

L Approved for Filing: JWH L

L 02-15-00 8:58 AM L

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**78-31b-3**, as repealed and reenacted by Chapter 228, Laws of Utah 1994

**78-31b-4**, as repealed and reenacted by Chapter 228, Laws of Utah 1994

**78-31b-5**, as repealed and reenacted by Chapter 228, Laws of Utah 1994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**78-31b-8**, as repealed and reenacted by Chapter 228, Laws of Utah 1994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

28 under 21 years of age)."'

29       (2) The petition shall be verified and statements in the petition may be made upon  
30 information and belief.

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

33       (4) The petition shall further state:

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

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

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

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

38 and

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

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

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

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

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

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

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

58       **78-31b-2. Definitions.**

59           As used in this act:

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

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

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

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

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

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

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

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

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

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

84           **78-31b-3. Purpose and findings.**

85           (1) The purpose of this act is to offer an alternative or supplement to the formal processes  
86 associated with a court trial and to promote the efficient and effective operation of the courts of  
87 this state by authorizing and encouraging the use of alternative methods of dispute resolution to  
88 secure the just, speedy, and inexpensive determination of civil actions filed in the courts of this  
89 state.

90           (2) The Legislature finds that:

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

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

96           (c) ADR procedures will reduce the need for judicial resources and the time and expense  
97 of the parties; [and]

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

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

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

105           **78-31b-4. Dispute Resolution Programs -- Director -- Duties -- Report.**

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

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

113           (3) In order to implement the purposes of this act, the Administrative Office of the Courts  
114 may employ or contract with ADR providers or ADR organizations on a case-by-case basis, on a  
115 service basis, or on a program basis. ADR providers and organizations shall be subject to the rules  
116 and fees set by the Judicial Council. The Administrative Office of the Courts shall establish  
117 programs for [the] training [of] ADR providers and [the orientation of] orienting attorneys and  
118 their clients to ADR programs and procedures.

119           (4) An ADR provider is [an independent contractor and shall be] immune from all liability  
120 when conducting proceedings under the rules of the Judicial Council and the provisions of this act,

121 except for wrongful disclosure of confidential information, to the same extent as a judge of the  
122 courts in this state.

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

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

128 (b) The report shall include:

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

131 (ii) the number and types of disputes received;

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

133 (iv) the course of the referral;

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

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

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

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

141 **78-31b-5. Judicial Council rules for ADR procedures.**

142 (1) To promote the use of ADR procedures, the Judicial Council may by rule establish  
143 [rules for the administration of an] experimental [program for referral of civil cases to ADR  
144 procedures. This program shall be] and permanent ADR programs administered by the  
145 Administrative Office of the Courts under the supervision of the director of Dispute Resolution  
146 Programs.

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

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

151 (a) to orient parties and their counsel to the ADR program, ADR procedures, and the rules

- 152 of the Judicial Council;
- 153 (b) to [refer civil actions and categories] identify types of civil actions [to] that qualify for
- 154 ADR procedures;
- 155 (c) to refer to ADR procedures all or particular issues within a civil action;
- 156 (d) to protect persons not parties to the civil action whose rights may be affected in the
- 157 resolution of the dispute;
- 158 (e) to ensure that no party or its attorney is prejudiced for electing, in good faith, not to
- 159 participate in an optional ADR procedure;
- 160 (f) to exempt any case from the ADR program in which the objectives of ADR would not
- 161 be realized;
- 162 (g) to create timetables to ensure that the ADR procedure is instituted and completed
- 163 without undue delay or expense;
- 164 (h) to establish the qualifications of ADR providers for each form of ADR procedure
- 165 including that:
- 166 (i) an ADR provider may, but need not be, a certified ADR provider pursuant to Title 58,
- 167 Chapter 39a, Alternative Dispute Resolution Providers Certification Act; and
- 168 (ii) formal education in any particular field may not, by itself, be either a prerequisite or
- 169 sufficient qualification to serve as an ADR provider under the program authorized by this act;
- 170 (i) to govern the conduct of each type of ADR procedure, including the site at which the
- 171 procedure is conducted;
- 172 (j) to establish the means for the selection of an ADR provider for each form of ADR
- 173 procedure;
- 174 (k) to determine the powers, duties, and responsibilities of the ADR provider for each form
- 175 of ADR procedure;
- 176 (l) to establish a code of ethics applicable to ADR providers with means for its
- 177 enforcement;
- 178 (m) to protect and preserve the privacy and confidentiality of ADR procedures;
- 179 (n) to protect and preserve the privacy rights of the [parties] persons attending the ADR
- 180 procedures;
- 181 (o) to permit waiver of all or part of fees assessed for referral of a case to the ADR
- 182 program on a showing of impecuniosity or other compelling reason;

183                   (p) to authorize imposition of sanctions for failure of counsel or parties to participate in  
184                   good faith in the ADR procedure assigned;

185                   (q) to assess the fees to cover the cost of compensation for the services of the ADR  
186                   provider and reimbursement for the provider's allowable, out-of-pocket expenses and  
187                   disbursements; and

188                   (r) to allow vacation of an award by a court as provided in Section 78-31a-14.

189                   (4) The Judicial Council may, from time to time, limit the application of its ADR rules to  
190                   particular judicial districts.

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

192                   **78-31b-7. Minimum procedures for mediation.**

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

196                   [(1)] (2) (a) Unless all parties and the neutral or neutrals agree[:(a)] only parties, their  
197                   representatives, and the neutral may attend the mediation sessions[;].

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

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

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

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

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

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

220           (b) With regard to mediation affecting any petition filed under Section 78-3a-305 or  
221 78-3a-405:

222           (i) all settlement agreements and stipulations of the parties shall be filed with the court;  
223           (ii) all timelines, requirements, and procedures described in Title 78, Chapter 3a, Parts 3  
224 and 4, and in Title 62A, Chapter 4a, shall be complied with; and  
225           (iii) the parties to the mediation may not agree to a result that could not have been ordered  
226 by the court in accordance with the procedures and requirements of Title 78, Chapter 3a, Parts 3  
227 and 4, and Title 62A, Chapter 4a.

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

229           **78-31b-8. Confidentiality.**

230           [(1) From the date a case or any portion of it is referred to any ADR procedure, all time  
231 requirements of the Utah Rules of Civil Procedure or applicable local rules are tolled unless the  
232 court determines that any portion of the dispute not referred to ADR should proceed. The tolling  
233 period shall end on the date the ADR provider files written notice with the court that the ADR  
234 procedure has terminated or, if an arbitration award has been filed, the time for filing a demand  
235 for trial de novo has expired.]

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

244           [(b)] (2) No evidence concerning the fact, conduct, or result of an ADR proceeding may

245 be subject to discovery or admissible at any subsequent [civil] trial of the same case or same issues  
246 between the same parties [or subject to inspection by any person not a party to the ADR  
247 proceeding, not an employee of the court, or not an employee of the Administrative Office of the  
248 Courts, including:].

249 [ (i) any written or oral admission or statement made by any party or counsel during the  
250 ADR proceeding, or]

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

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

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

259 [(e) An] (5) Except as provided, an ADR provider or ADR organization may not disclose  
260 or discuss any information about [or related to] any ADR proceeding to anyone outside the  
261 proceeding, including the judge or judges to whom the case may be assigned[, except:]. An ADR  
262 provider or an ADR organization may communicate information about an ADR proceeding with  
263 the director for the purposes of training, program management, or program evaluation and when  
264 consulting with a peer. In making those communications, the ADR provider or ADR organization  
265 shall render anonymous all identifying information.

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

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

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

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

275 [(e)] (7) No records of ADR proceedings under this act or under Title 78, Chapter 31a,

276 Utah Arbitration Act, shall be subject to Title 63, Chapter 2, Government Records Access and  
277 Management Act, except settlement agreements filed with the court after conclusion of an ADR  
278 proceeding or awards filed with the court after the period for filing a demand for trial de novo has  
279 expired.

280       **Section 8. Effective date.**

281       This act takes effect on July 1, 2000.

---

---

**Legislative Review Note**

**as of 2-9-00 1:15 PM**

A limited legal review of this legislation raises no obvious constitutional or statutory concerns.

**Office of Legislative Research and General Counsel**