S T A T E O F N E W Y O R K

S. 244 A. 331

2009-2010 Regular Sessions

S E N A T E - A S S E M B L Y

(PREFILED)

January 7, 2009

IN SENATE -- Introduced by Sen. PERKINS -- read twice and ordered printed, and when printed to be committed to the Committee on Judiciary

IN ASSEMBLY -- Introduced by M. of A. ROBINSON, TITUS, MAYERSOHN, McENENY, TOWNS -- read once and referred to the Committee on Judiciary

AN ACT to amend the domestic relations law, in relation to the establishment and use of a parent-mediation program for child custody disputes

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. The domestic relations law is amended by adding a new article 5-B to read as follows:

ARTICLE 5-B

PARENT-MEDIATION PROGRAM FOR CHILD CUSTODY DISPUTES

SECTION 79. PURPOSE.
79-A. DEFINITIONS.
79-B. RESPONSIBILITY FOR MEDIATION SERVICES.
79-C. MEDIATION PROCESS.
79-D. TRAINING, CONTINUING EDUCATION, AND EXPERIENCE REQUIREMENTS FOR MEDIATORS AND MEDIATION SUPERVISORS.
79-E. ETHICS.

S 79. PURPOSE. THE PURPOSE OF THIS ARTICLE IS TO PROVIDE A MEDIATION PROGRAM TO PARENTS WHO ARE IN DISPUTE OVER THE CUSTODY OF THEIR CHILD OR CHILDREN.

S 79-A. DEFINITIONS. AS USED IN THIS ARTICLE:

1. "COURT" SHALL MEAN ANY COURT OF THIS STATE AUTHORIZED TO ENTER AN ORDER OF CUSTODY AND/OR SUPPORT PURSUANT TO PARAGRAPH (A) OF SUBDIVISION ONE OF SECTION TWO HUNDRED FORTY OF THIS CHAPTER.

2. "MEDIATOR" SHALL HAVE THE SAME MEANING AS GIVEN IN SUBDIVISION TWO OF SECTION EIGHT HUNDRED FORTY-NINE-A OF THE JUDICIARY LAW.

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets [ ] is old law to be omitted.

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3. "MEDIATION SUPERVISOR" SHALL MEAN A MEDIATOR WHO HAS BEEN GIVEN DIRECT SUPERVISION OVER ONE OR MORE OTHER MEDIATORS.

S 79-B. RESPONSIBILITY FOR MEDIATION SERVICES. 1. ANY COURT WITH COUNTY-WIDE JURISDICTION SHALL ENSURE THAT:

(A) MEDIATORS ARE IMPARTIAL, COMPETENT, AND UPHOLD THE STANDARDS OF PRACTICE PURSUANT TO THIS ARTICLE.

(B) MEDIATION SERVICES AND CASE MANAGEMENT PROCEDURES IMPLEMENT STATE LAW AND ALLOW SUFFICIENT TIME FOR PARTIES TO RECEIVE ORIENTATION, PARTICIPATE FULLY IN MEDIATION, AND DEVELOP A COMPREHENSIVE PARENTING PLAN WITHOUT UNDULY COMPROMISING EACH PARTY'S RIGHT TO DUE PROCESS AND A TIMELY RESOLUTION OF THE ISSUES.

(C) MEDIATION SERVICES DEMONSTRATE ACCOUNTABILITY BY:

(I) PROVIDING FOR ACCEPTANCE OF AND RESPONSE TO COMPLAINTS ABOUT A MEDIATOR'S PERFORMANCE;

(II) PARTICIPATING IN STATEWIDE DATA COLLECTION EFFORTS; AND

(III) DISCLOSING THE USE OF INTERNS TO PROVIDE MEDIATION SERVICES.

(D) THE MEDIATION PROGRAM USES A DETAILED INTAKE PROCESS THAT SCREENS FOR AND INFORMS THE MEDIATOR ABOUT ANY RESTRAINING ORDERS OR SAFETY-RELATED ISSUES AFFECTING ANY PARTY OR CHILD NAMED IN THE PROCEEDINGS TO ALLOW COMPLIANCE WITH RELEVANT LAW OR COURT RULES BEFORE MEDIATION BEGINS.

(E) WHENEVER POSSIBLE, MEDIATION IS AVAILABLE FROM BILINGUAL MEDIATORS OR OTHER INTERPRETER SERVICES.

(F) MEDIATION SERVICES PROTECT PARTY CONFIDENTIALITY IN:

(I) STORAGE AND DISPOSAL OF RECORDS AND ANY PERSONAL INFORMATION ACCUMULATED DURING THE MEDIATION PROCESS;

(II) INTERAGENCY COORDINATION OR COOPERATION REGARDING A PARTICULAR FAMILY OR CASE; AND

(III) MANAGEMENT OF CHILD ABUSE REPORTS AND RELATED DOCUMENTS.

2. EACH MEDIATOR SHALL:

(A) MAINTAIN AN OVERRIDING CONCERN TO INTEGRATE THE CHILD'S BEST INTERESTS WITHIN THE FAMILY CONTEXT.

(B) INFORM THE PARTIES AND ANY COUNSEL FOR A MINOR CHILD IF THE MEDIATOR WILL MAKE A RECOMMENDATION TO THE COURT THAT THE COURT SHOULD APPOINT AN ATTORNEY TO REPRESENT THE MINOR CHILD. THE MEDIATOR SHALL INFORM THE COURT OF THE REASONS WHY IT WOULD BE IN THE BEST INTERESTS OF THE CHILD TO HAVE AN ATTORNEY APPOINTED.

(C) USE REASONABLE EFFORTS AND CONSIDER SAFETY ISSUES TO:

(I) FACILITATE THE FAMILY'S TRANSITION AND REDUCE ACRIMONY BY HELPING THE PARTIES IMPROVE THEIR COMMUNICATION SKILLS, FOCUS ON THE CHILD'S NEEDS AND AREAS OF STABILITY, IDENTIFY THE FAMILY'S STRENGTHS, AND LOCATE COUNSELING OR OTHER SERVICES;

(II) DEVELOP A COMPREHENSIVE PARENTING AGREEMENT THAT ADDRESSES EACH CHILD'S CURRENT AND FUTURE DEVELOPMENTAL NEEDS; AND

(III) CONTROL THE POTENTIAL POWER IMBALANCES BETWEEN THE PARTIES DURING MEDIATION.

S 79-C. MEDIATION PROCESS. 1. ALL PARENT-MEDIATION PROGRAM PROCESSES SHALL BE CONDUCTED IN ACCORDANCE WITH STATE LAW AND SHALL INCLUDE:

(A) REVIEW OF THE INTAKE FORM AND COURT FILE, IF AVAILABLE, BEFORE THE START OF MEDIATION.

(B) ORAL AND WRITTEN ORIENTATION OR PARENT EDUCATION THAT FACILITATES THE PARTIES' INFORMED AND SELF-DETERMINED DECISION-MAKING ABOUT:

(I) THE TYPES OF DISPUTED ISSUES GENERALLY DISCUSSED IN MEDIATION AND THE RANGE OF POSSIBLE OUTCOMES FROM THE MEDIATION PROCESS;

(II) THE MEDIATION PROCESS, INCLUDING: THE MEDIATOR'S ROLE; THE CIRCUMSTANCES THAT MAY LEAD THE MEDIATOR TO MAKE A PARTICULAR RECOMMEN-

DATION TO THE COURT; LIMITATIONS ON THE CONFIDENTIALITY OF THE PROCESS; AND ACCESS TO INFORMATION COMMUNICATED BY THE PARTIES OR INCLUDED IN THE MEDIATION FILE;

(III) HOW TO MAKE BEST USE OF INFORMATION DRAWN FROM CURRENT RESEARCH AND PROFESSIONAL EXPERIENCE TO FACILITATE THE MEDIATION PROCESS, PARTIES' COMMUNICATION, AND CO-PARENTING RELATIONSHIP; AND

(IV) HOW TO ADDRESS EACH CHILD'S CURRENT AND FUTURE DEVELOPMENTAL NEEDS.

(C) INTERVIEW WITH CHILDREN AT THE MEDIATOR'S DISCRETION. THE MEDIATOR MAY INTERVIEW THE CHILD ALONE OR TOGETHER WITH OTHER INTERESTED PARTIES, INCLUDING STEPPARENTS, SIBLINGS, NEW OR STEPSIBLINGS, OR OTHER FAMILY MEMBERS SIGNIFICANT TO THE CHILD. IF INTERVIEWING A CHILD, THE MEDIATOR SHALL:

(I) INFORM THE CHILD IN AN AGE-APPROPRIATE MANNER OF THE MEDIATOR'S OBLIGATION TO DISCLOSE SUSPECTED CHILD ABUSE AND NEGLECT AND THE LOCAL POLICIES CONCERNING DISCLOSURE OF THE CHILD'S STATEMENTS TO THE COURT.

(II) WITH PARENTAL CONSENT, COORDINATE INTERVIEW AND INFORMATION EXCHANGE AMONG AGENCY OR PRIVATE PROFESSIONALS TO REDUCE THE NUMBER OF INTERVIEWS A CHILD MIGHT EXPERIENCE.

(D) ASSISTANCE TO THE PARTIES, WITHOUT UNDUE INFLUENCE OR PERSONAL BIAS, IN DEVELOPING A PARENTING PLAN THAT PROTECTS THE HEALTH, SAFETY, WELFARE, AND THE BEST INTERESTS OF THE CHILD AND THAT OPTIMIZES THE CHILD'S RELATIONSHIP WITH EACH PARTY BY INCLUDING, AS APPROPRIATE, PROVISIONS FOR SUPERVISED VISITATION IN HIGH-RISK CASES; DESIGNATION FOR LEGAL AND PHYSICAL CUSTODY; A DESCRIPTION OF EACH PARTY'S AUTHORITY TO MAKE DECISIONS THAT AFFECT THE CHILD; LANGUAGE THAT MINIMIZES LEGAL, MENTAL HEALTH, OR OTHER JARGON; AND A DETAILED SCHEDULE OF THE TIME A CHILD IS TO SPEND WITH EACH PARTY, INCLUDING VACATIONS, HOLIDAYS, AND SPECIAL OCCASIONS, AND TIMES WHEN THE CHILD'S CONTACT WITH A PARTY MAY BE INTERRUPTED.

(E) EXTENSION OF TIME TO ALLOW THE PARTIES TO GATHER ADDITIONAL INFORMATION IF THE MEDIATOR DETERMINES THAT SUCH INFORMATION WILL HELP THE DISCUSSION PROCEED IN A FAIR AND ORDERLY MANNER OR FACILITATE AN AGREEMENT.

(F) SUSPENSION OR DISCONTINUANCE OF MEDIATION IF ALLEGATIONS OF CHILD ABUSE OR NEGLECT ARE MADE UNTIL A DESIGNATED AGENCY PERFORMS AN INVESTIGATION AND REPORTS A CASE DETERMINATION TO THE MEDIATOR.

(G) TERMINATION OF MEDIATION IF THE MEDIATOR BELIEVES THAT HE OR SHE IS UNABLE TO ACHIEVE A BALANCED DISCUSSION BETWEEN THE PARTIES.

(H) CONCLUSION OF MEDIATION WITH:

(I) A WRITTEN PARENTING PLAN THAT SUMMARIZES THE PARTIES' AGREEMENT OR MEDIATOR'S RECOMMENDATION THAT IS GIVEN TO COUNSEL OR THE PARTIES BEFORE THE RECOMMENDATION IS PRESENTED TO THE COURT.

(II) A WRITTEN OR ORAL DESCRIPTION OF ANY SUBSEQUENT CASE MANAGEMENT OR COURT PROCEDURES FOR RESOLVING ONE OR MORE OUTSTANDING CUSTODY OR VISITATION ISSUES, INCLUDING INSTRUCTIONS FOR OBTAINING TEMPORARY ORDERS.

(I) RETURN TO MEDIATION TO RESOLVE FUTURE CUSTODY OR VISITATION DISPUTES.

2. UPON THE COMPLETION OF THE MEDIATION PROCESS, THE MEDIATOR SHALL SUBMIT A WRITTEN COPY OF THE MEDIATION AGREEMENT TO THE COURT. SUCH AGREEMENT SHALL BE SIGNED BY BOTH PARENTS, INDICATING THEIR ASSENT TO THE TERMS OF THE AGREEMENT.

S 79-D. TRAINING, CONTINUING EDUCATION, AND EXPERIENCE REQUIREMENTS FOR MEDIATORS AND MEDIATION SUPERVISORS. 1. ALL MEDIATORS AND MEDIATION SUPERVISORS MUST:

(A) COMPLETE A MINIMUM OF FORTY HOURS OF CUSTODY AND VISITATION MEDIATION TRAINING WITHIN THE FIRST SIX MONTHS OF INITIAL EMPLOYMENT AS A PARENT-MEDIATION PROGRAM MEDIATOR.

(B) ATTEND RELATED CONTINUING EDUCATION PROGRAMS, CONFERENCES, AND WORKSHOPS.

(C) PARTICIPATE IN PERFORMANCE SUPERVISION AND PEER REVIEW.

2. EACH MEDIATION SUPERVISOR SHALL ATTEND AT LEAST THIRTY-TWO HOURS OF ADDITIONAL TRAINING EACH CALENDAR YEAR.

S 79-E. ETHICS. MEDIATION SHALL BE CONDUCTED IN AN ATMOSPHERE THAT ENCOURAGES TRUST IN THE PROCESS AND A PERCEPTION OF FAIRNESS. TO THAT END, MEDIATORS SHALL:

1. MEET THE PRACTICE AND ETHICAL STANDARDS ADOPTED BY THE LEGISLATURE AND THOSE STANDARDS ADOPTED BY THE COURTS.

2. MAINTAIN OBJECTIVITY, PROVIDE AND GATHER BALANCED INFORMATION FOR BOTH PARTIES, AND CONTROL BIAS.

3. PROTECT THE CONFIDENTIALITY OF THE PARTIES AND THE CHILD IN MAKING ANY COLLATERAL CONTACTS AND NOT RELEASE INFORMATION ABOUT THE CASE TO ANY INDIVIDUAL EXCEPT AS AUTHORIZED BY THE COURT OR STATUTE.

4. NOT OFFER ANY RECOMMENDATIONS ABOUT A PARTY UNLESS THAT PARTY HAS BEEN EVALUATED DIRECTLY OR IN CONSULTATION WITH ANOTHER QUALIFIED NEUTRAL PROFESSIONAL.

5. CONSIDER THE HEALTH, SAFETY, WELFARE, AND BEST INTERESTS OF THE CHILD IN ALL PHASES OF THE PROCESS, INCLUDING INTERVIEWS WITH PARENTS, EXTENDED FAMILY MEMBERS, COUNSEL FOR THE CHILD, AND OTHER INTERESTED PARTIES OR COLLATERAL CONTACTS.

6. STRIVE TO MAINTAIN THE CONFIDENTIAL RELATIONSHIP BETWEEN THE CHILD WHO IS THE SUBJECT OF AN EVALUATION AND HIS OR HER TREATING PSYCHOTHERAPIST.

7. OPERATE WITHIN THE LIMITS OF HIS OR HER TRAINING AND EXPERIENCE AND DISCLOSE ANY LIMITATIONS OR BIAS THAT WOULD AFFECT HIS OR HER ABILITY TO CONDUCT THE MEDIATION.

8. NOT REQUIRE CHILDREN TO STATE A CUSTODIAL PREFERENCE.

9. NOT DISCLOSE ANY RECOMMENDATIONS TO THE PARTIES, THEIR ATTORNEYS, OR THE ATTORNEYS FOR THE CHILD BEFORE HAVING GATHERED THE INFORMATION NECESSARY TO SUPPORT THE CONCLUSION.

10. DISCLOSE TO THE COURTS, PARTIES, ATTORNEYS FOR THE PARTIES, AND ATTORNEYS FOR THE CHILD CONFLICTS OF INTEREST OR DUAL RELATIONSHIPS AND NOT ACCEPT ANY APPOINTMENT EXCEPT BY COURT ORDER OR THE PARTIES' STIPULATION.

11. BE SENSITIVE TO THE PARTIES' SOCIOECONOMIC, GENDER, RACE, ETHNICITY, CULTURAL VALUES, RELIGIOUS, FAMILY STRUCTURE, AND DEVELOPMENTAL CHARACTERISTICS.

12. DISCLOSE ANY ACTUAL OR POTENTIAL CONFLICTS OF INTEREST. IN THE EVENT OF A CONFLICT OF INTEREST, THE MEDIATOR SHALL SUSPEND MEDIATION AND MEET AND CONFER IN AN EFFORT TO RESOLVE THE CONFLICT OF INTEREST TO THE SATISFACTION OF ALL PARTIES OR ACCORDING TO LOCAL COURT RULES. THE COURT MAY ORDER MEDIATION TO CONTINUE WITH ANOTHER MEDIATOR OR OFFER THE PARTIES ALTERNATIVES. THE MEDIATOR CANNOT CONTINUE UNLESS THE PARTIES AGREE IN WRITING TO CONTINUE MEDIATION DESPITE THE DISCLOSED CONFLICT OF INTEREST.

S 2. Paragraph (a) of subdivision 1 of section 240 of the domestic relations law, as amended by chapter 538 of the laws of 2008, is amended to read as follows:

(a) In any action or proceeding brought (1) to annul a marriage or to declare the nullity of a void marriage, or (2) for a separation, or (3) for a divorce, or (4) to obtain, by a writ of habeas corpus or by peti-

tion and order to show cause, the custody of or right to visitation with any child of a marriage, the court shall require verification of the status of any child of the marriage with respect to such child's custody and support, including any prior orders, and MAY REQUIRE THE PARENTS OF SUCH CHILD TO PARTICIPATE IN A MEDIATION PROCESS THROUGH THE PARENT-MEDIATION PROGRAM ESTABLISHED BY ARTICLE FIVE-B OF THIS CHAPTER. THE COURT shall enter orders for custody and support [as] THAT CONFORM WITH THE TERMS AND CONDITIONS OF THE MEDIATION AGREEMENT IF SUCH MEDIATION PROCESS IS UTILIZED, BUT IF THE COURT DETERMINES THAT THE TERMS OF SUCH AGREEMENT ARE UNFAIR OR UNJUST OR NO SUCH AGREEMENT EXISTS THEN, in the court's discretion, AS justice requires[, having regard to]. IN REACHING ITS DECISION THE COURT SHALL CONSIDER the circumstances of the case and of the respective parties and [to] the best interests of the child and SHALL BE subject to the provisions of subdivision one-c of this section. Where either party to an action concerning custody of or a right to visitation with a child alleges in a sworn petition or complaint or sworn answer, cross-petition, counterclaim or other sworn responsive pleading that the other party has committed an act of domestic violence against the party making the allegation or a family or household member of either party, as such family or household member is defined in article eight of the family court act, and such allegations are proven by a preponderance of the evidence, the court must consider the effect of such domestic violence upon the best interests of the child, together with such other facts and circumstances as the court deems relevant in making a direction pursuant to this section. If a parent makes a good faith allegation based on a reasonable belief supported by facts that the child is the victim of child abuse, child neglect, or the effects of domestic violence, and if that parent acts lawfully and in good faith in response to that reasonable belief to protect the child or seek treatment for the child, then that parent shall not be deprived of custody, visitation or contact with the child, or restricted in custody, visitation or contact, based solely on that belief or the reasonable actions taken based on that belief. If an allegation that a child is abused is supported by a preponderance of the evidence, then the court shall consider such evidence of abuse in determining the visitation arrangement that is in the best interest of the child, and the court shall not place a child in the custody of a parent who presents a substantial risk of harm to that child. An order directing the payment of child support shall contain the social security numbers of the named parties. In all cases there shall be no prima facie right to the custody of the child in either parent. Such direction shall make provision for child support out of the property of either or both parents. The court shall make its award for child support pursuant to subdivision one-b of this section. Such direction may provide for reasonable visitation rights to the maternal and/or paternal grandparents of any child of the parties. Such direction as it applies to rights of visitation with a child remanded or placed in the care of a person, official, agency or institution pursuant to article ten of the family court act, or pursuant to an instrument approved under section three hundred fifty-eight-a of the social services law, shall be enforceable pursuant to part eight of article ten of the family court act and sections three hundred fifty-eight-a and three hundred eighty-four-a of the social services law and other applicable provisions of law against any person having care and custody, or temporary care and custody, of the child. Notwithstanding any other provision of law, any written application or motion to the court for the establishment, modification or enforcement of a child support obligation

for persons not in receipt of public assistance and care must contain either a request for child support enforcement services which would authorize the collection of the support obligation by the immediate issuance of an income execution for support enforcement as provided for by this chapter, completed in the manner specified in section one hundred eleven-g of the social services law; or a statement that the applicant has applied for or is in receipt of such services; or a statement that the applicant knows of the availability of such services, has declined them at this time and where support enforcement services pursuant to section one hundred eleven-g of the social services law have been declined that the applicant understands that an income deduction order may be issued pursuant to subdivision (c) of section fifty-two hundred forty-two of the civil practice law and rules without other child support enforcement services and that payment of an administrative fee may be required. The court shall provide a copy of any such request for child support enforcement services to the support collection unit of the appropriate social services district any time it directs payments to be made to such support collection unit. Additionally, the copy of any such request shall be accompanied by the name, address and social security number of the parties; the date and place of the parties' marriage; the name and date of birth of the child or children; and the name and address of the employers and income payors of the party from whom child support is sought or from the party ordered to pay child support to the other party. Such direction may require the payment of a sum or sums of money either directly to the custodial parent or to third persons for goods or services furnished for such child, or for both payments to the custodial parent and to such third persons; provided, however, that unless the party seeking or receiving child support has applied for or is receiving such services, the court shall not direct such payments to be made to the support collection unit, as established in section one hundred eleven-h of the social services law. Every order directing the payment of support shall require that if either parent currently, or at any time in the future, has health insurance benefits available that may be extended or obtained to cover the child, such parent is required to exercise the option of additional coverage in favor of such child and execute and deliver to such person any forms, notices, documents or instruments necessary to assure timely payment of any health insurance claims for such child.

S 3. Paragraph (a) of subdivision 1-b of section 240 of the domestic relations law, as added by chapter 567 of the laws of 1989, is amended to read as follows:

(a) The court shall make its award for child support pursuant to THE TERMS AND CONDITIONS OF A MEDIATION AGREEMENT REACHED IN ACCORDANCE WITH THE PROVISIONS OF ARTICLE FIVE-B OF THIS CHAPTER, IF SUCH PROCESS IS UTILIZED. BUT IF THE COURT SHOULD DETERMINE THAT SUCH TERMS AND CONDITIONS ARE NOT FAIR AND JUST, OR IF THE MEDIATION PROCESS IS NOT UTILIZED, THEN THE COURT SHALL MAKE ITS AWARD FOR CHILD SUPPORT PURSUANT TO the provisions of this subdivision. The court may vary from the amount of the basic child support obligation determined pursuant to paragraph (c) of this subdivision only in accordance with paragraph (f) of this subdivision.

S 4. This act shall take effect immediately.