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Implementing Custody Mediation in Family Court: Some Comments on the Jefferson County Family Court Experience

BY LOUISE EVERETT GRAHAM*

INTRODUCTION

The Jefferson Family Court's custody mediation service was developed as part of a larger program creating the first family court system in Kentucky. The mediation service's connection with the Family Court has influenced both practical and policy aspects of its development. Any description of the mediation project necessarily entails some description of the court system that created it.

This Article describes the structure of the Jefferson Family Court and the custody mediation process as it has developed in Jefferson County.¹ A review of one community's approach to custody mediation may be useful not only as a blueprint for a system's structure, but as a vehicle for suggesting a number of issues that any community interested in custody mediation should address as it develops its own program. This Article comments on process and outcome goals for courts using mediation programs to resolve custody disputes. In a program as new as the Jefferson Family Court there is as yet insufficient data for statistical evaluation of custody mediation outcomes, but it is possible to address some of the mediation project's goals. This Article also explores the relationship between the creation of family courts and the adoption of alternative dispute resolution systems. Although the process and goals described here should not be considered the only valid models for the development of a community custody mediation project, the description of one group's progress may assist others aspiring to establish similar systems.

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¹ Although this Article is limited to the custody mediation process, Jefferson Family Court has implemented other mediation services and plans still more. One project provides juveniles and their parents with a referral and diversion service before the children would otherwise appear as status offenders on a court's docket. In addition, the Jefferson Family Court is developing a mediation rule to help address financial disputes in the divorce context.

Part I of this Article describes the Jefferson Family Court Pilot Project and the Family Court's Local Rule 612, which governs custody mediation.² Part II analyzes specific issues addressed in developing the mediation project and some concerns related to program evaluation.³

I. THE JEFFERSON FAMILY COURT AND ITS CUSTODY MEDIATION PROJECT

A. Family Court

The 1988 Kentucky General Assembly created a Family Court Feasibility Task Force and charged it with determining whether a family court pilot project should be undertaken in Kentucky.⁴ The enabling legislation providing for the task force noted several problem areas that might be improved through the creation of a family court system. Among these were overlapping court jurisdiction, lack of continuity in decision making, and the need for expertise in the management and disposal of family law cases.⁵ The task force's own findings, developed more than a year later, voiced similar concerns: more than half of a typical circuit court's docket involved family problems, inordinate delays plagued both child custody and termination of parental rights cases, and the use of domestic relations commissioners only increased the time and expense involved in the resolution of family litigation.⁶ Finally, the task force found that family court judges needed special training in both mental health and behavioral sciences, and recommended that the same judge hear all matters relating to the same family.⁷ The task force suggested initiating a pilot project in the 1990-92 biennium and asked the Chief Justice of the Kentucky Supreme Court to select the judicial district that would pilot the project, as well as the participating judges.⁸

Jefferson County agreed to serve as the pilot district for Family Court in Kentucky. The Kentucky General Assembly, the Jefferson County government, the Administrative Office of the Courts, the Cabinet for Human Resources, and Seven Counties Services, Inc., all contributed to

² See *infra* notes 4-60 and accompanying text.

³ See *infra* notes 61-119 and accompanying text.

⁴ House Concurrent Resolution 30, enacted by the 1988 Kentucky General Assembly, authorized the creation of a Task Force. H. Con. Res. 30, Reg. Sess. 1988 (enacted).

⁵ *Id.* at 1.

⁶ Family Court Feasibility Task Force Report 3 (1989) (on file with the author).

⁷ *Id.*

⁸ *Id.*

the project's funding.⁹ As originally constituted, the Jefferson Family Court consisted of three circuit judges and three district judges.¹⁰ All judicial assignments to Family Court were voluntary.

Court consolidation of family matters is a distinct feature of the Jefferson Family Court. Each of the Family Court judges has been "cross-appointed" so that a district judge can function in cases that normally fall within circuit court jurisdiction and a circuit judge can hear cases within district court jurisdiction. The usual division of jurisdiction between Kentucky circuit and district courts allocates divorce,¹¹ adoption,¹² and termination of parental rights¹³ to the circuit courts and paternity,¹⁴ emergency protective orders,¹⁵ neglect or abuse of children,¹⁶ and juvenile status cases¹⁷ to district courts. Jefferson Family Court has jurisdiction over all of these actions.

Jurisdictional consolidation recognizes the fact that family needs cannot be so neatly packaged as the traditional docket organization might suggest,¹⁸ and helps families avoid inconsistent judicial orders and

⁹ The Cabinet For Human Resources and Seven Counties Services, Inc., contributed to the project by loaning social workers to fill Family Court Support Worker positions.

¹⁰ A seventh judge has since been added to the court system to handle the court's paternity docket. The addition of another judge whose docket is limited to paternity cases probably reflects compromises necessitated by significant changes in the court's caseload and the physical constraints of the existing court setting rather than any change in court philosophy.

¹¹ KY. REV. STAT. ANN. § 403.140 (Michie/Bobbs-Merrill 1984) empowers circuit courts to enter decrees of dissolution of marriage.

¹² *Id.* § 199.470 (providing that petitions for adoption are to be filed in circuit courts); *see* Moore v. Dawson, 531 S.W.2d 259, 261 (Ky. 1975).

¹³ KY. REV. STAT. ANN. § 625.040 (Michie/Bobbs-Merrill 1990) (governing voluntary termination); *id.* § 625.050 (involuntary termination).

¹⁴ Paternity cases are allocated to the district court. *Id.* § 406.051 (Michie/Bobbs-Merrill 1984 & Supp. 1992).

¹⁵ *Id.* § 403.725 (1984). Recent legislative amendments also permit a circuit court to issue an emergency protective order. *See id.* § 403.725(4) (Supp. 1992).

¹⁶ *Id.* § 620.070 (providing that dependency, neglect, or abuse complaint must be filed in the juvenile session of district court).

¹⁷ *Id.* § 610.010(1)(b)-(d) (establishing district court's jurisdiction over juvenile status matters).

¹⁸ Divorce cases may well involve the need for protection from spousal abuse, while paternity cases may involve fathers' parental rights. *See* Sumner v. Roark, 836 S.W.2d 434, 437-38 (Ky. Ct. App. 1992). Requests for emergency protective orders and paternity cases may raise the same issues of appropriate child support as do divorce proceedings. Courts hearing requests for emergency protective orders have power to award temporary child support. KY. REV. STAT. ANN. § 403.750(1)(f) (Michie/Bobbs-Merrill Supp. 1992). District courts may also award child support in paternity actions. *See id.* § 406.051 (1984). Dependency, neglect, and abuse cases involve the issue of child custody. *See id.* § 620.060 (1990) (district court may enter an ex parte emergency custody order if there are reasonable grounds to believe that a child is in danger of imminent death or serious physical injury or is being sexually abused and the child's parents or other person in control is unable or unwilling to protect the child); *id.* § 620.090 (providing for an order for temporary removal and a grant of temporary custody to the Cabinet for Human Resources or other appropriate person or agency if the

multiple court appearances arising out of the same circumstances.¹⁹ It also alleviates public perception of unequal access to judicial resources that may arise when some families and issues are heard before a court of limited jurisdiction, while others appear in a higher court of general jurisdiction.²⁰

The Jefferson Family Court uses a "one family, one judge" principle of organization whereby each judge's docket covers all cases involving families whose names fall within a given section of the alphabet. Each division handles all aspects of the court's jurisdiction for families within that section. A Family Court judge thus has a weekly docket that includes matters that would formerly have been heard before a district court, such as status and dependency, as well as former circuit court matters such as divorce. Schedules vary among the divisions, but in practice each judge divides his or her docket into segments that reflect particular types of cases.

"One family, one judge" is a way of saying that the court system must be fully aware of the situation of all family members in order to engage in optimally informed decision making. In the typical allocation of cases, for example, a judge who handles the paternity docket in a district court might not know that the man whose parental involvement she is encouraging has been found to be abusive to other children. A "one family, one judge" rule also helps families avoid inconsistent orders and multiple appearances before the court system.²¹ Court efficiency may be

court finds reasonable grounds to believe the child is neglected or abused). The Family Court Feasibility Task Force Report, *supra* note 6, specifically noted the problem of jurisdictional overlap.

¹⁹ For example, the alleged perpetrator of child abuse may receive an order restricting access to the child. KY. REV. STAT. ANN. § 620.080 (Michie/Bobbs-Merrill 1990) (providing that a temporary removal hearing must be held within 72 hours of the issuance of an emergency custody order unless waived by the child and his parent or other person exercising custodial control); *id.* § 620.090 (permitting a district court to award temporary custody). That order may conflict with a circuit court order for temporary custody entered as part of the divorce case. *Id.* § 403.280 (1984).

²⁰ See KY. CONST. § 112(5) (providing that a circuit court shall have original jurisdiction of all justiciable causes not vested in some other court); *id.* § 113(6) (establishing district courts as courts of limited jurisdiction); see also KY. REV. STAT. ANN. § 23A.010 (Michie/Bobbs-Merrill 1992) (circuit court jurisdiction); *id.* § 24A.010 (district court jurisdiction); KY. R. CIV. P. 72 (concerning appeals to circuit court from district court). The National Council of Juvenile and Family Court Judges has recommended that a family court be a court of general jurisdiction. See Sanford N. Katz and Jeffrey A. Kuhn, *Recommendations for a Model Family Court: A Report from the National Family Court Symposium* (National Council of Juvenile and Family Court Judges 1991).

²¹ Multiple appearances before the same court are usually referred to as "related cases." "Related cases" should not be confused with recidivism or a family or family member's repeated appearances in court. See STATE JUSTICE UNIT, NATIONAL CENTER FOR STATE COURTS, COURT COORDINATION OF FAMILY CASES 3 (1992). Studies in Virginia family courts showed that approximately 20% of the parties appearing before the court had also appeared in a related case. *Id.* at 21. Other samples taken across several states showed a rate of 34%. *Id.*; see also Katz and Kuhn, *supra* note 20, at 5

improved as the judge gains familiarity with a family's situation over time. Finally, outcomes may be improved because the judge is likely to have a better grasp of the family's long-term situation.

Another important feature of the family court system is the use of social workers as Family Court support workers in each court division. The presence of these social work professionals reflects a decision that integrating the delivery of legal services with the delivery of social services will offer important options to a court. One theory underlying the adoption of a family court system is that the dispute resolution process for families requires consideration of matters not generally addressed in other types of litigation. Many families who come to the legal system seeking a dispute arbiter need other social services as well.²²

Family Court support workers have extensive social service backgrounds that enable them to identify existing community resources and advise the court on the coordination of court activity with those programs. It does no good, for example, to order an abusive spouse to attend an anger management program unless the court has the ability to determine whether the abuse perpetrator went to the program and whether it affected his behavior. Family Court support workers assist the court in coordinating those efforts, and function as advisers to the court rather than as advocates of any particular litigant within the system. They have also assisted in the development of programs such as custody mediation.

The development of mediation as a component of the Jefferson Family Court is consistent with the court's policy of judging its effectiveness by focusing on the effect of the legal process on litigants. By its nature, the legal process for resolving disputes is adversarial. A number of scholars have noted that adversarial resolution of disputes may be harmful to families, particularly when the well-being of family members requires that relationships continue even if their legal status or effect has changed.²³ Critics of the adversarial process have said that it impairs the

(recommending one case, one judge system).

²² For example, entering an emergency protective order that bars an abusive spouse from contact with the abused family member may be more effective if the court has the power not only to restrain the abusive spouse's contact with other family members but to assess appropriately the risk posed by the abusive spouse's behavior. In some cases that assessment may be assisted through programs such as anger management.

²³ See Katz and Kuhn, *supra* note 20, at 3; see also Ann Milne, *The Nature of Divorce Disputes*, in *DIVORCE MEDIATION: THEORY AND PRACTICE* 27, 34-35 (Joy Folberg & Ann Milne eds., 1988) (discussing structural impediments to effective spousal communications and noting that the adversarial structure of the legal process may create communication barriers); Nancy G. Maxwell, *Keeping the Family out of Court: Court Ordered Mediation of Custody Disputes Under the Kansas Statutes*, 25 *WASHBURN L.J.* 203, 205 (1986) (stating that primary impetus for development of domestic dispute mediation was dissatisfaction with adversarial process); Jessica Pearson and Nancy

ability of parents to continue joint responsibility for the welfare of minor children.²⁴ Some have criticized the adversarial process for relying on rules that conflict with the way individuals order their lives or see their rights and responsibilities, and see mediation as a way to return decision making to the more appropriate context of the family unit.²⁵ Advocates of mediation propose that it holds promise for resolving disputes in a nonadversarial manner, leading to better continuing relationships, and increasing the general welfare of children after divorce.²⁶

B. The Mediation Rule

The Jefferson Family Court's process for the mediation of disputes in child custody cases is laid out in a local rule.²⁷ Mediation is mandatory in that parties to a contested custody case must participate in an initial referral to mediation, unless the requirement is waived by the court upon a showing of good cause.²⁸

The local rule places the responsibility for initiating the referral process on the parties' attorneys, who must file a form with the appropriate Family Court clerk and send a copy to the Family Court support worker for the division in which the case is being heard when it becomes apparent that a genuine custody issue exists.²⁹ The form provides information that allows the support worker to contact the parties and assign them to a mediator, as well as financial information that affects the cost of mediation. An attorney must attach copies of a client's most recent federal and state tax returns and his or her three most recent paycheck stubs to the filed form.³⁰

Thoennes, *Mediation and Divorce: The Benefits Outweigh The Costs*, 4 FAM. ADVOC. 26, 32 (1982) (concluding that mediation is more desirable than adversary system for resolution of custody disputes); Andrew Schepard, *Taking Children Seriously: Promoting Cooperative Custody After Divorce*, 64 TEX. L. REV. 687, 703-09 (1985) (discussing conflict between adversarial procedure and best interests of children).

²⁴ The concepts of nonadversarial dispute resolution and shared parenting seem often to march together. See generally Schepard, *supra* note 23. But see Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727 (1988) (criticizing shared parenting and mediation as the result of excessive intrusion of the helping professions into procedures better governed by legal models).

²⁵ See Jana B. Singer, *The Privatization of Family Law*, 5 WIS. L. REV. 1442, 1505 (1992).

²⁶ For a discussion of divorce custody reform plans and the role of mediation within reformed procedures, see Jane W. Ellis, *Plans, Protections, and Professional Intervention: Innovations in Divorce Custody Reform and the Role of Legal Professionals*, 24 U. MICH. J. L. REF. 65 (1992).

²⁷ JEFFERSON FAMILY CT. LOCAL R. 612 (on file with *Kentucky Law Journal*).

²⁸ *Id.* R. 612A.

²⁹ *Id.*

³⁰ Jefferson Family Ct. Local Form 3 (on file with *Kentucky Law Journal*).

The Family Court support worker who receives this information assigns a mediator using the next name on a rotating list. An order signed by the court³¹ notifies the parties and their counsel of the name and telephone number of the assigned mediator and instructs the client to contact the mediator within ten days.³² Attendance at the first mediation session is mandatory.³³ The form requests that the parties meet with the mediator a sufficient number of times to allow the process to work, but it does not order a client to attend mediation beyond the initial referral period.³⁴ Clients may use a private mediator of their own selection with the court's permission.³⁵ The court order also explains the procedure for opting out of mediation and the sanctions for failure to comply with the order.³⁶

Parties ordered to mediation by the Family Court may ask to be excused from participation by completing a form that provides the court with information needed to determine whether good cause for opting out exists.³⁷ Litigants are asked to explain their reasons for opting out, and the Family Court support worker who investigates the case provides information to the judge hearing the case. In the determination of good cause, the presence of domestic violence is the only definitive criterion;³⁸ other parameters of the good cause doctrine will no doubt be developed as the system evolves.

The local rule also sets out sanctions for a party's failure to contact the mediator as ordered or to appear at a scheduled mediation session, including assessment of attorney fees or costs.³⁹ There are no sanctions for failure to continue mediation beyond the initial appointment. When mediation is terminated without an agreement, the mediator must report that fact to the court immediately "without any comment or recommenda-

³¹ Jefferson Family Ct. Local Form 4 (on file with *Kentucky Law Journal*).

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*; see also JEFFERSON FAMILY CT. LOCAL R. 612 (setting forth independent selection procedure and providing court with record of dispute's status).

³⁶ "Your failure to comply with this order and notice could result in your having to pay part or all of the expenses of the mediator and attorney's fees or suffer any appropriate sanction for contempt." Jefferson Family Ct. Local Form 4.

³⁷ See Jefferson Family Ct. Local Form 5 (on file with *Kentucky Law Journal*).

³⁸ This portion of the rule reflects a growing concern with the impact of mediation on battered women. See Tina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991).

³⁹ See generally KY. REV. STAT. ANN. § 403.220 (Michie/Bobbs-Merrill 1984) (permitting a circuit court to assess costs and attorney fees).

tion."⁴⁰ Termination or failure to agree is without prejudice to either party.⁴¹

All communications between the parties in the mediator's presence, between a party and the mediator, and between the Family Court support worker and a party are treated as confidential and privileged,⁴² with the exception that a Family Court support worker is required by statute to report child abuse.⁴³ The privileged status of conduct or statements which occur during mediation means that they are inadmissible as evidence at a later proceeding.⁴⁴

The Jefferson Family Court's local rule requires that a mediator have a college degree and basic education or training in the behavioral sciences.⁴⁵ Mediators must receive at least forty hours of training in a program meeting the requirements of the Academy of Family Mediators, unless this requirement is waived by the court because of the mediator's experience or training.⁴⁶

Mediators are chosen by the court after recommendations by the Mediation Review Committee.⁴⁷ The committee includes at least one Family Court or circuit court judge and representatives of the Louisville Bar Association and the Family Court Advisory Committee, as well as other members designated by the court.⁴⁸ The names of those who are selected as mediators are placed on a list kept by the Family Court Administrator, who supplies them to Family Court workers in rotating order.⁴⁹ Mediators must disclose facts bearing on their qualifications, and may be disqualified voluntarily or upon motion of any party.⁵⁰ If the court disqualifies a mediator, it must name a replacement.⁵¹

Because the orientation session is the only mandatory mediation under the Jefferson Family Court's rule, the mediator's duties during this

⁴⁰ JEFFERSON FAMILY CT. LOCAL R. 612M.

⁴¹ *Id.*

⁴² *Id.* R. 612N.

⁴³ See KY. REV. STAT. ANN. § 209.030 (Michie/Bobbs-Merrill 1991); *id.* § 620.030 (1990) (providing that any person who knows or has reasonable cause to believe that a child is abused or neglected shall inform authorities).

⁴⁴ JEFFERSON FAMILY CT. LOCAL R. 612N.

⁴⁵ *Id.* R. 612C(1). Mediation training must address mediation theory, mediation processes and techniques, standards of conduct for mediators, conflict management and intervention skills, community resources and referral processes, psychological issues in separation, divorce, and family dynamics, the needs of children in the divorce context, family law, and family economics. *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* R. 612D.

⁴⁸ *Id.*

⁴⁹ *Id.* R. 612E(1).

⁵⁰ *Id.* R. 612F.

⁵¹ *Id.*

session are spelled out in detail.⁵² The mediator's duty to be impartial includes the duty to advise all parties of any circumstance that affects the mediator's ability to be impartial.⁵³ The mediator must advise the parties that mediation can proceed only with their consent and that they have the right to terminate mediation without prejudice.⁵⁴

Mediators are compensated on the basis of a sliding scale fee rate set by the court⁵⁵ that permits parties whose income is less than \$13,000 to participate for a lower fee.⁵⁶ A party who fails to make the required financial disclosure may be taxed at the full hourly rate, but the court has the discretion to assess either party for the cost of the mediator's compensation.⁵⁷

If the parties reach an agreement, the mediator must report the fact of reaching agreement and nothing more to the court.⁵⁸ A memorandum of understanding is sent to each party's attorney setting forth all relevant statements of fact and statements of future courses of conduct as agreed upon by the parties. The parties and their attorneys file this agreement with the court, which retains final authority to accept, modify, or reject the agreement.⁵⁹ If mediation is terminated and no agreement is reached, that fact is reported to the

⁵² The mediator must "define and describe the mediation process and its cost during the orientation session before the mediation conference begins." The orientation is to inform the parties that the purpose of mediation is to attempt to reach an agreement that supports the best interest of the parties' minor children; explain that any agreement must be the product of party consent; note the difference between mediation and counseling; indicate when the mediator might meet privately with either of the parties or any other persons; explain the confidentiality and privilege rules and the role of counsel; tell the parties what information will be needed to define the disputed issues; inform the parties of their right to employ a third person, such as an evaluator, to help resolve disputed factual issues; and note that the mediator will be responsible for scheduling. *Id.* R. 612G(1). On the matter of scheduling, Rule 612I provides that a mediator may adjourn the mediation conference at any time and may set the times for reconvening of the conference. No further notice is required to parties present at the mediation. A mediator may suspend or terminate mediation if he or she feels that the matter is not appropriate for resolution through mediation. *Id.* R. 612I.

⁵³ *Id.* R. 612G(2).

⁵⁴ *Id.* R. 612G(3).

⁵⁵ The amounts owed by each party are computed on the basis of financial information provided with Jefferson Family Ct. Local Form 3 under the authority of section A of the local rule. JEFFERSON FAMILY CT. LOCAL R. 612A & 612L; see *supra* note 30 and accompanying text.

⁵⁶ Jefferson Family Court custody mediators are currently entitled to \$85 per hour or per session, payable in advance.

⁵⁷ JEFFERSON FAMILY CT. LOCAL R. 612L.

⁵⁸ The form used for this report includes only case identification and the information that mediation has been completed with or without agreement, that it never began, or that the mediator was voluntarily disqualified. See Jefferson Family Ct. Local Form 6 (on file with the author).

⁵⁹ "In order to preserve and promote the integrity of mediation as a dispute resolution technique, the Court will endeavor to include all reasonable agreements reached by the parties in formulating its order in the case." JEFFERSON FAMILY CT. LOCAL R. 612M(3).

Family Court support worker and to counsel but does not prejudice either party.⁶⁰

II. CREATING A MEDIATION ALTERNATIVE—PROCESS ISSUES

The Jefferson Family Court mediation process began with the development of a special local court rule for mediation. This rule had to satisfy the court itself, the Louisville Bar Association, and the Kentucky Supreme Court.⁶¹ The rule development process was designed to address the needs and concerns of these groups, as well as those of the clients.

A. The Importance of the Planning Process

Working out the entire program on paper before accepting any cases for mediation had a number of advantages and some disadvantages. The advantages of a carefully hammered-out paper rule are its clarity and the foundation it provided for developing broad-based approval of the mediation process before its implementation. However, careful development of a rule can delay implementation of the project and frustrate parties involved in the development process. On balance, however, the ability to build the consensus and trust that come from careful development outweighed the problem of frustration through delay.

A cautious assessment of the time needed for development may lower the frustration level. A program that involves a broad range of industrious but over-committed individuals should not expect to move at lightning speed. Moreover, if the mediation program is implemented at the same time as the reorganization of a court system, some account must be taken of the myriad of tasks facing the court. The program's progress can be assisted by careful attention to the planning process itself. In Louisville, Family Court personnel, including judges and Family Court support workers, as well as other interested parties, attended committee meetings to consider drafting of the rule and planning sessions that concentrated on the development process itself. Those sessions enabled the court to identify the issues that remained to be addressed at each planning stage and to determine the priorities and deadlines for development tasks.

Judges, because they have ultimate authority and responsibility for the court's process, should participate in a number of developmental tasks, but it is also important to remember that these judges have daily

⁶⁰ *Id.* R. 612M(1).

⁶¹ Ky. Sup. Ct. R. 1.040(3)(a).

dockets that have first call on their attention. It is therefore critical that judges be able to delegate a number of tasks to court personnel or to other process participants, using specific, mutually agreed-upon due dates.⁶²

Appointing a project coordinator also helps the project to advance more rapidly. Even though particular tasks may require the involvement of all project participants, one project participant needs to serve as an overseer who can move the group to task completion. In the Jefferson Family Court, the court found that assigning the coordination task to a Family Court support worker greatly helped the development process. Once the project is in place, the project coordinator can assess the need for education and training of court personnel.⁶³ In Louisville, the project coordinator, assisted by the Family Court Administrator, also held orientation sessions for participating mediators and the local bar that were critical to the program's development.

One particularly important contribution of the Family Court support worker serving as project coordinator in Jefferson Family Court was a paper flow process to track and record the various forms and orders necessary for mediation. If a court-ordered mediation system is to work, it must generate orders to attend an initial referral, motions to opt out of mediation, notices that mediation has terminated, and notices of agreement. A court system needs to minimize the amount of paperwork created, but it must have a record of case status. If that record does not exist, mediation runs the risk of becoming a black hole into which cases disappear. Designing an appropriate system helped the court keep track of cases sent to mediation and assisted the court in identifying those persons best suited to particular tasks such as sending out the required orders or notices.

The Jefferson Family Court created a flow chart that identified and color-coded the tasks of each group affected by the mediation process and the various steps in the program.⁶⁴ The flow chart covered three possible situations: when a client contacts the mediator and mediation proceeds as ordered, resulting either in an agreement or no agreement; when a client

⁶² Participants in the Jefferson Family Court development process were able to advance the process significantly by agreeing on the amount of time that a task should take and completing the task within that time.

⁶³ For example, the Jefferson Family Court Custody Mediation Rule requires that fees for mediation be set on the basis of information gained from the parties' tax returns and pay stubs. JEFFERSON FAMILY CT. LOCAL R. 612L. Court personnel responsible for fee setting must all be familiar with tax returns and must use the same information to determine the appropriate fees. The project coordinator developed an educational session to focus on that task.

⁶⁴ A copy of this flow chart appears as an Appendix to this Article.

asks to be excused from participation in mediation; and when a client fails to contact the mediator as ordered. This last situation is particularly critical, since clients who simply drop out may delay the resolution of the case for other parties.

The flow chart not only helped the court to allocate responsibility for various stages of the process, but proved to be a valuable tool in education. As the mediation program developed, orientation sessions were held for judges, support workers, and mediators. In each of these sessions, the flow chart provided a quick and easy way for participants to spot the places in the system where they were required to act.

B. Authority for Mediation

A well-drafted rule provides a court with the authority to use mediation. Although Jefferson Family Court judges were enthusiastic about the use of mediation to resolve contested custody, they were also concerned with establishing their authority to mandate mediation. Authority may have been particularly important because Jefferson County adopted a mandatory system that required all litigants in contested custody cases to participate in an initial referral to mediation.⁶⁵

Local rules as a basis for authority were important because existing Kentucky statutes did not specifically authorize the use of mediation in the divorce context. Moreover, although some options, such as conciliation conferences and counseling, were mentioned in the marriage dissolution statute,⁶⁶ anecdotal evidence suggested that these techniques were rarely, if ever, used by marriage dissolution courts. If conciliation conferences and court-ordered counseling are missing from the typical arsenal of case management techniques, a court interested in mediation may need to differentiate mediation from both conciliation and counseling, either for its own benefit or to persuade the practicing bar of the importance of mediation in the dispute resolution process. Two important questions suggest themselves. First, if the statutes permit court-ordered conciliation and allow a court to suggest that the parties participate in counseling, why are those provisions so routinely ignored? Second, does mediation serve the same purpose as either conciliation or counseling?

An examination of Kentucky's marriage dissolution statute⁶⁷ shows that the provisions for conciliation and counseling were included in the divorce statute to provide a counterweight to "no-fault" divorce. Like the

⁶⁵ See JEFFERSON FAMILY CT. LOCAL R. 612A.

⁶⁶ See KY. REV. STAT. ANN. § 403.170 (Michie/Bobbs-Merrill 1984).

⁶⁷ *Id.*

drafters of the Uniform Marriage and Divorce Act,⁶⁸ the Kentucky General Assembly apparently believed that removal of fault considerations from divorce litigation might produce a less adversarial atmosphere. Introductory material in Kentucky's dissolution statute states that the chapter should be applied to "promote the amicable settlement of disputes" and notes that marriage dissolution should "mitigate the potential harm to the spouses and their children caused by the process of legal dissolution of marriage."⁶⁹ The adoption of irretrievable breakdown as the sole ground for marriage dissolution⁷⁰ avoided the need to place blame and recognized that forcing parties to remain in a failed marriage served no genuine public purpose.⁷¹ Nevertheless, courts were given the power to order a conciliation conference or suggest counseling to the parties.⁷²

The history of the Uniform Marriage and Divorce Act helps to explain these provisions and their relationship to no-fault divorce. Although the Kentucky General Assembly adopted irretrievable breakdown as the sole ground for divorce, it was concerned with preserving some state control over marriage dissolution.⁷³ Under the previous divorce system, a court had the power to deny a divorce in some circumstances.⁷⁴ The legislature may have been concerned that removing fault from consideration would make divorce too easy. Clearly, the legislature wished to express a continued public interest in marriage dissolution and to prevent divorce by private agreement alone.⁷⁵

As a practical matter, however, the adoption of irretrievable breakdown and its definition as the lack of any reasonable prospect of reconciliation left the matter of divorce in the hands of one party to the marriage. Under such standards, a party who states her own unwillingness

⁶⁸ See UNIF. MARRIAGE AND DIVORCE ACT § 305 cmt., 9A U.L.A. 211-12 (1987).

⁶⁹ KY. REV. STAT. ANN. § 403.110 (Michie/Bobbs Merrill 1984).

⁷⁰ *Id.* § 403.140(1)(c).

⁷¹ See UNIF. MARRIAGE AND DIVORCE ACT § 305 cmt., 9A U.L.A. 211 (1987).

⁷² KY. REV. STAT. ANN. § 403.170 (Michie/Bobbs-Merrill 1984). It should be noted that the court may order a conciliation conference, but may only suggest counseling. The Uniform Marriage and Divorce Act disclaims any interest in compulsory counseling. See UNIF. MARRIAGE AND DIVORCE ACT § 305 cmt., 9A U.L.A. 211 (1987); see also Joseph Goldstein & Max Gitter, *On Abolition of Grounds for Divorce: A Model Statute and Commentary*, 3 FAM. L. Q. 75, 87 (1969) (suggesting that conciliation services should never be made mandatory).

⁷³ The statute requires a finding on the evidence. KY. REV. STAT. ANN. § 403.170 (Michie/Bobbs-Merrill 1984).

⁷⁴ For example, a court might deny a divorce if both parties were guilty of fault. See *Carlton v. Carlton*, 265 S.W.2d 477, 480 (Ky. 1954).

⁷⁵ The Uniform Marriage and Divorce Act noted that even in those cases in which each party concurred in the claim of irretrievable breakdown, determining that breakdown's actual existence was a judicial function. UNIF. MARRIAGE AND DIVORCE ACT § 305 cmt., 9A U.L.A. 211 (1987).

to reconcile with a marital partner should be entitled to a divorce regardless of her spouse's wishes. Whatever the legislature's intentions, the Kentucky appellate courts have seen the wisdom of this practical view. In *Putnam v. Fanning*,⁷⁶ the Kentucky Court of Appeals held that a trial court need not grant a party's motion for a conciliation conference even if the motion were supported by an affidavit that the marriage was not irretrievably broken.⁷⁷ No recent reported Kentucky case alludes to the use of any of these provisions, perhaps because the public and Kentucky courts have become more comfortable with the concept of no-fault divorce.

The disuse into which conciliation conferences and counseling have fallen need not affect mediation. Because these intervention techniques reflected concern that no-fault divorce might be too easy, they would have delayed the divorce by adding steps to the process. For example, a court that ordered a conciliation conference might set the conference date as much as sixty days after the hearing at which the conference was ordered.⁷⁸ Mediation also represents an additional step in the process, but it differs from counseling in both function and purpose. As envisioned by the Kentucky statute, conciliation and counseling are available only when one party denies irretrievable breakdown,⁷⁹ while mediation is not only available but mandatory regardless of the parties' positions regarding the status of the marriage. While conciliation and counseling protect one party's interest in remaining in the marriage and reflect a bias toward the decision to remain married, mediation facilitates decision making by the parties without favoring a particular kind of decision.⁸⁰ The concern with delaying the resolution of marital disputes may be misplaced: given the pace of motion practice, it is not clear that mediation would actually prolong the decisional process.

C. Court Control over the Mediation Process

Any court that contemplates the addition of a mediation component must determine the amount of control that the court will have over the

⁷⁶ 495 S.W.2d 175 (Ky. 1973). See also *Lafosse v. Lafosse*, 564 S.W.2d 220 (Ky. Ct. App. 1978) (finding reversible error where trial court found no irretrievable breakdown if both parties had testified to facts that would support irretrievable breakdown).

⁷⁷ *Putnam*, 495 S.W.2d at 176.

⁷⁸ KY. REV. STAT. ANN. § 403.170 (Michie/Bobbs-Merrill 1984).

⁷⁹ *Id.*

⁸⁰ There may be some reason to believe that mediation facilitates shared responsibility for children after divorce. Some commentators have argued that it is not entirely a value-neutral process. See Fineman, *supra* note 24, at 730-31.

mediation process. The Jefferson Family Court's local rule⁸¹ balances judicial discretion with the autonomy essential to the mediation process by providing for administrative tracking of case status, mediation qualification and compensation, and judicial review of mediated agreements. The mechanism for recording and following the status of cases has already been discussed.⁸² In establishing qualifications for mediators, the Jefferson Family Court determined that it would go beyond a minimum competency requirement.⁸³ The court's control of the appointment of mediators through the Mediation Review Committee finds precedent in the appointment of guardians ad litem and custody evaluators.⁸⁴

A court's ability to generate a list of approved mediators may be affected by the number of experienced mediators in a particular city and provisions for mediator compensation. Jefferson County is a large urban area with a population of experienced mediators. While this experienced population gave the court latitude to set high standards in selection, it also affected the need to compensate mediators. Experienced mediators should not necessarily be expected to provide regular services without compensation, but any significant compensation of mediators raises the problem of indigent litigants. Jefferson County addressed the problem of indigent custody disputants by requiring each court-approved mediator to take a percentage of cases from a list of parties who cannot pay the full mediation fee. At this early stage of the program, inability to serve clients who are unable to pay the full fee has not yet become a concern. However, any implementation of mediation services must consider the likelihood of a large population of clients for whom payment may be a financial hardship. Some attempt at estimating the size of that population may be made by looking at a representative sample of divorce cases and assessing the range of incomes demonstrated by the sample.

Two mechanisms provide for judicial review of the outcome of a mediator's work with clients. Approval of a party's request to opt out of mediation is based on a showing of good cause as determined by the court.⁸⁵ When mediation progresses to an agreement, the court has the authority to alter its content, as well as to accept or reject the agreement as presented by the mediator.⁸⁶ Although litigation on issues that are

⁸¹ JEFFERSON FAMILY CT. LOCAL R. 612.

⁸² See *supra* note 64 and accompanying text.

⁸³ JEFFERSON FAMILY CT. LOCAL R. 612D; see *supra* notes 45-46 and accompanying text.

⁸⁴ See KY. REV. STAT. ANN. § 403.300 (Michie/Bobbs-Merrill 1984) (appointment of custody evaluators); *id.* § 620.100(1)(a) (Supp. 1992) (guardians ad litem).

⁸⁵ JEFFERSON FAMILY CT. LOCAL R. 612B(2); see *supra* notes 37-38 and accompanying text.

⁸⁶ JEFFERSON FAMILY CT. LOCAL R. 612M(3); see *supra* note 59 and accompanying text.

being mediated is suspended during the course of mediation, the court retains authority to grant "interim or emergency relief" upon motion of a party.⁸⁷

D. Mandatory Mediation of Disputed Child Custody

The Jefferson Family Court Custody Mediation Rule calls for mandatory initial referral to mediation when the parties do not resolve the issue of child custody.⁸⁸ The decision to begin a mediation program with child custody does not mean that the Jefferson Family Court believed that other issues involved in divorce were not good candidates for mediation. Segregation of child custody from other types of disputes and implementation of a separate rule for child custody reflects significant differences between the substantive rules governing child custody disputes and those that govern other aspects of marriage dissolution.

Child custody disputes are governed by a broad, somewhat vague legal standard—the best interest of the child.⁸⁹ Despite general agreement that the child's best interest involves an evaluation of a child's psychological and developmental needs,⁹⁰ there is less consensus on how those needs should be worked out in individual cases. Substantive Kentucky law makes each parent entitled to equal consideration, removing the presumption that young children's custody should be awarded to their mothers.⁹¹ Moreover, Kentucky courts have not adopted a primary caretaker emphasis to resolve custody disputes.⁹² A growing number of courts award joint custody even when one parent objects.⁹³ Thus, child custody involves considerable uncertainty for parties, even in families that adopted traditional role differentiation for fathers and mothers during the marriage. Given the lack of clear rules for determining custody and the possibility that any litigated solution will include shared responsibility, parents may find mediation an attractive alternative.

Another factor that makes child custody amenable to mediation is the acknowledged influence that psychologists and social workers have in

⁸⁷ JEFFERSON FAMILY CT. LOCAL R. 612H.

⁸⁸ A growing number of states mandate mediation by statute. See Singer, *supra* note 25, at 1499 n.264.

⁸⁹ KY. REV. STAT. ANN. § 403.270 (Michie/Bobbs-Merrill 1984).

⁹⁰ See John Batt, *Child Custody Disputes: A Developmental Psychological Approach to Proof and Decisionmaking*, 12 WILLAMETTE L. REV. 491 (1976).

⁹¹ KY. REV. STAT. ANN. § 403.270 (Michie/Bobbs-Merrill 1984).

⁹² See Garska v. McCoy, 278 S.E.2d 357, 360-64 (W. Va. 1981) (using a primary caretaker analysis).

⁹³ See, e.g., Chalupa v. Chalupa, 830 S.W.2d 391, 393 (Ky. Ct. App. 1992) (stating that court should consider joint custody before deciding on sole custody).

litigated custody cases. Courts routinely order custody evaluations to be done by these professionals and their testimony carries significant weight with a court that is attempting to choose between parties who cannot agree on primary custody. Attorneys may feel more comfortable allowing these professionals and others with similar training to play a role as mediators.

Finally, child custody disputes may be amenable to mediation because many parents will be able to separate their own needs from those of their children and agree that their children's needs take primacy even in the context of divorce. One factor that may influence parental attitudes is the Jefferson Family Court's ability to deliver information about children's needs through the Families in Transition Project, a separate court program of education about divorce for families with minor children between seven and fourteen. Educating parents about the impact of divorce on children may increase the number of parents who are genuinely interested in mediation.

Despite its mandatory approach to mediation, the Jefferson Family Court rule reflects significant compromise. All parents must comply with a referral to mediation, and they are encouraged by the court to give mediation an opportunity to work.⁹⁴ However, a close reading of the rule shows that compliance with the referral may be satisfied by filing informational forms and attending an initial orientation session.⁹⁵ Because mediation requires the active participation of the parties, compulsion to attend sessions beyond the initial stage would appear futile. Rules keeping parties in mediation beyond that point through court compulsion may have been rejected for a number of reasons, including delay and cost. Conversely, mediation advocates argue that with proper selection of subjects for mediation, both time and money are saved, particularly because of a decrease in the incidence of post-award litigation.⁹⁶ With time, the Jefferson Family Court should be able to compare the duration and expense of mediation and litigation for specific types of cases.

Even if mediation were slightly more costly and slower than litigation, there might be reasons to expose parents to that option. The adversarial process of divorce takes a particular toll on the children who

⁹⁴ JEFFERSON FAMILY CT. LOCAL R. 612A. Parties showing special circumstances may be excused from mediation. See *supra* note 37 and accompanying text.

⁹⁵ "Mediation shall only proceed after the first session by the agreement of both parties and the mediator." *Id.* R. 612B(3).

⁹⁶ Jessica Pearson & Nancy Thoennes, *Mediating and Litigating Custody Disputes: A Longitudinal Evaluation*, 17 FAM. L. Q. 497, 507-08 (1984).

are involved.⁹⁷ The ability of mediation to eliminate much of the anger and anxiety involved in adversarial proceedings could make it preferable for disputes involving children. Again, comparison of mediated outcomes with litigated outcomes must await long-term use of such programs.

E. The Problem of Confidentiality

Mandatory mediation programs share some characteristics with counseling, and to that extent they raise some of the same problems raised by mandatory counseling. In both types of intervention, participants reveal information about their needs and desires. One severe limitation for counseling has been that information received in the course of counseling has not enjoyed a privilege from use in a subsequent custody dispute.⁹⁸ Kentucky courts have ruled that parties waive some privileges by putting their mental health in dispute in any child custody litigation.⁹⁹ Similarly, frank discussions in mediation may reveal facts that might affect subsequent litigation.

The Jefferson Family Court rule deals with this problem on a number of levels. First, the rule establishes confidentiality between the client and the mediator.¹⁰⁰ Mediators cannot be subpoenaed to appear at future litigation and have an obligation not to disclose confidential information to other parties or the court.¹⁰¹ More importantly, information revealed in the presence of the other party during mediation is not only confidential but inadmissible in later custody litigation.¹⁰² If mediation terminates without an agreement, neither party's case is prejudiced and the court receives no information on the cause for termination.¹⁰³ The Jefferson Family Court rule clearly prevents a party from using mediation as a fishing expedition to discover information to be used against the opposing party in later litigation.

The single exception from the general rule of confidentiality requires mediators and Family Court support workers to report abuse.¹⁰⁴ The need to protect children justifies this exception, and state reporting

⁹⁷ See generally JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, *SECOND CHANCES* (1989); Batt, *supra* note 90.

⁹⁸ See *Atwood v. Atwood*, 550 S.W.2d 465, 467 (Ky. 1976).

⁹⁹ *Id.*

¹⁰⁰ JEFFERSON FAMILY CT. LOCAL R. 612N.

¹⁰¹ *Id.*; see also *id.* R. 612G(1)(e) (requiring discussion of confidentiality and its evidentiary implications in initial orientation session).

¹⁰² *Id.* R. 612G(1)(e).

¹⁰³ *Id.* R. 612M(1).

¹⁰⁴ The requirement is statutory. See KY. REV. STAT. ANN. § 209.030 (Michie/Bobbs-Merrill 1991); *id.* § 620.030 (1990).

requirements would override any local rule that did not require reporting. Court workers must report child abuse allegations that arise when a party moves to opt out of mediation¹⁰⁵ or during the investigation of a claim that no mediation should be ordered. Mediators are likewise required to report such allegations if they surface in the context of mediation.¹⁰⁶

F. The Importance of the Committee Process

Compromise played an important part in the development of the Jefferson Family Court mediation system. Although it is not fair to characterize every member of any group as holding a rigid posture toward mediation, there were clearly diverse attitudes toward mediation, particularly at the project's inception. The attitudes of the groups who affected the project represented a broader spectrum of attitudes than those of the subcommittee drafting the mediation rule.¹⁰⁷ The committee process permitted interested parties who had not previously worked in the subcommittee to attend discussions of the rule. Any interested member of the bar had the opportunity to assess the process as it developed.

At opposite ends of the attitudinal spectrum were what might be called the "advocacy" group, most of whom were members of the practicing bar, and the "mediation" group, composed of social work professionals, some psychologists and counselors, community activists, and attorneys who favored mediation. The membership of each group was not necessarily static, nor were the groups internally consistent in their attitudes toward mediation. The "advocacy" group was characterized by attitudes toward mediation ranging from very positive to very negative. In the "mediation" group, mediation was strongly valued, but there was a wide range of positions regarding the appropriate form that mediation might take. The full range of opinions of both groups was heard in discussion sessions that critiqued drafting efforts, although all were not represented on the drafting committee. Given the diversity of opinions and ideas, compromise was a key ingredient in the development of a workable system.

G. Attorney Attitudes and Roles in Mediation

Some attorneys gave a number of reasons for opposing mediation for their clients, including a commitment to the existing process because it

¹⁰⁵ See Jefferson Family Ct. Local Form 5.

¹⁰⁶ JEFFERSON FAMILY CT., LOCAL R. 612g(1)(e).

¹⁰⁷ Much of the organizational task of structuring the Jefferson Family Court has been done by subcommittees. The membership of these subcommittees includes interested members of the private bar and social service organizations as well as court personnel.

protected the individual rights of clients, fear that mediation would be an additional roadblock to divorce and would increase costs, and a belief that mediation did not require particular skills and merely represented a shift of power within the system.¹⁰⁸ Some of these concerns may have reflected inaccurate understanding of the mediation process.

These attitudes may be characterized as protective of either clients or attorneys themselves. Attorney concern with client protection deserves consideration. Some Jefferson County attorneys expressed fear that mediation would be detrimental not only to those clients who had been victims of domestic violence, but to clients who came to the mediation bargaining table with less experience at articulate, forceful presentation of a position. As one attorney noted, some relationships involve significant power imbalances that may be exacerbated by mediation. A power imbalance might arise when one spouse has had significantly greater earning capacity or economic resources and thus has always controlled all of the important financial decisions, or when one spouse has made child-raising decisions without significant input from the other spouse.

Several aspects of the Jefferson Family Court program specifically address these concerns. A party who claims domestic violence may opt out of the mediation program entirely.¹⁰⁹ Because only one mediation session is mandatory, the mediator has an opportunity to explain mediation as an option to the parties, but the parties can decide whether mediation meets their particular needs.¹¹⁰ Parties with strong concerns over the need for assistance in advocacy may choose not to participate in the program or arrange for their attorneys to attend mediation sessions.¹¹¹

Permitting attorneys to be present during mediation is not without problems. Mediation rules clearly state that the mediator is in charge of all mediation sessions.¹¹² The rule does not state whether mediators may exclude counsel from the sessions, and implies that counsel will be present at any meeting by requiring that the parties and the mediator

¹⁰⁸ These reasons were expressed to the author in conversations and interviews that took place in the first year of the Family Court's operation. The sources are not disclosed here for reasons of confidentiality.

¹⁰⁹ See Jefferson Family Ct. Local Form 5 (including "family abuse" as an explicit reason for requesting that case not go to mediation).

¹¹⁰ JEFFERSON FAMILY CT. LOCAL R. 612B(3).

¹¹¹ *Id.* R. 612K (permitting counsel for each party to attend and participate in mediation sessions).

¹¹² *Id.* ("The mediator shall at all times be in control of the mediation and the procedures to be followed in the mediation.").

consent to proceed without counsel.¹¹³ As the mediation program develops, attorneys and mediators will have to work out a code of appropriate behavior for successful mediation. Attorneys may find that preparing clients for mediation contributes to the resolution of disputes. Because mediation may be as unfamiliar to a client as the litigation process, attorneys might offer clients the opportunity to view mock sessions, watch tapes of mediation, or read about the goals of mediation. Just as an attorney would not go to court for a hearing without significant preparation, attorneys may find that mediation requires its own type of preparation. Helping clients to organize information that will assist in decision making is an important activity. It may be even more critical to assist a client in focusing on and articulating his or her position on a particular matter and the range of options with which the client feels comfortable. Attorneys can assist clients by helping them to identify areas in which compromise is important, and by helping them to articulate rational opposition when the client does not wish to compromise.

Finally, attorneys maintain significant control under the Jefferson Family Court rule by retaining responsibility for drafting the agreements that arise out of mediation.¹¹⁴ The mediator drafts a memorandum of understanding and reports the fact of agreement to the court. The memorandum of understanding is sent to the attorneys, who draft the actual agreement to be signed and filed with the court.¹¹⁵

One of the Jefferson Family Court's efforts as the mediation project develops will be to determine the extent to which attorney attitudes change as mediation becomes more familiar to clients and the practicing bar. Some project participants believed that the process of comment and evaluation on the mediation rule was effective in moving attorneys toward acceptance of mediation.

H. Evaluation of Mediation

The purpose of providing Family Court participants with nonadversarial dispute resolution through mediation is part of the project's broader goal of reducing the burden imposed by the court system on families already involved in crisis. Evaluating mediation's effect on families requires consideration of the efficacy of the mediation process itself, as well as its outcomes. The Jefferson Family Court is developing

¹¹³ JEFFERSON FAMILY CT. LOCAL R. 612M(2).

¹¹⁴ *Id.*

¹¹⁵ *Id.*

a self-assessment form to provide the court with information that should help it evaluate both of these areas.¹¹⁶

Since Jefferson Family Court serves not only divorce clients, but also clients whose custody disputes arise in other contexts, the court is interested in the types of clients who use mediation services. It may be interesting to compare the mediation success of parties who are currently involved in divorce with those who have a post-divorce custody dispute. In addition, the impact on non-parental parties might also warrant consideration.

Kentucky statutes permit grandparents to seek visitation,¹¹⁷ allow some third parties who are not parents to make custody claims,¹¹⁸ and permit unwed fathers to seek custody.¹¹⁹ These circumstances may affect the outcome of mediation. Other variables of interest include the use of marriage counseling, family income, and the number and type of issues involved in the case.

Several proposed evaluation questions are designed to determine whether participants had sufficient information about mediation before they began the process. Other questions address those factors that influence the choice to use private mediators, as well as convenience and comfort of the parties with the process. The form asks participants to comment on their perceptions of fairness, undue pressure to come to an agreement, and their enthusiasm for mediation after having experienced the process. Questions have also been designed to identify mediator behaviors that are associated with high levels of participant comfort with the process. The form asks parties to characterize the kind of agreement, if any, that mediation produced. Finally, the form asks participants to identify the types of attorney participation that occurred.

Self-assessment is important to a family court mediation system for at least two reasons. First, continual evaluation may identify difficulties with the process before they become insurmountable. Second, evaluation may help a court determine which cases need not be sent to mediation by identifying demographic characteristics of successful mediation participants.

CONCLUSION

Although the Jefferson Family Mediation Project is in its infancy, much can be learned from studying the process of implementing a

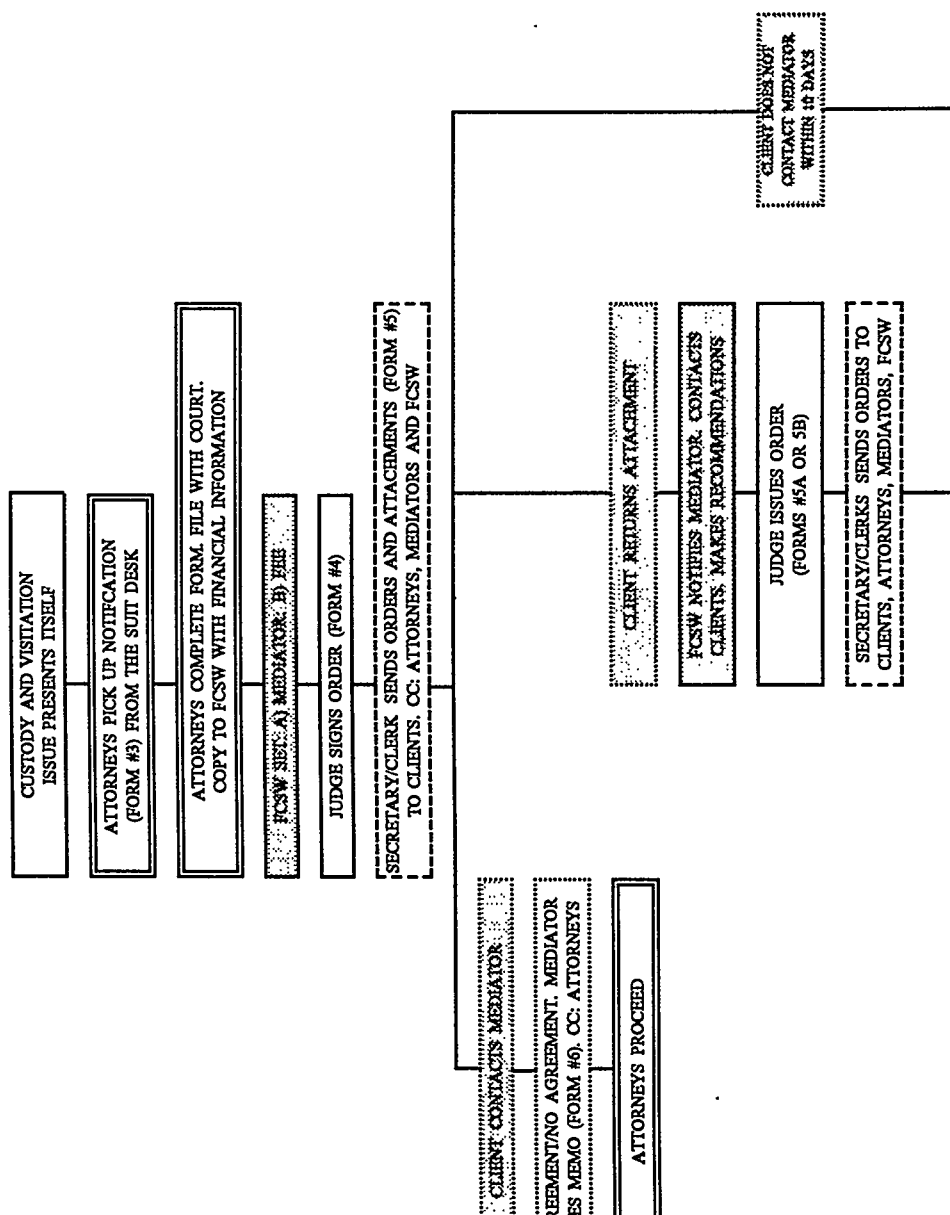
¹¹⁶ A draft version of the evaluation form is on file with the *Kentucky Law Journal*.

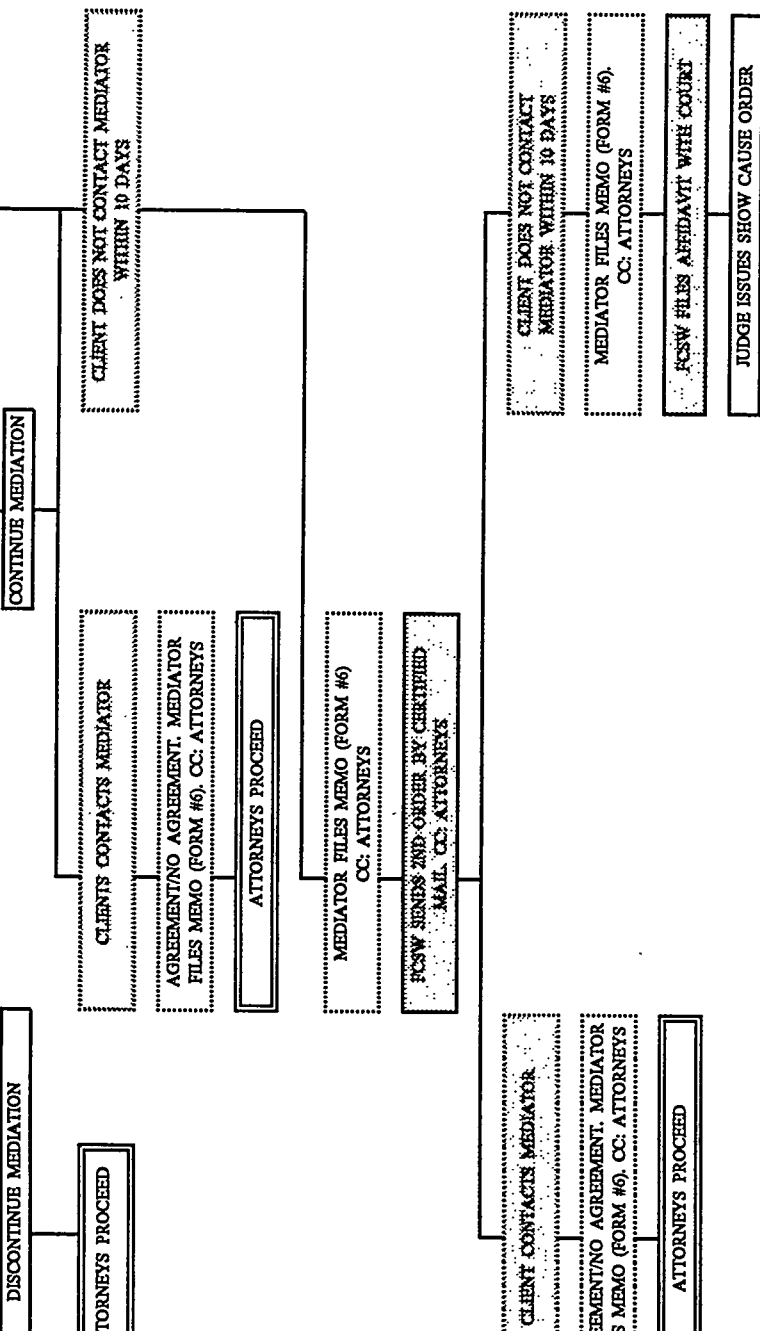
¹¹⁷ KY. REV. STAT. ANN. § 405.021 (Michie/Bobbs-Merrill 1984).

¹¹⁸ See *McDaniel v. Garrett*, 661 S.W.2d 789, 790 (Ky. Ct. App. 1983).

¹¹⁹ See *Sumner v. Roark*, 836 S.W.2d 434, 438-39 (Ky. Ct. App. 1992).

court-annexed mediation component. The Jefferson Family Court Mediation Project demonstrates the importance of meticulous planning, the critical nature of an open process that carefully builds community consensus, and the need for patience and flexibility in moving that process to completion.





November 30, 1992

JUDGE
ATTORNEY
SECRETARY
MEDIATOR
CLIENT
FAMILY COURT SUPPORT WORKER