Permanent Custody Mediation

Lucas County Court of Common Pleas

Juvenile Division

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Executive Summary

This report describes the results of an independent evaluation of the Lucas County Permanent Custody Mediation Project. The Project was funded through a grant, awarded in 1998, by the United States Department of Health and Human Services as part of an initiative on permanency for children.

Permanent custody mediation was introduced as a way to help avoid unnecessary delays in providing permanent homes to children. There was also the expectation from the outset that mediation would be a less painful and less destructive approach to permanent custody.

This report explores permanent mediation through the analysis of case specific data on 79 cases assigned to mediation and 53 cases assigned to the control group, and through qualitative interviews with the professionals who use permanent custody mediation.

Description of the Process

Overall, approximately two-thirds of the cases (n=52) assigned to mediation actually resulted in mediation. Of the 27 that did not mediate, the vast majority (81%) involved a parent who failed to appear.

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 1.6 hours.

The permanent custody mediation sessions nearly always involved a mother, her attorney, an attorney for the child protective services agency, a caseworker, and an advocate for the child. Other types of individuals also participated on a fairly regular basis, including the father, the father's attorney, a foster parent, or a relative.

Settlement Rates and Terms

Most cases (n=31, or 59.6%) were able to reach an agreement about permanent custody in mediation. Given that mediation only occurs when the case involves parents who are on the scene and involved, and given that these are the most time-consuming cases to try, it is likely that the settlements produced by permanent custody mediation produce significant savings in trial time.

All of the groups — those who settle in mediation, those who do not settle in mediation, those who fail to appear to mediation, and those in the control group — are quite similar with respect to the percentage resulting in a termination of parental rights. Over 80 percent of the families that mediated, those that failed to appear for mediation, and those in the control group experienced a termination of parental rights. The groups are also similar with respect to the type of permanent custody ordered.

Of the 24 cases in which mediation resulted in an agreement for parents to terminate their parental rights, 18 had sufficient information about the agreement to code whether there are any special provisions related to future contact or information sharing. Of these 18 cases, most (83.3%) did include these types of clauses.

The most common side agreement calls for some continued contact with children. However, about 20 percent of the agreements also make references to phone contact, initiated either by the biological parent or by the child; periodic exchanges of information; a letter to be forwarded when the child turns 18 years of age; or a scrapbook to be prepared by the biological parents.

Phone or in-person contact between the child and biological parents is most common when the biological parents know the adoptive party. Cases where the permanent caretaker and the biological parents do not know one another typically do not reference phone or in-person contact, or merely note that the case worker will raise these issues with the child's adoptive parents.

Cases that reach an agreement in mediation take, on average, 2.2 months between filing and entry of the agreement with the court. Control group cases take significantly longer to reach a resolution. On average 4.6 months elapse between the permanent custody filing and entry of orders in the control group.

User Reactions

In Lucas County, the decision to use mediation in permanent custody cases was less controversial than it might otherwise have been, because the professional community had already accepted the use of mediation in temporary custody cases. Judges, magistrates, attorneys, and case workers interviewed for this evaluation repeatedly noted that they approached the idea of permanent custody mediation with an open mind because of their prior, positive experiences with mediation in temporary custody cases.

However, for most professionals, there were two primary sources of concern around expanding mediation to include permanent custody cases. First, many professionals were skeptical about the likelihood that permanent custody settlements could be produced in mediation, because all the parties were seen as too entrenched in their positions. The second major source of concern had to do with the wisdom of allowing discussions of future contact or information sharing into the mediation.

Most of the professionals who say that they were initially skeptical that permanent custody could be resolved in mediation have decided that many cases do benefit from the process and that settlements are possible. All of the professionals interviewed in this evaluation thought the Court should continue to offer permanent custody mediation, and all would recommend the approach to other jurisdictions.

The issues that can, or should, be discussed remains the area of greatest controversy in permanent custody mediation. Specifically, there continue to be lingering concerns over the Agency's willingness to discuss outcomes other than permanent custody.

The professionals also vary in the degree to which they are comfortable with discussions of possible future contact between the biological parents and child, or the sharing of information with biological parents following the termination of their parental rights. However, all of the professionals agree that parents are repeatedly warned that the court will not enforce these “side agreements.”

The professionals interviewed in this evaluation agree that some cases are better suited to discussions of continued contact than are others. Comfort levels increase when (1) the children are old enough to remember their parents, regardless of whether there is continuing contact, (2) the children express an interest in continued contact, (3) the adoptive and biological parents know each other and understand what continued contact will be like, and (4) the adoptive parents are at the mediation session to indicate what types of contact would be acceptable or unacceptable. Fortunately, most professionals also see these as the types of cases that are most likely to involve provisions for future contact.

Chapter 1 Introduction to the Project

This report describes the results of an independent evaluation of the Lucas County Permanent Custody Mediation Program. The Program was funded through a grant, awarded in 1998, by the United States Department of Health and Human Services as part of an initiative on permanency.

The report begins with an introduction to the issues surrounding permanent custody mediation. Chapter 2 provides an overview of the 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 provides a brief description of the cases assigned to the mediation and comparison groups. This chapter describes the history of these cases in the child welfare and juvenile court systems, and identifies the issues leading to the tiling of a motion for permanent custody.

Chapter 4 provides a description of the mediation process: the issues dealt with in mediation, who participates in the process, the duration of an average mediation, and the steps taken if an agreement is produced. This chapter also explores the problem of parents who failed to appear for mediation.

Chapter 5 highlights the outcomes resulting from mediation. The chapter explores settlement rates, factors associated with settlement, and the nature of the agreements generated in mediation. Chapter 6 compares mediated and non-mediated agreements and reports on the status 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.

The report concludes in Chapter 8 with a summary of major findings and a discussion of what these findings suggest for both future research and current practice.

The Issues

The move to expedite permanency for children in out-of-home placements is not new. The Adoption Assistance and Child Welfare Act of 1980 was one of the earliest pieces of legislation to combat what the literature and research in the field often refer to as "foster care drift" — children moving from placement to placement without ever returning home or being freed for adoption. 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 have been 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,[2] and 21 percent of all foster children will have parental rights terminated."

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.[4]

The Resource Guidelines for Improving Court Practice in Child Abuse-Neglect Cases, developed by the National Council of Juvenile and Family Court Judges, 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.[5]

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.[6]

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

Mediation

The Adoption and Permanency Guidelines of NCJFCJ published in 2000, designed to set out "the essential elements of best practice" for court actions leading to permanent homes for children, 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."[7]

The Guidelines conclude that of all the negotiating options, "mediation has the best chance of achieving *all* these results."[8] 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 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. [10]

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%.[11]

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.

In Lucas County, the Children's Services Bureau stopped allowing voluntary relinquishments before the permanent custody mediation project started. A voluntary relinquishment gave parents the option of changing their minds prior to the time the relinquishment was accepted by the court. This created situations in which parents began voluntary relinquishments, the trial date for a termination hearing was vacated, the parent decided not to relinquish, and the Agency then faced months of waiting for another trial date. As an alternative to voluntary relinquishment, parents could 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 are sometimes not 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."" 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.[13]

Yet despite these misgivings, there is also strong support for willingness on the part of the court and child welfare agency 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.[14]

One of the Berkeley researchers notes that the role of the attorney is, unquestionably, to protect the client's 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. [15]

> 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."

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. [17]

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.[18]

Post-Adoption Contact

Desirability of Contact

When mediation of permanent custody includes a discussion of post-adoption contact between the child and the biological parents, more controversies emerge. The idea of post-adoption contact can be alarming for a number of reasons. Some critics of post-adoption contact contend that it will prove confusing to children and may put them in contact with biological parents who have multiple, serious problems. Arguably, post-adoption contact may also be the source of conflict between biological and adoptive parents, or might undermine the role of the adoptive parents. 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."[19]

The Expert Panel assembled to develop Adoptions 2002 for the 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.[20]

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.[21]

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.[22]

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."[23]

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.[24]

Enforcement of Contact Provisions

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."[25] 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 ofviolations 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.'"

However, like most states, Ohio does not recognize as binding any post-adoption contact agreed to by the parties. Ohio Revised Code §3 107.62 and 3 107.63 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.[27]

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.[28]

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.[29]

A report from the Mediated Permanency Planning Project of Harris County, Texas, relying primarily on case studies and surveys of 3 1 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.[30]

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 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.[31]

The following chapters contribute to the growing body of information on permanent custody mediation through an in-depth exploration of the pilot program in Lucas County, Ohio. ■

Chapter 1: End Notes

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Chapter 2 Overview of the Project

This chapter provides information about how the Lucas County Juvenile Court developed a permanent custody mediation Program, selected mediators, elicited the cooperation of relevant professional groups, assigned cases, and provided mediation services. In addition, the chapter describes the major steps involved in the program evaluation.

Program History

In 1997, the Lucas County Juvenile Court began using mediation in child protection cases where the Department was seeking temporary custody of children. Mediation was used to resolve disputes around the petition, placement, visitation, terms of the service plan, case goals, and compliance.

In 1998, the Administration for Children and Families of the U.S. Department of Health and Human Services made federal grant funds available to help promote timely adoptions. The Lucas County Juvenile Court was awarded one of the Adoptions Opportunity Program grants, which provided the opportunity to expand the mediation service to include permanent custody cases.

The Court hoped that mediation could be a tool for expediting permanency planning, as well as a means of promoting information sharing and cooperative case planning. In Lucas County, there is often a delay of several months between the permanent custody tiling and the court hearing. Following the hearing, an appeal is often tiled. Although the policy is for permanent custody appeals to be expedited, appeals can add another six- or even nine-month delay before the adoption process can begin. The Court believed that the permanent custody process could be expedited by offering mediation quickly after the permanent custody filing. If the parent(s) stipulated to permanent custody in mediation, the appeals process and its inherent delays would also be avoided.

By all accounts the Court was extremely supportive of the Program from the outset. With the support of the Court firmly in place, the next step was to ensure that all the professional

groups critical to the success of the Program were willing to give permanent custody mediation a chance. Broad-based commitment to the Program was encouraged in several different ways. The multi-disciplinary task force that had been created to help develop policies and procedures for temporary custody mediation was reactivated for discussions of permanent custody mediation. This task force was composed of major stakeholders, such as judges, magistrates, the Lucas County Department of Children's Services (LCDCS), the defense bar, and the mediation community.

In addition to this stakeholders' group, the judges and magistrates also met independently with the defense bar. This group was perceived to be the primary source of resistance, but also critical to the Program's success. As one attorney for the child protection agency noted:

> Unless the defense bar buys in, nothing's going to work. If they think it's selling their clients down the river, they're not going to settle in mediation.

One judge remembers asking members of the defense bar to simply give permanent custody mediation a chance, assuring them that the Court would not stay with the approach unless it was widely perceived to be both fair and useful.

Ongoing training was built into the permanent custody mediation grant as yet another method of building support. In the first year, a half-day training was provided to all stakeholders. This was an opportunity to introduce the concept of permanent custody mediation and address questions and concerns.

In this and subsequent training programs, the mediators and stakeholders had a chance to hear from professionals in jurisdictions with well-established permanent custody mediation programs, such as those in Santa Clara, California and Connecticut.

Interviews conducted for this evaluation suggest that for most players, the Program's early orientation and training sessions were helpful. According to one county attorney, it was persuasive to hear from people who were successfully using mediation in permanent custody cases in other jurisdictions.

He would strongly recommend that courts considering permanent custody mediation lay the groundwork by bringing in prosecutors, defense attorneys, mediators, case workers, and other professionals with real-world experience with permanent custody mediation.

Selection of Mediators

Permanent custody mediation is provided by the same four trained and experienced mediators who provide mediation in temporary custody cases. All four are attorneys with private practices in juvenile and domestic relations law. Many have experience representing both children and parents in dependency actions. This background made the mediators sensitive to the concerns being voiced about permanent custody mediation, especially by the defense bar. One mediator notes:

> I've represented parents, so I had parts of my head saying 'How would you ever get a parent to give up a child? What about confidentiality? What about protecting the parent's rights?'

Selecting mediators with a legal background that involved work in the area of permanent custody was also reassuring to the professionals who were asked to participate. One county attorney notes that less experienced mediators:

> . . . don't understand what we can and can't do. They'll ask why the Agency can't do such and such. Well, if we can't do it, bringing it up just gets the parent's hopes up for no reason.

Prior to the start of temporary custody mediation, the mediators completed general mediation training and training specifically on dependency mediation. When permanent custody mediation began, the mediators received an additional one-day training session in issues related specifically to permanent custody mediation.

Procedures and Policies

Prior to the start of the Program, decisions were made about which cases would be accepted into mediation, what issues would be discussed, and the types of agreements that would be produced.

The grant application proposed to complete 20 permanent custody mediations in the first year of the project, 30 in the second year, and 40 in the third year, for a total of 90 permanent custody mediations.

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 permanent custody filings were reviewed by the Magistrate responsible for oversight of the mediation service. She screened out cases where:

- The parent was considered unable to participate due to severe mental health problems;
- Criminal charges were pending against a parent; or
- Neither parent could be located.

These cases were believed to be ill-suited to mediation, either because parents would be unlikely to appear, or because they would not be in a position to make informed decisions about permanent custody and fully understand the consequences of the agreement. However, as Chapter 3 indicates, the parents who participated in mediation did have 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.

Once a case was determined to be eligible for mediation, it was assigned to mediation or the control group. This assignment was essentially random, although the court worked with the mediators to prevent more cases from being assigned than could be readily scheduled.

Cases assigned to the control group were processed as usual. In the mediation group, all the parties in the case were notified of its selection for permanent custody mediation and were ordered to attend mediation at the courthouse.

The policy in place for permanent custody mediation was that agreements would essentially 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 open adoption terms, party commitment terms, 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 actual visitation.

Party commitment terms would include those actions that one party could agree to unilaterally. For example, the Agency could agree to look for an adoptive home that would 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. Common examples are acknowledgments by all the mediation 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. However, the Court recognized that there was the potential for a parent to seek enforcement elsewhere, perhaps as a civil contract. Such

enforcement actions would not effect the standing of the permanent custody agreement but could potentially produce other outcomes such as the award of damages to the parent.

Structure of Mediation

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. 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.

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 of Children's Services 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.

Although many cases are resolved more quickly, each case is scheduled for two hours of mediation. Mediators report that it is important to provide time for parents to talk or "vent," but it is also important to ensure that the session does not return to closed issues, such as why the Agency became involved in the case in the first place. Despite the mediators' efforts to keep the session focused and on track, some professionals express frustration that 30 or 40 minutes may be spent on summarizing where the case currently stands before the discussion turns to the permanent custody arrangement.

Mediators and most participating professionals agree that parents speak up in mediation. One mediator says that this is helpful, regardless of whether permanent custody is resolved:

> Parents get to talk instead of sitting in a waiting room. They get to ask questions — of the worker, the foster parents, the CSB attorney. They get to see that these are not evil people and they get to hear what will come up at trial.

The informal atmosphere also gives the professionals a chance to say things to the parent that they would not normally say, and clearly gives some parents a chance to see a side of the professionals they would not otherwise see. For example, one County attorney recalled a permanent custody mediation involving a mentally handicapped mother this way:

> She really loved the child, she just couldn't parent. We were all crying and listening to her talk about the kind of home she wanted for her child.

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 parent's ability to participate or if they perceive the parent to be feeling pressured, they will speak privately to the parent's 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. However, one mediator notes that on occasion, "the court comes to the parties" since the magistrate sometimes comes into the mediation room rather than requiring the parties to go into the courtroom.

There are instances in which no magistrate is available when the mediation session ends, but this has not been a common problem. In such instances, the parties must return to court to have the agreement presented to the court. This is a less desirable approach because it requires both family and professionals to reappear at court and it leaves an emotionally wrenching decision hanging a bit longer.

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.

There has been controversy about the role the Court should play with respect to the non-binding agreements, specifically the open adoption and party commitment terms of the agreement. The professionals report differing experiences with respect to how the side agreements have been dealt with by the Court. One defense attorney says "the entire agreement was read in, but we specified what was unenforceable." Another defense attorney contends that the side agreements are sometimes on the record and sometimes not, depending on the magistrate.

Some of the differences in practice may be due to having cases mediated early in the program versus later. As the program progressed, the pros and cons of each approach were clarified. The administrative judge explains the current official position of the Court:

> There have been lots of discussions about the ancillary agreements, both here in the Court and in the Supreme Court's Dispute Resolution Committee. The judges and magistrates and Children's Services attorneys have talked about whether to put the side agreements on the record. My policy now is to put the fact of the side agreements on the record and question the parties to be sure they understand that these are not enforceable. The detail of the side agreement doesn't need to be entered, but the fact that is exists should be entered. There is a greater chance of reversal if the record is silent.

Evaluation Methodology

The evaluation of the Program was conducted by a private, non-profit research firm. The independent 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;
- Attorneys assigned by the court to represent children;
- Social workers at Lucas County Department of Children's Services;
- Legal counsel for Lucas County Department of Children's 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 project. 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 the permanent custody mediation. A total of 66 surveys from attorneys for parents and children, 35 attorneys for Children's Services, 36 surveys from case workers, 53 surveys from parents, and 2 1 surveys from other family members were collected across 79 cases.

Mediators were to complete data collection forms for each case that they mediated between March 1999 and April 200 1. Court files were reviewed on 60 mediation and 53 control group cases during the summer and fall of 200 1.[1] These court file reviews took place, on average, 20.4 months following the permanent custody filing and17.6 months following mediation. ■

Chapter 2: End Notes

1. The 19 mediation cases which did not have a court file review conducted were composed of eight cases in which mediation did not occur because a parent failed to appear for the session, two cases that mediated but lacking mediator data forms, and nine cases that could not be reviewed in a timely manner because the files were being used by judges or foster care review boards.

Chapter 3 Profile of the Cases

This chapter presents background information about the families who were assigned to mediate permanent custody. The chapter considers the nature of the problem bringing them into the child protection system and the nature of any additional problems present in the family. The mediation group is also compared 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

Families in both the mediation and control group were experiencing a variety of problems in addition to, and often contributing to, maltreatment of the child. Table 3-l shows that about three-quarters of the parents were noted to have substance abuse problems, and another three-quarters had inadequate housing and serious financial problems. Other common problems noted for parents include incarceration or a criminal record, family violence, and severe emotional problems.

Table 3-l
Problems Noted for Parents

	Mediation	Control
Incarcerated	14.3%	13.2%
Criminal record, but not incarcerated	14.3%	17.0%
Lack of housing, housing inadequate, financial problems	73.5%	81.1%
Parent rejects child, emotional abuse	12.2%	9.4%
Family violence among adults	22.4%	17.0%
Parent has severe emotional problems	20.4%	15.1%
Mentally handicapped parent	8.2%	1.9%
Parent has physical disability	6.1%	3.8%
Parent has drug and/or alcohol problem	73.5%	77.4%
	(49)	*(53)*

History with Child Protection

Approximately 60 percent of the mediation group families and nearly half of the control group families had been the subject of a prior child protection report.

Families with prior child protection reports (both mediation and control) had, on average, 1.9 previous reports. The lapse of time between the first and most recent report was 4.6 years in the mediation group and 3.4 years in the control group.

Approximately 45 percent of both the mediation and control group families had been the subject of a prior filing to terminate their parental rights. Of those with prior permanent custody filings, 80 percent of the control and 87 percent of the mediation families lost permanent custody of at least one child.

Table 3-2
History With the Child Protection Agency

	Mediation	Control
Percent with prior reports to child protective services	62.0%	48.8%
If there have been prior reports, average number of prior reports	1.9	1.9
Percent of all cases who have been subject to prior permanent custody filings	44.7%	44.9%
Of those with prior permanent custody filings, percent with permanent custody granted to the agency	86.9%	80.0%
	(50)	*(43)*

The Current Child Protection Case

The child protection case leading to the most recent permanent custody filing is summarized in Table 3-3. Typically, both parents were the subject of the child protection case. Most of the cases, both mediation and control, involved findings of neglect. Physical abuse was also present in 13 to 20 percent of the cases.

Table 3-3
Nature of the Child Protection Case

	Mediation	Control
Nature of the maltreatment		
Physical abuse	20.0%	13.2%
Sexual abuse	4.0%	11.3%
Neglect	90.0%	88.7%
Abandonment	0.0%	1.9%
Emotional abuse	2.0%	5.7%
Homelessness	14.0%	11.3%
Domestic violence	22.2%	9.4%
Drug-exposed infant	20.0%	18.9%
Parties named in petition		
Both parents	66.0%	64.2%
Mother	24.0%	28.3%
Father	6.0%	0.0%
Stepparent	2.0%	1.9%
New non-marital partner	2.0%	1.9%
Relative	2.0%	5.7%
Other	4.0%	3.8%
	(50)	*(53)*

Virtually all of the cases involved a child being 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.

Most children in both the mediation and control groups experienced one or two out-of-home placements and spent at least part of that time in the care of a non-relative.

Table 3-4
Placement of Children

	Mediation	Control
Number of different placements		
One	28.6%	19.2%
Two	40.8%	40.4%
Three	20.4%	21.2%
Four to nine	10.2%	19.2%
Average number	2.3	2.7
Types of placements used		
Relative	15.2%	19.2%
Non-relative foster care provider	73.9%	84.6%
Group setting	2.2%	1.9%
Other (including friends)	10.9%	3.8%
	(50)	*(53)*

The Permanent Custody Filing

In most cases in both the mediation and control group, the Agency was seeking permanent custody of only one child. However, tilings for permanent custody of two or more children were not uncommon.

There was also considerable variation in the ages of the children for whom the Agency was requesting permanent custody. Almost half of both groups involved a permanent custody filing on a child aged two years or younger, but 40 percent of the mediation and a quarter of the control group cases also involved a permanent custody filing on a child age nine years or older.

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

	Mediation	Control
Number of children of whom Agency requested permanent custody		
Average	1.8	1.4
Range	l-5	l-5
One	60.4%	75.0%
Two	14.6%	13.5%
Three	10.4%	5.8%
Four	10.4%	3.8%
Five	4.2%	1.9%
Permanent custody sought for child:		
Age two or under	48.0%	58.5%
Ages three to five	14.0%	18.9%
Ages six to eight	20.0%	15.1%
Age nine or older	40.0%	24.5%
	(49)	*(52)*

Table 3-6 shows the manner in which the Lucas County Department of Children's Services filed for permanent custody. In most cases, the permanent custody filing followed the provision of services with the goal of reunification. However, in about a quarter of all cases, the LCDCS moved directly to a request for permanent custody, as permitted by ASFA.

Table 3-6
The Permanent Custody Filing

	Mediation	Control
Original Permanent Custody Complaint	26.5%	24.0%
Motion for Permanent Custody	69.4%	72.0%
Amended Complaint requesting Permanent Custody	4.1%	4.0%
	(49)	*(50)*

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
Reasons Agency Requested a Move From Temporary to Permanent Custody

	Mediation	Control
Parents not complying with treatment plan	76.5%	72.2%
Parents unable to care for children	73.5%	66.7%
Another incident of abuse or neglect	44.1%	30.6%
Other reasons	2.9%	5.6%
	(34)	*(36)*

Overall, the information available in court records shows few significant differences between the mediation and control group families. Both groups have multiple, serious problems and lengthy histories in the child welfare system. ■

Chapter 4 The Mediation Intervention

This chapter describes the permanent custody mediation intervention using the data provided by the mediators of cases assigned to the mediation group during the time covered by the evaluation. The first case was scheduled for mediation in March 1999, the last case included in the evaluation was scheduled for mediation in April 200 1.

Discussed below are the characteristics of cases that did and did not result in mediation, the scheduling and format of the mediation session, a description of the participants, and a description of the issues dealt with in mediation.

Failure to Appear

Overall, approximately two-thirds of the cases assigned to mediation actually resulted in a mediation. Of the 27 that did not mediate, the vast majority (81%) involved a parent who failed to appear. In addition, there were three cases in which the parent was incarcerated at the time of the mediation (although possibly not at group assignment), and one case where an attorney failed to appear. The failure to appear rate

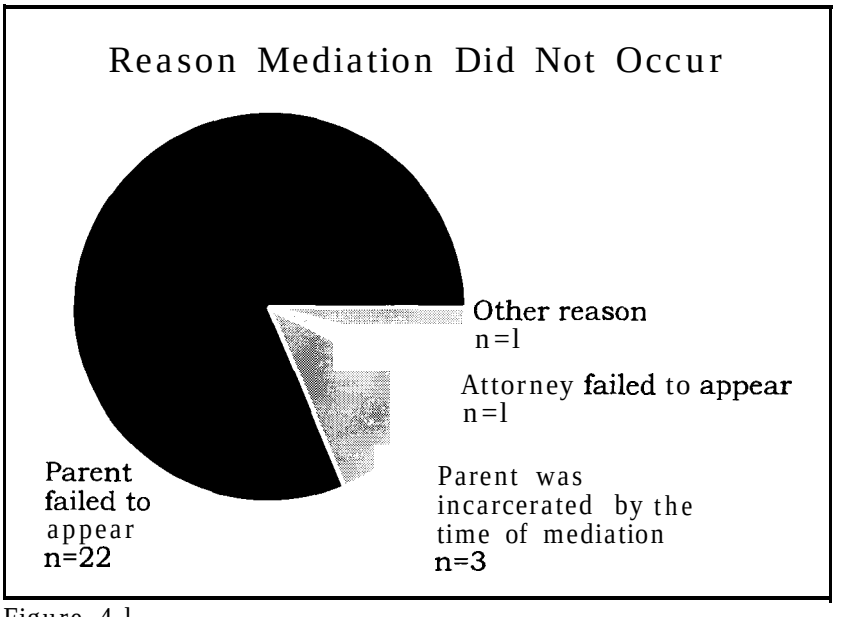

Figure 4-l

among parents remained fairly consistent over the full three years of the project.

There were a few characteristics of parents that were associated with a failure to appear at mediation. Failure to appear at mediation is more common among:

- Parents with known substance abuse problems;
- Parents who were in the system due a drug-exposed infant; and
- Parents who have been the subject of prior terminations of parental rights.

Table 4-1
Factors Related to Parents Failing to Appear for Mediation

	Parent Has Known Substance Abuse Problem*		Case Involves Drug-Exposed Infant'		Case Involves Prior Terminations of Parental Rights*	
Parent appeared for mediation	Yes	No	Yes	No	Yes	No
Yes	64.4%	100.0%	46.2%	75.4%	62.1%	93.1%
No	35.6%	0.0%	53.8%	24.6%	37.9%	6.9%
	(45)	*(16)*	*(13)*	*(61)*	*(29)*	*(29)*

* Differences between "yes" and "no" are statistically significant at .05.

In other respects, the parents who fail to appear for mediation appear to be very similar to those parents who do appear. Failure to appear is *not* associated with such factors as:

- The presence of developmental delays among parents;
- Known mental illness for parents;
- Known chronic abuse of the children;
- Known domestic violence in the home;
- Whether the case involved a motion to move from temporary to permanent custody versus an original filing for permanent custody; or
- The amount of time between the filing and the scheduled mediation.

There were too few cases in the study that involved abandoned infants, serious injuries, or sibling deaths to explore the relationship between each of these factors and parents' appearance for mediation.

Scheduling and Format of the Mediation Session

Excluding two cases that were rescheduled due to the failure of a parent to appear, the amount of time elapsing between the Agency's filing for permanent custody and the scheduled mediation averaged 63 days. As Table 4-2 indicates, 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 Elapsing Between Permanent Custody Filing and the Scheduled Mediation

	All cases	Immediate petition for permanent custody ✖	Petition for permanent custody follows attempts at reunification ✖
Average days	**63.5** days	45.9	69.3
	(69)	*(17)*	*(52)*

✖ Differences between these group statistically significant at .05.

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 1.6 hours.

Sessions resulting 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.

There was a significant difference in the average length of the session based on when the case came through the Program. In 1999, the average session lasted 1.8 hours. In 2000 and 2001,

the average had declined significantly to 1.3 hours. Undoubtedly, this decline reflects increased mediator skill over time.

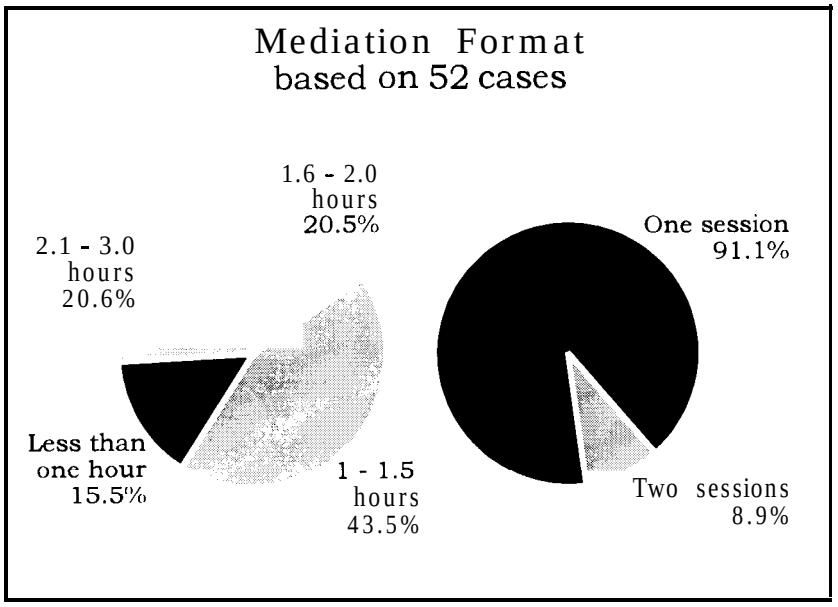

Figure 4-2

The Participants

Table 4-3 shows the various types of individuals attending the mediation session. As the table indicates, the 52 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. In approximately half of the cases, the father and the father's attorney were present. In over two-thirds of the cases, a foster parent attended the mediation, and in almost a third, a relative was present, often a relative who was providing out-of-home care.

A conservative estimate of the number of individuals participating in an average mediation session would be seven, or eight including the mediator. This is a conservative figure because the data merely indicate that a given type of individual attended, but not how many of each type. 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=52 cases)

Mother	80.8%
Father	48.1%
Relative providing out-of-home care	29.4%
Relative not providing out-of-home care	9.1%
Foster parent(s)	67.3%
Other individual known to parent(s) who may adopt	9.1%
Attorney for mother	93.2%
Attornev for father	56.1%
Case worker	97.7%
Attorney for child protection	100.0%
Attorney for child and/or CASA	78.8%
Other professionals	14.3%
Other friends	7.1%

Issues Discussed

The basic issue to be addressed through mediation was who would have permanent custody of the child. 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.

Table 4-4 shows the types of specific issues that were addressed in the permanent custody mediation session. Over 80 percent of the sessions included a discussion about the type of adoptive home that would be most appropriate. This might be a discussion about the children being adopted by a current or former foster parent, or a discussion about relatives who might consider adoption.

Slightly more than half of the cases also included a discussion of continued contact between the biological parent(s) and child. A few cases involved the discussion of possible contact after the child reaches the age of 18.

About a quarter of the cases involved a discussion of the biological parents providing the child with a letter or photo to be shared after the child turned age 18. Another 11 percent included a discussion of letters or photos to be prepared and shared now.

Table 4-4
Issues Discussed During Mediation ✖

	Percent Discussing Issue
Kinship care as a permanent plan	44.1%
Legal guardianship as a permanent plan	35.3%
The type of adoptive home that would be best (e.g., with relatives, foster parents, other known or unknown parties)	82.5%
Characteristics of an adoptive home/parent	40.6%
Continued visits between biological parent(s) and child	56.3%
Letter/photos to be sent on occasion by biological parent	11.1%
Contact between biological parent after child is 18	3.7%
Letter/photos to be shared with child after age 18	25.0%
Grief or separation counseling for one or more parties	7.1%
Scrapbook/Life Book to accompany child to adoptive home	16.7%
Updates from adoptive home to biological parents	22.6%
Who will be present at a final visit	22.6%
Where the final visit will take place	22.6%
Length of the final visit	16.7%

✖ Based on data from 40 cases with information about the issues discussed.

Discussions of continued visitation were far more common in cases where the children were in relative care, a foster-adopt home, or the home of someone else known to the parents and interested in adoption. Almost three-quarters of these cases involved discussions of continued contact, compared to only 4 1 percent of the cases where children were in other types of out-of-home placements. ■

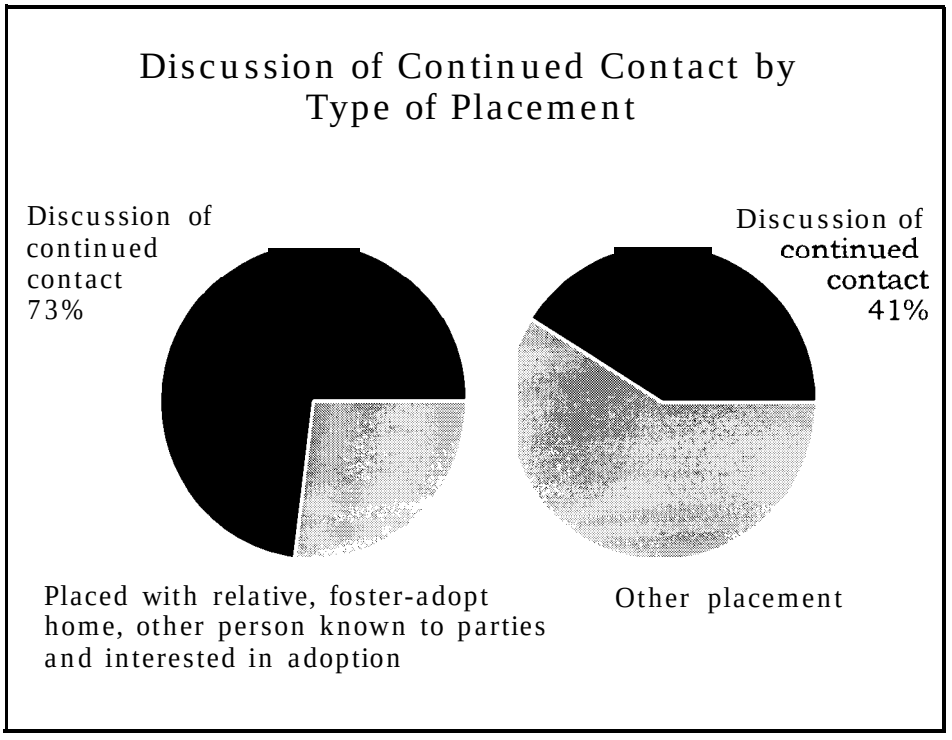

Figure 4-3

Chapter 5 Settlement in Mediation

This chapter considers the settlement rate in the Lucas County Permanent Custody Mediation Program and explores the factors related to settlement. For cases that reach a resolution in mediation, the analysis also describes the nature of the mediated permanent custody agreement and any non-binding side agreements. Chapter 6 compares the mediation and control group on the percentages of cases resulting in permanent custody, the type of permanent custody, as well as the length of time from the permanent custody filing to a resolution.

Settlement Rates

Figure 5-1 shows that most cases (59.6%) were able to reach an agreement in mediation. Overall, in slightly more than 46 percent of the cases, the parent(s) agreed to a relinquishment of their parental rights. In seven cases, the child welfare agency agreed to withdraw or hold the motion for permanent custody.

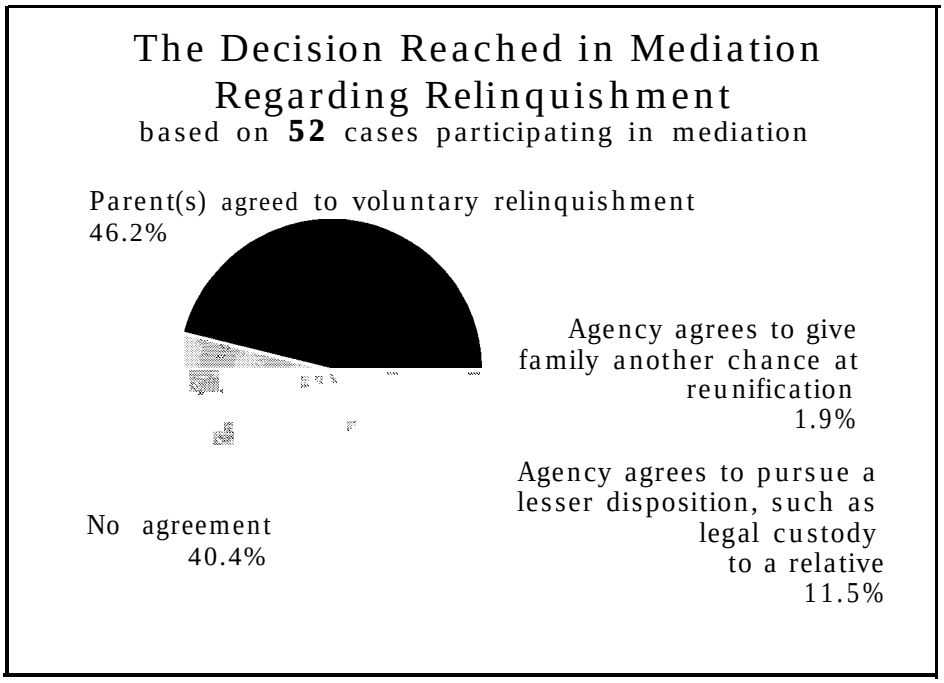

Figure 5-1

In six of these seven cases, the parents and the agency reached an agreement that would give legal custody of the child to a third party (often to a relative) without the termination of parental rights. In one of the seven cases, the agency agreed to give the parents another chance to comply with the treatment plan and potentially reunify with their child.

The settlement rate of approximately 60 percent is somewhat lower than the settlement rates of 70 to 80 percent reported by many court-based dependency mediation programs.' It is also lower than the settlement rate of 80 percent reported by Lucas County among temporary custody mediation cases. The lower settlement rate in permanent custody cases is not surprising. In all of the cases, the permanent custody arrangement sought by the child protection agency was a termination of parental rights and freeing of the child for adoption. 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 to relinquish parental rights is a permanent, far-reaching decision. It is to be expected that greater percentages of these cases, compared to temporary custody cases, go on to trial.

In 40.4 percent of the cases that participated in mediation, no agreement on permanent custody could be reached. However, in four of these 21 cases, the parties were able to produce an agreement on some other issues in dispute, such as revisions of the visitation arrangements.

Factors Associated With a Permanent Custody Agreement

The next set of analyses considers the factors associated with a permanent custody agreement in mediation. Although the vast majority of the permanent plans produced in mediation call for a termination of parental rights, the following analysis does not differentiate between agreements to terminate parental rights and other permanent custody agreements (such as legal

custody to a relative) that do not require a termination. The goal in the child protection system and the juvenile court is to generate an appropriate permanent plan. If the child's best interests are served by a legal custody without a termination of parental rights, this is acceptable as a permanent plan.

Some of the factors that might be expected to influence settlement in mediation did not appear to do so. For example, settlement was not associated with:

- Whether the petition for permanent custody was the initial filing or followed attempts at reunification;
- The age of the child;
- Whether relatives attended the mediation session; or
- Whether non-relatives who are potential adoptive parents attended the mediation.

Table 5-1
Factors Not Associated With Settlement in Mediation

Permanent custody agreement mediation	Nature of permanent custody petition		Relatives attended mediation		Potential non-relative adoptive parties attended mediation	
	Followed attempts to reunify	Original motion	Yes	No	Yes	No
Yes	62.5%	50.0%	66.7%	70.0%	63.6%	65.2%
No	37.5%	50.0%	33.3%	30.0%	36.4%	34.8%
	(40)	*(12)*	*(12)*	*(10)*	*(22)*	*(23)*

A number of factors emerged as possible predictors of settlement in mediation. Given the small sample sizes in this evaluation, the association between each of these factors and the permanent custody outcome often only approaches statistical significance. Nevertheless, these factors warrant further research.

The factors associated with permanent custody outcome in mediation include:

- **Parental race or ethnicity.**

While the level of statistical significance is only 0.2, Table 5-l suggests that minority parents may be less likely than White or Anglo parents to reach a permanent custody agreement in mediation.

Table 5-2
Relationship Between Parental Race/Ethnicity and Settlement in Mediation

Any settlement in mediation	Race/ Ethnicity *	
	Minority parent	White parent
Yes	**50.0%**	**70.8%**
No	**50.0%**	**29.2%**
	(16)	*(24)*

* Differences between the groups are statistically significant at .2.

- **Substance abuse as a known problem for parents.**

Only one of the parental problems on the checklist completed by mediators appears to be related to permanent custody settlement outcome. Table 5-3 shows that cases in which mediators were aware of serious substance abuse by parents were generally less likely to settle permanent custody in mediation than were cases without this problem. Other problems sometimes known to mediators, such as mental health issues, prior terminations of parental rights, or violence between adults in the home, were not related to settlement in mediation.

Table 5-3
Relationship Between Parental Problems Known to Mediators and Permanent Custody Settlement in Mediation

Mediated permanent custody settlement	Mental health issues		Prior terminations		Serious substance abuse ✖		Domestic violence	
	No	Yes	No	Yes	No	Yes	No	Yes
Yes	60.5%	58.3%	59.3%	61.1%	68.8%	48.3%	56.7%	62.5%
No	39.5%	41.7%	40.7%	38.9%	31.3%	51.7%	43.3%	37.5%
	(38)	*(12)*	*(27)*	*(18)*	*(16)*	*(29)*	*(30)*	*(8)*

✖ Differences between "yes" and "no" are statistically significant at .1.

- **Physical abuse of child.**

Most of the cases were in the child protection and juvenile court systems due to child neglect. Physical and sexual abuse cases were far less common. As a result, it is difficult to reach firm conclusions about the relationship between permanent custody settlement and type of maltreatment. However, Table 5-4 suggests that physical abuse cases may be more likely to reach a settlement in mediation, compared to sexual abuse and neglect cases. Perhaps parents in physical abuse cases see the evidence of the maltreatment as more compelling and are less optimistic about either the chance that a trial will help avoid a termination of parental rights, or their own ability to parent.

Table 5-4
Relationship Between Type of Maltreatment and Settlement in Mediation

Any settlement in mediation	Physical abuse ✖		Sexual abuse		Neglect	
	No	Yes	No	Yes	No	Yes
Yes	55.6%	85.7%	60.0%	57.1%	70.6%	54.3%
No	44.4%	14.3%	40.0%	**42.9%**	**29.4%**	45.7%
	(45)	*(7)*	*(45)*	*(7)*	*(17)*	*(35)*

✖ Differences between "yes" and "no" statistically significant at .1.

- **Length of time the child has been in care.**

Parents with a child in care for more than the mediation sample average of nine months, were somewhat more likely to settle in mediation compared to parents of a child in care for less time. Although this relationship only approaches statistical significance, the pattern suggests that future research should continue to consider the association between the length of time the child had been in an out-of-home placement and the outcome of mediation.

Table 5-5
Relationship Between the Length of the Child's Out-of-Home Placement and Settlement in Mediation

Any settlement in mediation	Length of placement ✖	
	No more than 9 months	More than 9 months
Yes	47.1%	60.9%
No	52.9%	39.1%
	(17)	*(23)*

✖ Differences are statistically significant at .3.

- **The discussion of kinship care or continued visits in mediation.**

Finally, there may be a relationship between some of the issues dealt with in mediation and the permanent custody settlement outcome. Cases with discussions of legal guardianship were less likely to reach a settlement than were cases without such discussions. Cases with discussions of continued visits with the child were more likely to settle than were cases without discussions of visits.

Although the reasons for these possible associations cannot be known, it is possible that raising the option of legal guardianship instead of a termination of parental rights makes parents less willing to consider relinquishment if the agency proves unwilling to agree to a lesser disposition. Working out

arrangements for continued contact, on the other hand, may increase parental willingness to agree to a relinquishment.

Table 5-6
Relationship Between Issues Discussed and Settlement in Mediation

Permanent custody settlement in mediation	Discussion of kinship or relative care		Discussion of legal guardianship *		Discussion of continued visits with children **	
	Yes	No	Yes	No	Yes	No
Yes	73.3%	73.7%	41.7%	86.4%	83.3%	57.1%
No	26.7%	26.3%	58.3%	13.6%	16.7%	42.9%
	(15)	*(19)*	*(12)*	*(22)*	*(18)*	*(14)*

Differences between "yes" and "no" categories are statistically significant at: * .O 1 level or **. 1 level.

Special Issues in Relinquishment

A total of 24 of the 52 cases (46.2%) that participated in mediation reached an agreement to terminate parental rights and free the child for adoption. To the extent that this information was available, it appears that all of these cases 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.'

Of the 24 cases in which mediation resulted in an agreement for parents to terminate their parental rights, 18 had sufficient information about the agreement to code whether there are any special provisions related to future contact or information sharing. Of these 18 cases, most (83.3%) did include these types of clauses. Table 5-7 shows the specific nature of the

special conditions built into the mediated permanent custody agreements.

The most common item included in the agreement is something related to future visits between the biological parents and the child. Slightly more than half (55.6%) of the agreements include something about future visits. These are equally divided between cases in which the agency merely agrees to convey the parents' interest in continued visit to adoptive parents, and those with prospective parents in attendance and in agreement that visits should continue.

Other types of provisions, for exchanges of information or phone contact, for example, are less common.

Table 5-7
Special Provisions in Mediated Agreements to Terminate Parental Rights at

	Agreement indicates:		
	Parent requested and Agency agreed to convey request	Prospective adoptive parents attended mediation and agreed	**No** mention
Visits between child and biological parent(s)	27.8%	27.8%	44.4%
Phone calls between child and biological parent(s)	5.6%	11.1%	83.3%
Child will initiate future contact (by phone or in person) as he or she desires	0.0%	11.1%	88.9%
Periodic exchange of letters or photos or information	5.6%	16.7%	77.8%
Letter/contact with child when he or she reaches specific age (e.g., age 18)	5.6%	11.1%	83.3%
Any of the items above	38.9%	38.9%	22.2%

✖ Based on 18 of 24 cases reaching a permanent custody agreement in mediation.

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]

Table 5-8 shows the specific non-binding agreements included in the mediated permanent custody agreements by the type of permanent placement. The percentages are based on very small numbers of agreements, and the results should, therefore, be viewed with caution.

Phone or in-person contact between the child and biological parent is most common when the adoptive party is known to the biological parents. In addition, these cases are more likely to have agreements that indicate that the family providing permanent care of the child has accepted the idea of continued contact.

Those cases where the permanent caretaker and the biological parents do not know one another typically do not reference phone or in-person contact, or merely note that the case worker will raise these issues with the child's adoptive parents. For example, when biological and adoptive/permanent caretakers know one another, 70 percent of the permanent custody agreements indicate that the permanent care provider is willing to grant the parent some type of continued contact. When the adoptive parents are not yet selected or are unknown to the biological parents, the agency agrees to raise the issue of contact in about half of all the settlements.

Some of the clauses included in mediated terminations of parental rights do not require the agreement of parties who will provide permanent care. These are items to which the child protection agency can agree or disagree unilaterally; that is, they are party commitment terms. These items cover things such as allowing the parent to prepare a letter or scrapbook to accompany the child to the adoptive home. These types of

agreements are equally likely to occur in cases where the family providing the child's permanent place knows the biological parents and in cases where they are unknown to one another. Similarly, periodic exchanges of information are equally likely to be included in permanent custody agreements that call for placement with parties known or unknown to the biological parents. ■

Table 5-8
Nature of Non-binding Agreements by Type of Permanent Placement

	Permanent placement:		
Agreement mentions:	Parties unknown to parents (n=8)	Parties known to parents (n= 11)	Total (n=19)
Continued visits with child"			
Agency agrees to convey request	42.9%	10.0%	23.5%
Permanent caretaker agrees	0.0%	70.0%	41.2%
No reference to this	57.1%	20.0%	35.3%
Phone contact with child"			
Agency agrees to convey request	14.3%	0.0%	6.7%
Permanent caretaker agrees	0.0%	37.5%	20.0%
No reference to this	85.7%	62.5%	73.3%
Child initiated phone contact ✖			
Agency agrees to convey request	0.0%	0.0%	0.0%
Permanent caretaker agrees	0.0%	33.3%	18.8%
No reference to this	100.0%	66.7%	81.3%
Periodic exchange of photos/info			
Agency agrees to convey request	12.5%	0.0%	5.6%
Permanent caretaker agrees	12.5%	20.0%	16.7%
No reference to this	75.0%	80.0%	77.8%
Letter/contact when child is 18			
Agency agrees to convey request	0.0%	11.1%	6.3%
Permanent caretaker agrees	14.3%	11.1%	12.5%
No reference to this	85.7%	77.8%	81.3%
Preparation of Letter/Scrapbook			
Agency agrees to convey request	0.0%	0.0%	0.0%
Permanent caretaker agrees	14.3%	12.5%	13.3%
No reference to this	85.7%	87.5%	86.7%

✖ Differences are statistically significant at . 1 or less.

Chapter 5: End Notes

1. 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 200 1. 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.

2. Adoption 2002: The President's Initiative On Adoption and Foster Care. U.S. Department of Health and Human Services, June 1999, p. 5.

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.

Chapter 6 Mediation vs Litigation: Comparing Outcomes

This chapter compares mediated and non-mediated cases as to:

- Whether permanent custody is resolved without trial;
- The amount of time elapsing between the permanent custody filing and the resolution of the case;
- The percentage of cases resulting in a termination of parental rights; and
- The type of permanent custody arrangement awarded.

Avoiding Trial

Court records were reviewed to determine whether the parents and Agency agreed to a settlement prior to trial.' Table 6- 1 shows that control group cases and the cases that failed to appear for mediation generally had to be resolved through trial. If mediated agreements are combined with non-mediated, out-of-court settlement, 70 percent of the mediation group avoids a permanent custody trial.

Table 6-1
Trial Avoidance by Group

Permanent custody:	Mediated	Failed to appear for mediation	Control cases
Resolved in mediation	59.6%	0.0%	**0.0%**
Resolved through out-of-court settlement	10.4%	10.5%	28.8%
Resolved through trial	30.0%	89.5%	71.2%
	(40)	*(19)*	*(52)*

Differences are significant at .OO.

Indeed, Table 6-2 shows that even when the entire mediation group (those that mediated and those that failed to appear) is compared to the control group, there is a significantly higher out-of-court settlement rate for mediation cases.

Table 6-2
Trial Avoidance by Mediation vs Control Group

Permanent custody:	Mediation (attended and failed to appear)	Control cases
Resolved without trial	50.8%	28.8%
Resolved through trial	49.2%	71.2%
	(59)	*(52)*

Differences are significant at .01

Some permanent custody cases can be resolved very quickly in trial because neither parent is on-scene or involved in the case. Other cases will require several days of trial time. No information is available in the court files to indicate the amount of court time spent on a specific case. 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 actively 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

Table 5-3 looks at the amount of time elapsing from the permanent custody filing to case resolution. Case resolution is defined as either an agreement on permanent custody being entered with the court or a court ruling on permanent custody. The table compares the control group to cases reached a permanent custody settlement in mediation.

The results show that cases that reach an agreement in mediation average 2.2 months between filing and entry of the agreement with the court. Control group cases take significantly longer to reach a resolution. On average 4.6

months elapses between the permanent custody filing and entry of orders in the control group.

Table 6-3
Time Elapsed From Permanent Custody Filing to Case Resolution Mediated Agreement vs Control Group

	Mediated agreement	Control
Average months from permanent custody filing to entry of agreement or court decision	2.2	4.6
	(21)	*(32)*

Differences are significant at .00.

Table 6-4 shows that mediation does not slow down case resolution even when families do not produce an agreement in mediation, or cases in which parents fail to appear for mediation. This is important because mediation providers sometimes worry that cases that do not settle in mediation will move more slowly than they would in the absence of mediation.

Table 6-4
Time Elapsed From Permanent Custody Filing to Case Resolution Cases Failing to Appear for Mediation or Failing to Reach a Settlement in Mediation vs Control Group

	Mediation cases that fail to appear or do not reach agreement	Control
Average months from permanent custody filing to entry of agreement or court decision	3.7	4.6
	(29)	*(32)*

Differences are significant at .1.

Permanent Custody Outcomes

Table 6-5 looks at permanent custody outcomes for control group cases, cases that reach an agreement in mediation, cases

that do not reach an agreement in mediation, and cases failing to participate in mediation. The possible outcomes include a termination of parental rights, a permanent custody arrangement without the termination of parental rights, or an agreement to extend the temporary custody arrangement in the hopes that the family can be reunified.

The results show no differences across the groups with respect to the percentage resulting in a termination of parental rights. In all cases, over 80 percent of the families experienced a termination of parental rights. Only 16 cases out of the 101 cases shown in Table 6-5 resulted in an outcome other than a termination of parental rights. Given these small numbers, the slightly higher percentage of cases with continued temporary custody in the control group is not significant.

Table 6-5
Outcomes by Group

	Mediation group			Control group
Percent of cases resulting in:	Settled in mediation	Did not settle in mediation	Failed to appear for mediation	
Termination of parental rights	83.3%	85.7%	94.1%	80.9%
Legal custody to third party, no termination of parental rights	3.3%	14.3%	5.9%	—
Continued temporary custody	13.3%	—	—	19.1%
	(30)	*(7)*	*(16)*	*(47)*

Differences are significant at . 1.

Type of Permanent Custody

For cases with permanent custody, Table 6-6 shows the type of permanent custody arrangement in place.

The control group and the mediation group — those who settle in mediation, those who do not settle in mediation, and those who fail to appear for mediation — are quite similar with respect to the type of permanent custody in place. In each group the most common outcome is the termination of parental rights and adoption by non-relatives. This permanent custody arrangement accounts for between 70 and 80 percent of all the cases.

Table 6-6
Nature of the Permanent Custody Agreement by Group

	Mediation group			Control group
Permanent custody to:	Settled in mediation	Did not settle in mediation	Failed to appear for mediation	
Non-relatives planning to adopt	73.9%	83.3%	80.0%	70.3%
Relatives planning to adopt	2 1.7%		13.2%	13.5%
Legal custody to relatives or other parties	4.3%	16.7%	6.7%	16.2%
	(23)	*(6)*	*(15)*	*(37)*

Differences across groups are not significant.

Chapter 6: End Notes

1. Final resolution was still pending for one control group case. This case was eliminated from the analysis.

Chapter 7 User Reactions

Initial Reactions

In Lucas County, the decision to use mediation in permanent custody cases was less controversial than it might otherwise have been because the professional community had already accepted the use of mediation in temporary custody cases. Judges, magistrates, attorneys, and case workers interviewed for this evaluation repeatedly noted that they approached the idea of permanent custody mediation with an open mind because of their prior, positive experiences with mediation in temporary custody cases.

However, for most professionals, there were two primary sources of concern around expanding mediation to include permanent custody cases. First, many professionals were skeptical about the likelihood that settlements could be produced in a permanent custody mediation, because all the parties were seen as too entrenched in their positions. The second major source of concern had to do with the wisdom of allowing discussions of future contact or information sharing into the mediation.

Many of the professionals interviewed for this evaluation said they were initially skeptical about permanent custody mediation because they did not believe that many parents would voluntarily agree to end their parental rights, and they did not see the Agency as able, or willing, to agree to something other than permanent custody. One judge noted, "I'll be honest — I wasn't opposed, I like mediation — but I had some doubts. I thought parents would be too bitter to accomplish anything by that point." A magistrate admits thinking the idea was "insanity — I thought no one would ever agree to anything."

A Lucas County Attorney, generally supportive of mediation, felt that it was not a good tool for use in permanent custody cases. His experience with such cases suggested that parents were either absentee and would not bother to come to mediation, or they were "determined to fight to the death" and would never discuss a relinquishment. Neither extreme seemed to be a **good** prospect for mediation. In the past, he noted, permanent

custody cases were not even set for settlement conferences, the way other dependency cases were, because they were viewed as such poor settlement prospects.

If parents were seen as determined to fight, the Agency was seen as equally committed to the outcome of permanent custody. For example, an attorney for the Lucas County Department of Children's Services noted:

> There have always been a fair number of PC cases that settle with the parent agreeing to permanent custody. Mediation seemed like a way to do it without waiting till the last moment. But I did wonder what we would have to offer. We aren't going to back off on PC.

Another County attorney agreed:

> I thought there would not be much room for negotiation, and I felt that even though I'm a supporter of mediation.

In addition to skepticism about the likelihood that parents would voluntarily agree to end their parental rights, there was also widespread concern about allowing discussions of ongoing contact or the exchange of information.

In large measure, the defense bar was concerned that parents would place too much faith in the unenforceable promise of continued contact with, or sharing information about, their children. One prosecutor summarized the initial position of the defense bar as

> You're selling Snake Oil! That was the initial position of the defense bar when they heard about mediation.

The defense bar was not alone in its concerns about unenforceable agreements. Judges and magistrates were also worried that parents might agree to give up their parental rights based on the hope, but no guarantee, of future contact.

Current Impressions of the Program

Over the course of the Project, all the professional groups have had an opportunity to reevaluate their initial reactions in light of their actual experiences. Most of the professionals who say they were initially skeptical that permanent custody could be resolved in mediation have decided that many cases benefit from the process and settlements are possible.

The following sampling of comments highlights what the professionals appreciate most about mediation:

> It gives parents some sense of helping to plan for their child's future.
>
> Mediation is a healthy thing. CASAs are learning from it and it's letting them be creative.
>
> It can be a supportive environment where a parent can release the children without being a bad parent. They can say 'I'm doing what's best for my kids'.
>
> It takes a pretty mature client to do it (agree to permanent custody). But it's a fantastic forum if they can do it. They can acknowledge that they love their kids. Other people can acknowledge it too. Sometimes the only reason they were fighting was to be able to make this point.
>
> I had a case that settled in mediation and saved the children from having to testify in court.
>
> I think in temporary custody cases the parents are in denial. By the time of the permanent custody filing they can see where it's going. Some parents don't want to fight. They want to be heard. That was something of a surprise for me.
>
> Everyone likes that it (mediation) is more humane. It avoids going to court to exhibit all the terrible things the parent has done. That damage will live on past the court hearing.

All of the professionals interviewed in this evaluation thought that the Court should continue to offer permanent custody mediation, and all would recommend the approach to other jurisdictions.

The professionals have also had time to consider some of the finer points of permanent custody mediation, such as the types of cases that are well-suited, or poorly-suited, for mediation; the qualities that make for good mediators; the impact of the process on workload; and the range of issues that are, or should be, open for negotiation. In the discussion that follows, their thoughts, and sometimes lingering concerns, surrounding these issues are considered.

Appropriate Cases

Even cases that appear to be especially conflict-ridden and problematic frequently reach an agreement in mediation. Indeed, the first case sent to mediation, involving a transsexual parent, was viewed as a poor candidate by many professionals. The settlement of this case in mediation helped to persuade some skeptics. As a result, the professionals are inclined to be inclusive, rather than exclusive, in deciding which cases to mediate.

However, there is a general consensus among professionals that permanent custody mediation programs should do some basic screening to eliminate cases that are unlikely to proceed. Many different professionals mentioned that cases should not be set for mediation if neither parent is on the scene or involved. Many of those interviewed suggested checking with the parents' attorneys to determine whether either parent is likely to attend a scheduled mediation. Others suggest screening out cases in which both parents have repeatedly failed to appear for previous court dates.

One County Attorney notes that setting a case for mediation which is likely to result in a parent's failure to appear is a waste of everyone's time, including the mediator's . In addition, cases where parents have a history of failing to appear for hearings, failing to comply with orders, and disappearing for long stretches of time require little trial preparation or court time.

Mediation can be useful if one parent is on the scene and the other is 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. Ideally, some attorneys would like to have the mediation agreement entered and a quick hearing held at the same time to demonstrate the need to terminate on the absent parent. This would provide complete closure on the case and obviate the need for all the professionals to return to court at a later date.

There is also a general consensus that mediation should not be used if the parent's attorney does not believe the parent is fully capable of participating. This would mean eliminating cases where parent is too low-functioning to participate effectively, or where the parent's severe mental health problems, either untreated or unresponsive to treatment, is believed to create a barrier to participation. Many professionals also feel that cases with extreme domestic violence may not be well-suited to mediation if both parents are involved with the child and plan to attend.

There is less consensus about whether or not to send cases where the parents — or sometimes their attorneys — are perceived as unwilling to entertain the idea of permanent custody. Some defense and prosecuting attorneys volunteer that it can be frustrating to spend hours in mediation with parents who are determined to "fight to the death." One defense attorney contends that when parents are not receptive to discussing permanent custody, mediation is little more than repeated efforts to push the parent into a permanent custody agreement. But most also acknowledge that they have had the experience of having an "impossible" case settle in mediation.

All the professionals agree that the best cases for mediation are those that fall between the extremes of absentee parents and parents who are unwilling to hear about relinquishment. The mediation experience has convinced the professionals that these cases do exist, and the Agency, defense attorneys, guardians *ad litem*, and other professionals are all in a position to refer suitable cases to mediation. One County Attorney notes:

> Defense attorneys have clients who know they can't raise their kids — or at least not this child and not *now*. They know they need to terminate and in court that will happen along with public humiliation.

Mediator Selection

Many of the decisions about what cases to send to mediation are less critical with the right mediator in charge of the session. Attorneys and case workers are frustrated if the mediator fails to recognize when parents are unwilling to seriously consider permanent custody. But they are equally frustrated if the mediator is slow to recognize when a parent is ready to settle. The best mediators are those who seem to intuitively recognize which cases need to go to court, which should move quickly to settlement, and when to slow down and spend extra time on a case.

This is the type of skill that separates the best mediators from those who are merely acceptable. Given the uniform training among the Lucas County mediators, these skills appear to be idiosyncratic rather than the result of the mediator training or other professional training. One attorney notes:

> This kind of program needs very good mediators, It can't entirely be taught, it's a personality. They need to be nurturing, but task oriented.

However, the professional participants in the permanent custody mediation process are nearly unanimous in their support of using mediators who have experience as defense attorneys or guardians *ad litem.* They feel legal knowledge is critical in this type of mediation.

Workload Implications

Permanent custody mediation was introduced primarily as a way to help avoid unnecessary delays in getting children into permanent homes. There was also the hope from the outset

that mediation would be a less painful and less destructive approach to permanent custody.

Although not the focus, the cost of permanent custody mediation could not be ignored. One magistrate notes:

> A lot of time and money go into mediation. A lot of people are asked to attend. So you have to worry about whether it's cost-effective.

The overall consensus from the defense bar and Children's Services attorneys seems to be that mediation of permanent custody does make sense on an economic basis. For example, one defense attorney reported, "It's eased my workload," and another offered that:

> Mediation is very economical. It does resolve cases that would go to trial.

One County Attorney notes:

> Some cases, mediation saves you time, some are slower, some make no difference. They do save you appeal time. Appeals are common enough that I'm almost always doing a brief for one or waiting for one to be decided.

Another Children's Services attorney notes that if the parents are involved in the case, mediation is nearly always faster.

> I had one case that took 2 or 3 mediation sessions. But there were 11 siblings. It would have taken days of trial time. If the parents are involved, the trial will be long.

Another County Attorney says:

> In temporary custody cases I always say that mediation makes no difference in my time. But, in permanent custody cases, mediation saves time. If the parent isn't at all involved it won't take any trial time, but it probably won't mediate either. If they show up for mediation, it would take 2-3 days of trial time.

However, the opinion is not unanimous. One county attorney says:

> I probably spend more time overall on cases with mediation. Given what mediation is, you sometimes get caught up in everyone telling stories. It saves the court time, but it takes more of my time.

Judges see the permanent custody cases that are not resolved in mediation. From the judicial point of view, permanent custody mediation is a good investment. One judge says:

> Mediation saves us time. I can tell that. I've had trials set and vacated because they settled in mediation. It happens with enough advance notice that I can then squeeze something else in to be heard.

Issues Dealt With in Mediation

The issues that can or cannot be discussed remains the area of greatest controversy in permanent custody mediation. Specifically, there continue to be lingering concerns over the Agency's willingness to discuss outcomes other than permanent custody, and the wisdom of allowing discussions of future contact with the child or information sharing about the child.

The decision to seek permanent custody is not made by a single case worker or County Attorney. During a case staffing, a variety of individuals determine whether the case warrants a permanent custody filing. As a result, the individual attorney and case worker who attend mediation are not free to unilaterally change the case plan to something other than permanent custody. All the professionals agree that in many, perhaps even most, instances this does not create a problem. By the time of a permanent custody filing, the alternatives have generally been considered and rejected.

Not surprisingly, defense attorneys are most likely to be critical of the fact that permanent custody is generally the only option on the table. One defense attorney says:

> The Agency has to be able to agree to something besides PC. I thought that would happen in time, but it hasn't.

Some mediators agree that there are instances in which mediation would benefit from a wider discussion of acceptable outcomes, and they perceive the Children's Services attorneys to be frustrated on occasion as well. One mediator notes:

> The Agency is still pretty inflexible. They won't move off of PC. Technically it's not mediation if only one outcome is possible. It's happened that we do something other than PC, but it's rare.

When the participants agree that another option should be considered, the Children's Services Attorney may consult with his or her supervisor or take the case back for another Agency staffing. One defense attorney notes:

> The Children's Services attorney doesn't have a lot of leeway to negotiate. At times the worker and attorney will go out and check with the Agency. Sometimes they just say 'no' we can't change it. But I think the Agency may be getting better about this. I think there's a greater awareness in staffings that there may need to be the need to at least consider some other options.

Ultimately, if the parties do not agree that permanent custody is needed, the case will not settle in mediation. For example, one mediator recalled a mediation that stopped when the foster parent expressed the view that the parent deserved another chance to reunify with the children.

The professionals also vary in the degree to which they are comfortable with discussions of possible future contact between the biological parents and child or the sharing of information with biological parents following the termination of their parental rights.

All of the professionals agree that parents are repeatedly warned that the court will not enforce these "side agreements." However, some defense attorneys remain critical. One, who

insists that future contact should not be dealt with in mediation, says:

> As a defense attorney I think it's a lousy carrot to dangle in front of a desperate parent — the possibility of future contact that is totally unenforceable.

All the professionals interviewed in this evaluation agree that some cases are better suited to discussions of continued contact than are others. Comfort levels increase when (1) the child is old enough to remember the parents, regardless of whether there is continuing contact; (2) the child expresses an interest in continued contact; (3)the adoptive and biological parents know each other and understand what continued contact will be like; and (4) the adoptive parents are at the mediation session to indicate what types of contact would be unacceptable or acceptable. Fortunately, most professionals also see these as the types of cases that are most likely to involve provisions for future contact. For example, one defense attorney says:

> If the child is old enough, the child will find the parent no matter what the agreement says or doesn't say about contact.

A Children's Services attorney notes:

> Basically, we're agreeing to let the people who will have the child discuss what they are or are not comfortable with. It's their choice.

And a CASA representative says:

> Our volunteers realize that as bad as these parents are, sometimes the children's needs to have this parent in their lives is real. Sometimes it's what is best for the child.

By contrast, all professionals agree that discussions of continued contact do not feel as satisfactory if the adoptive home has not yet been identified. In such cases, the best the Agency can offer is to "look for home" where adoptive parents

would consider such contact. One County attorney explains the situation:

> Sometimes I think the open adoption agreements work well. Especially if the future adoptive parents are in the mediation. If the Agency hasn't identified an adoptive home, it's problematic. Will the worker look for this type of home? Will it be found? It's hard enough to find a good home, let alone one that will agree to all the special conditions.

Another County Attorney says:

> A lot depends on trust and good faith. The Agency has to do what it says and we have to be clear about what we can and cannot do. We can recommend continued contact to adoptive parents, but we won't require this. But, if it's in the best interests of the child to have contact continue, we would look for *good* adoptive parents and *good* adoptive parents would want what is best for the child.

Most professionals believe that the type of continued contact requested by the biological parents is fairly modest.

> The parent will say 'Can I see them on their birthday for a couple of hours?'
>
> Actual requests for visits are rare. Usually it's a request for contact via reports, maybe a card to be forwarded to the child around a birthday or a photo exchange once a year.

However, when the adoptive parents are relatives, the contact may be more frequent. One defense attorney says:

> I've seen everything from requests for weekly visits to a request that a letter be forwarded to the child at age 18.

One continuing source of frustration for many of the professionals interviewed for this evaluation, including the

mediators, was the lack of information about what happens to the ancillary agreements. Many attorneys and mediators expressed an interest in finding out whether efforts were made to find the type of adoptive home that the Agency agreed to look for in mediation, and in knowing whether the adoptive parents were still allowing visits by biological parents a year after the adoption.

Case Specific Evaluations

Exit surveys were distributed to family and professionals in each of this evaluation's 52 permanent custody cases that resulted in mediation. These surveys provide another measure of user satisfaction, this time related to a specific case rather than a global assessment.

Across the 52 mediation cases, surveys were completed by:

- 53 parents (from 37 different cases);
- 2 1 extended family members or friends;
- 36 social workers;
- 13 foster parents;
- 12 Court Appointed Special Advocates;
- 48 attorneys representing a parent;
- 18 attorneys representing a child;
- 35 attorneys representing Lucas County Department of Children's Services;
- 14 attorneys listing themselves as "others", and
- 2 parties describing themselves as "others".

Table 7-l shows the reactions of parents and other family or friends. Overall, most of those responding said they had a chance to talk about the issues of importance to them and felt treated with respect by all the parties present in the mediation session.

Few parents or family members perceived the mediator to be siding with one party. However, compared to family and friends, parents were somewhat less likely to feel that the other participants listened to what they said.

Overall, about 68 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, 87 percent of the parents who reached an agreement in mediation and 40 percent of those who did not said mediation was preferable to court.

Table 7-1
Reactions to Mediation by Family Members

Percent agreeing with the statement:	Parents	Family or Friends
I got a chance to talk about what I wanted to talk about	80.7%	81.0%
The other parties really listened to what I said	62.2%	94.7%
I was treated with respect by everyone	84.6%	100.0%
The mediator took one side	5.9%	0.0%
Mediation was better than going to court	68.0%	61.9%
	(53)	*(52)*

Table 7-2 presents the results of the surveys completed by the professionals — attorneys for all the parties and case workers — as well as the foster parents and volunteer CASAs. The results indicate high overall satisfaction with mediation.

Between 70 to 100 percent rated mediation as preferable to court. Between 85 to 100 percent said there was sufficient time in mediation to talk about the issues they felt were important, and similar percentages said that the other participants listened to what they had to say.

Table 7-2
Reactions to Mediation by Non-family Participants

Percent agreeing with the statement:	Parent's attorney	County attorney	Case-worker	GAL or child's attorney	Foster parent, CASA, other
I got a chance to talk about what I wanted to talk about or My client got enough time	93.7%	94.3%	91.7%	100.0%	92.0%
The other parties really listened	91.7%	85.7%	85.7%	100.0%	91.7%
It was better than going to court	86.2%	80.9%	71.4%	100.0%	70.4%
	(48)	*(35)*	*(36)*	*(18)*	*(27)*

Attorneys were also asked to assess whether the use of mediation saved them any time in the particular case under review. The results in Table 7-3 show that across all types of attorneys, at least half and sometimes over 70 percent, believed there was a time savings from mediation. About 8 to 15 percent felt that mediation increased the amount of time they spent on this particular case. ■

Table 7-3
Perceived Impact Of Mediation On Time Spent on The Case

Effect of mediation on the amount of time spent on the case	Parent's attorney	County attorney	GAL or child's attorney
Significantly reduced the time	53.2%	33.3%	61.1%
Reduced the amount of time a little	14.9%	21.2%	16.7%
Made no difference	23.4%	30.3%	11.1%
Increased the amount of time	8.5%	15.2%	11.1%
	(47)	*(35)*	*(18)*

Chapter 8 Summary and Conclusions

This evaluation is based on 79 cases scheduled for mediation between March 1999 and April 2001, and 53 comparable cases not assigned to the mediation group. Given the relatively small sample sizes, it would be premature to view this as a definitive study of permanent custody mediation. However, the evaluation does offer insights into the types of cases that use permanent custody mediation, the settlement rate, the nature of the intervention, the types of outcomes that are generated, and the reactions of the users.

Summary of Key Findings

The Intervention

- In approximately one-third of the cases assigned to mediation, the parent fails to appear for the session.

Failure to appear for mediation is most common among parents with known substance abuse problems, parents in the system due to a drug-exposed infant, and parents who have been the subject of prior terminations of parental rights.

- Cases averaged a total of 1.6 hours in mediation.

The average length of the mediation session decreased over time, presumably as mediators became more skilled with permanent custody issues.

- The 52 cases with a permanent custody mediation almost always involved a mother, her attorney, an attorney for the child protective services agency, a caseworker, 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.

- Slightly more than half of the cases included a discussion of continued contact between the biological parent(s) and child.

Discussions of continued visitation were far more common in cases where the children were in relative care, a foster-adopt home, or the home of someone else known to the parents and interested in adoption.

Settlement

- Most cases were able to reach an agreement in mediation.

Approximately 60 percent of the families participating in permanent custody mediation were able to reach a settlement through the process. In more than 46 percent of all cases, the parent(s) agreed to a voluntary relinquishment of their parental rights. In approximately 12 percent, the permanent custody agreement was for legal custody of the children without a termination of parental rights. In seven cases, the child welfare agency agreed to withdraw or hold the motion for permanent custody.

- Mediation produces a considerable savings in trial time.

Parents who attend mediation are on the scene and involved in the case. These are exactly the types of cases that normally are set for lengthy trials. As a result, in the absence of Program, it is probable that each of the cases resolved in mediation would have required several days of trial time.

- Mediation speeds case processing.

Cases that reach an agreement in mediation average 2.2 months between filing and entry of the agreement with the court. Control group cases take significantly longer, on average 4.6 months.

- There are no differences between the mediation and control group with respect to the percentage resulting in a termination of parental rights.

Over 80 percent of the families in both groups experienced a termination of parental rights.

In addition, all of the groups — those who settle in mediation, those who do not settle in mediation, those who fail to appear to mediation, and those in the control group — are quite similar with respect to the type of permanent custody in place.

- Slightly more than half (55.6%) of the agreements include some reference to future parent-child contact.

Cases referencing future contact are equally divided between cases in which the agency merely agrees to convey the parents' interest in continued visits to adoptive parents, and those with prospective parents in attendance at mediation and in agreement that visits should continue.

Agreements that allow for continued contact, whether by phone or in person, are most common when the biological parents know the adoptive party.

User Reactions

- The professionals interviewed for this evaluation thought that the Court should continue to offer permanent custody mediation, and all would recommend the approach to other jurisdictions.

As with any new program, there were many professionals who initially resisted the idea of permanent custody mediation. Three years later, the professionals interviewed for this evaluation felt that both parents and the court benefit from permanent custody mediation. An exit survey of professionals following mediation found that between 70 and 100 percent rated mediation as preferable to court.

- In most cases, alternatives to permanent custody are not being considered, but this has not been a serious problem for the mediation program.

The professionals agree that in many, perhaps most, cases, the fact that the caseworker and Agency attorney are not free to move to an option other than permanent custody does not

create a problem. By the time of a permanent custody filing, the alternatives have generally been considered and rejected. Although there are instances in which greater flexibility on the part of the Agency would be appreciated, participants feel the process is useful even when options other than permanent custody are not part of the discussion.

- The professionals participating in mediation have discovered that the issue of continued parent-child contact can be effectively dealt with in many mediation cases.

In general, the professionals are most comfortable with an agreement calling for some type of ongoing contact if (1) the child is old enough to remember the parents; (2) the child expresses an interest in continued contact; (3) the adoptive and biological parents know each other and understand what continued contact will be like; and (4) the adoptive parents are at the mediation session. Fortunately, most professionals also see these as the types of cases that are most likely to involve provisions for future contact.

- All of the professionals agree that parents are repeatedly warned that the court will not enforce "side agreements."

All of the professionals agree that mediators, attorneys for Children's Services, parents' attorneys, caseworkers, and magistrates talk with parents to be sure that the parent understand the agreement, and understands the difference between the binding, enforceable parts of the agreement and those that are based solely on trust. Although acknowledging that parents are well informed, some participants continue to worry about how well the side agreements hold up.

- Parents prefer permanent custody mediation to trial.

Many of the parents participating in mediation have experienced prior terminations of parental rights on a child. Overall, exit surveys show that 68 percent of the parents felt mediation was better than court.

- The professionals participating in mediation generally perceive it to reduce their workloads.

The overall consensus from the defense bar and Children's Services attorneys seems to be that mediation of permanent custody does make sense on an economic basis. Exit surveys confirm this. Over 70 percent of the attorneys believed they experienced a time savings from mediation.

Conclusions

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

- 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.

- Programs need to plan ahead about how to handle case where parents failure to appear.

This planning may involve initial screening to ensure that cases are not set for mediation if the parents have a history of failing to appear for court hearings, or checking with the parent's attorney shortly before the scheduled mediation date to ensure that the parent is still located and involved in the case.

- 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 minimizes 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 interesting in learning about both the official and unofficial outcomes. Research needs to consider whether there 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 parent of adoptive parents, the child, and biological parents. ■