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Non-Adversarial Case Resolution

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Chapter 16 NON-ADVERSARIAL CASE RESOLUTION

by Donald N. Duquette[1]

§ 16.1 Introduction

Professionals who work with children and parents have become increasingly dissatisfied with the customary reliance on the traditional adversarial system in resolving family-related disputes, including cases involving children's protection, placement, and permanent care. The power struggle in contested cases and hearings relating to child welfare may foster hostility among the parties and dissipate money, energy, and attention that could otherwise be used to solve problems cooperatively. Parties may become polarized, open communication may be discouraged, and there may be little investment in information sharing and joint problem solving. Children may suffer when adversarial tensions escalate and ameliorative services are delayed.

The adversarial system is essential and well-suited to resolving conflicts, however, when differences regarding the true facts of a child abuse or neglect case, or the differing views of the proper response to a family's problems related to child protection, are irreconcilable. Nonetheless, most child abuse and neglect cases are resolved through informal settlement negotiations. Unfortunately, these settlements are often quickly made in courthouse hallways where the interests of all parties may not be carefully or fully considered. Hastily made agreements or stipulations made immediately prior to a hearing can do a disservice to both children and their families.

Courts traditionally encourage resolution of contested matters through pretrial hearings and party negotiations that narrow the issues in contention. These court-based approaches to avoid lengthy and contested case proceedings, including pretrial case settlement and case status conferences, are commonly used and often authorized by statute or court rule. Non-Adversarial Case Resolution (NACR)[2] has become an accepted alternative to the traditional adversarial

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2 Howard Davidson, Director of the American Bar Association Center for Children and the Law, deserves credit for coining the term, *Non-adversarial Case Resolution (NACR)* as it applies to the child welfare law context. In the *Guidelines* project, Howard was chair of the subcommittee developing policy recommendations for the use of alternative dispute resolution mechanisms in child protection and foster care legal cases. The use of this name reflects the hope of many that perhaps someday in the future non-adversarial case resolution will become

processes of the courts. It has also been widely adopted to resolve conflicts within government agencies and elsewhere. Surveys of court improvement projects indicate that one of the most popular reforms identified by the states is the use of alternative forms of dispute resolution.[3] Non-adversarial case resolution programs now exist in a number of states, and the popularity of these programs seems to be growing. A lawyer practicing in child welfare is increasingly likely to either want to refer a case to a NACR program or to be ordered into NACR by the court. This chapter is intended to orient a lawyer to the most common forms of NACR in the United States today, prepare him or her to participate competently in that structure, and to encourage more widespread use of these promising alternatives.

Two forms of NACR are in common use among the states and have considerable potential for improving decision making in the courts. Those are mediation and family group conferencing. A related practice, relinquishment counseling, is often a component of both mediation and family group conferencing.

§ 16.2 Mediation

§ 16.2.1 Definition

"Mediation in the child welfare context is well established in many jurisdictions. It is commonly defined as 'an intervention into a dispute or negotiation by an acceptable, impartial and neutral third party who has no authoritative decision-making power but who assists the disputing parties in voluntarily reaching their own mutually acceptable settlement of disputed issues in a non-adversarial setting.'"[4] Mediation is widely used today in domestic relations custody disputes between parents, and it is increasingly found in many juvenile delinquency, juvenile status offender, and child welfare proceedings.[5] Mediation in the child welfare context has existed in Los Angeles and Orange Counties in California and in Connecticut since the mid-1980s. Child welfare mediation programs now exist in some form in a number of states, including: Alaska, Arizona,

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widespread enough so as not to be considered the *alternative* dispute resolution, but rather the more commonplace means of conflict resolution. *See* CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., ADOPTION 2002: THE PRESIDENT'S INITIATIVE ON ADOPTION AND FOSTER CARE, GUIDELINES FOR PUBLIC POLICY AND STATE LEGISLATION GOVERNING PERMANENCE FOR CHILDREN (1999), *available at* http://www.acf.hhs.gov/programs/cb/publications/adopt02/.

[3] *See* NAT'L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, SUMMARIES OF TWENTY-FIVE STATE COURT IMPROVEMENT ASSESSMENT REPORTS (1998).

[4] CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., ADOPTION 2002: THE PRESIDENT'S INITIATIVE ON ADOPTION AND FOSTER CARE, GUIDELINES FOR PUBLIC POLICY AND STATE LEGISLATION GOVERNING PERMANENCE FOR CHILDREN, at V-2 (1999).

[5] *Id.* at V-2 to V-3.

Arkansas, California, Colorado, Connecticut, Florida, Iowa, Massachusetts, Michigan, New Jersey, Ohio, Oregon, Utah, Wisconsin, Texas, and the District of Columbia.[6] In addition, several states, including Arizona, California, Colorado, Delaware, and Florida, have state legislation authorizing the use of mediation in cases related to child welfare.[7]

§ 16.2.2 Philosophy and Principles

The adversarial process in child abuse and neglect cases can sometimes break down communications and create hostility, divisiveness, and rigid position-taking between participants, most notably between the parents and the child protective agency or the child's attorney. Mediation, on the other hand, brings all significant case participants together in a non-adversarial and problem-solving setting.[8] Mediation in child welfare cases typically has several central characteristics:

- Always focuses on preserving the safety and best interests of the children (and the safety of all family members), while simultaneously attempting to validate the concerns, points of view, feelings, and resources of all participants, especially family members.
- Involves discussions facilitated by one or more neutral, highly skilled and trained third-party mediators, involving all relevant case participants and attorneys at some point during the mediation.
- May occur at any stage in the history of the case. Typically the earlier it occurs once the most significant case information is available, the better.
- Can be used to resolve a broad range of disposition and post-disposition issues, as well as certain jurisdictional issues.
- Serves to orient and educate family members, clarify issues, facilitate exchange of the most current case information, and creatively intervene to resolve roadblocks to case resolution.
- Should be confidential with exceptions limited to new reports of suspected child abuse and neglect, and threats to harm self or others.
- Usually results in agreements that become part of the court record and, if approved by the court, are entered as fully enforceable court orders.

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[6] KATHLEEN STACK, NAT'L RES. CTR. FOR FOSTER CARE & PERMANENCY PLANNING, INFORMATION PACKET: CHILD WELFARE MEDIATION 2 (2003), *available at* http://www.hunter.cuny.edu/socwork/nrcfcpp/downloads/child-welfare-mediation.pdf.

[7] CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., ADOPTION 2002: THE PRESIDENT'S INITIATIVE ON ADOPTION AND FOSTER CARE, GUIDELINES FOR PUBLIC POLICY AND STATE LEGISLATION GOVERNING PERMANENCE FOR CHILDREN (1999).

[8] L. P. Edwards & S. Baron, *Alternatives to Contested Litigation in Child Abuse and Neglect Cases*, 33 FAM. & CONCILIATION CTS. REV. 275-285 (1995).

- Seeks to leave family members with an experience of having been significant, respected, and understood participants in the court process, with an investment in accepting and complying with the terms of the resolution or decisions of the court.
- Serves to reduce the degree of animosity held by family members toward "the system" and focuses the family's energy instead on child protection and parenting-related issues.[9]

§ 16.2.3 The Mediation Process

A child welfare lawyer, representing a child, parent, or child welfare agency, is very likely to have a case in mediation or to participate in mediation, either as a mediator or as a legal representative of one of the parties. The first stage in the process is to determine whether a particular case is suitable for mediation. Although mediation is successful in a large *number* of cases and in many *types* of cases, not every case is suitable. Your case may be referred for voluntary mediation or court-ordered into mediation. Once the case is selected for mediation, the parties are identified and the session is scheduled. The mediation steps are fairly simple, but the process itself can be complex. The nomenclature and outline may vary by local practice or depending on the unique variables of the case or the personalities of the individuals involved. The following anatomy is expanded from Beer and Stief, *The Mediator's Handbook.*[10] A typical mediation will be structured as follows:

Opening Statement

Mediations are held in a neutral place at a time convenient to the parties. Commonly, there are two mediators who open the session with a welcome and an explanation of the process. The mediators generally explain that they, the mediators, have no power to mandate a settlement but rather they are neutral facilitators who are charged with helping the parties to come to an agreement if possible.

Uninterrupted Time

Sometimes this is called the "opening statement." Each person takes a turn speaking while everyone else listens. The statement is generally open-ended in

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[9] NAT'L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, RESOURCE GUIDELINES: IMPROVING COURT PRACTICE IN CHILD ABUSE AND NEGLECT CASES 133-138 (1995).

[10] J. BEER & E. STIEF, THE MEDIATOR'S HANDBOOK (3d ed.), developed by the Friends Conflict Resolution Programs. Copyright 1997 by New Society Publishing Company. Reprinted by permission. For further information contact:

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response to a question like, "Tell us why you are here today." Typically the party, not the lawyer, speaks about anything that is relevant to the situation. Very commonly a mediator repeats back what the party has said in a neutral summary that reiterates the essential points—and communicates that the party has been respectfully heard.

The Exchange

Then the arguing and discussion begin. People commonly accuse each other and attempt to straighten out the other person on the facts. They explain why they are upset and make demands. The hostility and emotions come to the surface and are expressed. The mediators keep the discussion in bounds, making sure that each person is heard and each is protected. The mediators do not try to determine the truth or who is at fault. Rather, they listen for what matters to people and for possible areas of agreement. Sometimes the Exchange brings about a "turning point" of reconciliation.

Separate Meetings

Separate meetings, or caucuses, can occur at any time during the mediation and they have many uses, including checking out a person's concerns, confronting unhelpful behavior, or helping people think through their options. Typically the caucuses are confidential so that the mediator cannot share information obtained there without permission of the party. In some cases a shuttle diplomacy, with the mediators conveying information or options and offers, may help facilitate settlement.

Setting the Agenda

Once information is drawn out and hopefully heard by all sides, discussion turns to identifying the needs and interests of the parties, identifying and framing the issues, and setting and organizing the agenda for the remainder of the session.

Building the Agreement

The parties then work through each issue on the agenda, generating options, expanding options, and then weighing, adjusting, and testing the alternatives to craft a workable, mutually satisfactory solution.

Writing the Agreement and Closing

If the parties are able to settle their differences, the mediators write a formal agreement containing those decisions. Everyone present signs and takes a copy home. The mediators review what has been accomplished, remind people of next steps, congratulate them on their accomplishment, and wish them well.[11]

[11] *Id.* at 4-5.

§ 16.3 Family Group Conferencing

Family Group Conference (FGC) is a fairly new form of NACR that focuses on engaging the extended family in planning for a child and does not necessarily involve the mediating of disputes. It is a promising NACR model that has been recently imported to the U.S. from New Zealand. A Family Group Conference, whether it takes the form of Family Group Decision Making or a Family Unity Meeting, is characterized as a family-focused, strengths-oriented, and community-based process where parents, extended family members, and others come together to collectively make key decisions for children involved in the child welfare system.[12] Family Group Conference is often administered by the child welfare agency as authorized by Oregon statute. FGC could also be a form of court-approved NACR as described by Lowry.[13]

§ 16.3.1 Philosophy and Principles

The following principles and values characterize Family Group Conferences:

- Children are best raised in families.
- The primary responsibility for the care of children rests with their families, who should be respected, supported, and protected.
- Family groups can make safe decisions for their own children. Families have strengths and can change.
- Family groups are experts on themselves. Families have wisdom and solutions that are workable for them.
- The essence of family empowerment is the belief in self-determination: Those we help have a right and need to be free in making their own decisions and choices.[14]

§ 16.3.2 Structure of Family Group Conferencing

The Family Group Conference process comprises four main parts. The first is the referral, in which a coordinator or gatekeeper decides whether to hold a conference. The second is the preparation and planning. The third is the confer-

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[12] LISA MERKEL-HOLGUIN, PUTTING FAMILIES BACK INTO THE CHILD PROTECTION PARTNERSHIP: FAMILY GROUP DECISION-MAKING (American Humane Association, Summer 1996).

[13] *See* Jolene M. Lowry, *Family Group Conferences as a Form of Court Approved Alternative Dispute Resolution in Child Abuse and Neglect Cases,* 31 U. MICH. J.L. REFORM 57 (1997).

[14] *Id.* at 66. *See also* Elizabeth Cole, *Key Policy Decisions in Implementing Family Group Conferences: Observations Drawn from the New Zealand Model, in* MARK HARDIN, FAMILY GROUP CONFERENCES IN CHILD ABUSE AND NEGLECT CASES: LEARNING FROM THE EXPERIENCE IN NEW ZEALAND (ABA Center on Children and the Law, 1996).

ence itself, which is generally divided into four stages of welcome, information sharing, family meeting, and decision. The fourth is writing, distribution, and implementation of the plan.[15]

There are two primary differences between the Family Group Decision Making (FGDM) and Family Unity models (FUM). FGDM discourages the practice of excluding any family members from the meeting, while the FUM permits parents to veto the participation of any family member, a practice that provides parents with more control over the process and with whom information will be shared. The second major difference is that the FUM model allows professionals and support persons to be present during the family discussion, while a key tenet of FGDM is that families, once briefed by the professionals, must have a private family meeting without the presence of any nonfamily persons.

The Oregon Revised Statutes authorize family group conferences, which are generically referred to as "family decision-making meetings."[16] Kansas legislation authorizes a "conference of relatives," which is described in the statute as "a conference of the child's grandparents, aunts, uncles, siblings, cousins and other relatives determined...to have a potential interest in determining a placement which is in the best interests of the child."[17] Family Group Conferences are also being held in Santa Clara County, California, Grand Rapids, Michigan, and other jurisdictions.

§ 16.4 Voluntary Relinquishment Counseling

Voluntary relinquishment counseling is an underutilized child welfare NACR that should receive special attention. It may be employed as part of mediation or Family Group Conferencing, or it may occur separate from these mechanisms. Many professionals believe that it would be helpful for parents and children alike if parental counseling concerning the voluntary relinquishment of parental rights were readily available. Voluntary relinquishment can be more humane than contested termination proceedings by avoiding some trauma to parent and child. It can also avoid delay. In many cases, voluntary relinquishment of parental rights is preferable to contested termination because it reduces the financial, emotional, and time costs.

The use of NACR in the voluntary relinquishment process may also *add civil liberty protections* to the birth parents when compared with more common methods of working with birth parents on parental rights termination issues. By

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[15] Jolene M. Lowry, *Family Group Conferences as a Form of Court Approved Alternative Dispute Resolution in Child Abuse and Neglect Cases,* 31 U. MICH. J.L. REFORM 57, 66-76 (1997); LISA MERKEL-HOLGUIN, PUTTING FAMILIES BACK INTO THE CHILD PROTECTION PARTNERSHIP: FAMILY GROUP DECISION-MAKING 5-7 (American Humane Association, Summer 1996).

[16] OR. REV. STAT. §§ 417.365 through 417.375.

[17] KAN. STAT. ANN. § 38-1559 (2003).

participating in NACR, parents may be more likely to feel that those within the "system" are consciously protecting their rights, rather than simply coercing them to "give up" their rights to their child. Also, where voluntary relinquishments are not made within the court, making them within a NACR process could provide protections to parents that are similar to those that should be provided to parents within more formal termination of parental rights proceedings. Parents should be aware of the possibility of voluntary relinquishment at all stages of the court process.

Voluntary relinquishment will be more attractive if options for permanency, such as cooperative adoption or adoption with contact, are available under state law.[18] Some parents will be more willing to relinquish parental rights if they can ensure that their child will be adopted by someone of whom they approve. Subject to the court finding that it is in the best interests of a child, some states permit parents involved in child protection proceedings to voluntarily relinquish their child for adoption by specified persons to the same extent that so-called direct-consent adoptions are permitted for other birth parents. Relinquishment under state law is generally of two types. In one type, often called surrender, the agency determines who the adoptive parents will be subject to court approval. The other type involves direct or specific consent, in which the parents are allowed to relinquish the child to a designated individual, also with court approval.[19]

An amicable relationship between the birth parent and the new parent is also more likely under these circumstances. Further, if more contested terminations of parental rights could be converted into voluntary relinquishments, states would save considerable time and expense. Some voluntary relinquishment programs have involved elements of mediation, including the possibility of formal agreements concerning future contact between the birth parent and child. In such processes, parents' legal rights should be carefully protected. Parents should be legally represented, even though their lawyer might not participate in each stage of the relinquishment counseling or mediation.

§ 16.5 Uses of NACR in Child Welfare Cases

NACR techniques can be used in various ways and at various times in a child welfare case. Both mediation and Family Group Conferences can be used:

- To resolve conflicts between *child welfare agencies and parents* concerning proposed case plans and final case resolutions, to help divert cases from the court system, and to work out disputes over a child's supervision,

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[18] Options for legal permanency are discussed in Chapter 17, Establishing Legal Permanence for the Child.

[19] *See* JOAN H. HOLLINGER ET AL., ADOPTION LAW AND PRACTICE (Matthew Bender & Co., Inc. 1988).

placement, visitation, family reunification, and permanent plans for the child (*e.g.*, mediated relinquishment of parental rights or guardianship, as well as facilitation of cooperative adoption agreements where appropriate and permitted by law).

- To increase intrafamilial involvement among *parents, relatives, and other extended (kinship) family members* in fashioning case resolutions and improving cooperation and coordination with government child protection and child welfare authorities.[20] Proponents of NACR in child welfare cases have seen it used successfully to help expedite adoptions and guardianships for severely abused or neglected children.

Mediation can be used:

- To resolve conflicts among substitute care providers, foster care caseworkers and case reviewers, and children's court-appointed advocates about the needs of children during periods of substitute care.
- To resolve matters more promptly as part of the court process among the various attorneys and other advocates, caseworkers, therapists, other involved professionals, and the parents and other family members in child protection judicial proceedings. Mandatory case mediation facilitated by a trained independent mediator can help focus attention on collaborative problem solving on behalf of the child.[21]

Confidentiality is an essential component of NACR. The confidentiality provisions are intended to promote the free and unreserved discussion and sharing of information. Statements made in the NACR process should be treated as if they were statements made in the course of settlement discussions. Even when there is only partial agreement on the issues, the substance of the NACR discussion should not be used in the court process. When mediation is unsuccessful, neither the mediators nor other participants in the process should testify against any party in court nor should any product of the mediation be used in court, including whether in the mediator's opinion one party cooperated or failed to cooperate.[22]

As a corollary to confidentiality and also to ensure free and open discussion, sharing of information with all the participants is important. Information about the child and family can be shared, as appropriate, with members of the extended family during the NACR process, but the people who receive such information

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[20] CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., ADOPTION 2002: THE PRESIDENT'S INITIATIVE ON ADOPTION AND FOSTER CARE, GUIDELINES FOR PUBLIC POLICY AND STATE LEGISLATION GOVERNING PERMANENCE FOR CHILDREN, at Ch. V (1999).

[21] *Id.*

[22] NAT'L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, RESOURCE GUIDELINES: IMPROVING COURT PRACTICE IN CHILD ABUSE AND NEGLECT CASES 137 (1995).

have a duty to treat it in confidence. Relevant information about the child, parents, and other family members is likely to be known only to certain individuals directly involved in child welfare agency or court actions related to the child. Ideally, the persons affected would voluntarily release such information for purposes of NACR, but the voluntary cooperation may not be forthcoming, especially when the court mandates NACR. If information about the child, parents, and other family members is withheld, the type of shared decision making that is critical to successful NACR may be impossible.

On occasion, and where appropriate, children will be involved in the process, especially if they are older and reasonably mature. Exposure of children to NACR can help them recognize that their immediate families and relatives are truly interested in their welfare and that their own concerns are taken seriously.

The NACR process must not be delayed by strategic litigation concerns. The permanency timelines of Federal and State law must be met and delays in the formal process avoided. For example, in cases involving the abuse or neglect of a child, in which criminal charges are pending against a parent/party, mediation should not be delayed because the related criminal matter has not yet been resolved.[23]

Typically, any interested person is authorized to request NACR in a child welfare case. To avoid trivial issues taking up valuable time within NACR, court or agency gatekeepers or facilitators of these processes generally explain the ground rules to participants and indicate how matters inappropriate for resolution within NACR can be separately addressed. Because a Family Group Conference is more logistically complex and time consuming than mediation, the gatekeepers may be more cautious in convening the FGC. Some important questions must be addressed in any NACR program implementation. For example, do the parents have the right to consent, or opt out of, the convening of a Mediation or Family Group Conference process? Who should be considered "family members" or other "interested persons" and therefore invited to participate? Should the coordinator or facilitator of the process have authority to exclude certain family members, such as those believed to be intimidating the child or other family members? Should there be mandatory timetables for convening and completing the NACR process?

To assure that all parties consider it an objective process, some authorities recommend that mediators be independent of the child welfare agency or the judge, even though the child welfare and court system must coordinate in the execution of these processes to ensure NACR is effectively implemented.[24]

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[23] CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., ADOPTION 2002: THE PRESIDENT'S INITIATIVE ON ADOPTION AND FOSTER CARE, GUIDELINES FOR PUBLIC POLICY AND STATE LEGISLATION GOVERNING PERMANENCE FOR CHILDREN (1999).

[24] *Id.* at V-11.

Some also recommend that certification standards for NACR staff be established. NACR personnel should be trained in dispute resolution generally and on issues relevant to the child welfare NACR process. The training should include information on the following:

- Child abuse and neglect.
- Child development.
- Domestic violence and its impact on children.
- Substance abuse.
- Family functioning and family systems.
- Power imbalance concerns in mediating child welfare cases.
- Working with diverse communities.
- Access to community resources.

Because these are highly transferable skills, many in the community may want to be trained as mediators. All trainees should be monitored by more experienced NACR experts. Trainees should observe others in action.[25]

§ 16.6 Effectiveness of NACR

Evaluations of mediation programs have demonstrated that a variety of models proved effective, mediation can produce settlements at all *stages* of cases, and that all *types* of cases can be settled in mediation. Some argue that certain cases, such as domestic violence or child sexual abuse, are not appropriate for mediation, but Toennes found no evidence to support blanket screening out of certain types of cases.[26] There is also widespread support for mediating both jurisdictional and dispositional case issues, although time constraints pose problems in doing both. Parents report that mediation gave them a place to be "heard" and to better understand what was required of them.[27]

Agreements produced in mediation were similar to outcomes promulgated by judges. The former were more likely, however, to include detailed visitation plans for children in out-of-home placement, to address communication problems between family members or between the family and the child welfare

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[25] *Id.*

[26] Nancy Thoennes, *An Evaluation of Child Protection Mediation in Five California Courts*, 35 FAM. & CONCILIATION CTS. REV. 184-195 (1997).

[27] NANCY THOENNES & J. PEARSON, MEDIATION IN FIVE CALIFORNIA DEPENDENCY COURTS: A CROSS-SITE COMPARISON (Report to the California State Legislature, Denver, Colorado Center for Policy Research (1995)); Nancy Thoennes, *An Evaluation of Child Protection Mediation in Five California Courts*, 35 FAM. & CONCILIATION CTS. REV. 184-195 (1997).

agency, and to result in parents specifically acknowledging the need for services. Mediated contested cases were also less likely than non-mediated contested cases to result in later contested hearings. Mediated settlements enjoy greater compliance by parents at least in the short run.[28]

Both mediation and Family Group Conferences are alternatives to traditional adversarial litigation case approaches, and help divert children and families from the child welfare and court system while engaging parents in a non-threatening situation. NACR may enable parents who have been inappropriately denying or minimizing the impact of the children's abuse or neglect to safely acknowledge responsibility for the mistreatment and to willingly accept help. Within the NACR process, parents can be given choices of methods to solve the problems they and their children face. The informal and participatory setting of NACR can facilitate this problem-solving approach. Everyone benefits if disputes can be resolved earlier in the process when a child has been identified as abused or neglected.

The advantages to using NACR in child welfare cases include:

- Sharing of responsibility for child protection beyond the child welfare agency and the courts to include the child's immediate family, the child's extended family, and the child's community.
- Empowering parents in the decision-making process related to their children.
- Helping assure that, in addition to parents, others with a strong interest in abused and neglected children are heard within the process of intervention.
- Facilitating parental compliance with agency case plans.
- Avoiding conflicts and delay, especially those harmful to children, which are associated with the adversarial process.
- Reducing crowded judicial case dockets.
- Circumventing the need for expensive, lengthy contested trials and case review hearings.

Additionally, family members often feel more comfortable raising the cultural, ethnic, or religious needs of the child in the more informal NACR process.

Several unique factors should be considered whenever NACR is considered for a matter involving child welfare. First, those involved with the process must remember that the safety of children must never be compromised or endangered through the use of any non-adversarial case approaches. Second, parents who participate in the NACR process must be competently represented in order to

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[28] *Id.*

compensate for the potential power imbalance that can exist when government is intervening in a family's life. Third, NACR, if done properly within child welfare proceedings, may provide a beneficial process—but it will not be inexpensive. Programs must have adequate funding for properly trained mediators or family-group facilitators who can resolve cases in a timely manner.

§ 16.7 Compromising Child Safety or Well-Being

The principal goal of NACR in the child welfare context is to assure the safety and protection of children through resolution of disputes without having to rely on the traditional adversarial court process. At the same time, the process should assure that the parents' legal rights are properly protected. There should be no compromise on protection of parental rights.

NACR should also focus on child well-being and permanency, family empowerment, and community involvement in the process. NACR should not delay the resolution of cases nor create additional trauma for the child and family. NACR should empower parents and promote shared responsibility with the extended family and community to serve the best interests of the child effectively and more promptly.[29]

The greatest fear among critics of NACR in these cases is that child safety will be compromised or sacrificed during the process. Proponents and critics of such processes agree that child safety must never be sacrificed in the interests of reaching agreement or as part of any "plea bargains." Concerns about children being endangered through the use of NACR can be alleviated in several ways:

- NACR must assure that the child's "voice" is clearly heard within the process, either through the child, by the child's legal representative, or both.
- NACR must permit the child's representative, the convenor/facilitator/mediator, or others to veto any agreements reached through the process that compromise the child's safety or welfare.
- NACR should provide for an independent review of any mediated agreements, stipulations, or settlements by judges and child welfare agency supervisors.
- NACR should structure more frequent involvement by protective family members during the mediation processes and within mediated agreements.

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[29] Children's Bureau, U.S. Dep't of Health & Human Servs., Adoption 2002: The President's Initiative on Adoption and Foster Care, Guidelines for Public Policy and State Legislation Governing Permanence for Children, at V-8 (1999).

- NACR should be initiated promptly, and ideally a decision should be reached within 30 days of its initiation; in emergency situations, it should be completed even sooner.
- The NACR process should clarify how any agreement will be enforced and what will happen if the agreement fails.
- In addition to being ever conscious about the child safety issues in mediating case resolutions, those involved within the NACR process must constantly think about how the process, and its outcomes, will promote permanency for the child.

§ 16.8 Conclusion

Non-adversarial case resolution approaches are increasingly used throughout the child protection process—both before and after court intervention becomes necessary. NACR, while not inexpensive, is generally more expeditious and efficient than traditional litigation and can often resolve disputes without the hostile overtones characteristic of the court's adversarial process. When children are endangered, their extended families may provide invaluable resources to help fashion safe and permanent case resolutions.

NACR in the child welfare context can be structured to involve the parents and the child's extended family in responsible planning and decision making for the child. Use of various forms of NACR can provide clients with the opportunity to vent, disagree and be heard, and to understand the points of view of others. Typically, the earlier in the process that NACR is implemented, the greater its chance for success.

Different forms of NACR can be useful at any stage of state intervention to facilitate the well being of children—from the initial identification of abuse and neglect through the final permanent placement of a child. Child welfare lawyers must understand the process and make judgments about whether and how NACR will serve the interests of their clients.