements.

After several months of study, including review of literature and receipt of testimony from participants in the mediation process, the joint subcommittee has specified a number of important issues raised by the practice in the context of domestic dispute resolution which require consideration and some resolution before a responsible

proposal regarding use of mediation in the Commonwealth can be formulated. These issues are discussed in detail below.

ISSUES AND DISCUSSION

Appropriateness of Mediation

Mediation may not be appropriate in all contested custody cases. Some mediators have specifically suggested that it not be attempted in cases involving child abuse or neglect; multiple social agency or psychiatric contacts for adults or children; long-standing bitter conflict between parties and repeated court appearances in the past; serious psychiatric problems; or erratic, violent or very anti-social behavior. Mediation may also not be useful when parties cannot negotiate in good faith or there is a power imbalance between the parties. Some mediators addressing the joint subcommittee do not exclude all clients with these problems from mediation. They believe that power imbalances can be equalized by a competent mediator. They also see apparent passivity as power in some cases in which there initially appeared to be a power imbalance. In abuse situations, they note that mediation may help to control abuse if the safety of the parties can be ensured.

Some states and some programs in Virginia exclude financial matters from mediation, authorizing negotiation of custody and visitation issues only. This raises a question as to whether support issues are too intertwined with custody issues to justify their separation. It has been argued that custody and visitation issues require an ongoing relationship between divorced parents and their children, who can benefit from the skills learned in mediation. Support and property issues, however, are not negotiated on an ongoing basis. There was no consensus within the joint subcommittee as to whether support should be mediated.

Qualifications of Mediators

There are currently no established training or licensing requirements for mediators. Professional groups and states which regulate mediation have set or are working to establish standards. However, they vary widely in substance.

Two national professional groups--the Family Mediation Association and the Academy of Family Mediators--prescribe standards for members, but affiliation is not a prerequisite for practice. The Academy of Family Mediators requires associate members to have an undergraduate degree plus two years of professional experience in family casework or family mediation and forty hours of mediation training. Senior members must meet these minimum requirements and must also have completed fifteen mediations and ten hours of case consultation with an Academy-approved consultant and submit six representative memoranda of agreement for review. The Family Mediation Association gives a certificate after a five-day course and 250 hours of practice. In contrast, Catholic University operates a

two-year post-graduate program in family mediation for which applicants must have a graduate degree or equivalent certification in a legal, mental health or human service field and two years of related professional experience. California's mandatory mediation statute requires mediators to have a master's degree in psychology, social work or marriage, family or child counseling; these requirements also apply to attorney/mediators. Standards for practice have been developed by both the American Bar Association and the Association of Family and Conciliation Courts. The standards govern conduct but do not include detailed criteria for education and training.

The Department of Corrections, in the process of revising all departmental standards, is developing minimum standards for qualifications of mediators in court service units. The proposed standards address education, training and supervision requirements and ethical standards, among other issues.

Mediators addressing the joint subcommittee believed generally that the specification of training and certification standards for mediators is premature, as there is no national consensus yet on what these standards should be. The suggestion was offered, however, that if mediators are licensed or certified, they should be regulated as a new profession and not as part of an existing discipline. An interdisciplinary approach is also encouraged by mediators. Whatever standards are appropriate, mediators arguably should possess a working knowledge of divorce law, financial matters and psychological theory as well as good conflict resolution skills.

A national survey of divorce mediation programs completed in 1988 by the National Center for State Courts showed that a relatively small proportion of mediators are attorneys; the majority have a social work or court service background. The survey also reported that one third of the programs use trained volunteer mediators. Respondents reported diverse requirements for training of mediators; the number of hours of training required of staff ranged from twenty-four to 216, although the most common program was a forty-hour in-house or outside training program.

The survey report notes that states attempting to establish a role for mediation as a part of the range of judicial and nonjudicial options available to settle disputes are working to standardize mediator qualifications by specifying training and experience requirements. For example, California, Connecticut, Nevada and Oregon require a master's degree in counseling, social work or a related field and substantial experience in family mediation. New York and Texas require extensive training of mediators, and Florida requires judicial certification of mediators, who may be trained in social work, mental health, behavioral sciences, psychology or law.

There is a trend nationally for states to enact mediation statutes which specify qualifications of mediators. Many states which grant confidentiality to the mediation process specify standards for mediators in order to qualify to whom and under what

circumstances confidentiality provisions should be applied. This is an issue which has arisen in Virginia with the passage of confidentiality and immunity legislation in 1988, discussed below.

States which have specified standards have not done so uniformly. However, statutory qualifications usually address some or all of the following:

Education--Some jurisdictions require a graduate degree in the behavioral sciences, some require such a degree or, in the alternative, a degree in law, and some permit a bachelor's degree with experience substituted for a graduate degree.

Experience--Experience may be required in addition to other requirements.

Training--In the few jurisdictions where training is required, the number of hours required varies from twenty-five to forty hours. Only one statute specifies content of training. No state specifies qualifications for trainers of mediators. Ongoing education can be required.

Knowledge--A few jurisdictions require knowledge in such areas as the court system, family law, or child development.

Absence of Conflicts--Some states require that the mediator have no conflicts of personal or financial interest with the disputants. Generally, mediators are precluded from serving as therapist or attorney for either party.

Two options for establishing training and certification requirements legislatively have been identified. A general model specifies an agency, court official or committee which establishes training and certification requirements. The law may establish general guidelines, assigning responsibility for setting specific standards and requirements and promulgation of regulations. The committee may include court personnel, mediation program directors, and experts in related academic fields. A "specification" model stipulates minimum training requirements for mediators.

Quality control of mediators, once qualified, is needed. If a licensing body or agency is not involved, then a judge or administrator may need to review an individuals' compliance with minimum requirements.

Because states are now establishing qualifications, professional groups are working to develop consensus among mediators as to what qualifications should be in order to protect consumers as well as the integrity of the profession. The Academy of Family Mediators is working on model legislation. The Society for Professionals in Dispute Resolution (SPIDR) has developed a discussion draft of the findings of its Commission on Qualifications, which were reviewed by the joint subcommittee. Final recommendations are expected in 1989.

Certain legal ethics issues are raised by the involvement of attorneys in mediation. Whether or not an attorney/mediator is representing both sides of a controversy and is, therefore, caught in a conflict of interests depends on the definition of a lawyer-client relationship. There may not be a conflict if such a relationship is not recognized in mediation and if the attorney/mediator does not represent either party in a later proceeding. Another issue raised is whether or not attorneys who mediate with mental health professionals are violating the ethical prohibitions against partnerships with nonlawyers and thus jeopardizing their independent professional judgment. Legal ethics opinions in Virginia and around the country and the Model Code of Professional Responsibility seem to agree that it is appropriate for lawyers to act as mediators if they explain to their clients that they are not representing either party and that each party should have his own attorney.

The joint subcommittee recognizes certain threshold issues which should be resolved before qualifications for mediators can be prescribed. These include the following:

Whether a general or "specification" model should be employed;

Whether qualifications should be set by statute, court rule, or other method;

Who should prepare recommendations or standards. Options include the Supreme Court, an appropriate state agency, or an interagency or interdisciplinary group;

Whether a licensing process should employed, and, if not, what entity should determine who meets the qualifications; and

What areas the qualifications should address, such as education, experience, specific training, knowledge of related fields, and absence of conflicts.

The work of professional groups such as SPIDR and the Academy of Family Mediators should be reviewed prior to setting standards.

Participants in the Process

Affected persons other than the parties to the divorce include the children, grandparents and stepparents. Factors to consider regarding participation of children whose custody is at issue include their level of maturity and the likelihood that participation will enhance or harm their relationships with both parents. Mediation clients addressing the joint subcommittee found their adolescent son's participation in one session to be useful to the family.

California's statute authorizes participation of natural or adoptive parents who are not parties to the proceedings or of any person seeking visitation who has had a significant role in a child's life, including stepparents and grandparents. The Virginia Beach mediation program includes parties other than the parents in mediation sessions.

The joint subcommittee discussed whether the parties' attorneys should participate in the proceedings or just review the agreement reached. Most of the mediators addressing the joint subcommittee do not include attorneys in sessions but keep them apprised of progress throughout the process.

Mandatory Mediation

Participation in mediation can be mandatory, voluntary or discretionary. In the latter, the court exercises discretion as to orders to participate.

It has been argued that the success of a consensual agreement such as one reached in mediation depends on voluntary participation. Proponents of voluntary mediation note that it avoids the appearance that power which is constitutionally vested in the court alone has been transferred to a mediator. There is concern that couples may be denied their right to a fair trial when they are diverted into a mediation program that gives the mediator decision-making power.

Discretionary referrals may raise questions concerning equal protection violations. Judges unfamiliar with mediation may be reluctant to make discretionary referrals.

California has been requiring couples to attempt mediation before litigating divorce issues for a number of years, with reported success. In 1978, the Los Angeles Conciliation Court, the largest jurisdiction offering public sector mediation, handled 747 of 1431 disputed child custody cases, saving 374 days of court time, valued at $175,000. An evaluation of the Kansas practice of requiring that parties attempt mediation before being heard in court showed that in the first twenty-four months of the program, 71% of the 293 families with whom the court staff had contact were able to resolve custody issues outside the court. Virginia Beach is mandating mediation in all cases, with the same success rate as voluntary programs have shown. Representatives of three mediation programs, two of which were voluntary and one mandatory, all reported to the joint subcommittee that they reached agreements in 70-75% of cases.

Some states have established incentives to parties to mediate. Michigan provides a fee discount if a mediated agreement is presented when the complaint is filed. California provides an expedited calendar for mediated divorce agreements.

The National Center for State Courts (NCSC) survey described above surveyed programs on mandatory versus voluntary participation. The report noted that the majority of disputants do not volunteer for mediation. The report cites study results which indicate that in a Denver program, one third of disputants refused free voluntary mediation. A second study showed that, even when participation is mandatory, one-fifth of disputants avoided participation. Resistance was explained by a lack of familiarity with the process and greater knowledge of litigation. Another study was cited, however, which showed that satisfaction by participants in voluntary and mandatory

mediation did not differ significantly. Studies have also shown that agreement rates do not differ in mandatory and voluntary small-claims mediation programs.

The survey report notes that mandatory participation in a mediation program is distinct from coercion in the course of the mediation process itself. The NCSC survey data indicated that most programs were not mandatory, consistent with participants' preferences. An American Bar Association official with the Standing Committee on Dispute Resolution, however, reported an apparent nationwide trend to mandate learning about, if not participating in, mediation, with positive results.

The NCSC survey reported great variation in practices among mediation programs with regard to their characterization as mandatory or voluntary. States differ in their specification of cases which must be mediated. Some mandate mediation of all domestic issues, while others except support, visitation, or modifications. A Florida program requires mediation of post-decree modifications, but mediation prior to issuance of a decree is voluntary. Maine requires mediation only of divorces involving minor children. The 25th Judicial District court service unit in Staunton, in order to clear the docket, requires mediation of motions to amend divorce decrees but mediates other issues voluntarily.

Judges, mediators and mediation clients recommended to the joint subcommittee that the court be authorized to require at least one mediation session. The mediator and the parties could then decide if mediation will work for them. Such a requirement, they believe, would involve many couples in the process who are good candidates but who do not know about the process or who would not volunteer. It was suggested that the judge may be given discretion to order subsequent sessions if appropriate. The judge may retain discretion to find a case inappropriate for mediation, perhaps being required to state reasons for such a decision. It was suggested that in each case a petition should be filed and the parties appear in court before mediation is ordered, so that the court maintains control over the case. Attorneys also remain involved in this way, as they have an opportunity to comment on the appropriateness of mediation in each individual case. While it was suggested that judges should be authorized to order participation in mediation, none addressing the joint subcommittee was comfortable with the imposition of penalties for noncompliance. It was also emphasized that only participation should be required and that it should be made clear to participants that it is not required that an agreement be reached.

The joint subcommittee agreed that mediation should remain discretionary with the court at this time, to be provided within existing manpower and resources. However, it was noted that the mediation process is less costly than expanding judicial resources as caseloads continue to grow.

Confidentiality

The success of mediation depends to some extent on assurances that communications within the process will remain confidential.

States have encountered problems with protecting communications against compulsory process during subsequent litigation, particularly when mediation fails and the court must decide custody issues. Without a statutory privilege attached to communications, they must be protected by evidentiary rules governing settlement negotiations or the lawyer-client privilege; these means have not always been effective. It has been suggested that a statute may be preferable which protects all communications made in mediation except when disclosure is necessary to enforce the mediated agreement or to prove breach of one party's obligation to another in the course of mediation.

California, which has mandated mediation statewide since 1981, requires that mediation proceedings be confidential, but permits the mediator, consistent with local rules, to provide a recommendation to the court as to custody or visitation. Local rules vary as to whether mediators must maintain strict confidentiality, may make a limited or unlimited recommendation at their discretion, or are required to make a recommendation. In its 1987 report, the Advisory Panel on the Child-Oriented Divorce Act of 1987 reviewed the state's confidentiality policy. The panel noted, in support of mediators' providing a recommendation to the court, that the mediator may be able to make an informed recommendation as to what arrangement is most appropriate. The court can also save the expense of a separate custody investigation. However, disputants may be less than candid or may try to use the mediator as a judge if he can later use information provided during mediation to make a recommendation to the court. Mediation thus may be flawed. The panel concluded that a policy of strict confidentiality should be promoted statewide.

Until a confidentiality statute was enacted by the 1988 General Assembly, most practitioners addressing the joint subcommittee addressed confidentiality by executing an agreement with their clients that they will not call the mediator to testify and that records, offers or stipulations coming out of mediation are inadmissible in court in later proceedings. Mediators would be required by law to respond, however, if they were subpoenaed, so these agreements were incomplete protection. Most mediators had not had confidentiality problems in practice, however.

House Bill 943, enacted by the 1988 General Assembly, addresses for the first time in Virginia confidentiality of mediation proceedings and provides immunity to mediators. The Virginia State Bar and the Virginia Bar Association noted the need for such legislation, the principles of which were developed by the Boyd-Graves Conference, a coalition of legal professionals addressing civil law issues. The Virginia Bar Association brought the proposed legislation to the Joint Subcommittee on Tort Reform, which included it among its recommendations.

The act directs that all mediators' memoranda, work products and case files are confidential, as are all communications made in or in connection with the mediation and related to the controversy being mediated. The agreement itself is not confidential unless the

parties so agree in writing. Confidential materials and communications may be disclosed in a subsequent proceeding only if the parties so agree, the action is one against the mediator for damages resulting from the mediation, or the materials are otherwise subject to discovery and were not prepared specifically for use in or used in the mediation. The act also provides civil immunity of mediators and mediation programs from liability for acts or omissions occurring in the course of facilitating mediation, unless the act or omission was made in bad faith, with malicious intent, or with willful, wanton disregard of the rights, safety or property of another.

Concern has been expressed, however, that, without specific qualifications required of mediators to whom the statute will apply, its provisions may be inappropriately applied to untrained unskilled individuals holding themselves out as mediators. The joint subcommittee also is concerned with such a statute preventing the use in court of information discussed in mediation in the same case.

Judicial Recognition of Mediated Agreements

Courts have frequently reviewed mediation agreements very closely in furtherance of their parens patriae obligations, some reviewing them de novo. Such review can lengthen the decision-making process. Policy considerations regarding the deference which courts should give to mediated agreements may include identification of the basis of an inquiry into the agreement, balancing parens patriae duties against public and family interests in parents making their own decisions. It has been suggested that the appropriate basis of inquiry may be how well the agreement promotes and protects the child's interests. The court could base its judgment on a retainer agreement which spells out the legal standard used as well as all other procedural issues, such as what issues will be mediated, who will participate, when parties can withdraw, legal representation of parties, review of agreement by counsel, and modification procedures.

It has been suggested to the joint subcommittee that the appropriate place for intervention is in setting standards of mediators rather than in reviewing the agreements.

Judges addressing the joint subcommittee note that the agreements reached in mediation merit full recognition by the court as a valid enforceable order; one judge singled this out as an issue which may require legislative action.

Modification of Agreement

Because custody and support agreements are likely to change over time, provisions for modification merit consideration. The agreement itself can establish a procedure for modification. It may include a hierarchy of methods, starting with a private conference and proceeding to mediation, arbitration, then litigation as each preceding method fails. The agreement can include provision for automatic review when one party moves, remarries, or experiences

financial or other relevant changes. Testimony before the joint subcommittee has indicated the parties may be less likely to need these provisions when they mediate. They are able, with their new skills and improved relations, to resolve future issues themselves.

When Mediation Fails

Some programs arbitrate issues which cannot be resolved by mediation. Thus, either the mediator or a different arbitrator would make a decision based on information from the parties. California's statute authorizes the mediator to make a recommendation to the court when the process breaks down, combining mediation and evaluation functions; this method poses problems of confidentiality when cross-examination of the mediator is allowed. It was suggested to the joint subcommittee, however, that confidentiality should take precedence over the need for providing a recommendation to the court. Delaying the hearing or bringing in a second mediator or the attorneys or therapists involved with the parties may be preferable to arbitration or a recommendation to the court.

Funding Mediation Programs

States have funded mediation programs innovatively, some using increases in filing fees. California increased by $15 its divorce filing fee and the fee for a motion to modify or enforce a custody or visitation order and increased the marriage license fee by $5, earmarking the funds for use by county family courts for mediation services. This was accompanied by liberalization of *in forma pauperis* to protect the poor from prohibitive court costs.

In Virginia, public mediation programs are now limited in their ability to provide mediation to everyone who may want services. This is especially an issue if mediation is mandated by statute. The joint subcommittee considered the relative benefits of mediation in court service units, departments of social services and private programs. It recognizes that each of these settings provides a useful resource. It noted that the court services unit is a particularly appropriate setting for diversion from court and is accessible to people with domestic relations disputes. However, many court service units and departments of social services are providing services through employees with other responsibilities. A preference for any one setting over another or expansion of services raises funding issues because of limited existing resources and manpower.

Authority of Court to Refer to Mediation

The National Center for State Courts' study cited earlier notes that Virginia is one of three states with divorce mediation programs operating statewide but which lack statutory authority or court rules specifically authorizing courts to refer cases to divorce mediation. Neither the juvenile nor circuit court has explicit statutory authority. A 1987 amendment to § 16.1-69.35 authorizes the chief judge of a general district court to establish a voluntary civil mediation program, with costs to be paid by the local governing body or by program participants.

The joint subcommittee agreed that legislation would be useful which provides statutory authority to the court to refer cases to mediation. Such legislation would merely codify current practice. The joint subcommittee suggested that such legislation specifically authorize referral of matters involving disputes over custody, visitation or support of minor children to mediation services approved by the court.

Respectfully submitted,

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* See attached comments.

Comments

Betty A. Thompson submits the following comment to the report:

The present complete blanket immunity from civil liability granted to mediators where there is no licensing or other method of regulating mediators and no standards or qualifications for mediators established, is dangerous. At present, under Virginia law, any "man in the street" may be a mediator and may act in this capacity free of civil liability. The statute (§ 8.01-581.21 et seq.) adopted by the 1988 General Assembly needs to be amended to correct this situation.

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APPENDIX

HOUSE JOINT RESOLUTION NO. 246

Requesting a joint subcommittee to study mediation of child support, custody and visitation.

Agreed to by the House of Delegates, February 8, 1987
Agreed to by the Senate, February 19, 1987

WHEREAS, the judiciary, the Virginia State Bar and citizens' groups have questioned whether the court system's adversarial approach is effective or appropriate to settle family disputes concerning child support, custody and visitation; and

WHEREAS, mediation, the process by which persons negotiate and reach mutually satisfactory agreements with the assistance of neutral parties, is being used with increasing frequency in Virginia and in other states to resolve family disputes; and

WHEREAS, court service units, local departments of social services and private mediation programs now operating in Virginia report success in mediating child support, custody and visitation issues; and

WHEREAS, a settlement negotiated through mediation may be more readily accepted by disputants, can build understanding and trust among disputants, may be less expensive than litigation, and can encourage parties to negotiate in future disputes; and

WHEREAS, certain legal questions are raised concerning mediation, including the court's authority to compel parties to participate, the binding nature of such agreements, confidentiality regarding information revealed by the parties, liability of mediators, and the need for review of agreements by legal counsel; and

WHEREAS, in spite of the number of programs now existing in Virginia, there are no uniform standards for education and training nor a licensing procedure for mediators; now, therefore, be it

RESOLVED by the House of Delegates, the Senate concurring, That a joint subcommittee be created to study issues related to the mediation of child support, custody and visitation. The joint subcommittee shall investigate the quality and effectiveness of mediation services available in the Commonwealth; coordination among these services; need for expanded services; standards for programs and for education and training of mediators; legal problems raised, especially court-ordered participation, the binding nature of settlements, confidentiality of information revealed and liability of mediators; and other issues it deems relevant.

The joint subcommittee shall consult with the judiciary, the bar, and with existing mediation programs in the Commonwealth, including those administered by local courts, local departments of social services, and private nonprofit and profit-making services.

The joint subcommittee shall consist of nine members as follows: one member each from the House Committee for Courts of Justice, House Committee on Health, Welfare and Institutions, and House Committee on Appropriations to be appointed by the Speaker of the House of Delegates; one member each from the Senate Committee for Courts of Justice and the Senate Committee on Rehabilitation and Social Services, to be appointed by the Senate Committee on Privileges and Elections; and two juvenile and domestic relations district court judges, one court services representative and a representative of the Virginia State Bar to serve as citizen members, all to be appointed by the Speaker.

The joint subcommittee shall submit an interim report to the 1988 Session of the General Assembly and shall complete its work by November 15, 1988.

The indirect costs of this study are estimated to be $17,835; the direct costs shall not exceed $11,340.