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# Alaska Child Visitation Mediation Pilot Project

Report to the Legislature  
February 1992

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alaska judicial council

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***Alaska Child Visitation Mediation  
Pilot Project***

***Report to the Alaska Legislature***

January 1992

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## ***Executive Summary***

The Alaska Child Visitation Mediation Pilot Project was a seventeen month pilot project created and funded by the Alaska Legislature. Its purpose was first, to help parents having visitation disputes resolve those disputes through mediation, a collaborative problem solving process emphasizing cooperation and communication, and second, to evaluate the effects of mediation on the families who participated, especially on the children.

Based on the data gathered for this project, and on information provided by other states, the Judicial Council concluded that if the pilot project's current eligibility restrictions were included in a future project, that project would not be cost-effective. However, the Judicial Council concludes that an expanded mediation program would be more cost-effective and would help meet the needs of a substantially larger group of parents. Therefore, the Judicial Council recommends that the legislature create a future mediation program and expand the scope to include issues of custody and child support that are directly related to visitation, with the requirement that child support agreements be subject to court approval, or to administrative approval, whichever is appropriate. In addition, the Judicial Council recommends that parents without a visitation order be permitted to mediate, and that in certain circumstances people who have experienced domestic violence who want to mediate be permitted to do so, for example, after receiving domestic violence counseling.

The Pilot Project accepted cases from December of 1990 through November of 1991, screening 475 inquiries during that eleven-month period. Of the 475 inquiries, 85 were given information or referred to other agencies. Of the remaining 390 cases, 237 (61%) were found to be ineligible for mediation services due to a statutory restriction excluding cases involving domestic violence or a pattern of harassment (at any time, past or present), 27 were ineligible due to a statutory restriction excluding cases lacking a court-ordered visitation schedule, and one case was excluded under a restriction prohibiting parents from mediating a material change in the visitation order. Applicants who were ineligible for mediation were given referrals to other organizations and service providers.

The especially large number of cases screened out for domestic violence and harassment was unexpected. Because domestic violence cases comprised the largest group of cases in the project, they were studied in more detail. Victims of domestic violence who had requested and been denied mediation were interviewed on the phone and were asked to complete a written questionnaire. Often, victims saw the violence as irrelevant to the situation because it had occurred in the past, or had been relatively minor or infrequent in nature. Virtually none of the victims interviewed perceived formal litigation through the court system as a realistic option for them. Many victims, after being told that the exclusion was designed to protect them from further violence and from unequal bargaining power, indicated that they should be the ones to decide whether the potential risks associated with mediation were outweighed by the potential benefits or by the potential and actual risks of other options (i.e., dealing with their

abuser directly, dealing with their abuser through a lawyer). Many of these victims still wanted to try mediation; a few felt that mediation might not be right for them.

Only 125 cases were eligible for mediation services. Of that total, only 20 cases actually mediated. Eligible cases did not go to mediation for a variety of reasons, the most common being that the applicant never filed a formal request for mediation (42 cases), and that the responding parent declined to participate in mediation (34 cases). Of the eligible cases, the Judicial Council further analyzed characteristics of two groups: those who mediated and those in which one parent declined mediation. These two groups were compared to each other and to the ineligible applicants.

Because the number of mediations was so small, the Judicial Council could not evaluate the effects of the mediations with statistical certainty. However, some general conclusions could be reached. One finding is that half of those who mediated had shared parenting arrangements of some sort (either joint legal custody, or joint physical and legal custody). Shared parenting arrangements characterized only 26% of the total project cases. Also, those who mediated tended to be more educated and have higher incomes than all other groups. They had lower child support arrearages than any other group, although 87% were in arrears when they contacted the project.

A second finding concerned the cases in which one parent refused to mediate. Parents in this group seemed to be more hostile and embittered towards each other than the parents in any other group including those disqualified because of domestic violence. They also complained of more visitation problems at intake than any other group, and reported having more child support arrearages than any other group.

The Judicial Council evaluated the results of the mediations on seven different criteria contained in the legislation. The results of these evaluations suggested first, that mediation seemed to help parents focus on the needs of their children and come to agreements that furthered the best interests of their children. Second, it seemed that parents and mediators who were able to reach agreements were generally satisfied with the process, and, surprisingly, that some of those who could not reach agreement had been satisfied with the process or at least continued to believe that mediation could be useful to other parents.

In attempting to measure whether mediation is more economical and efficient than litigation, the Judicial Council discovered that few visitation disputes are resolved through formal litigation; indeed, many are never resolved at all, although some are worked out between the parents one way or another. With that caveat in mind, it nevertheless appears that for those visitation disputes that are resolved through formal litigation, mediation is more efficient and faster than formal litigation, and that it is at least as economical (measured in terms of cost to the state and also in terms of cost to the litigants).

It was unclear whether mediation helped reduce future litigation. Seven of the parents who mediated visitation issues also had custody or support motions pending with the court when mediation began; none were able to settle those motions during

mediation or after it ended. On the other hand, parents who were litigating during and after mediation were not litigating issues that could have been mediated; i.e., they were litigating custody and support issues beyond the scope of this project. Also, one parent filed a formal motion to change custody after being told that he could not discuss custody and support in mediation. These data, in addition to child support data and comments made in interviews and on written questionnaires, suggest that parents who mediated a visitation problem often had custody and support disputes on their minds as well, and that addressing the visitation problem did not cause the support and custody issues to go away.

Finally, the Judicial Council found possible support for the hypothesis that mediation can help improve compliance with child support. Although the number of cases for which CSED data were available was very small, it appeared that child support arrearages for parents who mediated (including those who did not reach agreement) dropped 32% between the day that mediation was requested and the end of the project. Similar decreases were not noted for the domestic violence group or for the group in which one parent refused to mediate. Thus, although the mediation group's improved child support compliance could be related to many factors, it is at least possible that mediation was one of them.



## ***I. Background***

### ***A. Introduction***

The Alaska Child Visitation Mediation Pilot Project was created by the Alaska Legislature during its 1990 session (Chapter 163 SLA 1990, attached as Appendix A). The pilot project, administered by the Alaska Judicial Council, was funded with \$100,000 for its first year of operation and \$63,450 for its final eight months.<sup>1</sup> The project's two purposes were to provide parents with mediators to help them resolve their child visitation disputes, and to evaluate the effects of visitation mediation.

About 400 parents, with an estimated 780 children, contacted the Judicial Council about mediation in the project's eleven months of operation. Parents seeking assistance were as diverse as the state's population in general, including varied ethnic, educational and employment backgrounds. In addition to receiving mediation services, callers were referred for assistance with legal questions, child support issues, domestic violence problems, paternity suits and family counseling.

In evaluating the effects of visitation mediation, the legislature directed the Judicial Council to study the mediation project's efficiency, economy and user satisfaction, whether the project decreased the time required to resolve disputes relating to child visitation, whether it reduced litigation relating to visitation disputes, whether mediation improved compliance with court-ordered child support payments, and whether visitation mediation promoted the best interests of the child. This report contains the Judicial Council's findings and recommendations concerning these issues.

### ***B. Legislative History***

Representative Johnny Ellis sponsored the mediation project legislation; Representative Max Gruenberg was co-sponsor. The Child Visitation Mediation Pilot Project originally was suggested to the legislature by non-custodial parents' rights organizations in response to members' complaints about the difficulty of getting access to their children after divorce.

During the legislative process, a concern was expressed that mediation might disadvantage women, and that it could be dangerous to women who have been victims

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<sup>1</sup> The Judicial Council did not use \$20,363.85 of the first year's funding and also expects to return to the legislature a portion of the project's second year funding. *See also* note 64.

of domestic violence. It was argued that mediation might unfairly disadvantage women because women are socialized by society to compromise. This concern may have been prompted by a study of divorce mediation which concluded that mediation benefitted men more than women compared to the adversarial process.<sup>2</sup> It was also argued that mediation could be dangerous to women who have been victims of domestic violence because the mediation process itself may cause further incidents of violence, and because the batterer may use intimidation and threats of physical violence to coerce the victim to give in to his demands in mediation. In general, some believe that women's rights and interests are best protected by formal court processes, and that extra-judicial processes such as mediation cause the post-divorce family to be reconstituted in the paternalistic model.<sup>3</sup>

In response to these concerns, the House Judiciary Committee limited the scope of the mediation project. First, the enabling legislation was drafted to limit mediation to parents who already had a visitation order from the court. Second, the Judicial Council was instructed to screen out parents who wished to negotiate a "material change" in the visitation order. Third, the enabling legislation instructed the Judicial Council to disqualify from the project all cases in which there had been an "indication of domestic violence or a pattern of harassment of one party by another." Finally, the legislation was drafted to allow the parents to mediate without being physically present in the same room (i.e., in separate rooms or by telephone) in order to guard against the possibility of nonverbal threats, intimidation, and overreaching.

After these changes, the legislation passed with broad bipartisan support. The Judicial Council strictly interpreted the legislature's intent that women not be put at risk by the mediation process. The exclusions to mediation were faithfully applied and applicants who were ineligible because of domestic violence were not referred to private commercial mediators.

### ***C. Project Time Table***

The mediation project's authorizing statute was signed by the Governor on June 21, 1990 and became effective on July 1, 1990. Section 4 of the legislation required the Judicial Council to apply for federal funds that might be available for the pilot child

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<sup>2</sup> Emery, R.E. & Wyer, M.M., "Child Custody Mediation and Litigation: An Experimental Evaluation of the Experience of Parents," 55 *Journal of Consulting and Clinical Psychology*, 179-186 (1987).

<sup>3</sup> See Ray and Bohmer, *Public and Private Ordering within the Context of Divorce* (Finger Lakes Law & Social Policy Center, Inc., 1989).

visitation mediation project. The Judicial Council determined that the Federal Office of Child Support Enforcement (OCSE) had funds available for demonstration projects for evaluating child access problems. The Judicial Council hired a grant consultant, John Martin, who assisted the Judicial Council in drafting and submitting the federal grant proposal by the June 13 deadline.

While the federal grant was scheduled to be decided within one month, it actually took over three months for OCSE to make its decision. While waiting for the OCSE's decision, the Judicial Council could not proceed with the project because the federal funds would have allowed a project several times as extensive. However, during this waiting period the Judicial Council did design an alternative project that would be implemented if the Judicial Council's grant request were unsuccessful. The OCSE announced in late September that it had not chosen Alaska to be a recipient of the grant money.<sup>4</sup> The Judicial Council then immediately implemented its alternative project.

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<sup>4</sup> The OCSE funded three grants in three different states: Idaho, Florida, and Indiana. The mediation demonstration projects that ultimately were funded differed from Alaska's project in one important respect: those three projects all had a mechanism for ensuring that cases were randomly assigned either to the treatment group (i.e., cases that would go to mediation) or to the control group (i.e., cases that would proceed through the ordinary court process). Alaska's program did not have a random assignment provision because of the legislative intent that participation in mediation be completely voluntary. Generally speaking, data are more valid and reliable when random assignment is used than when participation in the treatment group is voluntary.



## ***II. Methodology***

The methods the Judicial Council used to screen applicants for the project, provide mediations and evaluate the project on the criteria set out by the legislature were shaped in large part by the statutory parameters of the program and the limited time available for the project. The Judicial Council initially formed an advisory committee composed of representatives from interest groups, the court system, the Alaska Child Support Enforcement Division, local mediators, and legislators. In structuring the project, the Judicial Council drew upon suggestions from the members of this advisory committee, the experiences of other states, advice from the Judicial Council's evaluation specialist<sup>5</sup>, and the Judicial Council's own expertise in project management and evaluation. The project's structure, management and evaluation are described briefly below; the data collection forms and methods are described in greater detail in Appendix B.

### ***A. Structure of Project***

The legislature directed that the pilot program be established in the judicial district of the state determined to have the greatest caseload relating to court-ordered child visitations. The Third Judicial District has the highest volume of domestic matters in the state.<sup>6</sup> The Third Judicial District includes Anchorage, several mid-sized communities (Kenai, Homer, Palmer, Kodiak and Valdez), and a number of small towns (e.g., Soldotna, Wasilla, Cordova).

The Judicial Council hired a part-time secretary, assigned its staff attorney to act as project director, and selected 15 local mediators to be trained and work under contract to the Judicial Council to conduct the mediations. Two other Judicial Council staff were trained to conduct intake for the program when the project director was not available.

Extensive publicity was targeted to maximize the Judicial Council's ability to reach the parents most likely to benefit from the program. The Judicial Council sent all local media press releases and public service announcements; most responded with some coverage of the program. Three thousand brochures were distributed, to all attorneys in the Third Judicial District, all Child Support Enforcement Division caseworkers, all Anchorage judges and masters, and to a wide variety of other groups and individuals.

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<sup>5</sup> Portions of the evaluation and all of the data analysis were conducted by Dr. John Kruse and the staff of the Institute for Social and Economic Research (ISER) at the University of Alaska Anchorage.

<sup>6</sup> No state agency keeps records of caseloads specifically relating to court-ordered visitation.

Staff spoke to several local groups interested in the program, including the Alaska Family Support Group, the Alaska Children's Commission, the Network for Child Advocacy and two sections of the Alaska Bar Association. Finally, paid ads were placed in local newspapers throughout the period during which the Judicial Council was actively soliciting applicants for the program.<sup>7</sup> See Appendix C for examples.

### ***B. Mediators and Training***

Mediations were conducted by fifteen mediators, selected by the Judicial Council from a pool of about 70 applicants. Each of the mediators was required to have a college or university degree, previous professional group or university training as a mediator, plus two or more years of mediation experience (or a graduate degree in law, child psychology, social work or a related field in lieu of the direct mediation experience). Of the group selected, all had actual experience as a third party neutral (e.g., family counselor, mediator or arbitrator), all were familiar with children and family issues, and all but one had an advanced degree in addition to their college degrees (the one exception held the title of senior mediator in the Academy of Family Mediators by virtue of her extensive mediation experience).

The mediators received an additional 40 hours of training in family mediation sponsored by the project. The training was conducted by the Association of Family and Conciliation Courts, an organization headquartered in Madison, Wisconsin and nationally recognized for its expertise in mediation training. The "style" or "model" of mediation taught by AFCC's trainers, Ann Milne and Peter Salem, emphasized interest-based negotiating and the process of helping the parties to reach their own agreement, as opposed to the end result of reaching an agreement. Topics addressed which specifically related to this project included gender and culture sensitivity, Alaska law, domestic violence issues and mediator ethics. The Project Director, a representative from the Alaska Family Support Group and a representative from the Alaska Women's Commission also participated in the training. Mediators were required to pay a fee to participate in the training; the fee was refunded after the mediator remained with the project for three months. Appendices D and E contain brief biographies of each mediator and the course outline for the mediator training, respectively.

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<sup>7</sup> Channel 2 broadcast a short piece about the mediation project on a Sunday evening news program in December of 1990. Articles mentioning the mediation project appeared on several occasions in the *Anchorage Daily News*, as well as in the *Alaska Bar Rag* and in the August, 1990 volume of the nationally-distributed *Alternative Dispute Resolution Report*.

### ***C. Intake and Screening***

About 475 parents, attorneys, grandparents and stepparents contacted the project in the eleven months during which applicants were actively solicited. Each call was referred to one of the three Judicial Council staff who had been trained to handle the requests for mediation.

Applicants were asked a series of questions to determine whether they qualified for mediations, and to develop a profile of the types of cases handled by the project. Answers were recorded on an intake form. This intake interview required from twenty to forty-five minutes to complete. Callers who did not qualify were referred to other appropriate services,<sup>8</sup> and asked to assist the project by completing a questionnaire that would be mailed to them. Callers who did qualify were given more information about the project and sent an application form. When the application form was returned, the other parent was sent a similar form; if that was returned and both parents wanted mediation and qualified for it under project guidelines, the case was assigned to a mediator.

Screening took place at all of these stages. The most significant reason for disqualification from the project was an indication of domestic violence (see page 21 of this report). Second most significant was lack of a visitation order. The majority of the disqualifications were based on information given to staff at the time of the initial call or visit. Callers who reported any violence at any time were disqualified, whether or not a domestic violence restraining order had ever been sought.<sup>9</sup> Cases were further screened by reviewing available court records related to the case, by asking each party if a restraining order had ever been requested or received by either one,<sup>10</sup> and by training mediators to recognize signs of past or present domestic violence. No cases that progressed to mediation were then disqualified because of domestic violence, indicating that the earlier rigorous screening procedures were effective.

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<sup>8</sup> Many callers reported that these referrals were extremely beneficial and that they had received valuable assistance from the project even though they did not qualify for mediation.

<sup>9</sup> Any parents who reported allegations of child sexual or physical abuse or the crime of custodial interference also were disqualified under the domestic violence exclusion.

<sup>10</sup> All cases in which a domestic violence restraining order had been issued were disqualified. The existence of an emergency domestic violence restraining order indicates that a judge or magistrate has made a finding that the petitioner has been the victim of domestic violence, and that an emergency existed at the time the order was entered. In cases in which an emergency domestic violence restraining order had been requested but denied, staff checked court records to determine whether the order had been denied because there was no finding of domestic violence, or because no emergency existed.

#### ***D. Data Collection and Analysis***

Four separate groups of parents were considered in evaluating the project's effectiveness and benefits. They were: (1) parents who mediated (20 sets of parents); (2) parents who were eligible but did not mediate (105 sets); (3) parents who contacted the project but did not qualify for mediation (265 sets); and (4) a control group of parents selected from court cases in which some action relating to child custody or visitation had occurred (199 sets). Project staff compiled information about the parents' characteristics, children involved, the nature of the dispute, reasons for disqualification and the nature of the case. This information was analyzed by the Institute for Social and Economic Research (ISER) at the University of Alaska Anchorage. Detailed information about the data collection forms and methods is included as Appendix B.

The data analysis served two purposes: first, it provided a description of the types of cases handled by the project and their outcomes, and second, it evaluated the project's effectiveness based on the criteria set out by the legislature. ISER conducted the analysis using the SPSSX statistical package; project staff also performed additional analysis. The findings of the analyses are described in the remainder of the report.

### ***III. Data and Analysis***

This section explores the findings of the study about the parents and children served by the project, examines the characteristics that distinguished mediated cases from non-mediated cases, and evaluates the project on the criteria established by the legislature.

#### ***A. Overview***

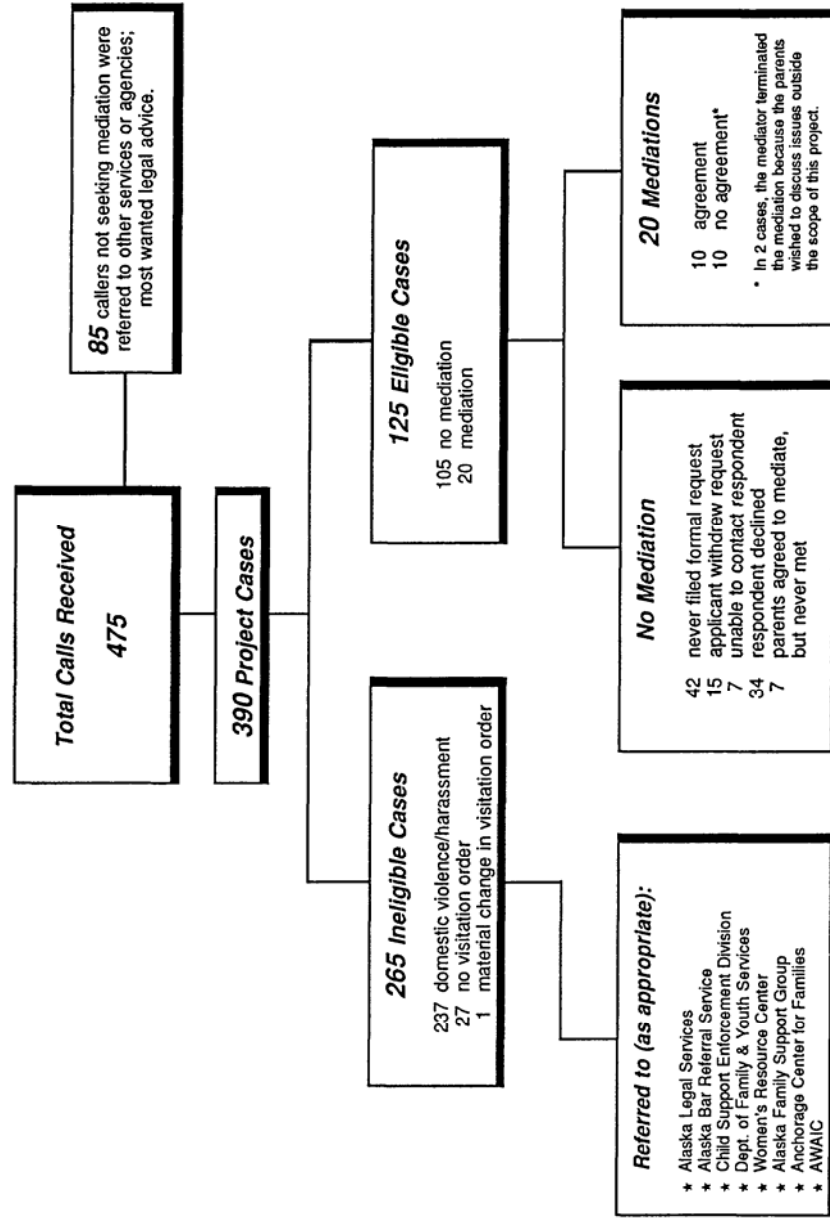
Data for the analysis were collected, first, from intake interviews with all project applicants, second, from forms completed by project participants at several points in the intake and mediation process, and third, from interviews and surveys of the mediators who worked for the project. Finally, a control group of Anchorage court cases was reviewed.

The interviews and data forms asked participants about their children, their visitation problem, their feelings about child custody, visitation and child support, what they hoped mediation would accomplish, their feelings about the other parent, the level of conflict with the other parent, child support payment history, and demographic information such as their age, race, education, income and employment. Participants also received three and six-month followup questionnaires designed to show how their situation had changed over time. In addition, parents who mediated were sent questionnaires asking how they felt about the mediation process, the mediator, and the agreement (if there was one).

About 475 parents contacted the Visitation Mediation Pilot Project for information or assistance. Figure 1 shows that 85 of the callers were not interested in mediation and were given information or a referral to another program or service. The remaining 390 calls were requests for mediation. These 390 parents were divided into three groups: (1) parents who mediated; (2) parents who were eligible to mediate but did not for one reason or another; and (3) parents who were ineligible to mediate.

Only 32% of the parents who contacted the project were eligible for mediation services. The other 68% (N=265) were ineligible because of statutory criteria that excluded cases in which there had been an indication of domestic violence or a pattern of harassment, cases in which no visitation order had been entered by a court, and cases in which the applicant wished to make a material change in the court ordered visitation schedule. The vast majority (89%) of these ineligible applicants were excluded for an indication of domestic violence.

**Figure 1**  
**Case Breakdown for Child Visitation Mediation Project**



## ***B. The Children Who Were the Subjects of Visitation Disputes***

Although the analysis primarily describes the parents who contacted the project<sup>11</sup>, care should be taken not to overlook the children for whose benefit the pilot project was established. About half (51%) of the children involved with the pilot project were between ages 6 and 12,<sup>12</sup> and 32% were aged five or under. Most (68%) lived primarily with their mothers; although 19% were in the custody of their fathers, and 10% were in families where the parents shared physical custody. The childrens' parents had been separated an average of 57.1 months at the time the parent requested mediation.

Information about the children is important in light of studies that indicate that children whose parents engage in lengthy post-separation disputes are the most "at risk" group among the divorcing population.<sup>13</sup> Approximately one-third of divorced parents are embittered and actively hostile 2-5 years post-separation.<sup>14</sup> This parental hostility may manifest itself in disputes over custody, visitation, or support issues. For these children, "the major benefit of the divorce, the cessation of parental hostilities, does not accrue."<sup>15</sup>

Although project interviewers did not talk directly to the children, the interviewers heard the parents' descriptions of disputes over the children (e.g., bitter court custody battles and complaints of abuse and neglect by the other parent), and disputes between the parents (e.g., physical, verbal and emotional abuse between the parents, sometimes in front of the children). Interviewers heard descriptions of noncustodial parents' gifts and letters to the children returned unopened, of denial of access to potential sources of support such as grandparents and other extended family, and childrens' academic performance suffering due to stress and dysfunction within the post-divorce family.

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<sup>11</sup> No child who was the subject of a visitation dispute ever contacted the project.

<sup>12</sup> Data were analyzed only for the first child listed; staff experience suggested that the second and third children were typically close in age to the first. A recent study of child support court cases filed in Alaska courts in 1989 found that the average number of minor children involved in support proceedings (i.e., in divorces, dissolutions, and other domestic relations cases) was 1.6, and the average age of the children was 7 years. Fay and Read, *Child Support in Alaska*, p. 24 (July 1991).

<sup>13</sup> Johnston, Campbell, and Mayes, "Latency Children in Post-Separation and Divorce Disputes," *Journal of American Academy of Child Psychiatry*, 24, 5: 563-574, 563 (1985).

<sup>14</sup> *Id.* Other studies indirectly support this one-third figure, e.g., Pearson *et al* (1988) found that for one-third of the couples studied, there was no compliance with both the child support and visitation orders.

<sup>15</sup> Johnston *et al*, at 563.

Finally, data indicated that over half of these children are not receiving the financial support to which they are entitled by law, certainly resulting in many cases in a decreased post-divorce standard of living.

### **Summary**

Many of the estimated 780 children involved in this project live in families characterized by a great deal of conflict between their parents and a decreased post-divorce standard of living. Interviews with these childrens' parents suggested that the parents remained bitter about the divorce and actively hostile towards each other, and that for the most part, they seemed unaware or unwilling to admit that their hostilities might be detrimental to the children.

### ***C. Characteristics of Parents and Outcomes***

Most requests (251 of 390) came from the parent who did not have primary physical custody of the child.<sup>16</sup> Even so, a significant minority (26%) of requests came from a parent legally committed to shared parenting (i.e., a parent with either joint legal custody, or joint physical and legal custody).

About half of all parents asking for services were female; half were male. Of non-custodial parents requesting mediation, 73% (N=136) were men, and 27% (N=50) were women. Only six men with sole physical and legal custody requested mediation, compared to 51 women. Figure 2 further illustrates the breakdown of project applicants by parenting arrangement and gender.

**1. Group 1: Profile of Parents Who Mediated.** The parents who mediated comprised the smallest group in the project--only 20 sets of parents. This group is simply too small for a reliable statistical analysis. However, the data about this group are presented for comparison, with the caution that generalizations from the data may not be valid.

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<sup>16</sup> However, one surprising finding was that in 43% of the cases, the parent requesting mediation was a custodial parent having either sole physical and legal custody, joint legal custody, or joint legal and physical custody. This percentage does not include 40 cases in which legal custody was unknown or as yet undetermined, and 18 cases in which neither physical nor legal custody was known.



**Figure 2**  
**Project Applicants by Gender and Parenting Arrangement**

<b>Applicant Description</b>	<b>Total</b>
Father with sole physical and legal custody	6
Father with legal custody - mother has physical custody	2
Mother with sole physical and legal custody	51
Mother with legal custody - father has physical custody	1
Father with neither physical nor legal custody	136
Mother with neither physical nor legal custody	50
Parents with joint legal custody:	48
▶ initiator was a mother with primary physical custody	9
▶ initiator was a father with primary physical custody	2
▶ initiator was father without primary physical custody	25
▶ initiator was mother without primary physical custody	11
▶ physical custody of kids "split"	1
Parents with joint legal and physical custody	38
▶ initiator was mother	22
▶ initiator was father	16
Legal custody undetermined/unknown	40
▶ initiator was a mother with physical custody	10
▶ initiator was a mother without physical custody	8
▶ initiator was a father with physical custody	2
▶ initiator was a father without physical custody	18
▶ parents have joint physical custody	1
▶ parents have "split" physical custody	1
Unknown	18
▶ initiator was mother	7
▶ initiator was father	11
<b>Total</b>	<b>390</b>

\* "Split" physical custody means that each parent has primary physical custody of at least one child in a family with two or more children.

Alaska Judicial Council 1992  
Child Visitation Mediation Project

**a. Differences Between Parents Who Mediated and Other Parents.** Parents who mediated differed in many respects from the parents in the other groups. They tended to have higher income, more education, and were more likely to have white collar jobs than parents who were ineligible to mediate and, to a lesser degree, than parents who were eligible but did not mediate. Parents who mediated approached the issues of child custody and visitation differently as well. Although parents with joint legal custody of

their children comprised only 26% (N=86)<sup>17</sup> of the parents who contacted the project, they comprised fully half (N=10) of the parents who actually participated in mediation.<sup>18</sup> (Figure 3, below, shows the parenting arrangements of the 20 sets of parents who mediated.) These data suggest that parents who have previously made a legal commitment to shared parenting are more disposed to try mediation than those who have not.

<b>Figure 3</b>		
<b>Parenting Arrangements of Families That Mediated</b>		
Joint Custody Arrangements		10
Joint physical and legal custody	8	
Joint legal custody, one parent has primary physical custody	2	
Mother has sole physical and legal custody		10

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Parents who mediated had had more contact with the legal system than those who did not, as measured by attorneys' fees incurred. Two-thirds or more of the parents who mediated had spent over \$2,000 in legal fees to resolve their custody/visitation disputes, as compared to 38% of all those who did not mediate.<sup>19</sup> Seventy-five percent of the parents who mediated had hired an attorney, compared to 60% of the other people who contacted the project. Moreover, in at least seven of the mediation cases, a formal motion regarding custody/visitation was on file in the court case before mediation began.

The relationships of parents who mediated with their children also appeared to be different. Parents who mediated were more likely than parents in other groups to say that their children came home tired and upset, or to worry about lack of supervision. However, they were less concerned about major problems such as abuse and neglect and

<sup>17</sup> This figure excludes the 58 cases for which legal custody was unknown or undetermined.

<sup>18</sup> In fact, in eight of the mediation cases (40%), the parents had joint legal and joint or shared physical custody of their children. This arrangement appeared in only 11% of the project applicants as a whole. By way of comparison, joint legal and physical custody appeared in only 9% of custody cases sampled in a recently published study by the Women's Commission and Alaska's Child Support Enforcement Division. Fay and Read, *supra* n. 12, at 24.

<sup>19</sup> This expenditure was reflected in the fact that over 30% of the mediation group court files contained formal visitation motions, compared to approximately 15% of the control group court files.

they were less likely to say that the other parent criticized them to the children (only half said criticism was a problem, as compared to 70% or more of the other groups).

As a group, then, parents who mediated tended to be more educated, have higher incomes, and previously have had joint custody. They seemed more willing to discuss their childrens' needs with each other. Conversely, they tended to be more likely to be involved in legal disputes with the other parent--perhaps because their higher incomes gave them access to the formal litigation process.

**b. Differences Between Parents who Reached an Agreement in Mediation and Those who Did Not.** Within the group of parents who mediated, parents who reached an agreement in mediation differed from those who could not reach agreement. First, parents who could not agree in mediation were more likely to complain that the other parent criticized them to the children. The quality of visitation, judged by the numbers of perceived problems, also was related to whether parents mediated and reached an agreement. Parents who initiated mediation and went on to reach agreement complained at intake of an average of 5.0 visitation problems. Parents who initiated mediation but could not reach agreement complained of 10.4 problems. They perceived even more problems than those who were eligible but did not mediate (7.8 problems) and those who were ineligible (8.8 problems).

Parents who could not reach an agreement in mediation seemed to be more hostile and bitter towards each other than those who agreed. Seventy-five percent reported that they and the other parent were getting along "not well at all" compared to 32% of the parents who went on to agree. The same pattern held true for other measures of the cooperativeness of the parenting relationship and the parents' ability to communicate, such as how well the other parent listens, the other parent's willingness to compromise, and trusting the other parent's word.

These data suggest that two different groups of parents were willing to mediate: those who perceived relatively few visitation problems and had a more cooperative relationship with the other parent, as measured by stated problems and ratings of the other parent, and those who had substantial numbers of problems and a more hostile, adversarial relationship with the other parent, by the same measures.

**c. Mediated Agreements.** Half of the parents who mediated reached an agreement on child visitation. This agreement rate is slightly lower than other rates reported in the literature, which vary from 60-80%. The difference can be explained by the fact that project mediators were hampered by the prohibition against mediating any

issues except visitation issues. The Mediation Project's experience suggests that visitation issues are closely related to other family issues, such as custody and support, and that parents have difficulty discussing and agreeing on visitation issues in isolation.<sup>20</sup>

Of the twenty cases mediated by the Mediation Pilot Project, two were terminated by the mediator because the parents wished to discuss issues outside the scope of the project. In one case, the father had contacted the project complaining that the mother, who lived with their child in California, refused to pay her half of their child's plane ticket to visit her father in Alaska. In mediation, the mother explained that she would not spend any money on a ticket until the father paid her approximately \$17,000 that was several years past due under the terms of the divorce property settlement. The father had never complied with the property settlement, and the parents wanted to negotiate a payment plan.

In the second case, the parents' court order gave sole physical and legal custody to the mother, but since the divorce the parents had come to an arrangement under which the children lived mostly with their father. Although the parents came to the mediation project wanting to discuss a few small changes in the visitation schedule, their main concern was a renegotiation of the child support award to reflect the fact that the children spent more time with their father. After the project mediator terminated the mediation, the father filed a formal motion in court to modify custody and visitation.

The fact that formal custody litigation was pending in seven of the mediation group cases also may have had an effect on the mediation process. In one case in which the mother had been awarded interim custody, the parents mediated a tentative visitation agreement but the mother's attorney advised her not to sign it, presumably because of the pending custody action.<sup>21</sup> In one particularly bitter custody case, the lawyer for one of the parents felt that mediation might have resulted in an agreement if it had been begun before the court custody battle. This lawyer believed that the parents' court battle had generated so much emotional hostility that they could not move out of the adversarial mode.

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<sup>20</sup> Jessica Pearson and Nancy Thoennes make a similar finding in a 1988 study, concluding that visitation problems and non-payment of support are related phenomena. They recommend the development of mechanisms in which visitation and child support grievances can be jointly aired. Pearson & Thoennes, "The Denial of Visitation Rights: A Preliminary Look at its Incidence, Correlates, Antecedents and Consequences," 10 *Law & Policy* IV, at 368 (1988).

<sup>21</sup> Custody and visitation ultimately were settled before trial through attorney negotiations.

For the parents who reached mediated agreements, the subjects covered in their agreements were detailed and touched on many different aspects of the parent-child relationship. Subjects included in the agreement were detailed arrangements for pick ups and drop offs, schedules and formats for communication between the parents and for exchange of important information about the children, babysitters, scheduling of the children's extracurricular activities, use of alcohol when in the presence of the children, purchase of equipment for participation in sports, purchase of extra clothing for the children, contact with other members of the parents' families, payment of medical bills and the children's spiritual development.

*d. Followups.* Analysis of followup surveys on parents' satisfaction with the mediation process and with the mediated agreements was hampered by the limited amount of time available to complete the work, and a low return rate on the followup questionnaires.<sup>22</sup> About half of the parents who reached an agreement said that they were optimistic that the agreement would work and that they were satisfied with it. About half of all who mediated said they would participate in mediation given the chance to make the decision over again. Interestingly, some parents who failed to agree in mediation said they would use mediation again. One mother who said she would not use mediation again wrote that the project questionnaire "...did not allow me to indicate certain beliefs I hold, i.e., mediation is good, I would support legislative action on mediation...."

Despite parents' generally positive attitude towards mediation, in two cases parents reported that the mediated agreement had broken down. In one case, the father, knowing that his daughter was looking forward to a summer visit with him, had announced that he would cancel the visit because he could not afford child support, the plane ticket and day care all at the same time. In the first mediation session, the mother volunteered to reimburse the father for the plane ticket. The mediator told the parents she believed that this solution was one-sided and unrealistic but the mother insisted, saying that her daughter would be terribly disappointed if the visit were cancelled. The father later angrily reported that the mother had not reimbursed him.

In the second case, the parents had agreed that the father would not take the son out of town during his summer visitation until the son's soccer season was over. Under the mediated agreement, the father promised to make best efforts to schedule around any

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<sup>22</sup> Of the 40 parents who mediated, 12 fathers and 10 mothers returned their evaluations in time to be included in the statistical analysis. An additional three mothers returned their evaluations after the data had been analyzed; their comments were incorporated where possible into the report.

end-of-the-season tournaments. After the summer visit, the mother reported that the father had "broken the agreement" because he had taken the child away before the last tournament was over. The father said that he was unaware of the game until it was too late to change his plans. The mother later told the interviewer that she believed mediation was generally a good idea. She explained, however, that it did not work for her in part because she could not put away her anger over the father's earlier attempt to gain custody.<sup>23</sup> The father echoed the mother's assessment, saying, "Every time I talk to her I see vengeance in her eyes."

Some proponents of mediation suggest that mediation can have beneficial effects whether or not agreement is reached, because the parents learn collaborative problem solving behaviors and more constructive ways of handling disagreements (e.g., using verbal reasoning instead of verbal or physical aggression).<sup>24</sup> The limited amount of formal project data available on this issue neither supported nor disproved this hypothesis; however, anecdotal evidence offered limited support for the proposition. In one case in which the end of the pilot project ended the mediation, the parents told the mediator that they would continue negotiations on their own, using what they had learned in mediation. In another case (in which agreement was reached), the mediator related the father's comment that mediation had enabled him for the first time in years fully to understand his ex-wife's concerns. On the other hand, one woman who was ordered by a judge into mediation told the interviewer, "Mediation is a good idea, but I knew before signing up that it wouldn't work. You can't communicate with people with personality disorders....The judge didn't know of my ex's personality disorders."

**2. Group 2: Eligible Parents who did Not Mediate.** There were 105 eligible parents who did not mediate. Forty-two of these callers never submitted a formal request for mediation.<sup>25</sup> Fifteen others submitted a request for mediation but withdrew

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<sup>23</sup> The father's motion for change of custody had sparked a particularly bitter court battle, because it came eight years after the original custody determination and contained allegations that the mother was neglecting the son.

<sup>24</sup> In one study of 80 families going through divorce, researchers found that the parents verbally abused each other (by insults, name calling and swearing) on the average of more than once per week but verbally reasoned only about once every two weeks, and that children witnessed more than half the verbal and physically abusive incidents but less than half the verbal reasoning. Johnston *et al*, at 566 (1985).

<sup>25</sup> Each of these parents was asked to answer a followup questionnaire in order to learn why they had completed the lengthy intake interview but had failed to submit an application. Only about six of the people in this group responded; some indicated they did not think the other parent would agree to mediation, and some indicated that they had worked the problem out themselves.

it before the other parent had been contacted, usually because the problem had been resolved. Another seven agreed to mediate but never met.

**a. Parents who Agreed to Mediate But Never Met.** Some of the parents who agreed to mediate but never met may have been using the mediation project simply as a way to get the other parent's attention: in one such case the responding parent's willingness to mediate seemed to open communication and the parents arranged visitation without the project's help. Other parents seemed to view the mediation project as a device to manipulate or harass the other parent. For example, one initiator's request may have been motivated more by pending litigation over a promissory note than by visitation problems; when his ex-wife agreed to mediate, he decided he did not really want to mediate himself. It also sometimes appeared that the parents' mistrust and maneuvering for a tactical advantage derailed their initial decision to mediate. For example, in one case the parties agreed to mediate but never got to the table because the mother insisted on bringing her new boyfriend to the mediation sessions and the father refused unless he could bring his girlfriend, which the mother would not accept.

**b. Responding Parents Who Refused to Mediate.** Thirty-four of the eligible cases (32%) did not go to mediation because the responding parent refused to mediate.<sup>26</sup> Further analysis of these cases shows that they differ from other eligible cases, and from disqualified cases, in several respects. In nine of these cases (27%) the initiator was a mother<sup>27</sup> who did not have physical custody of her child; mothers without custody comprised only 15% of all applicants. In all but five of these cases, the initiator did not have physical custody of the child. Mothers and fathers refused mediation in almost equal numbers, with mothers saying no in 56% of the cases and fathers saying no 44% of the time.

The group where the responding parent refused to mediate seemed to exhibit a higher level of hostility than other groups. Fifty-nine percent reported at intake that they and the other parent were getting along "not well at all" compared to 56% of the parents who were disqualified for domestic violence, and only 32% of parents who mediated an agreement. The same pattern held true for other measures of the cooperativeness of the parenting relationship and the parents' ability to communicate, such as how well the other parent listened (72% said the other parent listens "not well

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<sup>26</sup> In an additional seven cases, project staff were unable to contact the other parent.

<sup>27</sup> In one of these cases, the initiator was the sister of a mother who did not have custody. The aunt complained that the father had cut off contact between his daughter and all the members of mother's family. The mother also had contacted the project.

at all" compared to 68% of domestic violence cases and 50-69% of eligible cases overall), and the other parent's willingness to compromise (76% said "never" compared to 73% of domestic violence cases and 16-61% of eligible cases).

The group in which a parent refused to mediate also seemed to experience visitation problems differently from parents in other groups. While only about half of all other groups complained that the other parent changed the visitation times, 65% of the applicants in this group reported the problem. Seventy-six percent of the applicants in this group reported that the other parent would not let the children visit, compared to 61% of domestic violence groups and 40-60% of other groups. Eighty-nine percent of applicants in this group complained that the other parent was not cooperative and flexible about the visitation schedule. Eighty-six percent of the applicants in this group said the other parent criticized them to the children, compared with 72% of domestic violence cases and 20-66% of other groups. Parents in this group reported more verbal fights at pick ups and drop offs than parents in the domestic violence group.

Phone interviews with the respondents suggest that the visitation problems in these cases may have been related to conflict patterns and withholding behavior between the parents. A common response was initially to deny to the interviewer that there was any visitation problem. While denying any visitation problems, respondents needed little prompting to recount angrily all the other parent's faults and transgressions.

Many of these parents viewed the access issue as the other parent's problem or as a power struggle between adults, rather than as a common concern affecting the children. For example, one custodial father candidly admitted that he was preventing access because he wanted to "teach her [his ex-wife] a lesson." Many respondents said that they thought the other parent did not really want to see the children, but was using the mediation project as a way to "hassle" the custodial parent. Another custodial parent said of the initiating parent, "He always does something like this when I have a new boyfriend."

Respondents gave varied reasons for their decision to decline mediation, but the common underlying theme was a preference that the other parent not be involved in the post-divorce family. In particular, custodians who had remarried or started new relationships felt that their new partner could be substituted for the other parent. One woman reported that she and her daughter were very happy with her new partner and that "my daughter calls him 'daddy' and she hardly ever talks about him [the other parent] anymore." One man said that the children did not need to see their mother and in fact did not want to see their mother because "they have a new mother now." A third



said that his new wife had worked hard to integrate his girls into their new family, and unless she wanted to mediate he would not. His new wife refused, saying that the ex-wife's visitation concerns were "not my problem."

Some parents defended their decision not to mediate on the grounds that beginning visitation where the noncustodial parent had not had meaningful contact with the children for a number of months or years could be confusing or damaging to the children. A few parents explained their unwillingness to permit access by saying that the children did not want to see the other parent.

Concern may be warranted for children who are prevented or discouraged by one parent from knowing the other, or who witness parental conflict over access. In their long-term study of 70 divorcing families in California, Wallerstein and Kelly found that two-thirds of the children, especially the younger ones, yearned for the absent parent, one-half of these "with an intensity which we found profoundly moving."<sup>28</sup> In addition, they found that children of all ages, and six- to twelve-year-old boys in particular, felt rejected by their (departed) father and questioned their own loveability.<sup>29</sup> In addition, to the extent that these children witness or are aware of their parents' hostilities, they may become distressed<sup>30</sup> and may carry vivid and painful memories of the traumatic events for years to come.<sup>31</sup>

**3. Group 3: Ineligible Applicants.** Sixty-eight percent (N=265) of the project's cases were ineligible for mediation. Almost all of these cases (89%) were ineligible due to domestic violence. However, 27 cases were disqualified because the parent did not have a visitation order and one was disqualified because the parent wished to change the visitation order substantially.

**a. Disqualification Based on No Visitation Order.** Many of the cases which were disqualified because the parent did not have a visitation order<sup>32</sup> were ones in which the

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<sup>28</sup> Wallerstein and Kelly, *Surviving the Breakup*, 46 (Basic Books 1980).

<sup>29</sup> *Id.* at 48.

<sup>30</sup> Johnston *et al* at 567.

<sup>31</sup> Wallerstein and Kelly found that many children of divorce vividly remember painful memories ten years after the divorce. Wallerstein and Kelly, *Second Chances*, 23-24 (New York: Ticknar & Fields 1990).

<sup>32</sup> It should be noted that the number of these cases included in the project under-represents the number of parents without a visitation order who called the project. Staff often referred these callers to legal service providers without taking the time to complete an intake form.

parents had never been married and had separated without having custody and visitation determined by a court. Some of the parents in this group were angry because they were paying child support but had no legal right to see their children.<sup>33</sup> These cases also included a few parents who were married and were considering mediating their divorce.

Mediation may be particularly beneficial to these parents who have not yet become too heavily involved in the adversarial process. Many of these callers indicated a preference for resolving their disputes without resorting to litigation. There seems to be no reason for excluding this group from any future mediation project.

**b. Disqualification Based on Domestic Violence.** The statute establishing the Visitation Mediation Pilot Project expressly excluded all cases in which "there has been an indication of domestic violence...or pattern of harassment of one party by another."<sup>34</sup> The assumption underlying this exclusion is that mediation is never appropriate in any case in which there has ever been a single incident of violence. Some national women's organizations have encouraged this approach to mediation,<sup>35</sup> arguing that "when one disputant has abused another disputant, it is virtually impossible for the mediator to...protect against the dangers inherent in the misuse of mediation."

i) The number of domestic violence exclusions: A clear majority (237, or 61%) of the parents who contacted the project for assistance were disqualified because of one or more incidents of domestic violence, or a pattern of harassment. Almost half (N=109) of these applicants were women. The disqualification extended to any incident of domestic violence or harassment that had ever occurred in the relationship, even if it was a single incident and had occurred many years earlier.<sup>36</sup> This especially high rate of disqualification was unexpected: the Network on Domestic Violence estimated that

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<sup>33</sup> The Alaska CSED can establish paternity and set child support in an administrative proceeding for parents who were not married when the child was conceived. However, CSED has no authority to help a parent establish visitation rights.

<sup>34</sup> Chapter 163, Temporary and Special Acts (1990). See Appendix A for the full text of the Act.

<sup>35</sup> "...2) Family law cases involving parties between whom there was or is domestic abuse should not be mediated--no matter how seemingly long ago or how seemingly slight the abuse might appear." Sun and Woods, *A Mediator's Guide to Domestic Abuse*, p. 71 (National Center on Women and Family Law, 1989).

<sup>36</sup> Under the terms of the legislation, staff did not investigate allegations of domestic violence. Once the violence had been alleged by either party, in person, or in court records reviewed by staff, the case was excluded. Although a few callers insisted that they had been acquitted of charges, or cleared in some other court-related forum or hearing, staff interpreted the statute as requiring exclusion of the case.

30% to 40% of all domestic male-female relationships in Alaska involve violence.<sup>37</sup> A study of divorcing women in Ohio in 1978 found that 38% of the women mentioned physical abuse in the court files.<sup>38</sup>

The percentage disqualified from the project for domestic violence may be exceptionally high for several reasons. First, all of these relationships were between people who had ended, or were ending, the intimate aspect of their relationship. Although a few remained on somewhat friendly terms with the ex-partner, they were calling the project specifically because they had at least one dispute (over visitation) that they could not resolve on their own. It may be that they were more likely than average to have had some violence in the relationship.

Second, domestic violence was defined for purposes of this program as it is in Alaska's statutes generally,<sup>39</sup> to include children and others in the same domestic unit, and to include the crime of custodial interference. This definition is much broader than that used in most studies of domestic violence, which focus only on violence between male and female partners. A substantial minority of the parents disqualified from the project for domestic violence alleged abuse or neglect of the children or had obtained restraining orders to prevent the other parent from taking the children out of the community or state, and thus would not have been included in a typical study of domestic abuse.

ii) Parents' willingness to reveal domestic violence: The high rate of domestic violence disqualification was unexpected not only because the rates cited from other sources for domestic violence information are typically 50% to 100% lower, but also because some theorists suggest that people are unlikely to speak openly about

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<sup>37</sup> One report cites figures indicating that nationally, 11% to 12% of American men were physically violent toward their female partners. See, Sun and Woods, *supra* n. 34 at 23.

<sup>38</sup> *Id.*

<sup>39</sup> AS 18.66.900 (3) defines domestic violence as any crime in AS 11.41 (all murders, assaults, kidnapping and custodial interference, other violent crimes, and sexual assaults and abuse) when "the victim is a spouse or a former spouse of the defendant; a parent, grandparent, child, or grandchild of the defendant; a member of the social unit comprised of those living together in the same dwelling as the defendant; or a person who is not a spouse or former spouse of the defendant but who previously lived in a spousal relationship with the defendant or is in or has been in a dating, courtship, or engagement relationship with the defendant."

domestic violence.<sup>40</sup> This was not the experience of project staff; most callers, whether male or female, responded truthfully to the intake question about whether there had ever been domestic violence or a restraining order in the relationship.<sup>41</sup>

At least forty-eight of the men who called to ask about mediation<sup>42</sup> said that they had been arrested or convicted of violence against their former partner, or that a domestic violence restraining order had been filed against them. While the men often minimized the violence (One said, "I grabbed her shoulder and dislocated it, but I put it back in right away...other little incidents...but no more than in most marriages"), or placed the blame on alcohol, the woman ("...because my wife had a drug and alcohol problem, I was co-dependent. I beat her up once when she was using drugs in front of the kids"), or some other factor, they still seemed willing to report it. In only a few instances did staff accept a case for processing and find out later that domestic violence was a problem.<sup>43</sup>

One explanation for the parents' openness on this very personal topic may have been the non-threatening nature of the intake interview. Staff used active listening techniques, allowing the caller to take time to talk about the visitation problems, the violence and other issues in the case. In contrast, a parent appearing in court may feel intimidated by the surroundings and afraid of the court's response to an admission or allegation of abuse. For example, one caller told the interviewer of her 10-year marriage that involved frequent and severe abuse resulting in her permanent disfigurement, and added that she had not revealed the violence in the ongoing divorce/custody case. She

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<sup>40</sup> Pagelow, "Effects of Domestic Violence on Children and Their Consequences for Custody and Visitation Agreements," *Mediation Quarterly*, No. 4, pp. 347-363 (Summer, 1990). "Victims who voluntarily disclose their violent relationships are relatively rare, far outnumbered by those who say nothing to anyone in the court system, even to their attorneys if they have one. Much more frequently, both the women and the man minimize or deny any violence." *id.* at 355. However, Chandler, "Violence, Fear, and Communication," found that "...simple screening questions may be able to efficiently identify a variety of violence cases." 7 *Mediation Quarterly*, No. 4 at 345.

<sup>41</sup> In a few instances, a caller said there had not been domestic violence, and later contacts with the caller, the other parent, or review of the court records indicated there had been an allegation or evidence of violence. In some instances, this was because the caller had misinterpreted the question to include only current violence, only actual physical violence (e.g., restraining order had been issued based on allegation of custodial interference or verbal threats) or only violence against him or herself (e.g., did not think question included allegations of abuse of the child).

<sup>42</sup> See Appendix F for a detailed description of a subset of the cases disqualified for an indication of domestic violence.

<sup>43</sup> In no case that progressed to mediation was past or present domestic violence discovered during the mediation.

said that she had thought it best to hide the abuse from the judge and that she would decide later whether she needed to reveal it.

The fact that all of these parents had ended their relationships also may have encouraged them to speak openly. Parents who called the mediation project were not representative of all those who have had violent relationships. Women who felt that they had left (or were leaving) their troubled relationships may have been more willing to discuss the violent aspects. Several women said that they had left the relationship because of the violence. Men who spoke freely about their role (or alleged role) in abuse may have done so because they saw it as a past action, or because they felt that no serious consequences would attach to the admission.<sup>44</sup>

iii) Experience of Mediators: In an attempt to gain more insight into the much debated but seldom studied issue of mediation and violence, the project surveyed its mediators about their own private practices and opinions. A number of project mediators reported that they had handled cases with a history of violence in their private practices. Although each mediator had his or her own protocols for handling such cases, the general consensus was that where the violence is not current, and where it has not occurred for a specified time, the case could be appropriate for mediation. Issues that mediators explore before undertaking the mediation include whether the victim truly wishes to mediate, whether she feels safe, whether the victim still lives with the abuser, whether the victim depends on the abuser for basic necessities like transportation, the level of anger and blaming behavior between the clients, and whether the mediator feels, based on training and experience, that the victim can participate meaningfully in the mediation process.

iv) Conclusion: The blanket prohibition against mediating cases involving allegations of domestic violence was based on a group of cases in which the victim may have been at serious risk of further injury in the present or future. It arguably does not properly consider the wide range of cases excluded from mediation by Alaska's statute. Arguably, it does not consider the victims' perceptions of their own needs and abilities. It is axiomatic that all domestic violence and intimidation are wrong; however, participation in visitation mediation does not necessarily undermine this tenet. The pilot project was established to mediate issues related to child visitation, not the fact of the domestic violence.

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<sup>44</sup> It should be noted that callers were not promised confidentiality before the questions about domestic violence were asked.

Interviews with project applicants who had a history of violence in their relationships suggested that, under proper guidelines and circumstances, some could benefit from the mediator's assistance in making decisions about their children. Many of the women who were excluded from the project believed that the prohibition was damaging, rather than helpful to them. While women's advocates perceived the potential risks of mediation to outweigh any possible benefits, the victims often believed first, that they should be the ones allowed to make that choice and, second, that in their own cost-benefit assessments, the services offered by the pilot mediation project were valuable enough to overcome the risks as they perceived them.

One factor entering into their equations was the fact that almost no other feasible means of dealing with visitation problems exist in Alaska. Formal litigation through an attorney is too costly to be a realistic option, especially for the women in this group. Fifty-seven percent of these women reported that their total household income was \$20,000 or less; one quarter were on public assistance and half had no more than a high school education. Moreover, few attorneys are willing to take on visitation problems.<sup>45</sup> Staff searched, with little success, for alternatives to mediation that disqualified callers could be referred to. Alaska Legal Services takes few visitation cases, and some callers did not meet the income limitations. Other organizations such as the Women's Resource Center and the Alaska Family Support Group have few resources to devote to resolving visitation issues. A very few parents had complained to the police or troopers, but most rejected this option as too frightening for the children and too likely to escalate an already strained situation.

This lack of other resources, in turn, led some women to point out that they were placed at greater risk by being forced to deal directly with their abuser on issues of visitation. As one woman put it, "[p]eople like me are the ones who need the help. If he was rational at all, or most of the time, then we would not need help." Another queried, "What am I supposed to do when he won't listen to me and I can't afford to hire a lawyer? He sends her back late all the time. She's two days late now." Even though many of these women could understand the legislature's exclusion was intended to protect victims from further abuse or intimidation, these women had decided for themselves that the risks inherent in dealing with the other parent without mediation

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<sup>45</sup> A limited survey of Anchorage family law practitioners supported this perception. Most said that they discouraged clients and potential clients from litigating visitation issues through the courts unless the visitation problems were serious or chronic. The attorneys felt that visitation litigation is not worth the financial and emotional costs, given the difficulty of gaining any satisfactory long-term changes. For example, one attorney reported that she requires a \$1,500-\$2,500 retainer fee to litigate a visitation issue, depending upon the facts of the case.

were even greater. Mediation is sometimes criticized as if alternatives to it were without danger to victims; the victims themselves, however, did not perceive the alternatives as risk-free.

#### ***D. Areas of Dispute Between Parents***

**1. General Problems.** Noncustodial parents who contacted the project frequently expressed feelings of helplessness and frustration, because they felt that the custodial parent could unilaterally dictate the terms of any visitation, or deny visitation altogether. The overwhelming sentiment was that a court battle over visitation or custody was too costly. Many callers reported that they were unable to discuss visitation with the other parent because attempts to communicate soon degenerated into verbal fights.

Some disputes involved vacation time visitations (i.e., the Christmas holidays, Thanksgiving, or summer vacation). For example, parents had difficulty scheduling summer visits around the children's summer activities and around their own vacation plans. Other disputes involved weekly access. For example, one caller complained that every time she called to schedule weekend visitation, the custodial parent told her their child had other plans. This mother said that the other parent would not discuss their child's visitation schedule; he wanted instead to "talk about bills."

Many callers said that their access was denied after disagreements with the other parent. Disagreements that triggered visitation problems could involve many things, for example, a late child support payment, criticism of a new partner, a remarriage, or a move. In these cases, callers said they felt that the custodial parent was denying access in order to "punish" the noncustodial parent. One caller said that he could see his children only when the other parent was not "mad at me."

Custodial parents<sup>46</sup> who sought the project's services seldom said that they wanted to increase the amount or quality of time the children spent with the other parent. Most custodial parents who contacted the project did so in response to the other parent's unwelcome attempts to see the children. A commonly heard complaint was that the other parent had never shown any interest in the children until CSED started garnishing wages. In particular, custodial mothers who were receiving public assistance (Aid to Families with Dependent Children) often complained that they did not want the other

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<sup>46</sup> This section uses the term "custodial parent" to refer to the parent who has sole legal and/or physical custody of the child.

parent involved in the child's life, but that CSED's attempts to collect child support had caused the other parent to ask for visitation.

In addition to information given at the intake interview, applicants were given a list of 18 visitation problems and asked to circle the ones that they had experienced. For all groups, the most common responses were that the children were not allowed to go on visits, that the other parent was not cooperative or flexible about the visitation schedule, that it was hard to arrange mutually acceptable times for visitation, and that the parents criticized each other to the children.

The form also included a space for the parent to write in other problems. Problems most frequently mentioned by all applicants centered around one parent's move out of state (e.g., the other parent has moved and denies access, denies written or telephone contact with the children, or refuses to communicate at all with the applicant). A second area of concern for ineligible applicants was that the other parent or the other parent's new partner was sexually or physically abusing or neglecting the children. Other problems mentioned by eligible applicants involved complaints about the other parent's parenting skills, rather than complaints of physical or sexual abuse.

**2. The Problem of Distance.** A substantial number of the parents who contacted the mediation project were separated geographically from the other parent. (See Figure 4 for details.) In fact, only 38% (N=97) of applicants for whom both addresses were available reported both parents living in the Anchorage/Eagle River area.<sup>47</sup> Many of the access problems reported to the project were either caused or exacerbated by the expense involved in traveling great distances. For example, many callers said they were unable to exercise their scheduled visitation because they could not afford the children's transportation. One caller reported that she sent a plane ticket to the custodial parent and that the other parent tried to cash in the ticket instead of sending the child to visit. In another case, the custodial parent insisted that neither child would visit their mother unless they both did; but their mother reported that she could not afford to fly both of them up at once.

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<sup>47</sup> In only 10 of the 20 mediation cases did both parents live in the Anchorage/Eagle River area. Where parents were separated geographically, the mediation sessions were conducted by teleconference.



**Figure 4**  
**Residences of Initiator and Respondent\***

<i>Initiator's Residence</i>	<i>Respondent's Residence</i>			<i>Total</i>
	<i>Anchorage/ Eagle River</i>	<i>Outside Anchorage</i>	<i>Outside State</i>	
Anchorage/Eagle River	97	29	53	179
Outside Anchorage	15	28	19	62
Outside State	5	11	--	16
<b>Total</b>	<b>117</b>	<b>68</b>	<b>72</b>	<b>257</b>

\* Knew residence for both parties in 66% of the cases.

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Distance makes visitation more expensive and communication more difficult. Many callers complained that they had difficulty staying in touch with their children and their ex-spouses after a move out of state, and this concern was reflected in applicants' responses to the written questionnaires (see Section 1, above). For some, the expense of traveling to or from Alaska from the Lower 48 translated into less frequent contact with the children; for others it translated into cessation of contact. It also appeared that some custodial parents capitalized on distance by denying phone access and intercepting letters to the children.

Exercising visitation where the parents live far away from each other raises logistical concerns for both custodial and noncustodial parents. A common complaint from non-custodial parents was that they could not afford child support and a plane ticket in the same month. Parents must decide whether the children are old enough to travel to see the other parent or whether the other parent should travel to see the children. Disputes arise about whether the children would be comfortable on overnight visits or on extended visits with a parent they had not seen for many months. Custodial parents worried that the other parent would keep the children and not return them after a visit.

Finally, several callers reported that the other parent had moved out of state with the children, and that they did not know where they had gone. Three of these callers

complained bitterly that CSED garnished their wages but would not release information that would help them locate their children.<sup>48</sup>

**3. The Problem of Child Support.** Mediation project data and studies from other states suggest that the relationship between visitation and child support is complex. Comments made by callers at intake and elsewhere suggest a strong correlation between problems with child support and problems with access to the children. Although the intake interviewer asked no questions about child support during initial screening, most callers raised the issue on their own.<sup>49</sup> Obligor who were not in arrears were quick to mention that fact. Obligor who reported that they were in arrears sometimes said they felt that the other parent denied access because of the arrearage.

A substantial number of parents, both custodial and non-custodial, clearly regarded child support payments as the "admission price" for seeing the children. One mother asked: "I don't have to let him see the kids if he's behind on child support, do I?" A number of mothers on public assistance complained that the other parent had shown a new interest in seeing the child after CSED had initiated collection efforts. A few callers candidly reported that they had been motivated to establish or exercise visitation rights in response to CSED's collection efforts. One father told the project director that he no longer felt any moral obligation to support his children financially, because he had not seen them for a long time. Relatively few callers seemed to be aware that the obligation to pay child support and the right to access are not legally dependent. When they were aware, they were often upset that the child support obligation was vigorously enforced by the state, but the right to access was virtually unenforceable.<sup>50</sup>

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<sup>48</sup> The confidentiality of Child Support Enforcement's records is controlled by AS 25.27.275. CSED's internal regulations permit it to release the address of the obligee only if the obligor completes a form showing that there is a valid visitation order and that child support obligations are current.

<sup>49</sup> In one particularly vivid example of the anger some parents feel about child support issues, a father who had successfully mediated a visitation arrangement told the interviewer that he would not fill out the mediation evaluation survey until his CSED case was resolved. In response to a second reminder some weeks later, he told the interviewer, "I can't even open the envelope [containing the evaluation survey] until I get the support issue resolved." This father never completed the mediation evaluation survey.

<sup>50</sup> AS 11.51.125(e) makes failure to permit visitation a violation. Custodial interference is a misdemeanor under AS 11.41.330; it is a felony under AS 11.41.320 if the child is removed from the state. Data collected by the Alaska Sentencing Commission shows that from 1987-1990 there were only 6 cases with convictions of custodial interference in the first degree, and only 3 cases with convictions of custodial interference in the second degree in Alaska. In addition, AS 25.20.140 permits an action for damages of \$200 per day for failure to permit visitation; however, no one who contacted the project reported ever having used this remedy.

CSED records confirm that payment of child support was often a problem in project cases. Of the 176 cases for which CSED had records,<sup>51</sup> only 21% were current in their child support obligation on the date that the project was contacted. CSED records show that the average amount of the arrearage varied among the different categories of cases. For example, cases disqualified for domestic violence had the highest mean arrearage--\$5,832. Cases in which the respondent declined to mediate were \$4,813 in arrears. Cases which went to mediation were only \$2,819 in arrears on the date the project was contacted. In comparison, the average arrearage reported by CSED for the control group selected from Anchorage court files in which some action on visitation or custody had occurred was \$3,339.<sup>52</sup>

Figures 5 and 6 show the arrearages calculated based on self-report and on CSED report for different groups of project participants. The figures show clearly that applicants' self reports were substantially lower than CSED figures<sup>53</sup> and that striking differences exist among the project groups. For example, those who mediated and reached an agreement reported an average arrearage of only \$95, a relatively insignificant amount. For those who mediated and did not reach an agreement, however, child support issues may have been a barrier to agreement. Their average self-reported arrearage was \$470, the second highest amount on the chart. Those ineligible to participate in the project reported an average arrearage of \$2,100, again indicating that child support issues may have been important to this group.

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<sup>51</sup> CSED had records for approximately half of the project cases. This figure is interesting because it differs from Fay and Read's finding that child support payments were to be made through CSED in only 35% of the cases they sampled. Fay and Read, *supra* n. 12, at 24. Perhaps people who ask state agencies to help resolve visitation disputes also are more likely than the average divorcing population to ask a state agency to deal with their child support problems.

<sup>52</sup> CSED had records for 51% of the control cases. Of these cases, 69.3% were in arrears. By way of comparison, Fay and Read found that the average arrearage for 273 cases sampled from 1989 court records was \$3,691. Fay and Read, *supra* n. 12, at 60, Table 16.

<sup>53</sup> Please note that CSED figures include only those cases in which payment is made through CSED (N=176). Also please note that Figures 5 and 6 are not strictly comparable, because domestic violence applicants comprised most but not all of the ineligible group, and cases in which the respondent declined comprised only about half of the total number of eligible cases for which we had self-reported child support arrearages.

<b>Figure 5</b> <b>Mean Child Support Arrearage</b> <b>Based on CSED Report</b>	
Domestic violence applicants	\$5,832
Respondent declined mediation	4,813
Mediation group	2,819

<b>Figure 6</b> <b>Mean Child Support Arrearage</b> <b>Based on Self-Report</b>	
All ineligible applicants (domestic violence and no order)	\$2,100
All eligible applicants who did not mediate	205
Mediation group Agreement	95
No agreement	470

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The project's data indicates that non-payment of child support is a problem for a large number of parents who sought assistance with a visitation dispute. Other studies also have shown that non-payment of child support correlates with access disputes, although non-payment is much more common than non-compliance with visitation orders. At least one major study showed that only about half of all custodial parents owed child support receive the full amount of support owed them in any given year.<sup>54</sup> Yet one study of 133 contested custody cases in Colorado showed that only 22% of the fathers reported non-compliance with visitation orders.<sup>55</sup> Within the same group of cases 50% of the mothers reported problems with child support. Other studies have indicated that non-compliance with visitation orders occurs in 20-27% of divorce cases.<sup>56</sup> Commenting on this data, Jessica Pearson and Nancy Thoennes concluded that "while non-support cases do not always involve visitation problems, cases with visitation problems are disproportionately more likely to involve the non-payment of child support or disputes over support."<sup>57</sup>

However, Pearson and Thoennes cautioned that the existence of a relationship is not synonymous with causality.<sup>58</sup> Further analysis in their study showed that in 70% of all cases where both support and visitation are problems, the appearance of problems in one

<sup>54</sup> Pearson and Thoennes, "The Denial of Visitation Rights: A Preliminary Look at its Incidence, Correlates, Antecedents and Consequences," *Law and Policy*, Vol. 10, No. 4, p. 368 (1988).

<sup>55</sup> Pearson *et al* at 377.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 373.

<sup>58</sup> *Id.*

area is simultaneous with the emergence of problems in the other area.<sup>59</sup> Pearson and Thoennes concluded that "both phenomena [visitation problems and non-payment of support] appear to stem from conflict patterns between the parents, although we were unable to assess causal order in cases that involved both types of non-compliance."<sup>60</sup>

### ***E. Evaluation of Project Based on Legislative Criteria***

The legislature asked that the Visitation Mediation Pilot Project be evaluated on seven criteria: 1) the project's ability to promote and serve the best interests of the child; 2) the satisfaction of the needs of the persons who participate in the project; 3) efficiency; 4) economy; 5) whether the project has decreased the time required to resolve disputes relating to child visitation; 6) whether the project has reduced litigation relating to visitation disputes; and 7) whether mediation under the project improves compliance with court-ordered child support payments. Each of these criteria is addressed below. Because the project assisted two different groups of parents--those who mediated, and those who did not--the criteria are reviewed for each group.

**1. Best Interests of the Child.** The "best interest of the child" test is in many ways a subjective one. Moreover, an arrangement that serves the best interest of one child may be detrimental to another. Or, an arrangement that was in a child's best interest at one point may not be in her or his best interest at a later point. Given the difficulties of obtaining a direct, objective measure of this factor, the project chose several indirect measures.<sup>61</sup>

To measure whether the project served the best interests of the children whose parents mediated, both parents and mediators were surveyed. Generally, mothers who mediated said that the process had helped them focus more on the children's needs and most said that they believed mediation worked to support the children's best interests. These attitudes held whether the mediation itself resulted in an agreement between the parents or not. Fathers were slightly less certain that the process helped them focus on the children or that it was in the best interests of the children, even when they had resolved the visitation dispute. The mediators generally believed that both parents had

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<sup>59</sup> *Id.* at 375.

<sup>60</sup> *Id.* at 377.

<sup>61</sup> The project did not interview the children who were the subject of visitation disputes. It was felt that any benefit from the data gathered would be outweighed by the risk of drawing the child into the parents' hostilities, or making the child feel that he or she should "take sides."

paid more attention to the children's needs and interests, and that the process of mediating had been beneficial.

Examples of mediations that may have benefitted the children's best interests are subjective but merit passing mention. For example, one mediator encouraged both parents to read articles on separation anxiety when arranging a visitation schedule. Another couple discussed the possibility of consulting a child psychologist for professional advice about the impact their decisions might have on their children. A third couple, concerned about their teenage son's academic performance, included their child in the ultimate solution by agreeing on academic standards which they both believed he could achieve, and by presenting a united front on what the consequences would be if he did not achieve those standards. Clearly, mediation provided a process for these parents to shift from the adversarial focus of "me against you" to the collaborative focus of how they could work together to benefit their children.

Among the parents who did not mediate, the project still may have benefitted some children. Many callers were referred to other agencies for a variety of services, including child support, counseling services, and legal assistance. Some parents did not mediate because they had worked out an agreement on their own; others felt more comfortable with their situations because they had had the opportunity to discuss it with someone.

**2. Satisfaction of the Needs of Participants.** Parents who mediated generally believed that they had received a valuable service that benefitted them as well as their children. Sixty-four percent of parents who reached agreement in mediation reported that they would use mediation again to resolve a dispute. Even parents who did not reach an agreement about their particular visitation dispute believed that mediation was a helpful process and should continue to be available to other parents.<sup>62</sup> Most parents who mediated were satisfied that their needs had been met. The mediators also believed that the process was a legitimate and appropriate means of resolving visitation disputes and should be continued.

Parents who did not mediate, including many who were not eligible for the project because of domestic violence, also thought that they had been helped. A number said they felt that they had been helped for the first time, after trying to find assistance from a number of sources. Although project staff could do nothing more than refer disqualified parents to a variety of services and encourage them to help the project's

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<sup>62</sup> Thirty-seven percent said they would use mediation again.

research by filling out the disqualification questionnaire, many parents commented that they felt better just because someone had taken a few minutes to listen to them.

**3-5. Efficiency and Economy; Reduced Time.** Two of the principal criteria for measuring the project's cost and benefits were its efficiency and economy compared to comparable court proceedings. One argument made for establishing the pilot project was that few parents could afford to go to court to resolve visitation disputes. Informal surveys of experienced family law practitioners and judges in Anchorage established the truth of this argument. All agreed that attempting to settle visitation disagreements in courts would be extremely costly, that most attorneys discourage their clients from going to court over all but the most serious visitation issues, and that those few cases that did go to court were relatively time-consuming for all parties. These perceptions were supported by a finding from the data that, while over 80% of all parents contacting the project said they had talked to an attorney at some point about the visitation issue, only 62% had hired an attorney, and less than half (41%) reported that they had filed a complaint with the court.

Staff attempted to find control cases with court proceedings related to visitation, and found that the predicted paucity of visitation cases was in fact correct. Only 15% of the 199 court cases that were selected by court staff for control cases in the project's evaluation included a motion on visitation issues. Almost no cases were found that focussed entirely on visitation. Thus, it seems clear that visitation mediation offers parents a more economical alternative to formal litigation.

A second measure of efficiency and economy is the cost to the state. The project mediated 20 cases, paying mediators \$80 per hour and reimbursing them for long distance phone costs (they were not reimbursed for photocopies). In eleven months the state spent \$16,222 on mediations, at an average cost of \$812 per case. Administrative tasks were handled by a part-time project secretary and the project director; the project secretary and project director spent approximately 40% and 15% of their time, respectively, on these tasks. In addition, the project director spent approximately 60% of her time on screening, intake and referrals for the 455 cases that did not go to mediation.<sup>63</sup> The balance of the project director and project secretary's time and the

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<sup>63</sup> Although the project director spent almost 100% of her time on the mediation project, only a small part of her salary was paid out of mediation project funds.

project budget was spent on evaluation design and implementation.<sup>64</sup> Comparing the cost to the state of mediation versus submitting the disputes to the court system is difficult at best. Comparable visitation disputes filed in court could require the time of clerks, masters, law clerks, in-court clerks and superior court judges to resolve, all at some cost to the state. Thus, it is unlikely that resolving visitation disputes through formal litigation is any less costly to the state than mediating.

Analyzing the length of time taken to resolve a dispute in mediation, as compared to court proceedings, resulted in two major findings. First, relatively few disputes are resolved in either forum. Although some disputes are resolved informally without the assistance of a third party, many are not resolved at all. The reasons for lack of resolution are first, that the parents cannot agree on a resolution; and second, that it is too costly (whether financially or in other ways) to force a resolution upon one parent or the other. Failure to resolve visitation disputes may result in an emotional cost to parents and children.

The second major finding is that for those cases that do get resolved, mediation tends to be a more efficient process. For those parents who reached an agreement, three pairs agreed within a two to six week period, and three others reached agreement within eight weeks. The parents who mediated without reaching an agreement took somewhat longer, with most taking six to ten weeks, and a couple of cases taking up to 30 weeks. By comparison, in a typical court case, filing and getting action on a non-expedited motion takes no less than four weeks, and scheduling a hearing takes at least eight weeks. If a case involves custody issues, most judges order a custody investigation, which can take six months.

Hours spent per case is another measure of economy and efficiency. For parents who reached an agreement, the range of hours spent on the case stretched from 1.5 hours to 20 hours; the average was 4 to 6 hours. Again, parents who did not reach an agreement spent somewhat more time, with an average of about 7 to 10 hours of mediator time per case. Comparable figures were not available for court cases.

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<sup>64</sup> Total funds appropriated for the project were \$100,000 in the first year, \$63,450 in the second year, and \$7,500 from the Child Support Enforcement Division. The Judicial Council returned \$20,363.85 to the Legislature in the first year and anticipates returning some amount this year; the funds were not needed because of the small number of mediations performed. It should be noted that a significant amount of the total funds went to the pilot project's evaluation design and implementation, and to preparation of the final analysis and report, expenditures which would not be necessary in a future project.



Finally, it should be noted that at least 35 states contribute some funds to mediation programs (see Section IVA, below). Other states' commitment of public funds to mediation may represent a conclusion that mediation is an economical alternative to litigation.

**6. Reduction in Litigation.** Another measure of increased efficiency and economy of mediation is whether any reduction in litigation could be attributed to mediation. A review of this measure produced several interesting findings. First, seven of the parents who actually mediated were involved in pre-existing litigation before starting the mediation process. In every case, the litigation related to child custody or support issues that could not be mediated in this project because of the statutory guidelines.

Second, parents who mediated had spent, on average, substantially more money already on attorney's fees to resolve the visitation dispute than parents who did not mediate. Their willingness to try mediation may have represented an attempt to reduce their legal costs. Or, the amount they had already spent on attorney's fees may have been correlated with their determination to reach a satisfactory resolution of the dispute.

Third, the limited scope of the visitation mediation was not necessarily associated with a reduction in pre-existing custody and support litigation. As noted above, some parents with pending custody and support litigation continued to litigate those issues after the visitation mediation was completed, and this was true even for parents who had reached an agreement on visitation. One other apparently filed a motion for change of custody after being told that custody could not be mediated in this project. Clearly, parents were unable to resolve all of their disputes in the context of the project mediation.

**7. Child Support.** Data concerning the impact of mediation on child support compliance must be interpreted with care, because the number of mediated cases was very small and CSED only had records for slightly under half of the mediated cases. However, project data offered limited support for the hypothesis that visitation mediation might improve child support compliance. CSED records show that for parents who mediated, including those who could not reach agreement, the average child support arrearage decreased by 32% between the date that mediation was requested and the conclusion of the project. (Before mediation, 87% were in arrears, while after mediation only 62% showed arrearages.) Similar decreases were not noted in the other project groups: for example, arrearages for cases in which one parent refused to mediate decreased by only 8.6% between the date of the request for mediation

and the end of the project, and arrearages for cases disqualified for domestic violence decreased only 1.6% for the same period (see Figure 7). Although the mediation group's improved child support record could be related to many factors (e.g., increased collection efforts by CSED, suspension of child support obligation due to exercise of extended visitation by non-custodial parent, receipt of Permanent Fund Dividend), it is possible that some aspect of the mediation process increased some obligors' willingness to pay off child support arrearages.

<p><b>Figure 7</b> <b>Average Arrearage by CSED Report</b></p>			
	<i>Eligible - Mediated</i>	<i>Eligible - Respondent Declined</i>	<i>Ineligible - Domestic Violence</i>
On date of request for mediation	\$2,819	\$4,813	\$5,832
At end of project	\$1,900	\$4,398	\$5,737

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#### ***IV. Mediation Programs in Other States***

The mediation project's authorizing legislation directed the Judicial Council to consult with other states about their experiences with child visitation mediation and to obtain their recommendations relating to mediation of child visitation disputes. Because custody and visitation mediation programs exist in so many different forms, it is difficult to draw generalizations. The following is a brief overview of the development of mediation, followed by a description of several programs in other states.

##### ***A. Overview of Mediation***

Alternate dispute resolution<sup>65</sup> is an alternative to litigation that is gaining wide acceptance in other states, most commonly in response to the long delays caused by overcrowded court dockets, the prohibitively high cost of litigation, and the "winner take all" orientation of the adversarial system. Many court administrators and federal and state judges have come to regard ADR programs as case management tools. By referring appropriate cases to ADR, judges free up valuable court time for those cases that are better resolved by trial. Many ADR programs exist within the administrative structure of the court system, in order to coordinate the delivery of appropriate services with the court system's case management needs.<sup>66</sup>

Mediation is one of the most widely used ADR processes; American Bar Association data indicate that in 1990 mediation programs were operating in 47 states. Before the mediation pilot project was created, Alaska was one of only fifteen states that did not directly contribute any state funds to mediation.<sup>67</sup> Of these 15 states that do not directly fund mediation projects, most have mediation projects funded at the city and county level. Thus, virtually every state has some type of publicly-funded mediation service available to its residents. Many mediation programs are funded with a combination of

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<sup>65</sup> The term "alternate dispute resolution" ("ADR") encompasses a broad array of dispute resolution processes, including mediation, early neutral case evaluation, arbitration, summary jury trial, mini-trial, settlement week and complex case management. In general, alternate dispute resolution processes are less formal than litigation, and they emphasize efficiency, economy, privacy, flexibility and user satisfaction to a greater degree than the traditional adversarial system does.

<sup>66</sup> Projects to develop or implement comprehensive court-based dispute resolution programs are underway in Colorado, the District of Columbia, Georgia, Hawaii, Illinois, Maine, Massachusetts, New Jersey, North Carolina, and Ohio. These projects and others in the federal courts are funded by the National Institute for Dispute Resolution.

<sup>67</sup> See Standing Committee on Dispute Resolution of the American Bar Association, *Dispute Resolution Directory* (American Bar Association 1990).

public monies and private grants, and some are funded entirely by user fees and private foundations.

One type of mediation program commonly found in other states handles only issues of child custody and visitation.<sup>68</sup> Other programs handle both family cases and civil small claims cases. Community mediation programs emphasize resolution of conflicts that have not yet progressed to court, especially those occurring between neighbors or other members of a community. Still other programs handle criminal misdemeanors or criminal juvenile cases. Many states have programs designed to resolve disputes between merchants and consumers, usually in cooperation with the state's Better Business Bureau.

Administratively, programs can be "court annexed" or "court operated," meaning that they are funded and administered by the courts, although the neutrals<sup>69</sup> are often independent of the courts. Other programs are "court referred" or "court sponsored," meaning they operate independently of the courts but depend heavily on the court for case referrals.<sup>70</sup> Still other programs are privately operated and depend on word of mouth or advertising for referrals (these programs are typically community-based dispute resolution centers).

Participation in mediation can be mandatory, discretionary, or voluntary. In some states, court rules or state statutes mandate mediation in certain types of cases. For example, in Wisconsin a state statute mandates mediation in divorce cases where custody and visitation are at issue.<sup>71</sup> In other states, judges at their discretion can order

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<sup>68</sup> The National Center for State Courts ("NCSC") reported in November of 1990 that out of approximately 1,100 alternate dispute resolution programs for which it possessed basic information, 328 programs in 38 states and the District of Columbia mediated issues of child custody and visitation. Myers, Gallas, Hanson and Keilitz, "Divorce Mediation in the States: Institutionalization, Use, and Assessment" 17, 18 *State Court Journal* (Fall 1988) (hereinafter "NCSC Survey").

<sup>69</sup> "Neutral" is the term commonly used to describe the mediator, arbitrator, or other third person who assists the parties in resolving their dispute.

<sup>70</sup> In 1988, 86% of programs surveyed by the National Center for State Courts indicated that they had some strong, institutional connection to the courts, where funding and use were shared by the courts or where the courts used a regular procedure of referring cases to mediation. Forty-two percent of these programs were court annexed, while the other 44% were court sponsored. The remaining 14% were private programs, although many of them had some relationship to the court.

<sup>71</sup> See Wis. Stat. sec. 767.11(8). The term "mandatory" can be misleading. In some states that "mandate" mediation (such as Wisconsin), the parents are required to attend a mediation orientation session before they can have a court hearing on custody/visitation. After the orientation session, either parent is free to terminate mediation and to have the court decide the custody issue. In other states, the

participation in mediation under authority of local court rule, local court policy, or state statute. Strictly voluntary programs leave the choice to initiate and continue mediation to the parties themselves.<sup>72</sup> Mediation can be made available for voluntary use by the parties according to statute, court rule, or local practice. Eighty-five percent of the programs surveyed by NCSC were either discretionary (i.e., ordered at the judge's discretion) or voluntary; thirty-seven percent of the programs surveyed were mandatory in some aspect.<sup>73</sup>

Finally, programs differ as to the qualifications and authority of their mediators. As to qualifications, some programs prefer mediators with backgrounds in social work, while others prefer attorneys or retired judges. Many programs rely in part or largely on unpaid, trained volunteer mediators. Most programs require their mediators to complete some mediation training; the most common requirement is the standard 40 hour training. Family mediation programs usually require some additional training on specific divorce issues. As to mediators' authority, some mediators can make recommendations to the court or impose decisions regarding custody or visitation, while most have no such authority.

## ***B. Mediation Programs in Other States***

The following section describes only seven of the hundreds of mediation programs existing nationwide. These seven represent different options for administering and funding family mediation programs. They vary from modest programs that handle a

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concept of mandatory mediation is more coercive; for example, in California the mediator is required to "use his or her best efforts to effect a settlement of the custody or visitation dispute..." and the mediator may, consistent with local court rules, make a recommendation to the court as to custody or visitation. Cal. Code Ann. § 4607(a) and (e) (1991). See Sections B1 and B7, below, for details.

<sup>72</sup> Strictly voluntary mediation programs tend to have small caseloads, because very few disputants volunteer to resolve their disputes through mediation. For example, in a study of custody mediation between 1979 and 1981 in Denver, Colorado, one-third of the respondents refused voluntary free mediation. Pearson and Thoennes, "Reflections on a Decade of Divorce Mediation Research," in Kressell & Pruitt, eds, *The Mediation of Disputes: Empirical Studies in the Resolution of Conflict* (San Francisco: Jossey-Bass, 1987). This resistance to mediation can be attributed to disputants' lack of familiarity with mediation, and a preference to stay with the known quantity represented by litigation.

<sup>73</sup> NCSC Survey, *supra* note 8, at 21. Over one-fourth of the programs reported that mediation is voluntary for some case types and mandated for others. For example, Minnesota mandates custody mediation, while individual programs may make participation in the mediation of visitation, support and modifications voluntary. In Maine, mediation for contested divorces involving minor children is mandatory, and the Maine Court Mediation Service permits voluntary participation for families without minor children. The criteria states use for choosing to mandate mediation include the type of case, whether motions are made before or after a decree is issued, and the ages of any children involved. *Id.*

relatively small number of cases to statewide programs that handle all divorce and custody cases. The experiences of states with mandatory mediation are not wholly applicable to Alaska, where mediation is not mandated, but they are included here because their programs tend to have more data than the smaller programs. In addition, each program has a slightly different way of screening cases in which there has been domestic violence, with Hawaii's program being the most thorough on this subject.<sup>74</sup>

## **1. California**

**(1) Type of Program.** California's mandatory family mediation program is one of the largest in the nation. It handles contested custody and visitation issues presented to the court for resolution. Each superior court in the state has at least one mediator available.

**(2) Referrals.** California statutes require that all cases which present a contested custody or visitation dispute, including a request for modification of a custody or visitation order, be referred to mediation. Grandparents and stepparents who petition the court for visitation rights also must mediate before they can have a court hearing. Mediation may not address support issues.<sup>75</sup>

**(3) Screening (Domestic Violence Issues).** Screening varies from court to court. State statutes provide that if there has been a history of domestic violence between the parties, and if a restraining order is in effect, the parties may meet with the mediator at separate times, if the party who is protected by the order so requests.<sup>76</sup>

**(4) Mediations.** Mediation proceedings are held in private and are confidential; however, all communications from the parties to the mediator made during mediation can sometimes be admissible at trial. In addition, the mediator may, consistent with local court rules, render a recommendation to the court as to custody and visitation. Mediators may exclude attorneys and domestic violence support persons from mediations under certain circumstances. The mediator may order an investigation prior to a hearing if the parents cannot reach agreement in mediation.

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<sup>74</sup> Data compiled by the Alaska Network on Domestic Violence and Sexual Assault shows that 15 states (and various counties) have exemptions from mediation available to victims of domestic violence and child abuse.

<sup>75</sup> Ann. Cal. Civil Code §§ 4607, 4351.5 (1991).

<sup>76</sup> Ann. Cal. Civil Code § 4607.2 (1991). This provision expired on January 1, 1992.

## **2. Colorado**

The Office of Dispute Resolution in Denver, Colorado is a court-based mediation program located within the state court administrator's office. It was created by an act of the state legislature in July 1983. For the first five years of its existence, it received a small amount of state funding (annual budget in 1990 was \$50,000). Starting in July of 1990, it became a cash-funded program, and last year it received all its funding from user fees.

**(1) Type of Program.** The Office of Dispute Resolution is a mediation program. The office handles civil small claims cases (e.g., debt collection, personal injury) and marital dissolutions, including property issues.

**(2) Referrals.** Some cases are ordered into mediation at the discretion of judges; others are voluntary referrals from attorneys and social services workers; and others are self-referrals. Some local courts in Colorado have rules which authorize judges to order a case to mediation. At least two local courts in Colorado have a policy of mandatory mediation for divorce cases where custody or visitation is at issue.

**(3) Screening (Domestic Violence Issues).** All screening is performed by the director. Screening consists of a phone or in-person interview.

The director is familiar with domestic violence issues and volunteers at a battered women's shelter. She reports that her training and experience enable her to recognize cases of domestic violence during unstructured interviews with the women. When domestic violence is or has been present, it is the director's policy to ask the victim questions designed to determine whether she is capable of truly negotiating, such as whether she feels safe. The director also takes into account the victim's wishes about using mediation.

If the director concludes from her conversations with the victim that mediation would be inappropriate, she sends a letter to the judge (if the case was a judicial referral) explaining that some types of cases are inappropriate for mediation and that this is one of those cases. The letter lists several factors that can render a case inappropriate for mediation, including drug and alcohol abuse and mental illness.

**(4) Mediators.** The office has nine mediators on contract in Denver, and one or two other mediators on contract in two other offices. Mediators receive forty

hours of professional divorce and child custody mediation training and complete a six-month internship.

**(5) Mediations.** The office initially schedules one two-hour session for domestic cases. The mediator meets first with the parents together in an orientation session, where the parents are asked to sign an agreement to mediate. During the course of the mediation, the mediators may hold individual caucuses with the parents if the need arises. If the mediation is not completed within the two hours, the parties may schedule additional sessions. In cases of domestic violence, the parents can mediate from separate rooms.

### **3. Connecticut**

The Waterbury Superior Court Mediation Program is funded by the state of Connecticut (in the judicial budget) and administered through the Family Services Division of the superior court.

**(1) Type of Program.** The Connecticut mediation program performs both mediations and custody/visitation evaluations. Parents who are unable to resolve their custody and visitation disputes through mediation (or who decline to participate in mediation) are assigned a custody/visitation evaluator within the same office who makes a recommendation to the court on the disputed issues. The custody/visitation evaluator is not the same person who performed the mediation, although all staff (referred to as Family Relations Counselors) are trained both in mediation and custody evaluation.

The program mediates divorce, neighborhood, interpersonal, and landlord/tenant cases for residents of the state of Connecticut (pop. 3,107,580). In divorce mediations, the program handles only child custody and visitation issues (property or child support issues are excluded).

**(2) Referrals.** Referrals are made through the community, or at the discretion of the court under authority of court rule. When the referral is ordered by the court, attendance at the orientation session is mandatory; however, attendance at any subsequent mediation sessions is voluntary.

**(3) Screening (Domestic Violence Issues).** Screening is performed at intake. Intake consists of a brief (about 10 minutes) interview with each parent.



Information supplied by the parents is cross-checked against court records, and the parents' attorneys are consulted whenever possible.

The Connecticut program recognizes that the existence of domestic violence in a relationship is one factor that can impair a parent's ability to negotiate. When screening cases for mediation, the Family Relations Counselors listen for evidence of impairment of a parent's ability to complete mediation or to negotiate effectively. In addition to listening for evidence of domestic violence, counselors look for other factors that may impair a parent's ability to negotiate effectively, such as drug abuse, alcohol abuse, or mental illness.

If the counselor believes that a parent's ability to negotiate is impaired by domestic violence, the counselor asks a victim advocate to assess the parent. The advocate then gives a recommendation about the appropriateness of mediation.

If a mediator discovers during the course of the mediation that there has been domestic violence, the mediator must identify whether there is a lack of true bargaining in the mediation. If the mediator believes that the negotiation process is impaired, he or she must terminate the mediation.

**(4) Mediators.** The Connecticut program employs over 100 Family Relations Counselors statewide. All have bachelor's or master's degrees. All are trained in both custody evaluation and in mediation.

**(5) Mediations.** Mediations consist of an orientation session followed by three mediation sessions, each lasting up to two hours. Most resolutions are reached in 2.8 hours (2 sessions).

#### **4. Hawaii**

The Neighborhood Justice Center of Honolulu, in conjunction with the Family Peace Center, serves residents of the island of Oahu, Hawaii. The annual budget of \$650,000 is funded through the state judiciary, United Way, and other sources, including local foundations and grants.

**(1) Type of Program.** The Neighborhood Justice Center is a mediation project. The Family Peace Center is a domestic violence program that works with the Neighborhood Justice Center to provide mediators with additional training in domestic

violence issues and to provide victims of domestic violence with premediation assessment, premediation counseling, and support during mediations.

The Neighborhood Justice Center mediates a wide variety of cases. Most common are landlord/tenant, parent/child, employee/employer and domestic cases.

**(2) Referrals.** The Hawaii Family Court has a policy of presumptive mediation in divorce cases. Court rules require any unresolved issues to be submitted to mediation unless the court feels that mediation is unnecessary or inappropriate.

**(3) Screening (Domestic Violence Issues).** During the telephone intake interview, each woman is asked several domestic violence screening questions. The screening questions focus on three issues: presence of abuse, fear of abuse, and ability to communicate equally.<sup>77</sup> Women who identify a history of domestic violence are asked whether they can be referred to the Premediation Counseling Program of the Family Peace Center. Premediation counseling is voluntary. Some women decline counseling during this conversation, others say they will go but do not, and others make only brief telephone contact.

In most cases, the Family Peace Center initiates contact with the victim. After comprehensive structured interviews, including asking the woman whether she wants to mediate, and informal counseling about mediation and what to expect, the Family Peace Center makes an assessment as to whether the woman appears able (and willing) to mediate without additional support. If so, she is referred back to the mediation program. If the woman wishes to mediate but appears to need further assistance, the Family Peace Center can provide her with an advocate to accompany her to mediation, can give her more counseling, or can refer her to additional services. Mediation can be deferred indefinitely.

**(4) Mediators.** The mediation program uses teams of male and female volunteer mediators who receive thirty hours of basic mediation training, have

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<sup>77</sup> The domestic violence screening interview begins with a short preamble, such as "Violence is a common problem in divorces, so we need to ask you about it in your relationship." The women are asked a series of five questions about the recency of the violence, whether they feel safe, and whether they feel that they can communicate equally. The abused women are told that free premediation counseling is available. Women who want the premediation counseling are given an appointment to talk to a counselor. During that appointment, the counselor gathers comprehensive biographical information about the client, and detailed information about the history of the abuse. The client also fills out a written "Marital Conflict Questionnaire." The counselor eventually makes a lethality assessment and a recommendation as to whether mediation is appropriate for the client.

experience in non-divorce cases, are selected for divorce mediation training, and complete forty hours of that training. They then work with a mentor for several mediations before they are qualified for divorce cases. The Family Peace Center provides an additional ten hours of spouse-abuse training for the divorce mediators. The mediation program provides an ongoing system of advice and peer review for the mediators, including two trainings a year on domestic violence issues.

**(5) Mediations.** Mediations include private caucuses with each party. They vary from two to four hours, and can extend to multiple sessions if needed (usually scheduled a week apart). The program encourages the parties to use attorneys and other advisers between sessions. In addition, the program emphasizes the mediation process rather than the result of reaching an agreement.

For cases with a history of domestic abuse, the mediation format can be limited to separate sessions. The mediator makes a decision, based on, among other things, anger levels and blaming behavior, as to whether the parties should mediate in the same room. If the Family Peace Center has sent over a victim advocate, the advocate does not sit in on the sessions but waits outside and checks with the woman periodically during the sessions as to whether the mediator is listening to her and how she is feeling.

## **5. Chicago, Illinois**

The Cook County Court system funds a court-annexed mediation service in Chicago, Illinois. The mediation program was created by statute to mediate visitation and custody issues in all cases in which those issues are contested.

**(1) Type of Program.** The Chicago program performs mediations. The mediators do not make recommendations to the court, testify, or give any details of the mediation contact, except they may testify as to the substance of an agreement reached in mediation. All mediated settlements are binding.

**(2) Referrals.** The Chicago program works very closely with the Cook County judges. The judges schedule hearings for groups of divorcing parents, then order them as a group to seek mediation. The judges admonish the litigants about the disadvantages of bitter legal battles and highlight the advantages of mediation. The mediation program sends a mediator to the courtroom who performs the intake interviews immediately after the judge's talk.

The program handles only court-ordered referrals. The program can accept cases in which parents voluntarily request mediation as long as the judge then orders it.

**(3) Screening (Domestic Violence Issues).** Screening is performed during the intake interview. The interviewer meets with the parents in the courtroom and takes down the basic information about the case. The parents then are asked to come to the mediation office, where they are shown a video which explains mediation and prepares them to mediate. A written domestic violence screening instrument is administered.

If the case is one with a history of domestic violence, the mediation is performed with male-female teams of mediators. Occasionally, the mediation program will refer domestic violence cases back to the judge as being inappropriate for mediation; however, the program has a policy of mediating virtually all cases.

**(4) Mediators.** The program employs 21 mediators, in addition to interns from two local graduate schools of social work. Mediators must have completed a basic 40 hour training, and must have either a master's degree in mental health or a law degree. The program provides in-house training at the time of employment (one day a week for five weeks). In addition, the program offers shorter trainings two times per month.

**(5) Mediations.** Mediations are scheduled for two hour sessions. Sessions can extend up to four hours; however, if the parents need more than four hours they can schedule an additional session. The maximum amount of time spent on any case is six hours.

## **6. Prince George's County, Maryland**

**(1) Type of Program.** The Prince George's County Visitation Mediation Project is administered by the Maryland Office of Child Support Enforcement, although Child Support Enforcement contributes no direct funds to the project (such a contribution is prohibited by federal law). The spokesperson for the child support office handles the administrative responsibilities of the project. The program is limited to visitation issues, and parents must have a visitation order from the court.

**(2) Referrals.** Referrals come from all sources, although most are self-referrals. The Child Support Enforcement Office reports that it has not made a concerted effort to publicize the project and feels that the volume of calls would increase substantially if the project were better publicized.

The project receives approximately 150 calls a month. About thirty of those callers end up speaking with a mediator. The child support office attributes this large drop out rate to the fact that the project charges a fee. In the past, the project was funded with state and county money and offered its services free of charge.

**(3) Screening.** At intake, the interviewer records information about the parent and explains that the initiator must pay the mediator \$50 to conduct the mediation. Callers who say they cannot pay are evaluated as to whether their income qualifies them for pro bono services. The project received a \$10,000 grant from the county to provide pro bono mediation services for parents who are receiving public assistance, are unemployed, or earn less than \$20,000 a year. The mediator screens the cases carefully for evidence of child abuse; the project's policy is not to handle cases in which there is child abuse.

**(4) Mediators.** The project uses two mediators who work for the court. Both have had substantial family mediation experience with the court, and both continue to perform court-ordered mediations. The mediators work on contract to the project.

**(5) Mediations.** The mediation model used in Prince George's County differs from the standard model. In this program, the parents never meet and never talk directly to each other. The mediator talks on the phone to each parent and carries messages back and forth. The mediator remains neutral but also takes an active role in educating parents about their responsibilities and investigating why the court order is not being followed.

When making initial contact with the respondent parent, the mediator says that he is doing work for the Office of Child Support Enforcement. The mediator encourages the respondent parent to participate by pointing out that if the parents cannot work things out informally, the other parent's option is to ask the court to intervene, and when a motion is filed in court, both parents must go to a mandatory 2-hour mediation session, which costs each parent \$50.00 per hour. The respondent parent virtually always agrees to talk to the mediator.

The Prince George's Project has a very high resolution rate (approximately 80%), probably because of a combination of factors, including the mediator's directive role and the fact that the parents never speak to each other directly during the negotiations.

## **7. Rock County, Wisconsin**

The Mediation and Family Court Services program in Rock County, Wisconsin is located in the Clerk of Court's office. The director of the program works with the chief judge and with the clerk of court. The program is funded through a combination of county funds, user fees, and a percentage of the court filing fee for divorce cases. Its annual operating budget is approximately \$120,000.

**(1) Type of Program.** The Rock County office is a mediation program. It mediates custody and visitation issues arising in divorce cases. It does not mediate property, spousal maintenance or child support, unless those issues directly relate to the legal custody or physical placement issue at hand. The parties must agree in writing to consider any of those issues.

**(2) Referrals.** Under Wisconsin law, a court may not hold a trial of or final hearing on legal custody or physical placement until after mediation is completed or terminated. Thus, referral to the mediation program is by court order in any action concerning custody/physical placement, including post-judgment motions, or when a motion has been filed objecting to the removal of the child out of the state or a distance greater than 150 miles. In addition, parents may request the court to order mediation pursuant to Wisconsin Stat. Sec. 767.11(5)(c).

Under the mandatory mediation statute, the mediation orientation session (also called an assessment and evaluation session) is mandatory and is free of charge; any further sessions are voluntary and cost a \$100 user fee (usually split between the parties).

**(3) Screening (Domestic Violence Issues).** When parents are referred to the mediation program, the program sends them a letter accompanied by an intake questionnaire. Included on the questionnaire is a question about domestic violence and a number to call if the parent does not feel safe mediating. In addition, the program gets a data sheet from the court which includes basic information about the legal status of the case, including whether issues of domestic violence, alcohol or drug abuse have been raised.

If a parent reports that she does not feel safe mediating, staff makes a determination about safety. If necessary, the program will send a letter to the judge saying that the case is not appropriate for mediation.

Recently, the director of the Rock County Mediation Project has reached out to form an informal mediation/domestic violence working group which is attempting to develop a useful approach for working with victims of domestic violence who are parties to legal custody and time-sharing court actions. Group members report that participation in the working group has opened lines of communication and inter-agency interaction. Ultimately, the group aims to produce a specific plan to use in Rock County.

**(4) Mediators.** The Rock County mediation project has two staff mediators, one of whom also serves as its director. Both mediators have extensive mediation experience and training. Each attends a training once a year, usually in connection with workshops or conferences held by national mediation or dispute resolution organizations. In addition, the director occasionally teaches mediation on contract to various public and private groups.

**(5) Mediations.** In Rock County, parents are required to attend a group orientation session as well as a joint evaluation session with a mediator. At the group orientation, parents watch a film designed to educate them about mediation and post-divorce parenting (e.g., don't disparage the other parent to the children, give the children permission to love the other parent, explain that the divorce is not their fault). The program tries to have a roughly equal mix of men and women at the film, but no spouses.

At the joint evaluation session, the mediator meets briefly with both parents and then caucuses with each to go over the intake form and explore issues that a parent may not feel comfortable revealing in the other parent's presence. At the end of the joint evaluation session, the parents make a decision as to whether they wish to continue the mediation. The director reports that many cases settle in the first joint session, or shortly after that session.

### **Summary**

The previous survey reveals a growing trend to fund and integrate mediation services into state and local court systems, and to mandate use of these services in at least some cases. However, states differ according to the mediation "models" or "styles" employed. For example, in California, the mediator is directed to make best efforts to reach an agreement and is even given the authority to make a recommendation to the court. These factors suggest that the California style or model emphasizes the end result of reaching an agreement, since a pre-hearing resolution would remove the case from overcrowded family court dockets. The California model and others like it resemble

what one author has called "muscle mediation."<sup>78</sup> In contrast, the Wisconsin program, although mandatory for one session, has other goals in addition to reaching an agreement. The Wisconsin model emphasizes the parents' role in making their own decisions, and views the court ordered referral in part as an opportunity to educate parents about cooperative post-divorce parenting and how to minimize negative effects of divorce on their children.

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<sup>78</sup> "The term 'muscle mediation' denotes a style of mediation that should be separately recognized and generally avoided. In 'muscle mediation' the mediator, sometimes resembling a 'closet arbitrator,' tells the partners what is fair and appropriate. Muscle mediators...inform the disputants of the best 'voluntary' resolution or narrow the options to preclude effective choices." Goldberg, Green and Sander, *Dispute Resolution* at 101 (Boston: Little, Brown and Co.: 1985).



## ***V. Conclusions and Recommendations***

### ***A. There is a substantial need for an alternate process to address visitation disputes.***

The visitation mediation project received calls from 390 parents interested in mediation, each of whom was disputing with the other parent, and each of whom had, on average, two children. The total number of parents who would potentially benefit from the project was 780, and the total number of children was the same. Thus, over 1,500 people in 11 months (or about 136 per month) were possible beneficiaries from mediation of visitation disputes. Note that the project was centered in Anchorage and advertising was limited to the Anchorage newspapers. A statewide project could expect to encounter even more interest.

The pilot project showed, and national studies confirm, that the children involved in visitation disputes are at risk because of the embittered and hostile conduct of their parents. Data showed that many children are not receiving the child support they are entitled to, are denied access to a parent, are denied non-custodial parents' gifts and letters, and are suffering stress and dysfunction because of these and other problems related to visitation disputes.

The existing mechanisms for dealing with visitation disputes are simply not working for the majority of parents disputing visitation. The pilot project clearly shows that access to the courts to resolve visitation disputes is simply not a realistic option for the great majority of parents. The alternative of parents trying to work out the problems themselves is both ineffectual and fraught with danger that one parent will be intimidated by the other parent.

Finally, the need for an alternative has been recognized in most other states. Many of these states currently fund mediation services for visitation disputes.

### ***B. Mediation is a viable option for helping at least some parents constructively address visitation disputes.***

The pilot project has shown that mediation appears more likely to serve the best interests of the children than other choices. Further, the data available indicate that mediated cases were handled more quickly than the average court cases, whether or not

an agreement was reached in mediation. Not enough data was available to test the hypothesis that mediation would reduce the need for litigation.

This is not to say that mediation can help all parents reach agreements. The pilot project clearly shows that there are a substantial number of parents who have so much animosity that they will not try to work out problems in mediation. Further, even many parents who will try mediation will not reach an agreement because of a high level of conflict. Finally, mediation is clearly inappropriate when one parent wishes to use it to intimidate the other. However, in spite of these limitations of the mediation process, the study shows the efficacy of mediation in helping a significant number of parents reach agreements.

***C. Despite the need for an alternative process to address visitation disputes, and the proven efficacy of mediation, it would not be cost-effective to establish a visitation mediation project in Alaska if the restrictions in effect during the pilot project are continued.***

The Visitation Mediation Pilot Project was highly successful in that it gathered a substantial amount of information about the mediation process both from Alaska and other states. It was able to refer a significant number of parents to various services and to provide a basis of knowledge for deciding whether mediation should be continued in Alaska. However, it provided actual mediation services to only 20 of the 390 parents who called the project interested in mediation.

While the small number of mediations conducted was the result of several factors, fully 68% of the applying parents were ineligible because of statutory criteria that excluded cases in which there had been an indication of domestic violence or a pattern of harassment, cases in which no visitation order had been entered by a court, and cases in which the applicant wished to make a material change in the court ordered visitation schedule. If the legislature deems that all of these exclusions are justified (about 9 out of 10 ineligible cases were disqualified by the domestic violence exclusion), then the legislature should not establish an ongoing child visitation mediation project. The project simply cannot be cost-effective if it excludes such a high proportion of parents.

***D. A mediation project can operate fairly and equitably without most of the statutory exclusions imposed on the pilot project.***

The Judicial Council has concluded, based on the data gathered in Alaska from the pilot project and based on projects in other states, that mediation can be employed fairly and equitably for many of the parents who were excluded from mediation in the pilot project. First, a large number of parents who applied to the project stated that custody and child support also were problems. Since the project only dealt with visitation issues, parents were referred to organizations that could help them handle the other issues. However, it would be more efficient to deal with as many of these issues together as possible. This conclusion is similar to that reached in a national study in 1988, that suggested that it might be easier to resolve the individual issues if they could be considered simultaneously, rather than separately.

Thus, the Judicial Council recommends that any continued mediation project be able to address visitation issues (whether or not a substantial change is envisioned), custody issues, child support, and other issues to the extent that they are directly related to visitation. Steps permitting mediators to work with parents on all of these issues at once would increase the number of families that could be served. To prevent injustices to the children, however, agreements relating to child support should be subject to court approval or administrative approval by CSED.

Second, parents who are in the process of establishing custody and visitation orders, whether because of divorce or paternity action should be able to mediate these initial orders. That process might be especially beneficial because some research shows that the level of trust and style of communication established at the initial separation effects the long term relationship between the parties. To the extent that the process of mediation gives parents a structure for resolving disputes through cooperation and communication, it can reduce conflict in the long run.

Third, and most importantly, victims of domestic violence who wish to mediate should not automatically be excluded. Appendix F discusses the domestic violence issues more fully and suggests guidelines for screening, counseling, mediator training, and mediation in many of these cases. Although the presence of domestic violence clearly will create unsuitable circumstances for mediation of some child-related disputes, the great majority can be handled with appropriate safeguards.

Concerns about intimidation or violence related to the mediation process should not be discounted. Even appropriate safeguards in mediation cannot eliminate improper

conduct completely. But, requiring the parents to face off over their children without the help of a trained, neutral mediator is not a better choice. Litigation is an unrealistic option financially in the great majority of cases, especially for women; and intimidation can be present there as well.

***E. The legislature should establish a child visitation mediation and referral project in the Office of Public Advocacy.***

Assuming a larger percentage of parents can qualify for mediation, the Alaska Judicial Council recommends that the legislature establish a project to assist parents to mediate child visitation and other related disputes and to refer them to other appropriate resources. An ongoing mediation project should be housed in the Office of Public Advocacy. That agency has experience in emphasizing the interest of children and in contracting with private professionals to provide services.

A continuing child visitation mediation and referral project should continue to focus on mediation, but it should also address related issues. The project should serve parents on a statewide basis. An 800 number could be used by a central administrator to screen applicants. The actual mediations should be handled by private mediators on a contract basis. Finally, the project also should emphasize referrals to other agencies, and conduct training and screening that will ensure that the mediation process is safe and fair and is not used to reach inappropriate results.

A mediation project, even without the current restrictions, would not be able to provide mediation to all applicants, primarily because both parents would not agree to mediation in many cases. However, the Judicial Council believes that such a project would serve enough applicants, particularly considering the referral services, to justify the project's existence. Appendix G describes in more detail the type of project that the Judicial Council suggests. Appendix H consists of proposed legislation to establish that project.

***Appendix A***  
***Child Visitation Mediation***  
***Project Legislation***

## CHAPTER 163

AN ACT REQUIRING THE ALASKA JUDICIAL COUNCIL TO ESTABLISH AND  
EVALUATE A PILOT CHILD VISITATION MEDIATION PROJECT; AND  
PROVIDING FOR AN EFFECTIVE DATE.

(HCS SB 522(Jud))

*Be it enacted by the Legislature of the State of Alaska:*

Section 1. PILOT CHILD VISITATION MEDIATION PROJECT.

(a) A pilot child visitation mediation project is established to promote the best interests of children who are the subject of a visitation order. In order to determine whether the best interests of children are served by mediation intended to enable persons having either custody of or rights of visitation for a minor child to reach voluntary agreement relating to child visitation, the Alaska Judicial Council shall

(1) establish a pilot child visitation mediation project using mediators to mediate child visitation disputes; the pilot mediation project shall be located in and serve residents of the judicial district of the state determined by the Alaska Judicial Council to have the greatest case load relating to court-ordered child visitations; and

(2) evaluate the pilot child visitation mediation project created under (1) of this subsection; the evaluation must measure

(A) the success of the project in terms of its ability to promote and serve the best interests of the child;

(B) the satisfaction of the legitimate and appropriate needs of the persons who participate in the project;

(C) the project's efficiency;

(D) the project's economy;

(E) whether the project has decreased the time required to resolve disputes relating to child visitation;

(F) whether the project has reduced litigation relating to visitation disputes; and

(G) whether mediation under the project improves compliance with court-ordered child support payments.

(b) In establishing the pilot child visitation mediation project under (a) of this section, the Alaska Judicial Council shall

(1) require the screening of cases and exclude from the scope of the pilot child visitation mediation project cases in which

(A) there has been an indication of domestic violence as defined in AS 18.66.900 or a pattern of harassment of one party by another; or

(B) a party has indicated the intent to materially change an existing court-ordered visitation schedule;

(2) develop protocols for the initial contact and for the mediation orientation session that describes the process and purpose of mediation and informs all parties of their rights and the scope and purpose of the project before mediation begins;

(3) consult, as to the pilot child visitation mediation project's design and evaluation

(A) with the Alaska Court System; and

(B) in a formal process, with custodial and noncustodial parents and other appropriate parties;

(4) consult with other states to determine their experiences with child visitation mediation and to obtain their recommendations relating to mediation of child visitation disputes; and

(5) develop a list of qualifications for persons who may serve as mediators.

(c) A person may participate in the pilot child visitation mediation project if the person is a party to a valid visitation order and submits a written request for mediation to the Alaska Judicial Council. The request must state the existing visitation schedule as set out in the current visitation order, the actual visitation being exercised, what the party hopes that mediation will accomplish, and the efforts that the party has made to resolve the party's concerns.

(d) If a minor child for whom visitation rights are made the subject of mediation has a guardian ad litem, the guardian ad litem

(1) shall be involved in all aspects of mediation; and

(2) shall approve any agreement to child visitation that arises out of mediation.

(e) If one party to the visitation order files a request for mediation and the person qualifies for mediation, a mediator shall contact the other party and, in a nonthreatening manner and consistent with the protocols developed under (b)(2) of this section, notify the other party that a request for mediation has been filed and that visitation mediation services are available. In making the contact, the mediator shall outline the parties' option to participate in mediation. The mediator shall also invite the notified party to attend an initial orientation session, advising the party that the party may withdraw from mediation at any time.

(f) Mediation under the pilot child visitation mediation project is limited to the visitation dispute. Mediation must be conducted informally and may be conducted as a conference or series of conferences, by telephone or in person. The parties need not be present in the same location. Counsel for the parties may attend each conference.

(g) A person who has been contacted under (e) of this section and agrees to participate in mediation under the pilot child visitation mediation project must attend a mediation orientation session. After the mediation orientation session, either party may choose to with-

draw from mediation. A party's refusal to participate may not be used against the party in any proceeding.

(h) Mediation conferences under the pilot child visitation mediation project are confidential. The mediator may not submit recommendations to a court about the disposition of the dispute.

(i) In this section, "party"

(1) means a person having either custody of or rights of visitation for a minor child; and

(2) includes, when appropriate, the guardian ad litem of the minor child.

Sec. 2. PROJECT EVALUATION. The Alaska Judicial Council shall complete the evaluation required under sec. 1(a)(2) of this Act and report the evaluation to the legislature by February 1, 1992. The evaluation of the project must consider establishing a sliding scale fee system for visitation mediation services if this pilot child visitation mediation program is continued after February 1, 1992.

Sec. 3. ADDITIONAL MEDIATION PROJECTS PROHIBITED. The Alaska Court System may not establish and conduct another mediation project until February 1, 1992.

Sec. 4. USE OF FEDERAL FUNDS. The Alaska Judicial Council shall apply for federal money that may be available for the pilot child visitation mediation project.

Sec. 5. This Act is repealed February 1, 1992.

Sec. 6. This Act takes effect July 1, 1990.

Approved: June 21, 1990  
Effective: July 1, 1990



***Appendix B***  
***Data Collection Forms and Methods***

## **Appendix B**

### **Data Collection Forms and Methods**

1. **Data Collection Methods:** Data for evaluation of the project's success were collected through interviews, completion of forms by project participants, and review of court records. The interviews were primarily those conducted by project staff at the time of intake, although some data were filled in from personal meetings or later phone conversations with applicants. The forms are described in more detail in Section 2, below. Court records were reviewed by project staff both for the applicant group and the control group. Information from the court records supplemented that obtained by other means for applicants, but the court records were the only source of information about the control group.

2. **Data Collection Forms.**

a) **Intake.** Each time a person interested in the mediation project contacted the Judicial Council, the call was referred to one of the three staff who shared intake responsibilities. About 85 callers wanted information about mediation or about a topic outside the scope of the project; these callers were referred to appropriate agencies or organizations. If the caller was interested in mediation, staff completed as much as possible of the intake form during the initial phone (or, occasionally, in-person conversation). Generally, information about the names and ages of the children, their custody status, and initiator and respondent addresses were obtained, as well as information about the nature of the dispute or problem. Often, staff received a great deal of information about problems that the parent perceived as related, especially child support and custody. Every caller was asked whether there had ever been domestic violence in the relationship, whether a visitation order had been established by a judge, and whether a material change in visitation was the purpose of the mediation.

b) **Request for Mediation/Disqualification.** Parents were told that they were eligible or ineligible, based on their responses to the intake staff's questions. They were sent one of two very similar forms—the "Request for Mediation" or the "Disqualification" form—depending on their response. Both forms collected data to assess the quantity and quality of visitation problems, the status of child support, and demographic information about the parent. Disqualified parents were referred to other services for assistance with their problems and encouraged to assist the project's research

by completing the disqualification questionnaire and the three and six-month followup questionnaires.

When eligible parents returned the "Request for Mediation," the project sent a letter about the project with a brochure and a "Request for Mediation" form to the other parent. If the eligible parent did not return the "Request," he or she was sent a letter within a few weeks asking whether they were still interested in using mediation. Those who responded that they were not interested were asked to complete a followup questionnaire. If the other parent did not respond, a followup letter also was sent, and in some instances, a followup phone contact was made.

c) Long-range Followup. All parents who had contacted the project were sent three- and six-month followup questionnaires. The questionnaires asked questions similar to those on the initial questionnaires, to provide comparative data over a period of time. Proportionately more ineligible than eligible parents responded to the followup forms.

d) Parents Who Mediated. Parents who mediated were asked to fill out several additional forms. Before they began mediation, they signed an agreement form, stating their understanding and expectations about the mediation process and project. Soon after completing mediation, they were mailed a closeout questionnaire. Few parents completed these promptly. Staff contacted most by phone and encouraged them to return the forms. They also received three-month and (if time permitted) six-month followup forms by mail.

e) Court File Information. Information about as many of these parents as possible was compiled from court case files. The intake form completed for each caller contained sections for case processing and demographic information about each parent. Although files were occasionally available for divorces or custody suits from outside Anchorage, most of the court file data came from Anchorage cases.

### 3. Control Group

A group of control cases was selected for comparison to the cases of parents who called the mediation project. The purpose of a control group was to determine, to the extent possible from court files, whether the two groups differed in demographic characteristics, or in litigation about child visitation and related issues. The

control group cases were randomly selected from Anchorage Court System lists of divorced or divorcing parents with children whose court file had been routed to the family court judge on a dispute about visitation or custody. Due to the impracticality of contacting control group members in person for an interview, all data about these parents were gathered from the court system files.

#### 4. Mediators' Forms

Mediators completed several different forms to assist the project in evaluation of the mediations. After each mediation session, the mediator filled out a mediation observation form. Following completion of the mediation process, the mediator completed a mediation closeout. Mediators also responded to a survey of how they handled domestic violence issues that arose in the context of their private practices (none arose during a mediation in the course of the project). Finally, they met as a group late in the project, to compare experiences, assess the project, and share information about the problems they encountered.

***Alaska Child Visitation Mediation Project  
Request for Mediation  
Data Collection Form***

REQUEST FOR MEDIATION IN THE ALASKA CHILD VISITATION MEDIATION PROGRAM
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Rev.12/11/90

We hope the Child Visitation Mediation program will meet your needs. Please answer the following questions. Your answers will be seen only by the mediation program staff and will help them decide if the program will work for you. Some of the questions will help the program staff see how well the program works.

A1. How do you feel about:

IT HASN'T BEEN DECIDED	I CAN LIVE WITH IT	IT IS A BIG PROBLEM FOR ME	IT'S NOT AN ISSUE
------------------------------	--------------------------	----------------------------------	-------------------------

*(Please circle the number of your choice)*

A1a. Child Custody	1	2	3	4
A1b. Child Support	1	2	3	4
A1c. Child Visitation	1	2	3	4
A1d. Property Division	1	2	3	4

A2. How optimistic are you that the mediation will result in an agreement on child visitation?

- |                    |                          |
|--------------------|--------------------------|
| 1. Very optimistic | 3. Not very optimistic   |
| 2. Optimistic      | 4. Not at all optimistic |
| 8. I don't know    |                          |

A3. Was the mediation your idea or the other parent's idea?

- |                        |                        |
|------------------------|------------------------|
| 1. My idea             | 3. Someone else's idea |
| 2. Other parent's idea |                        |

A4. What do you hope the mediation will accomplish?

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A5. At the time you and the other parent separated, how well were you getting along?

1. Very well
2. OK
3. Not very well
4. Not well at all

A6. Have you ever taken out a restraining order against your spouse/ex-spouse?

1. Yes
2. No

A7. Has your spouse/ex-spouse ever taken out a restraining order against you?

1. Yes
2. No

A8. At the time of the separation, how much disagreement was there over:

	<u>NONE</u>	<u>LITTLE</u>	<u>SOME</u>	<u>LOTS</u>
A8a. Child Custody	1	2	3	4
A8b. Child Support	1	2	3	4
A8c. Child Visitation	1	2	3	4
A8d. Division of Property	1	2	3	4

A9. At the time of separation, do you think one of you wanted the separation/divorce more than the other?

1. We both wanted it
2. I wanted it more
3. The other parent wanted it more
4. I don't know

A10. How many times, if at all, have you asked the court to resolve a visitation dispute?

- 0. Never
- 1. Once
- 2. Twice
- 3. Three Times
- 4. More than three times

A11. About how much, if anything, have you paid in attorney's fees related to the divorce so far?

- 1. Nothing
- 2. Less than \$1,000
- 3. Between \$1,000 and \$2,000
- 4. Between \$2,000 and \$3,000
- 5. Over \$3,000
- 8. I don't know

A12. For each child, please write in their first name and the number of nights they stayed with you in each of the last four weeks:

FIRST NAME	NUMBER OF NIGHTS CHILD STAYED WITH YOU:			
	LAST WEEK	FIRST WEEK BEFORE LAST	SECOND WEEK BEFORE LAST	THIRD WEEK BEFORE LAST

A13. Please describe what the current visitation order calls for:

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A14. Which, if any, of the following problems have you had with the visitation agreement?

<u>PROBLEM</u>	<u>NOT A PROBLEM</u>	<u>DOESN'T APPLY</u>	
1	2	3	A14a. The children weren't allowed to go on visits.
1	2		A14b. The agreement doesn't give me enough time with the children.
1	2		A14c. The children were dropped off late or were not ready for visits on time.
1	2		A14d. The children were picked up late or the other parent didn't show up.
1	2		A14e. The children came home tired, sick, or upset.
1	2		A14f. The children weren't supervised properly when with the other parent.
1	2		A14g. I'm afraid the children were mistreated or abused while with the other parent.
1	2		A14h. The children don't want to be with the other parent.
1	2		A14i. The other parent changes the visitation times.
1	2		A14j. It has been hard to arrange mutually acceptable visitation time.
1	2		A14k. There have been verbal fights during pickups and dropoffs.
1	2	3	A14l. I just haven't had time to visit.
1	2		A14m. I haven't had enough time with the children when they are out of school.
1	2		A14n. I'm afraid the other parent is drinking or using drugs when with the children.
1	2		A14o. The other parent tells the children negative things about me, criticizing me.

<u>PROBLEM</u>	<u>NOT A PROBLEM</u>	<u>DOESN'T APPLY</u>
----------------	--------------------------	--------------------------

1	2	A14p. The other parent isn't cooperative and flexible about the visitation schedule.
---	---	--

1	2	A14q. I do not like the kids being around the other parent's new partner.
---	---	---

1	2	3	A14r. I'm afraid the other parent will take the children out of state or not return them after a visit.
---	---	---	---

1	2	A14s. Another problem: (Please describe)
---	---	--

A15. At any point, did you decide not to let the other parent see the children?

1. Yes \_\_\_\_\_ A15a. Why was that?

2. No

A16. If you pay child support, at any point did you decide to stop paying or withhold child support because of visitation problems?

1. Yes \_\_\_\_\_ A16a. Why was that?

2. No

0. I don't pay child support.

A17. When did the problems with child visitation start?

1. There aren't any problems.
2. Almost from the time we separated.
3. Within the first six months after we separated.
4. Within the first twelve months.
5. More than twelve months after we separated.

A18. Besides applying for mediation, which, if any, of the following did you do to try to solve the child visitation problems? (Please circle all that you tried)

<u>TRIED</u>	<u>DIDN'T TRY</u>	
1	2	A18a. Talked with other parent.
1	2	A18b. Went along with other parent's wishes.
1	2	A18c. Talked with a counselor.
1	2	A18d. Spoke to an attorney.
1	2	A18e. Hired an attorney.
1	2	A18f. Filed a complaint in court.
1	2	A18g. Other (Please Describe)

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A19. How much child support, if any, is supposed to be paid?

1. There is no child support agreement yet.

Total amount per Month  
for all children

A20. Think back over the last six months. For each month, please write in the amount of child support paid and whether it was paid on time:

	MONTH					
	1	2	3	4	5	6
AMOUNT PAID						
PAID ON TIME (Y/N)						

A21. Which, if any, of the following problems have you had with child support payments?

<u>PROBLEM</u>	<u>NOT A PROBLEM</u>	
1	2	A21a. I can't afford the payments.
1	2	A21b. I can't count on getting the payments.
1	2	A21c. The other parent has more money to support the children than I have.
1	2	A21d. The money isn't spent for the children.

A22. How well are you and the other parent getting along?

1. Very well
2. OK
3. Not very well
4. Not well at all

A23. How well do you think the other parent listens to you?

1. Very well
2. OK
3. Not very well
4. Not well at all

A24. When you and the other parent disagree on something, how often is the other parent willing to compromise?

1. Most of the time.
2. Some of the time.
3. Never.

A25. How much do you trust the other parent to do what they say they will do?

1. I trust them completely
2. I trust them most of the time
3. I don't trust them very much
4. I don't trust them at all

A26. Do you consider yourself to be:

1. Alaska Native
2. Black or Afro-American
3. Hispanic
4. Asian or Pacific Islander
5. White

A27. How old are you? \_\_\_\_\_

A28. How long have you been separated? \_\_\_\_\_

A29. What was your total household income before taxes in 1989:

(to nearest \$1,000)

A30. Are you currently receiving public assistance payments?

1. Yes                      2. No

A31. Do you currently have a job for pay?

1. Yes                      2. No

A32. If you are working for pay, what kind of work are you doing?

---

A33. What is the highest level of schooling you have completed?

- |                      |                      |
|----------------------|----------------------|
| 1. Elementary School | 3. Vocational School |
| 2. High School       | 4. College           |
|                      | 5. Graduate School   |

A34. I'm the:

- |                 |           |
|-----------------|-----------|
| 1. Mother       | 2. Father |
| 3. Other: _____ |           |

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Signature

(Office Use)



***Alaska Child Visitation Mediation Project  
Questionnaire for  
Parents Who Mediated***





CLOSEOUT QUESTIONNAIRE  
ALASKA  
CHILD VISITATION MEDIATION PROGRAM

Rev.11/21/90

We hope the Child Visitation Mediation program met your needs. Whether or not the program met your needs, we would like you to complete this questionnaire. Your answers will help the program staff to see how well the program works.

- C1. First of all, did the mediation produce an agreement on child visitation?

(Please circle the number of your choice)

1. Yes

2. Partially

☐ 3. No

8. Not Sure

C1a. Why didn't the mediation work?

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Please skip to the next page.

- C2. In your view, do you now have an agreement that you are satisfied with?

(Please circle the number of your choice)

1. Yes

☐ 2. No

8. Not Sure

C2a. What aren't you satisfied with?

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C3. How optimistic are you that the agreement on child visitation will work?

- |                               |                          |
|-------------------------------|--------------------------|
| 1. Very optimistic            | 3. Not very optimistic   |
| 2. Optimistic                 | 4. Not at all optimistic |
| 5. It has already broken down | 8. I don't know          |

C4. If you had a chance to decide again whether or not to participate in the mediation, what would you do?

- |                                 |             |
|---------------------------------|-------------|
| 1. Participate in the mediation |             |
| 2. Do something else            | 8. Not Sure |

C4a. What do you think you would rather do?

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Please skip to question C5.

C4. If the mediation program were continued by the legislature, people participating in the program would probably have to pay a fee according to their income. Would you have participated in the mediation if you had to pay:

- | <u>YES</u> | <u>NO</u> | <u>NOT<br/>SURE</u> |                     |
|------------|-----------|---------------------|---------------------|
| 1          | 2         | 3                   | C4a. \$15 per hour? |
| 1          | 2         | 3                   | C4b. \$35 per hour? |
| 1          | 2         | 3                   | C4c. \$55 per hour? |

C5. Do you think the mediation process helped you to focus on the needs of the children?

- |        |       |             |
|--------|-------|-------------|
| 1. Yes | 2. No | 8. Not Sure |
|--------|-------|-------------|

C6. Do you think that the agreement (if you have one) is in the best interests of your children?

- |        |                          |
|--------|--------------------------|
| 1. Yes | 3. There is no agreement |
| 2. No  | 8. Not sure              |

C7 How well are you and the other parent getting along?

1. Very well
2. OK
3. Not very well
4. Not well at all

C8. How well do you think the other parent listens to you?

1. Very well
2. OK
3. Not very well
4. Not well at all

C9. When you and the other parent disagree on something, how often is the other parent willing to compromise?

1. Most of the time.
2. Some of the time.
3. Never.

C10. How much do you trust the other parent to do what they say they will do?

1. I trust them completely
2. I trust them most of the time
3. I don't trust them very much
4. I don't trust them at all

C11. Please say how much you agree or disagree with the following statements about your mediator by circling the number of your choice:

<u>AGREE</u> <u>STRONGLY</u>		<u>NEITHER</u> <u>AGREE NOR</u> <u>DISAGREE</u>		<u>DISAGREE</u> <u>STRONGLY</u>	
1	2	3	4	5	C11a. Really understood the visitation problem I was having.
1	2	3	4	5	C11b. Took the mother's side.
1	2	3	4	5	C11c. Took the father's side.
1	2	3	4	5	C11d. Made suggestions to help solve problems.
1	2	3	4	5	C11e. Didn't force the other parent to face the facts.

<u>AGREE</u> <u>STRONGLY</u>		<u>NEITHER</u> <u>AGREE NOR</u> <u>DISAGREE</u>		<u>DISAGREE</u> <u>STRONGLY</u>	
1	2	3	4	5	C11f. Gave me a chance to explain my side.
1	2	3	4	5	C11g. Never really trusted or believed me.
1	2	3	4	5	C11h. Rushed the mediation.
1	2	3	4	5	C11i. Followed through to make sure the visitation was working better.
1	2	3	4	5	C11j. Made the visitation situation worse.
1	2	3	4	5	C11k. Couldn't do anything quickly to solve the problem.
1	2	3	4	5	C11l. Was too bossy, gave orders.
1	2	3	4	5	C11m. Helped us communicate better.
1	2	3	4	5	C11n. Helped us get along better.
1	2	3	4	5	C11o. Really seemed concerned about what would be best for the children.

C11. I'm the:

1. Mother

2. Father

3. Other: \_\_\_\_\_

(Office Use)

***Alaska Child Visitation Mediation Project  
Mediator Closeout Form***



PROJECT NO.

DATE:

MEDIATOR CLOSEOUT FORM  
ALASKA  
CHILD VISITATION MEDIATION PROGRAM

Rev. 11/21/90

MC1. Did the mediation produce an agreement on child visitation?

1. Yes

2. Partial agreement

☐ 3. No

8. Not Sure

MC1a. Why didn't the mediation work?

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Please skip to question MC6.

MC2. Are you satisfied with the agreement?

1. Yes

☐ 2. No

8. Not Sure

MC2a. What aren't you satisfied with?

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MC3. How optimistic are you that the agreement will work?

1. Very optimistic

3. Not very optimistic

2. Optimistic

4. Not at all optimistic

8. I don't know



MC4. Do you think the agreement (if there was one) is in the best interests of the children?

1. Yes

2. No

8. Not Sure

MC4a. Why Not?

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MC5. <sup>What</sup> ~~was~~ was agreed to?

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WEEKLY (WEEK ONE) VISITATION ORDER: (Use child's initials if nec.)

	1= Overnight    2= Day Visit						
	S	M	T	W	TH	F	S
MOTHER'S							
FATHER'S							
OTHER:							

WEEK TWO VISITATION ORDER:

	1= Overnight		2= Day Visit				
	S	M	T	W	TH	F	S
MOTHER'S							
FATHER'S							
OTHER:							

WEEK THREE VISITATION ORDER:

	1= Overnight		2= Day Visit				
	S	M	T	W	TH	F	S
MOTHER'S							
FATHER'S							
OTHER:							

WEEK FOUR VISITATION ORDER:

	1= Overnight		2= Day Visit				
	S	M	T	W	TH	F	S
MOTHER'S							
FATHER'S							
OTHER:							

OTHER VARIATIONS IN CHILD VISITATION ORDER:

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HOLIDAY SCHEDULE

	THANKS- GIVING	XMAS EVE	XMAS DAY	OTHER			
WITH MOTHER							
WITH FATHER							
W/OTHER:							

VACATION SCHEDULE

SUMMER

OTHER

WITH MOTHER		
WITH FATHER		
W/OTHER:		

MC6. Please rate yourself on each of the following:

<u>AGREE STRONGLY</u>		<u>NEITHER AGREE NOR DISAGREE</u>		<u>DISAGREE STRONGLY</u>	
1	2	3	4	5	C6a. Understood the visitation problem parents were having.
1	2	3	4	5	C6b. Empathized more with mother's side.
1	2	3	4	5	C6c. Empathized more with father's side.
1	2	3	4	5	C6d. Made suggestions to help solve problems.
1	2	3	4	5	C6e. Couldn't get both parents to face the facts.
1	2	3	4	5	C6f. Gave both parents a chance to explain their side.
1	2	3	4	5	C6g. Didn't trust the mother.
1	2	3	4	5	C6h. Didn't trust the father.
1	2	3	4	5	C6i. Felt like the mediation was rushed.
1	2	3	4	5	C6j. Made the visitation situation worse.
1	2	3	4	5	C6k. Couldn't do anything quickly to solve the problem.
1	2	3	4	5	C6l. Had to take a more active, directive role in order to make some progress.
1	2	3	4	5	C6m. Helped parents listen to each other better.
1	2	3	4	5	C6n. Helped parents get along better.

<u>AGREE</u> <u>STRONGLY</u>		<u>NEITHER</u> <u>AGREE NOR</u> <u>DISAGREE</u>		<u>DISAGREE</u> <u>STRONGLY</u>	
1	2	3	4	5	C6o. Helped parents to problem solve better.
1	2	3	4	5	C6o. Giving my options <sup>h</sup> seemed to help.
MC7.	How well are parents getting along?				
	1. Very well				
	2. OK				
	3. Not very well				
	4. Not well at all				
	8. Can't tell				
MC8.	How well does the father listen to the mother?				
	1. Very well				
	2. OK				
	3. Not very well				
	4. Not well at all				
	8. Can't tell				
MC9.	How well does the mother listen to the father?				
	1. Very well				
	2. OK				
	3. Not very well				
	4. Not well at all				
	5. Can't tell				
MC10.	How often is the father willing to compromise?				
	1. Most of the time				
	2. Some of the time				
	3. Never				
	8. Can't tell				
MC11.	How often is the mother willing to compromise?				
	1. Most of the time				
	2. Some of the time				
	3. Never				
	8. Can't tell				

MC12. How much does the father trust the mother to do what she says she will do?

1. He trusts her completely
2. He trusts her most of the time
3. He doesn't trust her very much
4. He doesn't trust her at all
8. Can't tell

MC13. How much does the mother trust the father to do what he says he will do?

1. She trusts him completely
2. She trusts him most of the time
3. She doesn't trust him very much
4. She doesn't trust him at all
8. Can't tell

MC14. What method are the parents likely to use to resolve any remaining divorce issues?

- |                                      |                       |
|--------------------------------------|-----------------------|
| 1. Trial                             | 4. Mediation          |
| 2. Hearing                           | 5. Settlement without |
| 3. Settlement using attorneys        | using attorneys       |
| 8. Not Sure                          |                       |
| 0. No known remaining divorce issues |                       |

MC15. How many hours did you spend on this mediation? \_\_\_\_\_

MC16. How many weeks elapsed between intake and closeout? \_\_\_\_\_



***Alaska Child Visitation Mediation Project  
Questionnaire for Ineligible Applicants***





ALASKA CHILD VISITATION MEDIATION PROJECT QUESTIONNAIRE
--

We are sorry that the Child Visitation Mediation Project could not be of use to you. One of the purposes of the project is to better understand the needs of separated parents and their children. We would like to ask you to spend a few minutes completing this questionnaire. Your answers will help make it possible to better meet your needs in the future. Thank you for your help!

A1. How do you feel about:

	IT HASN'T BEEN DECIDED	I CAN LIVE WITH IT	IT IS A BIG PROBLEM FOR ME	IT'S NOT AN ISSUE
<i>(Please circle the number of your choice)</i>				
A1a. Child Custody	1	2	3	4
A1b. Child Support	1	2	3	4
A1c. Child Visitation	1	2	3	4
A1d. Property Division	1	2	3	4

A2. How optimistic were you that mediation would have resulted in an agreement on child visitation?

- |                    |                          |
|--------------------|--------------------------|
| 1. Very optimistic | 3. Not very optimistic   |
| 2. Optimistic      | 4. Not at all optimistic |
8. I don't know

A3. Was the mediation your idea or the other parent's idea?

- |                        |                        |
|------------------------|------------------------|
| 1. My idea             | 3. Someone else's idea |
| 2. Other parent's idea |                        |

A4. What did you think mediation might have accomplished?

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A5. At the time you and the other parent separated, how well were you getting along?

1. Very well
2. OK
3. Not very well
4. Not well at all

A6. Have you ever taken out a domestic violence restraining order against your spouse/ex-spouse?

1. Yes
2. No

A7. Has your spouse/ex-spouse ever taken out a domestic violence restraining order against you?

1. Yes
2. No

A8. At the time of the separation, how much disagreement was there over:

	<u>NONE</u>	<u>LITTLE</u>	<u>SOME</u>	<u>LOTS</u>
A8a. Child Custody	1	2	3	4
A8b. Child Support	1	2	3	4
A8c. Child Visitation	1	2	3	4
A8d. Division of Property	1	2	3	4

A9. At the time of separation, do you think one of you wanted the separation/divorce more than the other?

1. We both wanted it
2. I wanted it more
3. The other parent wanted it more
8. I don't know

A10. How many times, if at all, have you asked the court to resolve a visitation dispute?

- |          |                          |
|----------|--------------------------|
| 0. Never | 3. Three Times           |
| 1. Once  | 4. More than three times |
| 2. Twice |                          |

A11. About how much, if anything, have you paid in attorney's fees related to the divorce so far?

1. Nothing
2. Less than \$1,000
3. Between \$1,000 and \$2,000
4. Between \$2,000 and \$3,000
5. Over \$3,000
8. I don't know

A12. Which, if any, of the following problems have you had with the visitation agreement?

<u>PROBLEM</u>	<u>NOT A PROBLEM</u>	<u>DOESN'T APPLY</u>	
1	2	3	A12a. The children weren't allowed to go on visits.
1	2		A12b. The agreement doesn't give me enough time with the children.
1	2		A12c. The children were dropped off late or were not ready for visits on time.
1	2		A12d. The children were picked up late or the other parent didn't show up.
1	2		A12e. The children came home tired, sick, or upset.
1	2		A12f. The children weren't supervised properly when with the other parent.
1	2		A12g. I'm afraid the children were mistreated or abused while with the other parent.
1	2		A12h. The children don't want to be with the other parent.

<u>PROBLEM</u>	<u>NOT A PROBLEM</u>	<u>DOESN'T APPLY</u>	
1	2		A12i. The other parent changes the visitation times.
1	2		A12j. It has been hard to arrange mutually acceptable visitation time.
1	2		A12k. There have been verbal fights during pickups and dropoffs.
1	2	3	A12l. I just haven't had time to visit.
1	2		A12m. I haven't had enough time with the children when they are out of school.
1	2		A12n. I'm afraid the other parent is drinking or using drugs when with the children.
1	2		A12o. The other parent tells the children negative things about me, criticizing me.
1	2		A12p. The other parent isn't cooperative and flexible about the visitation schedule.
1	2		A12q. I do not like the kids being around the other parent's new partner.
1	2	3	A12r. I'm afraid the other parent will take the children out of state or not return them after a visit.
1	2		A12s. Another problem: (Please describe)

---

A13. At any point, did you decide not to let the other parent see the children?

1. Yes \_\_\_\_\_ A13a. Why was that?

2. No \_\_\_\_\_

A14. If you pay child support, at any point did you decide to stop paying or withhold child support because of visitation problems?

1. Yes \_\_\_\_\_ A15a. Why was that?

\_\_\_\_\_  
\_\_\_\_\_

2. No

0. I don't pay child support.

A15. When did the problems with child visitation start?

1. There aren't any problems.
2. Almost from the time we separated.
3. Within the first six months after we separated.
4. Within the first twelve months.
5. More than twelve months after we separated.

A16. Which, if any, of the following did you try before applying for mediation to solve the child visitation problems?  
(Please circle all that you tried)

<u>TRIED</u>	<u>DIDN'T TRY</u>	
--------------	-----------------------	--

- |   |   |  |
|---|---|--|
| 1 | 2 | A16a. Talked with other parent.              |
| 1 | 2 | A16b. Went along with other parent's wishes. |
| 1 | 2 | A16c. Talked with a counselor.               |
| 1 | 2 | A16d. Spoke to an attorney.                  |
| 1 | 2 | A16e. Hired an attorney.                     |
| 1 | 2 | A16f. Filed a complaint in court.            |
| 1 | 2 | A16g. Other (Please Describe)                |

\_\_\_\_\_  
\_\_\_\_\_

A17. Which, if any, of the following do you think you might try in the future to solve the child visitation problems? (Please circle all that you might try)

<u>MAY</u> <u>TRY</u>	<u>WON'T</u> <u>TRY</u>	
1	2	A17a. Talk with other parent.
1	2	A17b. Go along with other parent's wishes.
1	2	A17c. Talk with a counselor.
1	2	A17d. Speak to an attorney.
1	2	A17e. Hire an attorney.
1	2	A17f. File a complaint in court.
1	2	A17g. Other (Please Describe)
		_____
		_____

A18. How much child support, if any, is supposed to be paid?

1. There is no child support agreement yet.

Total amount per Month  
for all children

A19. Think back over the last six months. For each month, please write in the amount of child support paid and whether it was paid on time:

	MONTH					
	1	2	3	4	5	6
AMOUNT PAID						
PAID ON TIME (Y/N)						

A20. Which, if any, of the following problems have you had with child support payments?

NOT A		
<u>PROBLEM</u>	<u>PROBLEM</u>	
1	2	A20a. I can't afford the payments.
1	2	A20b. I can't count on getting the payments.
1	2	A20c. The other parent has more money to support the children than I have.
1	2	A20d. I'm afraid that the money isn't spent for the children.

A21. How well are you and the other parent getting along?

1. Very well
2. OK
3. Not very well
4. Not well at all

A22. How well do you think the other parent listens to you?

1. Very well
2. OK
3. Not very well
4. Not well at all

A23. When you and the other parent disagree on something, how often is the other parent willing to compromise?

1. Most of the time.
2. Some of the time.
3. Never.



A24. How much do you trust the other parent to do what they say  
they will do?

1. I trust them completely
2. I trust them most of the time
3. I don't trust them very much
4. I don't trust them at all

A25. Do you consider yourself to be:

1. Alaska Native
2. Black or Afro-American
3. Hispanic
4. Asian or Pacific Islander
5. White

A26. How old are you? \_\_\_\_\_

A27. How long have you been separated from the other  
parent? \_\_\_\_\_

A28. What was your total household income before taxes in 1989:

(to nearest \$1,000)

A29. Are you currently receiving public assistance payments?

1. Yes
2. No

A30. Do you currently have a job for pay?

1. Yes                      2. No

A31. If you are working for pay, what kind of work are you doing?

---

A32. What is the highest level of schooling you have completed?

- |                      |                      |
|----------------------|----------------------|
| 1. Elementary School | 3. Vocational School |
| 2. High School       | 4. College           |
|                      | 5. Graduate School   |

A33. I'm the:

- |                 |           |
|-----------------|-----------|
| 1. Mother       | 2. Father |
| 3. Other: _____ |           |

(Office Use)



***Appendix C***  
***Mediation Brochure,***  
***Newspaper Ads***



## Visitation Guidelines

Children experience severe stresses and fears when their parents divorce. Parents can help their children adjust to the divorce and the changes that come with it by following a few common-sense guidelines.

### Things Parents Should Try To Do To Help Their Children

- ★ Put the best interest of your child above your own desires, convenience, and possibly angry feelings toward your former spouse.
- ★ Establish a cooperative relationship with your ex-spouse in matters concerning the children. Show your children that their parents can work together despite feelings of anger or disappointment.
- ★ Maintain contact between the children and both parents; children naturally want affection from both parents.
- ★ Give children a sense of continuity and security by providing them with their own space in your home. No matter how short the children's visits with you, they should feel that they are an integral part of your home.

### Things Parents Should Try Not To Do

- ★ Do not use the child to get information about the other parent.
- ★ Do not fight in front of the children; when parents fight, children become frightened and sad.
- ★ Do not use the child to convey possibly antagonistic messages.
- ★ Do not make derogatory statements about the other parent to the child; children want to love and respect both parents.
- ★ Try not to contradict the other parent's directions.
- ★ Do not attempt to "buy" the child's affections.
- ★ Do not be late or early for visitations. Should a change in plans occur, always inform the other parent with a full and honest explanation to the child.
- ★ Do not pick up the child when using drugs or alcohol.
- ★ Do not deny visitation because of the child's sickness unless the reasons are fully explained and the other parent is allowed to see the child.

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ALASKA JUDICIAL COUNCIL 279-2526

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## YOUR CHILD'S VISITATION

### THE ALASKA CHILD VISITATION MEDIATION PILOT PROJECT



ALASKA JUDICIAL COUNCIL  
1029 West Third Avenue, Suite 201  
Anchorage, AK 99501  
(907) 279-2526

November 1990

The Child Visitation Mediation Pilot Project was created and funded by the Alaska Legislature to provide a private, informal process for parents with a visitation disagreement to talk and decide what to do about their problem, and their child's access to both parents.

**All mediations are free.**

The Mediation Project is administered by the Alaska Judicial Council, a constitutionally-created state agency that is independent from the court system.

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## What is Mediation?

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Mediation is a voluntary, informal and confidential process designed to help people resolve their disagreements without going to court.

**Mediation is *Voluntary*:** Either party may withdraw from mediation at any time, and no one is forced to settle.

**Mediation is *Informal*:** Mediation is not a court proceeding. It can be one meeting or a series of meetings, and it does not necessarily require both parents to be in the same room.

**Mediation is *Confidential*:** Under state law, conferences under the Child Visitation Mediation Project are confidential.

Although any kind of disagreement can be mediated, the Child Visitation Mediation Project mediates parents' disagreements over visitation with their children. In mediation, the parties discuss the disputed issues with the mediator, who uses active listening and communication techniques to help the parents reconcile their differences and reach an agreement that defines their future actions.

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## What is a Mediator?

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A mediator is a neutral, impartial facilitator who directs the discussion of the issues. The mediator is not a judge; the mediator does not take sides or decide who is right and who is wrong. State law prohibits Alaska Child Visitation Mediation Project mediators from

submitting recommendations to the court about the dispute.

The mediator ensures that each party has the chance to say the things he or she wants to say, and guides the parties to an understanding of the issues involved in the dispute. The mediator will not make a decision for the parties, but will help the parties find their own mutually agreeable solutions to their problem.

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## What is the Alaska Child Visitation Mediation Pilot Project?

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The Mediation Project is a seventeen-month pilot program. The project has two goals: to conduct visitation mediations, and to evaluate the effectiveness of those mediations, particularly whether visitation mediations promote the best interests of the affected children. Parents who mediate with the Mediation Project will be asked to fill out several anonymous questionnaires in order to help the Judicial Council evaluate the project. At the end of the project, the Alaska Judicial Council will present a full report to the Alaska Legislature.

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## Who is Eligible to Mediate?

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The Alaska Legislature chose several criteria to determine who is eligible for the Mediation Project:

1. Any person who wishes to use the Mediation Project's services must first be a party to a valid visitation order from the court. This order can be temporary or

final. You do not have to be divorced to use the project.

2. The Mediation Project is not appropriate for people who have had domestic violence or a pattern of harassment of one party by the other in their relationship.

Other statutory limitations also may apply. For more information about whether you are eligible for the Mediation Project's services, call the Project Director, Susanne Di Pietro, at 279-2526.

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## How Do I Apply?

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Apply to the Mediation Project by calling or visiting the Alaska Judicial Council's office at 1029 West Third Avenue, Suite 201. You will be asked to fill out an application form. The Mediation Project staff then will invite the other parent to participate in the mediation. If both parents are willing, a staff person will call each one to schedule an orientation session. At the orientation session, the mediator will explain more about mediation, answer questions and schedule the mediation session.

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## Must Both Parents Live in Alaska?

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The Mediation Project can mediate by telephone if one of the parents lives outside of Anchorage or outside of Alaska.

### CHILD VISITATION PROBLEMS?

Summer vacation can be a tough time for divorced (or divorcing) parents to work out visitation schedules for their children. The Alaska Judicial Council is sponsoring a child visitation mediation project that might help. The Council will provide, without charge, a trained mediator who will help you work out visitation disputes. Call the Alaska Judicial Council at 279-2526 for information.

**ALASKA JUDICIAL COUNCIL: 279-2526**

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Publish: 6/6, 6/8, 6/11  
6/13, 6/15, 6/18  
6/20, 6/22, 6/25



### **CHILD VISITATION PROBLEMS?**

Are you a parent who is tired of going to court over visitation disputes? Or do you put up with visitation arrangements that just don't work? The Alaska Judicial Council can provide a trained, neutral mediator free of charge to help you and the other parent address your visitation concerns through mediation, a cooperative problem solving process designed to help parents work together to help their children.

**ALASKA JUDICIAL COUNCIL: 279-2526**

**Publish: July 30, August 1, 3, 6, 8, 10, 13, 15, 17**

**ALASKA CHILD VISITATION MEDIATION PILOT PROJECT**

**HANDBOOK**

**Alaska Judicial Council**  
**1029 W. Third, Suite 201**  
**Anchorage, AK 99501**  
**(907) 279-2526**



## **INTRODUCTION**

### **The Alaska Child Visitation Mediation Pilot Project**

Mediation is a process for helping people to resolve disagreements. The Child Visitation Mediation Pilot Project was created and funded by the Alaska Legislature to provide a safe, private place for parents with a visitation disagreement to talk and figure out what they can do about their problem. Mediators of the Alaska Child Visitation Mediation Project are trained, neutral third parties who use communication and listening skills to guide parents to an understanding of the issues involved in the dispute, and to help parents focus on the best interests of their children.

The Alaska Child Visitation Mediation Project provides visitation mediation services to Third Judicial District residents (including Anchorage, Kenai, Palmer, Wasilla and Eagle River). **The Mediation Project's services are free.**

The Alaska Child Visitation Mediation Project is administered by the Alaska Judicial Council. The Judicial Council is a constitutionally-created agency that is independent from the court system.

### **Program Eligibility**

The Alaska Legislature chose several standards to determine if you are eligible to participate in the project.

1. You must be a party to a valid visitation order from the court. This order can be a temporary or interim order, or a final order.
2. The Mediation Project is not appropriate for people who have had domestic violence in their relationship. If you have had domestic violence or a pattern of harrasment of one party by the other in your relationship, the Mediation Project cannot conduct your mediation. We can, however, help you with other referrals.
3. The Mediation Project cannot help you if you want a completely new visitation order; the Project only can help you work out problems in your current order.

For more information about whether you are eligible for the project's services, call or write the Project Director, Susanne Di Pietro, at (907) 279-2526.

### **Purpose of This Handbook**

This handbook provides a description of what you can expect to happen during mediation. It describes the steps involved in mediation and tells you about your role in mediation and the role of the mediator.

## **MEDIATING YOUR DISPUTE**

### **What is Mediation?**

Mediation provides an informal, confidential process and a neutral mediator to help you resolve your dispute. Mediators ensure that you have the chance to say the things you want to say. Mediators also ensure that what you say will be considered seriously. You and your spouse/former spouse do not have to be in the same room in order to mediate your visitation dispute. If you want to try mediation, but you are uncomfortable being in the same room with your spouse/former spouse, your mediation can be conducted separately or even by telephone.

### **What Mediation is Not**

Mediators **will not** make decisions for you. Mediation is not a court proceeding and mediators are not judges. Mediators do not decide who is right and who is wrong, and they do not take sides. Mediators from the Alaska Child Visitation Mediation Project will not make any recommendations in court about your visitation dispute, and they will not testify in court about what was said during mediation.

At the end of mediation, you may ask the court to review and approve whatever agreement you may have reached; however, the Mediation Project can not enforce your agreement. If further disputes arise after you have mediated your agreement, you can come back and use the Mediation Project's services again.

### **Potential Benefits of Mediation**

While no dispute resolution process can guarantee specific outcomes, certain benefits often result from the use of mediation. Some of the benefits that have resulted to others who have used mediation have included:

Economy - mediation is generally less expensive when contrasted to lengthy litigation or other forms of fighting;

Rapid Settlements - when parties want to get on with business or their lives, the dispute process that they select needs to produce rapid results; mediation is often a more timely way of resolving disputes than going to court;

Satisfaction - people are generally more satisfied with solutions that have been mutually agreed on than with those that are imposed by a judge or other third party decision-maker;

Compliance - people who have reached their own agreement are generally more likely to follow through and comply with its terms than when an agreement has been imposed by a judge or other third party decision-maker. Mediated settlements tend

to hold over time, and if a later dispute results, the parties are more likely to use a cooperative type of problem-solving to resolve their differences than pursue an adversarial approach.

### **Your Role in Mediation**

Before mediation begins, you will be asked to sign an "Agreement to Participate in the Child Visitation Mediation Project." The mediator assigned to help you will explain each part of that agreement to you.

During mediation, you will be expected to be honest and to attempt sincerely to resolve your dispute. You will be asked to state your opinions. You will also be asked to listen carefully to others when they state their opinions. Most importantly, you will be asked to develop solutions to your visitation problems that meet the best interests of your child(ren), not just your own interests.

Ten days after mediation, even if you were not able to reach an agreement, you will be asked to fill out an anonymous survey explaining what you thought about the mediation process. Three months and six months after your mediation, you will be asked to fill out two more anonymous surveys. It is very important that you fill out these surveys and return them to the mediation office, because the Project Director must report the results of the program to the state legislature. When reporting results to the legislature, the Mediation Project will keep your name completely confidential. Based on the survey results, the legislature will decide whether to continue the program.

### **The Mediator's Role**

The mediator's job is to make sure that you and your spouse or ex-spouse are given a fair chance to reach an agreement about your dispute. To help provide you this chance, the mediator will schedule mediation sessions, provide a meeting environment that supports communication, help keep you and your spouse/former spouse focused on problems and issues that you have identified, and help you prepare a written agreement.

### **The Visitation Mediation Project's Role**

The Visitation Mediation Project will provide a trained mediator to assist you in resolving your conflicts and will help schedule meetings between you, your spouse/former spouse and the mediator. The Project Director, Susanne Di Pietro, will be available to answer your questions.

### **The Role of Lawyers**

You do not need a lawyer to participate in mediation. However, if you wish, your lawyer may participate in the mediation by advising you about your legal interests and by reviewing any written agreements prepared by you and your spouse/former spouse. Lawyers usually do not

attend mediation sessions. When they do attend mediation sessions, it is requested that lawyers give you advice but not speak for you.

#### **What to Bring to Mediation**

Every mediation is different, but in general you should bring a copy of your most current visitation order. Just before your mediation, the mediator assigned to help you will let you know if there is anything else you should bring.

### **STEPS IN MEDIATION**

#### **1. Talking to the Mediation Office and the Mediator by Phone**

Usually, the mediation process starts when one parent calls the mediation office [(907) 279-2526]. An office staff person will ask the parent a few questions to determine if s/he is eligible for the program. If the parent seems to be eligible, s/he will be asked to fill out an application form. A staff person will send a letter to the other parent explaining mediation and asking if the other parent would like to use the Project's services. The staff person will follow this letter with a phone call. If the other parent agrees to try mediation, s/he will fill out an application form.

#### **2. The Orientation Session**

If both you and your spouse/former spouse say you want to try mediation, you will attend an orientation session with the mediator. At the orientation session, you and the mediator will go over and then sign the Agreement to Participate, talk about the mediation process and about the dispute, and arrange a time for mediation.

#### **3. Describing What You Agree About and Do Not Agree About**

In mediation, you and your spouse or former spouse typically will be asked to describe your dispute and talk about what you expect to get out of the mediation. The mediator will help you and your spouse or former spouse identify clearly the things you agree about and the things you do not agree about, and why.

#### **4. Developing a List of Problems and Issues**

The mediator will help you and your spouse/former spouse develop a list of problems and issues to be covered during mediation using the descriptions of the dispute that you have given.

#### **5. Making Decisions**

The mediator will help you and your spouse/former spouse look at all possible options for an agreement that is acceptable to both of you. The mediator will **not** make decisions for you. Instead of making decisions, the mediator will help keep the discussion between you

and your spouse/former spouse focused on the topics you indicated you wanted to discuss. Often this is the hardest part of the mediation. Although it might be hard for you to make decisions with your spouse/former spouse, keep in mind that these are decisions that must be made.

#### **6. Preparing a Written Agreement**

During your mediation, the mediator will help you keep track of the decisions that you have made. At the end of the mediation, the mediator can help you prepare a written "Memorandum of Understanding" that shows what you and your spouse/former spouse have agreed to do about your child's visitation.

### **AFTER MEDIATION**

If you signed a written Memorandum of Understanding at the end of the mediation, each of you will get a copy of it. (If you were unable to solve your dispute, you can still take the matter to court.) In many cases, you will find that the Memorandum of Understanding is a helpful reference point for any future discussions about your child's living arrangements. If you feel that some points remain unclear, or if another issue arises, you can contact the mediation project again.

About 7-10 days after mediation has been completed, you will receive in the mail a survey asking about your views of and satisfaction with the mediation process. About 3 months and 6 months after your mediation, you will receive in the mail two more, shorter surveys. It is very important that you fill out all of these surveys.

Parties who go through the mediation process can learn new and creative approaches to resolve conflicts based on techniques used in mediation: active listening, conflict management, team work and agreement drafting. Try using some of these new approaches to solve disputes that come up after your mediation is over.





***Appendix D***  
***List of Mediators***



## ***Appendix D*** ***Mediators***

The project mediators were:

**James R. Carr:** Mr. Carr holds a Master of Arts in Human Relations and has completed the forty hour certified training in family mediation offered by the Lemmon Mediation Institute of Oakland, California. For the past three years, Mr. Carr has mediated family issues through his private business, The Arbitration Group. He also mediates labor disputes on an ad hoc basis in his capacity as Deputy Director of the Alaska Department of Labor, Labor Standards and Safety Division. Mr. Carr is a member of the Academy of Family Mediators and is certified to the panels of the Federal Mediation and Conciliation Service and the American Arbitration Association.

**Glenn Cravez:** Mr. Cravez is an attorney whose practice includes domestic relations law. He has served as a third party neutral in the capacity of a hearing officer and as a discovery master. He has attended a two day mediation training seminar offered by John Lemmon of the Lemmon Mediation Institute. Mr. Cravez is the interim chair of the Alternate Dispute Resolution section of the Alaska Bar Association; that section was formed in response to his petition to the Board of Governors of the Alaska Bar. He is also a member of the court system's Standing Advisory Mediation Task Force.

**Jon C. Deisher:** Mr. Deisher holds a Master of Arts in Speech Communications. He has a background in marital and family counseling and has a private mediation/consulting practice. He has completed a forty hour mediation training course through the Pacific Family Mediation Center in Seattle.

**Deitra Ennis:** Ms. Ennis is an attorney whose practice consists primarily of domestic relations. In addition, she conducts divorce mediations as a part of her practice. During law school, she drafted an article which later was used by a bar committee in drafting rules concerning mediation. Ms. Ennis completed her mediation training in 1989, through a forty hour mediation training session given by the Conflict Resolution Center of Seattle, Washington.

**Jacqueline Ertischek:** Ms. Ertischek is a Senior Mediator in the Academy of Family Mediators. She was awarded senior status after training with the academy and completing an extensive supervised internship. Ms. Ertischek owned her own mediation business for two years, and worked part-time as a family and divorce mediator for the Anchorage Conflict Resolution Center from 1982-1986. In addition, she co-trained potential mediators with John Haynes, founder of the Academy of Family Mediators, and supervised their internships.

**Vincent Gollogly:** Mr. Gollogly holds a Master of Arts in Counseling and Guidance and is currently working towards his Ph.D. in clinical psychology. He has completed forty hours of mediation training with the Pacific Family Mediation Center in Seattle. He has counseled families, couples and children at the Anchorage Center for Families and Charter North Hospital. Mr. Gollogly currently counsels families in private practice and at the Alaska Native Medical Center; he has provided custody and visitation mediation and conflict resolution services as well.

**Carol Anne Hogins-Wolfe:** Ms. Hogins-Wolfe holds a Master of Social Work and is currently employed as a family therapist. In her work as a family therapist, she deals with issues such as divorce, custody and visitation disputes, and helping parents to understand important developmental aspects of their children's emotional growth. For the past two years, Ms. Hogins-Wolfe has served as a Volunteer Court Appointed Special Advocate with the Office of Public Advocacy.

**Jackie Housel:** Ms. Housel holds a Master of Arts in Marriage and Family Counseling. She has worked as a family therapist at the Anchorage Center for Families, where she helped individuals and families deal with divorce and custody issues. In addition, she has conducted parent/teenager mediations at the Family Connection, and has worked with divorce mediation, arbitration hearings, and landlord/tenant disputes at the Conflict Resolution Center of Anchorage.

**Elizabeth Page Kennedy:** Ms. Kennedy is an attorney who served as an assistant attorney general for the Alaska Department of Health and Social Services for ten years. In that capacity, she dealt with child abuse and child support issues, including negotiating terms of visitation with parents whose children were in state custody. Before attending law school, she obtained a Master of Arts in Teaching and completed ninety hours toward a Ph.D. in Guidance and Counseling. Ms. Kennedy has a private law practice.

**Mary Killorin:** Ms. Killorin is an attorney whose private practice emphasizes family law. Previously, she has worked as an assistant public defender on child in need of aid cases, and as a court-appointed guardian ad litem. Ms. Killorin has completed a forty hour divorce and child custody mediation training given by CDR Associates of Boulder, Colorado.

**Blythe Marston:** Ms. Marston is an attorney who received her mediation training from the Conflict Resolutions Center in Ithaca, New York. She also organized, directed and remains actively involved in the Anchorage Youth Court, a program which trains young people between the ages of 12 and 18 in criminal law, and then assigns these young people to work as attorneys, judges, bailiffs, clerks and jurors in the Youth Court, which tries juvenile defendants.

**Pamela Montgomery:** Ms. Montgomery holds a Masters of Social Work and has worked for five years as the program director for the Court Appointed Special Advocate program. She developed and designed the CASA program, which provides guardian ad litem representation to minors in court proceedings involving neglect/abuse, divorce, adoption, emancipation and delinquency issues. Ms. Montgomery also works as a guardian ad litem, a role which frequently involves mediation and negotiation. Ms. Montgomery now works in the private sector.

**Drew Peterson:** Mr. Peterson is an attorney whose practice emphasizes family mediations. He received his mediation training from the Lemmon Mediation Institute, and recently attended the 1991 conference of the Society of Professionals in Dispute Resolution. Mr. Peterson is one of three partners in Options Unlimited, a training company teaching collaborative methods of solving conflicts. The partners of Options Unlimited teach mediation.

**Ryan Roley:** Mr. Roley is an attorney with a substantial family law practice. While at Willamette Law School, he completed fifteen credit hours of special courses to acquire certification through the university's Center for Dispute Resolution. He has been a volunteer for the Anchorage Conflict Resolution Center, and has completed additional mediation training through the Alaska Youth and Parent Foundation. Mr. Roley is a member of the Academy of Family Mediators.

**Dorothy Shepard:** Ms. Shepard holds a Master of Arts in Political Theory. She has been a family mediator in private practice since 1987. She initially studied divorce mediation under Dr. John Haines. In addition, Ms. Shepard served for two years as the Executive Director of the Anchorage Conflict Resolution Center, where she designed and taught workshops in conflict resolution methods, and trained volunteer mediators and arbitrators. Ms. Shepard, also a partner in Options Unlimited, teaches mediation and serves on the court system's Standing Advisory Mediation Task Force.



***Appendix E***  
***Mediator Training***





## ***Appendix E***

### ***Mediator Training***

The Judicial Council sent out Requests for Proposals to 7 providers of mediation training services in October of 1990. The Council received 7 proposals in response and selected the Association of Family and Conciliation Courts ("AFCC") to give a 40 hour mediation training designed specifically for Alaska's program. AFCC is nationally recognized for its expertise in mediation training. The training was held in Anchorage on December 2-6, 1990. All fifteen mediators completed the training.





**ASSOCIATION OF FAMILY AND CONCILIATION COURTS**  
329 West Wilson Street, Madison, Wisconsin 53703-3612 • (608) 251-4001 • FAX (608) 257-4305

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**Child Visitation Mediation Training**

**Day 1**

- I. Welcome, Introductions and Course Overview.
- II. The Alaska Child Visitation Mediation Project
- III. Mediation - An Overview of the Field
- IV. What is Conflict? A Problem Solving Exercise.
- V. Methods of Conflict Resolution - An Introduction to Negotiation, Mediation and Arbitration/Adjudication.
- VI. Distinguishing the Differences - Exercise and Discussion
- VII. The Nature of Divorce and Visitation Disputes.
- VIII. Communication Skills - Active Listening
- IX. Video.

**Day 2**

- I. The Mediation Process From Beginning to End - A Series of Stages.
- II. Demonstration and Discussion.
- III. Role Play and Discussion.
- IV. Communication Exercise - Positional vs. Interest-based Negotiations
- V. Video and Discussion.

**Day 3**

- I. Alaska Law and Local Procedures.
- II. Conflict Styles - Exercise (The Thomas-Kilmann Conflict Mode Instrument).
- III. Conflict Styles - What the Mediator and the Parties Bring to the Process.
- IV. Diagnosing Disputes - Choosing the Right Intervention.
- V. Reframing the Issues - Exercise and Discussion
- VI. Roleplay and Discussion.
- VII. Video and Discussion.

**Day 4**

- I. Understanding Visitation and Access Issues.
- II. Techniques and Interventions.
- III. Child Development Issues and Reaching Solutions in the Best Interests of the Children.
- IV. Alternatives to Face-to-Face Mediation.
- V. Bringing the Parties to the Table.
- VI. Roleplay and Discussion.

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Day 5

- I. Communication Skills - Use of Questions.
- II. Exercise.
- III. Gender and Cultural Issues
- IV. Powerbalancing Exercise
- V. Professional and Ethical Issues - Exercise and Discussion
- VI. Putting It All Together - Roleplay and Individual Feedback.
- VII. Developing a Plan for Continued Skill Development.
- VIII. Wrap Up and Evaluation

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***Appendix F  
Special Study of  
Domestic Violence Cases***



**Appendix F**  
**Special Study of Domestic Violence Cases**  
(Teresa W. Carns, Senior Staff Associate)

Some national women's organizations have taken the position that mediation is always inappropriate if any domestic violence ever occurred, because of a real fear that women would be disadvantaged by the mediation process when they had been intimidated with violence.<sup>1</sup> However, not all of the women contacting the pilot mediation project agreed with that stand. As they eloquently express in the quotes and cases below, they requested mediation for a variety of reasons, often because they saw it as their only opportunity to establish workable visitation arrangements.

"I am very disappointed that you could not help me because [my ex-husband] has smashed me up in the past. People like me are the ones who need the help. If he was rational at all, or most of the time, then we would not need help. It is a pity that my kids and me have to suffer because long ago I made a mistake and married a mad man. The help of an experienced mediator would have been very soothing for me emotionally. And I cannot help but to believe that if an outsider (anyone other than me, or a woman) [had talked to him] he might have listened and learned something." (The children are 5 1/2 and 7 years old. The requestor of mediation has custody of the children, wanted assistance in getting the father to agree to pick them up and return them at the times set in the visitation order. He had at one time broken her cheekbone, and kicked her a number of times. She added that she had to get a restraining order against him "at least once a year.")

"Not only have I been denied help from this organization because I was a victim of violence eight years ago and that incident has no bearing on the current situation. I am now a victim of a system that provides absolutely no way in which I can have my court-ordered visitation enforced because I do not have thousands of dollars to hire an attorney....Something has got to be done! Hundreds, more likely thousands of children and mothers are suffering

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<sup>1</sup> "...2) Family law cases involving parties between whom there was or is domestic abuse should not be mediated – no matter how seemingly long ago or how seemingly slight the abuse might appear." (Sun and Woods, *A Mediator's Guide to Domestic Abuse*, National Center on Women and Family Law, 1989 at 71).



needlessly because the justice system has turned their back on them and do not hear their cries." (The children are 9 and 11 years old. The requestor of mediation did not have custody of her children and wanted assistance in enforcing the court-ordered summer visitation. She has not had an extended visit with her children for three years. He had threatened violence before she left the marriage, and she had obtained a domestic violence order about that time. No actual violence had occurred.)

[Case Notes] \_\_\_\_\_ is a nurse, works weekends and holidays. Had been going through a lawyer to arrange visitation, but that has become too expensive. Now she would like to use a mediator to arrange visitation. Recently, she's had to deal with her abuser directly to get visitation. (The children are 3 and 5 years old. The requestor of mediation had originally been referred to the program by her attorney; her ex-spouse's attorney had also referred the ex-spouse to the program. The requestor said that they had been separated for two years, and that the last two months of the relationship had been very physically and verbally abusive. She had not asked for a restraining order, but had moved out and left the children with him. She is paying \$987/month in child support.)

"This project only helps people who practically can do it themselves! What am I supposed to do when he won't listen to me and I can't afford to hire a lawyer? He sends her back late all the time. She's two days late now." (The child is 7 years old. The requestor of mediation wanted assistance in enforcing the existing visitation agreement and in getting her daughter back on time. He ex-husband was not violent until after the dissolution, when he "would break down my doors and throw me against the wall and grab her and take her...Since I re-married, all the violence has stopped because he's afraid of my new husband. Now, instead of threatening me, he threatens to take her away from me.")

Due to the large percentage of parents who were disqualified from the project because of domestic violence, staff believed it was important to a fuller understanding of the types of parents who had visitation disputes to know as much as possible about the type of domestic violence and the characteristics of the parents involved.

To provide this information, staff gathered more data about the cases from court case files. Complete information was unavailable for many of the cases, because of the limited amount of time available in the telephone intake process. Often, court files could not be located for verification; other times, the court files disclosed new information about the parents. Pulling together everything that could be known about each case within the confines of this project gives a picture of the situations of these men, women and children. These data clearly do not include a substantial minority of the parents disqualified because of domestic violence. The picture is not statistically definitive, but is reliable enough to use as a foundation for decisions about possible future programs.

At the time of the analysis, there were 159 cases in which the parties had been disqualified because of domestic violence, or because of some other restraining order. (In four cases of the 159, the most serious event was a restraining order to prevent one or both parents from taking the children from their home community without the permission of the court.<sup>2</sup>) Staff reviewed court files and conducted additional analysis of these cases to determine whether continuing the exclusion of domestic violence cases from mediation was appropriate. Many of the 159 cases had more than one domestic violence order; of the subset of 79 Anchorage cases for which one or more orders could be found, a total of 133 orders were located (1.7 orders per case). The cases are characterized for this analysis by the most serious violence alleged in any one of the orders or during the staff intake discussion.

Table A shows the most serious violence alleged or shown in each of the 159 cases. Acts at the level of 5 (hitting) or above were considered more serious.<sup>3</sup> In about two-thirds of the cases, the man was alleged to have committed at least one violent act against the woman during the period of their relationship that involved hitting, beating,

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<sup>2</sup> Each person requesting mediation was treated as one case for this analysis. The criteria for determining the level of violence categorizing the case were 1) The most serious violence mentioned either during the intake call or on a Domestic Violence Petition was used. Seriousness of violence between parents was ranked according to the "Conflict Tactics Scale" *Id.* at 22. See Attachment A for a more detailed discussion of the "Conflict Tactics Scale." If both parties were alleged to have been violent, the person alleged to have been more violent was considered the aggressor. Mutually combative couples or those in which the woman was the primary aggressor are discussed separately in the text. 2) In addition to the acts described on the "Conflict Tactics Scale," a number of domestic violence orders alleged actions that were not included such as threats to the woman, physical or sexual abuse of a child or neglect of a child. These were totalled separately and are also discussed in the text.

<sup>3</sup> *Id.* at 22-23. For purposes of this table, burning is included with hitting, at seriousness level 5. There were two instances alleged; one of a woman attempting to burn her boyfriend and the other of a woman burning her son's hand.

or use of a weapon. In two cases, the most serious violence alleged was the use of a knife by a woman against the other parent.

<b>Table A</b> <b><i>Alleged Inter-parental Level of Violence</i></b>			
<b><i>Most Serious Violence Alleged</i></b>	<b><i>Male</i></b>	<b><i>Female</i></b>	<b><i>Total</i></b>
1) Throwing (Objects)	4	--	4
2) Push, Grab	15	--	15
3) Slap	6	--	6
4) Kick, Bite, Punch	6	--	6
5) Hit, Burn	31	--	31
6) Beat, Rape	23	--	23
7) Threaten with Knife	2	--	2
Threaten with Gun	7	--	7
8) Use Knife	1	2	3
Use Gun	1	--	1
<b>Subtotal</b>	<b>96</b>	<b>2</b>	<b>98</b>
<b><i>Other Violence Alleged</i></b>			
A) Threats Only	14	--	14
B) Threaten to or Take Child	4	--	4
C) Abuse/Neglect of Child	10	4	14
D) Other	4	1	5
E) Violence Alleged but no Other Info	23	1	24
<b>Subtotal</b>	<b>55</b>	<b>6</b>	<b>61</b>
<b>Total</b>	<b>151</b>	<b>8</b>	<b>159</b>

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Child Visitation Mediation Project

The subset of 79 Anchorage cases for which domestic violence petitions could be found gave more detailed information about the allegations of violence. First, of the 107 petitions found for the 79 cases that alleged violence (rather than child-stealing or neglect), the petition was denied in only 12. The denial generally came either because the judge found that no emergency existed or the petition was withdrawn or combined with another current and related court case. The emergency petition was the only one filed in 42 of the 107 cases; in 53 cases, a 90-day extension was granted. This fact suggests that the majority of the petitions were well-founded.

Second, although weapons were used or threatened in a very small number of cases, they were actually present in nearly half of the respondents' homes (the respondent was the person named in the domestic violence petition as perpetrator of the violence). The petitioner knew of the weapons and often knew where they were kept. The fact that the weapons were not used in most cases suggests that although the violence is extremely serious, it does not often escalate into the use of weapons, despite their availability.

Finally, the most recent petition granted was in 1990 or 1991 in about half the cases (see Table B). Conversely, about half the time, the most recent petition had been filed between 1980 and 1989. Although this statistic cannot be applied across the board to cases disqualified for domestic violence, because many other factors and cases are omitted from the analysis, it does suggest that the staff's perception that domestic violence is not a current issue in many instances is correct.

<i><b>Table B</b></i>	
<i><b>Year</b></i>	<i><b>Most Recent Petition Granted</b></i>
1991	20
1990	21
1989	6
1988	13
1987	5
1986	6
1985 or before	8
<b>Total</b>	<b>79</b>

An important question was whether the person initiating the request for mediation was the perpetrator of the violence or the one abused, as well as the relationship between that question and who was the custodian of the children. If parents, especially women, who have been abused are requesting mediation, their requests and the reasons behind them should be carefully considered. A complex set of issues is involved. Some battered women's advocates suggest that women who have been abused and volunteer for mediation may not recognize that their "established

pattern of concession and deference suggests an imbalance in bargaining power.<sup>4</sup> They suggest that it is virtually impossible for a mediator to determine the victim's voluntary participation.<sup>5</sup> Similarly, men who were the aggressors in an abusive relationship and who now want to mediate may be continuing manipulative and controlling behavior that should be discouraged, rather than facilitated. Some see mediation as allowing the aggressor to benefit by these behaviors and would disallow mediation for that reason.

Custody of the children becomes important in these contexts. It could be argued that women who were abused but do not have custody of their children should be allowed access to mediation because they have so few other viable options to improve visitation. The same argument cannot be made for previously-abused women who do have custody. Women who do have custody, it could be argued, might jeopardize their safety and the benefits gained from the existing custody and visitation situation by mediating. Table C summarizes the information available about the relationships among the variables of custody of the children, parent who initiated the request for mediation, and identity of the primary victim of the violence alleged. A quick glance at the table shows immediately that for this group, no man who had primary custody of the children requested mediation, and also that men were very rarely the primary victims of violence.<sup>6</sup> In the total 63 cases in which a father requested mediation, the woman was the focus of the violence in 52 cases, there was another victim in six cases (generally, child neglect or abuse was alleged), and the man was the target of the violence in five cases.<sup>7</sup> In general, for the group of cases disqualified for domestic violence when the father initiated the request for mediation, he did not have custody of the children and he had been the primary perpetrator of the violent act(s).

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<sup>4</sup> *Id.* at 58.

<sup>5</sup> *Id.* at 69-70.

<sup>6</sup> Twenty-six cases that involved allegedly mutually-combative couples were excluded from the table and will be discussed separately. In another three cases, neither parent had custody of the children; those were also excluded.

<sup>7</sup> Little information was available about the level of violence against men. In the two (of five) cases with a description, one man said, "She hit me lots while we were married;" the other said (in his domestic violence petition) "She came to my workplace and threatened to 'beat [me]' and then [proceeded] to attack me physically. I suffered small lacerations on my left arm while trying to restrain her."

<b>Table C</b>				
<b>Initiator of Request by Custody Status by Victim of Violence</b>				
<b>(Excluding Alleged Mutually Combative Couples; Neither Parent is Custodian)</b>				
	<b>Custody Status</b>			
	<b>Split or Joint</b>	<b>He/She Has Physical Custody</b>	<b>He/She Does Not Have Custody</b>	<b>Totals</b>
<b>Mother Initiated Request for Mediation</b>				
She was victim of the violence	5	24	21	50
She was not the victim of violence	2	2	7	11
<b>Subtotals</b>	7	26	28	61 women
<b>Father Initiated Request for Mediation</b>				
He was victim of violence		—	5	5
He was not the victim of violence - woman was victim	4	—	48	52
Other victim	1	—	5	6
<b>Subtotals</b>	5	0	56	63 men
<b>Total</b>	12 (10%)	27 (22%)	84 (68%)	124

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The situation was more complex for women. Those who had custody and those who did not called in about equal numbers. Those who did not have custody were slightly more likely to say that a person other than themselves was the victim of the violence; generally they said that a child or children had been abused. In two instances, the father was the primary focus of the violence.<sup>8</sup> The violence against the women in both groups (custodial and non-custodial) ranged from threats, harassment, and vandalism to broken bones and beatings while pregnant.

<sup>8</sup> In one instance, the domestic violence petition filed by the father said, "She got violent, hitting and scratching. Four times in the past three weeks she got a knife and tried to cut me. Has broken glasses trying to hit me. She said she will kill me if she sees me again." He filed a second petition about three months later, saying that she continued to threaten him as well as calling his employer in an attempt to get him fired from his job.

The reasons given for requesting mediation, and the phrases in which they were expressed did not typically leave the impression that the women were being unduly conciliatory or submissive.

"I'm supposed to have them this summer.... The rest of the year, I see them every other weekend. Whenever he wants to take them hunting, it's a problem. Also, there's a problem with the Easter Bunny.... He thinks that the kids can decide whether they want to be here." (Woman also says she divorced him because of 15 years of violence; that she was intimidated into giving up custody at time of divorce four years earlier; that he had a lawyer and she didn't).

"I want him in my son's life, but only if he visits on a consistent basis....hasn't participated in my son's life for four years--now that he's in town, he wants to see him on three hours' notice." (Woman says he beat her up "many times" when she was pregnant; says there has been no violence since they separated four years ago.)

"He was put on probation in 1989 for an assault on me. Before that, he was convicted on manslaughter for shooting someone....[He's in an] alcohol treatment program--recovering alcoholic. The violence continued over a three-four year period. I finally had enough. I'm not afraid of him. The violence is the least of my worries at this point." (Woman says father has custody of four children now because he accused her "new boyfriend of sexually abusing our daughter." One daughter is disabled; judge has ordered only supervised visitation every other weekend for mother; she owes attorney over \$4,000 for this case.)

[Mediation would achieve] "Open communication between husband and myself--better idea of children's needs." (They had been separated six weeks; she had obtained a domestic violence order that established her as temporary custodian of the three daughters.)

As can be seen from the brief vignettes above, there were a number of cases in which neither parent's situation could be considered ideal for the children. Nonetheless, the children's situation often could be improved if visitation issues could be resolved, partially or wholly. In many of the cases, as the one mother said, "the violence is the least of my worries." Either the women did not expect the violence to continue, or they

believed that mediation would provide a safe context in which to work out the visitation problems they were experiencing.<sup>9</sup>

Women's advocates and supporters of mediation alike attempt to resolve these disparate viewpoints in an arena that is largely devoid of sound, reliable research. No studies were found on the question of whether mediation is more helpful than potentially harmful to women who have been abused by men who fathered their children. The experience of Alaska's pilot program does not fit neatly into any existing framework of information about mediation. Over 60% the persons initiating a request for mediation were disqualified because of violence, whether it was directed against the woman, the man, the children, other parties, or each other. Most frequently, violence against a woman was alleged, with abuse or neglect of children being the second most frequent problem. In a substantial minority of cases (17% of those disqualified for domestic violence), the couples were mutually combative. Both men and women occasionally did not mention violence that they had perpetrated.<sup>10</sup>

Mutual combativeness was alleged in a sizable minority of cases (26 of 150, or 17%), either during the intake call or in court files. The case characteristics did not differ much from the cases in which the violence was directed primarily against only one party. Table D shows that women requesting mediation were split fairly evenly between

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<sup>9</sup> One survey of battered women in Minnesota who were involved in child custody mediation had mixed responses to questions about satisfaction with the process. It should be noted that it appears that the mediators in the Minnesota study had the ability to make recommendations to the court about custody and visitation, and that the mediations may have been mandatory. The program proposed for Alaska would not put mediators in a position of making any recommendations or comment to the court, nor would mediation be mandatory. Also, comments came from only nineteen women, too small a group to be statistically useful. Finally, it is not known whether the mediators involved had been trained in domestic violence issues.

A few of the women were pleased with the mediation process; one said that "the mediator...did not let my abuser play any games." Another said "I was not pushed; they made sure we both understood everything before we made an agreement." However, most were not pleased with the procedure or outcome. The most common reason for dissatisfaction seemed to be that the mediator was not perceived to be neutral or was perceived to be pressuring for an agreement. These comments may indicate that the mediators may not have received special training for working with cases in which domestic violence had occurred. For example, one mother noted: "I believe mediation can be helpful if mediators are better educated on domestic violence issues." Others apparently had been under pressure to participate, and/or didn't understand the nature of the mediation process: "I was ordered. I thought the mediator had the power to make all decisions." (Source: Frederick and Rehn, "Excerpts From Custody Mediation Monitoring Survey, Minnesota Coalition for Battered Women's Advocacy Project.")

<sup>10</sup> See, e.g., note 8 above. The mother in that case had assaulted her former boy-friend, but did not mention that in the intake call beyond saying that there had been violence in the relationship.



those who had custody and those who did not. The great majority of the men who requested mediation were not the custodial parent.

<b>Table D</b> <b>Mutually Combative Couples</b>				
	<b>Joint or Split</b>	<b>She Has Physical Custody</b>	<b>He Has Physical Custody</b>	<b>Total</b>
He Requested Mediation	4	12	1	17
She Requested Mediation		4	5	9
<b>Total</b>	<b>4</b>	<b>16</b>	<b>6</b>	<b>26</b>

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Child Visitation Mediation Project

Cases involving allegations of mutually combative couples were among the "messiest" to categorize and understand.<sup>11</sup> In some, the parents had, at different times, filed domestic violence petitions against each other or called police, alleging violence.

[In 1982, I] had to call police because my wife was drunk. She hit me in front of the police, who arrested her. No charges were pressed. (He said that he had not seen his children since the 1982 divorce, but said he would like to see them.) About two weeks after he contacted the mediation project, the ex-wife filed a domestic violence petition saying that "he beat me, causing severe bruises....He contacted the children's school after no contact in 7 1/2 years."

In others, the parent contacting the project said that the violence happened some years earlier, typically around the time of the separation, and that it had not been repeated.

<sup>11</sup> Sun and Woods, *supra* note 1, at 19. One study found that men and women "engage in violence in about the same numbers," but "violence by men is more injurious and repeated about three times more often than violence by women. Self-defense was three times more likely to be the reason for a woman's violence."

Some just seemed to relate to others violently. One woman had two domestic violence orders against her ex-boy-friend (1988 and 1989). At one hearing, she said that she had hit him and would do it again "if needed." As one condition of the 1988 order, the judge required both parties to be screened for alcohol problems. She also had filed a domestic violence petition against her oldest son in 1987, saying that she had hit him and he had hit her, and she was afraid of him. And when referred to Alaska Legal Services because the mediation project could not help her, she expressed the opinion that they should be bombed out of the state. Still, she has court-ordered visitation for her 3 1/2-year-old daughter (the ex-boy-friend has custody) and he has not permitted her to exercise this right.

In another case, the woman had custody, despite long-standing alcohol problems (she had been ordered by the court to go for alcohol screening and treatment in both 1987 and 1988). She had obtained three domestic violence orders in 1987 and 1988, the last based on an incident that left her with a broken jaw and him with a substantial jail sentence. However, he had filed a domestic violence petition in 1991, alleging that she had hit both him and the children when drunk, and asking for temporary custody of the children. She requested mediation to help schedule the summer visitation; she wanted to be able to plan her own school for the summer.

In both of the above cases, the violence is not the issue to be mediated, but it appears to be an on-going and mutual fact of the relationship. It is not entirely clear that these parents should be flatly prohibited from trying mediation, if for no other reason than the children might benefit if they could come to some agreements, and the parents are almost certainly not going to qualify for, or try, means of resolving the situation other than continuing to fight.

Attorneys involved with the parties in some of the cases disqualified for domestic violence also expressed concern that their clients were prohibited from mediating without considering the circumstances of the individual case. One attorney said in a letter that

We are both very disappointed that your office is statutorily prohibited from providing mediation....The parties have weekly contact because of their children but there have been no instances of domestic violence in this period and we anticipate none in the future....Although I understand the reasoning behind this prohibition, I do not agree it should be uniformly applied, particularly when the person who is being

'protected' has retained counsel and has made an informed decision regarding mediation.

## **Attachment A**

### **Conflict Tactics Scale**

The "Conflict Tactics Scale" was developed by Straus in 1979 (Dunford, F., "System Initiated Warrants for Suspects of Misdemeanor Domestic Assault," Justice Quarterly, Vol.7, No. 4, Dec., 1990, p. 643-646). The Scale was also cited in A Mediator's Guide to Domestic Abuse (Sun, M. and Woods, L., National Center on Women and Family Law, Inc., 1989, p. 22). The original scale has eight categories: "1) throwing things, 2) pushing or grabbing, 3) slapping, 4) kicking or biting or punching, 5) hitting or hitting with an object; 6) beating, 7) threats with a knife or gun, or 8) use of a knife or gun." Sun and Woods note the violence described in categories 5 through 8 is "more serious."

Dunford modified the Scale for use in a study of Omaha, Nebraska police responses to domestic violence calls. The Dunford scale has 21 categories: "1) Berated you, put you down, yelled at you, insulted you, or swore at you on purpose? 2) Tied you up against your will? 3) Locked you in a room or in the house? 4) Locked you out of the house on purpose? 5) Damaged something of yours on purpose? 6) Threatened to throw something at you? 7) Threatened to hit you? 8) Threw something at you? 9) Pushed, grabbed, shoved, or slapped you on purpose? 10) Tried to hit you with something other than hand/fist? 11) Choked you? 12) Hit you with something on purpose? 13) Bit or kicked you? 14) Hit you with a fist? 15) Beat you up? 16) Threatened you with a knife? 17) Threatened you with a gun? 18) Threatened to kill you? (do not include attempts) 19) Cut or stabbed you? 20) Shot you? 21) Tried to kill you?"

The original Straus scale was used to categorize the violence reported by participants in this project who had filed domestic violence petitions. Project staff noticed that two things were omitted from both versions of the scale, scratching and burning, both things which in this project were associated almost exclusively with women who were aggressors (whether acting in self-defense or in a mutually combative situation or initiating the aggression). Staff also noted that choking (omitted from the original scale, but included on the Dunford scale) was a fairly common act. The scale was useful in general terms, but much seemed to depend on the victim's (or aggressor's) choice of terms. Some "slaps" resulted in broken bones, "pushes" resulted in bruising and other harms, and hitting sometimes seemed less serious than acts classed as less violent. In addition, the context of the violent behavior, of course, was important. Continued low-level violence could result in more harm or fear than an isolated instance of higher-level violence.





***Appendix G***  
***Proposed Child Visitation***  
***Mediation and Referral Project***

**Appendix G**  
**Proposed Child Visitation Mediation**  
**and Referral Project**

**A. Type of Project**

Any future project, in addition to providing mediation services, should also provide referral services. These referral services, to such places as domestic violence shelters, counselors, women's groups, non-custodial parents' groups, or other organizations, would be of great benefit not only to the members of the public who will qualify for mediation, but also to those for whom mediation is not a viable option.

The focus of the mediation portion of the project should remain on the children. Thus, visitation issues will continue to be the primary focus. However, the mediators should also be able to address custody issues, child support and other issues that are directly related to visitation.

Any discussion of child support however, should be limited to protect the best interests of the children. Parents should not be allowed to negotiate away the legitimate child support that their children are owed. Thus, there should be a strict guideline that any mediated agreement involving child support would be subject to court approval or to administrative approval from CSED, as appropriate.<sup>1</sup> In addition, to the extent that property division issues were related to visitation and thus could be discussed with the mediator, the mediator should terminate mediation if an agreement does not fairly allocate the economic effect of dissolution.

**B. Staff**

One mediation administrator would be hired to screen mediation applicants and to collect statistics. This level of staffing is consistent with the level from other states with programs of this size.

**C. Area**

A future project would operate on a statewide basis. An 800 number, probably in Anchorage, would be used for screening by the mediation project administrator. Mediators from different areas of the state would be used. Also, telephonic mediation would be used when there was no local mediator.

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<sup>1</sup> The Alaska Supreme Court has held that parents may not make a child support agreement which is not subject to Civil Rule 90.3. *Cox v. Cox*, 776, P.2d 1045, 1048 (Alaska 1989).



#### ***D. Mediators and Training***

Private mediators would be used on contract. A new group of probably about 12 mediators would be trained. The initial training should include at least 10 hours of training in domestic violence issues. These people would pay a minimum fee for the training; however, the fee would be waived if they had to travel to the mediation training. (The project would not pay for travel or per diem expenses for the training, with perhaps a few exceptions.) Also, the current mediators for the Council's mediation project would be qualified for the continued project, with the requirement that they complete the additional 10 hours of domestic violence training.

#### ***E. Referrals***

As with the current project, members of the public could call and ask to be included in the project. Also, judges could refer litigants to the project pursuant to their inherent authority or proposed Civil Rule 100 (attached). However, project screening guidelines also would apply to these referrals.

#### ***F. Limitations and Screening***

##### ***1. Equality and Safety of Parties***

It is essential that the mediation process not be allowed to be used by one spouse to take advantage of the other. This fact would be emphasized to judges who might refer persons to the project, to the project administrator, and to the mediators. While mediation can be a process by which the spouses operate on increasingly equal terms, mediation would be terminated any time that it appeared that one party was taking advantage of the other through mediation. Also, mediation should be terminated at any time that it appeared that it might subject a party or a child to physical injury.

##### ***2. Domestic Violence Screening and Counseling***

Any allegation of domestic violence, no matter how minor or remote, would at a minimum lead to a recommendation and referral to counseling for both parties. If the alleged domestic violence was serious enough to bring into the question the ability of mediation to fairly operate, mediation would be allowed only after referral to, and attendance at counseling (possibly at a domestic violence shelter). After counseling, the mediator would first meet separately with the victimized parent and determine whether that parent's desire to use mediation should be allowed. Representation of the victim of abuse by an attorney would act as a substitute for the mandatory counseling.

### ***3. Project Administrator Screening***

When contacting the parent who did not request mediation, the project administrator would carefully screen out cases that were not appropriate to mediation. However, the project administrator should in addition encourage parents not to reject mediation for inappropriate reasons. The mediator should acquaint both parents with the statutory obligation to allow court-ordered visitation and the fact that willful denial of visitation is a misdemeanor in Alaska. Further, the project administrator should emphasize the benefits to children of having positive relationships with both parents and the damage to children that can occur from not resolving parental conflicts. "Do's" and "Don'ts" of conflict resolution such as are suggested are in the pilot project brochure attached as Appendix C, should be emphasized to the parents.

### ***G. Role of the Mediators***

Under the existing legislation, all mediation conferences are confidential, and the mediator may not submit recommendations to a court about the disposition of the dispute. These provisions should be extended. However, the confidentiality provision should be clarified as follows:

Mediation conferences and mediators' notes about those conferences are confidential and shall be treated as privileged settlement discussions. The mediator may not submit recommendations to the court about the disposition of the dispute. However, all project mediators are subject to the child abuse reporting requirements of AS 47.17.020.

### ***H. Payment for Mediation***

The first two hours of mediation would be provided to the parties free as an incentive to reach an agreement expeditiously. After that time each party would pay approximately \$25.00 per hour for mediation unless the project administrator determined that a reduced fee was appropriate. It would be the responsibility of the mediator to collect any fee due from the parents. State payment for mediation would be limited to a maximum number of eight hours at a maximum of \$80.00 per hour. Most who mediated said they would pay \$15.00 (or weren't sure). A few said they would pay \$35.00. Only one said she would pay \$55.00

### ***I. Agency***

The best choice for an agency to run the program would be the Office of Public Advocacy. That agency has experience in emphasizing the interests of children and in

contracting with private professionals to provide services. Another possibility might be the Child Support Enforcement Agency. A remote possibility might be the Alaska Court System.

#### **J. Evaluation**

The project administrator would fill out an information sheet based on the screening. This information sheet would be designed by the Judicial Council. Also, the mediators would submit an information sheet about the mediation with their bill to the Office of Public Advocacy. These data sheets would be passed on to the Judicial Council who, in conjunction with the Institute of Social and Economic Research at the University of Alaska Anchorage, would complete an evaluation of the project for the first two years of its existence.

#### **K. Approximate Budget**

	Approximate Total
Personnel (14-16, \$30,000-\$35,000)	\$ 45,000 (w/benefits)
Mediators	\$ 50,000
Training	\$ 15,000
800 Number	\$ 1,000
Advertising	\$ 6,000
Office Space (\$400 x 12)	\$ 4,800
Equipment	\$ 3,500
Supplies	\$ 500
Subtotal	\$125,800
Domestic Violence Shelters (Counseling)	\$ 12,000
Alaska Judicial Council (Evaluation)	\$ 4,000
Total	\$141,800

### ***Proposed Civil Rule 100***

**Civil Rule 100: Mediation.** The Civil Rules Committee has recommended that the following rule on mediation be adopted as Civil Rule 100:

(a) **Application.** At any time after a complaint is filed, a party may file a motion with the court requesting mediation for the purpose of achieving a mutually agreeable settlement. The motion must address how the mediation should be conducted as specified in paragraph (b), including the names of any acceptable mediators. The court may order mediation in response to such a motion, or on its own motion, whenever it determines that mediation may result in an equitable settlement.

(b) **Order.** A court order of mediation must state:

(1) the name of the mediator, or how the mediator will be decided upon;

(2) any changes in the procedures specified in paragraphs (c) and (e), or any additional procedures;

(3) that the costs of mediation are to be borne equally by the parties unless the court orders otherwise; and

(4) a date by which the initial mediation conference must commence.

(c) **Challenge of Mediator.** Each party has the right once to challenge peremptorily any mediator appointed by the court if the "Notice of Challenge of Mediator" is timely filed pursuant to Civil Rule 41(c).

(d) **Mediation Briefs.** Any party may provide a conference brief to the mediator explaining its view of the dispute. If a party elects to provide a brief, the brief may not exceed five pages in length and must be provided to the mediator not less than three days prior to the mediation. A party's mediation brief may not be disclosed to anyone without the party's consent and is not admissible in evidence.

(e) Conferences. Mediation will be conducted in informal conferences at a location agreed to by the parties or, if they do not agree, at a location designated by the mediator. All parties shall attend the initial conference at which the mediator shall first meet with all parties. Thereafter the mediator may meet with the parties separately. Counsel for a party may attend all conferences attended by that party.

(f) Termination. After the initial joint conference and the first round of separate conferences if separate conferences are required by the mediator, a party may withdraw from mediation, or the mediator may terminate the process if the mediator determines that mediation efforts are likely to be unsuccessful. Upon withdrawal by a party or termination by the mediator, the mediator shall notify the court that mediation efforts have been terminated.

(g) Mediation proceedings shall be held in private and are confidential. The mediator shall not testify as to any aspect of the mediation proceedings. This rule does not relieve any person of a duty imposed by statute.

(h) If the mediation is successful, the party requesting mediation shall prepare a stipulation for dismissal which dismisses all or such portions of the action as have been concluded by mediation as agreed upon at the mediation.

***An Act establishing a child custody  
and visitation mediation and referral project;  
and providing for an effective date***

**Section 1.** Child Custody and Visitation Mediation and Referral Project.

- (a) **Establishment.** The Office of Public Advocacy shall establish a child custody and visitation mediation and referral project in order to promote the best interests of children involved in custody and visitation disputes. The project is intended to provide a means for the parties amicably to resolve these ongoing disputes in a cost-effective and expeditious manner.
- (b) **Mediation.**
  - (1) A party may request to participate in mediation by applying to the project. The agreement of both parties is necessary for the mediation to proceed, unless otherwise ordered by the court.
  - (2) Mediation under the project is limited to child custody and visitation disputes, and related financial issues involving the children, including child support, except that any agreement on the amount of child support shall be subject to court or administrative approval, as appropriate.
  - (3) Mediation may be conducted informally and may be conducted as a conference or a series of conferences, by telephone or in person. Counsel for a party may attend any conference that the party attends.
  - (4) All applications for mediation shall be screened, according to guidelines adopted by the Office of Public Advocacy, to exclude from mediation any cases which cannot fairly be resolved by the process, including those in which a history of domestic violence between the parties could be expected to affect the fairness of the mediation process or the physical safety of the victim.
- (c) **Referral Services.** The project shall refer applicants for mediation to public or private organizations who might benefit the children or parties involved, including domestic violence counseling if appropriate.

*Child Visitation Mediation Act*

- (d) **Mediators.** The Office of Public Advocacy may contract with private mediators to provide the mediation. The Office of Public Advocacy shall ensure that the mediators have the experience and training to conduct the mediation efficiently and fairly and to promote the best interests of the children.
- (e) **Confidentiality.** Mediation conferences and files under this project are confidential. The mediator may not submit recommendations to a court about the disposition of the dispute, and may not testify in any proceeding about the mediation session. However, all project mediators are subject to the child abuse reporting requirements of AS 47.17.020.
- (f) **Mediation Fees.**
  - (1) The initial mediation sessions, limited to two hours, will be paid by the project, without cost to the parties.
  - (2) Further mediation, up to a maximum of eight hours per case, will be provided based on a party's financial resources.
  - (3) The project will not pay for any mediation after eight hours for a particular case.
- (g) **Definitions.** In this section, "party" means a person having custody or alleging visitation rights for a minor child, including a grandparent; and includes, when appropriate, the guardian ad litem of minor children.
- (h) **Project Evaluation.** The Alaska Judicial Council shall review and evaluate this project, and make a report to the Legislature by February 15, 1994, with recommendations as to whether or not it should continue or be modified.

**Section 2.** This Act takes effect July 1, 1992.