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Mediating the Religious Upbringing Issue in Divorce Cases

Katheryn M. Dutenhaver*

I. INTRODUCTION

The DePaul Interfaith Family Mediation Project (Project) is a stand-alone dispute resolution system¹ that arose out of Judge Carole Kamin Bellows's concerns regarding cases in which divorcing spouses with different religions cannot agree on the religious upbringing of their children.² Judge Bellows described judicial orders common in multiple jurisdictions in which the custodial parent, or the parent with the greater amount of parenting time, is given the authority to make this decision for the children.³ Often in these cases, the noncustodial parent is permitted to expose the children to his or her religious beliefs and the activities of that religious institution without interference, unless there is a finding of harm or a strong likelihood of future harm.⁴

* Katheryn M. Dutenhaver, Associate Professor of Law, DePaul University College of Law; Director of the DePaul Center for Dispute Resolution; and Director of the DePaul Interfaith Family Mediation Project. Professor Dutenhaver earned her Bachelor of Arts from North Central College, 1960; Juris Doctor from DePaul University College of Law, 1972; and Master of Arts in Divinity from the University of Chicago, 2007. The author wishes to thank Jeff Atkinson, Brandon Baseman, Sam Morgan, and James Simon for their valuable assistance.

1. *See generally* WILLIAM L. URY, JEANNE M. BRETT & STEPHEN B. GOLDBERG, *GETTING DISPUTES RESOLVED* (1988) (introducing the design principles for dispute resolution systems created inside an existing organization). The Project was designed as an independent system for use by the public and incorporated some of the design principles suggested by this book. This Article also indicates some of the differences between the two systems.

2. Honorable Carole Kamin Bellows, Judge in the Domestic Relations Div. of the Circuit Court of Cook Cnty, Ill., Address at a Breakfast Forum Sponsored by the DePaul University College of Law, Center for Church/State Studies (Oct. 19, 1989).

3. *Id.*

4. *See, e.g.*, Meyer v. Meyer, 789 A.2d 921 (Vt. 2001); Kendall v. Kendall, 687 N.E.2d 1228 (Mass. 1997); Khalsa v. Khalsa, 751 P.2d 715 (N.M. Ct. App. 1988); Funk v. Ossman, 724 P.2d 1247 (Ariz. Ct. App. 1986); Felton v. Felton, 418 N.E.2d 606 (Mass. 1981); Murga v. Petersen, 103 Cal. App. 3d 498 (Cal. Ct. App. 1980); Munoz v. Munoz, 489 P.2d 1133 (Wash. 1971); Romano v. Romano, 283 N.Y.S.2d 813 (N.Y. Fam. Ct. 1967). *See also*, Zummo v. Zummo, 547 A.2d 1130, 1146 (holding that a prior agreement to raise a child in a particular religion is not enforceable

Judge Bellows also illustrated the difficulty judges can have in fashioning remedies that are actually workable for the parties.⁵ Assume the children are with their Catholic mother all five weekdays and with their Jewish father from Friday after school until Sunday evening. If the mother is given the authority to make decisions regarding their religious upbringing and chooses her own faith for the children, they will not be with her to attend Sunday Mass together. In addition, if she is permitted to prohibit any involvement in their father's Jewish religion, he will have to choose whether to leave the children home alone, or not attend his services when they are with him.

II. DESIGNING A STAND-ALONE DISPUTE RESOLUTION SYSTEM

Responding to the concerns raised by Judge Bellows, the Project was created as an independent, stand-alone dispute resolution system.⁶ Although the Project anticipated that cases would be referred by the courts, it was not set up by the courts, and the Project was free to establish its own guidelines. Even without the need to account to the courts or to any other potential source of referrals, as exists for in-house systems, the Project consulted with some of the judges in order to benefit from their experiences with these issues. Also, it was clear that if the judges later disapproved of the design of the mediations, there would not be referrals from the court. Another notable difference between this stand-alone system and in-house systems is the lack of an inside group of potential users to collaborate in the design of the system and assist in generating cases.⁷ The Project recruited and trained twenty-five clergy in the mediation of interfaith issues and informed the judges of the availability of the Project. Since the referral of the first case, there have been lessons learned that guide the Project in its ongoing administration.

because there is a fundamental right of individuals to question, to doubt, and to change their religious convictions, and to expose their children to their changed beliefs).

5. Bellows, *supra* note 2.

6. Because the author had been teaching Mediation since 1986 and Advanced Mediation since 1987, John Roberts, then-Dean of DePaul College of Law, asked if these cases could be mediated as a service project of the DePaul Center for Church/State Studies. Working with Dean Roberts, Craig Mousin, who became the executive director of the DePaul Center for Church/State Studies in 1990, and the author established the Project and served as co-directors. The Project was moved into the DePaul University College of Law Center for Dispute Resolution in 2001.

7. URY, BRETT & GOLDBERG, *supra* note 1, at 65-70.

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The initial design of the Project was quite simple: (1) mediation would be the only dispute resolution process offered;⁸ (2) the religious upbringing of the children would be the only issue mediated;⁹ (3) only the parents, or those with the legal responsibility for parenting the children, would attend the mediation sessions;¹⁰ (4) parties would receive legal advice from their own attorneys before and between the mediation sessions, but the attorneys would attend only if the mediator determined this to be necessary;¹¹ and (5) each parent would select a clergy of his or her own faith to be present during the entire mediation process.¹² If any party did not want to be accompanied by his or her own clergy, the party could select a clergy from the panel assembled by the Project.

A dispute resolution system is only as good as the quality of the process delivered. While many factors may guide parties toward settlement, the keys to achieving agreement in most of these cases have included the following: (1) the mediator's techniques to overcome barriers to settlement;

8. The Project did not offer a binding process to parents who were unable to settle in mediation. Returning to court for a contested hearing would be the only adjudicative alternative to the mediation process.

9. By limiting the negotiations to one issue, the parties would not be able to trade the religious upbringing of their children for other terms of settlement—such as the amount of visitation time, child support, division of property, etc. Without trades, the discussions would have to focus on the two religions and the religious education and experiences available in each. This would highlight what it is that religions do provide for children, and the parties would have a better opportunity to explore why arguing over this issue can become so intense and often destructive.

10. Since other individuals without legal authority over this issue are affected by any agreement made, many parties have requested their presence. During the span of time this Project has been in existence, there has been an increase in the number of post-judgment cases and the arguments for the inclusion of new spouses have occurred more frequently. The Project continues to limit participation to those who have the legal responsibility for the children.

11. Prior to a mediation session, the mediator describes the process to the attorneys. The attorneys are asked to review and approve the Agreement to Mediate, and advise their clients as to the likely process and outcome in court if there is no settlement in mediation. They are also asked to meet with their clients between the mediation sessions and incorporate the terms of settlement into the necessary documents for court. If it appears that a particular party fails to understand this advice regarding the likely outcome in court, or for any other reason is not able to meaningfully participate in the mediation, the mediator may request the presence of the attorneys at the next mediation session.

12. When questioned about this requirement, it was difficult to explain the anticipated participation of the clergy. However, it seemed clear to the author that when in a room where the parents, other clergy, and the mediator were present, the clergy would focus on the needs of the family and try to help the parents solve their dilemma. This assumption turned out to be true in most, but not all, of the cases. In a small number of cases, the clergy began to argue about prioritizing the two religions.

(2) the authority of the clergy in matters of religion; (3) the contributions of both clergy and the mediator in establishing a mediative atmosphere; and (4) the neutrality of the mediator regarding the subject matter of these cases.

III. MEDIATORS' TECHNIQUES TO OVERCOME BARRIERS

Successful experience moving parties from positional bargaining to interest-based bargaining in mediation is a requirement for membership on the panel of mediators in this Project.¹³ When parents come to the Project, many are stunned that court rules require them to participate in mediation before having a contested hearing in court.¹⁴ Already locked into positional bargaining because they have been preparing for litigation, mandatory mediation hardens their resolve to “win” the contest. In this type of bargaining, parties support their positions with arguments presumed to be unassailable in the hopes that the other parent will have to acquiesce to the demand for control over the religious upbringing of their children.

For example, a Catholic mother declared that she could not agree to raise their children in the Jewish faith because her religion required that she live up to the written promise she made at the time of their marriage in the Catholic Church. She said she was certain that no court would order her to violate the requirements of her religion. Her Jewish husband responded with an argument that he believed she could not successfully refute in court. Since she had converted to Judaism at the birth of their son, they raised him as a Jew, he had been studying for his Bar Mitzvah for three years and wants to continue, a court would not take that away from him six months before the scheduled date. Clearly, both parents expected their positions would prevail in court and therefore neither saw any need to compromise.

Often underlying the parents' positions is the assumption they are negotiating the religious commitment of their children rather than their religious upbringing. Although positional bargaining over a fixed resource, such as an amount of money or a quantity of time, can result in a split of the resource, one's religious commitment cannot be carved into percentages by anyone, not even the parents of a minor child. The mediator needs to be able to help parents understand the limits of what they can negotiate, and that it is the child who will ultimately decide whether or not to commit to a religious faith.

13. *See generally* ROGER FISHER, WILLIAM URY & BRUCE PATTON, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (2d ed. 1991).

14. Cir. Ct. Cook Cnty., Ill. R. 13.4(d)–(e), *available at* <http://www.cookcountycourt.org/rules/index.html>.

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The parents are limited to reaching agreement on the legal issue—what religious upbringing the child will experience during minority. No matter how much influence parents think they have—or feel they should have—they cannot, jointly or individually, decide the religious commitment of their children. However, even when the mediator has helped parents understand the legal issue to be negotiated, the bargaining sometimes continues to be extremely difficult. Many parents assume that the religious upbringing of the child will have a great influence over the religious commitment later chosen by the child. The mediator needs to understand that there is a strong possibility this assumption will prove to be true, and know that this is, in part, what encourages the parents' intense positional bargaining, despite their new understanding of the negotiable issue.¹⁵

Another useful technique mediators can employ when parties are deadlocked in their negotiation is to ask what will happen if there is no agreement on an issue.¹⁶ In the domestic relations context, parties often respond by stating that they will return to litigation to resolve their issues. Carefully, the mediator can explore with each party the possible risk that the litigation process may be long, expensive, and quite contentious with potential damage to themselves and their children. To avoid coercing a party into a settlement, the mediator can look for the terms on which they might agree—terms which are freely made and informed by the advice they have received from counsel. Finally, a potential mediator must acknowledge that, in some situations, litigation is the preferred dispute resolution process and agree that he or she will withdraw from a case if necessary. This has happened only in extreme circumstances: where the mediator has not been able to learn the reasons behind the strong positions taken by parties, and where the mediator's assessment is that the case should be handled in the courtroom, where historical events can be examined. One example of this type of situation was a proposed agreement where one parent would not be allowed to have any contact with the children, not even with supervision.

15. When any values clash, it is advisable to clarify the non-negotiability of the values and concentrate the discussion on what can be negotiated, how parties relate to each other when confronted with non-negotiable values.

16. A key to avoiding positional bargaining is the relative quality of the parties' best alternative to a negotiated agreement (BATNA). FISHER, URY & PATON, *supra* note 13, at 97-106.

IV. AUTHORITY OF CLERGY IN MATTERS OF RELIGION

During preparation for any mediation, many mediators will try to figure out what is needed to unlock the impasse. Often, parties need the input of someone with a particular expertise. This Project was designed to provide parents with such needed resources.¹⁷ Central to the successful resolution of these cases has been the assistance of the clergy. Contrary to the Project designer's expectations, but certainly understandable, many parties have not wanted to bring their own clergy. The most commonly stated reasons have included: (1) not wanting to see their clergy on a weekly basis after having discussed highly sensitive divorce and child-rearing issues with them, and (2) not wanting a clergy who knows the other parent or the grandparents, fearing loss of confidentiality, potential influence, or both.¹⁸

When discussing the Project with nonparticipants, many have asked, in a skeptical manner, what the clergy have done to contribute to the mediation process. Since many parties are afraid of being untrue to their religion if they reach an agreement, the clergy have given them "permission" to settle. In comparison, assurances from the mediator, attorneys, or both that it is alright to settle has no meaning to the parents on matters of religion. Permission from the clergy is conveyed in most cases simply by their presence; and in other situations, the clergy have explicitly told the respective parties that it is alright to work out an agreement. In some cases, clergy have explained the rules of their religions that were not understood by one or both parties.¹⁹ Clergy have provided parties with a rationale for settling.²⁰ They have helped parties see how the two religions can help

17. URY, BRETT & GOLDBERG, *supra* note 1, at 36-37.

18. Since parties are free to select the clergy participants and the Project does not screen for conflicts of interest in advance, the mediator must be sensitive to, and aware of, potential conflicts which may underlie or influence a clergy's contribution to the process. For example, a grandparent or spouse of one of the parents may be a member of the clergy's religious institution or even a member of the governing board. If the party has elected to bring his or her own clergy, and such potential conflict becomes apparent, the mediator alerts that parent to this possibility and then lets the parent decide whether to proceed with that particular clergy or select a different one.

19. In one case, a mother was told by a Catholic priest in caucus with the mediator that she did not promise to raise her children in the Catholic faith, rather her promise was to try. The explanation given was that the rule had changed with Vatican II, and her children must have been born since then.

20. In a joint session in one case, an Orthodox rabbi was present to assist the mother. Her position was that since the Conservative father had taken the children to eat at McDonald's, she could no longer allow the children to visit in his home. The Orthodox rabbi had an extended conversation with the Conservative father about the food the children would eat when they were with him. Once the father promised the Orthodox rabbi he would have the children observe the Orthodox rules regarding food, the rabbi convinced the reluctant mother that she could rely on this promise because it was made to a rabbi. In a different case, a rabbi told a Jewish father that he could

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children continue bonds with both parents rather than necessarily being instruments of divisiveness.²¹ Parents have been encouraged to rely on the clergy's authority when they appear reticent about taking responsibility for an agreed outcome. In some cases, parents are concerned with the attitudes and perceptions of others who have influence over them and their children.²² At the conclusion of the mediation, the mediator writes a memorandum of the terms of agreement, which is jointly dictated by the parties.²³ The mediator and clergy then help the parties reach an oral understanding, outlining how they will explain their settlement terms to the children, grandparents, extended family, and friends. As one rabbi commented to the parties at this juncture of a mediation session, "you can explain to the grandparents that this is your new covenant with each other. The use of the term covenant resonated with everyone in the room.

V. ESTABLISHING A MEDIATIVE ATMOSPHERE

Many parents going through a divorce cling to destructive behaviors. They blame each other for all that has gone wrong in their marriage. Others assume that to achieve happiness, vindication is necessary and will come only when someone in a position of authority judges his or her past behavior right and the other parent's past behavior wrong. The awards of custodial and decision-making authority for the children are the coveted prizes.²⁴ However, vindication by a judge may not be enough for some parents. More insidious is soliciting vindication from their children and demonizing the other parent to the children to achieve this goal. Many times, the parents think their feelings and behaviors will be justified if the children would feel the same way as the parents, and show it by shunning the other parent.

allow his children to attend Easter Mass and the extended family Easter dinner at their maternal grandmother's home because the mother is returning to her original faith. The rabbi simply said, "because their mother will be Catholic."

21. The clergy have regularly encouraged parents to agree on the religious upbringing of the children, and to also work out an arrangement where they will be exposed to the religious teachings of the other parent. Participation with the other parent, albeit on a limited basis, can result in the bonding that is encouraged via religious activities.

22. In a number of cases, clergy have encouraged parents to explain to grandparents that the clergy were present throughout the entire mediation.

23. The memorandum of the terms of agreement is then sent unsigned to the attorneys who review it with their clients and prepare the necessary documents for court.

24. See John Hartherley, *The Role of the Child's Wishes in California Custody Proceedings*, 6 U.C. DAVIS L. REV. 332, 346 (1973).

When the parents reflect on this, many say they know that if they were the children in a divorce situation, they would be horrified if placed in this kind of position by their parents, the very people they are dependent upon for love and protection.²⁵ Many even say they are certain this behavior can be irreparably harmful to children.²⁶ Yet, such recognition has not been enough to bring about change. Why do parents get stuck in destructive behaviors?

When preparing for mediation sessions with highly conflicted parties, mediators can spend much time thinking about how to establish an atmosphere that encourages productive work.²⁷ Adopting insights from other disciplines can be extremely helpful. For example, Augustine's fourth century insight—that one's history often interferes with one's ability to stop engaging in destructive behavior—is relevant to a mediator's efforts in helping parties deal with the highly contentious and often destructive disputes over the religious upbringing of their minor children.²⁸ His insights can aid in our understanding of how to create a mediative atmosphere. One need not ascribe to the theological context of Augustine's insight to appreciate the applicability of his thinking to mediation. One can only assume there are innumerable descriptions that parallel Augustine's insight that could be found in other religions and disciplines. For purposes in this Article, some of Augustine's thoughts will be considered.

Although Augustine's initial understanding of man was that change was not possible, he changed that understanding based on his awareness of changes that occurred in others.²⁹ He wanted to understand the catalyst for

25. ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY* 4 (1992).

26. JUDITH S. WALLERSTEIN & JOAN B. KELLY, *SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE* 4-5 (1996).

27. See DWIGHT GOLANN & JAY FOLBERG, *MEDIATION: THE ROLES OF ADVOCATE AND NEUTRAL* 47-48, 131, 135-38 (2d ed. 2011); STEPHEN B. GOLDBERG, FRANK E.A. SANDER, NANCY H. ROGERS & SARAH RUDOLPH COLE, *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES* 137-39 (5th ed. 2007).

28. Susan Schreiner, Professor, Lecture at University of Chicago Divinity School (Apr. 17, 2007). While listening to Professor Schreiner describe Augustine's answers to his questions about his inability to stop engaging in destructive behavior, particularly his understanding that it is the past that weighs one down and interferes with change, the relevance of Augustine's thought to the experience of parties entering mediation today suddenly became apparent. To understand the relevance it is instructive to look at his description of his own persistence in destructive behaviors that he wanted to overcome. He described being weighed down by a disease of the flesh, unable to free himself, and although he suffered cruel torments from this disease, he continued as a prisoner of habit, trying to satisfy a lust that could never be sated. AUGUSTINE, *CONFESSIONS* 128-29 (R.S. Pine-Coffin trans., Penguin Books 1961).

29. See AUGUSTINE, *supra* note 28, at 193-94. His mother, Monica, renounced drinking wine to excess at the moment she was called a drunkard by a servant girl. *Id.* Alypius, who had been dazzled by the allure of the pleasure of the games in the arena in Carthage, heard a lecture in which Augustine made a laughingstock of those under the spell of such insane games and did not return to

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this change. With his own deep respect for Scripture, Augustine turned to writings of Paul to try to find answers to his questions.³⁰ He found the very dilemma that he was experiencing in his own behavior described in Romans 7:19, “For I do not do the good I want, but the evil I do not want is what I do.”³¹ The explanation for the dilemma began to unfold for Augustine as he contemplated a portion of 1 Corinthians 4:7, “What do you have that you did not receive?”³²

In seeking understanding of this human dilemma, Augustine looked to what man received from his past that affects his behavior and grounded his answer in the story of the Fall, in which man had been dislocated by some ancient sin.³³ Since man’s inability to love what he knows is the truth stems from the original sin of Adam—everyone is born with the history of disordered love, a force that drags one backward and causes man to choose evil. Ever after, human nature has been such that one trying solely by his own efforts is unable to choose to do good, unable to do what he earnestly wants to do.³⁴

Augustine used the metaphor of a chain to explain this human behavior.³⁵

The chain is internal; it is the force of the past inherited from Adam, and it is perpetuated in each generation. It is then reinforced by sin which derives its power from custom and repetition, and forms a habit that cannot be broken.³⁶ This creates a clear division between knowing and doing. One can know what is good and not be able to do it. One is compelled by something outside of one’s own control. It is a powerful force that prevents

the arena in Carthage. *Id.* at 120-21. Augustine interpreted the changes that occurred in both Monica and Alypius as having been caused by God, that God had caused other people unknowingly to intervene in their lives. *Id.* at 120, 194. He described his own conversion experience as one remarkably similar—divine intervention through the acts of these other persons was the interpretation given by Augustine. *Id.* at 121, 177-78, 194.

30. *Id.* at 117.

31. Romans 7:19 (New Revised Standard Version). See Krister Stendahl, *The Apostle Paul and the Introspective Conscience of the West*, 56 HARV. THEOLOGICAL REV. 199, 205 (1963) (“[Augustine’s] *Confessiones* are the first great document in the history of the introspective conscience.”).

32. 1 Corinthians 4:7 (New Revised Standard Version); Susan Schreiner, Professor, Lecture at the University of Chicago Divinity School (Mar. 27, 2007).

33. PETER BROWN, *AUGUSTINE OF HIPPO: A BIOGRAPHY* 168-75 (1967).

34. Schreiner, *supra* note 28.

35. AUGUSTINE, *supra* note 28, at 164.

36. Augustine, *Letter to Simplician*, in EARLIER WRITINGS 381, 381 (J.H.S. Burleigh trans., Westminster Press 1953).

change. The good that man wants to do cannot be done because of what he received from the Fall.³⁷

For Augustine, Scripture not only contained an explanation of the origin of this human dilemma, Scripture also led to his analysis of how one is freed from the chain of the past and then is able to choose the good that one wants to do. Change for Augustine was thought possible when the first link in the chain, the sin that originated in the Fall, is followed by grace and man responds to grace.³⁸ The concept embodied in “what do you have that you have not received” applies to parties as they enter the mediation process. Many parents enter the divorce mediation process as perplexed and anxious as Augustine was when he faced his dilemma. Often, parents struggle to understand why they are unable to stop doing things which they think are self-destructive and horribly harmful to the other parent and their children. Why is the knowledge of this destruction and its inevitable suffering not enough to motivate them to change their behavior? What is it that happens in a mediation that enables parents to break this behavior?

The turning point in the mediation process often occurs as parties start to let go of their weighted pasts and begin to focus on the future. One of the ways this transition is signaled is by their mutual willingness to stop blaming each other and start exploring ways they might agree on an arrangement that is workable for both parents. The mediation question is Augustine’s question—What evokes this willingness?³⁹

Just as Augustine observed that no one begins life without a history, parents during a divorce are not operating in a vacuum. They are influenced and shaped by many factors. The factors most important to the interfaith

37. *Id.* at 380-81.

38. Augustine, *The Spirit and the Letter*, in AUGUSTINE: LATER WORKS 182, 236 (John Burnaby ed., 1955). Augustine described the new chain:

But by the law comes the knowledge of sin; by faith comes the obtaining of grace against sin; by grace comes the healing of the soul from sin’s sickness; by the healing of the soul comes freedom of choice, by freedom of choice comes the love of righteousness; by the love of righteousness comes the working of the law. And thus, as the law is not made void but established by faith, since faith obtains the grace whereby the law may be fulfilled, so freedom of choice is not made void but established by grace, since grace heals the will whereby righteousness may freely be loved. All the links in that chain which I have drawn out are found speaking in the Holy Scriptures.

Id.

39. Augustine saw the will “as dependent on a capacity for ‘delight’, and conscious actions as the result of a mysterious alliance of intellect and feeling: they are merely the final outgrowth of hidden processes, the processes by which the ‘heart’ is ‘stirred’, is ‘massaged and set’ by the hand of God.” BROWN, *supra* note 33, at 163. Parents, at the beginning of a divorce mediation, can also be described as moved by processes by which the heart is stirred.

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mediation process are the court system and their original families. A dissolution of marriage only occurs when the judge in a domestic relations court so orders. Parties must abide by the rules of the court and the procedures enacted by state statutes to obtain a judgment of dissolution. These rules and procedures have been enacted to fit divorce proceedings into an adversarial process in which a judge disposes of a case only after hearing arguments regarding the application of the law to the facts in the way that is most favorable to each party. While the children may not be parties or direct participants in these interfaith cases, they certainly are affected by the outcome.

The history and nature of our legal system provides part of the background “history” on how parties in interfaith divorce cases enter into mediation. In the context of litigation, parties seem compelled to present arguments in their most exaggerated form, extolling reasons why one party should prevail over the other. This skewed view of the overall process is, at least initially, brought into the mediation room. Often, the parties’ initial goal in mediation is to win. Thus, each parent feels compelled to try and convince the mediator, as they think they would have to do in court, that awarding him or her primary parenting and custody is in the best interests of their children. Many parents believe that the “best interests of the child” standard means one parent has to be judged less qualified than the other to carry out parenting responsibilities, including making decisions regarding religious upbringing to the exclusion of the other parent. Yet, underlying this process is the most fundamental question—What is really in the best interests of the child?

In addition to the influence of the adversarial system, many divorcing parents are also influenced by ill-conceived assistance their original families bring to the situation. Divorcing parents often turn to their original families for support during this time of extreme pain, and many spend untold hours airing complaints about their spouses and seeking family members’ advice. Taking their cues from these diatribes, many family members, including those who are well-meaning, will then echo the expressed feelings of their “family litigant” and think they are being supportive as they join in demonizing the in-law spouse.

Augustine used the Fall to describe the inability of people to make choices as if the historic experience of sin had never occurred. Similarly, the Project sees some divorcing parents who seem to be unable to act independent of their own “history.” These influences exist, and they encourage divorcing parents to do things they know cause harm—the very things they do not want to do.

One can apply the metaphor of the “chain” to describe the behavior of some divorcing parents as they enter mediation. The chain starts with the parents blaming each other for the overall breakdown of the marriage. Their illogical refusal to accept any share of responsibility can create a strong desire for vindication. They may participate in repeated acts designed to achieve vindication. As this behavior is greatly encouraged by their families and their interpretation of the adversarial nature of the court system, it becomes a stronghold on the parents, a habit that cannot be broken.

How then can the mediation process evoke change? Similar to Augustine’s analysis that knowledge does not elicit change, for some couples, their knowledge of—and even their open acknowledgment of—the destructiveness of their behaviors and their need to change does not induce different behaviors. To make the mediation process helpful, Augustine’s introspective questions must be asked. Why are parents willing to act in a destructive way? How can they change their destructive habits? Just as Augustine saw that the impact of the Fall had to be followed by grace in order for change to occur, mediation needs to replace the impact of what parents have received from the adversarial system and their families with a human form of grace.

The intent of the Project’s design is to establish a mediation atmosphere in which parents feel the mediator and the clergy are standing with them when they are in trouble. Augustine described an account that had just this kind of meaning for Alypius. Having been wrongfully accused of theft, an architect who saw Alypius in this dire predicament took his story seriously and did what was needed to help.⁴⁰

The Project has seen clergy stand with the parents, take their predicament seriously, and be helpful. Among other efforts, most clergy have recognized the dilemma and pain of both parents and have provided support. They have not ridiculed or judged either party or the dispute. They have placed no conditions on whether or not their support will be given.

40. AUGUSTINE, *supra* note 28, at 123-24. Although innocent, Alypius was once arrested as a thief in the market place in Carthage. *Id.* at 123. He had seen someone drop a hatchet and run off. *Id.* He picked up the hatchet not knowing it had just been used to try to break through the window of a shop. *Id.* Suddenly the men who had been sent out to find the intruder arrived and found Alypius standing alone with the hatchet in his hand. *Id.* They seized him and dragged him away, proudly telling the crowd of shopkeepers that they had caught him in the act. *Id.* at 123-24. But, as they were leading him away, they met the architect in charge of public buildings who recognized Alypius and at once took him aside to ask how he came to be in such trouble. *Id.* at 124. When the architect heard what had happened, he turned to the excited onlookers and told them all to follow him. *Id.* At the house of the youth who had committed the crime, a slave boy answered the door and recognized the hatchet. *Id.* He said he had been with his master in the market and told the whole story. *Id.* Augustine’s comment was that God was the only witness of Alypius’ innocence and through the intervention of the architect stood by his side to defend him. *Id.*

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Changed behavior and good works have not been prerequisites. Parents have not had to promise to behave in a certain way or compromise. Support is given first, and change follows. The clergy have modeled new behaviors by the way they relate to both parents and each other. They have focused on the needs of all family members and have helped find workable solutions for the future. They have been persistent through multiple mediation sessions. They have held out hope, assuming parents can reach agreement. Human grace can become a powerful presence with the participation of the clergy.

Two of the most important things mediators have done in establishing a meditative atmosphere have been to (1) assume both parents are deeply afraid of losing the relationship with their children and (2) try to alleviate the parents' fears. Instead of suspecting the parents of using the issue of the religious upbringing of their child as an adversarial tactic in the dissolution of their marriage, the Project wants mediators who can assume that, because parents are in the process of losing the love relationship they probably entered into with an abundance of hope, they are experiencing an irreducible pain and may have developed a deep fear of losing their relationship with their children. Mediation needs to hold out the possibility that losing one's relationship with the children is not a necessary corollary to the dissolution of their marriage. The Project insists mediators work with this fundamental assumption, even if it ultimately turns out to be false. In contrast to discovering parents' interests by asking directly what they would like to accomplish in the mediation, one of the ways to search for their underlying interests is by listening carefully for any expressions of fear. After a mediator has an understanding of the underlying interests, the mediator is then in a position to conduct the mediation process in a way that helps alleviate those fears.

Reframing the "best interests of the child" standard into a workable mediative approach has been helpful in alleviating parents' fears. Parents come to the mediation with an understanding of the court system that stands in the way of their negotiations. Unfortunately, whether in the court system or the mediation room, there is no precise answer or formula as to what in fact is in the "best interests of the child." Indeed, it is that very issue and its application in divorce proceedings which has absorbed so much court time when custody and child-rearing disputes arise.⁴¹ The Project's experience

41. ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT 94 (2005).

with these cases reveals that trying to agree on the meaning of the “best interests of the child” keeps parents locked in positional bargaining.

The Project’s mediative approach is to focus the discussions on one of the factors involved in the judicial determination of the application of the standard—Which parent is more likely to promote a good relationship with the other parent?⁴² When setting up the mediation, the mediator tells the parents that they will be asked to evaluate every proposed option for settlement by assessing the extent to which it will promote a good relationship between the child and both parents. The underlying premise is that only the marriage is being dissolved, not the family. The family, like a corporation on the brink of disaster, is being reorganized. The mediative work becomes focused on the relationships of all of the family members. With the hope that only the marriage is being dissolved, not the relationships of the family members, most parents have been able to participate constructively, working toward the goal of encouraging the children to have a good relationship with both parents. Instead of refusing to take any responsibility for the breakdown of the marriage and acting as if the other is unworthy of any consideration, they begin to demonstrate a different attitude towards each other. The spouse is no longer regarded as the only one who has committed wrongs in the past. Instead, each is willing to see the other as an accomplice in destructive behavior. When parents receive the mediation process in place of the adversarial system, and when they experience people standing with them, the fear of abandonment by one’s children is slowly taken off the table and most parents are able to stop their destructive behaviors. This demonstrates the analysis of Augustine, that what one receives can make a difference in what one chooses to do.

VI. SUBJECT MATTER NEUTRALITY FOR MEDIATORS

The most common response when describing the Project to non-participants is the assumption that these parents are only using religion as a way to fight with their spouses, gain leverage for future litigation, or both. Although sources of ethical obligations focus on the mediator’s bias as between the two parties,⁴³ the prevalence of this perception of the parties has

42. ILLINOIS MARRIAGE AND DISSOLUTION OF MARRIAGE ACT, 750 ILL. COMP. STAT. 5/602(a)(8) (2006) (listing as a factor in determining custody “the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child”).

43. *See* ILLINOIS UNIFORM MEDIATION ACT, 710 ILL. COMP. STAT. 35/9 (2004) which provides:

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(a) Before accepting a mediation, an individual who is requested to serve as a mediator shall:

(1) make an inquiry that is reasonable under the circumstances to determine whether there are any known facts that a reasonable individual would consider likely to affect the impartiality of the mediator, including a financial or personal interest in the outcome of the mediation and an existing or past relationship with a mediation party or foreseeable participant in the mediation; and

(2) disclose any such known fact to the mediation parties as soon as is practical before accepting a mediation.

(b) If a mediator learns any fact described in subsection (a) (1) after accepting a mediation, the mediator shall disclose it as soon as is practicable.

(g) A mediator must be impartial, unless after disclosure of the facts required in subsections (a) and (b) to be disclosed, the parties agree otherwise.

Id.

See also MODEL RULES OF PROF'L CONDUCT R. 1.12(a) (2010) (“[A] lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer . . . or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed consent”); ABA MODEL STANDARDS OF CONDUCT FOR MEDIATORS (Sept. 2005).

STANDARD II. IMPARTIALITY

A mediator shall decline a mediation if the mediator cannot conduct it in an impartial manner. Impartiality means freedom from favoritism, bias or prejudice.

B. A mediator shall conduct a mediation in an impartial manner and avoid conduct that gives the appearance of partiality.

1. A mediator should not act with partiality or prejudice based on any participant’s personal characteristics, background, values and beliefs, or performance at a mediation, or any other reason.

2. A mediator should neither give nor accept a gift, favor, loan or other item of value that raises a question as to the mediator’s actual or perceived impartiality.

3. A mediator may accept or give de minimus gifts or incidental items or services that are provided to facilitate a mediation or respect cultural norms so long as such practices do not raise questions as to a mediator’s actual or perceived impartiality.

C. If at any time a mediator is unable to conduct a mediation in an impartial manner, the mediator shall withdraw.

resulted in the Project's careful screening of potential mediators for possible suspicion they may hold against one or both parties. Even when a potential mediator can assume the parties truly believe in the merits of their respective positions, as destructive as they may be, the Project takes the position that the mediator would not be able to establish a mediative atmosphere if such bias existed. Additional screening takes place for bias with regard to the subject matter of the dispute—commitment of the parents to a religion, to no religion, or to a secular understanding of existence.⁴⁴

STANDARD III. CONFLICTS OF INTEREST

A. A mediator shall avoid a conflict of interest or the appearance of a conflict of interest during and after a mediation. A conflict of interest can arise from involvement by a mediator with the subject matter of the dispute or from any relationship between a mediator and any mediation participant, whether past or present, personal or professional, that reasonably raises a question of a mediator's impartiality.

Id.

44. See MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION IV (2001). A family mediator shall conduct the mediation process in an impartial manner. A family mediator shall disclose all actual and potential grounds of bias and conflicts of interest reasonably known to the mediator. The participants shall be free to retain the mediator by an informed, written waiver of the conflict of interest. However, if a bias or conflict of interest clearly impairs a mediator's impartiality, the mediator shall withdraw regardless of the express agreement of the participants.

1. Impartiality means freedom from favoritism or bias in word, action or appearance, and includes a commitment to assist all participants as opposed to any one individual.
2. Conflict of interest means any relationship between the mediator, any participant or the subject matter of the dispute, that compromises or appears to compromise the mediator's impartiality.
3. A family mediator should not accept a dispute for mediation if the family mediator cannot be impartial.
4. A family mediator should identify and disclose potential grounds of bias or conflict of interest upon which a mediator's impartiality might reasonably be questioned. Such disclosure should be made prior to the start of a mediation and in time to allow the participants to select an alternate mediator.
5. A family mediator should resolve all doubts in favor of disclosure. All disclosures should be made as soon as practical after the mediator becomes aware of the bias or potential conflict of interest. The duty to disclose is a continuing duty.
6. A family mediator should guard against bias or partiality based on the participants' personal characteristics, background or performance at the mediation.

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If a person commits to a religious faith, the Project assumes he or she believes it to be a true religion. However, in order to obtain membership on the panel of mediators, the Project does not insist that one believes in a particular faith, or in any faith at all. What the Project deems important is that, despite his or her own personal choices, the potential mediator accepts these possibilities: that there may be only one true religion, there may be more than one true religion, or maybe there is no true religion. If the individual can accept these possibilities, an assumption is made by the Project that this potential mediator probably would be able to remain neutral about the subject matter of these cases and thus not treat the parties with a bias.⁴⁵

VII. CONCLUSION

One of the highest priorities in the design of any in-house or stand-alone dispute resolution system is to create a mediative atmosphere so parties can participate productively. Much can be learned from the literature that presents the theoretical underpinnings of the mediation process and the writings that make practical applications of the theory. There is also much to be learned from the practical experience of mediators who assist parties in solving their disputes. Building on the experience of the DePaul Interfaith Family Mediation Project, which has witnessed the positive impact of combining insights from other disciplines with existing theory and practice, it is assumed that further exploration into insights that could be gained from other disciplines should prove to be very beneficial in the design of dispute resolution systems and the mediation process.

7. A family mediator should avoid conflicts of interest in recommending the services of other professionals.

8. A family mediator shall not use information about participants obtained in a mediation for personal gain or advantage.

9. A family mediator should withdraw pursuant to *Standard IX* if the mediator believes the mediator's impartiality has been compromised or a conflict of interest has been identified and has not been waived by the participants.

Id.

45. The author's thinking on this issue has been greatly aided by the work of Schubert Ogden. See generally SCHUBERT M. OGDEN, *IS THERE ONLY ONE TRUE RELIGION OR ARE THERE MANY?* (1992).

