

THE BOOGEYMAN OF CALIFORNIA FAMILY LAW

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For most of my 25 years as a trial lawyer, a substantial portion of which included family law matters, whenever the word “mediation” was used in the context of family law, parties (and even sometimes, lawyers) cringed. The problems with the process related to the term “mediation” in family law cases are many. This short essay will address but a few and will happily announce the slaying of the boogeyman.

Mediation is a special process designed to help disputing parties arrive at a resolution of whatever may be in dispute without having to resort to public trials, open hearings, the incredible costs of litigation and the overwhelming inconvenience and confusion the court system presents. Unfortunately, many years ago someone decided that in every family law case in which there were children, the matter must be “mediated” by a “mediator” who works for the Family Court Services (“FCS”). This endeavor was laudable. It was created to try to remove the drama and uncertainty from the issues surrounding child custody and visitation. The problem is that this process no more resembled mediation than an ice cream cone resembles a Buick.

In virtually every court in which I have practiced the professionals in FCS--who have worked very hard to provide a service to the public--have been dreadfully overworked. In spite of being generally trained in the concepts of mediation, the demands upon them and the time constraints inflicted upon them by the sheer number of family law litigants eventually transformed the process into one of dissatisfaction and sometimes outright trauma for the litigants and, I suggest, the FCS staff, as well. True mediation takes time and requires the voluntary participation of the parties. Since FCS was mandated in all cases involving children, FCS mediation was never truly voluntary. Additionally, in the counties (such as those in which I have practiced) where the FCS mediators made recommendations to the courts describing what the mediator believed was the appropriate custody and visitation arrangement, the confidentiality and sanctity of mediation was nonexistent. Consequently, if a parent attended FCS mediation involuntarily and then did not have an opportunity to have his or her story heard and understood by the overtaxed mediator, sometimes frustration with the process translated into a lack of cooperation or a poor attitude when the report from the FCS mediator made its way to the judicial officer. The result, then, was the perceived stripping of the due process rights from the family law litigants.

It is true that the parties could reject the recommendation of the FCS mediator but just as Family Court Services are overburdened, in California bench officers (judges and commissioners) in the family courts suffer with overwhelming caseloads and calendars that are unmanageable. A recent study indicated that the average time a litigant (all of the cases filed and heard in a one year timeframe divided into the number of Family Court hours available to those litigants) would have before a judicial officer in the entire course of his or her case was something less than twenty minutes, TOTAL. On a day in Family Court in which the bench

officer has to hear as many as 40 cases between 8:30 AM and noon, one can see how limited the time might be. Consequently, even the most conscientious judicial officer may occasionally rely too heavily upon the recommendation of the FCS mediator. I am told that in some venues there is a 95%, or more, probability that a bench officer will adopt the FCS recommendation in whole or in substantial part notwithstanding objections by the litigants. Add to this the fact that the vast majority of family law litigants are self-represented without the experience or wherewithal to challenge such a recommendation at trial, one should be able to see that the word "mediation" in family law settings is not well received by the parties.

Fortunately, beginning in 2012, the California courts no longer refer to the FCS process as "mediation." As of January 2012 the process is known as Child Custody Recommending Counseling (CCRC). There is no longer any suggestion that this process is mediation.

SO, WHAT'S THE DIFFERENCE?

As I indicated above, mediation is a process by which a trained neutral party assists litigants or disputants (mediation is used in the wide variety of disputed matters) to find a resolution to their dispute on their own terms. Because of the situation in which most of the family law litigants are self-represented, mediation is particularly critical. Except for "user-friendly" courts such as the small claims courts, the court system is a bewildering labyrinth of forms, rules, law and procedures that creates distress even in well experienced attorneys. People without the assistance of an attorney almost always run into legal barriers that may seem completely insurmountable. Furthermore, without some type of guide through the system, substantive rights may be forever lost simply because the individual does not understand the process.

Additionally, when a couple decides to dissolve their marriage and turns to a complete stranger (the Family Court judge) to make life-changing decisions that the parties are unable or unwilling to make on their own, they are taking serious risks. Family Court judges work very hard to rule in the best interests of the parties and, particularly, the children in a divorce. However, given the extremely small amount of time they have to devote to each case in the overwhelming number of cases they have to consider, it is no wonder that they frequently make rulings that are devastating to one or even both parties. One judge I know addressed a couple in which one of the spouses was accused of being unfaithful. Allegedly, that conduct went on for many years before the victim spouse discovered the ruse. During heated argument over who was telling the truth on a particular issue, the judge looked at the victim spouse and said, "It took you 20 years to figure out that your spouse was lying to you. Do you expect me to determine who's telling the truth as between the two of you in the five minutes we have?" Obviously, most courtrooms are not the ideal place for the revelation of truth or, even, the presumption of justice.

Family Law mediation involves a well-trained mediator who is experienced in family law, the various courts in the area and, ideally, has some sense of the temperament and tendencies of the family law judges. The keys, however, are formal mediation training and experience coupled with solid family law experience. Additionally, in order for mediation to be efficiently

productive, the parties (the disputing spouses) ***must*** want a resolution of their case. If all of those elements exist, a skilled mediator can get the case resolved.

Because family law, at least in California, is “form-driven” with an enormous number of statutory requirements (individual laws affecting the divorce), a mediator experienced in family law is essential if he/she is going to be successful in assisting the parties to reach a resolution and have a judgment entered. While mediators do not provide legal advice nor do they provide any type of “advocacy” to the mediating parties, it is always helpful for the mediator to know the procedures required in the local courts because unless all of the “I’s and T’s” are appropriately treated, cases can get stalled when judgment is submitted for signing (the Judgment is the document that divides the property, identifies and resolve child issues, defines child and/or spousal [alimony] support and acts as the instrument that records the dissolution of the marriage or the divorce). Thus, an experienced Family Law Mediator will be able to identify and provide limited assistance with the required court forms and procedures.

When parties submit their cases to a Judge (or in civil cases to a Jury) for a determination, those parties are asking a complete stranger to make critical, life-changing decisions that will affect them for the rest of their lives. As indicated above, family court judges work extremely hard to do the best they are able but are severely limited in the relief they can give to the parties. Therefore, once divorcing parties turn their case over to a judge for a determination, they essentially lose any influence they may have over the outcome and, we can say with firm assurance, those outcomes are often-times devastating to at least one of the parties.

Unlike submitting a dispute to a judge, when parties opt for mediation and want to resolve their case, they can fashion a resolution that will become a judgment that actually meets their needs as they define those needs through negotiation and compromise. Most people understand that divorce is a “negative sum” proposition. What that means is that the divorcing spouses (and certainly the children) are almost never as well off financially after as they were during the marriage. However, by mediating one’s case, the parties will be able to mitigate and control the negative outcome and work with the mediator to find resolutions that will meet the needs of the parties, rather than the system—and all without having a grumpy judge growling at them! Ideally, parties who turn to mediation to resolve their family law matters will never have to see the inside of a courtroom or see a judge. In other words, the PARTIES will make the decisions for their own lives.

In a separate document we have discussed the anticipated or estimated costs of most mediations. Typically, even the most complex mediations cost the parties less than most simple cases that go to trial. If the parties choose mediation and choose to cooperate with the mediator and the process in getting their case resolved, the case will be done in days or weeks as opposed to months or years in the traditional setting and at a cost that is a fraction of what it would be to try the case.

We hope you will choose a C.A.M.S. family law mediator to assist you. But if you do not, we do wish you the best with your dispute.