REPORT OF THE MEDIATION SUBCOMMITTEE
of the
JUSTICE INITIATIVES COMMITTEE

September 18, 2013

Formation and Mandate

The Mediation Subcommittee was launched at a meeting of the Justice Initiatives Committee on January 29, 2013 in Helena with the mandate to determine whether the increased use of mediation might partially alleviate the burden of the courts presented by the recent explosion of pro se litigation. Subcommittee members and staff include: Abigail St. Lawrence, Ann Davey, Anna Felton, August Swanson, Brian Muldoon, Charlotte Beatty, Chris Manos, Erin Farris, Janice Doggett, Kaitlyn Lamb, Justice Laurie McKinnon, Pamela Poon, Patrick Quinn, Patty Fain, and Stephanie Mann. Brian Muldoon served as chair.

Statement of Values

In an effort to establish a basic foundation for our work we first focused on creating a general Statement of Values for the use of mediation in family law matters, which comprise the vast majority of matters in which litigants represent themselves. Although it was anticipated that each judicial district may want to design its own program based on the needs, geography and unique dynamics of each district, our thought was that all such programs should be consistent with a common set of values.

The values we determined to be critical to the success of any such program are as follows:

1. *Early Resolution*. In family law matters, especially parenting issues, it is best to resolve the matter as early as possible.

2. *Outside the Court*. Parenting issues should be resolved outside the court system whenever possible, except in the case of harm or danger to the children or parents. We want to decrease the notion that going to court is what you want to do and increase the capacity to be able to work out the issue.

3. *Affordability*. To the extent possible, the parties should bear the reasonable cost of resolving their own parenting disputes. If the parties are unable to contribute meaningfully toward the reasonable cost of working out a parenting plan, then they should be encouraged to provide some other form of consideration to the community, such as an act of service for which they agree to be accountable. With that in mind, there should be a mechanism for providing conflict resolution services to all litigants, regardless of their financial resources.

4. *Proper Qualifications*. Mediators, whether lawyers or not, should be properly qualified to handle family law matters. While it is up to the individual mediator to choose the mediation approach that best suits the case, the mediator's style of family mediation should demonstrate a strong preference for facilitative or transformative mediation techniques.

5. *Oversight*. There should be an entity or person responsible for ensuring the quality of mediation services in a jurisdiction.

Mediator Qualifications

The success of a mediation program will depend, in large measure, on having truly qualified mediators handling the referrals. It is easy for someone with years of experience to feel that they know enough to help parties reach a settlement—but that often is not the case. More important than knowledge of the law, or even probable outcomes in court, is the ability to help emotionally-distraught couples come to a resolution that each is willing to accept and follow. That is not a skill that is usually developed without considerable training and experience. Based on a partial survey of mediation programs in other states, the trend in jurisdictions with a history of implementing such programs is to require more training, more experience, more exposure to the fields of child development, substance abuse, domestic violence and psychodynamics.

Because Montana is a relatively new actor in the field of dispute resolution, we elected to propose a set of qualifications that will allow the greatest number of trained mediators to participate in a court-annexed program. We suggest a two-year "grace period" to allow otherwise qualified mediators to complete the prescribed standards so that each jurisdiction can commence its own program as soon as

possible. In addition, a court can waive the qualifications in appropriate cases.

The suggested qualifications are as follows:

CERTIFIED FAMILY LAW MEDIATOR

The following qualifications should apply to any person who wishes to be appointed by the district court as a family law mediator under M.C.A. §§40-4-301 through 308 or similar local court provisions. Persons who meet these standards may be referred to as a "certified family law mediator."

For good cause shown, provided that a mediator meets the requirements of M.C.A. §40-4-307, and provided further that such person is in the process of satisfying the requirements set forth below and completes such requirements within two years of making application to the district court for listing under M.C.A. §40-4-306, such person may be listed as a "conditional family law mediator" and thereupon appointed by the district court.

The qualifications of the certified family law mediator shall be as follows:

TRAINING

All four of the following elements shall apply unless waived, individually or in total, by court order:

- 36 hours of basic mediation training (applicable to all forms of mediation); plus

- 20 hours of family law mediation (including substantive family law legal principles, family law litigation tools and parenting plans) and demonstrated familiarity with different mediation styles and their appropriate application; plus

- 16 hours of substance abuse and domestic violence training; plus

- 16 hours of family conflict psychology or family dynamics training, including principles of child development and the impact of divorce on children

EXPERIENCE

No fewer than ten (10) complete family law mediations (concluding in the entry of a decree of dissolution or the adoption of a final or modified parenting plan); plus

No fewer than five (5) complete parenting plans reviewed and approved by a certified family law mediator.

Financial Considerations

Obviously, one of the principal reasons that litigants choose to represent themselves is their inability to pay an attorney for legal services, so it is critical that we find a way to make such programs affordable. On the other hand, since funding for such programs is not easy to find these days, we believe that the parties can and should cover the costs of the mediation process. We anticipate that most parenting disputes can be resolved in one or two sessions of two or three hours, so the cost will be modest. We believe that each jurisdiction should adopt a sliding scale, based not only on the income but also the assets of the parties. Those who are entirely without means should be encouraged to make some form of in-kind contribution to the community as circumstances allow. Because certified mediators must invest in their own training and must make a living from their work, some form of meaningful compensation, where available, is essential to enable them to work at reduced fees or without charge.

We believe that most litigants can pay something, even if far less then they would if they retained counsel. Striking an equitable balance will determine the success of any such program.

Administration

Especially in more populous districts we expect that the number of cases referred to a mediation program will be significant. Because there may be a disproportionate number of low-paying (or non-paying) clients, it is important that an administrator fairly distribute the cases among the available resources. Because it is possible that some mediators may only wish to accept those cases that promise payment at his or her preferred rate, the program administrator should make sure that cases are equitably distributed, that mediators are properly

trained, that the necessary training is available, and should oversee case administration while the matter is outside of the judicial system. The administrator will also report back to the courts on the progress of cases referred into the system. We believe that a modest administrative fee charged to each party will support such an administrator.

A Sample Local Rule

In Flathead County a local rule has been proposed that would incorporate the considerations cited above. The rule has been presented to the current judges by retired judges Kitty Curtis, Stuart Stadler and attorney-mediator Brian Muldoon. It anticipates not only that parenting cases be referred to a certified mediator within thirty days, but that a special master be appointed to conduct a brief hearing if the matter is not successfully resolved in mediation. Again, the parties would bear the cost of the special master on a sliding scale. Either party could appeal the special master's proposed order, which would issue shortly after the hearing.

This rule is currently under discussion in the Flathead but has not yet been adopted. It has been proposed as a one-year experiment to determine if it can be self-supporting. Numerous questions were raised by the bar about the proposal, which were addressed in the attached response from its authors.

The text of the proposed rule is as follows:

DRAFT
PROPOSED LOCAL COURT RULE:
MEDIATION OF PARENTING ISSUES

1. All cases involving parenting of minor children not filed as a co-petition or with an agreed parenting plan shall be submitted to mediation through an entity designated by the Court for the administration of such matters within thirty (30) days of the filing of the initial petition (or filing of proof of service). The mediation shall be pursuant to Title 40, Chapter 4, Part 3, MCA. The mediator shall address with the parties the establishment of a parenting plan and, if applicable, child support. The mediator shall file a report with the Court setting forth solely the issues resolved through mediation.

2. If mediation does not result in the resolution of all issues between the parties, interim and/or final or modification of parenting and child support shall then be submitted to a special master appointed by the court pursuant to Rule 53, M.R.Civ.P. The master may refer the parties to Family Court Services, counseling, substance abuse evaluation and/or treatment, parenting classes or a domestic violence program.
3. Proceedings before the special master shall be governed by Rule 53, and the master shall, following final hearing, submit findings of fact and conclusions of law to the court. The court will then proceed as set forth in Rule 53(e)(2).
4. Mediators shall be properly qualified. Special masters must be retired judges with family law experience or attorneys with significant experience in family law.
5. Matters involving emergencies that may affect the health, safety or welfare of a child may proceed in accordance with this rule with safeguards implemented to insure children interests are protected, or may be exempted from this rule.
6. Fees for mediation and special master services must be reasonable in view of the parties' financial resources. (Reference Section 40-4-308, MCA.) A reasonable administrative fee may be charged to all parties. A mediator may find that a party acted in bad faith with respect to the mediation, in which event that party may recommend that party to be responsible for all costs, including the mediation costs. A special master may apportion costs of all proceedings in accordance with Montana law.

Conclusion

Perhaps at the heart of the explosion of pro se litigation is the conviction—which we as lawyers and judges have fostered—that justice requires that every litigant involved in a dispute with a spouse or fellow parent be afforded access to an adversarial system that pits mother against father. This inevitably and invariably puts the children in the middle. Even if this is justice from a procedural "due process" perspective, it often fails to produce substantively just outcomes.

Moreover, although lawyers are trained to convert emotional conflicts into fact patterns that are amenable to resolution by reference to legal principles, pro se litigants have no such training. In family law matters judges are often expected to play a very different role—that of stern "über-parent" who must decide, on the basis of very little evidence, what is best for a child the judge has never even seen.

Parents have a non-delegable duty to care for their children. That means they have to find a way to work through their anger, grief and

sense of failure. If they need to fight, let it be about dividing the retirement account or the furniture. Keep the kids out of it.

We believe that, together, mediators and the courts can help them to do exactly that.