

**CHAPTER 14**  
**NEGOTIATION AND MEDIATION**



**CHAPTER 14****NEGOTIATION AND MEDIATION****14.1. NON-ADVERSARIAL SETTLEMENT PREFERRED**

Professionals who work with children and parents have become increasingly dissatisfied with the customary reliance on the traditional adversarial system in resolving family-related disputes, including cases involving children's protection, placement, and permanent care. The power struggle in contested child welfare-related cases and hearings may foster hostility among the parties and dissipate money, energy and attention that could otherwise be used to solve problems cooperatively. Parties may become polarized, open communication may be discouraged, and there may be little investment in information sharing and joint problem solving. Children may suffer when adversarial tensions escalate and ameliorative services are delayed.<sup>1</sup>

The interests of the child and the family are often served by a voluntary resolution of the legal dispute, thus avoiding contested trial. A contested proceeding will not only delay implementation of a case plan but will take considerably more time and put substantial additional stresses on the child and family. All parties to a child protection proceeding should work persistently to find terms of settlement that all will find acceptable.

Historically most child abuse and neglect cases are resolved through informal settlement negotiations anyway. Unfortunately, these settlements are often quickly made in courthouse hallways where the interests of all parties may not be carefully or fully considered. Hastily made agreements or stipulations made immediately prior to a hearing can do a disservice to both children and their families.

**14.2. WIN-LOSE OR PROBLEM-SOLVING APPROACH**

There are many ways to approach negotiation. Much negotiation that we engage in is adversarial and competitive. It is a zero-sum game: -- if you win, I lose; therefore I want to win more than I want to lose. The implications of that win/lose mentality are to keep your cards close to your chest. You have a strategy of negotiation and you know what your resistant points are going to be. There are timing ploys, if you are going to give something, you want the other side to give something, and you identify leverage points. The win/lose mentality, which characterizes most of what lawyers do, is a power struggle.

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<sup>1</sup>. *Guidelines for Public Policy and State Legislation Governing Permanence for Children*, President's Initiative on Adoption and Foster Care, HHS 1999, p V-1. The *Guidelines* recommend that states develop and implement nonadversarial dispute resolution mechanisms in child protection cases.

To get to a problem-solving situation, one has to recognize that the shortcoming of the win/lose approach is that it is not cooperative and it tends to restrict rather than to expand choices. A problem-solving approach requires a supportive, nondefensive climate -- one of acceptance and trust. We need the expectation that in child protection proceedings there is going to be a different way to approach problems. Approaching a case in a problem-solving way requires engaging in some joint fact-finding. Sometimes the social workers misjudge the case and do not have the facts right. It is not uncommon that the parents have not given exactly the straight story. The caseworker, the lawyers, and others involved in the case must talk together. Between the story of the social worker and parents, get the facts straight.

Then the principals -- the caseworker, agency attorney, parents and their attorney, and the child's representative -- talk together to set forth as many solutions or alternatives to the presenting problems as they possibly can. A range of options should be defined. The more options there are, the more likely it is that the participants will find a solution to the problem that is acceptable to both family and the agency, and still protect the child.

Ideally everyone involved as a party or principal professional on the case should be included in this process. Unless everyone participates, someone may be left behind and end up killing a settlement the others were moving toward. You have to be alert to avoid stalemate.

### **14.3. NEGOTIATING AT EVERY STAGE OF THE COURT PROCESS**

Just as the social worker has negotiated with the family prior to invoking the power of the court, the negotiating process should continue through all the formal phases of the court proceedings. The social worker recognizes that contested court proceedings are costly to the child and his family. The relationship between Agency and parents becomes, at least for a time, adversarial. Resolution of contested cases is time-consuming for all concerned. The treatment goals for the child and his family are not usually furthered while the court action is pending. In many cases, the negative effects of adversarial court action may be reduced by a negotiated resolution.

Do not give up on a negotiated settlement too quickly. Often discussions that occur early in a child protection case are unsuccessful. The process, however, has a way of bringing parties together who start out apart. Do not fall into the mindset that trying to settle the case once, and failing, means that you should not try again later. Agreement may be reached on some issues, but not others, at every stage of the court process. Sometimes a case that starts with a particularly adversarial and distrustful tone evolves into a cooperative and trusting relationship. Be realistic and do not expect miracles, but keep working on developing a cooperative, problem-solving approach.

### **14.4. PREDICTING THE OUTCOME**

Professionals regularly involved in the court process can generally predict with some accuracy what the court is likely to do given the strength of each side's legal case and the reasonableness of each side's position. In the process of negotiation, information is shared in a persuasive fashion so as to convince the other side of the strength and reasonableness of one's position and the likelihood that the court will rule that way.

Likewise, one assesses the case of the opponent and in light of that assessment modifies one's position if one's case is found to be weak or not reasonable or if the other side's proposals are acceptable alternatives. By a process of mutual give-and-take some prediction is made by each side as to what the court is likely to do after full hearing. Negotiation is an opportunity to agree to a resolution of the problem, which is pretty close to what the court would order if a contested and adversarial trial were to take place.

If the assessments of the strengths and weaknesses of the cases differ, no negotiated settlement will result. In addition certain elements of each case, e.g., the safety of the child, will be nonnegotiable always. The process of give-and-take, of assessing one's own case and the case of an opponent, can become quite complicated and occur over several meetings.

#### **14.5. FLEXIBILITY; SEARCH FOR POSITIVE SOLUTIONS**

What do you negotiate about in child protection proceedings? There are four major issues. One is jurisdiction. The second is placement of the children, which is often the most important to the parents. They may not care so much about the abstract notion of court jurisdiction but they want John and Mary home tonight. A third element of negotiation is the parenting time. Finally, the case service plan. Other participants in the process should not abrogate the case plan to caseworkers alone. The other participants need to critique casework plans. In critiquing, we are going to come up with creative alternatives most likely to achieve the objective of reunifying the family. Coming up with alternatives is the basic element of successful negotiation--where all parties can be winners.

Preparation is 80 percent of a good trial. Preparation is equally important for negotiation. Participants will want to have gathered and settled the facts early on. Each person should consult the caseworker and others, asking, "what do you think the problems are?" Once the problem is defined, the question should be asked and re-asked: "what do you think are the solutions to those problems? To get at those solutions, who should do what and when? How should the personal links between the child and family be made?"

Even the most intractable parent may change his position once court action is begun. The prospect of appearing in court and the advice of a lawyer may temper a formerly uncompromising attitude. On the other hand, information not

previously available to the social worker may surface which tends to alter his evaluation of the case. The social worker may have been mistaken as to the true facts or may have misjudged important elements of the case. Therefore, positions of both the social worker and the parents may become fluid as the court process starts. A negotiated resolution may become possible.

#### 14.6. IDENTIFY OPTIONS FOR MUTUAL GAIN

To negotiate effectively in the legal context, one must be keenly aware of the various *options* available. On the issue of whether the court should take *jurisdiction* of a child, independent of consideration of where the child should be placed, consider several options in escalating degrees of court involvement.

- Agree *not* to petition the court.
- File petition.
- Agree to withdraw a petition already filed or to recommend dismissal by the court.
- Adjourn.
- Parents plea no contest.
- Amend the petition to add or delete allegations.
- Parents admit allegations of petition.
- Parents deny allegations of petition, trial date set.

Custody of the child(ren) is generally paramount to the parents. Consider the following negotiating options:

- Return the child home forthwith.
- Return the child home soon (on the condition that...).
- Return the child a date certain (on the condition that...).
- Visitation arranged daily, weekly, overnight, weekends, supervised or unsupervised, depending on the child's needs.
- Place child in a home requested by parents, e.g., home of a relative or licensable friend of family.

Certain elements of a treatment plan that the social worker considers desirable may be particularly onerous to the parents. Identify them. Attempt to fashion a treatment plan most likely to be accepted by the family. You may wish to bargain away an element of a plan that is particularly distasteful to the family in exchange for their agreement to accept court jurisdiction and a dispositional order that will address most of the family needs.

Consider negotiated resolutions like the following:

Withdraw Petition

Parents agree to accept service plan

Adjourn	Parents agree to use time to improve conditions and correct deficiencies
Return child or Child placed in parent-requested home or Generous visitation allowed	Parents admit petition or plead no contest and agree to needed services contained in dispositional order

#### 14.7. CHILD'S ADVOCATE AS MEDIATOR

The child's lawyer-guardian ad litem, attorney or lay advocate if one is appointed, may play a significant role as mediator. Michigan law requires the lawyer-guardian ad litem to help settle cases when it provides that one of the duties of the lawyer-GAL is<sup>2</sup>:

Consistent with the rules of professional responsibility, to identify common interests among the parties and, to the extent possible, promote a cooperative resolution of the matter through consultation with the child's parent, foster care provider, guardian, and caseworker.

The child's representative is neither the petitioner's attorney nor the defense attorney. He or she need not take an adversarial position on either side. The interest of his client is often served by voluntary resolution of the legal dispute, thus avoiding contested trial. A contested hearing will not only delay adoption of a treatment plan but put additional stresses on a family. A child's return home may be delayed by contested hearings. The child's counsel therefore may be a useful mediator and may assume responsibility for finding terms of settlement, which all parties find acceptable.

#### 14.8. INSTITUTIONAL SUPPORT

Some knowledge of community resources is necessary in this kind of advocacy and this kind of critique of the casework plans. The participants should come into a negotiation with some kind of objectives in mind about what would be a satisfactory solution in this particular situation. Attorneys should use the same kind of rigor in defining objectives in a child protection or foster care case as in a personal injury case. Define some general goals.

Some institutional support is necessary to be able to do effective negotiation. Is there time at court just prior to hearing and is there a physical setting to get the parties together to have the kind of conversation we have been talking about? If

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<sup>2</sup>. MCL 712A.17d(1)(k)

lawyers are paid by the hour, it is going to encourage preparation. A lawyer that is paid by court appearance does not have a financial incentive to do a thorough job of preparation and to spend time trying to settle matters.

#### 14.9. MEDIATION IN CHILD PROTECTION CASES

After conducting extensive research into existing child welfare mediation, Michigan implemented pilot programs in 1998 to provide mediation services in child protection cases. Called “Permanency Planning Mediation Program,” the pilots have run through the State Court Administrative Office Court Improvement Program. Programs have been successful in other states, including California, Connecticut, Florida and Oregon. Child protection mediation is available in several Michigan counties.

Mediation has been used at any stage of a child protection proceeding including issues in the petition allegations, service plans, child placement, parenting time, compliance with services, and communication difficulties and conflicts among workers, birth parents, foster parents, service providers and others. Although the Michigan Alternative Dispute Resolution Centers are free to experiment in this pilot phase, the CIP program is encouraging focus on post dispositional disputes and service plan non-compliance. Any solutions arrived at must be approved by the court.

Permanency Planning Mediation is a tool for preserving relationships and facilitating a process in which all parties can safely express their view while keeping the best interest of the child as the main objective. The mediator is neutral and acts as a facilitator of communication, not as a judge, jury or arbiter of the facts. The safety and interests of the child remains the paramount concern.

Research indicates that mediation in child protection cases results in higher compliance with the service plan by the parents and fewer contested hearings. Mediation is not found to make the situation worse and even if no agreement is reached, issues are often clarified for all parties.<sup>3</sup> Mediation in the child welfare context is well established in many jurisdictions. The National Council of Juvenile and Family Court Judges’ *Resource Guidelines* suggests that Mediation in child welfare legal cases<sup>4</sup>:

- Involves discussions facilitated by one or more court-appointed, neutral, highly skilled and trained third party mediators, involving all relevant case participants and attorneys at some point during the Mediation;
- Always focuses on preserving the safety and best interests of the children (and the safety of all family members), while simultaneously

<sup>3</sup>. Theonnes, N. An Evaluation of Child Protection Mediation in Five California Counties: *Family and Conciliation Courts Review*, 35 (2): 136-142 (April 1997)

<sup>4</sup>. National Council of Juvenile and Family Court Judges, *Resource Guidelines*, 1995, pp. 133-138



- attempting to validate the concerns, points of view, feelings, and resources of all participants, especially family members;
- May occur at any stage in the history of the case. Typically the earlier it occurs once the most significant case information is available, the better;
  - Can be used to resolve a broad range of disposition and post disposition issues as well as certain jurisdictional issues;
  - Serves to orient and educate family members, clarify issues, facilitate exchange of the most current case information, and creatively intervene to resolve roadblocks to case resolution;
  - Should be confidential with exceptions limited to new reports of suspected child abuse and neglect, and threats to harm self or others;
  - Usually results in agreements which should become part of the court record;
  - Seeks to leave family members with an experience of having been significant, respected, and understood participants in the court process, with an investment in accepting and complying with the terms of the resolution and/or decisions of the court;
  - Serves to reduce the degree of animosity held by family members toward “the system” and focuses the family’s energy instead on child protection and parenting related issues.

#### **14.10. THE ADVERSARIAL PROCESS HAS ITS PLACE**

Although a negotiated settlement is usually preferable, the caseworker and others must appreciate the value and importance of the traditional adversarial process when voluntary agreement cannot be reached. When differences regarding the true facts or the proper responses to the family problems are irreconcilable, the adversarial system is well suited to resolve the conflict. In some cases, nothing short of court wardship and a period of foster care will adequately safeguard the child. Unless the parents are willing to admit the petition or not contest it, there may be no basis for negotiation.

Similarly, the attorney for a set of parents may disagree with the allegations of the petition and the worker's assessment of the petitions strength, and his or her clients may be unwilling to consent to any form of state intervention and may have instructed him or her to contest all allegations. Here again, negotiation will not be successful. A contested hearing (trial) will likely result.

As long as all sides share a similar view of the problem and a desired outcome, such as family reunification, a conciliatory approach is more likely to be successful. But when the parents, child protection agency and child's advocate do not see the problem in the same terms or differ markedly on what the State intervention ought to be on behalf of the child, some means of resolving those conflicts must be available. For example, if the parent, Agency and child's

attorney all believe that the case requires a short period of foster care for the child while the mother obtains suitable housing away from an abusive boyfriend, cooperative agreement should be possible. If, however, the focus of the Department or the child's advocate turns to termination of parental rights or other actions which deprive the parents of custody, or where actions are proposed to which the child's representative in good conscious cannot agree on behalf of the child, agreement will not be possible. Traditional adversarial due process procedures are the best means of resolving the conflict and protecting the rights of all concerned. The traditional due process procedures remain available for those cases in which conciliation and negotiation have not worked. The proportion of cases in which the traditional adversarial approach is relied upon may be reduced to a distinct minority, however.