

HOUSE BILL REPORT

HB 2806

As Reported by House Committee On:
Civil Rights & Judiciary

Title: An act relating to mediation in family law cases involving children.

Brief Description: Concerning mediation in family law cases involving children.

Sponsors: Representatives Goodman, Fey and Davis.

Brief History:

Committee Activity:

Civil Rights & Judiciary: 2/4/20, 2/7/20 [DPS].

Brief Summary of Substitute Bill

- Revises standards for mediation in dissolution and legal separation proceedings.
- Requires mediation to be scheduled within 90 days in any matter regarding issues in a parenting plan, except dissolution and relocation. This requirement is subject to exceptions and the ability to opt out.

HOUSE COMMITTEE ON CIVIL RIGHTS & JUDICIARY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 11 members: Representatives Kilduff, Chair; Thai, Vice Chair; Irwin, Ranking Minority Member; Dufault, Assistant Ranking Minority Member; Goodman, Kirby, Klippert, Peterson, Rude, Walen and Ybarra.

Minority Report: Do not pass. Signed by 2 members: Representatives Hansen and Valdez.

Minority Report: Without recommendation. Signed by 2 members: Representatives Graham and Orwall.

Staff: Emily Williams (786-7291) and Edie Adams (786-7180).

Background:

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Mediation in Dissolution and Legal Separation.

In marriage dissolution and legal separation proceedings, the matter may be set for mediation before or concurrent to setting a date for a hearing. The purpose of mediation is to reduce acrimony between parties and to develop an agreement to assure that the child has continuing close contact with both parents.

Each superior court may make a mediator available. The mediation made available must be the most cost effective services that are readily available unless there is good cause. The mediator may be professional staff of a family court or mental health services agency, or anyone else designated by the court.

In proceedings involving issues covered in a parenting plan, parties may set mediation before or concurrent to setting a date for a hearing. The mediator must assess the needs of a child and may interview the child if the mediator deems it appropriate. Any agreement reached by the parties must be reported to the court and to the counsel of the parties. Some superior courts in Washington require mediation of parenting plans before a hearing.

Courts will generally not permit mediation in cases involving domestic violence or child abuse. Parties must be provided with access to trained domestic violence advocates in order to identify these cases. When the victim requests mediation, the court may permit it if it finds that it is appropriate under the circumstances. In those cases, the victim is permitted to have a support person present during mediation.

Parenting Plans.

In dissolution or legal separation cases in which there are minor children, the court must establish a parenting plan that provides for the care of the minor children. The parenting plan must include an allocation of decisionmaking authority to one or both parents, establish a residential schedule for the child, and provide for the resolution of future disputes between the parents.

The residential schedule designates in which parent's home the child resides on given days of the year. A court must consider specific factors when determining the child's residential schedule. A court may order that the child frequently alternate his or her residence between the parents for brief and substantially equal intervals of time if it is in the child's best interest. The court may consider the geographic proximity of the parties to the extent necessary to ensure the ability of the parents to share parenting functions.

Generally, a court may modify the residential provisions of a parenting plan only upon a showing of a substantial change of circumstances with respect to the child or the nonmoving party, and that the modification is in the best interests of the child. A person petitioning for a modification of the residential provisions must file an affidavit with supporting facts, and the court will deny the motion for a modification unless the court finds that adequate cause for the modification is presented in the affidavit.

When a parent with whom a child resides the majority of the time intends to relocate, he or she must notify every other person who has residential time or visitation with the child of the intent to relocate. A person may object to the relocation of a child through a petition for

modification of the parenting plan pursuant to relocation. "Relocate" means a change in principal residence either permanently or for a protracted period of time.

Summary of Substitute Bill:

Standards for mediation in dissolution and legal separation proceedings are revised, and a requirement for mediation is established in cases involving parenting plan issues, subject to exceptions.

Mediation in Dissolution and Legal Separation.

The purpose of mediation in dissolution or legal separation proceedings is to assist parties to reach agreements on contested issues. The mediator may be professional staff of a family court or mental health services agency, a dispute resolution center, or anyone else designated by the court. Counties may, and must if there is funding, provide mediation at a reduced or waived fee. The mediator may only interview a child if both parents agree the interview is appropriate or necessary. Any agreement reached by the parties must be memorialized in writing. The agreement is an enforceable contract and civil rule 2A agreement.

Mediation of Parenting Plans in Dissolution and Legal Separation.

In a proceeding involving parenting plan issues, except relocation or modification, the matter must be scheduled for mediation within 90 days after service and filing of responsive pleadings. The scheduling requirement may be excused for good cause. The purpose of mediation for issues in a parenting plan is to reduce acrimony that may exist between the parties and to seek to develop an agreement for a workable parenting plan.

Parties are exempt from mediation:

- where any of the following orders, except ex parte orders, exist with regard to one or both of the parties:
 - domestic violence protection orders, restraining orders, or no-contact orders;
 - stalking protection orders or no-contact orders;
 - sexual assault protection orders or no-contact orders; or
 - extreme risk protection orders;
- where a party chooses to opt-out of mediation because an impediment to mediation exists, including allegations of family or intimate partner violence, cognitive impairment, behavioral health disorder, or other circumstances that may render mediation inappropriate or would unreasonably interfere with the mediation process; or
- where a party chooses to opt out of mediation for any reason.

Either party may move to require mediation despite an exemption if both parties agree that they would be able to mediate their dispute at arm's length.

Each superior court must adopt a program and rules for mediation of parenting plan issues that address the following:

- qualifications for the mediator, including expertise and training;

- subject matter limitations, which must be limited to issues in a parenting plan, and processes for determining when an issue must be mediated;
- standards for providing mediation at a reduced or waived fee if a party is indigent or has a court order for a fee waiver; and
- a process by which parties may seek excusal under any of the exemptions through a form.

Substitute Bill Compared to Original Bill:

The substitute bill:

- removes the requirement that parties must address issues in a parenting plan in mediation prior to any court hearings for the establishment of a final parenting plan;
- removes the requirement that courts set rules for the number and length of sessions;
- removes the requirement that mediation is free if a party is indigent or has a court order for a fee waiver and instead requires courts to adopt standards for providing mediation at a reduced or waived fee if a party is indigent or has a court order for a fee waiver;
- changes the process that courts must create for excusal from mediation by allowing the party to seek excusal under any of the exemptions through a form;
- removes the exemptions for good cause shown and by motion when the court finds that domestic abuse has occurred between the parties and would interfere with mediation;
- reorganizes provisions for when parties may be excused from mandatory mediation because of a domestic violence protection order, no contact order, or restraining order;
- adds exemptions when there are stalking protection orders or no-contact orders, sexual assault protection orders or no-contact orders, or extreme risk protection orders;
- adds an exemption allowing a party to opt out of mediation because an impediment to mediation exists, including allegations of family or intimate partner violence;
- adds an exemption allowing a party to opt out of mediation for any reason;
- changes that standard when a party moves for mediation despite qualifying for an exception so that both parties must agree that they would be able to mediate their dispute at arm's length under the circumstances, instead of just the moving party; and
- makes various technical changes.

Appropriation: None.

Fiscal Note: Available.

Effective Date of Substitute Bill: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) The Alternative Dispute Resolution (ADR) Section of the Washington State Bar Association (WSBA) saw a need for statewide early mediation in divorce cases where children are involved because of the trauma to children during the divorce process. This bill has been two years in the making with a lot of input from various stakeholders, including the ADR and Family Law Section of the WSBA, and survivors of domestic violence and sexual assault. It is very important that this early mediation does not push survivors of domestic violence into mediation when they are already in a vulnerable position. To seek excusal for domestic violence, particularly when there has never been any legal indicia of the abuse, could provoke the abuser to further the abuse or an assault. It is important that this does not happen and that this bill does not make the situation worse for survivors of domestic abuse.

Tens of thousands of people who unfortunately find themselves ending their marriages every year will benefit from this early mediation process because it reduces time, cost, trauma to the children, and acrimony between the parties. Early mediation is effective because it provides an opportunity to foster cooperation and serves the best interest of children and families. Mediation in dissolution proceedings is already required in Thurston County. Eighty-five percent of parties who participate in early mediation have agreements that come out of the process. Over 90 percent found that being in mediation improved their situation by helping them develop greater understanding and improving communication between parents. Divorce can be very detrimental to children's health and early mediation can help alleviate this problem.

While there has been some question about whether there is the capacity to handle this mediation, the bill addresses this by giving courts the flexibility to come up with their own protocols for how to enact the mediation requirement. Early mediation is required in most small counties already, and it is the larger counties with bigger caseloads where it is not required. It does not seem like the smaller counties will have any problem with capacity.

(Opposed) Washington law states very clearly that mediation is generally inappropriate in cases of domestic violence and it is clear that this is true. Mediation is not good for survivors of domestic violence because abusers use the family court system to manipulate and intimidate survivors. In mediation, abusers often have an unfair advantage in terms of legal representation. Often information that survivors share during mediation is used against them later to gain custody of children. In addition, mediators are often not trained to work with survivors and force them to make decisions too quickly. There is concern that this bill will result in more survivors being forced to mediate early in family law cases with their abusers.

The domestic violence exceptions only apply if the victim can prove that they are a victim early in the dissolution process, and the exceptions are not sufficient to protect victims because they do not recognize the complexity of domestic violence. Many times people who are being abused do not identify themselves as victims. In addition, many domestic violence victims do not trust the court system or law enforcement to protect them from their abusers.

Divorce and separation is one of the most dangerous times for a person, and this is when over half of domestic violence homicides in Washington occur. This bill would not help survivors and it could create more risk for them. At the early stages of separation and divorce, the extent of an abuser's control is often not clear. Mediation so early in the process would place an incredibly high burden on people to identify themselves as a victim when it may not be

safe to do so. On many occasions survivors are afraid of deportation and abusers use that to force survivors into an agreement. Survivors fear that the abuser will no longer participate in a visa or green card process, and there is a real risk to the victims in not being able to parent their children.

(Other) There is concern about the financial impact of this bill on smaller, less affluent counties with respect to their independent abilities to implement a mediation program. In addition, there is concern about the use of the term domestic abuse because it is not defined.

Persons Testifying: (In support) Representative Goodman, prime sponsor; Jody Suhrbier, Resolution Washington; and Paul McVicker, Washington State Bar Association Alternative Dispute Resolution Section.

(Opposed) Judy Chen, Washington State Coalition Against Domestic Violence; Kris Camenzind, Hope Alliance; and Neetika Gupta, Lifewire.

(Other) Patrick Rawnsley, Washington State Bar Association Family Law Executive Committee.

Persons Signed In To Testify But Not Testifying: None.