

Why must children wait so long?

The use of mediation may help reduce the delays that children and their families experience when awaiting a decision regarding their status with Children's Aid.

By Joyce M. Young



Thirty per cent of the children brought into care by Ontario children's aid societies (CASs) have to

wait four months for an answer to a simple question: "When can I go home?"

CASs, the judiciary, the private bar and families have long voiced their concern about leaving children "in limbo" while their case meanders through an over-burdened court system.

While the *Child and Family Services Act*, RSO 2000, (CFSA) states that services provided should respect the children's need for continuity of care and for stable family relationships (s.1(2) para. 3(I)), in practice, children are left waiting. Statistics from the Ministry of the Attorney General show

that almost one-third of the CFSA applications in the Ontario Court of Justice take more than 120 days to reach disposition. In the Family Court of the Superior Court of Justice, up to 41 per cent of cases face a 120-day court wait time. (Child Welfare Transformation 2005, Ministry of Children and Youth Services.)

In addition to that, as former CAS lawyer, now mediator Warren Morris pointed out in his study: "even if disposition for society wardship is made, it is not clear when the CAS will be giving up on family reunification. These children are often ... in 'limbo', not

knowing whether their stay in care is indefinite or whether there will be an ultimate return to the family home." (Unfulfilled Promise: The Underutilization of Child Protection Mediation. LLM-ADR Major Research Paper, 2001.)

The Ontario government's response, *Child Welfare Transformation 2005*, is about to be implemented through a package of reforms contained in Bill 210. The government expects this to in the near future.

The timeliness of decision-making is addressed in s. 5 of the *Child and Family Services Statute Law Amendment Act, 2006*. It states that CASs "must consider 'ADR'" where there is a dispute related to a child or a child's plan of care. "ADR" in this instance includes interest-based mediation, family conferencing and talking circles in Aboriginal communities.

The CAS's assessment that a

child is in need of protection is *not* on the table in mediation. The purpose of mediation is to directly address the child protection concerns and identify the best option for the child's care. In the case of a supervision order, the parties may identify additional safeguards that need to be put in place for the child, goals for the parents and resources to assist the parents. In an application for society wardship, the parties at mediation might develop a set of goals for the parent or parents to achieve, a method for assessing goal achievement, and a schedule for returning the child to the home. Parents who have had a voice in designing a plan that recognizes their unique needs, abilities and resources will be more likely to implement the plan.

The promise of mediation is

see YOUNG p. 10

Disputants must be prepared for mediation

By Deborah Lynn Zutter

When disputants and their lawyers are well-prepared for mediation, they are confident, the likelihood of reaching a win/win solution increases, client satisfaction soars and mediation participants begin moving toward settlement at the joint mediation meeting sooner.

Of course, lawyers prepare for mediation. Typically, they gather documents and medical, engineering or other reports that will assist in making decisions about liability and quantifying the extent of loss. In addition, a summary containing the issues to be resolved and each counsel's perspective of the dispute is usually provided to the mediator in advance of the mediation.

Mediators also prepare for mediation. They review the summary. When the dispute is complex, they may contact each lawyer, individually or collectively, to explore procedural aspects of the upcoming mediation.

Who prepares the disputants for



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mediation? What steps are taken to:

- Describe the mediation process
- Identify the role that the client will play at mediation
- Explain the mediator's role
- Discuss confidentiality and any limitations that there may be on confidentiality
- Address any concerns that disputants may have about the mediation process
- List the client's objectives, needs and wants
- Explore the range of settlement options that could meet the client's objectives,
- Consider who else might attend the mediation, and what that individual's role might be
- Describe what will happen if the matter does not settle at mediation, and what this will cost, and
- Generally, suggest things that disputants can do to prepare for their mediation?

Certainly, lawyers can prepare their clients for mediation. However, the extent and frequency of client preparation for mediation is a matter of individual professional choice that is often influenced by limitations on time and financial resources.

Another answer to the question of who prepares disputants for mediation may be found in the mediation model itself. After all, mediation courses teach that during the Opening or stage 1, the mediator will describe the process and each person's role. When this model is followed, clients arrive at the mediation unprepared, unless their lawyers have worked with them.

Due to the concern in family

disputes that there may be spousal abuse present or power imbalances that are so significant there is a fear that settlements that are reached have been coerced, or worse, participants may not be safe before, during or after mediations, mediators often hold separate preliminary conferences with each family disputant before mediation. During preliminary conferences, mediators screen clients to ensure that mediation at this time is appropriate. Assuming that it is, they not only describe the process, mediators also discuss confidentiality, explain what interests are and how they will be used, listen to the disputant's story, give tips about what else the disputant can do to prepare, and assure the dis-

putant that mediation is a good process.

Family disputants may be the best-prepared mediation clients. They needn't be.

I believe that there are identifiable and repeatable procedures that can be utilized in preparation for mediation by lawyers and disputants. This is the premise of my book, *Preparing for Mediation: A Dispute Resolution Guide*. Preparation is broken into discrete steps. Each step is in turn reduced to one or more checklist. Before the mediation, in preparation for it, lawyers can work through relevant checklists with their clients. Unrepresented or sophisticated clients can use many of the checklists on their own. The checklists themselves are easily accessed on the web.

Here is an illustration. In my experience, one frequent frustra-

tion with mediation is that there are disputants who arrive at mediation with unrealistic outcome expectations. Mediators are expected to meet separately with these disputants and "help them to see reality". Mediators use different techniques. Some give their own opinion about what a court would do. Others stress the risks of not knowing what a court would do. Or, they may emphasize the benefits to the disputant of settling the matter that day.

Another way to address unrealistic outcome expectations is to prepare clients before the mediation by working through my *Checklist #11, Risk Analysis*. Here are some of the questions in this checklist:

Worst case/best case

- a. What is the best outcome

see CHECKLIST p. 10

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