

Court Imposed Mediation in Indiana Child Custody Cases: Practices and Proposals

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Introduction

Judges, research professionals and advocates for children all agree that when parents engage in mediation to resolved parenting time and custody issues that outcomes for children improve. [Courts] encourage parties to negotiate agreements regarding custody and parental visits. *Keen v. Keen*, 629 N.E.2d 938, 941 (Ind. Ct. App. 1994). Studies have shown that well-established, clear parenting time schedules are most likely to be followed if they are designed and implemented immediately following the divorce or separation (Kelly, 2000). Families who are able to negotiate their own parenting plans are more likely to implement extended visitation patterns than families who require involvement of the court to develop their parenting plans (Kelly, 1993). In situations of high conflict parenting, contact between the nonresidential parent and child tends to be greatly diminished (Whiteside, 1998; Kelly & Emery, 2003). Children who stay overnight at their nonresidential parent's home more than the typical guideline minimums report more positive relationships with and greater overall involvement with this parent than children who stay overnight less often or not at all (Cashmore, Parkinson, & Taylor, 2008). Studies from the developmental literature emphasize the role that both parents play in children's social, cognitive, and psychological development (Lamb, 1997).

Crafting parenting plans that exceed typical guideline minimums for the nonresidential parent have been shown to produce better outcomes for children. The earlier the plans are crafted the more likely they are to be adhered to over the long term. Thus, immediately providing divorcing or separating parents with the opportunities and resources to craft parenting plans should produce more favourable outcomes for children across a broad spectrum of well-being measures.

Practices

Numerous jurisdictions throughout the state of Indiana include this concept in their local rules. Shelby County courts "find that the best interests of the minor child or children of the parties shall be served by encouraging mediation and cooperation between divorcing parents prior to and after the dissolution of their marriage." Vanderburgh County rules state " that it is in the best interests of society, of children and of the Courts to encourage cooperation and mediation between separating and divorcing parents." Nearly all require parents to attend or complete some type of parenting education course intended to help parents understand the effects of divorce on children.

Although some courts retain the authority to require parents to attend mediation before hearing post-dissolution motions [LR53-FL00-0402] some have required it initially upon failure to reach an initial agreement [LR53-FL00-04, LR89-FL00-4(E)], before a final hearing is scheduled [LR89-FL00-9], or when litigation is expected to be protracted [LR73-FL00-2.2] while Vigo and Clark Counties makes it

mandatory in pro se cases [84LR-FL00-2, LR10-FR00-16].

St Joseph County has initiated a plan for early intervention with parents that may help reduce conflict in child custody cases. Its rule [LR71-FL00-404.6] provides that a "cooperation conference will ordinarily be scheduled by the Court for approximately 60 days after the filing of the initial petition for dissolution (or, in paternity cases, approximately 60 days after the finding of paternity). The rule states that the chief purposes of cooperation conferences is checking progress in "reducing conflict, building cooperation, preserving family relationships, and responding to the needs of the children" and for families, where required, to be referred for any necessary help.

Vigo County states that "If the petitioner and respondent, at the time of the filing of a Dissolution of Marriage action, are proceeding without an attorney to represent them, and they have a child or children as a result of the marriage or their relationship, they shall contact the Dispute Resolution Center for the Wabash Valley [phone] to make an appointment to attend a Mediation Consultation Workshop."

A blending of these last two concepts provide a sound structural framework for a mandatory mediation practice. Attendance at a facilitation location such as Vigo's Dispute Resolution Center followed by a brief court appearance as St Joseph's "cooperation conference" should introduce parents to Vanderburgh's concept "that it is in the best interests of society, of children and of the Courts to encourage cooperation and mediation between separating and divorcing parents."

Implementing the process could follow Vigo's rule which requires the petitioner to "contact the Dispute Resolution Center within seven (7) days of filing the Petition for Dissolution of Marriage." The respondent is provided program information when served and "shall contact the Dispute Resolution Center within seven (7) days of receiving notice of this rule."

A slightly more intense method should bring parties together sooner, reduce conflict and produce more lasting parenting plans. Parents who are initially involved in a child custody action through dissolution of marriage or a paternity action would begin the process not in a court room but in an atmosphere of cooperation which empowers both parents to determine the custody and parenting time of their child(ren).

Wayne County already has a rule [LR89-FL00-4(B)] using nearly the exact wording that I seek to have used in case captioning. "Parties in marital dissolution and separation and paternity cases shall not be captioned or designated as "petitioner," "respondent," "plaintiff," or "defendant." In marital dissolution and separation cases where the parties have one or more children under the age of nineteen on the date of the initial filing, all pleadings shall be captioned, "In Re The Marriage of _____, Father [or Mother], and _____, Mother [or Father]." The party filing the initial petition shall be named first.

I believe this is of utmost importance in fostering an atmosphere of cooperation because it identifies the parties not as adversaries but two separate parts of a single unit -- the parents of the child(ren) -- who will otherwise maintain separate lives.

During litigation the use of "parent coordinators may facilitate a decision regarding visitation". Bacon v. Bacon, 877 N.E.2d 801, 804 (Ind. Ct. App. 2007). This type of involvement has generally been reserved for high conflict parents. Parenting Time Coordination has provided mixed results and can be quite expensive. In Paternity of CH (Ind. Ct. App. 2010) the appointment by the court of a PTC was upheld but conditioned upon the parties having agreed to the court's appointment.

Jurisdictions facilitating court imposed mediation provide for the costs in various manners. Allen County provides that "unless otherwise agreed by the parties, or ordered by the Court, the mediator's fee shall be allocated between the parties on a income shares model basis." Also, that "If a party fails to appear for the mediation or fails to participate in good faith during mediation, the entire cost of the mediation may be assessed against that party." St Joseph County has added a ADR fee [LR71-FL00-418] to the usual filing fee. "The Clerk of the Court shall collect from every party filing a petition for legal separation, paternity, or dissolution of marriage action under I.C. 31 an alternative dispute resolution fee of twenty dollars (\$20); as such amount may be modified from time to time." Similarly the Shelby County rule [LR73-FL00-2] provides for the collection of a \$20 fee. "The Clerk of Shelby County shall commence collecting the additional \$20.00 alternative dispute resolution fee, pursuant to Indiana Code 33-4-13-1, on September 1, 2005." Shelby County states that "Mediation costs are low because most mediators will serve on pro bono basis as part of their voluntary participation in Shelby County Pro Bono Plan."

Proposal

The following is a proposed Court Imposed Mediation model.

1] In all actions for dissolution of marriage which include minor children and all paternity actions the filing party, named and then captioned as "mother" or "father" and thereafter referred to as such, shall complete and attach a Custody and Parenting Time Worksheet to the Petition.

2] The party served, named and then captioned as "mother" or "father" and thereafter referred to as such, shall complete and attach a Custody and Parenting Time Worksheet to a response if one is filed or standing alone within the time period indicated on the summons for when a response is due.

3] Upon receipt of both Custody and Parenting Time Worksheets or by the date a response is due, whichever comes first, the Court shall order both parties to meet with a mediator within 30 days. If the parties have agreed to a mediator as indicated on the Custody and Parenting Time Worksheet then the Court shall order the use of that mediator. If no mediator is indicated on either Worksheet or the parties have not agreed then the Court shall select a mediator from the Court's

pool of mediators. The Court shall forward the Worksheets to the mediator.

4] In jurisdictions that have a Dispute Resolution Center the parties shall use the mediators or facilitators and services provided by the Center. Divorce classes or programs should be completed prior to the mediation session. Ideally, they should run consecutive to each other so that parents are immediately aware of the benefits and harms of mediation and conflict.

The mediator shall evaluate the Worksheets for substantially similar responses and denote the agreed upon selections. At the mediation session the facilitator shall present to the parents a record of the agreed upon sections and ask each parent to affirm if that is his or her current wish. The facilitator shall assist the parents for up to one hour – or additional time as the mediator volunteers to provide and feels is probable to achieving resolution – to reach an agreement on additional terms. At the end of the session the parents shall both sign a copy of the Worksheet which details the issues upon which the parties agree. The Worksheet shall be prepared by the facilitator. Failure to cooperate in the process may subject a parent to contempt sanctions.

5] The Mediator shall promptly forward the Worksheet to the Court. The Court shall then set the matter for a status conference which shall also serve as a “cooperation conference”.

6] The mediator is not intended to conduct an evaluation of the parents or make a recommendation to the Court. The mediator's report shall be admitted to the court record without necessity of the mediator's testimony. The mediator's testimony, if any, shall be to the extent of establishing a factual basis of the failure to reach an agreement.

7] The Clerk of the Courts for each county shall impose and collect a filing fee surcharge sufficient to cover the operational costs of the program. Such fee however shall not exceed any maximum set by the State of Indiana through rule or law.

Indiana Custody and Parenting Time Worksheet

The Custody and Parenting Time Worksheet is designed to assist parents in considering the issues most likely to be contested in a child custody placement hearing. Parents who do not agree upon a parenting time and custody arrangement risk having their parenting time and custody of their children decided by a judicial officer whose decision may not be satisfactory to either parent. It is assumed that parents know best what arrangements provide the greatest benefit to their children and themselves. Parents are parents for life and those who can cooperate in establishing mutual expectations and consistent parenting time and expectations for the children produce the best outcomes for their children.

Research shows that parents who try to be the child's 'best friend', the 'nice parent' or otherwise win favour of the child ultimately do harm to the long term outcome of the child and have less satisfactory relationships with their children after reaching adulthood.

The worksheet is to be a guide for developing a long term parenting plan and should be added to or amended as meets the needs of the child(ren) and parents. Where checkoff boxes have been supplied they may be checked as appropriated or numbered by preference will multiple options are acceptable. Parents should not feel limited by the selection of topics or options provided. No guide or list can provide comprehensive coverage for all possible situations or scenarios. Parents are encourage to be inventive and cooperative in developing a parenting plan that utilizes their unique abilities, talents and resources that will best benefit their child(ren). Although parents may reach an agreement the court is not bound to accept it. It has long been held that it is a trial court's responsibility to determine what custody and parenting time arrangements are in the best interests of the children, and "[a] stipulation [between the parties] cannot place restrictions upon a court's duty to protect the best interest of a child." *Beeson v. Beeson*, 538 N.E.2d 293, 298-299 (Ind. Ct. App. 1989).

The Preamble to the Indiana Parenting Time Guidelines provides some insight into the reasons why parents should design their own agreement.

*The Indiana Parenting Time Guidelines are based on the premise that it is usually in a child's best interest to have frequent, meaningful and continuing contact with each parent. It is assumed that both parents nurture their child in important ways, significant to the development and well being of the child. The Guidelines also acknowledge that scheduling parenting time is more difficult when separate households are involved and requires persistent effort and communication between parents to promote the best interest of the children involved. The purpose of these guidelines is to provide a model which may be adjusted depending upon the unique needs and circumstances of each family
A child whose parents live apart has special needs related to the parent-child*

Custody

- This custody and parenting time proposal applies to all minor children under this cause.
- This custody and parenting time proposal applies to only the following minor children under this cause.

<input type="checkbox"/>	_____	Age _____
<input type="checkbox"/>	_____	Age _____
<input type="checkbox"/>	_____	Age _____
<input type="checkbox"/>	_____	Age _____
<input type="checkbox"/>	_____	Age _____

1] For purposes of using the Indiana Parenting Time Guidelines I prefer that the following parent be designated as the “custodial parent”.

- Father
- Mother

2] For purposes of deciding the child(ren)'s education, religion and medical care I prefer that the following parent(s) be designated as the “custodial parent”.

- Both
- Father
- Mother

3] For purposes of legal custodian designation that may be necessary for signing permission slips or meeting the requirements of accompaniment or approval of parent or guardian for matters other than those decisions listed under paragraph 2 the following shall have that authority;

- Father
- Mother
- Other person(s) being _____

4] I prefer the formal education of the child(ren) be as follows: [Include names of particular schools or school system] _____

5] I anticipate that the child(ren) will participate in the following extra-curricular or community activities; _____

6] I prefer the formal religious training of the child(ren) be as follows: [Include names of particular places of worship] _____

7] I prefer the formal education of the child(ren) be as follows: [Include names of particular schools] _____

8] The person designated as the primary emergency contact will be

- Mother
- Father
- Other person being _____

Parenting Time

1] The residential arrangements will be as follows:

2] The regular parenting time arrangement will be as follows:

Mother will have the child(ren) on _____

Mother will have child(ren) all times not exercised by Father

Mother will have child(ren) pursuant to the Indiana Parenting Time Guideline minimums in addition to; _____

Father will have the child(ren) on _____

Father will have child(ren) all times not exercised by Mother

Father will have child(ren) pursuant to the Indiana Parenting Time Guideline minimums in addition to; _____

Other person being, _____, will have the child(ren) on _____

3] The Holiday and Summer parenting time will be as follows;

Mother will be designated as the [custodial/non-custodial parent] and Father will be designated as the [custodial/non-custodial parent] for purposes of following the Indiana Parenting Time Guidelines.

Mother will have the child(ren) on the following holidays _____

Father will have the child(ren) on the following holidays _____

4] Other cultural events or activities shall be exercised with the child(ren) as follows;

Mother will have child(ren) for _____

Father will have child(ren) for _____

5] Parenting time exchanges will occur

Pursuant to the Indiana Parenting Time Guidelines.

At the following location(s) _____

6] For parenting time exchanges the following person(s) may act in place of

Mother _____

Father _____

7] Opportunities for additional parenting time shall be offered if child care service other than regularly provided and agreed upon care is going to be needed for more than _____ minutes.

8] The parent not exercising parenting time shall have opportunity for telephone or other electronic communication during the following times; _____

9] The following discipline techniques or lifestyle standards shall be considered and stated as how

they are to be applied to the child(ren);

Curfew: On school nights is _____, on other nights is _____.

School suspensions, referrals of failing grades will result in _____

Social networking and electronic devices or games _____

(Restrictions on communication devices must not impede the provisions related to parent-child contact)

Dating, friends and other social activities _____

Body art, piercings, branding or any other body adulteration _____

Other: _____

10] Punishment of the children should be based upon age appropriate standards. Punishment of the child(ren) shall be exercised as follows:

May include corporal punishment administered by the parents only

May include corporal punishment administered by the parents or the parents' subsequent spouse or partner

Non-physical punishment by the parents only

Non-physical punishment by the parents or the parents' subsequent spouse or partner

Time-out limited to _____ minutes

Grounding or restrictions which are exclusive to the parent administering the punishment

Grounding or restrictions which are mutual to both parents which will be limited to the following _____

(Restrictions on communication devices must not impede the provisions related to parent-child contact)

11] Notice of travel with the child must be provided to the parent not exercising parenting time whenever;

The travel will be more than _____ miles from the traveling parents' home

The travel will be out-of-state

The travel will be of a duration exceeding _____ days

and must include

An itinerary

Contact information at the destination point

A schedule of times to contact the child(ren)

12] Communication between the parents shall be

by telephone

by text message

by email

by other method being _____

and shall occur

Frequently

Infrequently

Only as necessary

13] The child(ren) shall observe the following dietary considerations which shall be made know to all persons providing care for the children by the parent facilitating such care

Religious diet consistent with the _____ faith.

- Food allergies or intolerance to: _____
 - _____
 - Avoidance of artificial flavourings and colourings.
 - Other food restrictions _____
-

- 14] New partners or household members shall be introduced to the child(ren) by
- The parent related to the new partner or household member
 - Both parents at the home of the parent related to the new partner or household member
 - Both parents at a neutral location
- and the new partners or household member shall be introduced to the other parent
- Preceding the introduction to the child(ren) but not disclosed to the child
 - Concurrent with the introduction to the child(ren)

- 15] Medical and other professional appointments shall be scheduled by
- As agreed upon by the parents
 - The parent making the inquiry and will be during that parents' parenting time
 - By the service provider.

Travel arrangements will be the responsibility of

- The parent whose parenting time is in effect during the scheduled appointment.
- Mother
- Father
- Other person(s) being _____

- 16] Child(ren)'s refusal to participate in parenting time will be resolved by
- Both parents meeting with the child at a neutral location and demanding compliance with the parenting plan
 - Both parents meeting with the child and a third-party at a neutral location and demanding compliance with the parenting plan.
 - Both parents meeting with the child and a third-party at a neutral location and allowing the third-party to make the decision.
 - Facilitating the use of a counselor where the child may express his or her concerns then following the recommendations of the counselor
 - Facilitating the use of a counselor where the child may express his or her concerns, getting a recommendation from the counselor and then the parents mutually deciding upon an arrangement.

17] Resolution of problems shall be pursued through

- any of the following persons _____
 - any of the following professionals _____
 - the parents attorneys
- and any costs shall be borne by _____

18] This parenting time and custody schedule shall be reviewed for amending consistent with the needs and age development of the child(ren) every _____ years.

19] Amendments to the parenting time and custody schedule shall be made as follows;

- Temporary changes shall be printed and signed by both parents and will state the effective dates
- Temporary changes shall be sent by email and replied to acknowledging acceptance and will state the effective dates
- Permanent changes shall be reduced to writing, signed by both parents and submitted to the court.

(end)