

Public Court Custody Mediation and Private Judging

By Contra Costa Superior Court Judge Leslie G. Landau (Ret.)

You have stipulated to the appointment of a private judge in your family law case, and now a custody issue has arisen. You file a request for order, to be heard by your private judge. In opting out of the public court in favor of a private judge, have you also relinquished the ability to use public court child custody mediation? (Family Code section 3160 *et seq.*) Many believe the answer is yes. And they are mistaken.

The right to a private judge derives from Article Six, section 21 of the California Constitution. It authorizes parties to stipulate to a temporary judge: "On stipulation of the parties litigant the court may order a cause to be tried by a temporary judge who is a member of the State Bar, sworn and empowered to act until final determination of the cause." California Rule of Court 2.831 requires the temporary Judge to swear to the judicial oath. Thereupon, the private judge has the same powers as a sitting public court judge: "Once a temporary judge has taken an oath of office, he or she has the same authority as a regular judge." (See *In re Marriage of Assemi* (1994) 7 Cal.4th 896, 908.)

As the authority of the private judge is coextensive with that of a public judge, the access to services that can or must be ordered in the public court is also available to the private judge. In the custody mediation setting, that means the mandate on or discretion afforded the public judge to order mediation also

applies to the private judge. For example, Family Code section 3170 requires mediation upon a request for a custody or visitation order: "If it appears on the face of a petition, application, or other pleading to obtain or modify a temporary or permanent custody or visitation order that custody, visitation, or both are contested, the court **shall set** the contested issues for mediation." (Emphasis added.) That applies to all judges, public and private.

The mediation to which you have access depends on the county in which your case is pending, not the location of your private judge; again, the private judge's authority is the same as the power of the judge he or she supplants. Counties differ in their approach to child custody mediation. Some counties are "mediation" counties, where parties meet with a Family Court Services mediator, and if they cannot agree, the court decides. (See FL-314-INFO) Others are "recommending" counties pursuant to Family Code 3183, where parties mediate with a family court services mediator, and if they cannot agree the mediator assumes the role of a family court services recommending counselor and makes a written recommendation to the Court. (See FL-313-INFO) Still others have a tier system, in which parties first do Tier I mediation (collaborative), and if it is not successful, the Court may in its discretion order Tier II (information gathering) or Tier III (recommending) mediation. You may

ask for mediation according to your case's needs and the type of mediation available in your case's county.

Contra Costa County, where I served on the Superior Court, has adopted the tiered mediation approach. Contra Costa Superior Court Local Rule 5.17(b) requires Tier I mediation, and authorizes Tier II and Tier III at the discretion of the judge: "Confidential Mediation (Tier I below) **shall be made available in all cases** in which child custody counseling/visitation is at issue; the remaining services, including any additional Tier I appointments, **shall be scheduled** at the discretion of and as directed by the family law judicial officer according to the needs of the case (Family Code section 3170)." (Emphasis added.) The rule, again, applies equally to public and private judges in Contra Costa cases.

Parties have reported to me that they have had difficulty scheduling mediation in cases in which a private judge is appointed. Perhaps the relative rarity of private judging has confused the Family Court Services scheduling clerk or a quirk of the court's case management system's outputs in private judge cases does not show the pendency of a motion. I confirmed with Judge Palvir Shoker, the Family Law Supervising Judge, that mediation is indeed available. To avoid confusion and delay, in any private judge case in which custody may be an issue, you should take the opportunity at the first Case Management Conference to address with the private judge the best process in the case/county for scheduling any necessary mediation. In my cases, I make the scheduling call to smooth the process for the parties.