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Child Welfare Mediation in Georgia

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Child Welfare Mediation: A Solution for Georgia?
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INTRODUCTION

The revision of Georgia’s juvenile code, ongoing changes in the administration of the Division of Family and Children Services (DFCS), and recent tragedies related to abused or neglected children have provided motivation for considering the best way Georgia can ensure the safety of its children without overburdening the courts and other public services. In this environment, mediation presents a unique opportunity for improving outcomes without creating unmanageable costs. While it is not a panacea, mediation does represent a system for helping Georgia’s diverse families by leveraging communities’ existing resources and reforming the way that child welfare professionals, court officials, and families themselves view the dependency systems intervention in children’s lives. Georgia’s recently updated juvenile code specifically recognizes mediation as an option for addressing dependency issues.\(^1\) While juvenile mediation has been a part of some of Georgia’s local courts for years, the majority of jurisdictions do not have a formal juvenile mediation—let alone child welfare mediation—program. The explicit inclusion of mediation in the juvenile code provides an incentive for these communities to consider adopting mediation as a tool for assisting in the resolution of dependency cases.

OVERVIEW OF MEDIATION

Mediation is an informal dispute resolution process facilitated by a neutral third party. Mediation’s consensual nature and reliance on informal procedures distinguishes it from litigation or other alternative dispute resolution methods like arbitration. In mediation the third party does not have decision-making authority.\(^2\) Instead, mediation is more like negotiation with a referee. The mediation process is designed to help disputants discuss their concerns and develop options for a mutually satisfactory resolution.\(^3\) Mediation can be used in a variety of settings. It has long been a staple in industrial relations and has been successfully used to
intervene in everything from patent disputes to complex, multi-party violent conflicts. In recent decades it has become increasingly common in family law.

Mediation has several key characteristics. First and foremost, it uses a neutral or impartial third party to assist the disputants by encouraging effective communication, promoting problem-solving, and supporting positive negotiation behaviors. In contrast, dispute resolution mechanisms such as arbitration, litigation, and neutral case evaluation emphasize the third party’s role as a fact finder and decision-maker. A mediator will encourage honesty between the disputants and attempt to build or repair relationships, but will not make decisions for the parties.

The mediator is an impartial facilitator who is responsible for maintaining the civility and productivity of the discussion. An effective mediator serves several important functions during the mediation and should possess certain characteristics. Impartiality or neutrality are usually considered an essential characteristic of a mediator. Thus, the mediator is expected not to be a party to the dispute, not to stand to benefit from any resolution (or the lack of resolution), and not to have any significant relationships with the disputants outside of the mediation.

In addition, the mediator does not make decisions for the parties or decide who is right or wrong. “They generally do not have the power, authority, or permission of disputants to make decisions for them. They cannot unilaterally force parties to resolve their differences, or enforce a judgment that they make.” The mediator will elicit information, help parties identify issues and options, provide reality checks, and encourage future-focused discussions. She may also help the parties examine the nature of their relationship and find mutually acceptable ways to redefine and improve that relationship. Using techniques like reframing issues, reality-checking, note
keeping, highlighting areas of agreement, and providing ground rules for the conversation, the mediator promotes communication between the disputants.\textsuperscript{9}

Second, mediation is typically voluntary and nonbinding. A court may refer or order parties to participate in mediation; however, the parties are not required to reach an agreement and may withdraw from the mediation process at any time. Once signed, mediation agreements are usually binding contracts, but parties are typically given an opportunity to review them with an attorney before signing and in family or juvenile cases, the agreements are often subject to court approval. Generally, participation in mediation also does not prohibit the parties from seeking or using alternate resolution methods if the mediation is not successful.\textsuperscript{10}

Third, mediation is a confidential process. Confidentiality is often considered an essential element of the mediation process and one of its chief benefits in comparison to litigation.\textsuperscript{11} The mediator is prohibited from discussing the content of the case outside of the mediation session. Generally, the parties are also prohibited from disclosing communications related to the mediation. Most jurisdictions have codified some type of statute providing for a privilege related to the general confidentiality of mediation.\textsuperscript{12} For example, California’s Evidence Code §§ 1119-1124 address admissibility and privilege for documents and communications related to mediation. As stated by the Supreme Court of California, “In order to encourage the candor necessary to a successful mediation, the Legislature has broadly provided for the confidentiality of things spoken or written in connection with a mediation proceeding…neither ‘evidence of anything said,’ nor any ‘writing,’ is discoverable or admissible… if the statement was made, or the writing was prepared, ‘for the purpose of, in the course of, or pursuant to, a mediation …”\textsuperscript{13} Similarly, the Supreme Court of New Jersey held that under rule 1:40-4(c) of New Jersey’s Complementary Dispute Resolution Programs “[N]o disclosure made by a party during
mediation shall be admitted as evidence against that party in any civil, criminal, or quasi-criminal proceeding . . . .”\textsuperscript{14} Alabama’s court rules have equivalent protections for the confidentiality of mediation communications. All information disclosed in the course of mediation is “deemed confidential” and the mediator cannot to be compelled to testify about “the contents of documents received, viewed, or drafted during mediation, about the existence of such documents, or about “the statements made, actions taken, or positions stated by a party during the mediation.”\textsuperscript{15}

**Mediation in Georgia**

Georgia’s mediation statute, the "Georgia Court-connected Alternative Dispute Resolution Act,” was passed in 1993.\textsuperscript{16} The statute itself does not define mediation, instead listing it as just one of several possible alternative dispute resolution options and delegating authority to establish the rules governing court-connected mediation to the Supreme Court of Georgia under its general constitutional authority to administer the state’s judicial system and publish uniform court rules.\textsuperscript{17} The Supreme Court then established the Georgia Commission on Dispute Resolution (GODR) to manage court-affiliated ADR.

Georgia’s juvenile code outlines the basic structure of mediation and sets some minimal standards for mediator conduct.\textsuperscript{18} The juvenile code also addresses issues unique to the child welfare context, such as describing the timeframes for reporting required by federal child welfare legislation and making explicit allowances for the participation of children and other interested parties. However, the code refers to the rules created by GODR to provide detailed guidelines on mediation procedures, the professional responsibilities of mediators, and on addressing domestic violence.\textsuperscript{19}
CHILD WELFARE MEDIATION

What Is Child Welfare Mediation?

Child welfare mediation (CWM) refers to the use of mediation to resolve issues related to a dependency case. CWM may also be known as dependency mediation or child protection mediation. CWM “is a collaborative problem solving process involving an impartial and neutral person who facilitates constructive negotiation and communication among parents, lawyers, child protection professionals… in an effort to reach a consensus regarding how to resolve issues of concern when children are alleged to be abused, neglected or abandoned.”20 CWM can occur at any point during a child welfare case.21 Common goals for CWMs include developing a reunification plan (including services for family members and parental obligations), crafting a permanency plan if reunification is not feasible, and determining visitation schedules, while always keeping the safety and best interests of the child in sight.22, 23 Mediation can be used to educate family members on the dependency process and orient them to the variety of resources available, clarify issues, resolve conflicts and improve communication between child welfare agencies and parents, increase family involvement, and incorporate information from therapists and other professionals into the case plan. CWM can also help resolve disputes between care providers, CASAs (Court Appointed Special Advocates) and other professionals about the needs of a child in foster care.24 Most importantly, CWM can help the individuals involved (and the system as a whole) address the underlying causes of child welfare problems.25

History of Child Welfare Mediation

CWM is a relatively recent development in the child welfare toolbox. It was first implemented in the United States in the 1980s and grew rapidly during the 1990s. By the 2000s numerous studies had proven the CWM concept could be successful.
Prior to the passage of the Adoption Assistance and Child Welfare Act (AACWA) in 1980, courts generally had minimal involvement with child welfare cases, sometimes not becoming involved until termination of parental rights. AACWA placed courts in a supervisory role.\textsuperscript{26,27} Increasing court oversight raised the level of accountability by providing a party outside of the child welfare agency with the authority to review agency decisions.\textsuperscript{28} It also provided parents and others with an external forum for their complaints. However, increasing the courts’ involvement also carried costs. Child welfare personnel had to spend time preparing for court or actually in court rather than caring for children; child welfare agencies had to hire lawyers; and the court system had to provide legal representation for parents and children.\textsuperscript{29} Further, adversarial proceedings are not the ideal forum for the sensitive and complex issues involved in family matters and may even induce feelings of anger, resentment, and fear in the various parties.\textsuperscript{30} Finally, there is an inherent conflict between a legal system designed to ascertain the “truth” and a social service system designed to make prospective decisions based on subjective, variable standards.\textsuperscript{31} By involving courts in the welfare process, AACWA thus provided the motivation to develop alternative means of resolving child welfare cases.

Two pilot programs conducted in Washington, D.C. and Denver, Colorado in the early 1980s were among the first CWM programs in the United States. The next major development in the use of CWM occurred in California, where a Los Angeles juvenile court referee began meeting with parties before their court hearings. By the late 1980s these informal meetings had produced such positive results that the Los Angeles court instituted a formal mediation program. Florida and Connecticut also developed CWM programs during the 1980s.\textsuperscript{32}

In the mid-1990s CWM began achieving national recognition. The National Council of Juvenile and Family Court Judges (NCJFCJ) published a series of recommendations for
improving child welfare court practices which included CWM. The passage of the Adoption and Safe Families Act (ASFA) in 1997 stimulated the spread of non-adversarial methods in child welfare cases. Under ASFA, the federal government funds court improvements which provide for “the safety, well-being, and permanence of children in foster care” by increasing “engagement of the entire family in court processes relating to child welfare, family preservation, family reunification, and adoption.” By explicitly endorsing family engagement, ASFA implicitly supports the use of collaborative methods like mediation. As of 2002, 30 states used some form of alternative dispute resolution for dependency cases.

**Is Child Welfare Mediation Really an Effective Solution?**

There is ample evidence that mediation can be an effective tool for resolving child welfare cases. Studies have documented improvements in settlement rates, compliance with permanency plans, the speed of resolutions, and other indicators. However, there are also numerous issues that can impact the success of a CWM program. CWM programs must carefully balance the need to foster trust with all of the participants, to simultaneously protect the confidentiality of the process and the safety of children, to acknowledge and address the power imbalances between families subject to child welfare interventions and the professionals conducting the intervention, the procedural constraints of the governing statutes or rules, and the practical constraints of time and costs.

According to one report, a study of ten mediation programs in California found that at least 70% of the cases reached a full or partial agreement. Other studies report that child protection programs generally produce settlement rates of 70% to 89% and satisfaction rates of 75% to 90%. Mediation can shorten the amount of time children spend in foster care and reduce costs. According to one study, mediation produced plans 1-2 months sooner than non-
mediated cases,\textsuperscript{38} in part by resolving or reducing the contested issues.\textsuperscript{39} Some studies found mediation helped families achieve permanency in less time.\textsuperscript{40} A study of a mediation program in Ohio found mediation saved an estimated 39\% of costs.\textsuperscript{41} In addition, mediation can result in more highly individualized case plans than is often possible in the court setting, which contributes to increased compliance and less subsequent contested litigation.\textsuperscript{42} Mediation improves the relationship between caseworkers and families.\textsuperscript{43} Parents report feeling more “heard,” having a better understanding of what they need to do (and why), and feeling more empowered. Parties may also feel more comfortable raising cultural or religious issues.\textsuperscript{44} Evaluation of one CWM program found that 60\% of mediated cases included counseling services compared to less than 25\% of non-mediated plans.\textsuperscript{45} Further, 70 to 80\% of child welfare professionals reported that parents were more involved in case planning when mediation was used. Finally, mediation often draws in greater familial resources by inviting the extended family and friends to participate. Some studies show mediated plans make more use of kinship care than non-mediated plans.\textsuperscript{46}

\textbf{QUALITIES OF A SUCCESSFUL CHILD WELFARE MEDIATION PROGRAM}

The success of a CWM program depends on a wide variety of factors, including the scope of the program, its inclusiveness, the level of resources the court and child welfare agency have committed to supporting the mediation process, the care put into structural concerns like confidentiality and referral procedures, and the skill and training of the mediators. While each jurisdiction is different, some general best practices have emerged. The Association of Family and Conciliation Courts recognize seven principles underpinning the successful planning and implementation of a CWM program. CWM should be: inclusive, collaborative, timely, safe,
confidential, ethical, and comprehensively supported. These principles guide the following discussion of the qualities necessary for a CWM program to be effective.  

**Who can and should participate in child welfare mediation?**

CWM should be an inclusive process that is open to engaging families, child welfare professionals, and anyone else with an interest in the child’s welfare. At a minimum a CWM will usually include the child’s parents, the child or the child’s representative, and DFCS. In addition, the attorneys for each party may also attend. Other potential parties include relatives, stepparents, boyfriends or girlfriends, foster parents, de facto (psychological) parents, court appointed special advocates (CASAs), and service providers or experts like psychologists. Including these additional parties expands the community that shares in responsibility for ensuring a child’s safety and well-being in ways that are difficult to achieve in court. However, the presence of more participants also raises important issues for organizing an effective mediation. The mediation program must consider practical concerns, such as finding a location that can comfortably accommodate multiple participants, scheduling sessions when all necessary parties will be able to attend, accounting for the increased amount of time which will be required for sessions with a large number of participants, and planning for caucuses or separate sessions with small groups as needed. In addition, careful selection of agency representatives is necessary. Because of the complexity of the issues involved, mediation may require multiple sessions, and it is important that the individuals selected to participate have the time and availability to attend all sessions. Mediation’s flexibility and inclusiveness allow it to accommodate a variety of parties who have different priorities and relationships with the issue in question, but careful planning is necessary to maximize on this potential. Although it can be challenging to coordinate, mediation’s ability to accommodate multiple parties is one of its chief benefits.
Children are essential and important participants in a CWM. Even when the child is not physically present, the child’s “voice” must play a central role in the mediation process. The decision on whether a child should participate hinges on the child’s age and maturity level, the topics to be discussed, and on the court’s general philosophy on children’s participation in the child welfare process. However, there are good reasons to encourage children to participate in mediation. First and foremost, the child has the greatest stake in the outcome of the mediation; her safety and well-being are directly impacted by the decisions being made in mediation. The child also possesses information about her situation that no one else has. In addition and perhaps most importantly, research has shown that when children participate in mediation they feel “empowered.” The opportunity to speak and be heard in a safe environment helps to restore “children’s sense of their own value, strength, and capacity to handle life problems,” while being excluded from mediation and thus from any meaningful participation in the decision-making process perpetuates children’s “feelings of isolation, loneliness, anxiety, fear, sadness, confusion, and anger.”

**How should a child welfare mediation be conducted?**

CWM should be a collaborative process that enhances communication between the parties and empowers them to be effective advocates for and guardians of children’s well-being. In particular, child welfare cases naturally display significant power imbalances, but mediation can be used to help level these imbalances. Through their authority to dictate how and when parents access their children, caseworkers and other state officials exercise far-reaching power over families. Mediation has the ability to ameliorate some of this power imbalance by providing parents with a forum for voicing their concerns and giving them the feeling of being heard. Mediation empowers parents by enabling them to participate in the development of options,
distributing decision-making responsibility, and transforming how the parties view and use their respective powers.58

Courts may choose from several forms of mediation operating along a continuum from settlement-focused processes to relationship-focused processes. Along this continuum the amount of time devoted to discussing and analyzing emotions and values versus facts and evidence will vary. The processes will also vary in the degree to which the mediator intervenes in the conversation and in how much structure is imposed on the conversation. The more collaborative and relationship-focused forms of mediation—such as facilitative, transformative, and narrative mediation—are typically best suited to child welfare cases.

In facilitative mediation the focus is on achieving agreement, while giving the parties adequate time to express and process their concerns (regardless of whether those concerns are substantive, relational, or emotional).59 It features a moderate amount of mediator intervention to clarify points, elicit information, and maintain positive momentum in the conversation. The process has a defined structure, consisting of four to seven distinct steps (depending on the model used), but is flexible enough to move back and forth between the steps as needed. The mediator does not evaluate the facts or the merits of the parties’ cases and does not provide suggestions.60 Instead, the mediator’s primary goals are to provide a safe forum for the parties’ discussion and to assist the parties with effectively communicating with each other. Facilitative mediation is probably the most common form of mediation practiced in relation to court cases, but it is not necessarily the most effective choice for healing relationships in family disputes because its humanizing potential is easily diluted by structural flaws in the mediation program.61

Transformative and narrative mediation emphasize the therapeutic elements of the process over the fact-based approach of evaluative mediation or the problem-solving approach of
facilitative mediation. According to Bush and Folger in *The Promise of Mediation*, mediation has two distinct transformative benefits. The first is empowerment, which is the self-confidence and self-determination that mediation participants gain from the process. The second is recognition, whereby the participants learn to be open with their feelings and empathize with those with whom they are in conflict—seeing them as human rather than inhuman enemies. This process of humanizing the parties, building trust, and improving communication is especially valuable in the context of the child protection mediation. It sets the groundwork for the productive long-term relationships necessary to ensure children’s safety and stability. This makes it a good fit for relationship-focused family law, especially in the context of therapeutic jurisprudence.

Similarly, narrative mediation seeks to deconstruct participants’ “stories” in order to analyze relationships and expand each individual’s point of view. By emphasizing the “storytelling” aspect of mediation and “examining the making of meaning through the filter of language and the subjective interpretation of ‘facts,’” the mediator assists the parties in creating a new, inclusive “story.” Narrative mediation does not focus on settlement per se, but still incorporates problem-solving and agreement-generating elements. Because of its emphasis on communication and relationships, especially the creation of a shared, inclusive history, narrative mediation is well-suited to family law cases. In particular, it parallels the humanistic and emotionally-aware processes of therapeutic jurisprudence.

Georgia’s rules for court-affiliated mediations generally endorse the facilitative style of mediation. However, it does not prohibit individual courts from adopting other variations of mediation. Courts should carefully consider their goals for the mediation program, the availability of mediators trained in a specific mediation style, and the amount of time and
resources they are willing to allot to the mediation program when deciding which type of mediation to use.

**Are there special requirements for child welfare mediators?**

Mediators play a key role in the success of the mediation process, thus it is essential that they receive appropriate training. Many of the skills required of a mediator are the same regardless of the topic being mediated. However, dependency mediators will benefit from additional training on family dynamics, trauma, child development, and domestic violence. A diverse mediator pool is essential. Program managers should recruit mediators who represent a variety of backgrounds, ages, racial and ethnic groups, genders, and languages. Pairing parties with a mediator that they can identify with can contribute to the trust necessary for the mediation process to be successful. Having a mediator who is familiar with the parties’ culture can also facilitate communication by allowing the mediator to more easily translate contextual information for the parties.

Mediators who handle cases under O.C.G.A § 15-11-20 must have a bachelor’s degree or equivalent child welfare experience and take a minimum of 28 hours of training (for new or general-civil mediators) or 21 hours of mediation training (for mediators who are already registered in domestic relations). The dependency mediation training should include instruction on topics such as dependency law, juvenile court process, the role of CASAs, guardian ad litems, and child attorneys, child support guidelines, DFCS policy and roles, domestic violence, basic child development, and Federal requirements like “reasonable efforts.” The rules also recommend that new dependency mediators should observe and comediate cases before mediating a dependency case on their own. However, courts who wish to implement dependency mediation face a major hurdle. GODR has not approved any dependency mediation training
providers at this time. If the availability of dependency mediation mirrors the history of
delinquency mediation in Georgia, the shortage of registered dependency mediators is likely to
continue for the foreseeable future. Delinquency mediation training, which has been around for
some time now (and was discussed for years before being approved), only has three approved
providers for the whole state.

**Confidentiality in Child Welfare Mediations**

Mediation is typically considered a confidential process. In fact, confidentiality is
considered one of the basic principles underlying mediation and contributing to its effectiveness
as a dispute resolution tool. Yet, for CWM confidentiality is a double-edged sword.
Confidentiality is necessary to encourage parent participation and ensure the effectiveness of the
process, but it must be carefully balanced against the juvenile court’s primary goal of securing
safety and permanency for dependent children. Further, many of the participants in a CWM are
mandatory child abuse reporters, so there is the potential for role confusion or breaches of trust
in a mediation whose subject matter is abuse and neglect, unless the mediation program provides
clear guidelines about what will and will not be reported. The degree of protection granted to
confidentiality in the dependency context varies dramatically—from California which says
family court mediations are “confidential” but vests the evidentiary privilege in the court itself
rather than the parties or the mediator\(^{69}\) to Florida whose dependency mediation statute does not
mention confidentiality at all.\(^{70}\) The lack of confidentiality can have substantial consequences for
the integrity of a CWM program. For example, *McLaughlin v. Superior Court* challenged
California’s practice of requiring mediators in some counties to recommend a disposition for
custody cases that were referred to mediation but failed to reach an agreement, while
simultaneously denying the parties the right to cross-examine the mediator.\(^{71}\) California’s Family
Code stated that family mediation proceedings conducted pursuant to that code were confidential and private but vested the evidentiary privilege in the court. A separate provision of the Family Code, § 3183(a), further undermined this limited guarantee of confidentiality by allowing local courts to require a mediator to submit custody or visitation recommendations based on their observations during the mediation. Mediator recommendations could include issuing restraining orders, opening an investigation, or providing other services to the family. In *McLaughlin*, the mediator was instructed not to provide details on why he made specific recommendations, and the court used that restriction as grounds for denying the parties the right to cross-examine the mediator. The appellate court disapproved this argument, saying that it could not constitutionally enforce a policy that allowed the court to receive significant information without allowing the parties to cross-examine the source of that information. Thus, the appellate court held that due process required the court not to receive recommendations from the mediator unless it “…first made a protective order which guarantees the parties the rights to have the mediator testify and to cross-examine him or her concerning the recommendation…” or the parties waive their right to cross-examine the mediator.

Georgia’s statute does not provide much clarity in this area because it fails to discuss confidentiality at all. Instead, confidentiality is discussed in the rules promulgated by the Supreme Court and only applies to court-annexed or court-referred mediations. According to these rules, confidentiality extends to “any statement” made during the mediation or during the mediation intake (including statements made to program staff). Such statements cannot be disclosed by the neutral or program staff, cannot be used as evidence in subsequent proceedings, and are not subject to discovery. The agreement to mediate, the mediated agreement, and the fact that the parties appeared for mediation are not considered confidential. Under the rules the
mediator is exempt from being called to testify regarding a mediation. In addition, neither a mediator’s notes and records nor the court ADR office’s records pertaining to the subject matter of a case are subject to discovery. There are exceptions to confidentiality for “threats of imminent violence to self or others” and when a mediator “believes that a child is abused or that the safety of any party or third person is in danger.” Thus, each jurisdiction must determine the degree of protection it will extend to confidentiality as it develops its CWM program.

CONCLUSION

Mediation is a viable solution for Georgia, but there are significant hurdles to its effective implementation. First and foremost, each jurisdiction must determine realistic goals for the mediation process and develop structures and procedures to support those goals, such as guidelines on who can participate in mediation, recommendations on when to initiate mediation, and qualifications for. Second, jurisdictions must also create ongoing, comprehensive training programs, especially for the mediators, judges, caseworkers, attorneys, and other system personnel. CWM is essentially a voluntary process whose success relies on the willingness and commitment of the parties, courts, and agencies involved in it. Thus, it is necessary to provide ongoing training and to establish policies that support the trust needed for the mediation process to function. Third, the court system must clarify the rules governing confidentiality in child welfare mediations to avoid inconsistencies between and within jurisdictions. All of these activities may be initiated on the local level but will also require collaboration at the state level.
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Cal Fam Code § 3177, Cal Evid Code § 1040

Fla. R. Juv. P. 8.292


Cal Fam Code § 3177 provides “Mediation proceedings pursuant to this chapter shall be held in private and shall be confidential. All communications...are official information within the meaning of Section 1040 of the Evidence Code.” Cal Evid Code § 1040 governs privilege for official information; “official information is defined as “information acquired in confidence by a public employee in the course of his or her duty...” that has not been
disclosed to the public prior to when the privilege claim is raised. Under Cal Evid Code § 1040, the public entity not the public employee—in this context a mediator—holds the privilege to the official information. Thus, the court rather than the mediator or the parties control the information, rendering the guarantee of confidentiality illusionary.

74 Saccuzzo, Johnson, and Koen, supra note72 at 2–3.
78 However, “Otherwise discoverable material is not rendered immune from discovery by use in a mediation...” Id.
79 Olson, supra note21 at 488.