



Hamilton County Juvenile Court

**Permanent
Custody
Mediation**



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Executive Summary



Underfunding from the United States Department of Health and Human Services, the Hamilton County Juvenile Court provided mediation services to families who were the subject of a permanent custody filing.

For evaluation purposes, cases were randomly assigned to the mediation or control group. Cases were also accepted for mediation at the request of one of the parties, or, more typically, the magistrate.

The court retained St. Aloysius, a multi-service treatment center for children and families with a track record in mediation to provide mediation. St. Aloysius contracted with, and supervised, experienced community mediators who received intensive training on issues pertaining to child protection.

Mediation agreements were bifurcated and included binding and non-binding provisions. The former included the decision to grant permanent custody, while the latter included agreements by the adoptive parents to allow phone contact, exchange of photos and letters, or in-person visitation with the biological parents.

This evaluation is based on 49 cases with a permanent custody mediation between December 1, 1999, and November 30, 2001, and 37 comparable cases assigned to the control group.

Summary of Key Findings

- Most cases were mediated in a single session. The average time spent in mediation was 2.7 hours.

No case required more than two sessions to complete. Slightly more than half of all cases completed mediation in 2.5 hours or less.

- The permanent custody mediation almost always involved a mother, her attorney, an attorney for the child protective services agency, a case worker, and an advocate for the child.

Other individuals who participated in permanent custody mediation on a fairly regular basis included the father, the father's attorney, foster parents, and relatives.



- Nearly 80 percent of the cases included a discussion of continued contact and/or information sharing between the biological parent(s) and child.

Discussions of whether, and how, biological parents might remain in contact with the children and/or the individuals providing permanent care for these children were common. Other frequently discussed issues had to do with the type of permanent home that would be most appropriate — including discussions of kinship care and other planned permanent living arrangements.

- Approximately 40 percent of all cases were able to reach an agreement of some type in mediation regarding custody.

In about 14 percent of all cases, the parent(s) agreed to a voluntary relinquishment of their parental rights. In approximately 14 percent, the permanent custody agreement was for legal custody of the children without a termination of parental rights. In 10 percent of the cases, the child welfare agency agreed to withdraw or hold the motion for permanent custody.

- A wide range of cases were able to resolve permanent custody issues in mediation.

Settlement in mediation was not associated with the type of maltreatment bringing the case into the system. **Nor was** the outcome of mediation associated with prior abuse reports or whether the permanent custody petition was filed as an original motion or following attempts to reunify the family.

- Agreements were reached in half the cases that dealt with continued contact.

The most common “open adoption” provisions included in mediated agreements called for continued visits between biological parents and children or for the periodic exchange of information. Often, these open adoption provisions were part of an agreement calling for relative care.

- Cases that did not result in agreements often narrowed the issues in dispute.

Even when the parties did not reach agreement on the permanent custody issue, mediation often helped them to reach partial agreements and to reduce the number of issues in dispute.

- There was substantial concern about permanent custody mediation at the start of the project.

Resistance was probably greatest among members of the defense bar. Defense attorneys feared that parents would be misled into relinquishing their parental rights in exchange for contact provisions that could not be legally enforced.



- Much of the initial resistance was dispelled through exposure to the process.

Although defense attorneys continued to express some concerns about the mediation of permanent custody in the absence of open adoption laws, most felt the cases they mediated produced fair, clearly understood outcomes.

The participants believe that everyone, including parents' attorneys and mediators, and later, the magistrates, do a good job of differentiating between the binding part of the agreement dealing with permanent custody and non-binding agreements dealing with contact.

- There is general agreement that cases involving extended family and identified adoptive parents are best suited for mediation.

Cases in which the prospective adoptive parents have not yet been identified are more difficult to mediate and more frustrating for the parties involved. In these cases, the child protection worker can agree to convey requests for contact to adoptive parents and to look for potential adoptive parents who would be willing to provide continued contact. However, the worker may not be able to find an adoptive home that will allow continued contact.

- Participants in the mediation process offer mixed reactions to the idea of more extensive screening efforts by magistrates.

All participants agree that cases should be eliminated from mediation if the parents cannot participate due to extremely low cognitive functioning or uncontrolled mental illness. Beyond this, the professionals are more mixed in their reactions to case screening. Many participants noted that even seemingly intractable cases often settle in mediation, and they also see benefits accruing even in cases that do not settle. Some participants suggest that a wide range of cases should be referred, but the professionals should alert the mediators to unusual dynamics that might make settlement unlikely.

- Case specific surveys completed by parents, social workers, attorneys, and guardians *ad litem* show high levels of user satisfaction with mediation.

Feedback on surveys completed immediately after mediation show most participants thought mediation was better than court; gave them an opportunity to talk about issues of importance; and provided a neutral forum where they felt listened to, understood, and treated with respect.

- Mediation appears to result in substantial cost savings.



The estimated cost of resolving a permanent custody case through mediation appears to be as much as 39 percent less than the estimated cost of processing permanent custody cases in the absence of mediation.

- Surveys completed by attorneys following mediation show mediation is often credited with reducing the amount of time a case will require.

Over 40 percent of the surveys completed by attorneys for parents and children indicate that mediation reduced the amount of time they needed to spend on at least one case. Among attorneys for the child protective services agency, the figure was 65 percent.

Conclusions

Given the small sample sizes, this evaluation cannot be considered a definitive study of permanent custody mediation. It does offer preliminary insights into the types of cases that use permanent custody mediation, the nature of the intervention, the settlement rate, and the types of outcomes that are generated, the costs involved, and the reactions of the users.

The limited empirical information also suggests that permanent custody mediation is a generally effective, as well as cost-effective, way of promoting agreements and avoiding contested trials to terminate parental rights. Professionals view the process as more humane and dignified for families than conventional adjudication.

Many of the preliminary findings noted above have implications for future permanent custody mediation programs. Among the key conclusions are the following:

- Permanent custody mediation should be offered along with mediation at all other stages of case processing.
- Every effort should be made to elicit the support of the key professional groups prior to the first permanent custody mediation.
- Mediators must be highly skilled.
- Mediation can be useful if one parent attends and the other does not.
- Future programs should plan on mediating a wide array of permanent custody cases.
- Careful consideration must be given to determining which issues will be dealt with in mediation.



- If open adoption issues are to be addressed in mediation and if potential adoptive parents have been identified, the adoptive family should attend the session.
- Every effort must be taken to ensure that the parents fully understand what is and what is not binding in their agreement.
- If the mediation session produces an agreement on permanent custody, this agreement should be immediately entered in the court record.
- If only one parent attends mediation and the absent parent has not been active in the case, the court should attempt to schedule time following the entry of the agreement into the record to hear the case against the absent parent.
- Future research is needed to determine the long-term outcomes in cases with non-binding agreements.

Preface

Permanent Custody Mediation in the Hamilton County Juvenile Court Dependency Department: The Evaluation

In 1998, the Hamilton County Juvenile Court (Cincinnati, Ohio) was awarded a grant by the United States Department of Health and Human Services as part of an initiative on permanency. This report describes the results of an independent evaluation of the Hamilton County Juvenile Court Permanent Custody Mediation Program. The evaluation was designed to address the following key questions:

- Does mediation reduce the amount of time that elapses between the filing for termination of parental rights and the termination hearing?
- Does the use of mediation increase the involvement of biological parents in the permanency planning process?
- How frequently do mediated permanent custody agreements include some provisions related to sharing of information or contacts between the biological and adoptive parents?
- Do professionals in the child welfare system view mediation as a useful and appropriate tool at the time of a termination filing?

In addition, the evaluation was intended to produce information about the development and implementation of permanent custody mediation that would be helpful to other jurisdictions considering such a program.

Chapter 1 provides an introduction to the concept of permanent custody mediation, discusses some of the improvements it is hoped the process will produce, and presents an overview of the concerns that have been voiced about its use.

In Chapter 2, the focus moves specifically to the Hamilton County Program — how it was designed and implemented, how cases were selected for the Program, how mediators were retained and trained, and how data were generated for the evaluation.

Chapter 3 is a profile of the cases assigned to the mediation and comparison groups. The chapter identifies the issues leading to the filing of a motion for permanent custody and describes the families in each group.



The mediation process, as practiced in Hamilton County, is described in Chapter 4. The Chapter documents the issues dealt with during mediation, the parties who participate in the process, the duration of an average mediation, and the steps taken if an agreement is produced.

Chapter 5 focuses on mediation outcomes, including settlement rates, factors associated with settlement, and the nature of the agreements generated in mediation.

Chapter 6 continues to explore the nature of mediated agreements, this time by comparing them with outcomes in the control group. The Chapter also presents the results of court file reviews of mediated and non-mediated cases a minimum of six months following group assignment.

Chapter 7 reports on the results of user satisfaction surveys administered to both professionals and family members and shares the results of open-ended, qualitative interviews with representatives of all the major professional groups involved in permanent custody cases.

Chapter 8 presents an analysis comparing the costs of processing permanent custody cases with and without mediation.

Finally, Chapter 9 summarizes major findings and considers what these findings suggest for future research and current practice in Hamilton County and nationally.

Chapter 1



Introduction to Permanent Custody Mediation

It has long been recognized that children in out-of-home placements need to achieve permanency in a faster manner. The Adoption Assistance and Child Welfare Act of 1980 was one of the earliest pieces of legislation meant to address what is often referred to as “foster care drift” — children moving from placement to placement without ever returning home or being freed for adoption. The legislators responsible for the Act intended it to:

...lessen the emphasis on foster care placement and to encourage greater efforts to find permanent homes for children either by making it possible for them to return to their own families or by placing them in adoptive homes.’

This 1980 legislation required reasonable efforts to avoid placements and mandated the development and regular review of a plan for each child in care.

Efforts to provide a permanent home to every child continued with the Adoption and Safe Families Act, which became law 1997. This legislation allows the court to move directly from adjudication to permanency under specific circumstances. For example, cases are allowed to bypass the requirement of “reasonable efforts” to reunify if the parent has subjected the child to aggravated circumstances (such as chronic abuse), or **where** there have been previous involuntary terminations on a sibling, or the parent has been convicted of murder or manslaughter of another child.

The results of such legislation have been limited. A recent report from the Children’s Bureau’ indicates that, historically, the proportion of children in foster care who are free for adoption has remained remarkably steady. In both 1977 and 1997, 20 percent of the children in foster care were available for adoption.

However, given the increased population, the increased number of abuse and neglect reports over time, and the resulting increase in the number of children in out-of-home placements, there are now an estimated 520,000 children in foster care. Research indicates that one-third of all foster children will not be returned to their birth **parents**,³ and 21 percent of all foster children will have parental rights **terminated**.⁴

There are many reasons why states continue to experience problems in expediting permanency for children in foster care. One legal analyst explains that:

Termination proceedings are typically the most difficult and hardest fought stage of child protection **cases**.⁵



The Resource Guidelines for Improving Court Practice in Child Abuse-Neglect Cases, developed by the National Council of Juvenile and Family Court Judges (NCJFCJ), noted that current court practices create some of the delays in freeing children for adoption. For example, the report notes that:

Contested termination trials too often are scheduled without sufficient time to allow them to be completed without interruption. For example, a single trial may begin with a half-day hearing, be continued for six weeks, take another day, and then be continued for another six weeks. In some courts, termination trials are often spread out over months.¹

However, the report notes that other delays are more inherent in the termination process, saying, “By their nature, appeals create another layer of process and potential for delay in achieving permanency for the child.”

Among NCJFCJ recommendations for avoiding delays and appeals are:

- Relinquishment counseling for parents early on;
- Care to make the hearings correct and less subject to reversal;
- Competent representation for all parties;
- Clear findings of fact; and
- Expedited appeals authorized by legislation or court rule.

However, the NCJFCJ warns that:

Even with fairness in procedures, competent attorneys, and full disclosure of facts related to the case, a significant percentage of involuntary termination cases will be appealed.⁷

To avoid both delays and appeals, the Guidelines also recommend the use of mediation or other negotiation tools.

Mediation

The Adoption and Permanency Guidelines published by the National Council of Juvenile and Family Court Judges in 2000 were designed to set out “the essential elements of best practice” for court actions leading to permanent homes for children. They note that mediation and other pre-trial processes can expedite permanency by:

- “Providing parents with factual information that offers a realistic prospect of trial outcome and helps to separate personal issues and biases from factual information;



- Giving parents a sense of participation in future planning for the child and a sense of significance and closure with dignity that will no longer be available if the case goes to trial;
- Helping the child, parents, and relatives to understand the importance of one stable home for the child and to overcome objections to terminating parental rights, opening the door to relative adoption; and
- Providing a forum to discuss the appropriateness of adoption with contact and to develop a proposed plan for the contact.”

The Guidelines conclude that of all the negotiating options, “mediation has the best chance of achieving *all* these results.”⁹ In fact, the Guidelines conclude that:

Even when mediation and other negotiations fail to produce agreement and avoid trial they can help narrow the focus of the trial, shorten its duration, and ensure that all parties are prepared well in advance of the trial.

Adoptions 2002, the response of the U.S. Department of Health and Human Services to President Clinton’s directive to improve permanency practices, recommends that mediation or other non-adversarial techniques “should be available prior to the filing of a court petition and throughout the legal process, up to and including relinquishment or termination of parental rights, adoption, and guardianships.”

Mediation in child protection cases is not new. The chief architect of the first court-based dependency mediation program describes the program’s origins this way:

It was initiated in May 1983 in an effort to achieve earlier case resolution with its many benefits, . involve parents and children to a greater degree in case planning and assist the court in calendar management.”

Numerous courts have now adopted dependency mediation, and research has addressed the ability of the process to produce sound, safe, expedited agreements about a wide range of issues, including the wording of the abuse/neglect petition, the nature of the placement, the types of services to be required, and case goals.

Many professionals in the field feel that mediation and other pre-trial negotiations will also benefit families facing termination of parental rights proceedings. These tools may help the family to better understand the court process, their own limitations as parents, and the range of options available to them. These practices may also help the family avoid the contentious, demeaning process of a trial and reduce the need for appeals.

However, permanent custody mediation is not without controversy. It deals with the inherently controversial practice of parents agreeing to a termination of their parental rights and discussions of post-adoption contact.



Agreement to Terminate Parental Rights

Voluntary relinquishments were once quite common, even in cases where the relinquishment followed the placement of the child into foster care and the involvement of the juvenile court and child welfare agency. However, in many jurisdictions, voluntary relinquishments have declined in recent years. One study found that

... in the early 1980s over half (56%) of the children in California's public adoption caseload were there on a voluntary basis, but by 1994, this proportion had declined to only 12%.¹²

The reason for declines in voluntary relinquishments has been attributed to several factors, including quick case processing time frames, set by legislation, that reduce the opportunity for caseworkers to explore the option of voluntary relinquishment and concerns about coercion and possible violations of the rights of biological parents. Some courts choose not to accept voluntary relinquishments, but allow parents to stipulate to the allegations and choose not to contest an involuntary termination of parental rights.

Stipulating to a termination of parental rights, within or outside of mediation, can evoke strong responses from some professional groups who fear that these agreements are the result of undue pressure on biological parents. Attorneys for parents may not be supportive of a stipulation to the termination of parental rights because of the "fear that clients will claim coercion or that their due process rights were not observed."¹³ At the extreme would be parental charges of malpractice against an attorney who stopped short of a trial to determine permanent custody. Certainly, attorneys who represent respondent parents have expressed concerns that in discussions of permanent custody, all compromises are made by parents, never by the agency.¹⁴

Yet despite these misgivings, there is also strong support for courts and child welfare agencies to raise the possibility of a settlement with parents who face termination filings. For example, a survey in 1996 conducted by the Abandoned Infants Resource Center of the University of California at Berkeley School of Social Work revealed that policy makers, administrators, and line workers are interested in seeing the use of voluntary relinquishment revitalized.¹⁵

One of the Berkeley researchers notes that the role of the attorney is, unquestionably, to protect the clients rights. But, he warns, the attorney must recognize that one of the parent's rights is the right to move away from the goal of reunification.¹⁶

Voluntary relinquishment offers parents the opportunity to make a choice for the future of their child. Making a choice, and making a decision on behalf of the child, is empowering for the parent. The range of choices open to the parent may not be as wide as the parent might prefer, but that should not be construed as putting undue pressure on the parent.¹⁷



Adoptions 2002 concluded that:

Public child welfare agencies may rely more heavily than may be necessary on involuntary judicial termination of parental rights to make adoption possible for foster children . Voluntary relinquishment is generally more humane and preferable to involuntary termination of parental rights.*

Adoptions 2002 notes that when parents agree to a termination of parental rights, the process is faster, less adversarial, and relatives who had been unwilling to adopt the child when the parent was fighting the termination of parental rights may become willing to consider adoption.

Some observers conclude that dealing with permanent custody within mediation may help to address some of the concerns about coercion or violations of rights that are a part of the controversy surrounding the practice.

The use of [non-adversarial case resolution] in the voluntary relinquishment process may also add civil liberty *protections* to the birth parents when compared with more common methods of working with birth parents on parental rights termination issues. Parents may . . . be more likely to feel that those within the 'system' are consciously protecting their rights, rather than simply coercing them to 'give up' their rights to their child. Also, where voluntary relinquishments are not made within the court, making them within [a non-adversarial process] could provide protections to the parents that are similar to those that should be provided to parents within more formal termination of parental rights proceedings . Voluntary relinquishment can be encouraged, in appropriate cases, by mediation or skilled relinquishment counseling. Note that, when properly handled, mediation and skilled counseling help ensure that relinquishment decisions are well informed and fully **voluntary**.¹⁹

Open Adoption

The term open adoption actually covers a wide array of situations. One researcher describes it this way:

Openness refers to a continuum of contact and communication among members of the adopted child's family of birth and family of rearing. The continuum ranges from *confidential* (no contact and no identifying information shared) to mediated (communication occurs, but is relayed through a third party such as an adoption agency) to *fully disclosed* (communication and contact occur directly between parties).²⁰



Another researcher describes the concept:

Open adoption refers to the sharing of information and/or contacts between the adoptive and biological parents of an adopted child, before and/or after the placement of the child and perhaps continuing for the life of the child.”

When mediation of permanent custody includes a discussion of information sharing or contact between birth parent(s) and the child and/or adoptive parents, controversies emerge. The idea of information sharing or contact can be alarming for a number of reasons.

Some critics of open adoption contend that it will prove confusing to children, put children in contact with biological parents who have serious problems, require adoptive parents to parent both children and troubled biological parents, or cause unnecessary anxiety on the part of adoptive parents by causing them to feel their role is being threatened or undermined. There has also been speculation that open adoption may make it harder for biological parents to grieve and move on.

One researcher in the field notes, “Much of the literature on open adoption is polemical,” adding that existing research has not been “very instructive about open adoption for child welfare clients following voluntary relinquishment.”²² The National Adoption Information Clearinghouse concludes that open adoption “raises questions to which there are not yet clear answers.”

The Expert Panel assembled to develop Adoptions 2002 for the U.S. Department of Health and Human Services resulted in a minority opinion being issued that called for post-adoption contact to always be entirely voluntary, with no enforcement by the court. Anything else, these experts felt, eroded the exclusive rights and prerogatives of the adoptive parents. This is the same position taken by the Uniform Adoption Act proposed by the National Conference of Commissioners on Uniform State Laws and approved by the American Bar Association.²³

On the other hand, the Adoption and Permanency Guidelines published by the NCJFCJ note that, prior to the 1930s, strict confidentiality around adoption was the exception, not the rule. In addition, the Guidelines point out that adoption with contact can include very limited contact, such as exchanging annual reports or photos through an intermediary, and yet:

Small degrees of contact are often sufficient to facilitate obtaining voluntary relinquishments of parental rights and consequently serve to avoid trials and lengthy appeals.²⁴

Some experts believe that open adoption may lessen the sense of identity confusion that some adoptees experience during adolescence, make adoptive parents more accepting of the child’s background and heritage, and generally diminish the sense of mystery that surrounds closed adoptions.

Richard Barth at the University of California at Berkeley studied adoption disruption among older children. His preliminary follow-up results confirm that post-adoption contact is often very limited. Eight years after their adoption from foster care, many



children in his sample (70%) still had some type of contact with a biological parent; however, very little was face to face. More common was infrequent, non-personal contact, such as a mailing every year or two. The preliminary results of Barth's study also show that when contact breaks down, it is usually because the birth parent can no longer be located.²⁵

One researcher summarizes the limited empirical work on open adoption this way:

In older-child adoption, pre-placement openness is very typical, particularly when foster parents are adopting an older child. Foster parents support and facilitate visiting between children and their biological parents in the hope of achieving reunification, so there is often substantial contact and information shared during foster placement. the practice of continuing contact after the adoption, although rare, was characterized by a positive relationship between the two sets of parents.²⁶

Even those who support the concept of post-adoption contact agree that the determining factor should be what is in the child's best interests, not what the parents want or the desire to avoid trial. For example, the majority opinion set out in Adoptions 2002 recommends that:

State law should permit agreed upon legally protected contacts between the child and members of the child's birth family or other significant person, so long as the permanent placement option is based on the child's best interests and ensures the stability and security of the placement.²⁷

Examples of cases in which continued contact with a biological parent is likely to be in the child's best interests include cases where the child has a positive relationship with a physically or developmentally disabled parent who cannot care for the child; the child is older and wants contact; the foster and birth parents know each other and have a good relationship; or there are **still** siblings residing with the birth parents.

There may be many adoptions that fit these examples. For example, research indicates that 78 percent of the children who are ultimately adopted will be adopted by their foster parent or a relative. Of those former foster care children who have already been adopted, 65 percent were adopted by foster parents, 15 percent by relatives, and only 20 percent by unrelated other parties.**

Enforcing Open Adoption

Beyond the issue of whether post-adoption contact can be beneficial to children are questions about whether post-adoption contact provisions can be enforced. Attorneys for respondent parents express concerns that their clients will agree to a termination of parental rights based on a belief that there will be continued contact, only to discover that the contact does not happen and the agreement is not enforceable.



Many supporters of post-adoption contact favor legislation to address the enforcement of such agreements. The Adoption and Safe Families Act (ASFA) does not provide post-adoption contact, but a work group of more than 40 child welfare and legal experts convened by the Children's Bureau of Health and Human Services to draft Guidelines for States in legislating the ASFA and other federal adoption initiatives recommended that "states enact legislation that recognizes post-adoption contact agreements in the context of adoptions of children who have been subject to state custody and have spent time in out-of-home care."²⁹

The Guidelines call for state laws to provide for the legal enforcement of an agreement for post-adoption contact, along with provisions that the adoption cannot be reversed because of violations of the contact agreement, contact cannot be imposed over parties' objections, and the court be allowed to modify the agreement.

As of January 2000, 17 states had legislation allowing courts to recognize certain types of open adoption or post-adoption contact. For example, Oregon law allows provisions of the open adoption agreement to be enforced by a civil action. Minnesota and California do as well, although the family court is charged with enforcement. Some legislation encourages mediation in the case of a dispute.³⁰

However, like most states, Ohio does not recognize as binding any post-adoption contact agreed to by the parties. Ohio Revised Code §§ 3107.62 and 3107.63 state that a birth parent who voluntarily places a child for adoption can ask the agency or attorney arranging the adoption to help negotiate a non-binding open adoption agreement.

Adoption 2002 notes that:

Without protective legislation, post-adoption contact is purely voluntary and rarely enforceable in court. Despite these uncertainties, informal voluntary arrangements for post-adoption contact may be appropriate for some children, especially when adoptive and birth families already know each other and have a high degree of trust.³¹

Permanent Custody Mediation: The Research

Despite the arguments for and against permanent custody mediation, there is little empirical information about the process.

A 1996 survey of public agencies responsible for adoptions in all 50 states and all 58 California counties included questions about the practice of permanent custody mediation. The survey yielded responses from 24 non-California counties and 20 California counties. When asked if they make use of mediation or other collaborative negotiation strategies in dealing with voluntary relinquishments, 57 percent of those responding said they do not, and only 5 percent said it is used frequently.³²



The limited empirical information that is available on permanent custody mediation is encouraging. Jeanne Etter and Teamwork for Children provide mediation after the Oregon State Department of Human Services becomes involved in a case, but before the state terminates parental rights. Etter plans to expand on the Cooperative Adoption Mediation Project (CAMP), a Children's Services Division pilot program that successfully mediated 30 cases with high-risk parents.

The pilot helped families to avoid contested termination of parental rights trials, helped children find homes sooner, and reduced the number of changes in placement experienced by children. In addition, this pilot project estimated that each foster case that avoids a contested termination of parental rights' trial reduces per case costs by \$5,000 to \$35,000.³³

A report from the Mediated Permanency Planning Project of Harris County, Texas, relying primarily on case studies and surveys of 31 families, notes that the process can divert cases from costly trials, reduce feelings of loss and guilt on the part of children, and promote a sense of identity.³⁴

An evaluation of the dependency mediation program in Colorado's Fourth Judicial District found that almost a third of the cases were being mediated due to a termination of parental rights filing. Overall, 60 percent of the permanent custody cases resulted in a full settlement, compared to 72 percent of all other types of cases. In fact, compared to other post-disposition cases seen in mediation, permanent custody cases fared even better — 60 percent reached full settlement, compared to 50 percent of other post-disposition cases.

In addition, the qualitative interviewing conducted for the Colorado evaluation found that most professionals who have participated in mediation around the time of a termination of parental rights filing favor its use. They like the fact that mediation provides an opportunity to acknowledge that the parent loves the child and, in many cases, has worked hard to reunify. A word used by many of these professionals in describing the advantage of mediating permanent custody is "dignity."

Mediation can also be a more "humane" option because it can be flexible about who attends. Almost half of the mediations involving the termination of parental rights in El Paso County, Colorado, included a friend or family member along with the parents.³⁵

The following chapters of this report continue to explore the issues surrounding permanent custody mediation and open adoption through an in-depth exploration of the program in the Hamilton County Juvenile Court, Dependency Division.



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Chapter 2



Hamilton County Permanent Custody Mediation

Program History

The Hamilton County Juvenile Court located in Cincinnati, Ohio, was a logical site to pioneer the use of mediation in permanent custody cases. The Hamilton County Juvenile Court was designated a Model Court by the National Council of Juvenile and Family Court Judges (NCJFCJ) in 1993. Indeed, it was the first Model Court established by NCJFCJ. The Model Courts test best practices in dependency cases and serve as study sites for other jurisdictions seeking to improve their handling of child abuse and neglect cases.

The Hamilton County Juvenile Court has two juvenile court judges and six full-time and two part-time magistrates who hear matters related to abuse and neglect. The judges act in an appellate role and hear objections and appeals, while magistrates hear all other matters related to the child abuse and neglect action. The court employs a one magistrate-one family docketing system, provides legal representation through the Office of the Public Defender to all qualified parents, provides an attorney guardian *ad litem* (GAL) to children in alleged abuse cases and a social worker GAL to children in neglect and dependency cases, and provides Court Appointed Special Advocates (a trained lay advocate, known as a CASA) to approximately 20 percent of all children.

Adding permanent custody mediation to the court was made possible by an Adoptions Opportunity Grant from the Administration for Children and Families of the U.S. Department of Health and Human Services. However, much of the work needed to establish a permanent custody mediation program was underway before the Hamilton County Juvenile Court ever applied for the grant.

Responding to concerns about delays in permanent custody trials, a task force had been organized to work on permanency and adoption, and a smaller working group had emerged to explore issues around open adoption. Both the task force and working group involved judges, magistrates, defense bar attorneys, prosecutors, guardians *ad litem*, and representatives from the Hamilton County Department of Job and Family Services.

Members of the task force visited Portland, Oregon (another NCJFCJ Model Court), to learn more about permanent custody mediation. The positive reports they received



from Oregon and the strong judicial support for all types of alternative dispute resolution led to the application for funding and the 1998 award.

Mediation Providers

The court decided to contract out the permanent custody mediation, in part to ensure that the court was perceived to be neutral and independent. This decision required that the court release a Request for Proposals and accept bids from potential service providers. The proposal was a joint venture of the Hamilton County Juvenile Court and the Hamilton County Department of Job and Family Services.

The court received fewer than expected proposals. The court attributes this to the fact that Ohio is not an open adoption state, and, as a result, many potential mediation providers were probably hesitant to provide permanent custody mediation. In May 1999, the mediation contract was awarded to St. Aloysius Orphanage.

St. Aloysius is a teaching and treatment center for children, from birth to age 18 who have severe emotional and/or behavioral problems, and their families. It includes a group home for boys, day treatment for children who need therapeutic services, foster care and adoption services, and parent education. St. Aloysius also provides mediation services for school and family issues, including custody, visitation, and truancy. The addition of permanent custody mediation, and later temporary custody mediation, was a natural extension of the organization's work in mediation and adoption.

St. Aloysius recruited permanent custody mediators through classified ads. They required that applicants have 52 hours of general mediation training on entry. This was followed by a four-day training specific to child protection. This intensive training covered an overview of the legal system; the role of the judge and magistrate; an overview of the Department of Job and Family Services; an introduction to child protection case work; and the dynamics of family violence. After the training, each individual co-mediated with an experienced dependency mediator. All of the mediators who completed the training are still with the Program.

A total of 12 mediators provide permanent custody mediation. They include attorneys, social workers, **CASAs**, teachers, and a variety of other professions. The supervisors at St. Aloysius like the fact that the mediators are an older group of people who bring real-life experiences to the table. They are perceived as being flexible -willing to accept that there is usually more than one answer or approach that will work.

Cases are assigned to mediators fairly randomly. There is no matching of mediator and case. The goal is to balance the workload and to get everyone as much experience as possible. The mediators also work on other St. Aloysius mediation



projects, such as mediation for unwed parents, which also helps them gain critical mediation experience.

Generating Mediation and Control Groups

Cases could enter the mediation group in two ways: (1) through random assignment to the mediation group or (2) by referral of the magistrate or one of the parties. The plan called for every third filing to be assigned to the control group (with follow-up for research purposes), while every fifth case would be sent to mediation.

Program administrators at the court quickly recognized the need to suspend the rules of random assignment when the magistrate or one of the parties felt the case would benefit from mediation.

Ultimately, the mediation group was fairly evenly divided between cases randomly assigned to the group and cases referred to mediation. Virtually all of the referrals were made by the magistrates.

Magistrates referred cases for a variety of reasons. In almost a third of the referrals, the magistrate believed the case was close to settling and could avoid trial if the parties were given a chance to discuss the issues. In slightly more than a third of the referrals, the magistrate indicated the case was being sent to mediation because it was especially difficult. The remaining cases were sent for a variety of other reasons. Cases were identified on the data collection forms as “randomly assigned” or “referred” and the analysis considers these two groups separately.

Cases were eligible for mediation regardless of whether the permanent custody filing (1) followed a temporary custody filing and effort to reunify the family or (2) was the initial filing in the case, as allowed by the Adoption and Safe Families Act.

All cases assigned to mediation were reviewed by the magistrate prior to the parties being noticed. The magistrate could overrule the mediation assignment. Each year of the Program, about a dozen cases were diverted from mediation by the magistrate. Typically this was done because the parents were not located, the parent was too low-functioning or mentally ill to effectively participate, or the dispute was resolved by the time of the magistrate’s review.

A few cases were also eliminated as too legally complex, including one case in which a previous permanent custody filing was denied before a judge on objections. Magistrates also reviewed control group cases and indicated which would have been eliminated had the case been randomly assigned to mediation. Cases that were determined by magistrates to be inappropriate for mediation, whether in the mediation or control group, were eliminated from the study.



Although the magistrates did screen cases, the majority of the cases they reviewed were sent on to mediation. As Chapter 3 discusses, these were by no means simple cases, and many did involve parents with multiple problems, including mental health and substance abuse issues.

The decision was made during the first year of the Program to allow cases to mediate if one parent was on the scene but the other could not be located. The mediation dealt only with the parent who attended. The case could not be fully resolved until the court terminated the parental rights of the absent parent, but this was generally not a lengthy process since the absent parent was typically not contesting the termination, did not appear at the termination hearing, and had not participated in any efforts at reunification.

All the parties in cases selected for mediation were notified and ordered to attend mediation at the court. There were discussions about having the mediation take place at St. Aloysius to emphasize the neutrality of the process. Ultimately, mediating at the court was viewed as a more practical alternative. The assumption was that families know how to get to court and attorneys would be more likely to attend, and appear on time, if the session was at court. Cases assigned to the control group were processed as usual.

Terms of the Agreements

The policy in place for permanent custody mediation was that agreements would be bifurcated. The decision to grant permanent custody would be independent of the other agreements reached in mediation. These other agreements would not be binding, but might include provisions dealing with open adoption, party commitment, and/or precatory terms. The open adoption terms would include any agreements entered into by the prospective adoptive parents, such as agreements to allow phone contact, exchange of photos and letters, or in-person visitation.

Party commitment terms include those actions that one party can agree to unilaterally. For example, the Agency could agree to look for adoptive parents who will be receptive to continued contact between the biological parent and child, or the Agency could agree to forward a letter from the biological parent to the adoptive parent once this party was identified.

Precatory terms, expressing a wish or viewpoint, have no legal consequences, but may be extremely important to the family. An example would be an acknowledgment by the participants that the biological parent loves the child and is agreeing to permanent custody only because the parent believes it to be in the child's best interests.



The understanding was that all open adoption, party commitment, and precatory agreements would be based entirely on trust among the parties and would not be enforceable by the court. This was to be explained to the parents from the outset, explained clearly and repeatedly. The actual agreement was even divided into parts labeled “binding” and “non-binding.” The magistrates say they emphasize the non-binding nature of some parts of an agreement. As one magistrate notes:

We do a very explicit job of warning clients about the non-binding versus the binding. We’ll tell the parent “do you understand that even if you never get a single photo of your child ever again, your rights are still going to be terminated? The foster parents can decide tomorrow that they never want any contact with you again and you cannot reopen this and go to court?”

Mediation Format

Cases sent to mediation via a referral are usually sent at the time of a pre-trial hearing. The magistrate has a calendar with available mediation times and can set the appointment on the spot. As a back up, the parties are also given a court date at the same time.

When a case is scheduled for mediation, the magistrate also arranges his or her schedule to provide a half hour to put the agreement on the record, if a settlement is reached. The one magistrate-one family policy means that families cannot simply go before any available magistrate to enter the agreement.

Cases are scheduled for mediation about six weeks in advance. Ideally, the mediation providers would like to schedule the session to take place within two weeks of the referral, but they have found that this is generally impossible given the competing schedules of most attorneys involved in any given case.

During the time between the referral/assignment to mediation and the actual mediation session, the case worker reviews the pre-mediation checklist developed by St. Aloysius to be sure that the parent has transportation, the worker who attends the session has decision-making authority, and all relevant parties, including family members and treatment providers, are invited to attend. One magistrate reports that this checklist has helped reduce the incidence of cases in which parties fail to appear:

Failure to appear hasn’t been much of a problem. At one time there were parents who didn’t show up, but they got transportation arranged for them and that improved. Some attorneys double book or show up late, and the court needs to remind them that is unacceptable.



The mediators generally agree with this assessment. One mediator says:

There were some initial problems with no-shows, but we worked with Social Services on transportation. Lateness is a problem. When parties are late that leads to rushing through and that may be why for a while the surveys showed a dip in how many people felt listened to. Lateness is a problem in part because there is such a small group of defense attorneys. There is a core of maybe 12 attorneys who do most cases. That means they are overbooked and spread thin.

Program staff feel a sign-in sheet for the professionals has helped to make everyone more accountable, and more likely to be on time.

Mediation is scheduled for three hours, with the understanding that the full time will not be used if the case can be resolved more quickly or if it reaches an impasse.

The mediator does little preparation prior to the start of mediation. For example, mediators generally do not review the court file, although they generally have a copy of the motion/complaint and a list of the parties who were ordered to attend the session.

The mediators are allowed flexibility in their approach to permanent custody mediation. However, all the mediators generally begin by providing an explanation of the process. One mediation session was introduced with the mediator explaining to the parents and professionals:

Your role is to bring to the table the things you want to talk about. We [the mediators] will try to help you identify the issues, exchange information and look at all the options. You can see where you might have an agreement. This is pretty informal, there aren't very many rules. There is a rule that says you need to listen when others are talking.

The introduction generally stresses that parents can choose not to enter into an agreement and have the right to go to court. The final nature of the decision is also stressed -if the parent agrees to permanent custody and this agreement is entered with the court, there is no chance for the parent to change his or her mind and no right to appeal.

Everyone who attends the session is also asked to sign a confidentiality agreement. The mediator tells the parties:

There is a rule of confidentiality. That means whatever is said in mediation, stays in mediation. There are a couple of exceptions to that. If there are new allegations of abuse, there are people here who have to report that abuse, the same goes for threats.



As the mediation session starts, the parents are also introduced to the idea of enforceable and non-enforceable aspects of an agreement. Parents are told that mediation sometimes results in agreements about things that the court cannot enforce. These aspects of the agreement are based entirely on trust among the parties.

The parents are given examples of what is and what is not enforceable. For example, the agreement may specify that the Department will seek adoptive parents who are willing to allow some contact between the biological parents and child. However, if the Department fails to follow through on this agreement, or if suitable adoptive parents who are willing to allow continued visits cannot be located, the court will not prevent the adoption or take any other action.

Mediators say they feel no pressure to produce agreements and do not believe they are evaluated on the basis of their settlement rate. Indeed, mediators say if they have concerns about a parents ability to participate or if they perceive the parent to be feeling pressured, they will speak privately to the parents attorney. If the concerns persist, the mediator is free to end the mediation session.

If the parties come to an agreement, the policy is for the case to proceed directly to court. Before the court accepts any stipulation to permanent custody, the policy is for the magistrate to question the parents to be certain that they fully understand the stipulation, are entering into it voluntarily, and know they have the right to proceed to trial. If the magistrate is satisfied that the parents are entering into the permanent custody agreement voluntarily and with a full understanding of it, the agreement will then be read into the record.

Evaluation Methodology

The evaluation of the Program was conducted by a private, nonprofit research firm, the Center for Policy Research. The evaluation involved interviews with the judges, magistrates, and mediators involved in permanent custody cases. In addition, representatives of the following professional groups were interviewed:

- Attorneys assigned by the court to represent parents;
- Guardians *ad litem* assigned by the court to represent children;
- Social workers at the Hamilton County Department of Job and Family Services;
- Legal counsel for the Department of Human Services; and
- Representatives of the Court Appointed Special Advocate Program.



These interviews took place at the close of the third year of the permanent custody mediation program. This provided an opportunity to talk with individuals after they had a maximum exposure to the intervention.

In addition, surveys were distributed to attorneys, case workers, and family members following each permanent custody mediation. Included in this analysis are 20 surveys from attorneys for parents, 37 from children's representative, 23 from attorneys for Children's Services, 22 from case workers, and 23 from parents.

Mediators completed data collection forms for cases mediated between December 1999 and February 2001. Mediation continued after this date, and court files were ultimately reviewed for 49 cases that mediated between December 1, 1999, and November 30, 2001. Files were also reviewed on 37 control group cases generated during the same time period. Court file reviews took place a minimum of six months following the mediation.

Excluding seven cases scheduled for mediation that did not take place due to non-attendance by a parent, this report draws on data from 49 mediated and 37 control cases.

The mediated cases were fairly evenly divided between those randomly assigned to mediation and those referred to mediation by the court or one of the parties. Among the referred cases, the vast majority (25 of the 28, or 89.3%) were referred by the magistrate.

The following table shows the type of data available for the analysis.

Data Available	Mediated Cases			Control Cases
	Random assignment	Referral	Total	
Forms completed by mediators	14	17	31	
Review of court file	21	28	49	37
Cases in the analysis	21	28	49	37

Chapter 3



Profile of the Cases

This chapter presents background information about the families who took part in permanent custody mediation. Only seven families assigned to the mediation group failed to take part in mediation. They are very briefly discussed in Chapter 4.

The present chapter considers the nature of the problem of bringing the family into the child protection system and the types of additional problems present in the family. Patterns are presented separately for families randomly assigned to mediation and those in the Program as a result of a referral. The families who mediated are also compared to the families assigned to the control group. This comparison identifies any ways in which the two groups were significantly different at the outset, which might also lead to differences in case outcomes.

Family Problems

A review of court records indicates that families in both the mediation and control groups were experiencing a variety of problems in addition to, and no doubt contributing to, the child abuse or neglect which brought the family into the system. Table 3-1 shows that about half of the parents were noted to have substance abuse problems, either drug related and/or alcohol abuse.

Between 30 and 40 percent of the parents were struggling with inadequate housing and serious financial problems. Other common problems noted for parents included incarceration or a criminal record, family conflicts and dysfunctions, and severe emotional problems.

The fact that there are no statistically significant differences between cases sent to mediation through random assignment and those sent by referral suggests that magistrates (the primary referral source) were not basing the decision to refer a case on the presence or absence of certain types of problems in a family.

The similarity between randomly assigned and referred cases also eliminates the need to keep these two groups separate throughout the analysis.

In Table 3-1, and all subsequent tables, there are few differences between the mediation group and the control group. This indicates that the procedures used to



generate the samples produced the desire goal: equivalent groups of cases exposed to different approaches to resolve the issue of permanent custody.

Table 3-1. Problems Noted for Parents

	Randomly assigned to mediate <i>n=16</i>	Sent to mediation by referral <i>n=21</i>	All mediation <i>n=37</i>	Control <i>n=28</i>
Incarcerated	6.3%	9.5%	8.1%	7.1%
Criminal record, but not incarcerated	18.8%	9.5%	13.5%	14.3%
Lack of housing, housing inadequate, financial problems	25.0%	33.3%	29.7%	39.3%
Dysfunction among family members	25.0%	9.5%	16.2%	14.3%
Family violence among adults	0.0%	9.5%	5.4%	7.1%
Parent has severe emotional problems	25.0%	14.3%	18.9%	28.6%
Mentally handicapped parent	6.3%	9.5%	8.1%	0.0%
Parent has physical disability	6.3%	0.0%	2.7%	0.0%
Parent has drug and/or alcohol problem	37.5%	52.4%	45.9%	53.6%

No statistically significant differences between cases randomly assigned and referred to mediation.
No **statistically significant** differences between the mediation and the control **group**.

History with Child Protection

Approximately 50 percent of the mediation group families and just over 60 percent of the control group families had been the subject of a prior child protective services (CPS) report.

Mediation group families with prior child protection reports had, on average, 1.6 previous reports, while control group families had an average of 2.3. Prior CPS reports were more common among cases sent to mediation by referral than among those sent by random assignment.

Among mediation group parents with a prior CPS report, approximately a third had been the subject of a prior permanent custody filing. Among the control group, the figure was significantly higher at 57 percent. Of those mediation and control group parents with prior permanent custody filings, the majority had lost permanent custody of at least one child.



Table 3-2. History With the Child Protection Agency

	Randomly assigned to mediate <i>n</i> =21	Sent to mediation by referral <i>n</i> =28	All mediation <i>n</i> =49	Control <i>n</i> =37
Percent with prior abuse/neglect reports [▲]	30.0%	61.5%	47.8%	61.1%
If prior reports, average number	1.7	1.6	1.6	2.3
Percent with prior permanent custody filings ^{▲■}	83.3%	16.7%	33.3%	57.1%
If prior PC filings, percent with PC to the agency	80.0%	75.0%	77.8%	91.7%

[▲] Differences between cases randomly assigned and referred to mediation are significant at .05.
[■] Differences between the mediation and control group are significant at .1

The Current Child Protection Case

The child protection case leading to the most recent permanent custody filing is summarized in Table 3-3. Most of the cases were in the system due to child neglect, rather than physical or sexual abuse. A significant number of the cases involve a parent with mental illness or disabilities making it unlikely that the parent would ever be able to provide adequate care for the children.

Although parental rights would need to be terminated on both parents in order for adoption to occur, typically, only the mother was on scene and involved in the case.

Table 3-3. The Current Child Protection Case [■]

	Randomly assigned to mediate <i>n</i> =21	Sent to mediation by referral <i>n</i> =28	All mediation <i>n</i> =49	Control <i>n</i> =36
Nature of the maltreatment				
Physical abuse	23.8%	7.1%	14.3%	11.1%
Sexual abuse	14.3%	3.6%	8.2%	5.6%
Neglect [▲]	9.5%	53.6%	34.7%	25.0%
Abandonment	14.3%	10.7%	12.2%	5.6%
Parent mentally unable to care for child	28.6%	17.9%	22.4%	25.0%
Homelessness	23.8%	21.4%	22.4%	19.4%
Domestic violence	23.8%	7.1%	14.3%	5.6%
Drug-exposed infant	0.0%	3.6%	2.0%	8.3%

Table 3-3 continues on page 24



Table 3-3. The Current Child Protection Case ■

	Randomly assigned to mediate <i>n</i> =21	Sent to mediation by referral <i>n</i> =28	All mediation <i>n</i> =49	Control <i>n</i> =36
Parties named in petition				
Both parents	14.3%	28.6%	22.4%	13.9%
Mother (but not father)	66.7%	67.9%	67.3%	72.2%
Father (but not mother)	0.0%	3.6%	2.0%	0.0%
New non-marital partner	14.3%	0.0%	6.1%	2.8%
Relative ▲	19.0%	0.0%	8.2%	11.1%

■ Percentages may exceed 100% because the items are not mutually exclusive.

▲ Differences between those randomly assigned and referred to mediation are significant at .05.

All of the cases involved a child who was placed outside the home following the child protection report. In a few cases, the Agency attempted to return the child home following this placement, but the effort was unsuccessful. Nearly all of the children were in placement at the time of the permanent custody filing.

Most children in both the mediation and control groups experienced one or two out-of-home placements and most were in foster care at the permanent custody filing.

Table 3-4. Placement of Children Named in Permanent Custody Motion

	Randomly assigned to mediate <i>n</i> =20	Sent to mediation by referral <i>n</i> =27	All mediation <i>n</i> =47	Control <i>n</i> =36
Placed outside the home	100.0%	100.0%	100.0%	100.0%
Child returned home following this placement	4.8%	10.7%	8.2%	0.0%
Average number of placements	1.7	2.6	2.2	1.9
Average time in placement at the PC filing	7.4	11.5	9.6	8.4
In placement at the time of the PC filing	100.0%	96.4%	97.9%	97.6%
Type of placement at the PC filing:				
Relative	5.0%	7.4%	6.4%	11.1%
Non-relative foster care	95.0%	85.2%	89.4%	83.3%
Group home	0.0%	3.7%	2.1%	2.8%
Other	0.0%	3.7%	2.1%	2.8%

No statistically significant differences between cases randomly assigned and referred to mediation.
No statistically significant differences between the mediation and the control group.



The Permanent Custody Filing

In the control group, the Department of Human Services was generally only seeking permanent custody of one child. In the mediation group, about a third of the cases involved a permanent custody filing on only a single child, but slightly over a quarter involved filings on two children.

There was considerable variation in the ages of the children of whom the Agency was requesting permanent custody. Over 30 percent of the mediation cases and over 48 percent of the control cases involved a filing on a child age two or younger. On the other hand, over half of the mediation and 32 percent of the control group cases included a child age nine or older.

Table 3-5. Profile of Children of Whom Agency Seeks Permanent Custody

	Randomly assigned to mediate <i>n</i> =21	Sent to mediation by referral <i>n</i> =28	All mediation <i>n</i> =49	Control <i>n</i> =37
Number of children for whom Agency requested permanent custody				
Average number	2.6	2.6	2.6	1.9
Range	1-8	1-7	1-a	1-6
One	28.6%	35.7%	32.7%	59.5%
Two	33.3%	21.4%	26.5%	13.5%
Three	19.0%	17.9%	18.4%	13.5%
Four	4.8%	10.7%	8.2%	5.4%
Five or more	14.4%	14.3%	14.2%	8.1%
Permanent custody sought for				
Child age two or under	23.8%	35.7%	30.6%	48.6%
Child ages three to five	23.8%	39.3%	32.7%	31.4%
Child ages six to eight	33.3%	32.1%	32.7%	29.7%
Child age nine or older ■	66.7%	46.4%	55.1%	32.4%

No statistically significant differences between randomly assigned and referred mediation cases

■ Differences between the mediation and control group are statistically significant at .05.

Table 3-6 shows the manner in which the Hamilton County Department of Job and Family Services filed for permanent custody. In most cases, the permanent custody filing followed the provision of services with the goal of reunification. However, slightly more than about a quarter of the mediation cases and 40 percent of the control cases went directly to a petition for permanent custody, as permitted by ASFA.



Table 3-6. The Permanent Custody Filing

	Randomly assigned to mediate <i>n=20</i>	Sent to mediation by referral <i>n=28</i>	All mediation <i>n=48</i>	Control <i>n=37</i>
Original Permanent Custody complaint	35.0%	21.4%	27.1%	40.5%
Motion for Permanent Custody	35.0%	57.1%	47.9%	37.8%
Amended Complaint requesting Permanent Custody	30.0%	21.4%	25.0%	21.6%

No statistically significant differences between randomly assigned and referred mediation cases.
No statistically significant differences between the entire mediation group and the control group.

In those cases that moved from temporary custody to permanent custody, the decision to seek permanent custody was the result of many factors. As Table 3-7 shows, the parents were typically not complying with the treatment plan and most were perceived to be unable to parent, even with compliance. A sizeable percent also involved another incidence of abuse or neglect following the child protection report.

Table 3-7. Reason Agency Requested the Move From Temporary to Permanent Custody

	Randomly assigned to mediate <i>n=20</i>	Sent to mediation by referral <i>n=27</i>	All mediation <i>n=47</i>	Control <i>n=36</i>
Parents not complying with treatment plan	61.5%	86.4%	77.1%	81.8%
Parents unable to care for children	7.7%	9.1%	8.6%	4.5%
Another incident of abuse or neglect	0.0%	0.0%	0.0%	0.0%
Other reasons	30.8%	13.6%	20.0%	13.6%

No statistically significant differences between randomly assigned and referred mediation cases.
No statistically significant differences between the entire mediation group and the control group.



Sample Case 1

■ The family includes eight children who were between the ages of seven months and 14 years at the time of the mediation session. There are four suspected fathers — one is deceased and the other three have no contact with the family.

The case came into the child protection agency in 1993. The mother and maternal grandmother were caring for the mother's children, but the home showed signs of neglect and some of the children were evidencing severe behavioral problems. The social worker found garbage spilled throughout the house and an almost complete lack of food and clothes for the children.

Follow-up contact with the elementary school revealed that the younger children were often absent and frequently fall asleep in school. The middle school reported one child was expelled after threatening to kill a teacher and another child was considered uncontrollable. The school arranged psychiatric evaluations for the children, but the mother and grandmother failed to follow through. One child had high lead levels in his blood that required careful monitoring, but the mother also failed to keep these medical appointments.

The oldest child had been adjudicated delinquent and had allegedly sexually abused two of his siblings.

The children were most recently taken into custody about two months prior to

mediation when the police found the two-year-old wandering several blocks from the home. Following the placement of the children, the mother gave birth to an eighth child, despite repeated denials that she was pregnant. This child was taken into custody at birth.

The mediation session was attended by the mother, maternal grandmother, one paternal grandmother, foster parents not planning to adopt, and parties known to the mother who were interested in adoption. The professionals attending the session included the attorney for the mother, an attorney for one of the fathers, the children's attorney, the attorney for the social services agency, and the case worker.

During the session, the parties discussed the permanent care options that were feasible in the case and the desirability of continued contact between the mother and children. The parties agreed that four children would be in the permanent care of their maternal aunt, while one child would be in the permanent care of a paternal grandmother. Two children would remain in foster care with the eventual goal of reunification with the mother, and the oldest child would remain long-term in a group home until emancipation.

The mediated agreement reiterated that the mother will complete her service plan and obtain adequate housing. The plan calls for all the children to remain in counseling and for contact with their mother to be based on the counselor's recommendations.



Chapter

The Mediation

Intervention



This chapter begins with a brief description of the cases that fail to appear for mediation. The remainder of the chapter describes the mediation intervention in those cases that resulted in a mediation session being held.

Failure to Appear

Only 7 of the 56 cases in this study that were scheduled for mediation appear to have been cancelled because a parent failed to appear. The high appearance rate may be due to the fact that all cases were sent to the magistrates for review prior to mediation, and the magistrates did a good job of eliminating cases in which parents were not on scene or generally unavailable for mediation.

Most variables — including emotional problems, lack of housing and/or financial resources, type of abuse, reason for permanent custody filing, and drug/alcohol problems—do not show a statistically significant association with a failure to appear. However, it is possible that these items would distinguish between those who do and do not attend mediation had the samples been larger.

Table 4-1. Comparison of Families That Mediated and Failed to Appear for Mediation

	Mediation Occurred (n=37)	Parent Failed to Appear (n=7)
Lack of housing, adequate housing, financial resources	29.7%	50.0%
Severe emotional dysfunction	18.9%	0.0%
Alcohol or drug problems	45.9%	66.7%
Prior child maltreatment reports	47.8%	57.1%
Physical abuse of child	14.3%	0.0%
Neglect	34.7%	57.1%
PC filing due to noncompliance	72.3%	100.0%



Scheduling and Format of the Mediation Session

Only 59.7 days elapsed between the time the case was referred to mediation and the date the mediation actually took place.

The amount of time elapsing between the Agency's filing for permanent custody and the scheduled mediation averaged 143.6 days. However, most of this time passed before the mediation referral, and was undoubtedly due in large measure to heavily booked attorney schedules.

Although the differences in time lags are not statistically significant, cases that move directly to a filing for permanent custody were seen in mediation somewhat sooner than were cases where the petition for permanent custody followed efforts at reunification.

Table 4-2. Time Between Permanent Custody Filing and Mediation Referral

	All cases <i>n</i> =30	Immediate petition for permanent custody <i>n</i> =9	Petition follows attempts at reunification <i>n</i> =21
PC filing to the mediation referral			
Average days between	94.2	67.0	106.3
Median days between	61.0	61.0	51.5
Mediation referral to actual mediation			
Average days between	59.7	51.8	63.6
Median days between	63.0	51.0	66.0
PC filing to actual mediation			
Average days between	143.6	108.8	158.6
Median days between	118.5	81.0	122.0

Most cases were mediated in a single session. No case required more than two sessions. The average amount of time spent in mediation per case was 2.7 hours, but 56 percent of all cases were in mediation for 2.5 hours or less.

Sessions that resulted in a permanent custody agreement, and those that did not, were comparable in length. Nor were there significant differences in the length of the session based on whether the session included parties who were considering adoption, or whether the mediation included a discussion of possible future contact between children and biological parents.

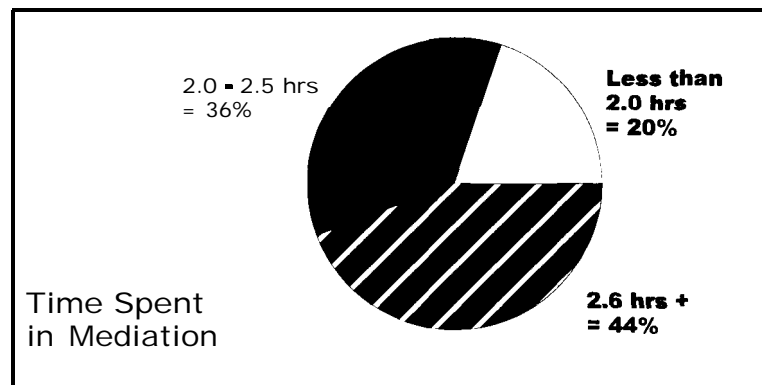


Figure 4-1

The Participants

Table 4-3 shows the various types of individuals commonly attending the mediation session. As the table indicates, the permanent custody mediation sessions nearly always involved a mother, her attorney, an attorney for the child protective services agency, a case worker, and an advocate for the child.

However, other types of individuals also participated on a fairly regular basis. The father's attorney attended in over half of all cases, although only about 38 percent of the mediation sessions included a father.

Professionals other than the social worker also attended fairly regularly. Between 30 and 40 percent of the mediation sessions also involved family and friends, and foster parents also attended with some regularity.

A conservative estimate of the number of individuals participating in an average mediation session would be seven — eight including the mediator. This is probably an underrepresentation of the true number because the data merely indicate that a given type of individual attended, but not how many of each type were present. As a result, the mediation may have included multiple fathers, relatives, friends, treatment providers, or social work staff.



Table 4-3. Types of Individuals Attending Mediation (n=31 cases)	
Mother	90.0%
Father	37.9%
Relative providing out-of-home care	35.7%
Relative not providing out-of-home care	40.0%
Foster adopt parent(s)	21.7%
Foster parent not planning to adopt	15.8%
Other individual known to parent(s) who may adopt	12.5%
Attorney for mother	92.9%
Attorney for father	60.0%
Case worker	100.0%
Attorney for child protection	100.0%
Attorney for child and/or CASA	91.3%
Other professionals	70.0%
Other friends	33.0%

Issues Discussed

The session was not to be used to readdress issues that brought the family and agency to the point of a permanent custody filing, but to work out future plans that would serve the child's best interests. Of course, the basic question to be addressed through mediation was "who will have permanent custody of the child?"

Table 4-4 shows that 70 percent of the mediation sessions included some type of discussion about the type of permanent home that would be acceptable to all the parties. In two-thirds of the mediation sessions, this included very general discussions about all the options available for permanent care of the children.

Slightly more than half of the sessions addressed the possibility of kinship care, about a third included a discussion of legal guardianship, and a third included discussions of other planned permanent living arrangements, such as long-term foster care. It was less common for the session to deal with the general characteristics of an adoptive home that would be important for the parents (such as religious orientation, other children in the home, family values, etc.). The fact that this type of discussion was not more common is probably a reflection of the fact that the potential adoptive home had often been identified prior to mediation.



Discussions of open adoption issues were very common. Almost 80 percent of the mediation sessions included discussions of continued visits or communication between the child and biological parents. In nearly 77 percent of all cases, there was a discussion about continued visitation.

About a third of the sessions included discussions of parents sending letters and photos to the child on occasion, while slightly less than third of the sessions included discussions of updates being provided by the adoptive parents. In about a quarter of the sessions, the parties talked about contact between the biological parent and child after the child reaches the age of 18.

Slightly less than a quarter of the cases included a discussion of a scrapbook to be prepared for the child to take to the adoptive home that would include letters and photos from the biological parents. Plans for a final visit were discussed in about 18 percent of the mediation sessions.

Table 4-4. Issues Discussed During Mediation	
	Issue Discussed (n=27)
Kinship care as a permanent plan	56.0%
Other planned permanent living arrangement (such as long-term foster care)	29.6%
The type of adoptive home that would be best for the child (e.g., with relatives, foster parents, other known or unknown parties)	61.9%
Characteristics of an adoptive home/parent that biological parent would prefer	13.6%
Any of the above	70.4%
Continued visits between biological parent(s) and child	76.9%
Updates from adoptive home to biological parents	27.3%
Letter/photos to be sent on occasion by biological parent	34.8%
Any of contact items listed above	77.8%
Contact between biological parent after child is 18	25.0%
Letter/photos to be shared with child after age 18	0.0%
Grief or separation counseling for one or more parties	9.1%
Scrapbook/Life Book to accompany child to adoptive home	22.7%
Who will be present at a final visit	18.2%
Where the final visit will take place	18.2%
Length of the final visit	13.6%



Sample Case 2

The case involves twins who entered temporary care in 1998 at the age of five months, following a report of child neglect. In the 18 months following the placement, both parents failed to participate in services and failed to regularly visit the children.

The Agency filed for permanent custody, citing the parents' failure to participate in drug testing, secure adequate housing, maintain steady employment, and visit the children in care.

The mediation session was attended by the mother, her attorney, the case worker, and the attorney for the Agency.

In the course of the session, the parties discussed the compliance problems and reached an agreement that provided the parents with another chance at reunification.

The mediated agreement contains provisions moving the supervised visitation to a location more readily accessible to the mother.

The mother agreed to attend all eight currently scheduled visitations and agreed to complete four random drug tests. She also agreed to make daily phone calls to the twins and to begin parenting classes.

The parties also agreed that the Agency will make unannounced home visits over the next six weeks. If the mother fully complies, she will be allowed unsupervised visits two days a week.



Chapter 5

Mediation

Outcomes



This chapter presents information on outcomes in cases that mediated. In addition to presenting an overall settlement rate, the analysis considers settlement rates on specific issues — such as permanent living arrangements for children or future contact between parents and children — and explores whether any case characteristics appear to predict settlement rates.

Settlement of Permanent Custody

Approximately 40 percent of the cases that took part in mediation were able to reach a resolution about permanent custody in this setting. Figure 5-1 presents the outcome of mediation for the 49 cases in this study. The results show that roughly comparable percentages of settlements call for (1) a termination of the parents' rights, (2) a planned permanent living arrangement that does not require a

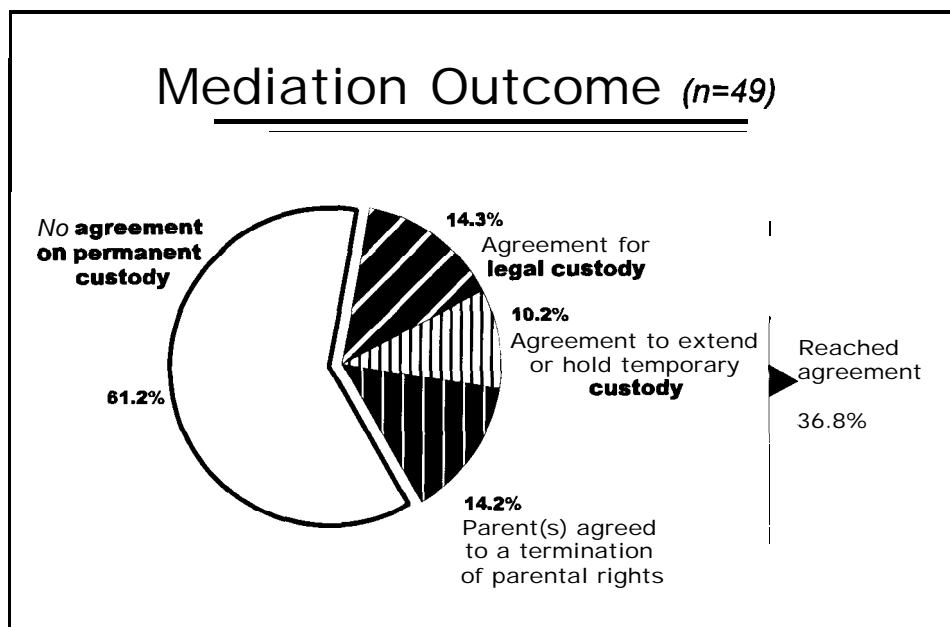


Figure 5-1



termination of parental rights, or (3) an extension of temporary custody with continued efforts at reunification.

To the extent that information was available, it appears that most of the cases (70.6%) that produced a settlement proceeded directly to court to enter this agreement. This is the approach recommended in the special report, *Adoption 2002*. The authors of this document agreed that:

if voluntary consent to relinquish is taken in the presence of the judge, there should be no period of time within which the parent can withdraw consent without cause.'

As Figure 5-2 demonstrates, mediation outcomes were very similar for cases that were randomly assigned and those referred to mediation by one of the parties or, more typically, the magistrate.

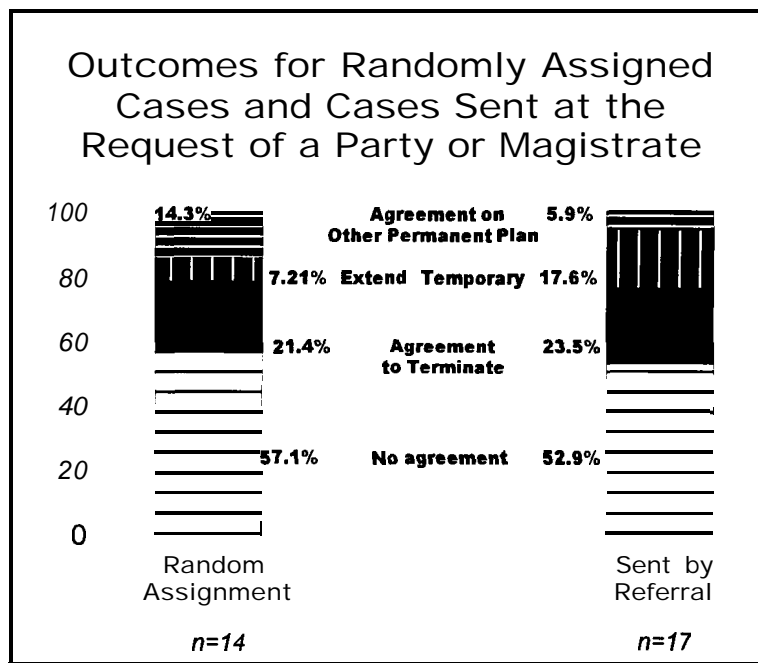


Figure 5-2

Cases sent by request of the magistrate were somewhat more likely to result in an extension of temporary custody, while randomly referred cases were somewhat more likely to result in a planned permanent living arrangement not requiring a termination of parental rights. However, the differences in outcomes between cases randomly assigned and those sent to mediation at the request of the court or one of the parties were not statistically significant.



The settlement rate of approximately 40 percent is somewhat lower than the settlement rates of 70 to 80 percent reported by many court-based dependency mediation programs.* However, a lower settlement rate in permanent custody cases is to be expected. The decision to terminate parental rights has been described as the “death penalty” of child dependency cases. It is not a decision that parents come to easily, or one that child protective services agencies pursue when other solutions are apparent.

Treatment plan issues or visitation arrangements while the child is in temporary custody are important decisions, but these decisions can be revisited if problems arise or if the parties become dissatisfied with the agreement. An agreement on permanent custody is a far-reaching decision. It is to be expected that greater percentages of these cases, compared to temporary custody cases, go on to trial. Such trials are typically lengthy and the fact that 40 percent of the mediated cases are able to avoid trial is noteworthy (and explored in greater detail in Chapter 8).

It is also important to note that even cases that did not reach an agreement in mediation were typically able to narrow the issues in dispute, which can help reduce the amount of trial time required.

Factors Associated With Settlement

A total of 49 cases participated in permanent custody mediation, and 19 reached an agreement. The small sample makes it impossible to offer definitive conclusions about what types cases settle permanent custody in mediation. However, given the lack of available information about permanent custody mediation, the following findings, although very preliminary in nature, are presented as a first step in exploring the factors that may be associated with a permanent custody decision in mediation.

Perhaps the most notable finding is that a wide range of cases produced an agreement in mediation. There was no evidence that settlement was influenced by:

- The type of maltreatment bringing the case into the system. Physical abuse cases were as likely to settle as were neglect cases. There were too few sexual abuse cases in the sample to reach any conclusion about their likelihood of settlement.
- Whether or not the family had been the subject of prior child protection reports. Approximately 33 percent of those with no prior reports reached an agreement, as did 45 percent of those with a prior report.



- Whether the petition was filed following attempts at reunification or as an original motion for permanent custody as allowed by ASFA. Both types of cases were equally likely to settle.
- Whether the case record noted any mental or physical health issues for the children. There were no statistically significant differences in settlement rates in cases with and without noted problems pertaining to mental health, physical health, or disabilities for children.

There is some evidence to suggest that settlement was influenced by:

- The length of time the children had been in out-of-home placement by the time of mediation. Among those with children in placement for a year or less, 31 percent reached a permanent custody agreement in mediation. Among those with children in care for more than a year, the settlement rate was 57 percent.
- The reason for the permanent custody filing. Among cases filed due to parental non-compliance with a treatment plan, only 18 percent reached a permanent custody decision in mediation. By contrast, there was an 86 percent settlement rate among cases filed for any other reason (most notably because the Agency believed the parents would be unable to provide adequate care due to mental illness or low cognitive functioning).
- Whether the child protection agency was seeking permanent custody of more than one child. In cases where the Agency was seeking permanent custody of only one child, 56 percent settled. If the Agency was seeking permanent custody of two or more children, the settlement rate dropped to 30 percent.
- Noted child behavior problems. Although only five cases involved a child with a recent delinquency adjudication or expulsion from school, four of these five cases settled in mediation.

These patterns are summarized in Table 5-1.

Table 5-1. Settlement Rates by Case Characteristics ▲		
	Length of time in placement at mediation	
	12 months or less	More than 12 months
No permanent custody agreement	68.8%	42.9%
Permanency custody agreement	31.3%	57.1%
	(16)	(14)

Table continued on page 39


Table 5-1. Settlement Rates by Case Characteristics [▲]

	Reason for the permanent custody filing	
	Non-cooperation	Any other reason
No permanent custody agreement	81.8%	14.3%
Permanency custody agreement	18.2%	85.7%
	(33)	(14)
	Number of children on permanent custody motion	
	One	Two or more
No permanent custody agreement	43.8%	69.7%
Permanency custody agreement	56.3%	30.3%
	(16)	(33)
	Behavior problems noted for child	
	No	Yes
No permanent custody agreement	65.9%	20.0%
Permanency custody agreement	34.1%	80.0%
	(44)	(5)

[▲] Tests of significance are not reported due to small sample sizes.

Settlement on Issues of Future Contact

In addition to discussing the permanent custody arrangement that should be in effect, the mediation session often dealt with issues surrounding continued contact or information exchange. These discussions dealt with ways the biological parent might remain in contact with a child, or receive information about a child, either a termination of parental rights or the adoption of a planned permanent living arrangement not requiring termination.

Chapter 4 noted that approximately 77 percent of the mediation cases included a discussion of continued visits between the biological parent and child, while more than a quarter of the cases included discussions of adoptive parents or legal guardians occasionally sending letters or photos to the biological parents.

When mediation dealt with continued contact, whether in person or through the exchange of information, about half of the time the parties were able to reach a consensus on the issue. This does not necessarily mean that half of the cases had provisions for future contact. In some instances, the parties dealt with open adoption issues first and were successful in reaching a consensus, but ultimately could not



reach a permanent custody agreement. In other instances, the consensus that was reached ruled out continued contact.

Figure 5-3 shows the rate of agreement on issues related to continued contact, as well as the percentage of cases with open adoption elements (such as continued contact) in the final agreement.

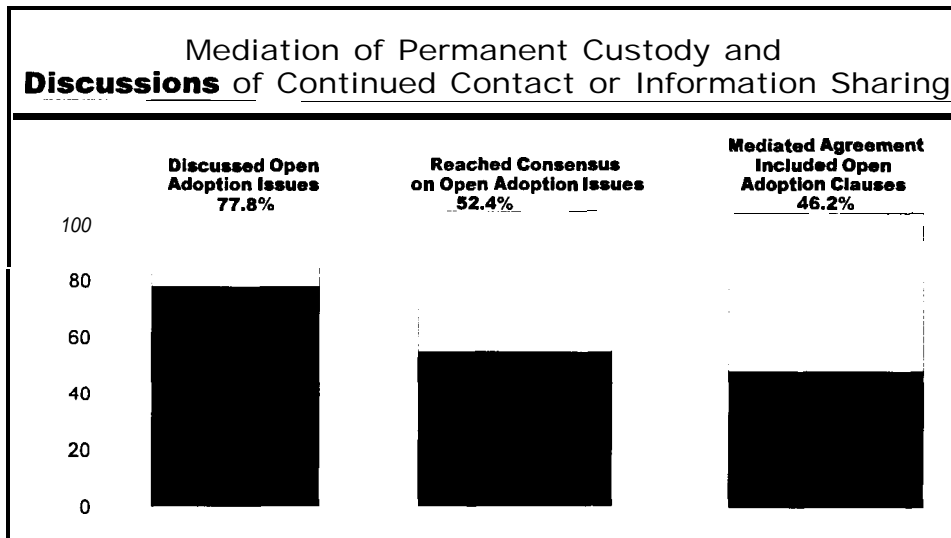


Figure 5-3

Table 5-2 shows the types of continued contact provisions requested and included in mediated agreements for permanent custody. Given the small number of cases on which the table is based (nine cases with an agreement for the termination of parental rights or other planned permanent living arrangement), these results should be viewed with caution. Generally, it appears that the most common provision are those calling for continued visits or the periodic exchange of information.

When considering the special clauses that are included in mediated permanent custody agreements, it is important to consider the type of adoptive home that will be in place. Cases in which the permanent caretakers of the child are known to the biological parents are the types of cases that the NCJFCJ Adoption Guidelines say are well suited to continuing contact. Indeed, in such cases, NCJFCJ says:

The question often becomes whether or not the child, birth parent and relatives are going to have sanctioned or unsanctioned **contact**.³

The nine cases with information about specific requests or provisions for continued contact between parents and children following the termination of parental rights or



an order for some other planned permanent living arrangement, include five cases in which relatives will provide care (either as adoptive parents or through a planned permanent living arrangement) and four cases where the agreement calls for non-relative adoption. Five of the nine cases provide for some type of continued contact, and four of these five cases involve relative care.

Table 5-2. Special Provisions in Mediated Permanent Custody Agreements *

	Parent requested and Agency agreed to convey request	Prospective permanent caretakers attended mediation and agreed	No mention
Visits between child and biological parent(s)	22.2%	55.6%	22.2%
Phone calls between child and biological parent(s)	12.5%	0.0%	87.5%
Periodic exchange of letters or photos or information	25.0%	25.0%	50.0%
Letter/contact with child when he or she age 18	0.0%	12.5%	87.5%
Any of the items above	15.4%	38.5%	53.8%

* Based on nine cases reaching a permanent custody agreement in mediation for the termination of rights or other planned permanent living arrangement.



End Notes

1. **Adoption 2002: The President's Initiative On Adoption and Foster Care.** U.S. Department of Health and Human Services, June 1999, p. 5.
2. A settlement rate of 71 percent was reported in the 1998 study **Dependency Mediation in the San Francisco Courts**, prepared by the Center for Policy Research.

Full settlements of 60 to 80 percent were noted in a five-site study reported in *An Evaluation of Child Protection Mediation in Five California Courts*, in **Family and Conciliation Courts Review**, April 1997.

A settlement rate of 86 percent is reported for CHIPS cases in an evaluation of mediation in two Wisconsin counties, **Mediated Child Protection Conferencing in Criminal and Civil Child Abuse and Neglect Cases**, John Martin and Steven Weller of the Center for Public Policy Studies, April 2001.

In El Paso County, Colorado, 60 percent of the permanent custody cases resulted in a full settlement, **Dependency Mediation in Colorado's Fourth Judicial District**, October 1999, Center for Policy Research.

3. **Adoption and Permanency Guidelines: Improving Court Practice in Child Abuse and Neglect Cases.** National Council of Juvenile and Family Court Judges, Fall 2000, p. 28.



Sample Case 3

The family in this mediation has two children who are in the permanent custody of relatives. The Agency is seeking permanent custody of five of the six additional children. The children who were the subject of the permanent custody petition ranged in age from five to ten years at the time of the mediation session.

The family first came to the attention of the Agency in 1996 due to drug use by both the mother and father, as well as general neglect. The children were removed from the home and the two older children moved into the permanent custody of relatives.

The mother failed to participate in any treatment or services. The father completed his service plan and, in 1998, the children were returned to his care.

Approximately a year later, the supervising social worker found the children alone at home with a ten-year-old in charge. The children were placed in non-relative foster care. The father reports that he hired a babysitter for the children while he was at work, but was unable to provide any details to corroborate this story.

The Agency recognized that the children were bonded with the father, but felt his ability to care for the children was precarious at best. He had stopped participating in drug testing and was not cooperating with the aide assigned to the family. It is unclear whether the mother continued to see the children; the father said there has been no visitation, but the children report having seen her.

The mediation session included the mother and father, the father's attorney, the social worker, and the Agency attorney. During the three-hour session, the participants discussed the option of kinship care, but agreed that no relatives were both willing and suitable to provide this care. The father's attorney recommended that his client proceed to trial, since he felt sure the court would not order permanent custody, and the Agency was unwilling to continue temporary custody.



Chapter 6



Comparing Mediated and Non-Mediated Cases

This chapter compares mediated and non-mediated cases to address the following questions:

- Does mediation increase the percentage of permanent custody cases resolved without trial?
- Does mediation affect the amount of time elapsing between the permanent custody filing and the resolution of the case?
- Do mediated and non-mediated cases differ with respect to the percentage of cases resulting in a termination of parental rights, other planned permanent living arrangements, or an agreement to extend temporary custody?

Resolution of Permanent Custody

Court records were reviewed to determine whether the parents and Agency agreed to a settlement prior to trial. Figure 6-1 shows that 22.4 percent of the mediation and 32.4 percent of the control group cases had not reached a resolution on permanent custody at the time of data collection for this study.

As Figure 6-1 indicates, most of the pre-trial settlements in the mediation group were produced during mediation. The percentages of pre-trial settlements reached outside of mediation were very comparable in both groups — 14 and 11 percent.

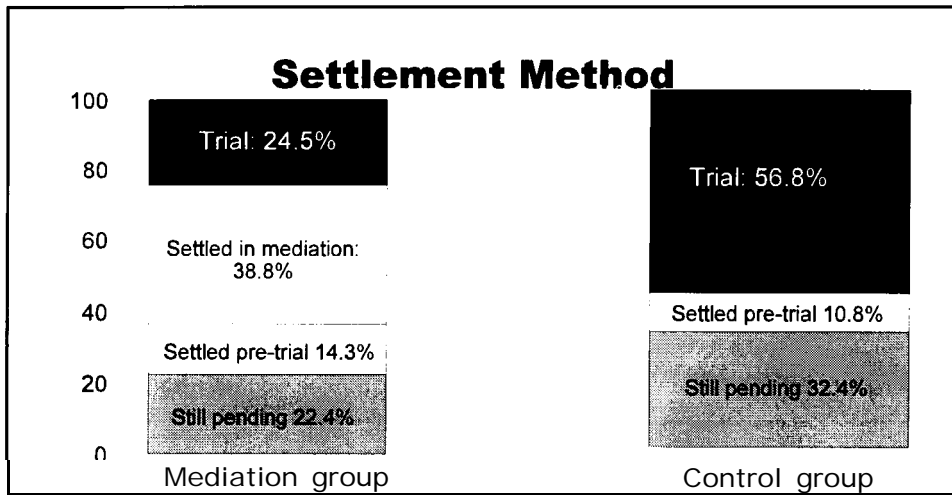


Table 6-1 removes the cases where a resolution is still pending. With the pending cases removed, the percentages resolved through trial are 32.4 percent in the mediation group and 84 percent in the control group. Among cases with a resolution at the time of data collection, nearly 68 percent of the mediation cases and 16 percent of the control group cases reached the resolution by presenting a stipulation to the court.

Table 6-1. Where Permanent Custody Was Resolved

	Mediation Cases	Control Cases
Of those that have been resolved *		
Settled before trial (mediation or pre-trial conference)	67.6%	16.0%
Trial held	32.4%	84.0%
	(49)	(37)

* The differences between the mediation and control group statistically significant at .05.

Some permanent custody cases can be resolved very quickly in trial because neither parent is on-scene or involved in the case. Other cases require several days of trial time. No information is available in the court files to indicate the amount of court time spent on the cases in this study. The control group probably includes a mixture of involved and absent parents. However, it is very likely that the cases that mediated would have required substantial trial time without mediation, since the parents were on-scene and involved. Thus, although precise expenditures of time are not available, it is probably safe to conclude that mediation produced a considerable savings in trial time.



Time from Permanent Custody Filing to Resolution

The use of mediation does not appear to reduce the amount of time between the permanent custody filing and the resolution of permanent custody. However, mediation, even when no settlement is produced, does not slow down the process.

There are no statistically significant differences in the number of days elapsing between from the permanent custody filing to case resolution when we compare control group cases, cases that settle in mediation, and cases that do not settle in mediation.

Permanent Custody Outcomes

Table 6-2 shows the outcome of the permanent custody motion based on those cases with a resolution by the time of data collection. The results show no statistically significant differences between the control group and the entire mediation group (i.e., with cases that settled in mediation and those that did not settle in mediation combined).

Approximately 16 percent of the mediation cases and 16 percent of the control cases resulted in an extension of temporary custody. Slightly more than a third of the mediation cases and 20 percent of the control cases resulted in a planned permanent living arrangement that did not require the termination of parental rights. In almost 49 percent of the mediated, and 64 percent of the control cases, the final resolution was the termination of parental rights. Again, none of the differences between the mediation and control groups are statistically significant.

The shaded columns in Table 6-2 show the outcomes for the control group relative to those who settled in mediation. These results must be viewed with caution because the number of cases in each groups is quite small. However, the results suggest that future research should consider whether mediated cases are more likely to result in an agreement by the Agency and parents to extend temporary custody and less likely to result in a termination of parental rights.



Table 6-2. The Permanent Custody Outcome
(Excluding Cases That Did Not Settle and Cases That Are Still Pending)

	Control Cases	Mediation Cases		
		All mediation cases	Cases resolved in mediation	Cases not resolved in mediation
Termination of parental rights	64.0%	48.6%	38.9%	57.9%
Other planned permanent living arrangement not requiring a termination of parental rights	20.0%	35.1%	27.8%	42.1%
Extension of temporary custody	16.0%	16.2%	33.3%	0.0%
	(25)	(37)	(18)	(19)

* Differences between cases resolved in mediation and control aroou statistically significant at .05.



Sample Case 4



The case involves a mother, two absent fathers, and four children. Only two children, ages eight and ten, were the subject of the current permanent custody motion. The oldest child will be the subject of a separate permanent custody action, and custody of the youngest child has been awarded to his father.

Over an eight-year span of time, the mother has repeatedly called social services requesting voluntary placement of her children. She initially cites her drug problem, her feelings of being overwhelmed, and the children's behavior as reasons for the placement, but soon requests that the children be returned home.

In 1999, at the mother's request, the children were taken into custody and placed with a maternal aunt. Shortly thereafter, the mother, who was not participating in any services, began making repeated charges that the aunt abused the children. The Agency investigated but found no evidence of maltreatment.

The aunt reported that the mother began stealing her mail, accusing people in the aunts home of drug use, and telling the children during visits that they could return home. The aunt requested that the children be removed from her home, and the Agency filed a motion for permanent custody.

Two mediation sessions were held, totaling four hours. Participants included the mother, her attorney, the social worker and the attorney for the Agency, the child's CASA, and an attorney for the CASA.

The sessions dealt with the types of permanent homes that might be available, through relatives or adoptive parents, as well as dealing with continued mother-child contact. Ultimately, the mother was unwilling to grant permanent custody and a trial date was set.



Chapter 7

User Reactions



Initial Reactions

The introduction of permanent custody mediation into the Hamilton County Juvenile Court was complicated by the fact that the court did not have any dependency mediation in place at the time. The court recognized that it would have been preferable to begin with mediation at the earliest stages, and later move into permanent custody mediation. However, in practice, the availability of funds to expedite permanency and adoption dictated that mediation begin at the final stage of case processing.

Program administrators and magistrates at the court note that the introduction of mediation at the temporary custody stage has been much easier. One magistrate notes:

The reaction to mediation in temporary custody cases has been very different. Everyone is quite open to it and supportive.

— Magistrate

The initial resistance to permanent custody mediation, by contrast, was quite strong. One magistrate noted about permanent custody mediation, “Basically it’s taken a year for people to even begin to warm up.” A guardian ad *litem* observed, “It seemed as though starting with PC was doing the whole thing backwards.”

The concern was not simply that the mediation was occurring late in the case. Nor was the resistance based entirely on concerns about making time in busy schedules to mediate — although this was an initial complaint. Many professionals were worried that permanent custody mediation would not be fair to the parents, as the following comments illustrate:



The defense bar was very resistant. Basically, they didn't see what the incentive would be Ohio does not have open adoption laws. What could parents realistically be assured of getting in exchange for relinquishing? [The resistance is] not a philosophical stand against mediation, it's a concern about misleading parents.

— *Magistrate*

The initial concern was that the process would be misleading. Since Ohio isn't an open adoption state, there was concern that parents might agree to termination only, or at least primarily, because of some promise, and then the promise would turn out to be unenforceable.

— *Guardian ad litem*

The defense bar was opposed to PC mediation. They said it would be hard for them to recommend to their clients that they agree to a termination if they thought the underlying reason was the client's hope for continued contact. Knowing that the continued contact couldn't be enforced they would have to recommend trial.

— *Program Administrator*

The court took the concerns about misleading parents very seriously.

There is case law that says if there are promises made in order to affect a permanent surrender and the parent feels the promise is broken, the surrender is out the window. Chief legal counsel looked at their procedures very carefully.

— *Program Administrator*

A visit to the permanent custody mediation program in Portland, Oregon, helped to reassure the magistrates that it was possible to mediate permanent custody and to deal with continued contact or information exchange, even in the absence of open adoption laws.

The Portland people said the mediation program pre-dated the passage of open adoption laws in their state and they said nothing really changed with the passage of these laws. So we decided to try. The key is, are the parents relinquishing because they believe that is what is best for the children, or because they think they are being guaranteed continued contact?

— *Magistrate*



The court decided that the mediated permanent custody agreement would be very explicit about what could, and what could not, be legally enforced. The decision was made to write up two separate agreements: one clearly marked “binding” and one clearly marked “non-binding.” In addition, magistrates would question the parties to reassure themselves that the parents understood what could not be enforced before any agreement was accepted.

The magistrates do a very explicit job of warning clients about the non-binding versus binding aspects of an agreement. They’ll tell a parent “do you understand that even if you **never** get a single photo of your child again, your rights are **still** going to be terminated? The foster parents can decide tomorrow that they never want any contact with you again, and you **cannot** reopen this and go to court?”

— Program Administrator

This approach, along with the support of the magistrates and judges, was enough to get the professionals to, reluctantly, try permanent custody mediation.

Magistrates were receptive to permanent custody mediation because their initial research suggested it had worked in other jurisdictions, and also because they saw, first-hand, the flaws with the existing system, as evidenced by the following comments from magistrates:

Before mediation started, the magistrates would talk with families about options. The same magistrate sees the family from start to finish, so they do get to know them and the setting is relatively informal. But talking about relinquishment and how parents feel about it can put the magistrate in an awkward role

[Without mediation] foster parents are unaware that they can involve the parents in a variety of ways down the line. They hear that termination means no further rights, and they rightly assume that they aren’t supposed to allow the children to go off with the biological parents. But they don’t realize that it would be okay with safeguards in place. It’s not the role of the magistrate to bring that up.

There is a comfort in knowing where your child is going. If everything after relinquishment is a great abyss, it can be harder. If the person who will be caring for your child has a face, it can be easier.

Without mediation, often the only things the foster parent knows about the parent are bad things, the things leading to this relinquishment. Meeting the parents can help foster parents see that parents do love their children. Plus, foster parents who have been in this system a while also understand that kids have attachments to biological parents, no matter how bad they are. So



they may understand that getting rid of the idea that the biological parent will completely cease to exist is not what is best for the children. If the children are older, it's unrealistic anyway, they will remember parents. They will probably also try to initiate contact and making any contact taboo is just another potential source of conflict. Many of the children moving into permanent care know their biological parents and have attachments to them and the system needs to acknowledge this.

Current Reactions

Initial concerns about the use of mediation to resolve permanent custody cases have not entirely disappeared, but for most participants, exposure to the process has convinced them that many cases are suited to mediation. Most professionals agree that the process is especially useful in cases where the potential adoptive parents have already been identified by the time of the permanent custody filing.

Permanent custody mediation is definitely easier with the adoptive family identified. If they aren't on the scene yet, it's much harder. You have to ask the parent to imagine them in the abstract and to trust the Agency to find them. It's best if the foster and biological parents have had a chance to get to know each other.

— *Program Administrator*

My sense is that permanent custody mediation has been most successful when the parents and foster parents know one another, which would also include relative adoption. If they don't know one another, there isn't trust and no one is sure about the idea of continued visits or information exchange. The adoptive parents aren't sure they want to commit to having the biological parents in their lives and the biological parents aren't sure the adoptive parents will actually allow the contact.

— *Magistrate*

Cases that involve lots of extended family and friends are also viewed as especially appropriate for mediation.



Mediation is best when there are lots of people, especially family and friends, present. That way the family seems supported and not bullied. It's not good when it's just the parent and Department.

— *Guardian ad litem*

If cases involving extended family and identified adoptive parents are best suited to mediation, many professionals express a general feeling that some cases are not suited. However, there is also a general acknowledgment that beyond the most general criterion, such as excluding parents who are too low functioning or mentally ill to participate, more extensive screening is difficult. Probably the most enduring area of controversy has to do with which cases should be referred to mediation. Magistrates who use the process routinely see benefits in a wide range of cases, including many that are not resolved in mediation:

I refer [to mediation] anything that has a glimmer of chance of settling. If there is no settlement, usually the issues are reduced. And, sometimes we get too concerned with producing settlements in mediation and we forget that one important thing it does is lend some dignity and some sense of control. I think that most parents do want what's best for their child, sometimes even to the point of relinquishment.

— *Magistrate*

The other professionals are more likely to voice the opinion that there should be greater screening of cases prior to the mediation referral. For example, one guardian *ad litem* insists:

The problem is that some magistrates like this because it gets rid of the case and they send everything. People aren't as hostile towards mediation now, they've calmed down some, but if five professionals agree it won't work, it shouldn't be ordered.

An attorney for the child protective services agency agrees that more screening might be useful, but points out that it is difficult to know who can make the best determination about which cases can benefit from mediation.

There needs to be more screening. But you can't send cases only by mutual consent, because somebody is always going to object. The court can't be fully in charge, because magistrates will solve it by sending everything. Workers don't always make the best decisions.

— *Attorney for the child protective services agency*

One possible way to accommodate these different referral preferences would be to send a wide range of cases to mediation, but alert the mediator to case dynamics that might make settlement unlikely in certain cases.



I spoke to the Court and the magistrate said if there is something about the case that makes it really inappropriate, we should let the mediator know. Otherwise the mediator can't figure out why no one is cooperating, the poor mediator keeps trying to get somewhere on a hopeless case.

— *Guardian ad litem*

Concerns about parents being misled into believing that they could be guaranteed continued contact have been dissipated. Many of the professionals interviewed for this evaluation noted that everyone — especially, parents' attorneys, magistrates, and mediators — do an excellent job of ensuring that parents understand what is, and what is not, enforceable. This has contributed greatly to making the professionals more comfortable with the process. One guardian ad litem notes:

Parents' attorneys do a good job of making sure the parents understand what can be enforced and what can't. The process works best when the parents and adoptive parents know each other and have an ongoing relationship. Then if they agree to continue contact you get the feeling it may work out. I suspect that in the past, these kinds of arrangements were worked out anyway.

— *Guardian ad litem*

Some of the reasons professionals approve of permanent custody mediation are because they see it resulting in the generation of varied outcomes and not just the termination of parental rights.

There have been mediation sessions that resulted in the agency agreeing to dismiss the permanent custody mediation and trying for reunification again. So it does seem that the agency changes.

— *Guardian ad litem*

There have also been some mediation cases where the Department has backed away from PC and been willing to give the parents another chance. We've seen all kinds of outcomes — relative care, Planned Permanent Living Arrangements, surrender, the Agency agreeing to try reunification again.

— *Magistrate*

Other perceived benefits to mediation cited by professionals are its ability to identify relatives and families who may be care givers, focus the family on problem-solving, and provide additional support for inexperienced caseworkers.

The professionals know that some PC motions are only filed because the department is trying to get the family into action. Some families will do nothing until those papers are filed. Also, the filing



can flush out relatives and families who may be care givers. The parents won't reveal them until things get really serious.

— *Program Administra for*

I agreed to mediate permanent custody on one case knowing full well that the department was not going to get it. Sometimes the only way to light a fire under a family is to file. They don't believe it or get serious before that.

— *Attorney for the child protective services agency*

[Mediation is] good if you have an inexperienced worker. It's probably good when you have a worker who thinks that PC is always the solution, because they may move off of that position.

— *Attorney for the child protective services agency*

The professionals have also been reassured to discover that parents can be active participants in mediation.

The parents do participate. They understand what's going on, they speak up.

— *Guardian ad litem*

Finally, mediation can also be a place, sometimes the first place, where attorneys level with their clients about the probable outcome of a trial.

I had a case where the parent said I won't give you names [of relatives for placement or adoption] until I know I'm at the end of the line. And her attorney said "You're at the end of the line!" and she gave us names. We got the names of relatives who didn't even know about the termination. They said "Really? We heard that it was all working out and the kids would be coming home." Sometimes it helps people to see that this is the last stop before trial and they get serious about solving the case.

— *Guardian ad litem*

While some attorneys are critical of any parent's attorney conceding "this is the end of the line" and believe their role always requires trying to get the children returned home, most professionals favor the candor that mediation affords to families. As one magistrate notes:

Attorneys plea bargain every day to get the best possible deals for their clients. How are you representing your client to the best of your ability if you won't be honest about probable outcomes?

— *Magistrate*



At the same time, the magistrates are quick to acknowledge that some parents need to have permanent custody decided in court:

In some cases agreeing to termination can help the parent to feel that they are doing this voluntarily because it's best for the child, not because a judge has ruled them unfit. But the reverse is also true — some parents need to fight it in court so they can say they did everything possible to hang onto their children.

— *Magistrate*

Ultimately, the court's position is that mediation should be fully integrated with adjudication and used throughout the dependency process.

One day, the court will use mediation at every step in the case: In protective supervision cases where the children remain in the home, at the front end to make sure everyone understands the situation and to make sure services get put into place, and then as needed, to decide on permanent custody.

— *Magistrate*

Case Specific Evaluations

Exit surveys were completed by family and professionals in 26 permanent custody cases with mediation. These surveys provide another measure of user satisfaction, this time related to a specific case rather than a global assessment.

Across the 26 mediation cases, surveys were completed by:

- 23 parents (from 21 cases);
- 22 social workers (from 16 cases);
- 20 attorneys representing a parent (from 19 cases);
- 37 individuals representing a child (from 24 cases); and
- 23 attorneys representing Hamilton County Child Protective Services (from 22 cases).

Figure 7-1 shows the reactions of parents to their mediation session. Overall, most parents said they had a chance to talk about the issues of importance to them, felt the other participants listened to and understood what they had to say. In addition, most parents felt treated with respect by all the parties present in the mediation session and did not perceive the mediator to take sides. Overall, almost 70 percent of the parents felt that mediation was better than court.



Not surprisingly, parents who reached a settlement in mediation were more likely to say mediation was better than court than were parents who did not reach a settlement. Overall, 89 percent of the parents who reached an agreement in mediation, and 57 percent of those who did not, said mediation was preferable to court.

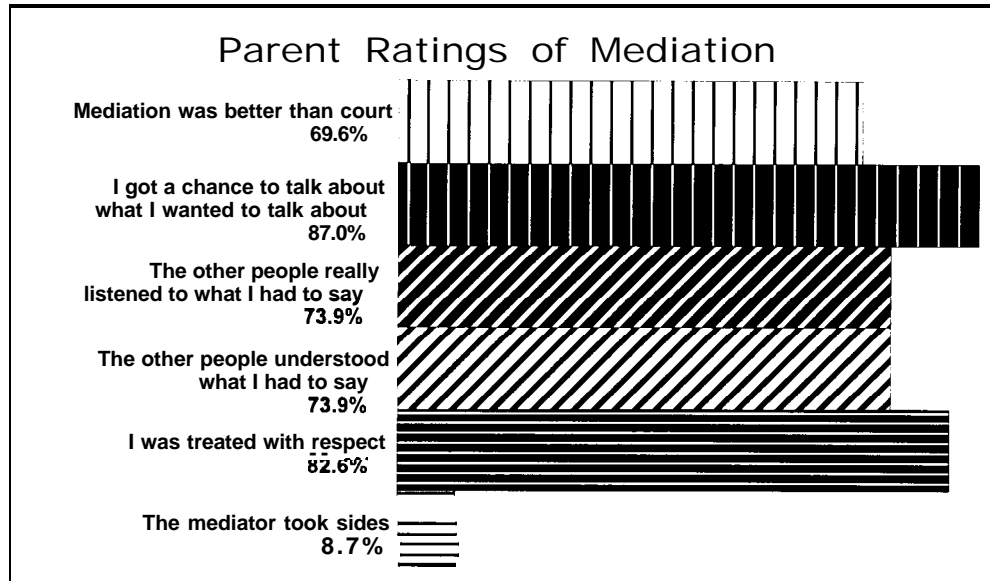


Figure 7-1

Figure 7-2 presents the results of the surveys completed by the case workers. The 22 workers who completed a survey unanimously gave mediation the highest ratings on mediator neutrality, respect among the parties, and on other parties listening to and understanding what the worker had to say.

Ratings were nearly as high on providing enough time to talk about the things the worker considered important. Overall, 81.8 percent of the workers said that, in this specific case, mediation was better than court would have been.

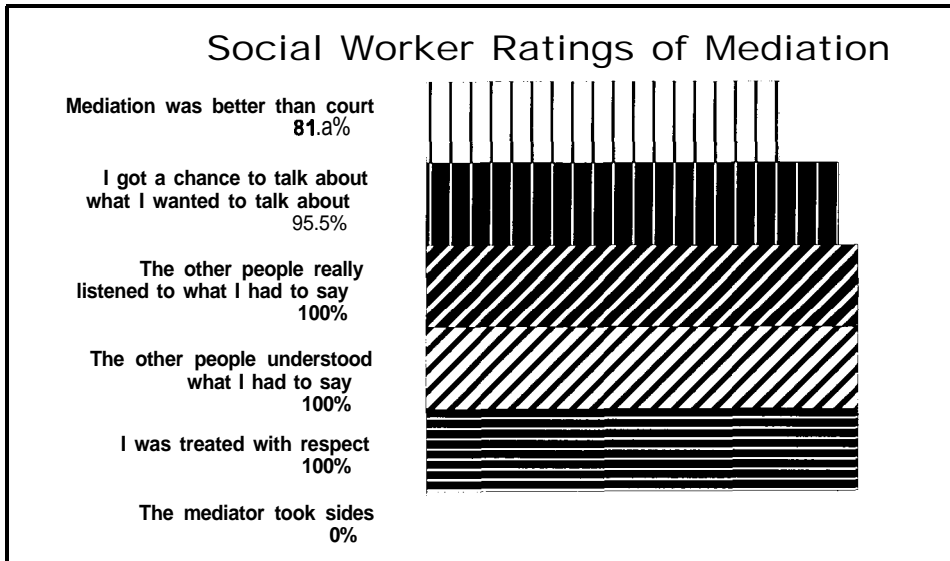


Figure 7-2

Reactions from parents' attorneys and attorneys for the child protective services agency are shown in Figure 7-3. Again, the results show that mediators are rated highly, and the process is perceived to give the attorney's client (either the parent or the case worker) sufficient time to be heard.

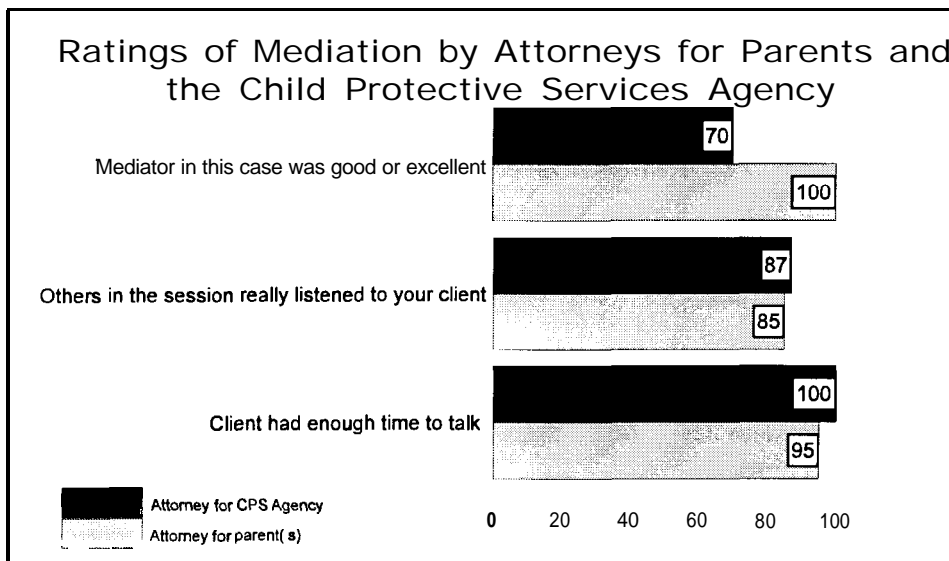


Figure 7-3



Representatives for children also gave mediation high marks in the cases for which they completed surveys. They rated mediators highly and agreed with parents and other professionals that the process provided time to discuss issues and to be heard by others.

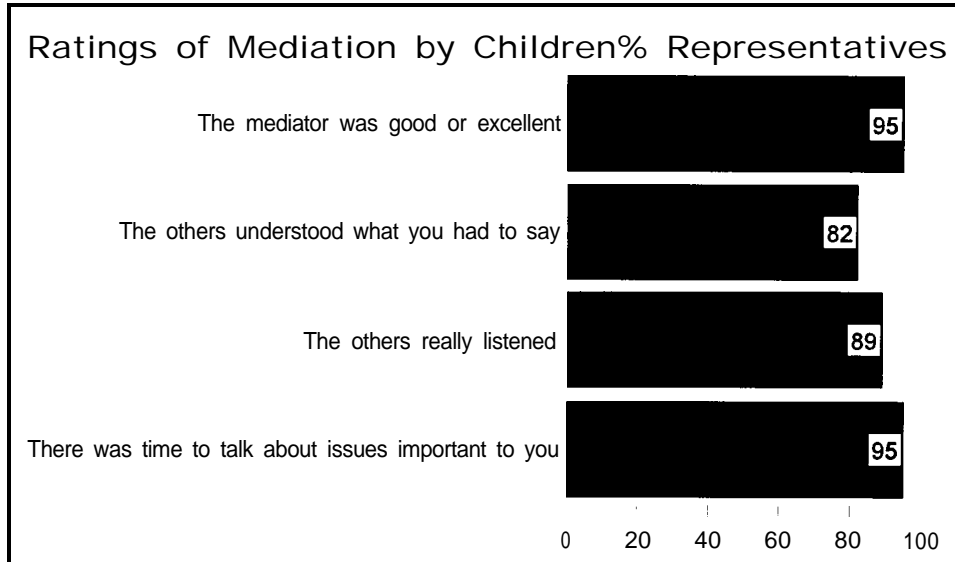


Figure 7-4



Sample Case 5



The case involves neglect of two children, ages 10 and 16. The children had been in temporary care of the Agency for almost two years at the time of mediation. The case came into the system due to severe neglect.

The parents participated only sporadically in the services intended to help them reunify with their children. They failed to attend two rounds of parenting class before completing a program. They failed to participate in the ordered counseling services and visited only on occasion. For a period of ten weeks, they failed to visit when both parents contracted a severe case of head lice, a reoccurring problem in the family.

The three-hour mediation session was attended by both parents and attorneys for both parents. Also attending were the case worker, two treatment providers, and two sets of foster/adoptive parents. The discussion in mediation centered around the possibility of continued visits, updates and exchanges of information, contact after the children are age 18, the preparation of a Life Book (scrapbook) for the children, and the details of a final visit.

The final agreement was prepared in two parts. The portion labeled "binding agreement" noted that both parents agree to the permanent surrender of their children and the termination of their parental rights. Also described as part of the binding agreement was the right of the parents to a final visit and the preparation of scrapbook for the children. The non-binding portion of the agreement notes that the Agency will seek to facilitate continued visits between the siblings and will act as an intermediary to forward letters and pictures between the parents and children. The Agency also agreed to deliver to one of the children the father's gift of a bicycle.



Chapter 8



Mediation and Cost Savings

A judge who has been a national leader in the effort to introduce mediation into the dependency court expressed his concerns about a focus on cost savings this way:

My major concern about a national juvenile court mediation movement would be that this kind of program is expensive to do right. I don't know if it saves money. Probably it does since I know it can avoid a 3-4 day trial. But courts may be tempted to do it quick and dirty because that's bound to be cheaper.

His warning is understandable. Mediation cannot function properly without an adequately trained and compensated staff. Nor can it replace other elements in the system, such as adequate representation for parents and children and adequate services for families. In addition, courts and legislators should not lose sight of the non-financial benefits associated with mediation.

Nevertheless, most courts are understandably concerned with containing costs and are interested in discovering if mediation can reduce the costs associated with dependency court cases.

The following analysis uses two different approaches to explore the possibility that mediation helps courts, and the professionals who practice in them, to save time and money.

The analysis begins with assessments by the various attorneys in permanent custody cases regarding the impact of mediation on the amount of time they spent on a specific case. The surveys, administered immediately following the mediation session, asked the attorneys to assess whether or not mediation would probably result in a reduction of the amount of time they spent on the case.

The second approach utilizes the reports provided by a variety of professionals regarding the "average" amount of time associated with various case processing events — including trial preparation, trial, and mediation. These estimates are applied to create estimates of the costs involved with these processing events.



Attorney Impressions of Time Savings

Following each mediation session, attorneys were asked to complete a one-page survey that asked them to rate whether the use of mediation saved them any time in the particular case.

The results, shown in Figure 8-1, indicate that, with the exception of parents' attorneys, very few professionals thought that mediation increased the amount of time they spent on a case.

However, even in this group, the percent reporting that mediation reduced the amount of time in a case was nearly twice as great as the percent reporting an increase. This suggests that over time the increased time spent on some cases would be more than offset by a reduction in time in other cases.

Among attorneys for children and attorneys for the child protective services agency, relatively few reported that mediation ever increased the amount of time spent on a case, but many did view mediation as reducing the time required in at least one case.

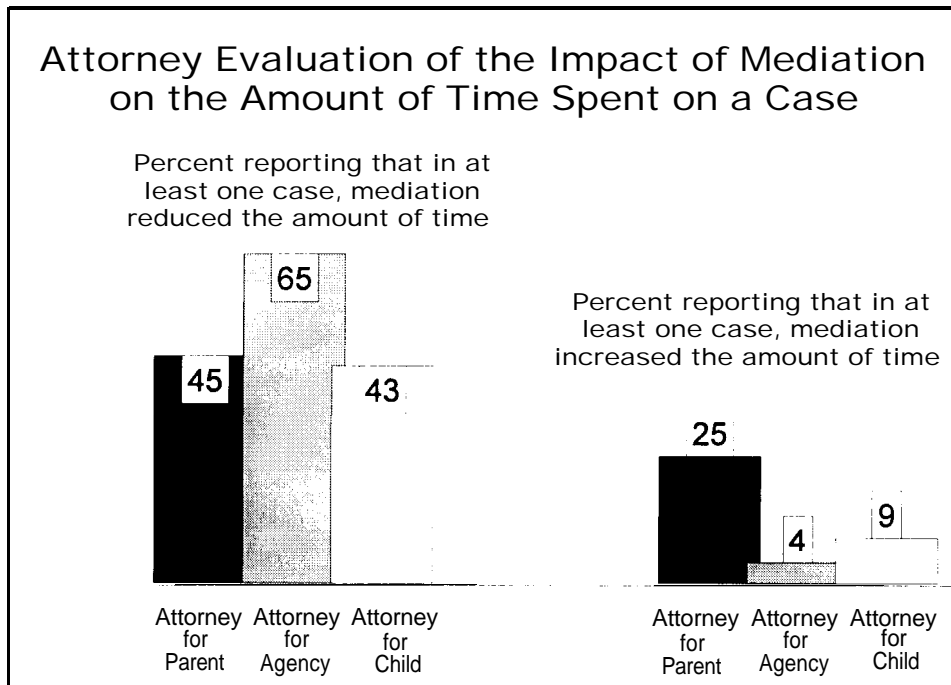


Figure 8-1



Applying Dollars to Time Saved

Magistrates, administrators at the child protective services agency, prosecutors, and public defenders were asked to provide estimates of the amount of time “typically” involved in trial preparation, trial, appeals, and mediation.

Their responses and the data generated in this evaluation produce the following figures regarding a “typical” permanent custody case. These “facts” are not true in all cases, but are common to many or most cases, and therefore are a starting place in estimating typical or average costs.

However, the figures that are presented in this chapter are only estimates. As one GAL noted:

Because of the cumulative knowledge and experience which accompany any case, it is virtually impossible to separate time spent solely in preparation for either trial or mediation.

In addition, the figures used in generating these estimates are often based on the relatively small number of permanent custody mediation cases included in this study.

The following assumptions and estimates are a first attempt, but not a definitive attempt, at generating cost and cost-savings figures.

Assumptions

Mediation

- Mediation is conducted by a single mediator.
- A typical mediation lasts 2.7 hours.

Participants

- A typical permanent custody case includes the following paid professionals: the caseworker; legal counsel for the caseworker; separate legal counsel for the mother and father; and a representative for the child.
- The assignment of a social worker or attorney guardian *ad litem* for the child is based on whether there is abuse or neglect involved, as well as on the specifics of the case and whether it proceeds to trial.

For this, admittedly simplified cost estimation, it is assumed that prior to *trial* 50 percent of the cases involve a social worker GAL, 25 percent involve an attorney GAL, and 25 percent involve both an attorney and a social worker GAL. For cases that reach trial, 25 percent are assumed to involve only an



attorney GAL, and 75percent are assumed to involve both an attorney and a social worker GAL.

- Permanent custody cases that proceed to trial will generally include approximately two expert witnesses and one hour of court time per witness.

Settlement Forum

- Approximately 40 percent of the cases sent to mediation result in a settlement.
- As shown in Table 6-1, 32.4 percent of the cases sent to mediation will result in a full trial. Approximately 84 percent of non-mediated cases will result in a full trial.

Court Time

- A typical trial to resolve permanent custody will require two days.
- Cases that proceed to trial will also include an estimated three hours of “down” time for all the parties. This is time spent waiting, appearing at hearings that are continued, and so on.

Pre-Trial Preparation

- Attorneys for the social services agency will not spend time preparing the case prior to mediation. They will spend four hours preparing for trial **post**-mediation or in the absence of mediation.
- Caseworkers will spend two hours preparing prior to mediation. Workers will spend 2.5 hours preparing for trial post-mediation or in the absence of mediation. The workers’ supervisors will also spend 2.5 hours preparing for trial, but will not spend any time preparing prior to mediation.
- Attorneys for parents will not spend time preparing prior to mediation. They will spent five hours preparing for trial post-mediation or in the absence of mediation.
- Social worker guardians *ad litem* will not spend time preparing prior to mediation. They will spend six hours preparing for trial post-mediation or in the absence of mediation.
- Attorney guardians *ad litem* will not spend time preparing prior to mediation. They will spend 2.5 hours preparing for trial post-mediation or in the absence of mediation.
- Although cases set for trial do settle out of court, they will typically settle only after most trial preparation has occurred.



Appeals

- Approximately 20 percent of the cases proceeding to a permanent custody trial will result in an appeal.
- Each case that is appealed will require approximately two additional hours of preparation time from each attorney.
- Each case that is appealed will require approximately 1.5 additional hours of judicial time.

Reimbursement

The hourly rates presented below are calculated as salary plus benefits equivalent to 33 percent of the salary. Annual salaries are assumed to represent 260 working days and eight working hours per day.

- Attorneys for the parents are paid \$40 per hour, with a total cap of \$1,600 for a permanent custody case.
- Case worker salaries average \$24 per hour, and their supervisors earn, on average, \$32 per hour.
- Attorneys for the social services agency earn, on average, \$34 per hour.
- Attorney **GALs** earn an average of \$27 per hour, and case worker **GALs** earn, on average, \$20 per hour.
- Average hourly rates for magistrates are \$40 per hour, and for judges, the average hourly rate is \$68 per hour.
- Mediators average \$87 per hour.
- Expert witnesses are paid, on average, \$25 per hour, with the exception of **M.D.s**, who are paid \$150 per hour.

Given the assumptions and facts listed above, it is possible to generate an average cost for a permanent custody case resolved prior to trial (but without mediation), and a permanent custody case resolved through trial (no mediation). These estimates are presented in Tables 8-1 and 8-2.



Table 8-1. Cost Per Case Settled Pre-trial (No Mediation)				
	Hourly rate	Hours of pre-trial preparation	Time to enter stipulation	Total cost
Attorney for Agency	\$34	4	.25 hrs	\$145
Caseworker	\$24	2.5	.25 hrs	\$66
Caseworker Supervisor	\$32	2.5	.25 hrs	\$88
Attorney - Mother	\$40 capped at \$1,600	5	.25 hrs	\$210
Attorney - Father	\$40 capped at \$1,600	5	.25 hrs	\$210
GAL - Attorney	\$27	5	.25 hrs	\$142
GAL - Social Worker	\$20	6	.25 hrs	\$125
Expert witnesses	hourly for: M.D.: \$150 Social worker: \$25 Therapist: \$25	2	0	\$400
Magistrate	\$40	0	.25 hrs	\$10
Judge	\$68	0	0	\$0
Total with only social worker GAL				\$1,254
Total with only attorney GAL				\$1,270
Total with both a social worker and attorney GAL				\$1,395



Table 8-2. Cost Per Case Settled In Trial (No mediation)

	Hourly rate	Hours of pre-trial preparation	Hours Of wait and delay time at court	Trial time	Total cost pre-appeal	Time on appeals	Total cost post-appeal
Attorney for Agency	\$34	4	3	16	\$782	3.5	\$119
Caseworker	\$24	2.5	3	16	\$516		
Caseworker Supervisor	\$32	2.5	3	16	\$688		
Attorney - Mother	\$40 capped at \$1,600	5	3	16	\$960	3.5	\$140
Attorney - Father	\$40 capped at \$1,600	5	3	16	\$960	3.5	\$140
GAL - Attorney	\$27	5	3	16	\$648	3.5	\$95
GAL -Social Worker	\$20	6	3	16	\$500		
Expert witnesses	M.D.: \$150 social worker: \$25 therapist: \$25	2	3	1	\$1,200		
Magistrate	\$40	0		16	\$640		
Judge	\$68	0				1.5	\$102
Total with only social worker GAL					\$6,246		
Total with only attorney GAL					\$6,394		\$596 (Plus \$6,394 at pre- appeal = \$6,990)
Total with both a social worker and attorney GAL					\$6,894		\$596 (Plus \$6,894 at pre- appeal = \$7,490)



Applying the figures from Tables 8-1 and 8-2 to a hypothetical 100 permanent custody cases produces the results shown in Figure 8-2. Cases that are resolved prior to trial require a total of \$20,692. Those that proceed to trial cost a total of \$568,596, and the appeals that result cost an estimated \$10,013. The total estimated cost to resolve these hypothetical 100 permanent custody cases is \$599,301, or \$5,993 per case.

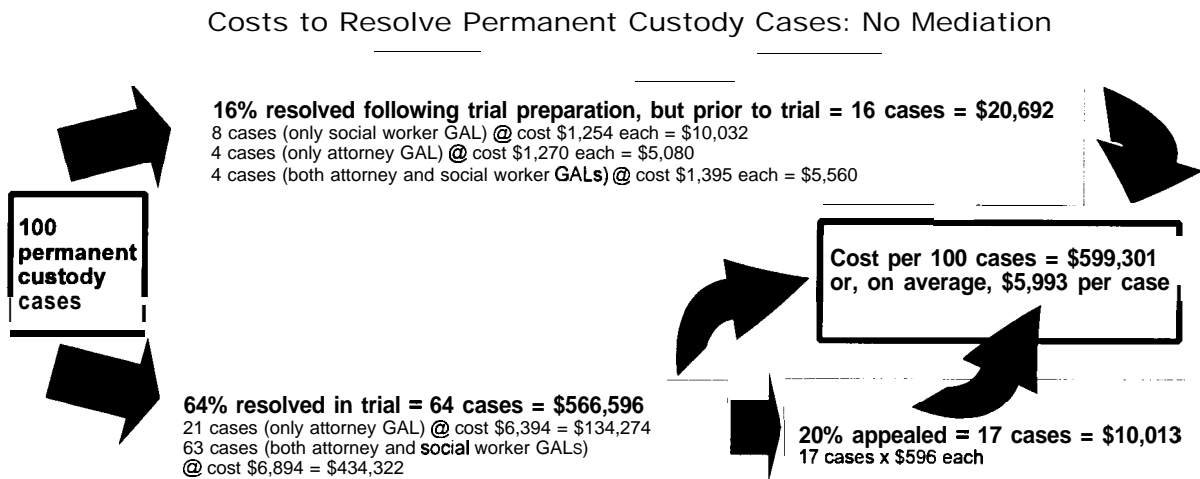


Figure 8-2

Using the assumptions presented above, it is also possible to generate an estimated cost for permanent custody mediation. The estimate, presented in Table 8-3, is broken down into the cost of mediation under two conditions: (1) a settlement is reached and (2) no settlement is reached. The differences between the two figures is the modest amount of time required of a magistrate to enter the mediated agreement.



	Hourly rate	Hours of preparation pre-mediation	Mediation 2.7 hours	Hours needed to enter stipulation if settled	Total Cost (With time to enter agreement in court)	
					Settled in mediation	Not settled in mediation
Attorney for Agency	\$34	0	2.7	.25 hrs	\$100	\$92
Caseworker	\$24	2	2.7	.25 hrs	\$119	\$113
Attorney - Mother	\$40 capped at \$1,600	0	2.7	.25 hrs	\$118	\$108
Attorney - Father	\$40 capped at \$1,600	0	2.7	.25 hrs	\$118	\$108
GAL - Attorney	\$27	0	2.7	.25 hrs	\$80	\$73
GAL - Social Worker	\$20	0	2.7	.25 hrs	\$59	\$54
Magistrate	\$40	0	0	.25 hrs	\$10	\$0
Mediator	\$87	0	2.7	0	\$235	\$235
Total with only social worker GAL					\$759	\$710
Total with only attorney GAL					\$780	\$728
Total with both a social worker and attorney GAL					\$839	\$782

Applying the figures from Table 8-3 to a hypothetical 100 permanent custody cases referred to mediation produces the results shown in Figure 8-3. Out of the 100 cases, the 40 that are resolved in mediation will cost an estimated \$75,920. Another 60 cases will use mediation but will not settle in mediation. Of these 60 cases, 22 will settle outside mediation, but prior to trial, at an estimated cost of \$28,452. Another 38 cases will require trial at an estimated cost of \$257,472. The cost of appeals will total \$4,768.



Costs to Resolve Permanent Custody Using Mediation

100 permanent custody cases



100 sent to mediation = **\$75,920**
40 resolved in mediation = \$31,370
20 cases (only social worker GAL) cost = \$759
10 cases (only attorney GAL) cost = \$780
10 cases (both attorney and social worker GALs) cost = \$839

60 not resolved in mediation = \$43,950
30 cases (only social worker GAL) cost = \$710
15 cases (only attorney GAL) cost = \$728
15 cases (both social worker and attorney GALs) cost = \$782



60 set for trial
37% settle pre-trial: 22 cases = \$28,452
11 cases (only social worker GAL) cost = \$1,254
5.5 cases (only attorney GAL) cost = \$1,270
5.5 cases (both attorney and social worker GALs) cost = \$1,395

63% resolved through trial: 38 cases = \$257,472
9 cases (only attorney GAL) cost = \$6,394
29 cases (both social worker and attorney GALs) cost = \$6,894



8 appeals = \$4,768
8 cases x \$596 each



Total costs = \$366,612
or \$3,666 per case

Figure 8-3

Comparing the costs of resolving 100 cases without mediation (\$599,301) and the costs of resolving 100 cases including mediation (\$366,612) suggests a possible savings of \$232,689 per 100 cases, or \$2,327 per case. This would be a cost savings of 39 percent per case.

While these figures are only estimates, the pattern certainly suggests significant cost savings are a result of mediation.

Chapter 9



Summary and Conclusions

Under funding from the United States Department of Health and Human Services, Hamilton County Juvenile Court, Ohio, provided mediation services for families who were the subject of a permanent custody filing.

For evaluation purposes, cases were randomly assigned to the mediation or control group. Cases were also accepted for mediation at the request of one of the parties, or, more typically, the magistrate.

Both the mediation and control groups consisted of cases for which the permanent custody filing was the initial filing, as well as those that had experienced a temporary custody filing and prior efforts to reunify the family.

The court retained St. Aloysius Orphanage, a multi-service treatment center for children and families with a track record in mediation, to provide mediation. St. Aloysius contracted with, and supervised, experienced community mediators who received intensive training on issues pertaining to child protection.

Mediation agreements were bifurcated and included binding and non-binding provisions. The former included the decision to grant permanent custody, while the latter included agreements by the adoptive parents to allow phone contact, exchange of photos and letters, or in-person visitation with the biological parents.

This evaluation is based on 49 cases with a permanent custody mediation between December 1, 1999, and November 30, 2001, and 37 comparable cases not assigned to the mediation group.

The evaluation relied on information provided by mediators and case information extracted from court files by independent data collectors. An analysis of cases in the mediation and control group revealed that they were statistically equivalent.

Surveys were distributed to attorneys, case workers, and family members following the permanent custody mediation. In addition, in-person interviews were conducted with judges, magistrates, and mediators involved in permanent custody cases, as well as representatives of the many professional groups involved in permanent custody -attorneys who represent parents, guardians *ad/item* who represent children, social



workers at the Department of Human Services and their attorneys, and representatives of the Court Appointed Special Advocate Program.

Summary of Key Findings

The Mediation Process

- Most cases were mediated in a single session. The average time spent in mediation was 2.7 hours.

No case required more than two sessions to complete. Slightly more than half of all cases completed mediation in 2.5 hours or less.

- The permanent custody mediation almost always involved a mother, her attorney, an attorney for the child protective services agency, a case worker, and an advocate for the child.

Other individuals who participate in permanent custody mediation on a fairly regular basis include the father, the father's attorney, foster parents, and relatives.

- Nearly 80 percent of the cases included a discussion of continued contact and/or information sharing between the biological parent(s) and child.

Discussions of whether, and how, biological parents might remain in contact with the children and/or the individuals providing permanent care for these children were common. Other frequently discussed issues had to do with the type of permanent home that would be most appropriate — including discussions of kinship care and other planned permanent living arrangements.

Mediated and Non-Mediated Outcomes

- Approximately 40 percent of all cases were able to reach an agreement in mediation regarding permanent custody.

In about 14 percent of all cases, the parent(s) agreed to a voluntary relinquishment of their parental rights. In approximately 14 percent, the permanent custody agreement was for legal custody of the children without a termination of parental rights. In 10 percent of the cases, the child welfare agency agreed to withdraw or hold the motion for permanent custody.



- A wide range of cases were able to resolve permanent custody issues in mediation.

Settlement in mediation was not associated with the type of maltreatment bringing the case into the system. Nor was the outcome of mediation associated with prior abuse reports or whether the permanent custody petition was filed as an original motion or following attempts to reunify the family.

- Agreements were reached in half the cases that dealt with continued contact.

The most common “open adoption” provisions included in mediated agreements called for continued visits between biological parents and children or for the periodic exchange of information. Often, these open adoption provisions were part of an agreement calling for relative care.

User Reactions

- There was substantial concern about permanent custody mediation at the start of the project.

Resistance was probably greatest among members of the defense bar. Defense attorneys feared that parents would be misled into relinquishing in exchange for the contact provisions that could not be legally enforced.

- Much of the initial resistance was dispelled through exposure to the process.

Although defense attorneys continue to express some concerns about the mediation of permanent custody in the absence of open adoption laws, most felt the cases they mediated produced fair, clearly understood outcomes.

The participants believe that everyone, including parents' attorneys and mediators, and later, the magistrates, do a good job of differentiating between the binding and non-binding portions of the agreements.

- There is general agreement that cases involving extended family and identified adoptive parents are best suited for mediation.

Cases in which the prospective adoptive parents have not yet been identified are more difficult to mediate and more frustrating for the parties involved.



- Participants to the mediation process offer mixed reactions to the idea of more extensive screening efforts by magistrates.

All participants agree that cases should be eliminated from mediation if the parents cannot participate due to extremely low cognitive functioning or uncontrolled mental illness. Beyond this, the professionals are more mixed in their reactions to case screening. Many participants noted that even seemingly intractable cases often settle in mediation and also see benefits accruing even in cases that do not settle. Some participants suggest that a wide range of cases should be referred, but the professionals should alert the mediators to unusual dynamics that might make settlement unlikely.

- Case specific surveys completed by parents, social workers, attorneys, and guardians *ad litem* show high levels of user satisfaction with participants rating mediation.

Feedback on surveys completed immediately after mediation show most participants thought mediation was better than court; gave them an opportunity to talk about issues of importance; and provided a neutral forum where they felt listened to, understood, and treated with respect.

Cost Savings

- Mediation appears to result in substantial cost savings.

The estimated cost of resolving a permanent custody case through mediation appears to be as much as 39 percent less than the estimated cost of processing permanent custody cases in the absence of mediation.

- Surveys completed by attorneys following mediation show mediation is often credited with reducing the amount of time a case will require.

Over 40 percent of the surveys completed by attorneys for parents and children indicate that mediation reduced the amount of time they needed to spend on at least one case. Among attorneys for the Agency, the figure was 65 percent.



Conclusions

Given the small sample sizes, this evaluation cannot be considered a definitive study of permanent custody mediation. It does offer preliminary insights into the types of cases that use permanent custody mediation, the nature of the intervention, the settlement rate and the types of outcomes that are generated, the costs involved, and the reactions of the users.

The limited empirical information also suggests that permanent custody mediation is a generally effective, as well as cost-effective, way of promoting agreements and avoiding contested trials to terminate parental rights. Professionals view the process as more humane and dignified for families than conventional adjudication.

Many of the preliminary findings noted above have implications for future permanent custody mediation programs. Among the key conclusions are the following:

- Permanent custody mediation should be offered along with mediation at all other stages of case processing.

Due to practical funding considerations, Hamilton County introduced permanent custody mediation prior to offering mediation at the earlier stages of case processing. This was frustrating for most professionals in the system. Administrators and mediators in the court understood this, and mediation has now been incorporated into temporary custody cases. Programs that are just beginning should make every effort to introduce mediation soon after cases enter the system.

- Every effort should be made to elicit the support of the key professional groups prior to the first permanent custody mediation.

This evaluation suggests the defense bar is likely to be the most resistant group. Steps to address their concerns during the planning stages of the project will help in developing trust and commitment to the process.

- Mediators must be highly skilled

Program administrators must make every effort to select mediators who understand the permanent custody process from a wide range of perspectives. Permanent custody mediators must understand the constraints and obligations of the respondent parents' attorneys, the guardian *ad litem*, and the child protection agency.

In addition, mediators must have the skills to provide each party with a chance to be heard, while avoiding excessively long sessions or revisiting of closed issues.



- Mediation can be useful if one parent attends and the other does not.

If one parent agrees to permanent custody, there will still have to be court action to terminate the rights of the absent parent. However, this is usually not a difficult or time-consuming matter, given that the absent parent has typically not participated in any efforts at reunification.

- Future programs should plan on mediating a wide array of permanent custody cases.

There is no evidence from this evaluation to suggest that certain types of permanent custody cases cannot be successfully mediated.

- Careful consideration must be given to determining which issues will be dealt with in mediation.

It must be clear at the outset whether the child protection agency will allow its representatives to move to a permanent custody arrangement that does not require the termination of parental rights. Similarly, there must be a consensus on whether to allow a discussion of continuing parent-child contact following a termination of rights.

- If open adoption issues are to be addressed in mediation and if potential adoptive parents have been identified, the adoptive family should attend the session.

The mediation of continued contact is less satisfying for everyone involved if the adoptive family has not been identified or is not present at the session.

- Every effort must be taken to ensure that the parents fully understand what is and what is not binding in their agreement.

This information needs to be presented in a simple, straightforward manner and at several points in time.

- If the mediation session produces an agreement on permanent custody, this agreement should be immediately entered in the court record.

Allowing families to move directly from mediation to court to enter the permanent custody agreement eliminates the need for a return to court. It also provides greater closure to an emotionally taxing decision.



- If only one parent attends mediation and the absent parent has not been active in the case, the court should attempt to schedule time following the entry of the agreement into the record to hear the case against the absent parent.

This approach also helps to minimize the number of times the parties need to return court and allows for complete closure on the case.

- Future research is needed to determine the long-term outcomes in cases with non-binding agreements.

All the professionals involved in these cases express an interest in learning about both the official and unofficial outcomes. Research needs to consider whether there are legal challenges to such agreements and what action, if any, other courts take in enforcement. Research is also needed about how agreements for future contact hold up over time and the long-term satisfaction with such agreements on the part of adoptive parents, the child, and biological parents.

