

Mandatory Custody Mediation: The Debate Over its Usefulness Continues

I. INTRODUCTION

In 1980 the California legislature enacted the first statute requiring the mediation of all contested child custody cases.¹ This led to the belief by some that most states would soon adopt mandatory mediation statutes to handle child custody cases.² As this Note will discuss, this has not happened — only six other states have enacted mandatory state-wide child custody mediation statutes since California Civil Code Section 4607 became operative more than fourteen years ago.³

This Note begins with a discussion of California's custody mediation statute. It then will review the initial statute, criticisms of it, and subsequent amendments which have resulted in the current statute. The Note continues by summarizing custody mediation legislation throughout the United States. The following section will discuss the criticisms of child custody mediation, that principally have been advanced by many feminists. The Note will continue with a discussion of the advantages of mediation, with a review of quantifiable benefits as well as more subjective advantages of mediation. The final section will review the research that has been conducted comparing mandatory mediation to voluntary programs. The Conclusion will suggest that the legal community may be reluctant to use mediation due to a lack of familiarity with the process. In addition, the Conclusion will summarize suggested components for a mandatory custody mediation statute and ultimately recommend that more states enact such legislation.

II. CALIFORNIA'S CUSTODY MEDIATION STATUTE

A. *California Civil Code Section 4607*

Section 4607 of the California Civil Code, which was enacted in 1980 and became effective on January 1, 1981, required all contested cases of child custody or visitation to be mediated prior to a court hearing on the divorce.⁴ The statute's purpose was to "reduce acrimony which may exist between the parties and to develop an agreement, assuring the child or

¹ CAL. CIV. CODE § 4607 (West 1993) (repealed 1994).

² Jay Folberg, *The Changing Family — Implications for the Law*, CONCILIATION CTS. REV., Dec. 1981, at 4.

³ The six other states are Delaware, Maine, New Mexico, Oregon, Washington, and Wisconsin. See Table I, *infra* pages 473-74.

⁴ CAL. CIV. CODE § 4607 (West 1993) (repealed 1994).

children's close and continuing contact with both parents after the marriage is dissolved."⁵

Since its enactment, Section 4607 has been amended seven times.⁶ These various amendments incorporated changes that required the mediator to effect an agreement that is in the best interests of the child, gave the mediator the authority to meet with the parties separately when there was evidence of a history of domestic violence, and allowed for the appointment of counsel to represent the minor children.⁷ The statute was repealed in 1994 and replaced with California Family Code Sections 3155-77. Later that same year, the newly enacted Sections 3155-77⁸ were replaced by California Family Code Sections 3160-92.⁹ No substantive changes in the law, however, were effected with these changes, and all amendments to the original statute have been incorporated in the new law.¹⁰

B. Criticisms of the California Statute

Since California's custody mediation statute was originally enacted, the state legislature has passed amendments which have answered many of the initial criticisms of the statute.¹¹ A discussion of some of these early criticisms, along with the legislature's subsequent responses, follows.

In early writings discussing California's custody mediation statute, a concern was raised that the statute did not specifically consider the best interests of the child.¹² This was viewed as a glaring omission because the prevailing view of custody determination is that all agreements or plans for the child's future should be formulated with the idea of promoting the best interests of the child.¹³ In 1985 the California Legislature enacted a provision that allowed a mediator to recommend to the court that counsel be appointed to represent the best interests of the minor child.¹⁴ In 1988 the legislature enacted a provision that required the mediator to use his best

⁵ CAL. CIV. CODE § 4607 (West 1993) (repealed 1994).

⁶ See CAL. CIV. CODE § 4607 HISTORICAL AND STATUTORY NOTES (West 1993) (repealed 1994).

⁷ *Id.*

⁸ See CAL. FAM. CODE § 3160 HISTORICAL AND STATUTORY NOTES (West 1994).

⁹ *Id.*

¹⁰ *Id.*

¹¹ See *supra* notes 6-7 and accompanying text.

¹² See, e.g., Michelle Deis, Note, *California's Answer: Mandatory Mediation of Child Custody and Visitation Disputes*, 1 OHIO ST. J. ON DISP. RESOL. 149, 168 (1985).

¹³ *Id.*

¹⁴ 1985 Cal. Stat. 361.

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efforts to formulate a plan that is in the best interests of the child.¹⁵ These two amendments revised the statute so as to correct the original omission of a best interest standard.

A further criticism levied against California's statute was that it lacked judicial protection for women.¹⁶ This concern is based on the assertion that in our society there is a power imbalance between men and women resulting from a man's higher earning power.¹⁷ Adding to this imbalance is a woman's willingness to make financial concessions during custody disputes in an effort to maintain custody of her children.¹⁸ In effect, the wife is viewed as being willing to sacrifice, in terms of the property settlement, child support, and spousal support in an effort to keep custody of the couple's children. The wife "bargains" away future financial considerations, and as a result, is in need of the court's protection.

The California Legislature addressed this concern in its 1988 amendments to the statute that limited mediation exclusively to the resolution of custody or visitation issues.¹⁹ By keeping the resolution of custody issues separate from property settlement discussions, it is anticipated that less "bargaining" of custody for financial considerations would occur.

Another area of concern was that the statute required mediation in all contested cases of child custody²⁰ and did not allow for an exception in cases with a history of spousal abuse. The problem in this instance is that a victim of spousal abuse is unable to effectively mediate with her tormentor. This issue was also addressed by the 1988 amendments, which allowed for separate mediation if there has been a history of domestic violence.²¹

This historical analysis of criticisms of California's custody mediation statute is important not only to show the development of the current statute, but also because these same concerns have been raised concerning custody mediation statutes in general. These criticisms will be explored further in Part IV of this Note. California has been able to revise its statute to address these concerns and quiet some of its critics. Other states have had the opportunity to learn from California's experience in developing their own custody mediation statutes.

¹⁵ 1988 Cal. Stats. 1377, 1550.

¹⁶ Deis, *supra* note 12, at 167.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ 1988 Cal. Stats. 1377, 1550.

²⁰ Deis, *supra* note 12, at 166.

²¹ 1988 Cal. Stats. 1377, 1550.

III. SUMMARY OF CUSTODY MEDIATION STATUTES

Following California's enactment of Section 4607, approximately sixty percent of the remaining states have passed a custody mediation statute in one form or another. Table I summarizes custody mediation statutes in the United States. The majority of the statutes are discretionary in nature, allowing for mediation upon the recommendation of the court or the request of one of the parties. Only eight states, including California, require the mediation of all contested custody issues. Some states are still in the process of implementing pilot programs in order to evaluate the effectiveness of custody mediation prior to a full-scale commitment.

In addition to the discretionary/mandatory nature of the statutes, Table I lists three other issues that have been incorporated into some state statutes. The first is a best interests standard. This column reports whether or not a particular state's custody mediation statute incorporates a mandate that the best interests of the child be considered in the formulation of a mediated agreement. Only fifteen states have incorporated a best interests standard in their custody mediation statutes. The second issue in Table I is whether a state allows for the appointment of counsel to represent the child. Only one state, Alaska, requires that counsel be appointed to represent the child, while three others, including California, allow for, but do not require, the appointment of counsel. The appointment of counsel for the child is a further indication of an intent to represent the best interests of the child during the mediation process. The final issue summarized in Table I indicates those states which excuse mediation upon evidence of a history of spousal abuse. California in particular, allows the parties to mediate separately upon evidence of abuse. There are seventeen states which excuse mediation upon evidence of abuse.

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TABLE I

**AN OVERVIEW OF CUSTODY MEDIATION LEGISLATION
IN THE UNITED STATES²²**

State	Type of Program	Employs Best Interests of Child Standard	Court Appointed Representative for Child	Excuses Mediation Upon Evidence of Spouse Abuse
Alaska	discretionary	—	required	—
California	mandatory	yes	permitted	parties may mediate separately
Colorado	discretionary	—	—	—
Connecticut	discretionary	—	—	—
Delaware	mandatory	—	—	—
Florida	discretionary	—	—	yes
Idaho	discretionary	—	—	—
Illinois	discretionary	yes	—	yes
Iowa	discretionary	yes	—	—
Kansas	discretionary	yes	—	—
Louisiana	discretionary	yes	—	yes

²² See ALASKA STAT. § 25.20.080 (1994); CAL. FAM. CODE §§ 3160-92 (West 1994); COLO. REV. STAT. ANN. § 14-10-123.5 (West 1994); CONN. GEN. STAT. § 46b-53a (West Supp. 1994); DEL. FAM. CT. CIV. RULE ANN. 16(b); FLA. STAT. ANN. §§ 44.102, 61.183 (West Supp. 1995); IDAHO C.P.R. 16(j) (1993); ILL. ANN. STAT. ch. 750, para. 5/602.1, 5/607.1 (Smith-Hurd Supp. 1994); IOWA CODE ANN. § 598.41 (West Supp. 1994); KAN. STAT. ANN. §§ 23-602, 23-603 (1988); LA. REV. STAT. ANN. §§ 9:332, 9:363 (West Supp. 1994); ME. REV. STAT. ANN. tit. 19, § 752 (West Supp. 1994); MD. RULE S73A; MICH. COMP. LAWS ANN. § 552.513 (West 1988); MINN. STAT. ANN. § 518.619 (West Supp. 1994); MO. ANN. STAT. § 452.375 (Vernon Supp. 1994); MONT. CODE ANN. §§ 40-4-301 to 40-4-308 (1993); NEV. REV. STAT. ANN. § 3.500 (Michie Supp. 1993); N.J. CT. RULE 1:40-5; N.M. STAT. ANN. § 40-4-8 (Michie 1994); N.C. GEN. STAT. § 50-13.1 (Supp. 1994); N.D. CENT. CODE § 14-09.1-02 (1991); OHIO REV. CODE ANN. § 3109.052 (Baldwin 1992); OR. REV. STAT. § 107.179 (1993); R.I. GEN. LAWS § 15-5-29 (1988); S.D. CODIFIED LAWS ANN. § 25-4-56 (Supp. 1994); UTAH CODE ANN. § 30-3-21 (Supp. 1994); VA. CODE ANN. §§ 16.1-272.1, 20-124.2 (Michie Supp. 1994); WASH. REV. CODE ANN. § 26.09.184 (West Supp. 1994); W. VA. CODE § 48A-5-7a (Supp. 1994); WIS. STAT. ANN. § 767.11 (West 1993, Supp. 1994).

Maine	mandatory	yes	—	yes
Maryland	discretionary	—	—	yes
Michigan	discretionary	—	—	—
Minnesota	discretionary	yes	—	yes
Missouri	discretionary	yes	—	yes
Montana	discretionary	yes	—	yes
Nevada ²³	mandatory	—	—	yes
New Jersey	mandatory	yes	—	yes
New Mexico	mandatory	yes	permitted	yes
North Carolina ²⁴	mandatory	yes	—	yes
North Dakota	discretionary	—	—	yes
Ohio	discretionary	yes	—	yes
Oregon	mandatory	—	—	yes
Rhode Island	discretionary	—	—	—
South Dakota	mandatory	—	—	—
Utah ²⁵	mandatory	—	—	—
Virginia ²⁶	discretionary	yes	—	—
Washington	discretionary	yes	—	yes
West Virginia ²⁷	mandatory	—	—	—
Wisconsin	mandatory	—	permitted	yes

IV. CRITICISMS OF CUSTODY MEDIATION

Some feminists have been leading critics of custody mediation and have expressed concern that mediation can be unfair to women overall.²⁸ This

²³ NEV. REV. STAT. ANN. § 3.500 (Michie Supp. 1993). A mediation program is mandatory in counties with a population between 100,000 and 400,000. Counties with a population less than 100,000 may implement a mediation program at their discretion. If a program is implemented, it must be mandatory.

²⁴ N.C. GEN. STAT. § 50-13.1 (Supp. 1994). The program is mandatory in counties where it is available, but it is not mandatory that all counties establish a program.

²⁵ UTAH CODE ANN. § 30-3-21 (Supp. 1994). This program is only a pilot program, mandatory mediation is not yet state-wide.

²⁶ VA. CODE ANN. §§ 16.1-272.1, 20-124.2 (Michie Supp. 1994). This program will become effective 7/1/96 if sufficient funds are available.

²⁷ W. VA. CODE § 48A-5-7a (Supp. 1994). This program is only a pilot program, mandatory mediation is not yet state-wide.

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concern stems from the belief that a wide power imbalance exists between men and women in society as a whole.²⁹ One aspect of this argument asserts that mediation favors men due to certain innate characteristics they possess, as well as societal attitudes in general.³⁰ Men are perceived as having an advantage in divorce mediation because they generally are more educated than their wives,³¹ learn negotiating skills through their jobs,³² have a higher level of income³³ and generally are granted higher status in society than women.³⁴

The problem with this argument is that it lacks support. It is believable that a person would be likely to have an advantage in negotiations if that person had a significantly higher level of education than his or her opponent. This is witnessed when observing the negotiations that occur between a parent and a child. But this analogy does not necessarily transfer to the context of a husband and a wife. There is not, on average, a substantial difference in the education levels between a husband and a wife. Studies have shown that most men and women marry someone with a similar education level³⁵ and that the average difference between spouses is typically as slight as 0.3 years.³⁶ A difference in education levels of such modest proportions would hardly give one party a significant advantage when negotiating with the other party.

The assertion that all men learn negotiating skills through their jobs is equally flawed. While it is true that some men may acquire knowledge of legal rights and finances, or enhanced negotiating skills through their jobs, this does not mean that all men do. It also completely discounts the fact that many women can acquire these same skills through their jobs. As an increasing percentage of women enter the work force, this becomes an even larger over-generalization. First, any knowledge that *any* person, man or woman, gains through his or her job is usually not general in nature, but specific to their job. A man may acquire knowledge about certain standard

²⁸ Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991); see also Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441 (1992).

²⁹ Bryan, *supra* note 28, at 445.

³⁰ Carol S. Bruch, *And How Are the Children?: The Effects of Ideology and Mediation on Child Custody Law and Children's Well-being in the United States*, 2 INT'L J.L. & FAM. 106, 120 (1988).

³¹ Bryan, *supra* note 28, at 450.

³² *Id.* at 452.

³³ *Id.* at 449.

³⁴ *Id.* at 458-63.

³⁵ *Id.* at 450-51.

³⁶ Bryan, *supra* note 28, at 451 n.30.

contractual obligations in his line of work, but it does not follow that this knowledge is transferable to the divorce arena. It is for this very reason that an attorney will often hire another attorney to handle a matter which is outside his or her area of expertise. Even attorneys, who certainly have a higher level of "legal" knowledge than the average person, do not have a strong base of knowledge in every area of the law. To postulate that someone who works is thereby exposed to negotiating, and as a result has an advantage in divorce mediation, is simply too tenuous a connection. To claim that even a construction foreman has an advantage in the area of divorce mediation, because his job requires him to engage in negotiations,³⁷ is simply a *non sequitur*.

An argument is also asserted that men have an advantage in divorce mediation due to their higher level of income.³⁸ This advantage follows from the assumption that men use this monetary advantage to hire experts to advise them in their divorce mediation.³⁹ Yet, as with other arguments, there is no substantiation that higher earning spouses (i.e., men) are in fact hiring expert advisors to assist them. Additionally, if men are in fact hiring experts to assist them in mediation, this would not differ from their ability to hire these same experts to assist them in the standard adversarial format.

Those opposed to mediation assert that women's innate weaknesses lead them to accept poor proposals in divorce mediation.⁴⁰ As discussed later in this Note, this statement is refuted by several studies on divorce mediation which have demonstrated that generally women are pleased with the results achieved through mediation.⁴¹ Additionally, some mediation statutes allow the parties to review the proposed mediated agreement with their attorneys before entering into a final agreement.⁴² This is designed to protect both sides from accepting an inferior agreement. Overall, there is simply not enough support for the claim that legal review of mediated agreements is insufficient in providing results as favorable to the weaker spouse (i.e., women) as lawyer-negotiated, litigated agreements.⁴³

In the one area where one would generally assume that women have a societal advantage—child custody—opponents argue that women still lose.⁴⁴ In this case, opponents of custody mediation argue that women lose because

³⁷ Bryan, *supra* note 28, at 452.

³⁸ *Id.* at 449.

³⁹ *Id.*

⁴⁰ *Id.* at 481.

⁴¹ See Part V, B *infra* for a discussion of the benefits of mediation.

⁴² See, e.g., CAL. FAM. CODE § 3186(a) (1994); FLA. STAT. ANN. § 61.183(2) (West Supp. 1995); MINN. STAT. ANN. § 518.619 (West Supp. 1994).

⁴³ *Contra* Bryan, *supra* note 28, at 515.

⁴⁴ *Id.* at 490-91.

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mediators are biased towards joint custody agreements.⁴⁵ “Mediator intervention results in custody arrangements more favorable to fathers than fathers could obtain in direct negotiations with their authoritative wives.”⁴⁶ Opponents do not offer strong support for this claim; they merely state it as an inherent fact of the process of mediation.⁴⁷

It is interesting to note that some feminists will characterize mediators as skillful,⁴⁸ professional, and coercive expert authorities⁴⁹ when they are manipulating women out of their just rewards. Yet when these same mediators are not able to properly protect women, they are depicted as ignorant and lacking in skills.⁵⁰ The description changes depending on whether mediators are taking advantage of women, or whether mediators are failing to adequately represent the interests of women. The fallacy of this argument is that it applies equally to female mediators, which means that even women who are mediators are unable to protect, and are biased against, members of their own sex.

Some feminists also assert that it is a less desirable outcome when a wife’s initial idea concerning custody is changed during mediation from sole to joint.⁵¹ While this may be true in certain instances, it cannot be stated as a universal truth. Many custody mediation statutes require the development of an agreement that is in the best interests of the children.⁵² There is no support for the assertion that sole maternal custody represents the best interests of the child in every case.

Some feminists assert that mediation avoids discussing fault, which may be relevant to formulating decisions for the future.⁵³ While awareness of *past* behavior may be beneficial to structuring a *future* relationship, establishing guideposts to monitor *future* behavior, and monitoring *future* compliance with an agreement, the issue of fault or blame is not a positive influence in determining a plan for the *future*. Therefore, the exclusion of fault should not hinder the formulation of a plan agreement.

A further criticism of mediation is that it is not a setting that allows emotion into the legal process.⁵⁴ Mediation especially discourages the exhibition of anger, which is an important part of a woman’s and man’s

⁴⁵ Bryan, *supra* note 28, at 490-91

⁴⁶ *Id.* at 491.

⁴⁷ *Id.* at 494.

⁴⁸ *Id.*

⁴⁹ Bryan, *supra* note 28, at 490.

⁵⁰ *Id.* at 498.

⁵¹ *Id.* at 491-93.

⁵² See Table I, *supra* pages 473-74.

⁵³ Grillo, *supra* note 28, at 1560.

⁵⁴ *Id.* at 1572.

recovery from the divorce.⁵⁵ From this perspective, litigation is considered advantageous because it does not have a similar prohibition on the expression of anger.⁵⁶ However, the statutes that are cited as offensive for this reason, e.g., California's Civil Code Section 4607, separate only the issues of child custody and visitation for mediation.⁵⁷ The other issues of the divorce continue through the normal adversarial mode and are not mediated. This bifurcation allows for the expression of anger, which is deemed important to a woman's and man's recovery.

Opponents of custody mediation assert that, in mandatory mediation, participants are not allowed to make their own decisions. The criticism arises because the participants do not choose the process, or the mediator. In addition, they either cannot involve their attorneys or can involve them only to a limited degree.⁵⁸ For these reasons, mediation loses its supposed primary benefit: a voluntary setting in which the participants formulate their own plan. While it is true that, under mandatory mediation statutes, the participants do not choose all aspects of the process, they do still formulate their own plans. The participants are still the parties who must design their agreement regardless of whether they have chosen the specific mediator, or the process of mediation itself. The loss of decision-making ability supposedly exists because the participants do not have full and free rein over all the components in mediation. This should not negate all the benefits that can be achieved through mediation simply because some structure is applied to the process.

One of the more interesting points proposed by one feminist is that mediation favors liars, thereby making the nonlying spouse look hysterical.⁵⁹ Therefore, women who allege spousal abuse in order to be excused from mediation should not be required to substantiate their claims of spousal abuse.⁶⁰ While it may be difficult for an abused spouse to confront her abuser, this is not a sufficient reason to do away with requiring the substantiation of the allegation. In essence, the argument claims that women should be believed when they allege abuse because they could not possibly be making a false accusation as it is so difficult for them to raise these allegations in the first place. Using the logic that mediation favors liars, any man who denies abusing his wife must also be lying. This is truly outrageous, as it advocates a complete abandonment of one of the basic tenets of our legal system: the presumption of innocence until guilt is

⁵⁵ Grillo, *supra* note 28, at 1572.

⁵⁶ *Id.*

⁵⁷ CAL. FAM. CODE § 3178 (1994).

⁵⁸ Grillo, *supra* note 28, at 1581.

⁵⁹ *Id.*

⁶⁰ *Id.*

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proven. Though there is a valid argument for diverting those cases involving spousal abuse from mediation,⁶¹ it is an insufficient reason to reformulate our legal system. Nonetheless, many custody mediation statutes do exclude cases involving spousal abuse from custody mediation.⁶²

Some feminists assert that mandatory mediation is inferior to litigation because judges can maintain impartiality better than mediators⁶³ and mediation too often favors joint custody.⁶⁴ Like a judge, a mediator's job is to remain neutral throughout the process.⁶⁵ There is no support for the accusation that mediators will be more biased than judges, as both jobs require neutrality. Regardless of any alleged bias of the facilitator, litigation should result in joint custody awards just as often as mediation because many divorce statutes require the consideration of the best interests of the children. Additionally, there is no support for the assertion that sole maternal custody is always preferable to joint custody.

A further problem asserted by opponents is that attorneys who represent the mediation participants are excluded from mediation sessions.⁶⁶ This exclusion prevents the attorneys from being able to protect their clients' rights.⁶⁷ However, few custody mediation statutes absolutely preclude the presence of the parties' attorneys.⁶⁸ Since many statutes allow for attorney review prior to accepting a final agreement, there is an opportunity for an attorney to protect his or her client's rights.⁶⁹ The presence of attorneys in mediation sessions might detract from the objective of mediation, which is to have the participants formulate their own agreement. It may be better to

⁶¹ Robert Geffner & Mildred D. Pagelow, *Mediation and Child Custody Issues in Abusive Relationships*, 8 BEHAV. SCI. & L. 151, 156-57 (1990); see also Bruch, *supra* note 30; Sheila J. Kuehl, *Is Mediation Unfair to Women?: Forced Mediation "Downright Dangerous" for Battered Women*, L.A. DAILY J., Oct. 29, 1992, at S4 (identifying critics' claim that mandatory custody mediation in cases of spousal abuse is counter-productive because there is an increase in abuse following mediation).

⁶² See Table I, *supra* pages 5-6. Critics of custody mediation have also raised the issue of forced mediation in cases of spouse abuse, indicating that there is an increase in abuse following mediation. Bruch, *supra* note 30; see also Kuehl, *supra* note 61, at 54. This point is well taken, and has led to a provision in many custody statutes allowing for the exclusion of cases involving spouse abuse.

⁶³ Grillo, *supra* note 28, at 1589.

⁶⁴ *Id.* at 1594-95; see also Bruch, *supra* note 30, at 122.

⁶⁵ Nancy G. Maxwell, *Keeping the Family Out of Court: Court-Ordered Mediation of Custody Disputes Under the Kansas Statutes*, 25 WASHBURN L.J. 203, 211 (1986).

⁶⁶ *Id.*

⁶⁷ Grillo, *supra* note 28, at 1597.

⁶⁸ See, e.g., ALASKA STAT. § 25.20.080 (1994).

⁶⁹ See *supra* note 42.

limit an attorney's involvement to the review of the proposed mediated agreement.

Another criticism raised regarding custody mediation is that it is based on compromise.⁷⁰ This concern appears to be misplaced because compromise is often a part of the adversarial route as well. In litigation, both parties cannot achieve everything they want in the absence of compromise. In such cases, the ultimate agreement often requires compromise regardless of whether litigation or mediation is employed.

Another concern that has been raised is that women are more depressed during custody mediation than during custody litigation.⁷¹ Some have asserted this is due to mediation not allowing for the expression of anger.⁷² However, there do not appear to be any reported long term ill effects from this depression. Additionally, contrary to this assertion, most studies have shown that women are more satisfied with mediation than litigation.⁷³

It has also been asserted that because successful mediation requires a voluntary commitment, by definition mandatory mediation cannot be successful.⁷⁴ However, studies have not confirmed this assertion.⁷⁵ Couples have been able to successfully formulate a custody plan where the mediation was mandated.⁷⁶

It has also been argued that mediation is just another obstacle to obtaining a divorce because if no agreement is reached through mediation, the couple must still proceed to litigation.⁷⁷ This is true for those cases that are unable to reach agreement. However, as this Note will discuss in Part V, studies have shown that mediation is successful in producing an agreement in the majority of cases.⁷⁸

⁷⁰ Bruch, *supra* note 30, at 119.

⁷¹ *Id.* (citing Robert E. Emery & Melissa M. Wyer, *Child Custody Mediation and Litigation: An Experimental Evaluation of the Experience of Parents*, 55 J. CONSULTING & CLINICAL PSYCHOL. 179, 184 (1987)).

⁷² See *supra* notes 60-62 and accompanying text.

⁷³ See *infra* notes 120-25 and accompanying text.

⁷⁴ Susan C. Kuhn, Comment, *Mandatory Mediations*: California Civil Code Section 4607, 33 EMORY L.J. 733, 757 (1984).

⁷⁵ See, e.g., Melanie R. Trost et al., *Mandatory Mediation: Encouraging Results for the Court System*, 26 CONCILIATION CTS. REV. 59 (1988).

⁷⁶ *Id.* at 63.

⁷⁷ Kuhn, *supra* note 74, at 758 (citing Margaret S. Herrman et al., *Mediation and Arbitration Applied to Family Conflict Resolution: The Divorce Settlement*, 34 ARB. J., Mar. 1979, at 20-21).

⁷⁸ See, e.g., Robert E. Emery & Joanne A. Jackson, *The Charlottesville Mediation Project: Mediated and Litigated Child Custody Disputes*, MEDIATION Q., Summer 1989, at 3.

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Much of what opponents of custody mediation write has tenuous support. There are many assertions which lack statistical support and if support is provided, it is often outdated. Little of the support that is provided is based on custody mediation studies, but rather is of a more general sociological/psychological nature, and may not be relevant. Often, specific isolated instances are used to generalize the mediation process as a whole and serve as the basis for condemnation. While there will be problems with any system, the goal should be to try to minimize the problems while maximizing the benefits. As the discussion of studies conducted on divorce and custody mediation will show, and opponents of mediation will admit, the participants in mediation prefer it to litigation.⁷⁹

V. ADVANTAGES OF MEDIATION

A. *Quantifiable Advantages*

Only a few studies have attempted to quantify the results of a custody mediation program on the court system or the litigants. The majority of studies have focused on more subjective psychological measures, such as how the parties felt about the agreement they reached. The first studies to report quantifiable benefits of custody mediation came from California. Prior to the enactment of California Civil Code Section 4607, many of the counties in California had already instituted mediation programs. The San Francisco Superior Court started a mandatory custody mediation program in 1977. In 1980 an evaluation of its program showed a reduction in the average number of custody or visitation hearings from 275 per year in 1977 to three in 1980.⁸⁰

A later study conducted in Virginia found a similar caseload reduction due to mediation.⁸¹ The Charlottesville Mediation Project found that mediation resulted in a sixty-seven percent reduction in the number of cases going to trial.⁸² Additionally, mediated final agreements were achieved in one-half of the time required to reach a final agreement through litigation.⁸³

A 1979 study of Los Angeles County's custody mediation program demonstrated substantial monetary savings for the county. Three hours of

⁷⁹ Grillo, *supra* note 28, at 1548-49.

⁸⁰ Deis, *supra* note 12, at 160 (citing AMERICAN BAR ASSOCIATION, SPECIAL COMMITTEE ON DISPUTE RESOLUTION, MONOGRAPH SERIES - NO. 2, LEGISLATION ON DISPUTE RESOLUTION 18 (1984)).

⁸¹ Emery & Wyer, *supra* note 71, at 182.

⁸² *Id.*

⁸³ *Id.*

mediation versus a standard two-day trial was estimated to save the county over \$280,000 for the year 1979.⁸⁴ The annual savings to Los Angeles County was estimated to be between \$990,000 and \$1,140,000 for 1982.⁸⁵

A mid-1980s study of a Marin County, California divorce mediation program found the average cost to the parties to be 134 percent higher for litigation.⁸⁶ In this study the average cost to litigate a divorce was \$12,226, while the average cost to mediate a divorce was only \$5,234.⁸⁷ The mediation figure included the cost of consulting with an attorney regarding the divorce and the mediated agreement.

A study of mediation conducted in Georgia and North Carolina found an even greater disparity in the cost of reaching a final agreement depending on whether mediation or litigation was used.⁸⁸ The total cost of reaching a final divorce agreement in litigation was three times the cost of reaching an agreement through mediation.⁸⁹

These studies show that the mediation of custody disputes can lead to cost savings to the parties and the court system. The savings result from fewer cases proceeding to full trial and the reduced time involved in reaching an agreement. The Marin County study demonstrated a cost savings can be achieved while still allowing the parties to consult with an attorney, which better ensures that the parties' interests are protected by the agreement.

B. Subjective Advantages

As a dispute resolution technique, mediation has many typically cited benefits. Mediation allows the parties to reach their own agreement and determine what is best for themselves rather than having an agreement forced upon them by the courts.⁹⁰ "Mediation stresses honest, open communication, attention to the underlying causes of disputes,

⁸⁴ Hugh McIsaac, *Mandatory Conciliation Custody/Visitation Matters: California's Bold Stroke*, 19 CONCIILIATION CTS. REV., Dec. 1981, at 73, 77.

⁸⁵ Hugh McIsaac, *Court-Connected Mediation*, 21 CONCIILIATION CTS. REV., Dec. 1983, at 49, 53.

⁸⁶ Joan B. Kelly, *Is Mediation Less Expensive?: Comparison of Mediated and Adversarial Divorce Costs*, 8 MEDIATION Q., Fall 1990, at 15, 19.

⁸⁷ *Id.*

⁸⁸ Jay Folberg, *Mediation of Child Custody Disputes*, 19 COLUM. J. L. & SOC. PROBS. 413, 427 (1985).

⁸⁹ *Id.* at 429 (footnote omitted).

⁹⁰ Deis, *supra* note 12, at 164; *see also* Folberg, *supra* note 88, at 421 (citing Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 956-57).

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reinforcement of positive bonds, and avoidance of blame.⁹¹ Mediation is less adversarial than litigation, promotes conciliation, and focuses on the future.⁹² Mediation reduces conflict and fosters a commitment to the successful implementation of an agreement.⁹³ In mediation there is a lower likelihood that custody of the children will be used as a bargaining chip in the formation of the agreement.⁹⁴

The desired outcome of a custody dispute is a parenting plan for the future. Although their marriage has ended, parents will continue to interact through the necessity of carrying out the custody and visitation plan. In most cases, they must continue to make joint decisions regarding their children. Children are affected by custody disputes⁹⁵ and litigation is often directly contrary to the children's interest in maintaining a stable environment.⁹⁶ A process that lessens that conflict and encourages future cooperation also furthers the best interests of the children, which is the stated objective of most custody legislation.⁹⁷

Studies conducted to determine the subjective views of participants are more numerous than the studies discussed in the previous section, and while they do not yield statistical data, their findings are no less valuable. In their studies of custody mediation in Colorado and Delaware, Jessica Pearson and Nancy Thoennes found that mediation was more likely to result in joint legal custody and higher rates of visitation for the noncustodial parent.⁹⁸ The parties who went through mediation were more pleased with the process than were those who used litigation.⁹⁹ The participants in mediation

⁹¹ Jessica Pearson, *Child Custody: Why Not Let the Parents Decide?*, 20 JUDGES J. Winter 1981, at 4-5.

⁹² Deis, *supra* note 12, at 164.

⁹³ Kuhn, *supra* note 74, at 745-46; *see also* Christopher W. Camplair & Arnold L. Stolberg, *Benefits of Court-Sponsored Divorce Mediation: A Study of Outcomes and Influences on Success*, 7 MEDIATION Q. 199, 204 (1990).

⁹⁴ Deis, *supra* note 12, at 165; *see also* Stephen W. Schlissel, *A Proposal for Final and Binding Arbitration of Initial Custody Determinations*, 26 FAM. L.Q. 71, 75 (1992).

⁹⁵ *Recommendation of the Law Revision Commission to the 1985 Legislature: Relating to the Child Custody Decision-Making Process*, 19 COLUM. J. L. & SOC. PROBS. 105, 109 (1985).

⁹⁶ Schlissel, *supra* note 94, at 74-75 (citation omitted); *see also Recommendation of the Law Revision Commission, supra* note 95, at 110.

⁹⁷ Kuhn, *supra* note 74, at 743-46; *see also* Camplair & Stolberg, *supra* note 93, at 199.

⁹⁸ Jessica Pearson & Nancy Thoennes, *Divorce Mediation: Reflections on a Decade of Research*, in MEDIATION RESEARCH: THE PROCESS AND EFFECTIVENESS OF THIRD-PARTY INTERVENTION 15, 18 (Kenneth Kressel et al. eds., 1989).

⁹⁹ *Id.* at 19.

felt that it helped them focus better on the needs of their children and provided a better opportunity to express their own points of view.¹⁰⁰ The studies also found a higher level of compliance with custody agreements and that mediation was viewed by the participants as less damaging to the relationship with their former spouse.¹⁰¹

Another long term mediation project, conducted by Robert Emery, has shown similar positive results.¹⁰² Among forty pairs of separated parents who were randomly assigned to settle their custody dispute by either mediation or litigation a higher percentage of the cases were settled in mediation.¹⁰³ Seventy-seven percent of the custody cases which attempted mediation were settled, whereas only thirty-one percent of the cases tried under the adversarial format settled out of court.¹⁰⁴ The average settlement time was also lower in mediation—three weeks versus seven weeks for litigated cases.¹⁰⁵

Emery's study also examined the effects of mediation on men and women. Men who participated in the mediation program were generally more satisfied with the outcome than were the men who participated in the litigation process.¹⁰⁶ The men who went through the mediation program felt that their rights were better protected and that they were more likely to feel that concern was shown for them, than were the men who went through litigation.¹⁰⁷ The men in mediation also reported that they were better able to settle problems with their former spouse.¹⁰⁸ Men were more likely to feel they were in a "win-win" situation in mediation than in litigation, whereas litigation was viewed as a "win-lose" situation.¹⁰⁹ Men also viewed mediation as having a positive effect on their children that resulted in a better relationship between the children and their mothers.¹¹⁰

In this study, mothers in the litigation group reported lower levels of depression.¹¹¹ While this result has been touted by opponents of custody mediation, it must be noted that this is only one study involving forty couples and a similar result has not been replicated in any other study. The

¹⁰⁰ Pearson & Thoennes, *supra* note 98, at 19.

¹⁰¹ *Id.* at 21-23.

¹⁰² Emery & Wyer, *supra* note 71.

¹⁰³ *Id.* at 182.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 182-83.

¹⁰⁷ Emery & Jackson, *supra* note 78, at 13-14.

¹⁰⁸ *Id.* at 11.

¹⁰⁹ *Id.* at 12.

¹¹⁰ Emery & Wyer, *supra* note 71, at 182-83.

¹¹¹ *Id.* at 184. A similar result was not experienced by men in the study.

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depression category was one of only two areas in which the litigation group fared better than the mediation group. As mentioned previously,¹¹² the higher levels of depression may be related to the suppression of anger. The second positive area for women in the litigation group was that they were more satisfied with their outcome.¹¹³ However, the women in mediation viewed mediation as having a more positive effect on their children than did the women in litigation.¹¹⁴ There was no difference among women in the two groups in terms of their perception of how well their rights were protected or if concern had been shown for them.¹¹⁵

In a broad-based study for the National Center for State Courts (NCSC), positive results were found.¹¹⁶ The NCSC study viewed the impact of court-based mediation programs and traditional litigation on the resolution of custody, visitation, and support issues in divorce cases in four states.¹¹⁷ The participants in mediation viewed the process as fairer, felt less pressure to agree to things they did not want, felt less pressure to reach a quick agreement, felt their rights were better protected, and were more satisfied with their agreements.¹¹⁸ The study also found that in the majority of cases mediation took less time to reach a final agreement than did litigation.¹¹⁹

In the NCSC study, women participants viewed the mediation process most positively. Women in the mediation group were more pleased with the results than those in the litigation group.¹²⁰ The women in the mediation group perceived less intimidation from their spouses and felt they had more control over the decisions than did their counterparts in the litigation group.¹²¹

In the mediation group, women were more positive about the process than men.¹²² The women viewed the process as more fair and were more likely to feel that their rights were protected. In addition, the women felt

¹¹² See *supra* notes 54–56, 67 and accompanying text.

¹¹³ Emery & Wyer, *supra* note 71, at 183.

¹¹⁴ *Id.*

¹¹⁵ Emery & Jackson, *supra* note 78, at 13–14.

¹¹⁶ SUSAN L. KEILITZ ET AL., NATIONAL CTR. FOR STATE CTS., MULTI-STATE ASSESSMENT OF DIVORCE MEDIATION AND TRADITIONAL PROCESSING (1992).

¹¹⁷ The four states in the NCSC study were Florida, Nevada, New Mexico, and North Carolina.

¹¹⁸ Keilitz, *supra* note 116, at 20–21.

¹¹⁹ *Id.* at 42–43.

¹²⁰ *Id.* at 26.

¹²¹ Keilitz, *supra* note 116, at 20–21.

¹²² *Id.*

they had control over decisions and were treated with respect.¹²³ The women were also less likely than the men to feel that the rules favored their former spouse, but more likely to feel intimidated by their former spouse.¹²⁴

Since 1983, Joan Kelly has studied the effects of divorce through mediation and litigation at the Northern California Mediation Center. Her studies demonstrated that women in mediation were more confident of their ability to stand up for themselves than were men.¹²⁵ Both men and women felt that mediation helped them become more reasonable in their dealings with their former spouse, although the women felt this more strongly than the men.¹²⁶ Couples in mediation were more satisfied with the overall process, happier with the custody agreement, and felt that mediation better incorporated an understanding of the child's needs.¹²⁷ The litigation group did have a higher rating in one area — they were more likely to feel that a viewpoint had been imposed on them.¹²⁸

Kelly followed the participants for two years to see if the initial benefits of mediation were lasting or transitory in nature. The couples who went through mediation reported less tension and hostility for the six months prior to divorce as well as for a full year following the divorce.¹²⁹ The participants who went through litigation reported that their level of anger actually increased through the adversarial process.¹³⁰ The mediation group also reported that for the two years following divorce they were more likely to communicate with their former spouse, experienced more cooperation, and held more positive perceptions of their former spouse.¹³¹ Kelly's studies show that the beneficial effects of mediation last.

Positive results for mandatory custody mediation have also been demonstrated in a two year study in Alameda County, California.¹³² The study showed that the participants preferred mediation to litigation and that

¹²³ KEILITZ, *supra* note 116, at 26.

¹²⁴ *Id.* at 27-29.

¹²⁵ Joan B. Kelly, *Mediated and Adversarial Divorce: Respondents' Perceptions of Their Processes and Outcomes*, MEDIATION Q., Summer 1989, at 71, 78.

¹²⁶ *Id.* at 79.

¹²⁷ *Id.*

¹²⁸ *Id.* at 78.

¹²⁹ Joan B. Kelly, *Parent Interaction After Divorce: Comparison of Mediated and Adversarial Divorce Processes*, 9 BEHAV. SCI. & L. 387, 393 (1991).

¹³⁰ *Id.* at 394.

¹³¹ Kelly, *supra* note 129, at 394-95.

¹³² Mary A. Duryee, *Mandatory Court Mediation: Demographic Summary and Consumer Evaluation of One Court Service*, 30 FAM. AND CONCILIATION CTS. REV., April 1992, at 260-62.

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women viewed the process more favorably than did men.¹³³ A recent state-wide study in California also found that more than eighty percent of its participants viewed mediation positively.¹³⁴

A study of divorce mediation in New Hampshire has echoed similar positive results.¹³⁵ The couples who went through mediation were more satisfied with their agreements, more likely to view the agreements as fair, and reported more harmonious relationships following the divorce than the couples who litigated their divorces.¹³⁶ Mediation was more likely to result in joint legal custody, and also more likely to result in compliance with the agreement.¹³⁷ Ninety-seven percent of the noncustodial parents in the mediation group made all child support payments, while only sixty-three percent of the noncustodial parents in the litigation group made all child support payments.¹³⁸

A study of the effects of a mandatory mediation program in Arizona has also produced positive results.¹³⁹ In viewing the Superior Court of Arizona in Maricopa County, both prior and subsequent to the implementation of mandatory mediation, the study found that mediation helped more participants reach an agreement outside of the court's intervention.¹⁴⁰ Mandatory mediation also required less time to reach a final agreement.¹⁴¹

Overwhelmingly, these studies have shown the positive benefits of using mediation in child custody cases. Mediation is a faster process and is viewed more positively by its participants than litigation. The concerns for women raised by some feminists, discussed in the Fourth Part of this Note, have not been verified. With few exceptions, women have preferred mediation over litigation. Of course, the quality of the mediation program will vary and there are still a few problems with it, but mediation shows more promise than litigation as a fair and effective method for resolving custody disputes for both men and women.

¹³³ Duryee, *supra* note 132, at 265.

¹³⁴ Mary Duryee & Hugh McIsaac, *Is Mediation Unfair to Women?: Evidence Reveals Mediation Fairer than Adversarial Process*, L.A. DAILY J., Oct. 29, 1992, at S1.

¹³⁵ Barbara J. Bautz & Rose M. Hill, *Divorce Mediation in New Hampshire: A Voluntary Concept*, 7 MEDIATION Q. 33 (1989).

¹³⁶ *Id.* at 37-39.

¹³⁷ *Id.* at 37.

¹³⁸ *Id.*

¹³⁹ Trost, *supra* note 75.

¹⁴⁰ Trost, *supra* note 75, at 61.

¹⁴¹ *Id.* at 63.

VI. MANDATORY VS. DISCRETIONARY

Little work has been done in the area of studying mandatory mediation versus voluntary mediation. Critics have asserted that mediation must, by its very nature, be voluntary to work properly.¹⁴² Studies have not shown this to be true. In an Arizona study, mandatory custody mediation did not yield any less likelihood of reaching a final agreement than voluntary mediation.¹⁴³

The only real difference between mandatory and voluntary mediation is that a mandatory custody mediation statute requires the parents to attempt to mediate any and all contested custody or visitation issues. A voluntary or discretionary custody mediation statute allows mediation, as an option, to settle a custody or visitation contest if either the court thinks it would be advisable or if one of the parties requests it. Beyond this, the statutes are similar in nature. Any final mediated agreement is submitted to the court for approval. In the event that mediation fails to result in an agreement, the parties may proceed through the normal adversarial mode.

In comparisons between mandatory and voluntary mediation programs in California, Minnesota, and Connecticut, Jessica Pearson reported that whether the program was voluntary or mandatory in nature did not affect the percentage of participants who reached a final agreement.¹⁴⁴ In fact, eighty-five to ninety percent of those who participated in the programs favored mandatory mediation.¹⁴⁵ Even two-thirds of those participants who failed to reach a mediated agreement favored mandatory mediation.¹⁴⁶

Pearson did report that the public sector participants slightly favored voluntary mediation.¹⁴⁷ This outcome may be more a reflection of the poorer quality of the publicly funded programs than a difference between the voluntary or mandatory nature of the programs.¹⁴⁸ What this public sector outcome may demonstrate is a need for better training of mediators and a system to ensure that the programs maintain a higher level of quality.

Critics of mandatory custody mediation may favor voluntary programs because they can be recommended when needed, but avoid subjecting everyone to mediation. In voluntary mediation, the decision is left to the discretion of the judge. As the studies noted above have shown, there are no

¹⁴² See *supra* note 74 and accompanying text.

¹⁴³ Trost, *supra* note 75, at 64.

¹⁴⁴ Jessica Pearson, *Ten Myths About Family Law*, 27 FAM. L.Q. 279, 286-87 (1993).

¹⁴⁵ *Id.* at 287.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 287. Public sector participants were those who used the mediation services provided by the court system, as opposed to a private mediation center.

¹⁴⁸ Pearson, *supra* note 144, at 287.

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evils associated with mandatory programs. Therefore, there is no need to avoid such programs. The value of mandatory mediation is that all custody cases would have an opportunity to experience the benefits of mediation. The decision to mediate would not be left to the judges, who may be unfamiliar and untrained with the process and therefore avoid using it.

VII. CONCLUSION

While critics of custody mediation have focused on the potential problems for women, studies have shown these fears to be overstated and unfounded. The critics have based their assertions on speculation and isolated examples. While there may be isolated problems for individuals using mediation, this will be true under any system. These isolated problems are an insufficient reason to abandon mediation. No alternative to the current adversary system will be perfect; however, custody mediation still represents an improvement over the current system.

As this Note has shown, studies have demonstrated the benefits of mediation. The mediation of custody issues has led to lower costs and lighter caseloads in our courts. It has represented cost savings to participants and yielded agreements in a shorter time frame. Participants, both men and women, have viewed the results positively and preferred mediation to litigation.

While many states have incorporated mediation as an option in their custody statutes, for most, mediation is implemented at the discretion of the judge. By the time a case reaches a judge, the judge may feel it is easier to adjudicate than to recommend mediation. Judges' unfamiliarity with mediation will only fortify their reluctance to recommend it. Perhaps mediation will become more popular as judges become familiar with the process and witness the benefits in their courtrooms. As familiarity with mediation increases in the legal community as a whole, there will be more of a drive toward the mandatory mediation of custody disputes. Mandatory mediation will take the decision out of the hands of those who may be unfamiliar with it and allow a larger segment of the population to experience the benefits of mediation.

More states should follow California's lead by enacting mandatory custody mediation statutes. The statutes should require mediation of only contested custody or visitation issues. Once an agreement is reached, each party should be allowed to review it with his or her attorney before a final agreement is submitted to the court for approval. The parties should not be required to mediate in cases where there is a history of spousal or child abuse. The mediator should be required to consider the best interests of the children in formulating an agreement and counsel should be appointed to

represent the children's interests. If the parties, after a good faith effort, fail to reach an agreement the issues should be litigated.

Perhaps the biggest fear of mediation is the fear of the unknown. Mediation is a product of the social sciences not the legal field. Many in the legal community are still unfamiliar with the process and its benefits. As with everything that is unfamiliar, people are less likely to recommend or use it. As more people become familiar with mediation, their fears should lessen and mediation should be used more widely.

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