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The Hendershott Ruling: When Mediation Runs into Domestic Violence

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When mediation runs into domestic violence

By **Eduardo R.C. Capulong** & **Karen Alley**

Family law cases with a history of domestic violence cannot be mediated, the Montana Supreme Court has held. In a case of first impression, a unanimous Montana Supreme Court held in April that MCA §40-4-301(2) bars district courts in family law proceedings "from authorizing or continuing mediation of any kind where there is a reason to suspect emotional, physical, or sexual abuse."[1]

The ruling shows great sensitivity to a problem that has reached crisis proportions in Montana and the rest of the country, and it very well may be the broadest exception to court-mandated family mediations to date.[2] The challenge now is to ensure that the decision is implemented statewide. The courts, bar, mediators, and domestic-violence advocates must collaborate to create a protocol and mechanism by which to screen such cases. This means outreach and training.

The Montana Supreme Court's decision may well be the broadest exception to court-mandated family mediations to date.

Since mediation is meant to empower parents to freely design arrangements best suited to their family's specific needs – an aim compromised by many, but not all, instances of domestic abuse – Montana ought to consider a way by which parties can opt into an alternative dispute-resolution process.

Hendershott v. Westphal involved a Flathead County District Court's approval of a parenting plan that included a mandatory mediation provision. Heidi Hendershott appealed, citing MCA §40-4-301(2), which states that:

> The Court may not authorize … mediated negotiations if the court has reason to suspect that one of the parties . . . has been physically, sexually, or emotionally abused by the other party.[3]

Hendershott argued that the District Court had reason to suspect physical and emotional abuse. She submitted an affidavit stating that she and her children had suffered escalating incidents of emotional and physical abuse from Jesse Westphal.[4] At trial, two psychologists also testified that Hendershott exhibited traits of an abused woman.[5]

The Montana Supreme Court agreed, holding that the District Court erred as a matter of law for failing to apply MCA §40-4-301(2).[6] The evidence before the District Court showed enough reason to suspect emotional abuse, the Supreme Court found. And as an absolute bar to mediation given this minimal "reason to suspect" standard – a standard akin to that which obligates teachers and doctors to investigate abuse – a district court had no discretion, as here, to specially tailor a process by which to mitigate such issues.[7]

The Court also noted a discrepancy between §40-4-301(2) and MCA §40-4-219, which applies to mediation of parenting plan amendments, and provides an exception only in cases of physical abuse; §40-4-301(2) includes emotional as well as physical abuse.[8] Finally, the Court observed that §40-4-301(2) prohibits the use of alternative dispute resolution generally, arguably expanding the statute to cover not only mediation but settlement conferences as well[9] – "the hot-button issue," Monte Jewell, who represented Heidi Hendershott, tells us, as many practitioners insist that settlement conferences are not mediations. That may be so. But the decision referred not only to mediation but to "alternative dispute resolution,"[10] which may include settlement conferences. This broader import of Hendershott may impose a greater task on district courts.

The decision strikes a welcome balance between the promise of mediation and the realities of domestic violence. The court is, more often than not, an inappropriate venue for familial dispute – hence the routine referral of parenting cases to mediation. At the same time, domestic violence often robs victims of meaningful choice – a fundamental requirement of mediated agreement. By recognizing that mediation must be consensual, that is, free from any physical or emotional coercion attending domestic abuse, the court protects domestic violence victims and the mediation process.[11]

BUT THIS IS JUST the first step. There very well may be instances in which mediation can empower domestic violence victims. Experts distinguish among four general types of domestic abuse:

- Battering situations characterized by coercive control through violent behavior and other abuse.
- Situations characterized more by a batterer's weak impulse control, influenced perhaps by concurrent alcohol or chemical abuse.
- Situations involving self-defense by the victim.
- Isolated acts of violence that do not allow one party to coercively control the other.

Chronic battering situations are clearly inappropriate for mediation – and these situations are likely what the Legislature and Supreme Court had in mind in carving out the exception.

But what about the other situations? Can't mediation actually provide an empowering forum for victims under these circumstances?

The answer is, of course: it depends. As a threshold matter, courts and mediators must be able to distinguish among these four situations. Cases involving chronic battering are never appropriate for mediation. As for cases involving poor impulse control, self-defense, and more isolated acts of violence, district courts may need to decide their propriety for mediation ad hoc. This means training – for judges, court personnel, mediators, attorneys and survivors. In such instances, appreciating the complexities of domestic violence and advantages of mediation may call for an opt-in process.

IT IS NOT CLEAR from *Hendershott* or the legislative history of §40-4-301(2) if a survivor can opt-in to mediation. Under an opt-in provision, a survivor would be able to decide whether or not to mediate after orientation on the nature of domestic violence, mediation, and litigation. Because survivors are most familiar with their own situations, they ought to be given the opportunity to choose the forum in which to assert their claims.[12]

Several states allow victims to opt in to mediation under certain circumstances. Those circumstances include cases in which:

- The survivor voluntarily chooses or proposes mediation.
- There is an available mediator trained in the way domestic violence affects a survivor.
- The survivor has a support person (either an attorney or a victim's advocate).
- The mediation is specially structured to ensure the survivor's safety.[13]

Some states also require courts or mediation centers to adopt a screening protocol.[14] Such a protocol is meant to help courts and mediators evaluate whether domestic violence has occurred and, if so, of what nature. Screening protocols also could help assess whether a survivor is able to mediate or falls into the category of "battered," rendering mediation inappropriate. Under these statutes, the screening process is multi-tiered, requiring both the courts' staff and the mediator to screen parties. In such processes, both parties should be carefully questioned about whether there is a history of domestic violence, the extent of the violence, and whether the survivor, in particular, feels able to communicate with her former partner. Where the mediator is involved in screening parties, the mediator can determine how to structure the mediation to best meet the needs of the survivor, if the survivor chooses to mediate.

All states that allow for a survivor to opt-in to mediation require that the mediator be specially trained to understand the subtle dynamics at play in domestic violence cases. The mediator must be able to understand the psychological impact of domestic violence on a survivor, as well as be able to recognize nonverbal cues that the abuser may use to control the victim. Further, the mediator needs sufficient training to understand how to balance the power between the parties.

IF NOTHING ELSE, *Hendershott* presents us with the opportunity to educate each other about domestic violence. How are such cases different from "high-conflict" situations – so often the paradigm through which courts and mediators analyze and resolve family disputes? Which cases should courts decide and, if so, how? Beyond the assumption that courts are better equipped to handle cases of domestic violence, how are survivors actually treated? (Here, we need to assess empirically the oft-idealized nature of litigation.) Which cases, if any, can mediators handle and, if so, how?

Courts and mediators cannot do this alone. Advocates not only need to get involved in screening for domestic violence cases and training judges, court personnel, attorneys and mediators; they also need to help survivors through any mediation process through their perspective, resources and support.

Hendershott reaffirms that domestic violence is a matter of public concern. As critics have long contended, mediation can re-privatize this important social problem by its private, informal, confidential nature. To adequately address domestic violence and at the same time remain true to the promise of self-determination through mediation and alternative dispute resolution, we must design and implement systems equal to the letter and spirit of this important ruling.

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NOTES

1. *Hendershott v. Westphal*, 2011 MT 73 ¶ 31 [hereinafter *Hendershott*].

2. Colin Miller, *FeministLawProfessors.com*, "Exception(al) Opinion: Supreme Court of Montana Opinion Might Mean Montana Has Broadest Abuse Exception to Court-Ordered Mediation," *www.feministlawprofessors.com/2011/05/exceptional-opinion-supreme-court-of-montana-opinion-might-mean-montana-has-broadest-abuse-exception-to-court-ordered-mediation/* (last visited May 18, 2011). The Montana Attorney General's office notes that the "rate of domestic abuse in Montana has remained unacceptably high. The rate of domestic violence offenses reported to law enforcement in … 2007 was 462 reported domestic violence offenses for every 100,000 people. Each year, approximately five out of every 1,000 Montanans are victims of reported cases of domestic violence - and that doesn't include those who don't seek help and suffer in silence." *www.doj.mt.gov/victims/domesticviolence.asp* (last visited May 19, 2011).

3. Emphasis is ours.
4. *Hendershott*, supra note 1 at ¶ 3.
5. *Hendershott*, supra note 1 at ¶ 11.
6. *Hendershott*, supra note 1 at ¶ 32.
7. *Hendershott*, supra note 1 at ¶ 31.
8. *Hendershott*, supra note 1 at ¶ 33.
9. *Hendershott*, supra note 1 at ¶ 32.
10. *Hendershott*, supra note 1 at ¶ 32.

11. We do note with dismay, however, the Court's rejection of Hendershott's argument that mediation can only be authorized "only where both parties consent." *Hendershott*, supra note 1 at ¶ 21.

12. Aimee Davis, "Mediating Cases Involving Domestic Violence: Solution or Setback?," 8 Cardozo J. Conflict Res. 253, 272 (2006).

13. See, e.g., Alabama Code § 6-6-20; Alaska Stat. § 25,24,060; Hawaii Rev. Stat. § 580-41.5; Kentucky Rev. Stat. Ann. § 403.036; New Mexico Stat. An. § 40-4-8; 12 Oklahoma Stat. Ann. §§ 1801-1813; Tennessee Code Ann. § 36-4-131. This list is not exhaustive but is representative of states with an opt-in provision.

14. See Alabama Code § 6-6-20; Alaska Stat. ¶ 25,20,808; Oregon