CHAPTER SEVEN – USE OF CONSENT AND NEGOTIATION

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AGREEMENTS

Alternative dispute resolution broadly refers to processes that aim to resolve conflicts outside traditional judicial settings. These processes allow disputants to exercise self-determination, deciding for themselves whether to settle and under what terms, rather than relying on judicial officers to decide. The processes vary widely and range from informal negotiations among the disputants themselves to more structured processes like mediation and arbitration that involve neutral third parties – such as mediators and arbitrators – who work with disputants. Alternative dispute resolution processes provide more confidentiality and informality than judicial processes. Especially in the arena of family law, these characteristics of alternative dispute resolution contribute to the widespread use of negotiation and mediation, in particular, to avoid public, contested litigation about sensitive legal issues within families. Indeed, some jurisdictions require disputants to attempt alternative dispute resolution before they resort to contested trials or hearings.

As in the larger context of family law, alternative dispute resolution also occurs within the child support program. A few jurisdictions engage in mediation with neutral, third party mediators from outside the child support agency; child support disputants in Delaware, for example, participate in mediation of parentage cases with mediators from local courts. However, in many jurisdictions, parent and child support agency representatives resolve child support cases through negotiation, rather than through mediation facilitated by neutral third parties. The process for negotiating child support agreements varies from jurisdiction to jurisdiction. When parents and the child support agency reach negotiated agreements concerning parentage and support arrangements, these agreements are then submitted for court or administrative approval. Sometimes, orders based on agreements are called stipulated orders (or stipulations); sometimes, they are simply called agreed orders.

Most commonly, the child support agency reaches these agreements with parents in the halls outside a courtroom or an administrative hearing room, just prior to a scheduled hearing. Because of the context in which they occur, pre-hearing negotiations are outcome-focused – that is, their aim is quickly reaching an agreement so that the tribunal does not have to conduct a contested hearing on the case. For most parents, the environment of pre-hearing negotiations can be stressful, unfamiliar, and confusing. In particular, there may be little time for agency representatives to engage with parents, answer their questions, and educate them about post-hearing expectations. When the fast-paced, outcome-focused context of pre-hearing negotiations limits the ability of agency representatives to ensure that parents understand the process and their

responsibilities that flow from reaching an agreement, parents may agree without fully understanding what has occurred and what happens next.

In some jurisdictions, however, the opportunity for reaching agreements occurs much earlier in the process. Child support agencies in those jurisdictions invite parents to conferences, usually at the agency offices. Depending on filing and notice requirements of the jurisdiction, the conference invitation may occur prior to the initiation of legal proceedings for parentage, order establishment, or order modification. Or, it may occur shortly after legal proceedings have been initiated, perhaps shortly before or shortly after formal service of process has occurred. Parents often find earlier conferences less stressful than negotiations immediately prior to a hearing, and conferences provide a forum where their questions and concerns are welcomed and can be addressed.

Child support attorneys may ask: What room is there for negotiation in child support orders? Certainly, presumptions regarding parentage and mandatory child support guidelines leave a very limited range of negotiation options. For example, in most cases the amount of child support will likely be the same if parents reach an agreement with the child support agency or if a tribunal renders a decision following a hearing. Rather than focusing primarily on the outcome of the negotiation – the amount of the order – child support staff need to view negotiations to reach agreements or stipulations as an opportunity to engage parents and to educate them about the child support process.

Fundamentally, negotiations between child support agency representatives and parents are conversations. Early in the life cycle of a child support case, in particular, these conversations establish a relationship between the agency and the parents. Engaging parents in a productive way encourages ongoing beneficial interactions between the agency staff and parents.

Benefits of Agreements

Agreed or stipulated orders improve judicial and administrative efficiency by avoiding the necessity of hearings or by significantly reducing the time required for the judicial or administrative hearing officers to render their orders. Parents also find that agreed or stipulated orders reduce or eliminate the need to appear before the tribunal; that means less inconvenience and expense of missing work, making child care arrangements, traveling to the tribunal, and dealing with the unfamiliar and sometimes confusing hearing process. Finally, agreed or stipulated orders may allow child support agency staff to obtain orders more quickly and with fewer resources. Beyond efficiency and convenience,

agreed or stipulated orders benefit both families and the child support program because they produce greater rates of child support payments to families.[1]

Increased rates of support payments from agreed or stipulated orders are attributed to these factors:

- Because they have been involved in creating the agreement, parents know what the order requires of them. Indeed, they have voluntarily agreed to pay support, rather than have the order imposed upon them by a judicial or an administrative hearing officer.

- By meeting with child support agency representatives, parents have learned about the child support process, their responsibilities, and the agency's role.

- In choosing to pay support voluntarily, parents exercise their personal autonomy and fulfill their sense of responsibility toward their children. In contrast, when a judicial or an administrative hearing officer imposes a child support order, parents may feel powerless and disrespected in their roles as parents.

Limitations of Agreements

Despite the benefits of agreed or stipulated orders to the agency and to parents, obtaining agreements may not be possible or appropriate in all cases. Parents or the agency may choose not to agree. Parents or the agency may prefer to have a tribunal decide the matter in whole or in part. As noted later, cases involving parents who are minors or parents who are victims of domestic violence are usually not appropriate for mediated agreements.

The legal context of a jurisdiction may provide limitations on the use of agreements as well. Some jurisdictions may require legal actions to be filed and served before an agency may reach an agreement with parents, which moves the negotiations further into the life cycle of a case. Jurisdictions may require that parents receive notice of their right to have a hearing rather than reach an agreement. Judicial review of agreements also varies. Some jurisdictions require a hearing before a tribunal may approve an agreed or stipulated order, and others may simply require submission of proposed orders for the signature of a judicial or administrative hearing officer with no need for a formal hearing. Remedies available to enforce an agreed or stipulated order may be different from a judicial or an administrative order. Beyond legal requirements, judicial and administrative hearing officers may impose local practices that impact agreements, for example, requiring personal appearances by parents who have

[1] Cynthia Bryant, *Case Conferences: Engaging Parents to Improve Performance,* NCSEA Child Support Quarterly, Feb. 2012.

previously signed agreements so that they may confirm their agreements before the tribunal.

Finally, obtaining agreed or stipulated orders may impose additional administrative challenges and training needs on agencies. Logistics for conducting negotiation conferences involve making arrangements for parents and staff to participate. These logistics may also involve making additional contacts with parents, arranging space for confidential negotiations, scheduling meetings with staff and parents, and training staff to conduct negotiations. In addition, agencies often develop processes for data collection and analysis to determine the effectiveness of negotiated agreements as compared to traditional administrative or judicial processes.

Tribal Processes

In tribal child support programs, dispute resolution processes reflect a tribe's traditional culture, rather than Anglo-American judicial traditions and alternative processes. Some tribes know these processes as Peacemaker Courts. Due to the uniqueness of each tribe's culture, processes vary widely among the tribes and vary significantly from state judicial processes. Common features include a focus on healing relationships, restoring harmony within the community, and involving extended family members and others in the tribal community in addition to the parents. Because these processes are part of tribal culture and tradition, negotiation skills and legal issues may be different from those discussed in this chapter.

NEGOTIATION PRINCIPLES

From the perspective of the child support agency, child support negotiations are founded on the principles of voluntariness and neutrality. Both these principles have legal and practical implications.

Voluntariness and Consent

Parties in child support cases do not have to negotiate, and if they do negotiate, they do not have to reach agreements. Parents must have the ability to give voluntary consent to any agreement. Consequently, where there are concerns that parents may not be able to give voluntary consent, the child support agency may exclude those cases from the negotiation process or may provide additional protections or limitations in certain cases. One category of cases that may either be excluded from the negotiation process or provided additional protections involves parents who are minors and other parents who lack legal capacity. They may not give consent, although their appropriately designated representatives may. Other cases that a child support agency may wish to exclude or provide additional protection to are those prompting concerns related to family violence. A parent who has been subjected to family violence, or

who fears it, may feel coerced in the negotiation process. Because coercion or duress undermines voluntariness, such a parent cannot give truly voluntary consent to an agreement. Coercion and duress render any purported consent ineffective.

It is important that voluntary consent be informed consent. To give effective consent to a child support agreement, parents must understand the basis of the agreement and its impact on them and their family. Consequently, education about the child support process and about the agreement itself must precede consent. On the practical side, voluntariness also encourages payment of support because parents are more likely to pay a support amount to which they have agreed, even when the agreed-to amount is based on the jurisdiction's child support guidelines.

Some jurisdictions do not require the consent of a parent who currently receives TANF benefits in order to settle a child support case. Even when not required, it may be advantageous to include parents receiving TANF in negotiations. First, engaging TANF recipients in negotiations also engages them with the agency and furthers their cooperation with the process. Second, because TANF is a limited benefit determined by eligibility that may change, parents who currently receive TANF will ultimately become former TANF recipients, with the legal status of parties to legal proceedings. When that occurs, the child support agency will benefit from the former TANF recipient's collaboration.

Neutrality

After voluntariness, neutrality is the second fundamental principle in child support settlement negotiations. Neutrality in child support negotiations refers to the agency's position between the parents. In negotiating support, the agency is not "on the side" of either parent and does not represent the parents as individuals. Child support negotiators should demonstrate neutrality in both word and deed. To avoid misunderstanding of the role of counsel for the agency, the child support attorney should explicitly inform parents that the attorney is not the parents' lawyer and cannot provide legal advice to either of the parents.[2] In addition, the child support attorney's behavior should reflect this fundamental principle. For example, the child support attorney should avoid comments or actions that a parent may interpret as advocacy on behalf of one parent and possibly against the other parent. Parents may be especially sensitive to behavior by agency negotiators that creates the appearance that the agency is aligned with the other parent. Whether the perception of the agency aligned with one parent is an accurate one or not, this perception undermines the role of the agency and its lawyers as neutral. Fundamentally, the child support attorney is

[2] For a more detailed discussion on the client of a IV-D attorney, *see* Chapter Four: Ethical and Regulatory Requirements Governing Attorneys in the Child Support Program.

an advocate for compliance with the law. By being neutral and nonjudgmental toward both parents, the attorney or child support representative avoids alienating one or the other parent and encourages both parents to engage in the child support process.

NEGOTIATION PROCESS

Preparation

Preparing for a negotiation is similar to preparing for a court or an administrative hearing. Of course, agency negotiators should be familiar with child support law and policy relevant to the case. They should know where they have flexibility to negotiate and what they may not negotiate. Child support guidelines in particular illustrate the necessity of knowing what may and may not be negotiated. All child support agencies must apply guidelines that are law in their jurisdictions, and consequently, negotiators must be familiar with the guidelines and their application. Law and policy in the jurisdiction may identify circumstances under which child support may deviate from amounts computed under guidelines. For example, some jurisdictions allow a reduction in the amount of support for low-income obligors – commonly known as a low income allowance or self-support reserve. Some jurisdictions allow parents in nonpublic assistance cases to agree to less than the guideline support amount, provided a court approves the deviation. In preparing for negotiations, child support negotiators may want to identify areas within the guidelines that allow discretion based on the evidence and anticipate how the guidelines might apply to the circumstances of different families.

Both attorneys and nonlegal child support professionals may be involved in negotiating agreements. They both should be aware of any limitations on the role of nonlegal staff, including the necessity to collaborate with child support attorneys as required by the legal context of the jurisdiction. Negotiators should familiarize themselves with the particulars of the family's case and the information needed from the parents so that the agency may go forth with next steps in the child support process. In jurisdictions where the legal context involves traditional judicial decision-making, negotiators should be aware of the likely outcome of court hearings if negotiations do not result in agreements. In addition, negotiators may need to prepare appropriate legal documents to provide the parents during the negotiation.

The Learning Conversation

Because informed consent is an essential part of reaching agreements, agency staff should ensure parents are aware of the issues and impact of potential decisions. Underlying informed decision-making is the practical consideration that parents are more likely to live up to the commitments they make in agreements when they understand what they have agreed to and the

consequences of the agreement. However, the negotiation conversation between parents and child support negotiators is not a one-way street where the child support professional controls the conversation. Instead, it is a conversation in which all participants learn from each other. To reach an agreement, parents need information from the child support agency, and agency staff needs information from parents. In order to establish and enforce support, the agency needs information about the children and their needs, parenting time, parental employment, personal finances, and, at times, intimate information about the parents' relationship. Parents need information about their rights and responsibilities, the legal process, and procedures for paying support. Sometimes the child support agency may be able to identify other services that may also assist the family.

Child support guidelines provide an illustration of the importance of making the learning conversation a two-way street. Consider the differences between these two approaches. One negotiator uses information from the agency's automated system to compute the amount of support due under the guidelines; if information about an obligor's earnings is not available, this negotiator may base the calculation on presumed income. Assume the amount of support calculated this way comes to $X. The negotiator begins the negotiation by telling the parents that the amount of support for their case is $X and continues by describing the calculation. Often, parents quit listening after they hear an amount they feel they cannot pay and consequently do not really hear the explanation. Sometimes, parents become defensive and disengage from the negotiation. A different negotiator may conduct a similar calculation to arrive at the $X figure in advance of the negotiation, but this second negotiator begins the negotiation differently. The second negotiator may tell parents that child support is calculated using guidelines established under state or tribal law, and that these guidelines apply throughout the jurisdiction. In describing the guidelines, the second negotiator may tell the parents that a starting point for determining the amount of support due under the guidelines is the parents' earnings. Then, the second negotiator engages the parents by asking them to talk about their employment, earnings, and similar information, and the negotiator ***listens*** to what the parents say. The second negotiator may ask a parent to explain differences between what the parent reports in the negotiation and what the negotiator has learned from automated resources. The bottom line is that the second negotiator has engaged parents in a learning conversation so that they become part of the process for determining the amount of support. Even if the final amount of support is the same $X, the second negotiator has changed the dynamic of the negotiation so that $X becomes the amount of support that the parents have helped determine, rather than an amount they feel has been imposed on them in the approach of the first negotiator.

Beyond providing information on which to base informed consent, the learning conversation provides a foundation for later problem-solving. First, as the learning conversation progresses, early agreements may occur. For example, parents may agree about parentage while continuing the negotiation

conversation about the amount of support to be paid. Negotiators should confirm these agreements because it ends discussion of the agreed issue and creates momentum toward resolving other issues.

In learning from the parents, negotiators are well served by focusing on interests, rather than positions. As described by the experts who wrote "Getting to Yes," "[I]nterests motivate people; they are the silent movers behind the hubbub of positions. Your position is something you have decided upon. Your interests are what caused you to so decide."[3] All participants in the negotiation conversation have positions: "I'm not supporting her kid." "You have to pay medical expenses for the child." "He may be the baby's father but he's sure not acting like it." Positions stake out claims about the child support case and communicate "this is where I stand." However, positions do not reveal much information. Most important, positions do not reveal what led parents to take a particular stand. Mediation expert Christopher Moore has identified a triangle of interests that often underlie stated positions:

- Substantive interests – what the case or dispute is about.
- Psychological interests – what emotional needs are at play; for example, the need for security and financial well-being, the need for a sense of belonging, and the need for recognition and respect.
- Procedural interests – what perceptions one harbors about the impact of the process and one's sense of personal control.[4]

Learning the interests of parents is important in negotiations because parents are unlikely to reach agreements unless their basic and important interests are satisfied. Moreover, an agreement that satisfies parents' interests is one that they are more likely to honor. Child support negotiators learn about parents' interests by asking questions and listening to the answers. Otherwise, their intuitions about parents' interests are only guesses.

Communication Skills

Reaching agreements in child support cases requires negotiation skills. Negotiating with parents requires substantive knowledge about child support legal issues and each family's case. Truly engaging parents in the negotiation conversation also requires parent-focused communications skills, dealing with emotion, and problem-solving.

The learning conversation in negotiating child support agreements begins with listening – parents listening to agency representatives and agency staff

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[3] Roger Fisher, William Ury & Bruce Patton, Getting to Yes, 41 (2d ed. 1991).
[4] *See* Christopher W. Moore, The Mediation Process: Practical Strategies for Resolving Conflict (3d ed. 2003).

listening to parents. However, listening may be challenging for parents and agency staff. Parents may approach the agency with anger, anxiety, worry about themselves and their children, and even hostility toward the situation in which they find themselves. The challenge of creating trust and rapport with parents under these circumstances requires empathetic communication. This approach requires agency staff to understand the family's situation as the parents understand and experience it. It is nonjudgmental. It does not require agency staff to agree with or refute the parents' experiences or to "fix" it. Instead, the aim is to understand the parents' viewpoints first, before expecting parents to hear what the agency needs to convey about the child support process. Using empathetic communication to develop rapport with parents encourages them to provide information to negotiators and to listen. In effect, listening to parents encourages them to listen to agency negotiators.

Empathetic communication starts with active listening, a different and more powerful way of hearing one another. It has a specific purpose beyond hearing the words of the speaker. That additional purpose is to assure the speaker that they have been heard. For the parent who speaks, agency negotiators engaged in active listening demonstrate that they value the parent and care enough to listen. Negotiators are, in effect, saying "I respect you. I want to understand this from your perspective, even if it is different from my own." Listening in this way, negotiators create, in turn, a willingness in the parents themselves to listen with respect and empathy when it becomes the agency negotiators' time to talk. In this way, active listening encourages reciprocal, respectful communication.

This kind of communication involves more than simply hearing what parents say, although that is where it begins. To engage in active listening, negotiators must:

- Pay attention and hear the words spoken. The negotiators' goal is to learn from the parents. They must have a laser-like focus on listening. For example, negotiators cannot be mentally rehearsing the next question if they seek to hear accurately the response to the first question.

- Acknowledge what they heard. It is not enough to tell the speaking parent "I understand." The acknowledgment needs to include what the negotiator understood. However, the acknowledgment does not need to include any evaluation, assessment, or judgment about what the parent said. In fact, a judgmental acknowledgment does not amount to listening at all; it turns listening into an argument. On the other hand, a nonjudgmental acknowledgment is not the same as agreeing with the parent's words or feelings.

- Confirm with the speaker that the negotiators heard correctly, and if not, begin the listening process again. This demonstrates a commitment by agency negotiators to hear and understand what the parent is saying.

With practice, the active listening process can become second nature for negotiators. Effectively employed in negotiation conversations, active listening both informs the agency negotiator and fulfills the needs of the parents to be heard and understood.

To reach agreements in child support cases, negotiators must gather information from parents about intimate details of their lives, their children, and their finances. Although automation resources provide important information in child support cases, negotiators also ask questions to gather information from parents and listen to their responses. Parents' responses depend on the kinds of questions asked. Closed questions suggest an answer and restrict the response. On the other hand, open-ended questions and requests encourage fuller expression from the parent and provide more information. Compare these questions and the responses they may elicit:

- Your take-home pay is $450 per week, right?
- What do you earn?

There are only two possible answers to the first question: yes or no. However, the second question invites a more complete response and has the possibility of gathering far more information than the first question does. In addition to providing more information, open-ended questions engage the parents in the negotiation conversation. Rather than being interrogated by the negotiator, parents are in conversation with the negotiator. Examples of open-ended questions and requests include:

- Would you tell me . . .?
- What are your goals today?
- What do you mean by "_____?"
- I wonder . . .
- Can you be more specific?
- Tell me more about . . .
- In what way?
- How do you suggest . . .?

- Please explain why this is important to you.
- How?

Although “why?” is an open-ended question, it may put the answerer on the defensive and feel confrontational. On the one hand, “why?” may mean “I’m calling you into account” or it may mean “I’m curious.” Consequently, a different question or a tone of curiosity is helpful when negotiators want to ask “why.”

In the context of negotiation, the image of a funnel provides a model for efficient information gathering. This model begins with broad, open-ended questions first – like the wide top of a funnel – then focuses more and more narrowly – toward the spout at the bottom of the funnel – until specific facts are confirmed by closed-ended questions. If parents respond to the beginning, open-ended questions fully, they will become active participants in the negotiation conversation. Moreover, the agency staff will likely gather more information quickly and limit the need for closed-ended questions.

Sometimes, parents use language that undermines collaboration among the participants in the negotiation conversation. They may express strong feelings about important and personal issues, using words that may demean or attack the other parent or the agency. When this occurs, it limits the negotiation conversation; indeed, toxic language is “un-listen-able.” Yet, strong language arises from underlying interests or concerns that may need to be addressed in the negotiation. This presents a challenge for negotiators who seek to engage parents with active listening. On the one hand, negotiators want to show the speaker they are listening in a nonjudgmental way. On the other hand, reinforcing toxic language by confirming the speaker’s words undermines the negotiation process. An effective negotiation tool for these circumstances is reframing. Reframing refers to recasting a statement in more neutral terms so that it can be heard in a different, more positive way that furthers the negotiation conversation. Its goals are both to make the strong statement more open to negotiation and, at the same time, to make the speaker feel heard. The steps in reframing are:

- Listen to the words of the speaker;
- Look for the interests (discussed above) that underlie the words;
- Take out the language that limits negotiation;
- Restate the speaker’s meaning; and
- Confirm that the restatement is accurate.

The challenge for negotiators is to maintain the speaker's message in a way that improves communication among the negotiation participants. Consider this statement and possible reframes:

> Statement: "You know what? She's a fraud. She knew I didn't want any more kids. Having this kid was her idea and now she's trying to trick me again."
>
> Reframe 1: "You sound concerned about being treated fairly and you want to make sure you're t reated fairly in the future."

Of course, whether this statement accurately expresses the speaker's intent depends on the context. Its accuracy can only be tested by asking the speaker. Another possible reframe might be:

> Reframe 2: "You did not expect to have more children and now you want to be able to rely on what happens next."

Sometimes when they practice active listening or reframe a statement, negotiators do not accurately acknowledge the speaker's message. Allowing the speaker to address the inaccuracy demonstrates the negotiators' commitment to understanding the speaker as the speaker seeks to be understood. When negotiators attempt to correct inaccuracies in their understanding of the speaker's meaning, it satisfies the speaker's need to be heard and contributes to empathetic communication.

Sometimes, the communications styles of parents present challenges in efficiently managing the negotiation conversation. In responding to open-ended questions, parents may ramble, repeat themselves, dominate the discussion, or withdraw from the conversation. These communication challenges may make the negotiation conversation feel stuck, unproductive, and lengthy. Listed below are some communication challenges and suggestions for overcoming them:

- Rambling: The speaker may need structure to the conversation. Provide the speaker with an agenda of topics, organized with the most important first, and focus them on each topic in order.

- Repetition: Speakers often repeat when they do not feel heard. Listen carefully to the speaker's primary message, summarize it, and seek confirmation that the summary is accurate. Repeat this process if the speaker repeats the same point later.

- Domination: Speakers may try to take control of the conversation and limit others' participation. This behavior may indicate the need for

structure. Organize their response and the participation of others in the negotiation conversation.

- Withdrawal from the conversation: Those who do not participate may not feel welcome to speak. Invite their participation by asking them open-ended questions.

Emotion in Negotiations

Emotional outbursts may also pose challenges in negotiation. Indeed, it is not surprising that parents express strong emotions. Often, they have difficult, perhaps volatile, and sometimes disappointing relationships with each other. In addition, child support cases involve their children as well as personal and financial issues. However, venting emotions in negotiations may make the conflict worse, rather than "clear the air." Expressing strong emotions may lead to a downward spiral toward an impasse in negotiations, especially if strong emotions of one parent feed an emotional response from the other parent. Child support negotiators may feel uncomfortable and emotional themselves, and they may want to intervene and return the negotiation to a more rational, unemotional focus. As attractive as this may sound, returning to rationality is usually not that easy.

Experts Roger Fisher and Daniel Shapiro[5] counsel that emotions in negotiation are unavoidable. In fact, one interaction may produce multiple emotions. Emotions are also multilayered and not consistent. For example, parents may be both angry and disappointed with each other and yet love one another – all at the same time. Emotions also vary in how they affect each person; for example, some people anger more easily and some more easily resent actions that others ignore. Plus, the source of emotion cannot always be accurately identified. Because emotions are both impossible to ignore and too complex to figure out quickly, Fisher and Shapiro suggest a different approach.

They suggest focusing on five "core concerns" that arise is most negotiations:

- Appreciation: Are our thoughts, feelings, and actions devalued, or are they acknowledged as having merit?

- Affiliation: Are we treated as adversaries and kept at a distance, or are we treated as colleagues?

- Autonomy: Is our freedom to make decisions impinged upon, or is it respected?

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[5] Roger Fisher & Daniel Shapiro, Beyond Reason: Using Emotions as You Negotiate (2005).

- Status: Is our standing treated as inferior, or is it given full recognition when deserved?

- Role: Are the roles we play meaningless, or are they personally fulfilling?

Unmet core concerns lead to negative emotions, and people may act contrary to their own interests, deciding to "go it alone" or adopt more rigid or deceptive strategies. On the other hand, when core concerns are met, the resulting positive emotions lead people to act more cooperatively, creatively, and honestly.

When emotional outbursts threaten the negotiation conversation, child support negotiators can follow a process to address the core concerns. To begin, negotiators should "step to the balcony," to view the negotiation from an imaginary perspective above the fray. This allows negotiators to remain calm and not be drawn into the emotional outburst. It also gives them a virtual place from which to observe the negotiation interactions that underlie the outburst. Then, negotiators can follow the two-step approach suggested by Fisher and Shapiro. First, using the core concerns as a lens, negotiators can step into the shoes of the emotional parent and identify the core concern that may be contributing to the negative emotions. Then, the second step is to use the particular core concern at play as a lever, to move the emotion from negative to positive. Note that intervening to use core concerns as a lens and then as a lever occurs before any effort to "fix" the problem identified, so that negotiators following this approach address the emotions before they address the substantive issues. This emotions-before-substance approach reflects the view that parents are unlikely to listen to solutions before their emotions are addressed.

For example, consider an emotional outburst from a parent who said: "Dads don't count for anything with you people." Using the core concerns as a lens, this expression seems to reflect a concern with Appreciation, because the speaker feels his thoughts, feelings, and actions are devalued, literally "unappreciated." To use the core concern as a lever, negotiators may say "You want to be an important part of what happens, don't you?" If the emotional parent agrees, then negotiators can identify the ways in which "dads" are important to the process; for example, "Dads like you are so important to our agency because you are so important to your children."

Problem Solving and Resolution

As the learning conversation winds down, child support negotiators have often identified issues on which the parents have agreed or on which they seem likely to agree. The resolution process begins with identifying the agreements or potential agreements already brought forth and confirming agreements on these points. This leaves the issues that remain to be resolved before a stipulated or agreed order can be signed by all participants. Some issues, however, are not negotiable and it serves no useful purpose to continue negotiating them. Truly

disputed facts are not negotiable. For example, a specific amount of child support was either paid or it was not paid; payment is not negotiable. However, how much is to be repaid or the terms of repayment may be negotiated. Similarly, truly disputed issues of law are not negotiable. For example, a state either has jurisdiction or does not have jurisdiction over an individual or case; jurisdiction is not negotiable.

For many parents, reaching agreements means reconciling their expectations before the negotiation with the reality of what they have learned during the negotiation conversation. They may have come into the negotiation with high hopes and unrealistic positions, and before the negotiation, they may have shared these with family and close associates. Then, during the learning conversation, these hopes and plans meet reality when they learn about their rights and responsibilities as parents and about the child support process. Consequently, reaching an agreement involves finding a path from their uninformed and, perhaps, unrealistic pre-negotiation hopes and plans toward acceptance of the reality they encounter during the negotiation process. In essence, for parents to agree, they have to articulate to themselves the reasons to move toward an acceptable resolution. As negotiations develop, parents may come to see that their ideal solution is not one that the other parent or the agency will agree with, and so they must find a solution that is acceptable to all. Although it may be less than what one hoped for at the beginning, an acceptable solution is more likely to be an enduring solution that encourages compliance over time.

Tempting as it may be, agency negotiators should not solve this problem ***for*** parents, for example, by telling them terms that they should accept. Solving the problem for parents has the effect of undermining their integrity as parents, as individuals responsible for their own autonomy, and as valued participants in the process. In addition, parents may perceive an agency-proposed solution as favoring one parent over the other. Like most people, parents believe that solutions they come up with are better than solutions that are suggested by others. Consequently, effective negotiators assist parents by asking them to formulate solutions that work for the parents themselves, using an ask-don’t-tell approach. In fact, the key reason to engage parents in developing acceptable resolutions is what occurs after an agreement is reached, when parents must pay support in keeping with the promises they make in agreements.

Parents who participate in reaching an agreement develop a sense of ownership in the outcome of the process and are more likely to comply with an agreed order.

Negotiators may employ problem-solving strategies, such as:

- Brainstorming. Gather a variety of alternative solutions to help participants think of the problem in new ways.
- Crystal ball. Imagine a future in which the problem is solved and work backward from that point to a solution.
- Break it down. Separate the problem into its component parts and work to resolve them one at a time.
- View from the balcony. Discuss the big picture to see the problem and possible solutions from a different perspective.
- Step into the shoes of the other person. Imagine the problem from the other parent's side and see what solutions would work from that perspective.
- Consult objective criteria. Consider child support guidelines as providing external, objective criteria for what the state legislature or state courts have determined are appropriate amounts of support to be paid by families in similar situations.

With the development of an acceptable resolution, the negotiation conversation moves to its final stages and the decision of parents to agree or not. In child support cases, parents have a ready alternative to a negotiated agreement, namely, having the case decided by a tribunal following a hearing. In fact, by not reaching an agreement through negotiation, parents have agreed on one point: that their family's case will be decided by someone else — a judicial or an administrative hearing officer. Is a tribunal likely to provide a more favorable outcome to the party who is unwilling to accept the proposed stipulated or agreed order? What are the risks that the tribunal's resolution will not be a better alternative? Will a hearing before a tribunal take longer? Will it be more convenient for the parents? Are there changes to the proposed agreement that would make it more attractive than the alternative of a tribunal proceeding? These are questions negotiators can pose to help parents reach a decision.

Not all negotiations will – or should – result in agreements. Some parents may feel that having a tribunal decide is actually better for them than a negotiated agreement. Other times, parents do not trust each other enough to feel that the promises in the agreement will be kept, and so they prefer not to agree. Other parents may seek to have a recognized authority, like a court, make the decision, rather than make it themselves. Of course, agreements based on coercion or threats would not be voluntary or appropriate. Simply put, some cases ***should*** be decided at a judicial or administrative hearing and not by agreement.

LEGAL ISSUES IN NEGOTIATION

Although federal law forms the backbone of the IV-D program, child support cases are decided in state and tribal courts and administrative hearings, governed by the particular jurisdiction's law. Legal issues related to negotiating child support cases likewise arise under a particular jurisdiction's law. Although resolution of legal issues will depend on the law of the jurisdiction, questions arise infrequently about protection of confidentiality of settlement negotiations, particularly negotiations that fail to yield an agreement.

Confidentiality of Settlement Negotiations

Most state jurisdictions provide that, in litigated cases, compromise negotiations as to claims and amounts may not be admitted into evidence in subsequent litigation of the same matter, pursuant to rules with language similar to or, in some jurisdictions, identical to the current version of Federal Rule of Evidence 408 or the version in effect before its 2006 revision. The current version reads:

> **(a) Prohibited Uses**. Evidence of the following is not admissible — on behalf of any party — either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:
>
> **(1)** furnishing, promising, or offering — or accepting, promising to accept, or offering to accept — a valuable consideration in compromising or attempting to compromise the claim; and
>
> **(2)** conduct or a statement made during compromise negotiations about the claim — except when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority**.**
>
> **(b) Exceptions**. The court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.[6]

Rule 408 is a rule of relevance. Under its terms, prior "compromise negotiations" are not relevant in subsequent litigation of the matter negotiated. The aim of the rule is to encourage settlement of cases by freeing parties from the fear that revelations made during compromise negotiations could come back to haunt them if negotiations failed.

Because it excludes evidence, Rule 408 has been read and applied carefully and narrowly. For example, its terms apply to parties to the negotiation

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[6] Fed. R. Evid. 408 (2011).

who are also parties to subsequent litigation of the negotiated matter. It does not apply to a participant in negotiations who is not a party, as defined by the law of the jurisdiction, and statements by that participant may be relevant and admissible. The rule also does not apply to litigation in an entirely different matter than the one negotiated. For example, when parents and child support staff negotiate to establish a child support order by agreement, statements made by an agency staff member during the negotiation may not be excluded from evidence in unrelated litigation such as an employment lawsuit filed by the staff member following adverse personnel action by the child support agency. The rule does not render irrelevant communications made during negotiation that do not constitute "compromise negotiations." If, for example, a parent admitted to violating parole during negotiations in a child support case, the admission would not be protected under Rule 408 because it does not involve "compromise" of the child support case. Finally, and most obviously, Rule 408 applies only where rules of evidence apply – in courts that have adopted it and in administrative hearings where rules of evidence apply. By itself, Rule 408 does not prevent disclosure of compromise negotiations in any other context. However, state and federal law more broadly provide additional protections for confidentiality of child support case and program information, including information that arises in the context of settlement negotiations.

Mediation Confidentiality

A small number of jurisdictions use mediation to settle child support cases, although mediation is available in all states to resolve family law matters generally. At its heart, mediation is facilitated negotiation by qualified third-party neutrals known as "mediators" who are unaffiliated with any party and who may be court employees. State law governs both the mediation process and the qualifications of mediators. In addition, state statutes and rules provide confidentiality protections for mediation communications, with substantial variations among states.

When child support cases are mediated, child support attorneys should be familiar with the mediation law of their jurisdictions. As of January 1, 2021, 12 jurisdictions have adopted the Uniform Mediation Act (UMA), promulgated by the Uniform Law Commission.[7] The UMA creates a privilege against admission of evidence of mediation communications. Parties to the mediation hold the privilege differently from the mediator and from nonparty participants in the mediation. In addition, the UMA provides for waiver of the privilege in limited circumstances and specifies limited exceptions to the privilege. Beyond creating privilege for mediation communications, the UMA also provides for confidentiality of mediation communication and prevents its disclosure in certain circumstances.

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[7] Unif. Mediation Act (2003), https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=9b244b42-269c-769e-9f89-590ce048d0dd&forceDialog=0 (last visited Jan. 22, 2021).

Jurisdictions that have not adopted the UMA have statutory confidentiality protections, and some have court rules with greater or different restrictions than those provided in the UMA.[8]

LEGAL EFFECT OF SETTLEMENT AGREEMENTS

Settlement agreements and their effects are creatures of state law. Because they create legal agreements enforceable by law, settlements may be considered contracts. They may be enforced as contracts, and traditional contract defenses – such as fraud, coercion, and duress – apply. Ordinarily, when a child support agreement is incorporated into a court or an administrative order, the legal action is disposed of, ending the proceeding until subsequent enforcement or modification is initiated. Also, when a child support settlement is incorporated into a court or an administrative order, additional enforcement remedies may become available, most notably contempt for failure to comply with a court order.

Child support attorneys must be aware of the process for incorporating a settlement agreement into a court or an administrative order. Both state laws and practices concerning the process differ widely. Key issues include:

- May parties withdraw consent to an agreement before it is incorporated into a court or an administrative order? If so, the agreement may be enforceable as a contract but not as an order of a tribunal.

- What effect does an agreement have on pending court or administrative orders? Ordinarily, an agreement of the parties does not trump the tribunal's order until it becomes an order of the tribunal itself.

- What is the process for incorporating a settlement agreement into a court or an administrative order? May the settlement agreement simply be incorporated into a proposed order and submitted to the tribunal? Or, instead, must the parties to the agreement present evidence of the agreement and have the tribunal determine whether it will approve an order that incorporates the agreement? On what basis may a tribunal determine that an agreement will not be incorporated into a court or an administrative order?

- Are all judicial remedies, including contempt, available for court or administrative orders based on settlement agreements?

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[8] *See, e.g.*, Tex. Civ. Prac. & Rem. Code Ann. §§ 154.053, 154.073 (West 2019).

EXAMPLES OF SETTLEMENT PRACTICES

Since the early 2000s, child support agencies have reported increasing their use of agreements or stipulated orders to resolve child support cases. The use of case conferences that engage child support parents and agency professionals is widespread. However, practices and processes employed to reach agreements vary widely and reflect the unique legal context of each jurisdiction.

For example, Texas conducts its negotiation conferences, known as the Child Support Review Process or CSRP, shortly after case initiation and locate activities are complete; an automated invitation goes out to both parents asking them to attend a CSRP conference at a specific time and date in the local child support office. There is no requirement that legal proceedings be initiated in Texas courts before the invitation is sent or the conference occurs. At the conference, trained child support staff meet with parents to attempt to negotiate an agreed order. The negotiation process includes providing parents with a written statement of their rights and responsibilities, educating parents about the child support process, and obtaining relevant information from them including information about parenting time. If the parents and agency reach an agreement, it is reduced to writing, signed by the parties, and submitted to the court. When approved, the CSRP order fully becomes an order of the court, enforceable as any other court order, including by contempt.

In contrast with Texas, the Orange County child support agency in Southern California invites parents to participate in conferences ***after*** legal actions have been filed. The agency invites parents to a customer- and child-friendly space in its offices, so that noncustodial parents may confer with staff trained in negotiation. The discussions between agency staff and parents focus on obtaining accurate financial information from parents, leading to more payable orders through stipulations. The Orange County strategy has both decreased new orders obtained by default and increased new orders obtained through stipulation.

While the California practice arises from its judicial process, and the Texas process may be characterized as a combination of judicial and administrative process, the Arapahoe County, Colorado, child support program uses a similar process based on the Colorado Administrative Procedure Act for the Establishment and Enforcement of Child Support.[9] The agency sends letters to both parents promptly after case initiation and schedules a conference within 30 days pursuant to the Act. Although the conference focuses on noncustodial parents, the agency also asks custodial parents to provide financial information in advance of the conference and encourages them to attend. Both prior to and following the conference, the agency provides parents with information about the

[9] *See* Colo. Rev. Stat. §§ 26-13.5-101 to -115 (2019).

child support process. The agency has found that most parents who respond to the conference notice waive service of process. In the Colorado administrative process, a waiver amounts to notice that the parent agrees with the proposed agency action.

CONCLUSION

Being skillful in negotiation is as important as being skillful in litigation in a courtroom or before an administrative tribunal. Child support attorneys need to engage in learning conversations with parents and learn how to employ problem-solving strategies. Attorneys must also be aware of the legal issues that underlie consent and negotiation processes for obtaining child support orders. When attorneys are effective negotiators and help parents reach agreed upon or stipulated orders, there is the potential for better compliance by parents and greater efficiency in child support operations.

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CHAPTER SEVEN

TABLE OF STATUTES AND AUTHORITIES

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