

SB

302

BILL NO: SB 302 DATE: March 25, 1988

TITLE: An Act relating to CONTACT: Barbara Miklos
mediation in divorce actions Executive Director
Council on Domestic
Violence and
Sexual Assault

MAR 29 1988

DEPARTMENT OF
PUBLIC SAFETY

SB 302 would change AS 25.34 to require mediation of custody or of visitation with a minor child in a contested divorce action. Current law permits one party to request mediation or the court may order mediation in divorce cases. If mediation occurs, it is conducted informally, the parties and a court-appointed representative of any minor children are required to attend, and counsel is permitted to attend all the conferences. After the first conference, either party may withdraw or the mediator may terminate mediation if the mediator determines that mediation efforts are unsuccessful. Upon withdrawal, the court is notified and divorce action proceeds in the usual manner.

Under SB 302 the court is required to order mediation if custody of, or visitation with, a minor child is a contested issue in a divorce action. At least six hours of mediation is required. However, mediation is waived if, during the marriage, there has been a finding under AS 23.35 of sexual or physical abuse of a child or spouse by either party. The bill sets out qualifications for a mediator. Mediation is to be conducted informally, with the public excluded but the court "may allow persons to attend a conference if their attendance is compatible with the purposes of mediation." Counsel for the parties may not attend the conference, unless the mediator determines that counsel for both should be present.

POSITION

The Council on Domestic Violence and Sexual Assault opposes SB 302 for the following reasons:

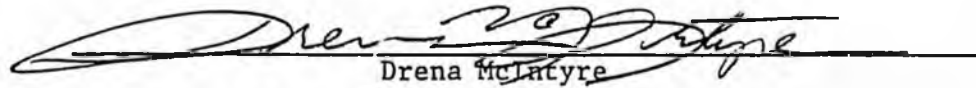
- * It requires mediation in the area of law where mediation is least likely to be successful. Mediation depends on equality of personal, social and economic power between the disputing parties. It is a self-directed rule-free process where each party is his or her own advocate. However, the reality of the relationship between men and women in our society is that in general women do not have equal personal, social or economic power to that of men.
- * Mediation is most harmful to victims of domestic violence or sexual assault. Violence further distorts the balance of power in a relationship. Violent men physically and psychologically coerce women, by domination and intimidation. Women who are severely intimidated and frightened of the violence will not be able to make independent decisions in their own best interests or those of their children. Mediation cannot address the violence. Domestic violence and sexual assault occur much more

frequently than may be suspected. A recent study by Stockholm and Helms which surveyed women in Alaska on the extent of abuse of women by their spouses or live-in partners found that 26% of the women had been abused as adults during their lifetime. It is often difficult for victims in rural areas to obtain an injunctive relief order. Also, relief orders are rarely obtained in child abuse cases. Since this bill requires that there has been a finding of physical or sexual abuse under AS 23.35 (injunctive relief orders), there will be many victims of physical or sexual abuse, both children and adult women, who could have been abused but have not obtained an injunctive relief order. If the bill is retained, it should at least include adjudication of physical or sexual abuse of children.

- * To be effective, mediation must be voluntary. Under SB 302, mediation is mandatory. Mediation fails where there are truly irreconcilable differences, no common interests, and where both parties are not committed to the process. Research on conflict resolution also indicates that to the extent that one or both parties feel coerced, negotiations will be deadlocked or agreements that are reached are likely to fail to be implemented. In one study conducted in California (Zemmelman, et. al.) mediation failed for approximately 20% of the families.
- * Counsel is not permitted to attend the mediation hearings unless the court decides both will attend; however, "other persons" may attend if their attendance is compatible with the purposes of mediation. Who would such "other" persons be? To prohibit attorneys from attending further puts the women's rights in jeopardy.
- * The qualifications of mediators will be very difficult to measure and qualified mediators as defined by SB 302 will not be available statewide, which means mediation will only be required in urban areas of the state. Standards and training in the fledgling mediation field are still being debated.
- * Mediation cannot adequately protect the rights of women and children. As Schulman and Woods state: "Divorce and custody are first and foremost legal and financial problems which must be handled by trained lawyers or legal advocates. Women and children require the benefit of the full weight of our legal system with protections built in over the centuries, with rules of evidence, court reporters and an open court system. Women have never

fared well in a system that operates, as mediation does, behind closed doors and without strict legal protections. In mediation it is possible for women to unwittingly bargain away financial or custody rights which a trained lawyer, aware of the full legal ramifications of the professed 'solutions,' could have secured. Communications with mediators are not confidential and women can jeopardize their chances for securing child custody, divorce or alimony by making statements that could later be used against them in court."

- * Mediators would have no power or authority to require the parties to disclose financial information. In mediation, the wife and mother must rely on the good faith of the husband to provide the information. In contested divorce cases, it is naive to think that good faith will ensure fairness. The legal system offers a number of methods to compel the disclosure of financial information. In addition, there are legal safeguards to protect the assets once court proceedings are under way. In mediation proceedings, there would be no such protection.
- * Finally, who would pay for the costs of mediation? Six sessions would be costly. Would the court system pay for these sessions?



Drena McLartyre

Chair, Council on Domestic Violence and Sexual Assault

FISCAL NOTE

REQUEST:

Revision Date: _____
 Title: An act relating to mediation in divorce actions
 Sponsor: Duncan
 Requestor: Senate Judiciary
 Agency Affected: Public Safety
 BRU: Council on Domestic Violence and Sexual Assault
 Components: _____

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0

CAPITAL						
---------	--	--	--	--	--	--

REVENUE						
---------	--	--	--	--	--	--

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

Prepared by: Barbara Miklos, Exec. Director *BGM* Phone: 465-4356
 Division: Council on Domestic Violence & Sexual Assault Date: 3/2/88
 Approved by Commissioner: Paula Hootoni, Dep. Comm. Date: 3-25-88
 Agency: Dept. of Public Safety

Distribution (by preparer):
 Legislative Finance
 Legislative Sponsor
 Requestor
 Office of Management and Budget
 Impacted Agency(ies)

Alaska Dispute Resolution Association

HOMER • c/o Peninsula Mediation, P. O. Box 1044, Homer, AK 99693 - Phone: 235-6417
ANCHORAGE • c/o Laisner Mediation Service, 2052 Eastridge Dr., Anchorage, AK 99501 - Phone: 276-1355
TAD-BANKS • c/o Interior AK Dispute Resolution Service, Box 81596, College, AK 99708 - Phone: 456-6556

mp only
Beth

December 17, 1987

JAN 28 1988

Senator Jalmar M. Kerttula, Chairman
Judiciary Committee
P.O. Box Z
Palmer, Alaska 99645

Dear Senator Kerttula,

In September of this year a group of professionals from around the State involved in the practice of alternative dispute resolution met and formed the Alaska Dispute Resolution Association. We believe that mediation is an excellent alternative for dispute resolution, and would like to see dispute resolution addressed on a Statewide level. This organization would like to be involved on a task force that explores alternative dispute resolution (ADR) on a Statewide level, and has input into legislation that may be considered.

While we support the concepts of Senate Bill #302 that was introduced last year, we feel that there are major problems with this bill. We feel that the Bill is premature, was written without thorough research in the subject of alternative dispute resolution, and that the most appropriate action at this time would be to postpone action on this bill until it is clear what the legislation is meant to accomplish. We would like to see Alaska be a leader in supporting legislation for alternative dispute resolution, therefore we feel that it is imperative that legislation that is adopted by this State be well thought out and consistent with what national leaders in the field of dispute resolution feel is appropriate.

Major problems we see in SB 302 include: 1) Section 1 (i), qualifications of a mediator. While we feel that certification requirements and qualifications are important, we do not feel that the qualifications listed here are appropriate. We feel that the most important qualification is mediation training. On a national level, 40 hours from a certified mediation training program is standard. We feel that an education is important, but also feel that substantial experience (possibly 3 yrs.) could be substituted for a degree. At this time there are no national guidelines for certification. Organizations that are prominent in the field of alternative dispute resolution (ADR) (Society of Professionals in Dispute Resolution

(SPIDR), Academy of Family Mediators) are looking into the process of certification, but have not yet made any recommendations. We feel that the State of Alaska should be consistent with what is happening on a National level.

2) Section 1 (a). This bill requires mandatory mediation in child custody disputes, but does not address the question of funding. If the State requires mediation, will the State also pay for it? What about those that can't afford to pay? What will prevent abuse of the process of mediation? Will the process be taken less seriously if the disputing parties are not required to pay in some way for the services.

3) Section 1 (c). This bill waives mediation if there has been sexual or physical abuse of a child or spouse. We do not feel that evidence of sexual or physical abuse should necessarily eliminate the process of mediation. Mediation may not be appropriate in all cases, but should not be routinely discarded.

4) SB 302 does not address the confidentiality issue. Confidentiality of all aspects of the mediation process is essential for open, honest negotiation during dispute resolution. It is critical that each party know that the mediation and the mediator cannot be used as evidence or witness in any subsequent court proceeding.

Other areas in which the State could become involved in dispute resolution include landlord/tenant, insurance, small claims, or environmental disputes. As an alternative to the court system, we would like to see the State fund a program for alternative dispute resolution (ADR). Education is a large part of ADR. We would like to see the State fund educational programs in methods of alternative dispute for the schools as well as for the general public.

We have contacted the American Bar Association Standing Committee on Dispute Resolution and asked for them to send appropriate copies of legislation that have been passed in other States. We will be happy to share this information with the Alaska legislature in order to help determine what is best for our State.

We are hoping that the Alaska Dispute Resolution Association can work together with the Alaska legislature to make alternative dispute resolution (ADR) a reasonable and responsible process and choice for the people of Alaska. Governor Cowper discussed mediation in point 12 of the State of the State address recognizing this important process. Together we can make the alternative dispute resolution more known and used in our state. This will benefit all Alaskans. ADR has great potential!

We look forward to hearing from you.

Very sincerely,

Sara Spichinsky
for the Alaska Dispute Resolution Association

PENINSULA MEDIATION
P.O. Box 1044
Homer, Alaska 99603
(907) 235-6417

January 25, 1988

FEB 1 1988

Senator James Duncan
Alaska State Legislature
P.O. Box V
Juneau, Alaska 99811

Bill

Re: Senate Bill No. 302

Senator Duncan,

I am a trained mediator with a private practice in Homer, Alaska. I am a member of Alaska Dispute Resolution Association (ADRA).

Your time, energy and efforts in sponsoring Senate Bill #302 are most appreciated. I fully support alternative dispute resolution (ADR) and hope that the State of Alaska will support mediation.

Reasons to support mediation in this state include:

1. Mediation is easier on families than contested divorces. It does not put the parties in adversarial roles. The outcome of mediation benefits both parties. Since the mediated decision is the result of mutual participation, the result is more readily acceptable and compliance is expedited.
2. Studies have consistently shown a higher rate of satisfaction with agreements negotiated in mediation over those reached in litigation. (Stephen Bahr, "Mediation is the Answer," Family Advocate, Vol. 3, No. 4, Spring 1981. (Am. Bar Asso Family Law Section) pp. 32-35.)
3. Mediation is generally less expensive than the legal system.
4. Through mediation the parties gain a model process for future dispute resolution.
5. Mediation is usually less time consuming than litigation.
6. Mediation expands the range of possible remedies.

I have reservations in supporting Senate Bill #302. Problems I see with this bill are as follows:

1. Section 1 (i). Qualifications of a mediator. Certification is important, however, those listed are not appropriate. The most important qualification is mediation training. There are no national guidelines at this time. However, many national ADR organizations are in the process of writing guidelines for qualifications. I would suggest that the State of Alaska look at national organizations and structure qualifications that are consistent with national guidelines.
2. Section 1 (b). Who will pay for mandatory mediation?

3. The confidentiality issue must be addressed. Confidentiality of all aspects of the mediation process is essential for open, honest negotiation during dispute resolution.

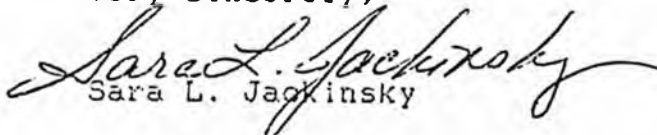
4. Section 1 (c). Evidence of sexual or physical abuse should not necessarily eliminate the process of mediation.

I would like to see a comprehensive mediation bill that addresses child custody disputes as well as other disputes, such as landlord/tenant, insurance, other family disputes, small claims, or environmental disputes. I would like to see the State support and fund conflict resolution training in the school system.

I would be happy to work with your office, or to be involved on a task force that addresses mediation in the State of Alaska. I think that it is imperative that the Alaska legislature support mediation in this State.

Thank you for your support and efforts.

Very Sincerely,


Sara L. Jackinsky

cc A.D.R.A., Cowper, Fisher, Kerttula, Gruenberg, Navarre,
Swackhammer, Ulmer