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[Vol. 15: 415, 2015]

*A Happier Ending for Everyone*

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

# A Happier Ending for Everyone: Resolving Adoption Disputes Between Putative Fathers and Adoptive Parents Through Clinical Mediation

Tiffany Bostinelos\*

## I. INTRODUCTION

In 2009, Christy Maldonado told her fiancé Dusten Brown<sup>1</sup> that she was pregnant; but after some turmoil, Christy broke off their engagement and completely ended their relationship.<sup>2</sup> Christy made the decision to put her unborn child up for adoption.<sup>3</sup> Through an agency, she found adoptive parents,<sup>4</sup> Matt and Melanie Capobianco, and together they agreed to an open adoption.<sup>5</sup> The Capobiancos supported Christy financially in her last months

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1. Nina Totenberg, *Adoption Case Brings Rare Family Law Dispute to High Court*, NPR (Apr. 16, 2013), <http://www.npr.org/2013/04/16/177327391/adoption-case-brings-rare-family-law-dispute-to-high-court>. Dusten Brown was a member of the Cherokee Nation. *Id.*

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.* An open adoption includes birth and adoptive parents meeting one another, sharing full identifying information, and having direct access to ongoing contact over the years. *Open Adoption Terms*, INDEP. ADOPTION CTR., <http://www.adoptionhelp.org/open-adoption/terms#openadoption> (last visited Jan. 26, 2015). In open adoption, birthparents and adopting parents select each other. *Id.* They have control over all critical decisions in their adoption, including the amount of ongoing contact. *Id.*

415

[Vol. 15: 415, 2015]

*A Happier Ending for Everyone*

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

of pregnancy and were in the delivery room for the birth of Baby Veronica.<sup>6</sup> Christy's lawyer sent a letter notifying the Cherokee nation of her adoptions plans, giving them the chance to intervene under the Indian Welfare Act.<sup>7</sup> The Cherokee tribe had no record of Dusten Brown being a tribe member and the adoption went forward.<sup>8</sup> Four months after the birth of Baby Veronica, Dusten Brown was served with papers notifying him of the adoption.<sup>9</sup> Dusten Brown signed off on the papers,<sup>10</sup> but a few days later he filed a formal objection under the Indian Child Welfare Act.<sup>11</sup>

At trial, the South Carolina courts ruled that the Indian Welfare Act trumped state law; and in December 2011, the court ordered the Capobiancos to give their now two-year-old daughter Veronica back to her biological father.<sup>12</sup> The court found that Dusten Brown never gave "voluntary consent" to the adoption.<sup>13</sup> Fast forward to September 23, 2013, when the United States Supreme Court ruled 5-4 that Dusten Brown did not have standing under the Indian Child Welfare Act.<sup>14</sup> This decision forced the South Carolina courts to reconsider the custody issue once again; and this time they awarded custody of Veronica back to the Capobiancos.<sup>15</sup>

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6. Totenberg, *supra* note 1.

7. *Id.* The Indian Child Welfare Act was a law enacted in 1978 that protects Native American tribes from having their children taken from them and given to non-Indian adoptive or foster parents. *Id.*

8. *Id.*

9. *Id.*

10. Dusten Brown argued that he was tricked into signing away his parental rights and only thought that he was agreeing to give custody up to the birth mother. *Id.*

11. *Id.*

12. Totenberg, *supra* note 1.

13. *Id.*

14. *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013); *see also* Eyder Peralta, *Okla. Court Says 'Baby Veronica' should go to Adoptive Parents*, NPR (Sept. 23, 2013), <http://www.npr.org/blogs/thetwo-way/2013/09/23/225540776/okla-court-says-baby-veronica-should-go-to-adoptive-parents>.

15. Peralta, *supra* note 14.

[Vol. 15: 415, 2015]

*A Happier Ending for Everyone*

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

Recently turning four, Veronica has now spent half of her life with her biological father and half of her life with her adoptive parents.<sup>16</sup> After years of vicious litigation—with Veronica being shuffled in-between homes—was the Court's final decision the correct one? How is excluding her biological father from her life going to affect her in the future? Is there any way a decision could have been reached that preserved Veronica's relationship with both her biological father and her adoptive parents? Was the court's decision really in Veronica's best interest? While the decision in this case may not have been in Veronica's best interest, had the parties been required to participate in the clinical mediation process, all the important relationships in her life may have been able to remain intact.

This article will discuss the problems putative fathers face when their biological child is put up for adoption without their consent or knowledge. It will further argue that when a custody issue does arise between putative fathers and adoptive parents, the best way to resolve the custody dispute—and more importantly protect the best interest of the child—is through a process called clinical mediation. Finally, even if clinical mediation is not successful, this article will argue that clinical mediators should be permitted to make recommendations to the court as to the custody or visitation issues.

## II. PROBLEMS FACING PUTATIVE FATHERS WITH ADOPTIONS

For an unwed pregnant woman who cannot keep her unborn child, one of the few available options is placing the child up for adoption.<sup>17</sup>

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16. Michael Overall, *Baby Veronica Case: Five Days of Mediation Yield No Agreement*, TULSA WORLD (Sept. 20, 2013), [http://www.tulsaworld.com/archives/baby-veronica-case-five-days-of-mediation-yield-no-agreement/article\\_47d85882-8318-58b4-a05a-72318a7b9c56.html](http://www.tulsaworld.com/archives/baby-veronica-case-five-days-of-mediation-yield-no-agreement/article_47d85882-8318-58b4-a05a-72318a7b9c56.html).

17. Carol A. Gorenberg, *Fathers' Rights vs. Children's Best Interest: Establishing a Predictable Standard for California Adoption Disputes*, 31 FAM. L.Q. 169, 174 (1997-1998). "Adoption involves the relinquishment of legal rights to a child by the natural parents and a subsequent creation of those rights in the adoptive parents." Alexandra R. Dapolito, *The Failure to Notify Punitive Fathers of Adoption Proceedings: Balancing the Adoption Equation*, 42 CATH. U. L. REV. 979, 979 (2003).

[Vol. 15: 415, 2015]

*A Happier Ending for Everyone*

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

Traditionally, women were under the assumption that the decision to place their child up for adoption was theirs alone to make.<sup>18</sup> This assumption is no longer a valid one as more putative fathers are seeking custody and trying to prevent the adoption of their nonmarital children.<sup>19</sup>

Only a few decades ago the consent of a putative father was not needed for an adoption to be completed.<sup>20</sup> However, starting in 1972 four significant Supreme Court Cases, and a number of lower court decisions, have broadened the scope and defined the extent of putative fathers' rights in adoptions.<sup>21</sup> These decisions acknowledge that an unwed father's right to develop a relationship is as important as that of a married father, and therefore, an unwed father's relationship with his non-marital children is protected by the due process and equal protection clauses of the Fourteenth Amendment.<sup>22</sup> Under a putative father's due process rights, they are entitled to notice of adoption proceedings.<sup>23</sup>

The birth mother and birth father are the only two people who have a legal say on whether their child can be placed for adoption or not.<sup>24</sup> While the law states that the mother or adoption facilitator must provide notice to the father of the intended adoption, many adoptions proceed without the

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18. Gorenberg, *supra* note 17, at 176.

19. *Id.* at 174. "A putative father is generally a man whose legal relationship to a child has not been established, but claims to be the father or who is alleged to be the father to a child who is born to a woman to whom he is not married at the time of the child's birth." *Putative Father Registry*, AM. ACAD. ADOPTION ATTORNEYS (2014), <http://www.adoptionattorneys.org/refinery/cache/pages/aaaa-page/birth-parents/putative-father-registry.html>.

20. Dapolito, *supra* note 17, at 980.

21. *Id.*

22. Gorenberg, *supra* note 17.

23. Dapolito, *supra* note 17, at 981.

24. *Consent to Adoption: Introduction*, FINDLAW, [http://files.findlaw.com/pdf/family/family.findlaw.com\\_adoption\\_consent-to-adoption-introduction.pdf](http://files.findlaw.com/pdf/family/family.findlaw.com_adoption_consent-to-adoption-introduction.pdf) (last visited Jan. 23, 2015).

[Vol. 15: 415, 2015]

*A Happier Ending for Everyone*

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

birth father's knowledge or involvement in any way.<sup>25</sup> Often times when a birthmother makes an adoption plan, she claims the birth father is unknown; this then places the burden of proving paternity onto the birthfather.<sup>26</sup> Even if the birth father is known, the birth mother may still provide inaccurate or incomplete information to the agency in an effort to avoid the putative father's participation.<sup>27</sup> Private attorneys may also consciously or unconsciously take steps that avoid the required involvement of the putative father.<sup>28</sup> So—although protections have been created to protect putative fathers—in practice, infants are often placed in adoptive homes without notice to or the consent of the putative father.<sup>29</sup> While most fathers do agree to an adoption plan or do not contest to the termination of their parental rights, there are those putative fathers who want to parent their child, and more importantly, have a constitutional right to parent their child.<sup>30</sup>

Both the adoptive parents and the putative fathers have a role in preventing adoption disputes from even occurring in the first place. Adopting parents must take responsibility for asking the right questions and making sure everyone's rights are protected. They should become familiar with what their state considers grounds for reversal of an adoption and

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25. *Adoption Facts: Understanding the Birthfather's Rights*, JOHN WILEY & SONS, INC, <http://www.dummies.com/how-to/content/adoption-facts-understanding-the-birthfathers-righ.html> (last visited Jan. 26, 2015).

26. The main reason the birth mother claims the birth father as unknown is because now it places the burden of proof onto the birth father. Erik L. Smith, *Unwed Fathers: Preventing Your Child from Being Adopted Without Your Consent*, ABOUT.COM, [http://adoption.about.com/cs/adoptionrights/a/unwedfath\\_2.htm](http://adoption.about.com/cs/adoptionrights/a/unwedfath_2.htm) (last visited Jan. 26, 2015). If an unwed father wants to veto an adoption, he must take action to preserve his right to do so. *Id.* Before the birth the unwed father should "(1) formally acknowledge paternity, (2) give the mother reasonable consistent economic support (like paying her medical bills and child care bills, and sending her money), (3) regularly visit and communicate with the mother and the child, and (4) sign the relevant putative father registries." *Id.*

27. Dapolito, *supra* note 17, at 981-82.

28. *Id.* at 982.

29. *Id.*

30. *Id.*

[Vol. 15: 415, 2015]

*A Happier Ending for Everyone*

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

should become proactive in assuring that everything regarding the adoption is being handled ethically and according to best practices.<sup>31</sup> Adoptive parents should become aware that the less involved the father is in the adoption planning, the greater the legal risks there are in the adoption.<sup>32</sup> The putative father—if he thinks he may have fathered a child and wants to make sure he has a say in whether the child is adopted or not—is responsible for taking the proper affirmative action.<sup>33</sup> For example, a man who believes he may have fathered a child should register with the Putative Father Registry if one exists in his state.<sup>34</sup>

In a perfect world, all adoptions would go through without a hitch. However, what happens when an innocent putative father who is left in the dark by the biological mother wants to block an adoption after the child has already been placed with adoptive parents?

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31. *Id.*

32. *Id.*; Tamar Lewin, *Unwed Fathers Fight for Babies Placed for Adoption by Mothers*, N.Y. TIMES (Mar. 19, 2006), [http://nytimes.com/2006/03/19/national/19fathers.html?pagewanted=all&\\_r=0](http://nytimes.com/2006/03/19/national/19fathers.html?pagewanted=all&_r=0).

33. Lewin, *supra* note 32. While the Supreme Court has established due process rights for putative fathers, if an unwed father does not take affirmative steps and act immediately to protect his rights, there may be nothing he can do. *Id.* Jeremiah Clayton Jones only discovered his former fiancée was pregnant three weeks before the baby was due when an adoption agency lawyer called and asked if he would consent to the adoption. *Id.* He stated he would not give his consent, but he still lost his parental rights because of his failure to take affirmative steps and register with the state registry for unwed fathers. *Id.* Jeremiah only learned about this registry after the adoption was completed. *Id.*

34. Smith, *supra* note 26. About half of the states have enacted a putative father registry. *Id.* The registries let petitioners find putative fathers without relying on the mothers naming the fathers. *Id.* However, even if a search finds the father, absent a mutual agreement with the mother, a court will require that he still prove paternity. *Id.* If a state does not have a putative father registry, they still may have paternity acknowledgement and registration requirements that function similar to a registry. *Id.*

[Vol. 15: 415, 2015]

*A Happier Ending for Everyone*

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

## III. THE BEST INTEREST OF THE CHILD

In child custody disputes, the standard family law judges use for determining who should have custody of the child is the “best interest of the child” standard.<sup>35</sup> “The best interest of the child standard refers to the deliberations that courts undertake when they decide what types of services, actions, and orders will best serve a child as well as who is best suited to take care of the child.”<sup>36</sup> The best interests determinations are usually made by considering a number of factors related to the child’s circumstances and the parent or caregiver’s capacity to parent.<sup>37</sup> While these factors may vary considerably from state to state, the most important concern in all states is the child’s safety and well-being.<sup>38</sup>

Judges decide what is best for the child, but the best interest standard allows them to rely on their own values and biases to decide the case the way they feel is best.<sup>39</sup> Many family law scholars do not believe that the best interest of the child standard is the best way to decide legal matters regarding children.<sup>40</sup> The court often finds the child’s best interest to reflect what was found to be the *parents’* best interests.<sup>41</sup> The objective should be the best interest of the child, and the “goal should be to establish a stable and permanent home for the child,” but that does not always result.<sup>42</sup>

In adoption disputes involving a putative father and adoptive parents, a better solution is needed that balances the rights of the putative father with

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35. Gorenberg, *supra* note 17, at 188.

36. *Determining the Best Interests of the Child*, CHILD WELFARE INFO. GATEWAY 2 (2012), [https://www.childwelfare.gov/systemwide/laws\\_policies/statutes/best\\_interest.cfm](https://www.childwelfare.gov/systemwide/laws_policies/statutes/best_interest.cfm).

37. *See id.*

38. *See id.*

39. Lynne Marie Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence*, 10 J.L. & FAM. STUD. 337, 337 (2008).

40. *Id.* at 370.

41. Gorenberg, *supra* note 17, at 188.

42. *Id.* at 201.

[Vol. 15: 415, 2015]

*A Happier Ending for Everyone*

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

those of the adoptive parents and child, while ultimately looking at the child's best interest. A better solution would allow the putative father and the adoptive parents to work together with trained professionals to collectively come up with a solution to the custody dispute.

Keeping a putative father—one who truly wants to establish a relationship with his biological child—from establishing that relationship can almost never be in the child's best interest. Further, taking and keeping the child away from the adoptive parents after that child has formed an attachment with them is never in the child's best interest either.<sup>43</sup> There should be a way that both the putative father and the adoptive parents are able to remain in the child's life. Therefore, if the best interest of the child is the main concern, then both the putative father and adoptive parents should be able to establish and maintain their bonds with the child, but can this type of cooperative solution be achieved through the litigation process?

#### IV. A BETTER ALTERNATIVE TO LITIGATION

The adversarial system promotes the idea of a “winner take all” outcome, where the parties are made to believe that someone must win and someone must lose.<sup>44</sup> Children are not pieces of chattel that can be won or lost; and they should never have to bear the emotional burdens of these disputes. Through the litigation process, it is very unlikely that a court order will preserve both the putative father's and the adoptive parents' relationships with the child.<sup>45</sup> One of the relationships will likely be severed, and severing an important relationship can have detrimental

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43. Eleanor Willemsen & Michael Willemson, *The Best Interest of the Child*, 11 ISSUES IN ETHICS (2000), available at <http://www.scu.edu/ethics/publications/iie/v11n1/custody.html>.

44. Gary A. Debele, *Adoption Mediation*, in ADOPTION LAW: PRACTICE AND PROCEDURE IN THE 21ST CENTURY 1 (Gelda Zimmerman ed., 2004), available at <http://www.wbdlaw.com/In-the-News/Adoption-Mediation.pdf>.

45. *Id.*

[Vol. 15: 415, 2015]

*A Happier Ending for Everyone*

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

psychological effects on the child both now and into the future. Further, litigation can be a very lengthy process in which the crucial formative years of a child's life could be spent in uncertainty. An appropriate solution would resolve the conflict while maintaining the relationship's the child has with both the putative father and the adoptive parents.

Mediation and other forms of alternative dispute resolution have become a more appropriate means for resolving differences between parties. Mediation is defined as a process of assisted negotiation in which a neutral person helps people to reach an agreement.<sup>46</sup> While mediation has long been used in divorce and custody disputes, it is just beginning to be used in the area of adoption law and adoption disputes.<sup>47</sup> This may be due to the unique challenges adoption disputes face, which are unlike those found in any other area of law.<sup>48</sup> In most states, mandatory or voluntary mediation provisions are now affecting adoption law.<sup>49</sup>

Through the mediation process, the mediator is "working the parties through a process where they explain what their concerns are, delineate the legal issues, assess the potential legal outcomes, and then reach a solution that can be approved by the court."<sup>50</sup> Mediation "takes property law and adversarial issues out of adoption" and instead focuses on the mutually shared concerns about the child's interests and needs. While mediation does have its advantages when compared to litigation, it still faces a few shortcomings. Mediation does not require that the mediators have the sufficient knowledge or training in adoption and child welfare issues, family

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46. DWIGHT GOLANN & JAY FOLBERG, *MEDIATION: THE ROLES OF ADVOCATE AND NEUTRAL* 89 (2d ed. 2011).

47. Debele, *supra* note 44, at 1.

48. *Id.* at 2.

49. Wright S. Walling, *Reflections on the Purpose of the AAAA Mediation Committee*, WALLING, BERG, & DEBELE PROF'L ASS'N (Sept. 1999), <http://www.wbdlaw.com/In-the-News/AAAA-Mediation-Committee-Training-Session.pdf>.

50. Debele, *supra* note 44, at 30.

[Vol. 15: 415, 2015]

*A Happier Ending for Everyone*

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

systems, and family law.<sup>51</sup> Further, regular mediation does not involve psychological testing and other evaluations that are beneficial in helping to determine the best interest of the child.<sup>52</sup> Where mediation falls short, a newer approach called clinical mediation may succeed, thereby better protecting and preserving the child's best interests.<sup>53</sup>

#### V. WHAT IS CLINICAL MEDIATION?

Clinical mediation is a mutual, child-centered decision-making process that recognizes and encourages all the important relationships a child has in his or her life.<sup>54</sup> The goal of a clinical mediation is to "create an emotionally healthy environment for the child who is the subject of this dispute."<sup>55</sup> This process allows all the parties to explore a range of alternatives and make a plan for the child that is constantly evaluated for the child's best interests.<sup>56</sup> The most difficult part of clinical mediation is forcing adults to put aside their personal interests and center everything around what is best for the child.<sup>57</sup>

Clinical mediation calls for psychological testing and other evaluations not used in regular mediations, which helps mental health professionals assess the situation and determine the needs of the participants.<sup>58</sup> Therapists with expertise in adoption and family system issues conduct clinical

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51. Debele, *supra* note 44.

52. *Id.*

53. Madelyn Freundlich, Clinical Mediation: Preventing and Resolving Adoption Disputes, AM. ADOPTION CONG. NEWSLETTER (1998), available at [http://www.relatedbychoice.com/clinical\\_mediation.htm](http://www.relatedbychoice.com/clinical_mediation.htm).

54. *Id.*

55. Debele, *supra* note 44, at 30.

56. Freundlich, *supra* note 53.

57. *Id.*

58. Debele, *supra* note 44, at 30.

[Vol. 15: 415, 2015]

*A Happier Ending for Everyone*

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

mediations.<sup>59</sup> It is important that mediators have an understanding of the potential legal rights of fathers, and are aware that there might be a statute of limitations on paternity adjudication and father registries that may affect a father's ability to even have legally recognized participation in the adoption dispute.<sup>60</sup> Further, the clinical mediator also needs to have an understanding of the legal requirements for valid consent to adoption or termination of parental rights.<sup>61</sup>

The clinical mediation process involves a series of meetings with sufficient time between meetings for all parties to reflect on the issues and the decisions that need to be made.<sup>62</sup> The principal approach is meeting together with birth parents, adoptive parents, extended family members, and any professionals who may be involved with the families.<sup>63</sup> The process involves: clarification of the issues and the goals, engagement and trust, education, connections and cooperation between the birth and adoptive families, connections and cooperation among professionals, and achieving a plan.<sup>64</sup>

Clinical mediation begins with a clear statement of the issues that need to be resolved and the feelings and positions of each of the participating individuals.<sup>65</sup> This early on, it is very important that the mediator remind all the parties involved that the focus of the mediation is on the child and determining what is best for the child now and into the future.<sup>66</sup>

The next step is engagement and trust building. By "identifying the strengths of each party and the challenges they face," the parties become

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59. Freundlich, *supra* note 53.

60. Debele, *supra* note 44, at 18.

61. *Id.* at 18-19.

62. Freundlich, *supra* note 53.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

[Vol. 15: 415, 2015]

*A Happier Ending for Everyone*

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

engaged, and that engagement leads to trust building.<sup>67</sup> The parties first begin to develop trust in the mediator, but as time progresses, it is important that they start establishing trust in one another.<sup>68</sup>

Education is the next step in the clinical mediation process. This stage focuses on educating the parties “on the nature of adoption and the roles and responsibilities of all the parties involved.”<sup>69</sup> This phase allows the parties to learn that the work being done now helps to ensure that the child can appreciate and value what both the putative father and adoptive parents can individually contribute to his or her life.<sup>70</sup> As the putative father and the adoptive parents are all able to acknowledge and appreciate the unique gifts that the opposing individual can contribute to the child, further cooperation between the parties ensues.<sup>71</sup>

Finally, the parties achieve a plan. At the end of a successful clinical mediation, the parties will have developed a plan that meets the best interest of the child.<sup>72</sup> If the case is already in litigation, then a judge must sign off on any agreement made.<sup>73</sup>

#### VI. HOW CLINICAL MEDIATION IS PARAMOUNT FOR PROTECTING THE CHILD’S BEST INTEREST

As stated above, under state laws, the best interest of the child prevails in adoption disputes; but in courts, judges have no set test on how to properly apply this standard.<sup>74</sup> Eleanor Willemsen and Michael Willemson offer five principles that should be looked at to assure the child’s best

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67. *Id.*

68. Freundlich, *supra* note 53.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. Willemsen & Willemson, *supra* note 43.

[Vol. 15: 415, 2015]

*A Happier Ending for Everyone*

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

interests are kept supreme.<sup>75</sup> The five principals are: (1) the child must be respected as a person and acknowledged as “the most vulnerable party in the proceeding,” (2) the placement decision plans must most importantly take into “account the child’s important relationships of attachment,” (3) the parties must move as fast as possible “to provide a placement plan that will offer the child a stable, long term living situation,” (4) the child’s primary caregiver must be fit to parent, (5) the right of the custodial parent to make decisions about the everyday conduct of the child’s life must prevent the severing of the child’s important attachments.<sup>76</sup> Clinical mediation is the best way for assuring that all five of these principles reign supreme.

The first principle is that the child must be respected as a person and acknowledged as the most vulnerable party in the proceeding. In clinical mediations, the parties acknowledge that the focus is centered on the child and determining what is best for the child both now and forever.<sup>77</sup> The parties are educated on the long-term psychological and emotional implications of any possible outcome and work together to create the healthiest possible environment for the child.<sup>78</sup> Through the adversarial process, while judges say they are looking out for the best interest of the child, many times their own biases and prejudices unknowingly influence their decisions.<sup>79</sup> It is best if the putative father and adoptive parents, who truly know their child and care about the outcome, can come together and create a solution themselves.

The second principle is that the decision plans must most importantly take into account the child’s important relationships of attachment. Clinical mediation strives to create life-long relationships among the child, the adoptive parents, the putative father, and any other extended family that is

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75. *Id.*

76. *Id.*

77. Freundlich, *supra* note 53.

78. Debele, *supra* note 44

79. Kohm, *supra* note 39.

[Vol. 15: 415, 2015]

*A Happier Ending for Everyone*

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

important in the child's life.<sup>80</sup> Instead of severing any relationships, this process encourages that all important relationships of attachment in the child's life are further built and strengthened.<sup>81</sup> The litigation process does not take into account all the child's important relationships of attachment.<sup>82</sup> Instead, the custody of the child is awarded to one party, while any attachment the child has to the "losing" party is completely irrelevant and unimportant to the court.<sup>83</sup>

The third principle states that any placement must be as fast as possible and must offer the child a stable, long-term living situation. "There is little that can be as detrimental to a child's sound development as uncertainty over whether he is to remain in his current 'home,' . . . especially when such uncertainty is prolonged."<sup>84</sup> In clinical mediation, the parties can achieve a settlement much quicker than if the dispute went through litigation. This faster decision making will benefit the child by creating a better sense of stability and certainty earlier on. Litigation can take years before the dispute is fully resolved and one party is awarded custody.<sup>85</sup> While the child may have only been an infant when the custody dispute started, by the time a final decision has been made, years could have passed. Experts in psychology believe that rapid placement is critical to a child's development, which is why faster custody arrangements that can be achieved through clinical mediation are more beneficial.<sup>86</sup>

The fourth principle states that whoever is caring for the child in the parental role must be fit to be a parent. Since the clinical mediator is a

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80. Freundlich, *supra* note 53.

81. Debele, *supra* note 44.

82. Kohm, *supra* note 39.

83. *Id.*

84. Andrew S. Rosenman, *Babies Jessica, Richard, and Emily: The Need for Legislative Reform of Adoption Laws*, 70 CHI.-KENT L. REV. 1851, 1851-52 (1995).

85. Freundlich, *supra* note 53.

86. Rosenman, *supra* note 84, at 1878.

[Vol. 15: 415, 2015]

*A Happier Ending for Everyone*

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

trained professional,<sup>87</sup> they will be able to evaluate whether someone is fit to parent the child or not. If a clinical mediator believed an individual was not fit to parent the child, he may address that issue with the parties and help to resolve it. It is better that a trained professional determines who is fit to be a parent rather than a judge who probably does not have real training or expertise in this area.

Finally, the fifth principle states that the right of the custodial parent to make decisions about the child's everyday conduct must not sever any of the child's important relationships of attachments. Through the clinical mediation process, connections and cooperation between the putative father and the adoptive parents are established. The parties learn how important all the relationships in the child's life are, and they become aware of how important it is to always promote, rather than sever, those relationships. Through the adversarial process, however, the parties are put against one other with the belief that one party must win and the other party must lose. Once one party is awarded custody, they often have so much hatred towards the opposing party; it is likely that they will try to sever all ties between the child and losing party. Severing any important relationship can be very detrimental to the child and is never in a child's best interest.<sup>88</sup>

It is evident that clinical mediation fulfills all five principles in assuring that the child's best interests are kept supreme.<sup>89</sup> While the adversarial process puts the parties against one another, clinical mediation brings the putative father and adoptive parents together, further strengthening the decision making process. Clinical mediation allows the parties to get back to "what they share, which is their love for the child."<sup>90</sup> Instead of severing any relationships in the child's life, clinical mediation promotes all of the child's important relationships of attachment. If the child's best interest is

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87. Debele, *supra* note 44.

88. *Id.*

89. Willemsen & Willemson, *supra* note 43.

90. Freundlich, *supra* note 53.

[Vol. 15: 415, 2015]

*A Happier Ending for Everyone*

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

really what the putative father and adoptive parents are most concerned about, then clinical mediation is the best solution to achieve that result.

#### VII. EXAMPLES OF ADOPTION DISPUTES SUCCESSFULLY RESOLVED THROUGH CLINICAL MEDIATIONS

Over the years, the media has publicized cases such as Baby Jessica,<sup>91</sup> Baby Richard,<sup>92</sup> and Baby Emily.<sup>93</sup> These cases all involved fierce custody disputes between birth parents and adoptive parents.<sup>94</sup> The competing interest of the birth parents and adoptive parents were resolved only after years of vicious conflict and litigation.<sup>95</sup> Could these cases have been more amicably resolved through clinical mediation? Probably. In adoption disputes, clinical mediation has successfully been used in resolving disputed court cases<sup>96</sup> and is also being used more extensively as a preventative manner.<sup>97</sup> Below are three examples:

Baby Pete's birth parents were separated before he was conceived, and the mother, believing her boyfriend was the father of Baby Pete, decided to place the baby up for adoption.<sup>98</sup> After Baby Pete's birth, the birth mother's husband came forward claiming to be the baby's biological father, and after

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91. Rosenman, *supra* note 84, at 1851. After spending the first twenty-nine months of her life with her adoptive parents, custody of Jessica was awarded back to her birth parents. *Id.*

92. Rosenman, *supra* note 84, at 1851. More than four years after his birth, and all but four days of that time spent with his adoptive parents, custody of Richard was awarded back to his birth parents. *Id.*

93. Freundulich, *supra* note 53. After the first appeal of her adoption was completed and then upheld, Emily was twenty-seven months old. Rosenman, *supra* note 84, at 1851.

94. Freundulich, *supra* note 53.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* The baby's birth mother and the adoptive family agreed to an open adoption, and she and her boyfriend signed the necessary papers. *Id.*

[Vol. 15: 415, 2015]

*A Happier Ending for Everyone*

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

some DNA testing, that was confirmed.<sup>99</sup> The biological father contested the adoption, claiming that he should be awarded custody of Baby Pete.<sup>100</sup> The judge in this case ordered a clinical mediation,<sup>101</sup> and through the process, the adults were able to reach an agreement.<sup>102</sup> Baby Pete would stay with his adoptive family but would still have contact with his birth mother and birth father.<sup>103</sup> The parties also agreed that the birth certificate would contain the names of the birth father and the adoptive mother.<sup>104</sup> As the years progressed, the adoptive father and Baby Pete's birth father became good friends, and Baby Pete has built strong relationships with both his birth parents and his adoptive parents.<sup>105</sup>

In the second example, a mother put her child up for adoption and refused to identify the birth father.<sup>106</sup> The baby was placed in an adoptive family, and when the baby was thirteen months old, the birth father came forward to oppose the adoption.<sup>107</sup> The parties agreed to a clinical mediation before any litigation began, and through that process, they were able to reach an agreement that allowed all the parties to maintain some sort of role in the child's life.<sup>108</sup> The baby would remain with the adoptive parents, but all the parties involved would have contact with him.<sup>109</sup>

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99. *Id.*

100. Freundlich, *supra* note 53.

101. *Id.* The judge in this case order a clinical mediation after facing a very fierce dispute involving Baby Pete's adoptive parents, his birth mother, and his birth father. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* Having his name on the birth certificate was something that was very important to the Baby Pete's birth father. *Id.*

105. *Id.*

106. Freundlich, *supra* note 53.

107. *Id.*

108. *Id.*

109. *Id.*

[Vol. 15: 415, 2015]

*A Happier Ending for Everyone*

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

Finally, a couple adopted Baby D when he was only several weeks old.<sup>110</sup> The birth father learned of his now nine-month-old Baby D while he was in a West Virginia jail, and upon learning this information, he immediately challenged the adoption and argued that he never relinquished his parental rights.<sup>111</sup> The New Jersey trial court overturned the adoption, and the court of appeals upheld that ruling.<sup>112</sup> The state appellate court ordered a hearing in which the birth father was required to show that Baby D would not suffer serious harm in his custody.<sup>113</sup> The parties attempted clinical mediation, and through the process, the adults were able to reach a settlement.<sup>114</sup> Baby D remained with the adoptive parents, but the birth father was awarded secondary residential custody with significant parenting time.<sup>115</sup> This agreement allowed Baby D to benefit from all the parties' love and affection.<sup>116</sup>

These three cases show how clinical mediation has been used to help resolve adoption custody dispute cases. By resolving the disputes through clinical mediation, the child maintained all the important relationships in his or her life. Clinical mediation does not result in a winner and a loser; instead, it creates a solution where all the parties involved get some sense of satisfaction. However, if the clinical mediation is not successful, the child's best interest can still be protected through the litigation process if the clinical mediator is authorized to give the judge a recommending report.<sup>117</sup>

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110. *Id.*

111. Freundulich, *supra* note 53.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *See infra* notes 102-111.

[Vol. 15: 415, 2015]

*A Happier Ending for Everyone*

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

## VIII. IF ALL ELSE FAILS: MEDIATOR RECOMMENDING REPORTS

In 1979, “California enacted one of the nation’s first laws requiring mediation of any child custody dispute in a dissolution proceeding.”<sup>118</sup> Before a court will hear a dissolution case, the California Mandatory Mediation Law requires parties to participate in a mandatory mediation in order to attempt to resolve their child custody or visitation disputes.<sup>119</sup> When parties are unable to reach an agreement in mediation, some counties permit the mediators to make recommendations to the court as to the custody or visitation issues.<sup>120</sup> Arguments have been made that allowing mediators to make recommendations conflicts with the principles of mediation, making it an extension of the adversarial system instead of a confidential process that helps parties to reach their own decisions.<sup>121</sup> It is also believed that recommending mediations may give the mediator too much power and discretion because often their recommendations are just “rubber stamped” by judges.<sup>122</sup> However, other family law professionals believe that recommending mediations help the courts make difficult decisions and help families arrive at a resolution without much delay or expenses.<sup>123</sup> While there have been arguments both for and against recommending mediations, below will describe why it is advantageous to allow clinical mediators to give a recommending report to judges if a resolution is not reached during the mediation.

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118. Lizbeth M. Morris, *Mandatory Custody Mediation: A Threat to Confidentiality*, 26 SANTA CLARA L. REV. 745, 745 (1986).

119. S.B. 1406 (2001-2002), Leg. Sess. (Cal. 2002), available at [http://www.leginfo.ca.gov/pub/01-02/bill/sen/sb\\_1401-1450/sb\\_1406\\_cfa\\_20020501\\_093453\\_sen\\_comm.html](http://www.leginfo.ca.gov/pub/01-02/bill/sen/sb_1401-1450/sb_1406_cfa_20020501_093453_sen_comm.html).

120. *See id.*

121. *See id.*

122. *See id.*

123. *See id.*

[Vol. 15: 415, 2015]

*A Happier Ending for Everyone*

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

While the discussion here is adoption disputes and not dissolution proceedings, mediator recommending may also be very advantageous in adoption disputes of this nature. Those opposed to mediator recommendations believe that the recommendations usurp the roles of judges and that judges should be making decisions based on reliable information that has been sifted through the rules of evidence, rather than based on the perceptions of the mediator.<sup>124</sup> Clinical mediators are qualified therapists with expertise in adoption and family system issues.<sup>125</sup> While these clinical mediators are experienced professionals, judges may not have this kind of specialized knowledge. After talking to and evaluating the parents and the child, the clinical mediator would have a reasonable basis for the recommendations they give to the court.<sup>126</sup> Judges ultimately decide what is best for the child, but without a mediator report, these judges would be able to rely on their own values and biases too much.<sup>127</sup>

Parents should find comfort in knowing that a clinical mediator's report will provide the judge with concrete information to base his or her decision on. Further, it is important to remember that judges do not have to follow the recommendations they receive in the mediator's report.<sup>128</sup> Judges have the authority to resolve the custody issues the way they feel is best, but often follow the mediator's recommendations because they feel that these recommendations do protect the child's best interests.<sup>129</sup> While resolving the adoption dispute through clinical mediation would ultimately be best, if no agreement is reached, a mediator's report would provide the judge with vital information that the judge may not otherwise have.

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124. *See id.*

125. *See* Freundlich, *supra* note 53.

126. Kohm, *supra* note 39.

127. *Id.* at 337.

128. *Id.*

129. *Id.*

[Vol. 15: 415, 2015]

*A Happier Ending for Everyone*

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

Those opposed to mediator recommending reports believe that these recommendations compromise confidentiality.<sup>130</sup> If parties know their communication is not being kept confidential, they will try to reveal information both favorable to their position and damaging to the other side.<sup>131</sup> However, attacking the other side may reflect badly in the mediator's report, therefore, it may actually do the opposite and prevent the two sides from attacking one another. Further, clinical mediation is different from regular mediation in that clinical mediation is a much more collaborative approach with the child's best interest at the center of it all.<sup>132</sup> In clinical mediation, there may be evaluations or other testing required, and therefore, there may be a lower standard of confidentiality to begin with.<sup>133</sup>

While everyone should be hopeful that the clinical mediation will be successful, clinical mediator recommending reports should be required if not. These reports would save courts money, resources, and time from having to do the same evaluations again.<sup>134</sup> It is clearly in the child's best interest for the custody dispute to be resolved as quickly as possible, and if the dispute ended up in litigation, the recommending reports would help expedite the whole process. Recommendations would also give judges an opinion from someone with the type of specialized knowledge to know what really is in the child's best interest.

#### IX. CONCLUSION

Experts believe that states need to "reform laws and policies to minimize drawn-out, damaging adoption disputes and, when they occur, to

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130. Hugh McIssac, *Confidentiality Revisited California Style*, 39 FAM. CT. REV. 405, 406-07 (Oct. 2001).

131. *Id.* at 407.

132. See Freundlich, *supra* note 53.

133. McIssac, *supra* note 130.

134. *Id.*

[Vol. 15: 415, 2015]

*A Happier Ending for Everyone*

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

give consideration to the rights of the children . . . .”<sup>135</sup> While judges claim to use the best interest of the child standard when determining who should have custody of the child, the decision is left too subjectively in their hands. When an innocent biological father—left in the dark by the biological mother—seeks custody of his child from the adoptive parents, judges should order the parties to participate in a clinical mediation before any litigation is allowed to commence. The best chance of a child’s “best interest” being preserved is not through a judge’s order, but through a collective decision involving the putative father, adoptive parents, and all the people that have a relationship with the child. If mediation is not successful, then the best way to preserve the best interest of the child is to allow the clinical mediator to make recommendations to the court.

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135. Ann Scott Tyson, *Rival Parents Clash Over Adopted Child*, CHRISTIAN SCIENCE MONITOR (July 18, 1994), [http://www.csmonitor.com/1994/0718/18071.html/\(page\)2](http://www.csmonitor.com/1994/0718/18071.html/(page)2).