

2018 Hawai'i Access to Justice Conference
"Fighting for Access to Justice for All"
Friday, June 29, 2018

Workshop summary:¹

"Alternative Dispute Resolution in Family Court Cases"

Presenters: Judge Catherine Remigio, Deputy Chief Judge, Family Division (facilitator); Judge Kevin Morikone, District Family Court Judge; Katherine Bennett; Judge Dyan Medeiros

Judge Catherine Remigio began with an overview of the mission of Family Court and the reasons for the Court's commitment to alternative dispute resolution. The mission of Family Court is "to provide every family, child, and individual under its jurisdiction with equal access to fair, efficient, culturally aware, and timely justice. It is a court committed to therapeutic and restorative justice within the parameters of the law." However, the number of cases at Family Court makes it challenging to fulfill this mission. Often, only 12-17 minutes are allotted for child support, custody, or pre-decree hearings. The TRO calendar averages only 14 minutes per case, which doesn't include the time it takes to read a protective order to ensure all parties understand it. This difficulty is intensified when parties are pro se or require an interpreter. The Court has a self-help desk and the Access to Justice room, but information and access does not equal case closure, which is why the court works hard in the area of alternative dispute resolution. Settling cases saves time and money and prevents the trauma and negative impact of prolonged cases on children and families.

Katherine Bennett discussed the Child Welfare Mediation Program, which began in 2016 here on Oahu. This program attempts to settle the case before trial or towards the end of the case if there will be a motion to sever parental rights. Usually the program involves both parents and their counsel, GAL, child welfare services social worker, and the foster parents. Everyone has an opportunity to sit down together and talk about practical solutions in a collaborative, rather than adversarial, mindset. Mediation attempts to bring everyone back to the same purpose and common goal—the best interests of the child. In the first quarter of 2018, 19 mediations were scheduled, and 14 of those were held. Of those held, 72% settled and 14% were partially settled.

Katherine Bennett also discussed the Onsite Paternity Mediation Program, which provides free mediation services for paternity cases. Judges mostly refer double pro se cases, but sometimes there are one or two attorneys involved. Generally, it is a relatively fast mediation, but parties can ask for continued

mediation at Mediation Center of the Pacific at no cost. Usually the program conducts two or three mediation sessions in a morning, especially when the cases involve small issues like exchanging info about insurance. Often mediation is simply about a child-focused time-sharing schedule. Ms. Bennett advocates for involving third parties in the mediation process if they will have a stake in the outcome, such as grandparents.

Katherine Bennett also shared her perspective on why cases do or do not settle, which she characterized as a shift in mindset from adversarial to the interests of the child. She also emphasized the importance of mediators with subject matter expertise. For example, it's helpful to have an understanding of child development, overnights, attachment. It's rare that a case doesn't have substance abuse, mental health, or domestic violence issues, and mediators need to understand abuse and control and power dynamics. By understanding these issues, mediators can know when mediation is not appropriate. Most attorneys are acting as co-mediators, helping to settle a case. Sometimes attorneys give bad advice about likely outcomes, and those mediations tend to fail. But when parties work beyond the first offer and don't give up, eventually most cases do settle. Ms. Bennett shared that she often likes to give people time to think about an offer and to talk to the appropriate people in order to make sure they are comfortable with the settlement.

Ms. Bennett clarified that in cases where there is a TRO, there's a presumption against mediation, but sometimes the survivor does want to do it, and mediation can be easier than trial. Sometimes mediators can keep parties separate, or make sure there's a lawyer for the survivor. In those cases, mediators make sure that the arrangement is one where the abuser doesn't have control and survivor doesn't need to have direct contact with the abuser moving forward.

Judge Kevin Morikone shared his perspective on mediation, emphasizing how these agreements are better for the parties and for the court. In private practice, mediation and arbitration made up 70%-80% of his work, so this is the lens that Judge Morikone brings to Family Court, even though the subject matter is different. The same tools and methods are in place, such as managing client expectations, having clients focus on cost versus benefit, and having clients focus on the big picture. Mediation in Family Court allows parties to be heard and facilitate an agreement that everyone can live with. When parties settle, it's a stronger agreement and gives them a better chance of solving future issues together. The Court's perspective is that it's not good enough to say parties are too far apart for mediation, and Judge Morikone works to ensure that parties are using their good faith effort to settle before coming to court asking a judge for help.

Judge Kevin Morikone discussed the different points in a case where parties can work on a settlement. If parties are represented by counsel, then

they are typically referred for private mediation. If parties are pro se, Mediation Center of the Pacific is available. Judge Morikone treats a Motion to Set as a mini settlement conference and will at least resolve what he can to help streamline the case. If they do set a trial and settlement conference, then they go through the same process again, trying to help parties meet somewhere in the middle. At a settlement conference, judges receive position statements, but don't often see confidential settlement letters. However, these letters are very helpful because they can help focus on what's really at stake or at issue within the case and then better assist with settlement. Judge Morikone's goal is to stabilize the situation and promote mediation, and ultimately make decisions for people who can't settle. Parties should be prepared to stay all afternoon and even beyond, because Family Court will work through lunch and into the nighttime in certain cases.

Judge Dyan Medeiros discussed the Volunteer Settlement Master program, where family law practitioners serve as quasi-mediators for divorce cases, providing three hours of free mediation services. Many VSMs will provide more than three hours if they are making progress, but that is at their discretion. Any kind of case can be referred to a VSM, and every VSM runs differently. For example, some VSMs have office space to keep parties separate, something critical in cases with a TRO. Even if a VSM doesn't settle a case, they help lay a foundation, and by the time the parties get to the judge they hopefully heard the same legal information along the way, making settlement much easier.

Judge Dyan Medeiros discussed some of the difficulties in settling a case with a TRO. There may have been significant domestic violence issues with long term battery, or it may have just been one incident, but it doesn't really matter because either way, there will be a whole range of emotions between parties. These cases aren't impossible to settle, but parties must stay separate, and that the survivor feels safe enough and empowered enough to express what they want. Sometimes parties don't believe that the abuser will be a danger to the children, and it's important to listen to them but also question them a little bit to make sure what they are saying is realistic. TROs are complicated, but that doesn't mean that the case can't settle.

Judge Dyan Medeiros also discussed top reasons why cases don't settle, emphasizing that preparation is key. Attorneys need to prepare clients so that they understand what they can and cannot prove and how the law applies. Attorneys also need to prepare clients for the true financial and psychological cost of a trial, even from the first meeting. Cases settle because people are prepared and have the mindset to settle and are willing to be flexible. Sometimes one person has to be more flexible than the other, but creativity is important to find solutions that work for everybody. A settlement can be as creative as parties want within the bounds of law. As a judge, there are slim chances of creativity because often judges don't get all the information needed to be that creative. It's important for clients to understand that a judge may hear the evidence a number of ways, and to develop a range of what they could live with. Usually there is

some overlap between the ranges of what both parties would be willing to accept, and the best settlement outcomes are what people can live with and stay out of court.

Judge Catherine Remigio further emphasized the importance of attorneys managing client expectations. When attorneys over-promise and a VSM tells them that what they want is not a likely outcome, clients feel betrayed. Sometimes attorneys aren't prepared to settle, for example, sometimes attorneys appear at Family Court without updated financial statements or school schedules and are unable and clearly uninterested in settling. Even if parties only settle some issues, it's a better use of judicial time and a better outcome for the family.

¹ A draft summary was prepared by Heather Tanner, law clerk, Legal Aid Society of Hawaii, and reviewed by the presenters.