

**AN ANALYSIS OF THE INCLUSION OF CHILDEN IN DIVORCE MEDIATION AND
THE USE OF QUALITY ASSESSMENT METHODS TO MAKE BENEFITS
OUTWEIGH RISKS
IS THE JUICE WORTH THE SQUEEZE?**

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I. INTRODUCTION

Many millions of Americans in today's society are touched by divorce.¹ Divorce has affected more than one million children each year from 1995 to 2005 and if current trends continue, 40-50% of first marriages in the United States will end in divorce.² The prevalence of divorce in today's society has produced negative effects on the family unit overall, most notably on the children whose parents are involved in the divorce.³ Over the past several decades, courts have attempted to abandon custody arrangements based on gender-bias, and instead, have begun employing a gender-neutral analysis focusing on the best interests of the child.⁴ The child custody conflicts that have been created as a result of this shift, when combined with the long-term detrimental effects they potentially have on children, has brought conflict management strategies to the forefront of those concerned about the well-being of affected children.⁵

The adverse effect of divorce on children, and their experiences during the process, has been well documented and scrutinized. Research has demonstrated that children suffer developmentally as a result of conflicted custody cases with resulting prolonged emotional turmoil, depression, greater risk of mental illness, parental alienation, and potential for substance abuse.⁶ Even more concerning, research has also illustrated that when children are exposed to violence and high levels of conflict, they shoulder an increased risk of perpetuating this cycle of

¹ National Vital Statistics System, National Marriage and Divorce Rate Trends, www.cdc.gov/nchs/nvss/marriage_divorce_tables.htm (last visited September 14, 2013).

² Melissa Schoffer, Comment, Bringing Children to the Mediation Table: Defining a Child's Best Interests in Divorce Mediation, 43 Fam. Ct. Rev. 323 (2005).

³ American Academy of Child & Adolescent Psychiatry, Children and Divorce, www.acap.org/AACAP/Families_and_Youth/Facts_for_Families (last visited September 14, 2013).

⁴ Charlee Lane, For Heaven's Sake, Give the Child a Voice: An ADR Approach to Interfaith Child Custody Disputes, 10 Pepp. Disp. Resol. L.J. 623, 624 (2010) (citing *Zummo v. Zummo*, 574 A.2d. 1130, 1135 (Pa. Super. Ct. 1990)).

⁵ *Id.* at 624.

⁶ Linda Elrod, Reforming the System to Protect Children in High Conflict Custody Cases, 28 Wm. Mitchell L. Rev. 495, 496 (2001) (citing Judith Wallerstein & Sandra Blakeslee, Second Chances: Men, Women, and Children a Decade After Divorce 202-03, (1989); Michael Lamb, The Effects of Divorce on Children's Behavior, Development, and Adjustment, 35 Fam. & Concil. Cts. Rev. 393, 395-396 (1997)).

violence and conflicted or unhealthy relationships as they transition into adulthood and begin forming families of their own.⁷ Some children enter adolescence and adulthood with unresolved feelings on account of their parent's divorce, particularly regarding how their parents conducted themselves and their own involvement in the process.⁸ These unsettled feelings can manifest in a persistent, lingering presence of anger in a child's psyche, leading to high stress levels, anxiety, low self-esteem, and difficulty performing at school or work as an adult.⁹

This article will attempt to address a critical issue regarding divorce and children: should children actively participate in divorce mediation? Addressing this issue necessitates evaluating a corollary issue; if children are involved in divorce mediation, what type of training or experience should be necessary to assure adequate qualification of those mediators who conduct the mediation involving children? To address these issues, this article will attempt to identify the problem, possible solutions, the approaches taken by other states and countries and any results, the legal issues regarding inclusion of children, and a recommendation for future action.

II. WHAT IS THE PROBLEM?

A. The problems

1. Adversarial process creates risk for children.

Aside from the mental, emotional, and psychological implications on children as a result of divorce, the adversarial process generally can be connected to these consequences. Currently, children often have little to no voice in the process of divorce, caused in part by the

⁷ Linda Elrod, Reforming the System to Protect Children in High Conflict Custody Cases, 28 Wm. Mitchell L. Rev. 495, 496 (2001) (citing Janet Johnson & Vivienne Roseby, In the Name of the Child: A Developmental Approach to Understanding and Helping Children of Conflicted and Violent Divorce, 4, 5 (1997)).

⁸ Solangel Maldonado, Taking Account of Children's Emotions: Anger and Forgiveness in "Renegotiated Families", 16 Va. J. Soc. Pol'y & L. 443, 447 (2009) (citing Judith Wallerstein & Sandra Blakeslee, Second Chances, 12, 25, 29 (1989); Richard Fitzgibbons, Anger and the Healing Power of Forgiveness: A Psychiatrist's View in Exploring Forgiveness, 65, 71 (1998)).

⁹ *Id.*

inexistence of an appropriate legal mechanism for children to ask questions, express their thoughts or emotions, and convey their personal wishes and needs.¹⁰ The adversarial divorce process can exacerbate certain conditions that create risk for children.¹¹ The focus in most proceedings in the adversarial system is the outcome of the case, creating situations that pit parent against parent, child against parent, or put the child in the middle of their parent's battle.¹² The outcome of most cases is determined according to the information presented to the court, which begs the question, how can the court reach a result that is in the best interests of the child if the children themselves are never able to provide information directly to the court? Instead of asking a child to make a decision in divorce custody disputes, children are often asked what it would be like to live with each parent and other information that could assist the court in making a determination.¹³ Unfortunately, the questions and information provided might not be sufficient in determining the child's wishes regarding aspects of divorce that will greatly impact their lives. By only allowing information regarding the best interests of the child to be relayed through a third party officer etc., and not by the child directly, the risk that the child's wishes will fall to the wayside increases greatly.

2. Child inclusive mediation requires quality assurance.

If children are included in divorce mediation, quality assurance for mediators becomes a major concern. Consider which would be worse: not involving children in divorce mediation for fear of any potential negative side effects OR involving children in a mediation process

¹⁰ Joan Kelly, Psychological and Legal Interventions for Parents and Children in Custody and Access Disputes: Current Research and Practice, 10 VA. J. Soc. Pol'y & L. 129, 149 (2002).

¹¹ Id at 131 (citing Janet Johnson & Linda Campbell, Impasses of Divorce: The Dynamics and Resolution of Family Conflicts, 38-44 (1998)).

¹² Janet Weinstein, And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System, 52 U. Miami L. Rev. 79, 85 (1997).

¹³ Joan Kelly, Psychological and Legal Interventions for Parents and Children in Custody and Access Disputes: Current Research and Practice, 10 VA. J. Soc. Pol'y & L. 129, 148 (2002).

conducted by an unqualified mediator, potentially aggravating negative side effects. In order to obtain any of the positive effects that divorce mediation could provide for children, it becomes necessary to analyze the minimum standards or qualifications necessary to assure that the mediator is qualified to oversee the mediation. To establish minimum standards for mediators, many factors necessarily must be considered: who decides the minimum qualifications, how will these standards be enforced and by whom, what will the minimum standards be, and how will we assess whether the standards are working.

B. What are the solutions?

1. Include children in mediation process.

In certain circumstances, divorce mediation has become a welcome alternative to the usual divorce process. Mediation is a process of alternative dispute resolution in which a mediator or neutral third party employs problem solving negotiations in order to assist parties in making an agreement addressing their specific needs.¹⁴ Parties typically sign a written mediation agreement, in essence a contract, to protect both parties and the mediator in the event that litigation ensues as a result of unsuccessful mediation.¹⁵ Mediation is attractive to some parties because it provides a mechanism to solve custody, and other, disputes relating to divorce without involving the court directly and can be considered less intimidating.¹⁶ One possible solution to mitigate the negative consequences of the typical divorce process is to use mediation and allow children to participate, with the goal of assuring their needs are also being met. The most commonly accepted methods for involving children in the adversarial process currently are: in-chambers interviews, appointment of an attorney ad litem as an advocate for the child, and a

¹⁴ Wash. Rev. Code §7.07.010(1) (2005).

¹⁵ Wash. Rev. Code §§7.04A, 5.60.070 (2005).

¹⁶ Lisa Elrod, Reforming the System to Protect Children in High Conflict Custody Cases, 28 Wm. Mitchell L. Rev. 495, 503 (2001).

guardian ad litem who ensures that the child's best interests are being protected.¹⁷ Child-inclusive mediation could provide an alternative to the adversarial processes, which would allow for direct involvement by the child during the mediation process. Including children in mediation could be an opportunity to give the child a meaningful voice while dealing with the underlying issues of the divorce, without embroiling them in the divorce process itself. This could include direct participation in the process or child intervention inclusion, discussed below.

2. Establish adequate standards.

Mediation is a multi-disciplinary field involving professionals with very diverse backgrounds.¹⁸ One solution to the issue of how to assure divorce mediators are adequately qualified is to dictate a minimum set of standards applicable across the board to all individuals who are mediators. Next, the disciplines that divorce mediation implicates, namely mental health and family law, will be assessed.¹⁹ Depending on the educational or experiential background of the individual, additional training may be required to establish comprehensive knowledge in each area implicated in mediation with the goal of adequately incorporating and successfully including children in divorce mediation.

III. ASSESSMENT, SUMMARIES, AND EXAMPLES

Many states in the U.S. and countries around the world have begun the process of including children in mediation and attempting to create guidelines and standards for mediators in their localities.

¹⁷ Debra Lehrmann, The Child's Voice, 65 Tex. B.J. 882, 888-891 (2002).

¹⁸ Carrie Menkel-Meadow, When Dispute Resolution Begets Disputes of Its Own: Conflicts Among Dispute Professionals, 44 UCLA L. Rev. 1871, 1881 (1997).

¹⁹ *Id.*

A. How are other states and countries including children in divorce mediation?

Studies conducted in Australia provide some of the most extensive and comprehensive information regarding the involvement of children in divorce mediation. Generally, Australia has employed basic models in family dispute resolution: child inclusive family dispute resolution, child focused family dispute resolution, and child inclusive practice/intervention, which does not necessarily proceed to family dispute resolution.²⁰ Child focused family dispute resolution encourages parents to consider the specific needs of their children but does not include any direct involvement by the children.²¹ Child inclusive intervention incorporates separate consultation by a specialist with each child in the family, and then considers their specific concerns in the mediation forum.²² This method of mediation, child inclusive intervention, evolved as a strategy to enable children to present their wishes in the context of the family proceedings surrounding them.²³ Child inclusive family law dispute resolution and child inclusive intervention have been addressed in this paper under the umbrella term “child inclusive mediation” but the two models have an important dissimilarity: child inclusive intervention relays the information or concerns from the child via a third party, whereas child inclusive mediation relays the information directly by the child themselves.²⁴ Although the end result is essentially the same, the child’s perspective is included, child inclusive intervention might not proceed to family dispute resolution or require direct attendance by the child due to the presence

²⁰ Jennifer Hannan, Child Protection in Family Relationship Centres: Innovations in Western Australia, 51 Fam. Ct. Rev. 268, 271 (2013).

²¹ Caroline Long, Jennifer McIntosh, Bruce Smyth, Yvonne Wells, Child-Focused and Child-Inclusive Divorce Mediation: Comparative Outcomes from a Prospective Study of Post Separation Adjustment, 46 Fam. Ct. Rev. 105, (2008).

²² *Id.*

²³ *Id.*

²⁴ Jennifer Hanna, Child Protection in Family Relationship Centres: Innovations in Western Australia, 51 Fam. Ct. Rev. 268 (2013).

of an identifiable risk factor.²⁵ Where a risk factor such as family violence, drug, alcohol, or mental health issues or suspected neglect have been identified, Family Relationship Centers in Australia are cognizant of potential child protection concerns that may arise by the child's direct presence and contact.²⁶ In order to ensure the child's needs and well being are identified and incorporated, without overlooking or minimizing the child protection concerns, child inclusive intervention utilizes a third party to relay the information, thereby preventing potential protection concerns.²⁷

A study conducted by the Association of Family and Conciliation Courts, compared outcomes over a one-year period for two groups of separated parents who participated in two forms of mediation, child inclusive and child focused.²⁸ The goal of the study was to explore the effects of the different groups on quality of conflict resolution and post-separation adjustment using surveys and interviews with the participants.²⁹ Generally, data from both groups showed a significant and enduring decrease in levels of conflict.³⁰ Compared to the child-focused group, child-inclusive mediation had several notable results, which included:

Children were more likely to report improved emotional availability of their fathers and greater feelings of closeness to him, improvement and preservation in the mother-child relationship from both the child and mother's perspectives, greater contentment with contact and care arrangements and a greater stability of care and contact patterns over the year for families generally.³¹

²⁵ Jennifer Hanna, Child Protection in Family Relationship Centres: Innovations in Western Australia, 51 Fam. Ct. Rev. 268 (2013).

²⁶ *Id.* at 271.

²⁷ *Id.*

²⁸ Caroline Long, Jennifer McIntosh, Bruce Smyth, Yvonne Wells, Child-Focused and Child-Inclusive Divorce Mediation: Comparative Outcomes from a Prospective Study of Post Separation Adjustment, 46 Fam. Ct. Rev. 105, 106 (2008).

²⁹ *Id.* at 109.

³⁰ *Id.*

³¹ *Id.* at 113.

Additionally, in the year following intervention, the child-focused groups had changed arrangements or litigated more often in order to bring about new parenting plans than the child inclusive group.³² Parenting agreements were also significantly more durable and workable, from both the child and parent's perspective, than those reached in the child focused group, with child inclusive cases also reporting lower rates of litigation over parenting disputes in the year that followed mediation.³³

Studies conducted in United States and Scotland have also found that a large majority of children whose parents are involved in a separation would welcome the opportunity to express their thoughts and feelings about the divorce.³⁴

B. What strategies have other states and countries used in attempts to assure mediator quality?

In 2001, mediation for custody in divorce was mandatory in 13 states, all of which included opt-out provisions for domestic violence circumstances.³⁵ A majority of the remaining states have created statutes bestowing judges with the ability to mandate mediation at their discretion, but those statutes addressing custody mediation have differing guidelines and procedures in each state concerning mediator qualifications.³⁶ Some of the states mandating mediation in divorce custody disputes include Delaware³⁷, California³⁸, Utah³⁹, Maine⁴⁰, and

³² *Id* at 114.

³³ *Id*.

³⁴ Solangel Maldonado, Taking Account of Children's Emotions: Anger and Forgiveness in "Renegotiated Families", 16 Va. J. Soc. Pol'y & L. 443, 458 (2009) (citing Joan Kelly, Psychological and Legal Interventions for Parents and Children in Custody and Access Disputes: Current Research and Practice, 10 Va. J. Soc. Pol'y & L. 129, 160-162, (2002)).

³⁵ Camie-Anne Tondo et. Al, Mediation Trends: A Survey of the States, 39 Fam. Ct. Rev. 431, 431-453 (2001).

³⁶ *Id*.

³⁷ Delaware State Courts, courts.delaware.gov/help/proceedings/fc_mediation.stm (last visited September 16, 2013).

³⁸ Cal. Fam. Code §3170 (1993) (amended in 2009).

³⁹ Utah State Courts, www.utcourts.gov/mediation/divmed/ (last visited September 16, 2013).

Illinois⁴¹. In addition to regulatory attempts by the states, many professional legal organizations have also promulgated standards for mediators. The Model Standards of Conduct for Mediators were originally prepared in 1994 by the American Arbitration Association, the American Bar Association's ("ABA") Section of Dispute Resolution, and the Association for Conflict Resolution and were revised and approved by participating organizations in 2005.⁴² But, it should be noted, that these standards do not have the force of law if not adopted by a particular court or other regulatory authority.⁴³ Model Standards of Practice for Family and Divorce Mediation, though not specifically geared toward mediator qualifications, have been adopted by the Association of Family and Conciliation Courts and the Association for Conflict Resolution and are generally applicable to the mediation of family and divorce disputes.⁴⁴

In Canada, Family Mediation Canada ("FMC") has created a set of credentialing standards for family mediators in the country, and FMC requires an initial 13 page application documenting completion of a minimum 80 hours of basic training, 100 additional hours of related training and education, and letters of reference and insurance.⁴⁵ Following this initial process, applicants then receive a Candidate's Manual in order to prepare them for a self-evaluation, videotaped skills demonstration, and a 4 hour written exam on substantive issues in family mediation.⁴⁶

In terms of mediatory quality assurance on a state level, Texas provides an example of attempting to assure quality of divorce mediators through setting minimum, base level

⁴⁰ State of Maine Judicial Branch, www.courts.state.me.us/maine_courts/family/divorce/ (last visited September 16, 2013).

⁴¹ Ill. Sup. Ct. R. 905 (2006)(amended in 2013).

⁴² Model Standard of Conduct for Mediators (1994)(amended in 2005).

⁴³ *Id.*

⁴⁴ Janet Flaccus, Mediation of Divorce Disputes –Is This The Solution?, 2009 Ark. L. Notes 79, 81-82 (2009).

⁴⁵ Linda Neilson, Peggy English, The Role of Interest-Based Facilitation in Designing Accreditation Standards: The Canadian Experience, Med. Q., 221 (2001).

⁴⁶ *Id.* at 229-231.

qualifications. The Texas Mediator Credentialing Association (“TMCA”), whose board of 10 members includes individuals from major mediator and trainer groups in the state, the Bar Association, consumers, the judiciary, and educational institutions, has been incorporated as a not-for-profit entity whose purpose is to serve as a voluntary credentialing base for mediators and mediation trainers.⁴⁷ The TMCA board has set training and credentialing standards using a four-tiered approach that employs a seniority system with basic certification requirements and levels of credentialing based on experience and training.⁴⁸ A grievance process has also been created.⁴⁹ The TMCA’s collaborative effort to ensure quality within the family mediation system has effectively created more widespread acceptance and recognition among many groups of mediators within Texas.

In Colorado, for example, efforts to develop principles and strategies for assuring mediator qualifications have been met with some opposition. After forming a steering committee in the mid-1990s, five major entities engaged in mediation within the State attempted to develop an agreement to define mediation and handle qualifications and credentials for mediators.⁵⁰ After a few years of work, the steering committee proposed an oversight group to administer a certification program for mediators, however, the product was ultimately rejected by the Colorado Bar Association.⁵¹

In Florida, court mediators must be certified by the Florida Supreme Court in order to receive court referrals and mediator qualifications have been established by the Florida Rules for

⁴⁷ Texas Mediator Credentialing Association, Promoting Quality Mediation Throughout Texas (brochure); Texas Mediator Credentialing Association, Frequently Asked Questions, at <http://txmca.org/taq.htm> (last visited Aug. 17, 2013).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Sally Ortner, Merrill Shields, A Report on the Development of Qualifications and Standards of Conduct for ADR Professionals, *The Colorado Lawyer* (October 1997) (describing early stages of history).

⁵¹ *Id.*

Certified and Court-Appointed Mediators.⁵² In addition, Florida rules for certified and court-appointed mediators §10.100 provides:

in order to be a certified mediator of family and dissolution of marriage issues, an individual must: complete a minimum of 40 hours in a family mediation training program certified by the Supreme Court; have a master's degree or doctorate in social work, mental health, or behavior or social sciences, be a physician certified to practice adult or child psychiatry, or be an attorney or a certified public accountant licensed to practice in any U.S. jurisdiction, and have at least 4 years practical experience in one of the aforementioned fields or have 8 years family mediation experience with a minimum of 10 mediations per year; observe 2 family mediation conducted by a certified family mediator and conduct 2 family mediations under the supervision and observation of a certified family mediator; and be of good moral character.⁵³

On the other hand, Revised Code of Washington §7.07.080(3) states that at the request of a mediation party, an individual who is requested to serve as a mediator shall disclose their qualifications to mediate a dispute but noticeably absent from this title is any specification regarding what the qualifications must be.⁵⁴ Despite a lack of general mediator standards adopted and recognized by courts within Washington, several statewide organizations have attempted to fill the gap by promulgating standards of practice. The Washington Mediation Association (“WMA”) has been at the forefront of drawing on existing codes of conduct for mediators and promulgating standards that take into account issues within the practice of mediation.⁵⁵ The standards adopted by the WMA were originally developed as Model Standards of Conduct for Mediators by the Society of Professionals in Dispute Resolution, the American Arbitration Association, and the Litigation and Dispute Resolution Sections of the ABA, and were adopted by the WMA in 1997.⁵⁶ Additionally, the WMA has a Mediator

⁵² Fla R. for Certified and Court-Appointed Mediators 10.100 (2000).

⁵³ *Id.*

⁵⁴ Wash. Rev. Code §7.07.080 (2005).

⁵⁵ Washington Mediation Association, Washington Mediation Association Standards of Practice for Mediators, <http://washingtonmediation.org/about/ethics> (last visited September 15, 2013).

⁵⁶ *Id.*

Certification Program for association members, which requires completion of a certification application packet, at least 36 hours of basic mediation training, three options to satisfy a minimum experience requirement, and 60 hours of additional documented education or experience relating to an area of specialization or category of practice.⁵⁷ Other professional mediation associations within Washington also offer a certification process, namely the Association of Washington Dispute Resolution Centers and the Academy of Family Law Mediators.⁵⁸

IV. LEGAL ISSUES REGARDING THE INCLUSION OF CHILDREN IN DIVORCE MEDIATION

Because mediation is a multi-disciplinary profession that involves practitioners from many different fields, including law, mental health, mediation and negotiation, unique issues arise regarding problems practitioners may face as a result of including children in divorce mediation. Some of these issues are specific to attorneys who mediate. Additionally, the field of alternative dispute resolution seeks to regulate itself through internal and professional standards and protocols.⁵⁹ This would implicate each practitioner who could also be subject to those codes and standards set within their individual profession outside alternative dispute resolution. Multi-disciplinary knowledge is essential to assuring that mediators have the ability to conduct mediations effectively, however, a deep schism exists over which professions knowledge is essential and which knowledge is merely peripheral.

A. Confidentiality

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Carrie Menkel-Meadow, When Dispute Resolution Begets Disputes of Its Own: Conflicts Among Dispute Professionals, 44 UCLA L. Rev. 1871, 1911 (1997).

In Washington, mediation communications are privileged and not subject to discovery or admissibility in evidence unless waived or precluded.⁶⁰ Would the presence of an additional person in the mediation, the child, break the privilege/confidentiality of the discussions? The mediation agreements made between the parties has additional legal consequences in the sense that the agreement must be incorporated into a judgment by the court allowing the parties to complete dissolution of their marriage. Confidentiality and disclosure requirements may prevent attorneys from sharing information with other parties and the court, information that may be pertinent to the best interests of the child. Moreover, attorneys may feel internal tension in circumstances where they are prohibited from providing certain information regarding the child to the court due to legal rules, but personally feel this information is significant to the divorce and the well being of the child subsequent to the mediation.

In an attempt to bring uniformity to mediation across the country, drafting committees from the ABA's Section of Dispute Resolution and the National Conference of Commissioners on Uniform State Laws constructed the Uniform Mediation Act ("UMA").⁶¹ Aside from the goal of uniform practice of mediation, the UMA established a privilege of confidentiality for mediators and participants to mediation in order to encourage candor and provide confidentiality throughout the process.⁶² Currently, the UMA has been enacted in the District of Columbia, Hawaii, Idaho, Washington, Illinois, Nebraska, New Jersey, Ohio, South Dakota, Utah, and Vermont.⁶³ Although the promulgation and enactment of this Act is a step in the right direction, the aforementioned issues still remain.

⁶⁰ Wash. Rev. Code §7.07.030 (2005).

⁶¹ International Institute for Conflict Prevention & Resolution, Legislation: Where the Uniform Mediation Act Stands in the States, www.cpradr.org (last visited September 15, 2013).

⁶² *Id.*; Unif. Med. Act §4 (2001(amended in 2013)).

⁶³ Uniform Law Commission, Legislative Fact Sheet-Mediation Act, www.uniformlaws.org/LegislativeFactSheet (last visited September 15, 2013).

B. Issues in contract

As previously mentioned, the authority for mediation is derived from a written mediation agreement signed by the parties. If, in addition to the spouses, a child were included in divorce mediation, this would essentially necessitate a three-party agreement. Would this require changing the general mediation model, as one involving a third-third party neutral and both spouses, to a multi-party model? Moreover, in the State of Washington, an individual must be 18 years of age or older to enter into any legal contractual obligation and to be legally bound thereby to the full extent as any other adult person.⁶⁴ Difficulties arise in how to create an agreement that is binding with the full force and effect of the law if the children who will be involved are unable to actually enter into the agreement. Will an exception have to be made in these instances in order to all children to enter into a binding mediation agreement? If children are able to participate in this so-called mediation contract, will the child have any authority to change the contract at a later date? Should there be an age limit for children entering these types of agreements?

C. Ethical problems

Ethical conduct on behalf of the legal profession is regulated mainly by the ABA Model Rules of Professional Conduct, as adopted and promulgated by each state. Specifically, Model Rule 2.4 states

“A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer’s role in the matter, the lawyer shall explain the difference between the lawyer’s role as a third-party neutral and a lawyer’s role as one who represents a client.”⁶⁵

⁶⁴ Wash. Rev. Code §26.28.015 (1992).

⁶⁵ Model Rules of Prof’L Conduct R. 2.4 (1983)

The ABA has explained that in performing their role as a third-party neutral, a lawyer may be subject to court rules or other law that either applies generally to third-party neutrals or specifically lawyers serving as third-party neutrals.⁶⁶ Additionally, lawyers may be subjected to other various codes of ethics in addition to the Model Rules.⁶⁷ If lawyers are subjected to other codes of ethics and rules regulated by professional bodies outside the legal realm, should those non-lawyers practicing mediation be regulated by the legal ethics rules as well?

Mediating within the family law arena presents unique ethical issues that may not be addressed by the Model Rules. Attorneys in the context of mediation must consider family stability, dynamics within the family unit, and the child's best interests. Attorneys are required to remain neutral, representing neither spouse nor the child specifically, but in considering the interests of all parties, including those of the child who may be harmed most directly by the divorce, the potential for bias may be heightened.

V. BENEFITS - WHAT CHILDREN DON'T KNOW WON'T HURT THEM?

Many benefits have been addressed in this article pertaining to the inclusion of children in divorce mediation. Notwithstanding the obvious benefits, the idea of including children in divorce may still be met with resistance. For many, any risk that a child could face through their involvement in divorce mediation is sufficient to justify non-inclusion. Being involved in the mediation process itself would subject a child to information regarding their parents divorce, information that may never have come to light had the child not been involved. Acknowledging that children may learn information throughout the process, however benign that information may be, could cause many parents to elect not to have their child involved. The idea that "what

⁶⁶ Model Rules of Prof'L. Conduct R. 2.4 cmt. (1983).

⁶⁷ *Id.*

children don't know won't hurt them" could be a driving factor in justifying non-inclusion. The risk that a child will hear harmful or damaging information through mediation proceedings completely dissipates if the option of including children in the process is taken off the table.

VI. RECOMMENDATIONS

A. Should children be included in divorce mediation? – With caveats, yes.

Because of the potential benefits that inclusion of children in divorce mediation can yield for the child, mediation should be child-inclusive in certain scenarios with one major caveat; inclusion is recommended only if the process is conducted by a qualified family law divorce mediator who has specialized training to handle children's involvement in the process. Additionally, the process of including children should be carefully implemented and monitored bi-annually to assure that the intended purpose is being achieved. Children should not be involved in any divorce mediation process conducted by an unqualified mediator, due to the potential for aggravation of existing risks caused by involvement. Furthermore, inclusion will only be available to children who meet certain requirements. Prior to inclusion, a psychologist or other mental health professional should interview the child to determine if the child possesses adequate mental capacity and maturity to participate. Until it has been determined that a child has achieved a certain maturation level or capacity necessary to comprehend and fully participate in the matter, that child should not be included.

B. What minimum qualifications should a mediator possess and is there any way to minimize negative side effects of inclusion?

It would be incredibly difficult to establish and mandate one set of qualifications that apply to all mediators on a national scale. Instead, I propose a minimum set of requisite qualifications on a national scale, which would apply to only those mediators who intend to

handle child-inclusive divorce mediation. The individual states would then be free to impose additional or supplementary requirements. Because divorce mediation is a multi-disciplinary area, the minimum qualifications should reflect the goal of achieving a basic knowledge in each of the following fields: family law, mental health, mediation techniques, and negotiation. Once an individual has demonstrated basic knowledge in one field, typically the field of their profession, additional training will be required to compensate in the other fields in which they lack knowledge. Furthermore, each mediator should be required to complete additional training specifically addressing the child's role in the mediation process, regardless of the mediator's prior education, training, knowledge, or experience. Training that speaks to the unique issues presented by involvement of a child is a critical component in assuring that a mediator is qualified to handle the matter. After a mediator has established the requisite qualifications, they would be certified as a mediator competent to handle child-inclusive divorce mediation. Because these requirements would be applied across the nation, but only to mediators who handle child-inclusive divorce mediation, a national body should be formed to handle training and certification. This body should be comprised of individuals representing each field involved.

C. Interim measures - What should Washington do in the mean time?

Without the endorsement of the courts and legislature within Washington, it is likely that the current involvement of children in divorce mediation and the lack of mediator standards will remain the same. Any attempts within the state to address these issues will potentially come before any national standards are established. This could allow Washington to be a pioneer in crafting a framework for involving children in divorce mediation through implementation of minimum mediator standards within the state. In the interim, a statewide body should be established in Washington to train and certify those mediators who intend to handle child-

inclusive divorce mediation. The first step must be establishing a minimum set of standards that mediators must have in order to handle this type of mediation, and the standards could parallel the aforementioned proposed national standards. Instead of promoting child-inclusive divorce mediation within the state, an emphasis should be placed on adequate training standards as a necessity. Awareness about the benefits of including children in divorce mediation should be emphasized, but only after it is certain that qualified mediators are available within the state.

VII. CONCLUSION

Children suffer negative mental, emotional and psychological effects, both in real time and in the future, as a result of their experiences during the process of divorce. This reality has brought the concept of child inclusive mediation to the forefront of potential solutions to problems faced by these children as a consequence of divorce. Child inclusive mediation could negate many of the adverse consequences, potentially alleviating many issues in the context of children and divorce. Furthermore, child inclusive mediation could provide additional benefits for the family unit, particularly children. The family may experience greater satisfaction with the process and any resulting parenting plans, rates of subsequent litigation may be lowered, children's feelings and opinions are considered and the child may feel happier and more content with the situation in the long-term.

In order to effectuate the solution of involving children in divorce mediation, assuring that other parties involved, specifically the mediator, are adequately qualified to participate becomes paramount. To assure that divorce mediators conducting the process are adequately qualified to do so, a set of minimum standards must be created to guarantee basic knowledge in the fields involved. An additional requirement of training relating directly to the child's role in the process should also be imposed, in order to address some of the unique issues presented by

the child's participation. A national body should be formed to regulate and handle training and certification of divorce mediators, the body being comprised of representatives of the fields involved in divorce mediation process itself.

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