Mediation in Custody Issues Must Include Confidentiality

By Fred Silberberg

The policy of California is to promote the resolution of disputes outside of litigation via mediation or settlement conferences. Communications which are divulged in the course of such mediation are expected to be confidential, because that would promote dialogue between the parties and allow them to air their positions without fear that the information would be used against them in litigation. Unfortunately, in counties other than Los Angeles, confidentiality is violated often in an area where this privilege should be kept sacrosanct — custody litigation. SB1406, which would preserve the mediation privilege statewide, is pending in the state Legislature. Its passage is a worthy goal.

Parties to a custody dispute are required to attend mediation before a judicial officer can hear the case. Mediation is provided through the conciliation court using marriage, family and child counselors who assist parties in resolving their differences regarding their children. In the county of Los Angeles, information discussed in the course of mediation through the conciliation court is kept confidential.

If an agreement is reached, the facilitator records it on paper. If it is not, the court is simply informed that no agreement was reached. All of this helps facilitate the parties' earnest attempts to resolve their differences because there is no fear of repercussion if no deal is reached.

Unfortunately, in other counties of our state, discussions with the "mediators" with whom parents are required to meet are not kept confidential. And if no agreement is reached, the mediator reports back to the judge not only what transpired in the course of mediation but also his or her recommendations for how to resolve the dispute. This does relieve court congestion because cases are rushed through the system without a complete evaluation. However, rather than fostering an environment where open dialogue can lead to the resolution of serious problems, in these counties parents risk being penalized by the court for taking certain positions in the mediation.

This system misleads the litigants. They are told that they are going through mediation, yet they are really being investigated by someone who will meet with them only briefly and provide potentially damaging information to the court. What is most shocking about this practice is that this information could lead to custody arrangements that are detrimental to children, the very people whom the system is designated to protect.

Parties who are not represented by counsel, who make up more than 70 percent of family law litigants, thus proceed at their own peril. The fortunate ones with lawyers are counseled carefully by their attorneys regarding what to say and what not to say to the mediator, in order to protect themselves.

SB1406 attempts to rectify this abusive practice by mandating that all such mediation be confidential.

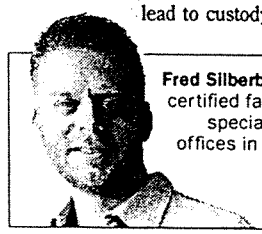
Under the law as it stands now, the mediator may recommend to the court that minors counsel be appointed or that restraining orders issue to protect the children. However, the bill contains a provision that prohibits such recommendations. Part of the debate over this pending legislation is whether it is appropriate to abolish such practices.

While allowing mediators to make such recommendations could help children who have no independent voice in our legal system, if mediation is intended to be confidential, then allowing the mediator to testify on some issues is not appropriate. Moreover, such testimony could open the door to an explanation about what was discussed in mediation. Any competent family law practitioner would cross-examine the mediator, particularly if the recommendation was against his client. This would expose what was discussed in mediation.

Although protecting the children is of paramount importance, this is not the way to do it. The court can appoint independent counsel for the children if the facts call for that. In most cases of high conflict, the parties are in court before the mediation session in any event, and that would give the judge the opportunity to consider the issue of both restraining orders and children's counsel. The use of a court-appointed mediator is not the proper means by which to procure this information. This provision, therefore, is a good idea.

It is unfortunate that thousands of families have gone through the system without the protection of confidential mediation. It is unknown how many custody decisions were made in error as a result of these "investigations." Mediation, by its very nature must be confidential. It is high time that this injustice be corrected, and for that reason, SB1406 should pass.

Parents risk being penalized by the court for taking certain positions in the mediation.



Fred Silberberg is a certified family law specialist with offices in Century City.

Give Us a Piece of Your Mind

We want to hear your viewpoints and responses. E-mail your article to Pamela Peery, Forum Editor, at pamela_peery@dailyjournal.com or call (703) 924-1313. Each article should include the author's name, phone number and fax number.

Forum
LOS ANGELES DAILY JOURNAL • TUESDAY, APRIL 30, 2002 • PAGE 6