

CHILD WELFARE MEDIATION

2000 GENERAL SESSION

STATE OF UTAH

Sponsor: Greg J. Curtis

AN ACT RELATING TO THE JUDICIARY; ESTABLISHING MEDIATION FOR ABUSE, NEGLECT, AND DEPENDENCY PETITIONS AND TERMINATION OF PARENTAL RIGHTS PETITIONS; ALLOWING THE JUDICIAL COUNCIL TO ESTABLISH PERMANENT ADR PROGRAMS BY RULE; ALLOWING AN ADR PROVIDER TO BE AN EMPLOYEE OF THE COURT; PROVIDING THAT ADR PROCEDURES MAY BE MANDATED BY THE COURT; AMENDING THE DEFINITION OF "CIVIL ACTION"; AND PROVIDING AN EFFECTIVE DATE.

This act affects sections of Utah Code Annotated 1953 as follows:

AMENDS:

78-3a-109, as enacted by Chapter 365, Laws of Utah 1997

78-31b-2, as last amended by Chapter 20, Laws of Utah 1995

78-31b-3, as repealed and reenacted by Chapter 228, Laws of Utah 1994

78-31b-4, as repealed and reenacted by Chapter 228, Laws of Utah 1994

78-31b-5, as repealed and reenacted by Chapter 228, Laws of Utah 1994

78-31b-7, as last amended by Chapter 68, Laws of Utah 1995

78-31b-8, as repealed and reenacted by Chapter 228, Laws of Utah 1994

Be it enacted by the Legislature of the state of Utah:

Section 1. Section **78-3a-109** is amended to read:

78-3a-109. Title of petition and other court documents -- Form and contents of petition -- Order for temporary custody -- Physical or psychological examination of minor, parent, or guardian -- Dismissal of petition.

(1) The petition and all subsequent court documents in the proceeding shall be entitled:

"State of Utah, in the interest of....., a person under 18 years of age (or a person under 21 years of age)."

(2) The petition shall be verified and statements in the petition may be made upon

information and belief.

(3) The petition shall be written in simple and brief language and include the facts which bring the minor within the jurisdiction of the court, as provided in Section 78-3a-104.

(4) The petition shall further state:

(a) the name, age, and residence of the minor;

(b) the names and residences of the minor's parents;

(c) the name and residence of the guardian, if there is one;

(d) the name and address of the nearest known relative, if no parent or guardian is known;

and

(e) the name and residence of the person having physical custody of the minor. If any of the facts required are not known by the petitioner, the petition shall so state.

(5) At any time after a petition is filed, the court may make an order providing for temporary custody of the minor.

(6) The court may order that a minor concerning whom a petition has been filed shall be examined by a physician, surgeon, psychiatrist, or psychologist and may place the minor in a hospital or other facility for examination. After notice and a hearing set for the specific purpose, the court may order a similar examination of a parent or guardian whose ability to care for a minor is at issue, if the court finds from the evidence presented at the hearing that the parent's or guardian's physical, mental, or emotional condition may be a factor in causing the neglect, dependency, or delinquency of the minor.

(7) Pursuant to Rule 506(d)(3), Utah Rules of Evidence, examinations conducted pursuant to Subsection (6) are not privileged communications, but are exempt from the general rule of privilege.

(8) The court may dismiss a petition at any stage of the proceedings.

(9) If the petition is filed under Section 78-3a-305 or 78-3a-405 or if the matter is referred to the court under Subsection 78-3a-105(3)(b), the court may require the parties to participate in mediation in accordance with Title 78, Chapter 31b, Alternative Dispute Resolution.

Section 2. Section **78-31b-2** is amended to read:

78-31b-2. Definitions.

As used in this act:

(1) "ADR" means alternative dispute resolution and includes arbitration, mediation, and other means of dispute resolution, other than court trial, authorized by the Judicial Council under this chapter.

(2) "ADR organization" means an organization which provides training for ADR providers or offers other ADR services.

(3) "ADR provider" means a neutral person who conducts an ADR procedure. An arbitrator, mediator, and early neutral evaluator are ADR providers. An ADR provider may be an employee of the court or an independent contractor.

(4) "Arbitration" means a private hearing before a neutral or panel of neutrals who hear the evidence, consider the contentions of the parties, and enter a written award to resolve the issues presented pursuant to Section 78-31b-6.

(5) "Award" as used in connection with arbitration includes monetary or equitable relief and may include damages, interest, costs, and attorneys' fees.

(6) "Civil action" means an action in which a party seeks monetary or equitable relief at common law or pursuant to statute~~[, other than the prosecution of a minor for an act that would constitute a crime if committed by an adult].~~

(7) "Early neutral evaluation" means a confidential meeting with a neutral expert to identify the issues in a dispute, explore settlement, and assess the merits of the claims.

(8) "Mediation" means a private forum in which one or more impartial persons facilitate communication between parties to a civil action to promote a mutually acceptable resolution or settlement.

(9) "Summary jury trial" means a summary presentation of a case to a jury which results in a nonbinding verdict.

Section 3. Section **78-31b-3** is amended to read:

78-31b-3. Purpose and findings.

(1) The purpose of this act is to offer an alternative or supplement to the formal processes

associated with a court trial and to promote the efficient and effective operation of the courts of this state by authorizing and encouraging the use of alternative methods of dispute resolution to secure the just, speedy, and inexpensive determination of civil actions filed in the courts of this state.

(2) The Legislature finds that:

(a) the use of alternative methods of dispute resolution authorized by this act will secure the purposes of Article I, Section 11, Utah Constitution, by providing supplemental or complementary means for the just, speedy, and inexpensive resolution of disputes;

(b) preservation of the confidentiality of ADR procedures will significantly aid the successful resolution of civil actions in a just, speedy, and inexpensive manner;

(c) ADR procedures will reduce the need for judicial resources and the time and expense of the parties; ~~and~~

(d) mediation has, in pilot programs, resulted in the just and equitable settlement of petitions for the protection of children under Section 78-3a-305 and petitions for the terminations of parental rights under Section 78-3a-405; and

~~(e)~~ (e) the purpose of this act will be promoted by authorizing the Judicial Council to establish rules ~~[for the administration of an experimental program]~~ to promote the use of ADR procedures by the courts of this state as an alternative or supplement to court trial.

Section 4. Section **78-31b-4** is amended to read:

78-31b-4. Dispute Resolution Programs -- Director -- Duties -- Report.

(1) Within the Administrative Office of the Courts, there shall be a director of Dispute Resolution Programs, appointed by the state court administrator.

(2) The director shall be an employee of the Administrative Office of the Courts and shall be responsible for the administration of all court-annexed Dispute Resolution Programs. The director shall have duties, powers, and responsibilities as the Judicial Council may determine. The qualifications for employment of the director shall be based on training and experience in the management, principles, and purposes of alternative dispute resolution procedures.

(3) In order to implement the purposes of this act, the Administrative Office of the Courts may employ or contract with ADR providers or ADR organizations on a case-by-case basis, on a

service basis, or on a program basis. ADR providers and organizations shall be subject to the rules and fees set by the Judicial Council. The Administrative Office of the Courts shall establish programs for ~~the~~ training ~~of~~ ADR providers and ~~the orientation of~~ orienting attorneys and their clients to ADR programs and procedures.

(4) An ADR provider is ~~[an independent contractor and shall be]~~ immune from all liability when conducting proceedings under the rules of the Judicial Council and the provisions of this act, except for wrongful disclosure of confidential information, to the same extent as a judge of the courts in this state.

(5) The director shall report annually to the Supreme Court, the Judicial Council, the Judiciary Interim Committee, the governor, and the Utah State Bar on the operation of the Dispute Resolution Programs.

(a) Copies of the report shall be available to the public at the Administrative Office of the Courts.

(b) The report shall include:

(i) identification of participating judicial districts and the methods of alternative dispute resolution that are available in those districts;

(ii) the number and types of disputes received;

(iii) the methods of alternative dispute resolution to which the disputes were referred;

(iv) the course of the referral;

(v) the status of cases referred to alternative dispute resolution or the disposition of these disputes; and

(vi) any problems encountered in the administration of the program and the recommendations of the director as to the continuation or modification of any program.

(c) Nothing may be included in a report which would impair the privacy or confidentiality of any specific ADR proceeding.

Section 5. Section **78-31b-5** is amended to read:

78-31b-5. Judicial Council rules for ADR procedures.

(1) To promote the use of ADR procedures, the Judicial Council may by rule establish ~~rules~~

~~for the administration of an] experimental [program for referral of civil cases to ADR procedures. This program shall be]~~ and permanent ADR programs administered by the Administrative Office of the Courts under the supervision of the director of Dispute Resolution Programs.

(2) The rules of the Judicial Council shall be based upon the purposes and provisions of this act. Any procedural and evidentiary rules as the Supreme Court may adopt shall not impinge on the constitutional rights of any parties.

(3) The rules of the Judicial Council shall include provisions:

(a) to orient parties and their counsel to the ADR program, ADR procedures, and the rules of the Judicial Council;

(b) to ~~[refer civil actions and categories]~~ identify types of civil actions ~~[to]~~ that qualify for ADR procedures;

(c) to refer to ADR procedures all or particular issues within a civil action;

(d) to protect persons not parties to the civil action whose rights may be affected in the resolution of the dispute;

(e) to ensure that no party or its attorney is prejudiced for electing, in good faith, not to participate in an optional ADR procedure;

(f) to exempt any case from the ADR program in which the objectives of ADR would not be realized;

(g) to create timetables to ensure that the ADR procedure is instituted and completed without undue delay or expense;

(h) to establish the qualifications of ADR providers for each form of ADR procedure including that:

(i) an ADR provider may, but need not be, a certified ADR provider pursuant to Title 58, Chapter 39a, Alternative Dispute Resolution Providers Certification Act; and

(ii) formal education in any particular field may not, by itself, be either a prerequisite or sufficient qualification to serve as an ADR provider under the program authorized by this act;

(i) to govern the conduct of each type of ADR procedure, including the site at which the procedure is conducted;

- (j) to establish the means for the selection of an ADR provider for each form of ADR procedure;
 - (k) to determine the powers, duties, and responsibilities of the ADR provider for each form of ADR procedure;
 - (l) to establish a code of ethics applicable to ADR providers with means for its enforcement;
 - (m) to protect and preserve the privacy and confidentiality of ADR procedures;
 - (n) to protect and preserve the privacy rights of the ~~[parties]~~ persons attending the ADR procedures;
 - (o) to permit waiver of all or part of fees assessed for referral of a case to the ADR program on a showing of impecuniosity or other compelling reason;
 - (p) to authorize imposition of sanctions for failure of counsel or parties to participate in good faith in the ADR procedure assigned;
 - (q) to assess the fees to cover the cost of compensation for the services of the ADR provider and reimbursement for the provider's allowable, out-of-pocket expenses and disbursements; and
 - (r) to allow vacation of an award by a court as provided in Section 78-31a-14.
- (4) The Judicial Council may, from time to time, limit the application of its ADR rules to particular judicial districts.

Section 6. Section **78-31b-7** is amended to read:

78-31b-7. Minimum procedures for mediation.

(1) A judge or court commissioner may refer to mediation any case for which the Judicial Council and Supreme Court have established a program or procedures. A party may file with the court an objection to the referral which may be granted for good cause.

~~[(1)]~~ (2) (a) Unless all parties and the neutral or neutrals agree~~[-(a)]~~ only parties, their representatives, and the neutral may attend the mediation sessions~~[-(a)]~~.

~~[(b) any recording of the proceedings may not be allowed;]~~

~~[(c) any notes of the proceedings maintained by the neutral may not be considered a record and shall be destroyed by the neutral when a settlement is reached or the parties have abandoned the settlement negotiations;]~~

~~[(d) any party, its representative, the neutral, or any other person who attends or participates in the mediation proceeding may not disclose, or through any discovery or other compulsory process, may not be required to disclose any oral or written communications prepared for or expressed in the course of the mediation proceeding, including any memoranda, notes, records, or work product of a mediator, any party, or its representative.]~~

~~[(2) Any information disclosed or obtained in violation of Subsection (1) may not be admitted into evidence in any judicial proceeding between the same parties.]~~

(b) If the mediation session is pursuant to a referral under Subsection 78-3a-109(9), the ADR provider or ADR organization shall notify any person entitled to attend a juvenile court hearing under Section 78-3a-314. The ADR provider may notify any person whose rights may be affected by the mediated agreement or who may be able to contribute to the agreement. A party may request notice be provided to a person who is not a party.

(3) ~~[Any]~~ (a) Except as provided in Subsection (3)(b), any settlement agreement between the parties as a result of mediation [or other ADR procedures] may be executed in writing, filed with the clerk of the court, and enforceable as a judgment of the court[, or the parties may stipulate, if appropriate, to dismissal of the action]. If the parties stipulate to dismiss the action, any agreement to dismiss ~~[need]~~ shall not be filed with the court ~~[and may not be part of the records of the court].~~

(b) With regard to mediation affecting any petition filed under Section 78-3a-305 or 78-3a-405:

(i) all settlement agreements and stipulations of the parties shall be filed with the court;

(ii) all timelines, requirements, and procedures described in Title 78, Chapter 3a, Parts 3 and 4, and in Title 62A, Chapter 4a, shall be complied with; and

(iii) the parties to the mediation may not agree to a result that could not have been ordered by the court in accordance with the procedures and requirements of Title 78, Chapter 3a, Parts 3 and 4, and Title 62A, Chapter 4a.

Section 7. Section **78-31b-8** is amended to read:

78-31b-8. Confidentiality.

~~[(1) From the date a case or any portion of it is referred to any ADR procedure, all time~~

~~requirements of the Utah Rules of Civil Procedure or applicable local rules are tolled unless the court determines that any portion of the dispute not referred to ADR should proceed. The tolling period shall end on the date the ADR provider files written notice with the court that the ADR procedure has terminated or, if an arbitration award has been filed, the time for filing a demand for trial de novo has expired.]~~

~~[(2) (a)] (1) [The purpose of the ADR program authorized by this act is to offer an alternative or supplement to the formal processes and requirements associated with a court trial.] ADR proceedings shall be conducted in a manner that encourages informal and confidential exchange among ~~[counsel, the parties, and the ADR provider]~~ the persons present to facilitate resolution of the dispute or a part of the dispute. ADR proceedings shall be closed~~[, unless the court finds a strong countervailing interest against maintaining the confidentiality of the proceedings in that particular case, or]~~ unless the parties agree that the proceedings be open. ADR proceedings shall not be recorded.~~

~~[(b)] (2) No evidence concerning the fact, conduct, or result of an ADR proceeding may be subject to discovery or admissible at any subsequent [civil] trial of the same case or same issues between the same parties [or subject to inspection by any person not a party to the ADR proceeding, not an employee of the court, or not an employee of the Administrative Office of the Courts, including:].~~

~~[(i) any written or oral admission or statement made by any party or counsel during the ADR proceeding; or]~~

~~[(ii) any transcript or recording of any ADR hearing.]~~

~~(3) No party to the case may introduce as evidence information obtained during an ADR proceeding unless the information was discovered from a source independent of the ADR proceeding.~~

~~(4) Unless all parties and the neutral agree, no person attending an ADR proceeding, including the ADR provider or ADR organization, may disclose or be required to disclose any information obtained in the course of an ADR proceeding, including any memoranda, notes, records, or work product.~~

~~[(c) An] (5) Except as provided, an ADR provider or ADR organization may not disclose~~

or discuss any information about ~~[or related to]~~ any ADR proceeding to anyone outside the proceeding, including the judge or judges to whom the case may be assigned~~[-except:]~~. An ADR provider or an ADR organization may communicate information about an ADR proceeding with the director for the purposes of training, program management, or program evaluation and when consulting with a peer. In making those communications, the ADR provider or ADR organization shall render anonymous all identifying information.

~~[(i) in the instance of a dispute between a litigant and legal counsel concerning attorneys' fees or claimed legal malpractice; and]~~

~~[(ii) where it is claimed a witness in an arbitration proceeding committed perjury.]~~

~~[(d) The ADR provider shall render anonymous all identifying information when materials from any ADR proceeding are used for research, training, or statistical compilation. Mediators shall keep confidential from all other parties any information obtained in individual caucuses, unless the party to the caucus permits the disclosure.]~~

(6) Nothing in this section limits or affects the responsibility to report child abuse or neglect in accordance with Section 62A-4a-403.

~~[(e)]~~ (7) No records of ADR proceedings under this act or under Title 78, Chapter 31a, Utah Arbitration Act, shall be subject to Title 63, Chapter 2, Government Records Access and Management Act, except settlement agreements filed with the court after conclusion of an ADR proceeding or awards filed with the court after the period for filing a demand for trial de novo has expired.

Section 8. **Effective date.**

This act takes effect on July 1, 2000.