

Non-Party Participation in Child Welfare Mediations

SUPREME COURT OF TEXAS CHILDREN'S COMMISSION

MARCH 28, 2025



Who are Non-Parties?



Non-Parties

- A non-party is any individual or entity that is not directly involved in a lawsuit, contract, or other legal proceeding as a plaintiff, defendant, or signatory, but who may still be affected by the outcome of the case or have some involvement in the proceedings.
- A non-party may be allowed to participate in a legal proceeding, such as a mediation or collaborative law process, but is still not considered a party to the suit.



Non-Parties to Child Welfare Cases

- The Child (the subject of the suit)
- Placement
 - Relative/Fictive Kin
 - Foster Parents/Agency
- Spouse of a Parent
- Potential Witnesses
 - Medical or Service Providers (Pediatrician, Therapist, Substance Abuse Counselor, etc.)
 - Law Enforcement
 - Teachers, Neighbors, Family members



A Note on Tribal Participation

- In ICWA cases, the tribe is allowed to participate in all proceedings, which, presumably, includes mediation.
- There are no confidentiality issues with tribes because they are entitled to an unmarked copy of the DFPS record, even without “formal” intervention.
- The tribe’s input is always important to the outcome of the case.



Why Consider Non-Party Participation in Mediation?



Possible Ways a Non-Party May Factor into Reaching an Agreement

Conservatorship or Supervision

- If a non-party is to be named a conservator of a child or serve as a supervisor for visitation, the non-party must agree to the terms and should sign the mediated settlement agreement.

Potential Placement Options

- Family
- Fosters

ICPC

- Home Studies
- Timeliness

ICWA

- Will the proposed agreement meet statutory requirements?
- Compliance with the placement hierarchy.



Non-Parties as a Source of Information

- Child or Parent Issues from the therapist
 - Therapy goals and progress
 - Medical information
 - Mental health assessments
- Family Members
 - Observed progress
 - Identify other placement options
 - Verify core or central facts
- Non-parties serving as a source of information provide but don't necessarily receive information during the mediation
 - Mediator controls the flow of information



Scope of Non-Party Participation in Child Welfare Mediations

- Who is going to participate?
- Why are they participating?
 - Agreement of the parties or authorized by the court?
 - Is the individual providing moral support, or will their participation assist in achieving an agreement?
- Are they to be a part of the Final Order?
 - Signatory
 - Collateral
 - Supervisory, e.g. visitation
 - Providing non-monetary support (housing)
- Bound by Confidentiality?
- Bound Contractually (parties' reliance?)



Deciding Whether a Non-Party Participates in Mediation

- Most courts leave the decision of who to include in a mediation to the mediator.
- A party may also request that the court authorize the participation of a non-party.
- **Balancing Test**
 - Are the parties in agreement to include the non-party in the mediation?
 - Is participation by the non-party more helpful than not?
 - Is the non-party's participation essential to reaching an agreement?
 - Is participation by the non-party required based on the direction of the mediation?
 - Does the proposed non-party participant have helpful/useful information that may assist during the mediation?



Pragmatism I: Inclusion Over Exclusion

- In the Age of Zoom, parties no longer sit across the table from each other. A non-party can be stashed away in a separate breakout room. This gives the mediator options to use the non-party as a chess piece in achieving a mediated solution.
- In reality, the default in most mediators' minds is going to be inclusive rather than exclusive. The mediator is going to want more information to maximize possibilities of a settlement.



The Strong Objection

Ultimately, the mediation is for the parties.

- If a party strongly objects to the participation of a non-party, it may cause an objection to the whole mediation.
 - In that instance, it may be that the proponent of the non-party participation, if any, may need to justify the participation to the Court or the Mediator.
- Depending on the timing, the Court or the Mediator needs to consider the objection.
- The Tactical Objection:
 - Mom doesn't want her sister to be a conservator;
 - Everyone else thinks it's a great idea;
 - Mom objects to her sister's participation in an effort to prevent it from even being discussed.



Potential Impediments to Reaching a Settlement Agreement



Inclusion of a Non-Party

Sometimes the non-party turns out to be more of an impediment than a help.

Examples include:

- Party position changes or previously settled or unidentified issues are presented after a party sidebars with a non-party;
 - A previously undisclosed position by a service provider is revealed;
 - Placement discloses previously unknown information or decides to intervene based on the trajectory of the mediation;
 - The tribe determines they should intervene (*note that tribal participation is different than participation from other non-parties);
- * Emphasize that the parties are the ultimate decision makers at mediation; the final decision on whether to agree to terms that include a non-party is theirs, and any perceived consequences of including a non-party at the mediation rest with them.



Exclusion of a Non-Party Participant

Sometimes, it is not until after the mediation has started that the mediator or a party's attorney realizes they need someone else present.

- The child(ren)
- Placement
- Program Director (PD)
- Spouse of a party (or non-party if non-party will be a signatory of the MSA)

This usually happens when the direction of the mediation takes an unexpected turn or the authority to agree to proposed terms has been exceeded.

For example, a CVS Supervisor may only be authorized to agree up to a certain point. Any proposal that goes beyond what they are authorized to agree to would have to be run by the PD. This can largely be avoided through mediation preparation ahead of time.



Other Considerations



Confidentiality

Options that allow a non-party to participate while still preserving confidentiality include:

- Ask the non-party to execute the mediation agreement “as to confidentiality;”
- Allow the party requesting participation of a non-party to assume full responsibility for confidentiality by both participants;
- Request that the non-party sit out of any joint sessions, while being allowed to join in any private caucuses; or
- Include a stipulation in the mediation agreement that non-parties will be allowed to participate subject to the same confidentiality obligations as the parties and consenting to the court’s jurisdiction should there be a breach.



Pragmatism II: The Challenge of Neutrality

- One of the biggest challenges for mediators and sometimes for attorney proponents of non-parties is remaining neutral or avoiding providing legal counsel to unrepresented persons.
- This most frequently comes up when the parties agree to name a non-party a conservator of the child.
 - The non-party participant is unrepresented, and the question of their rights, duties, and obligations arises.
 - Questions may also arise around the issues of child support, Permanency Care Assistance (PCA), and other supports available for the care of the child.



Domestic Violence Considerations

- ALWAYS, ALWAYS, ALWAYS be mindful of domestic violence and/or abuse issues.
 - Non-party participation by a known abuser should always be suspect.
 - If permitted at all, it must be closely monitored.



Mental Health Considerations

- If an unrepresented non-party lacks the capacity to understand the mediation process or make informed decisions, their inclusion in the mediation may not be appropriate.
- If there is a significant power imbalance between the parties and the non-party, inclusion of the non-party in mediation may not be the best approach.



Non-Party Signatures Required on the Mediated Settlement Agreement

- A non-party who is named a conservator;
- A non-party that is addressed in the final order (ex. named visitation supervisor);
- The Tribe;
- A non-party who is specifically named within the agreed terms of the MSA.



Questions?

Mark Briggs

Briggs & Associates, P.C.

Email: mark@briggslaw.org

Electra Watson

Watson Mediations

Email: ewatson@watsonmediations.com



Thank You!

Questions related to MCLE self reporting may be sent to:
cctraining@txcourts.gov

