

## DISPELLING THE MYTH OF MEDIATION AND CUSTODY DISPUTES

Although there has clearly been an upswing in domestic mediations in central Indiana during the past two to three years, it is also equally clear that many myths still exist in the legal community regarding domestic mediation. This article will attempt to address one of the most common myths, namely the myth that custody disputes cannot be successfully mediated.

It is a commonly held belief by attorneys that since the child of a divorcing couple cannot be divided in two (remember Solomon once proposed this solution but it tends to be very messy and is probably illegal) if both parties purport to want the child to live with them then successful mediation is an oxymoron. Nothing could be further from the truth. In fact, my experience tells me that domestic disputes involving custody questions are more likely, rather than less likely, to resolve successfully.

Mediation is especially effective in resolving custody disputes for number of reasons. First of all, it is a fallacy to assume that both parties truly have as their primary goal the desire for their child to live exclusively with them to the exclusion of their soon-to-be former spouse. Once the purely emotional baggage is stripped away from the custody issue (typically this is the most difficult aspect of the mediation) it typically becomes clear that one or both of the parties are not really interested in holding on to “custody” of the child at “all costs.” Rather than maintaining sole custody, the parties typically have one or more concerns that need to be directly addressed and protected in some way, shape or form. Such concerns as frequent and meaningful access to the child, a safe environment for the child, a say so in the upbringing of the child, knowledge that the parent will not be replaced by a substitute mom or dad (i.e. the step-mom/dad or girlfriend/boyfriend) are really what need to be addressed rather than “custody” per se. During the mediation it is often more a matter of education of the parties rather than persuasion. Prior to mediation, the parties often believe “custody” is an all or nothing proposition. They believe that either they will gain total control of their child or else they will be relegated to the role of an infrequent visitor with their child. The challenge of the mediator is to educate both of the parties to the range of possibilities available to them in order to both address their concerns **and** to resolve their custody dispute. Typically a skilled mediator can successfully navigate the rough and treacherous waters which surround this issue.

Another hurdle which often must be overcome in a custody dispute is the social stigma associated with “giving up the child.” This social “taboo” is especially strong in mothers. They typically believe that if they allow the child to live with their father somehow they will be viewed by society as abandoning their child. Mediation is especially effective in resolving custody disputes in this circumstance because it provides an ideal opportunity to counter the party’s belief that they will face a social stigma by providing positive verbal reinforcement to them during the mediation process and by providing concrete written safeguards in the mediated agreement. The good mediator never underestimates the power of the written word. Merely setting forth, in written form

by way of the mediated agreement, the protections to the parent's status as father or mother goes a long way toward resolving the dispute. The parties are relieved to see for themselves (and as an added benefit they can show the document to their friends and family) that the law will not allow them to be replaced by some stranger. They will always be "Mom" or "Dad" with certain rights and obligations.

Finally, it is important to remember in a custody dispute that (believe it or not) the majority of the time, the parents truly do want to "do the right thing" for their child. The problem could be easily resolved if the parties could just agree on what "the right thing" is. Of course, that is the nub of the problem but once again mediation is ideal for addressing this problem. Since the mediator is neutral, he (or she) can use their neutrality to offer several suggestions to help determine "the right thing/best interest of the child." The mediator can propose the name of one or more neutral custody evaluators. If the parties accept the suggestion, the mediator can coordinate the hiring of the evaluator in order to ensure that the evaluator is not swayed one way or the other by the hiring party. If, however, an evaluation has already been completed, the mediator might, in some instances, contact the evaluator during the mediation process to clarify the meaning of the evaluator's report. This can allow the parties to truly understand the evaluator's position regarding the child's best interests and custody so that there is no surprise in store for either party at the time of the contested final hearing. In a few instances, it might be possible (depending on the age of the child) to involve the child in the mediation process. I have used this approach on a few occasions but it is a technique, in my opinion, that should be used sparingly, and cautiously, given the overarching concern that the child might feel as if they are being asked to choose between their parents. Although the mediator should cautiously guard against imposing his/her belief concerning the "best interest" of the child on the parties in any particular situation, the mediator must always keep focused (and help the parties to focus) on the "best interest of the child" throughout the mediation.

Over the past nine years that I have been a mediator, of the hundreds of domestic cases that I have handled between 80 to 85% of them have been successfully resolved. Of those domestic disputes that I have handled involving custody of one or more children **more** than 85% of the time mediation has been successful. I believe that my experience as a mediator is not unique. Hopefully, as more and more attorneys see the fruit that mediation bears for their clients in resolving custody disputes (both divorce and post-divorce in nature), the myth that mediation cannot resolve custody disputes will quickly, and finally, fade into oblivion and domestic mediation will take its place in Indiana alongside civil mediation as an essential instrument in the attorney's tool chest for serving their clients' needs.