

ADR/Mediation: Helping Parents Negotiate Agreements and Renegotiate Family Relationships

Robert E. Emery
Professor of Psychology
University of Virginia

ree@virginia.edu
<http://emeryondivorce.com/>

Take Home Messages: ADR/Mediation in Custody Disputes

- Embraces philosophy that parents, not the state, should decide what's best for children
- Reduces burden on courts
- Helps separated families resolve disputes and *be families*

Philosophy: Parents Should Decide

- "Dispute between parents when it does not involve anything immoral or harmful to the welfare of the child is beyond the reach of the law. The vast majority of matters concerning the upbringing of children must be left to the conscience, patience, and self restraint of father and mother. No end of difficulties would arise should judges try to tell parents how to bring up their children. Only when moral, mental, and physical conditions are so bad as seriously to affect the health or morals of children should the courts be called upon to act."
- *Sisson v. Sisson*, Court of Appeals of New York, 1936, on the courts refusal to enter a dispute about a child's education
- A dispute between *married* parents, which courts still won't hear
- See Emery & Emery, in press, *Wake Forest Law Review*

When Did Society Decide to Ask Judges to Make...?

- Parenting decisions for half of all American families
- Judges (potentially) have this authority when...
 - Divorce rate approaches 50%
 - Bramlett & Mosher, 2001
 - 36.9% of all children born *outside* of marriage in 2005
 - Martin et al., 2007
 - 40% of nonmarital births to cohabiting couples
 - Bumpas & Lu, 2000

When Did Society Decide to Ask Judges to Make...?

- Parenting decisions about
 - Where children live according to what schedule
 - Schooling, religious upbringing, elective medical care
 - The details of living like...
 - "... telephone access, vacation planning, and decisions about the children's after school activities, health care, child care, and child-rearing practices." Coates et al. (2004)
 - "High conflict" cases – the tail that is wagging the dog
- Nontraditional families *are* families
 - We assert that judicial intervention harms marriage...
 - Shouldn't we worry (as a public policy goal) that it might harm the coparenting relationship between separated parents?

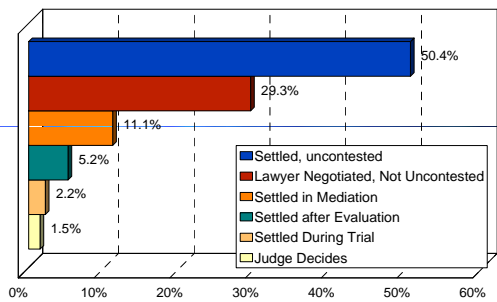
Reduce Court Burden: Settlement Rates

- Mediation is about more than getting agreements
 - Unfortunately, some court-connected programs are judged by this criterion alone
 - And often given very short time to mediate
 - Calling parents meeting with a probation officer for an hour "mediation" doesn't make it mediation
- Still, settlement rates still are important
 - Programs typically report 40-75% settlements *with cases that have not settled out of court*
 - Excellent models in states like California, Connecticut, North Carolina (and more)

Mediation Is Only One Of Many Alternatives



Settlement Methods for 933 Custody and Visitation Issues in (Judge Edwards) Court



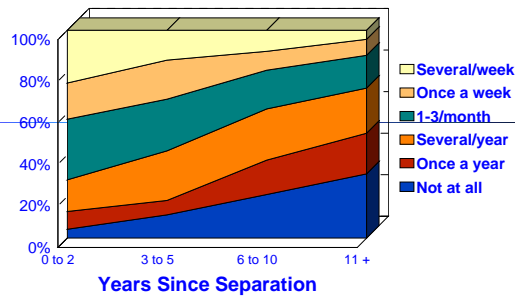
Settlement Is the Goal

- What is "best" for children?: Little legal guidance for judges:
 - Mnookin, 1975
- Science of custody evaluations weak
 - Emery, Otto, & O'Donohue, 2005
 - Early neutral evaluations example of evaluation as arbitration
- Goal: Move more cases up to wide end of funnel
- Warning: Don't let the tail (high conflict cases) wag the dog
 - Take more and more judicial, lawyer, therapist, and mediator time
 - Cannot extrapolate from our personal experiences
 - Judges (and most of us) mainly see cases that are *not* working
 - Should we expect to resolve personality disorders in a legal setting?
 - Or, from a policy perspective, want to try to do so?

Mediation/ADR is More Family Friendly

- Relationships don't end with divorce, so they need to be renegotiated
 - True for parents and children, and also for former partners who remain parents
- How do people ordinarily handle the hurt, shame, guilt, tension, and complications of lost love?
 - Too many divorced parents do what everyone does...

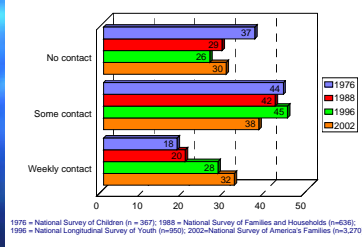
Father-Child Contact After Separation: By Length of Time Since Separation



Based on Seltzer, 1991

Things Have Changed: But Not So Much

Nonresident Father-Child Contact



1976 = National Survey of Children (n = 367); 1988 = National Survey of Families and Households (n=636); 1996 = National Longitudinal Survey of Youth (n=650); 2002=National Survey of America's Families (n=3,270)

Amato, Myers, & Emery (under review)

ADR/Mediation is Emotionally *Unnatural*

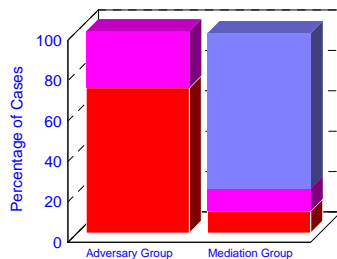
- When we are hurt, we want to hurt back
- Partners are entitled to their hurt/anger
 - ADR professionals must recognize this
- Emotionally informed mediation
 - Recognize emotion, but address (largely) indirectly
- And most complications in divorce are emotional
 - More later...
 - New area of legal reasoning: Law and emotion
 - *Law and Emotion: Re-Envisioning Family Law*
 - UVA Center conference September 18 & 19, 2008

Emery's Study of Mediation and Adversary Settlement

- Short-term, problem-focused but with awareness of broader emotional issues
 - Average of 3 two hour sessions in research
 - Male-female co-mediators; masters degree
 - High conflict families
 - All filed for contested court hearing in research
- Focus on children's issues (custody etc)
 - May work with financial issues or leave for lawyers
 - Only custody, visitation, and child support in research
- Random assignment to mediation/adversary settlement
- 12 year longitudinal follow-up
 - Emery et al. (2001); Emery et al. (2005); Sbarra & Emery (2005)

Case Settlement Following Random Assignment

■ Mediated Settlement
■ Attorney Settlement
■ Custody Hearing



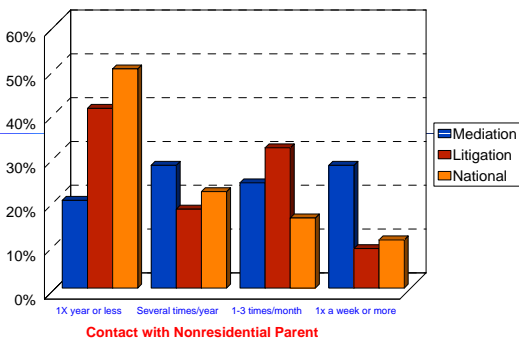
N=36 for adversary group and N=35 for mediation group

Mediated and Litigated Settlements

- Very similar agreements in both groups
- Did not include spousal support or property division
- Primary mother custody is most cases in both groups
- No difference number of days with other parent
- No difference in child support
- More joint legal in mediation (but still minority)

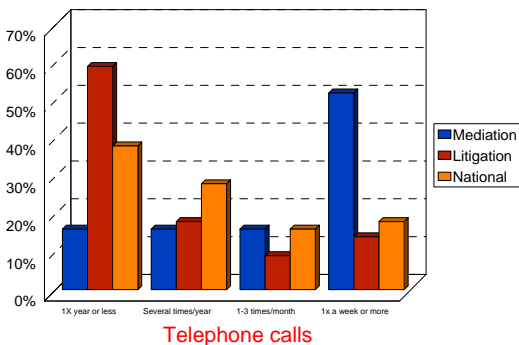
12 Year Follow-Up:

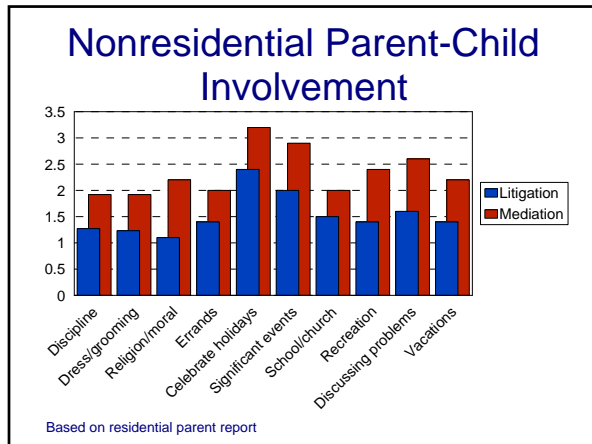
Outcomes of Mediation and Litigation



12 Year Follow-Up:

Outcomes of Mediation and Litigation







- ### Other Findings at 12 Years
- Mediation
 - Less parent conflict despite increased parent contact
 - *Increased* ambivalence about ending marriage
 - Mediation
 - More changes in living arrangements
 - But only about 1 in 12 years (essentially 0 in litigation)
 - A parenting plan can be a living agreement
 - No differences in children's mental health
 - Except mediation significantly better when few cases with 4 or more changes removed
 - But randomization lost for this analysis

Contact and Conflict

Correlations Between Involvement and Adolescent/Young Adult Adjustment: High and Low Parent Conflict

| Measure | Low Conflict NCP Involvement | High Conflict NCP Involvement |
|---------------|------------------------------------|-------------------------------------|
| Internalizing | -0.4* | 0.21 |
| Externalizing | -0.31 | 0.04 |
| Depression | -0.4* | 0.41* |

More Findings at 12 Years

- Sbarra & Emery, 2008
- Fathers more angry when mothers more accepting
 - Contesting divorce by contesting custody?
- Mediation *less* conflict at one year, litigation *more* conflict at one year
 - Mediation made relationship better
 - Court made relationship worse
- Litigation substantially reduced long-term conflict for a small number of cases
 - In part, because one parent dropped out of child's life
- Still, cannot mediate/ADR everything
 - But can substantially help the majority by doing so
