Referring family disputes to mediation and other ADR processes – especially matters concerning children – may be the most intuitive use of ADR. Most of us would agree that parents, not judges, are generally best equipped to make decisions about their children. Moreover, the benefits of a process with the capacity to foster communication and model collaborative problem-solving seem evident when there is a future long-term parenting relationship. Thus it should come as no surprise that family courts have long been among the earliest court adopters of dispute resolution programs – most often mediation.

Family ADR may seem ubiquitous today, but its prevalence is the result of decades of innovation and evolving programs and processes designed to keep pace with the ever-changing capacity of the justice system while meeting the needs of separating and divorcing parents. These innovations have often paved the way for other applications in court ADR.1 (See the Press and Schepard article in this issue, page 9.) This article provides a brief overview of the programmatic roots of family ADR in the courts, how these programs have borne fruit, and what the ADR field ought to know from this story.

Early Roots

Many family court ADR programs took root in family conciliation or counseling service (FCS) agencies first established in California in 1939. FCS agencies throughout the United States are typically court-connected and have historically provided family-related services, such as short-term

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counseling to help couples reconcile, as well as child
custody evaluations on behalf of the court for those who
could not stay together. Over the years, family court
ADR processes largely grew out of these counseling and
evaluation services. There are myriad models of custody
evaluation in both the public and private sector, ranging
from a brief, focused process that assesses specific issues (e.g., family violence or chemical dependency) for the
court to more comprehensive processes that may involve
multiple interviews, observations of parent-child interaction,
and psychological testing. Evaluations typically
result in a written report to the court and are frequently
used in settlement negotiations.

In 1969, California Gov. Ronald Reagan signed the
first no-fault divorce statute. This coincided with other
societal changes that led to a substantial
increase in the
divorce rate. Perhaps
most important, the
feminist movement
took hold, and an
increasing number
of women joined the
workforce – whether
by choice or out of
economic necessity – and men devoted more time to
child-rearing. Family courts thus generally (but gradually,
over many years) moved from a default of the tender
years doctrine and maternal sole custody – typically
resulting in children visiting their fathers on alternate
weekends – toward a greater sharing of parenting time
and responsibilities. To address changes in the needs
of clientele in the early 1970s, FCS agencies adapted.
According to Jay Folberg, an early family mediator and
proponent of mediation, “That was when the meaning of
‘conciliation’ began to change from staying together to
peacefully separating with an eye toward the best inter-
ests of the children.” The seeds of self-determination
and confidentiality, generally considered central to
mediation, were already planted in the counseling ser-
dices provided by FCS agencies. Then, in 1973, the first
court-connected family mediation program was piloted in
the Los Angeles Conciliation Court.

In 1974, the first private mediation center was estab-
lished in Atlanta by O.J. Coogler, a lawyer and counselor
who, spurred by his own difficult divorce, established the
Family Mediation Association in 1975. Coogler
was harshly criticized by members of the legal com-
nunity, and some bar associations declared mediation
by non-lawyers as the unauthorized practice of law and
attempted to discourage lawyers from serving as media-
tors through the threat of ethical sanctions. Nonetheless,
interest in mediation grew rapidly in both the private and
public sectors. While custody evaluation continued to
play a role in the divorce process, it generally took a back
seat to mediation.

Branches and Offshoots

In 1981, California established mediation of custody
and visitation throughout the state by enacting the first
state statute to mandate parents’ participation in media-
tion. This led to significant discussion about the appro-
priateness of requiring litigants to mediate. Nonetheless,
mediation grew, in the form of both voluntary and
mandatory programs, across the United States in the
1980s. The National Center for State Courts estimated
that as of the early 1990s, programs existed in more than
200 courts in nearly 40 states.

As mediation developed in family courts (and
elsewhere), the early rumblings of what has become
a long-standing conversation about mediation styles
began to emerge. California’s statute permitted a local
option for what was known as “recomm-
ending mediation,” a process in which the mediator makes
recommendations to the court if parties do not reach
agreement. The pages of Conciliation Courts Review (now
Family Court Review) were replete with articles about
self-determination and evaluative and recommending
mediation, examining fundamental assumptions about
the role of the mediator and the mediation process. This
tension – certainly not limited to California or family
mediation – has long existed at the heart of many FCS
programs. The continuing effort to reap the potential
benefits of approaches that value both self-determination
and expert guidance has contributed to the development
of a rich array of innovative hybrid processes in family
ADR today.

One early example of innovation in family court ADR
can be found in integrating court-based mediation and
custody evaluation. Court-based custody evaluations had
traditionally been evaluative or investigative processes,
but beginning in the 1980s, some FCS agencies changed
their evaluation process. In Connecticut, for example,
after information-gathering and assessment (but prior to a
report and recommendations to the court) evaluators
systematically shared forthcoming recommendations
with parties and lawyers and then facilitated a settlement
conference. In another program, Hennepin County
(Minneapolis) Family Court Services, parties who did not
reach mediated agreements were offered (after mediation
ended) the opportunity for their mediator to conduct
an evaluation. These hybrid processes, while clearly dif-
ferent from each other, both attempted to integrate the

As mediation developed in family courts (and elsewhere), the early rumblings of what has become a long-standing conversation about mediation styles began to emerge.
facilitative and evaluative role of the neutral in an effort to reach resolution.

Critics of hybrid processes believe that they potentially undermine the primary foci of both processes. Mediators who might ultimately make a recommendation or conduct an evaluation may struggle to simultaneously help parties engage in interest-based negotiations while also evaluating the parties’ strengths and weaknesses and considering a recommendation. Further, parties in a mediation that has the potential to become an evaluation may share confidential information with a mediator that they may not want to share with an evaluator. Evaluators conducting evaluations with an eye toward settlement may struggle to leave behind their assessments when attempting to facilitate settlements based on their evaluations. Moreover, parties to post-evaluation settlement discussions facilitated by evaluators may feel compelled to acquiesce to the evaluator’s recommendation.

Nonetheless, a hybrid approach allows the parties and neutral to build on any progress or information developed in one process and avoid spending time and energy starting over with a new professional in the other process.

Perhaps more important, the hybrid processes can, at times, be more flexible in meeting the specific needs of the parties. Indeed, courts that are concerned with the cost of ADR and with serving the needs of families may find these hybrid approaches efficient and effective in particular cases.

Pruning and Fertilizing as Needs Change

In the 1990s, as courts continued to establish mediation programs, the evolution of services continued as FCS agencies confronted an increasing array of challenges. These included budget and staffing cuts, increasing caseloads, non-English speaking clientele, unrepresented litigants, and an increasing number of parents who had never been married to each other. Thus many courts developed programs for separating and divorcing parties even when no specific legal issue was before the court. To help guide self-represented litigants through the court and dispute resolution process, many courts established self-help centers as well as divorce education programs, the number of which quadrupled in the United States between 1994 and 1998 (See the Macfarlane article in this issue, page 14). These early-intervention education

Examples of Family ADR Innovations

These processes and others – including adaptations of mediation for domestic violence or child welfare disputes – are highly nuanced and many overlap substantially. Nonetheless, these adaptations and nuances may be informative as the broader ADR field faces similar issues.

Brief Focused Assessment (BFA): an abbreviated custody evaluation typically focusing on specific, targeted questions. The BFA may be used when a comprehensive evaluation (typically more costly and divisive) is not required. Many courts have implemented BFAs in a variety of formats. BFAs are also used in private-sector evaluations.

Child Inclusive Mediation: an empirically based process in which the child is interviewed by a child specialist who then participates in mediation with the parents, bringing the child’s voice into the room. Child Inclusive Mediation was first developed in Australia by Dr. Jennifer McIntosh and has been replicated with modifications in the United States.

Conflict Resolution Conference: a hybrid process where the neutral meets with the parties over multiple sessions, conducts limited independent information-gathering, and attempts to facilitate settlement in a directive fashion. The Connecticut Court Support Services Division offers conflict resolution conferences. This process evolved in part from Connecticut’s settlement-based evaluation process noted earlier in this article.

Early Neutral Evaluation: a process in which co-evaluators hear from the parties without corroborating the information or conducting further investigation. The evaluators then share with the parties what they would report based on the information given. Parties then conduct settlement discussions or continue to a full evaluation. Hennepin County FCS first developed Early Neutral Evaluation for family cases in addition to its mediation and evaluation processes noted in the article.

Impasse-Directed Mediation: a process that combines aspects of counseling, negotiation coaching, and mediation for high-conflict parents. Janet Johnston and Linda Campbell pioneered this resource-intensive and ground-breaking approach in the 1980s in the book Impasses of Divorce (Free Press, 1988). It was one of the early, if not the first, hybrid processes designed specifically for high-conflict, highly litigious families and was adapted for use in the most challenging cases in both court-connected agencies and the private sector.

Parenting Coordination: a process that combines education, mediation, and limited decision-making by a parenting coordinator. It is offered primarily in the private sector but also in some courts, including Florida’s 11th Judicial Circuit. Parenting Coordination is typically used in post-decree matters, but it has also been implemented in a wide variety of formats.
programs vary but typically include information about children’s needs and/or skill-based curricula to provide parents with information, tools, and techniques for co- or parallel-parenting and for mitigating inter-parental conflict. A small number of evidence-based educational programs have demonstrated the capacity to prevent negative consequences of separation and divorce on children such as substance abuse, poor grades, and mental disorders.4

The 1990s also saw an increasing number of cases involving issues such as high conflict, domestic violence (See the Olson article in this issue, page 25), and chemical dependency, which created challenges for agencies where mediation was the default, and sometimes the only available, process. While space does not permit a full discussion of the impact of these issues on family dispute resolution, many programs continue to move away from “mediation as usual” to help manage these challenging cases. It is not clear whether these challenges were new to FCS agencies in the 1990s or social science research and political advocacy created a greater awareness.5

What is clear, however, is that families coming to court presented an increasingly diverse set of needs when it came to a dispute resolution process.

Family ADR Innovation: Bearing Fruit

As FCS agencies and private practitioners worked toward addressing these challenges, a variety of new processes emerged under the family ADR umbrella, many of which sought to find just the right blend of facilitative and directive or evaluative components. Some developed in the courts and were adapted by private practitioners; some emerged from social science research; and some were developed in private practices and adapted in courts. While an exhaustive list of family ADR processes is not possible, the box on the previous page contains some examples and brief descriptions.

Funding Drought

At a time when families appear to need more and more, governments are providing courts with less and less to do their work. For example, in recent years Los Angeles County Family Court Services reduced its staff by one-third and eliminated services, including comprehensive custody evaluation and a group intervention for high-conflict parents. Similar cuts are taking place in many courts across the country. While the innovations described on the facing page helped improve services for families, there is a limit to how much courts can innovate their way out of budget trouble. Even when spurred by adversity, at some point courts and FCS agencies will not be able to provide sufficient services if the budget ax continues to fall. Although many agencies are not under this level of stress, too many family court services are.

Adaptations to Climate Change

By the beginning of this century, innovation in court ADR was flourishing. Nearly half the US states allowed mandatory mediation in parenting time disputes, based on local court rules or the discretion of judges, while 13 states had family mediation laws. This institutionalization created an expectation and in many cases a reliance on the availability of mediation (but not necessarily other family ADR) among parties, the bar, and the bench in many jurisdictions. However, at the same time expectations grew, the capacity of many courts to provide services diminished due to many of the challenges noted above. Early on, court-connected mediation was premised on adequate program resources and parties with access to legal representation and other appropriate support services. Cases involving domestic violence, high-conflict,
chemical dependency, or child welfare issues were the exception rather than the rule. Today, many programs have re-evaluated service delivery options to adapt to the influx of challenging cases combined with, at best, stagnant (or diminishing) resources.

Courts also have expanded the use of screening and differentiated case management (or triage) in family court settings. Screening in court-connected mediation is not new, having been developed extensively over the last two decades in large part in response to concerns expressed by advocates for victims of domestic violence about mediation in such cases. More recently, however, FCS agencies have begun exploring triaging services, sometimes beginning with a screening process that attempts to match the parties to the family dispute resolution process that is most appropriate at the outset, rather than referring all parties to mediation and then, failing a mediated agreement, to subsequent processes (e.g., hearings, custody evaluation, or settlement conferences).

The use of triage in family cases has generated debate. Proponents argue that triage benefits families and is an effective and efficient use of court resources. Critics contend that no one can predict who will succeed in mediation and that triage is a hurdle rather than a help and potentially undermines mediation programs and resources.6

Measuring the Yield

As new processes are developed and implemented, they must be assessed, especially with such limited resources. Are children faring better because of the processes? Do parents feel they have been treated fairly? Are resources of the courts and the families being used efficiently? We do not have the answers, and society, courts, and parents will be operating in ignorance if these questions are not addressed through comprehensive evaluation. In an era of limited funds for direct provision of services, conducting reliable evaluations of court ADR programs is more of a challenge – but more important than ever.

Future Seeds of Change

Looking forward, family court ADR will continue to need to evolve to meet the challenges of social and economic change. We can anticipate that same-sex marriage, globalization, evolving technology, and an increasingly mobile society will provide new challenges and spark further innovations.

Family court services agencies have shown themselves to be uniquely able to adapt, in large part by keeping a close eye on the needs of the parents and children who use the system. As we all work to meet the needs of those who turn to the courts to address their conflicts, other areas of the judicial system should continue to look to family court ADR for inspiration. 

Endnotes


6 Peter Salem, The Emergence of Triage in Family Court Services: The Beginning of the End for Mandatory Mediation? 47 FAM. CT. REV. 371 (2009); Hugh McIsaac, A Response to Peter Salem’s Article The Emergence of Triage in Family Court Services: Beginning of the End for Mandatory Mediation. 48 FAM. CT. REV. 190 (2010).

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