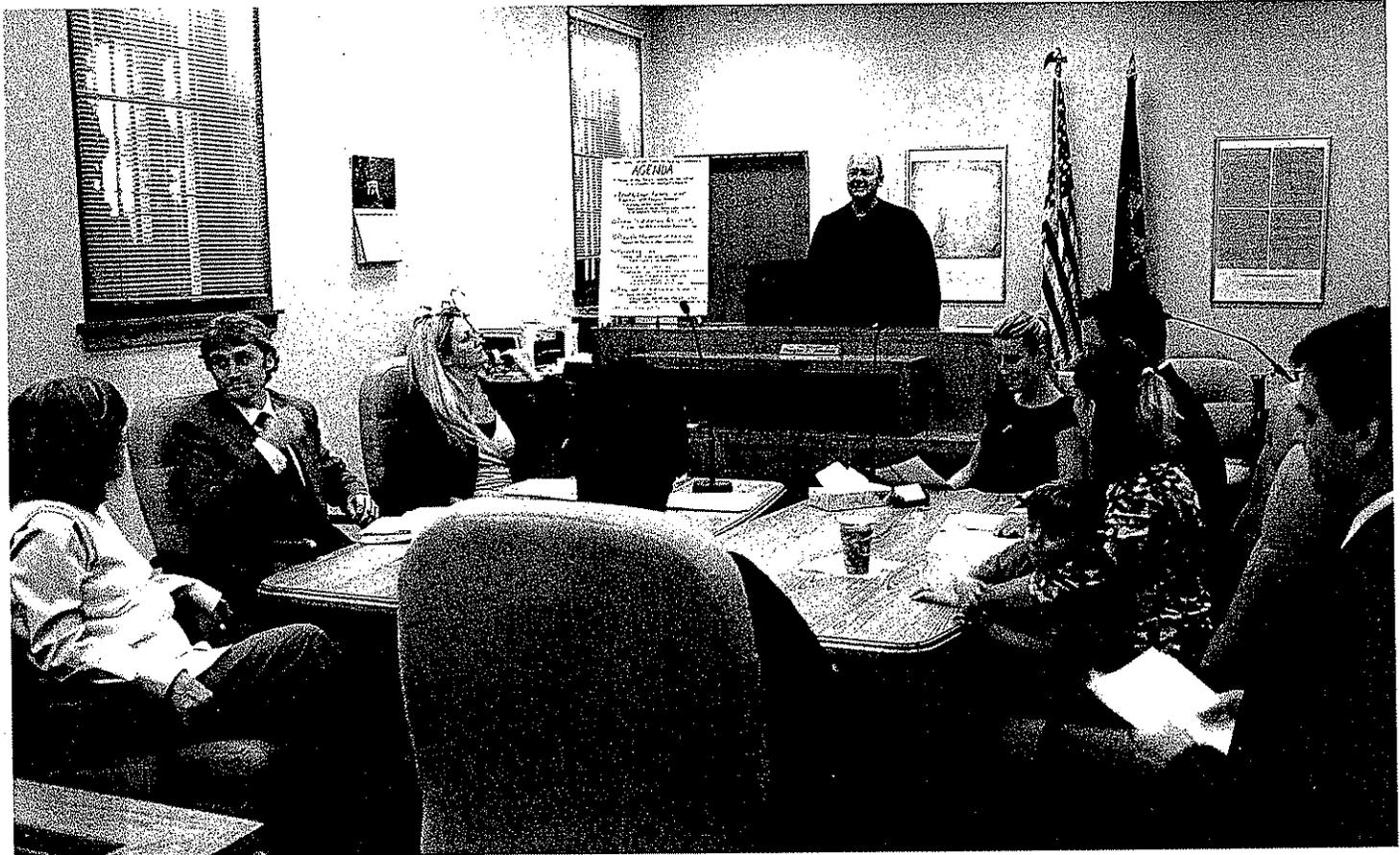


# The Role of the Judge:

## Convene Stakeholders for Facilitated Pre-Hearing Conferences in Abuse, Neglect, and Dependency Cases

By Judge Douglas F. Johnson



Judge Douglas Johnson talks to participants prior to the Pre-Hearing Conference.

One of the best goals of the Omaha, Nebraska, Victims Act Model Court (one of many, thanks to NCJFCJ) was starting Facilitated Pre-Hearing Conferences in July 2004. We learned about and borrowed this problem-solving tool from the Pima County (Tucson, Ariz.) Model Court. After making a few adaptations to fit our court process, we have found that Facilitated Pre-Hearing Conferences are resulting in improved outcomes for the children and families in our courts.

### WHAT IS A FACILITATED PRE-HEARING CONFERENCE?

A Facilitated Pre-Hearing Conference is a form of alternative dispute resolution where a trained mediator facilitates a problem-solving agenda with most but not all of the stakeholders in a child protection case: the prosecutor, parents, attorneys, Guardian ad Litem, Child Protective Services caseworker, and family members. The Pre-Hearing Conference is unique in that the judge does not participate, and all Conference discussions are confidential and

off the record. The substance of the Pre-Hearing Conference is based on the core principles of the Protective Custody Hearing (known in other jurisdictions as shelter care hearings, removal hearings, etc.), as discussed in NCJFCJ's *RESOURCE GUIDELINES: Improving Court Practice in Child Abuse & Neglect Cases*.\*

#### \* The Protective Custody Hearing and *RESOURCE GUIDELINES*

The Protective Custody Hearing is the most important hearing; it sets the foundation for all subsequent hearings. If we get things right on day one, we will not have to go back over problems in the future. The Facilitated Pre-Hearing Conference offers an Alternative Dispute Resolution opportunity to prepare for a meaningful Protective Custody Hearing.

Since it was published in 1995, the National Council of Juvenile and Family Court Judges' *RESOURCE GUIDELINES: Improving Court Practice in Child Abuse & Neglect Cases* continues to inform and shape court process through meaningful hearings, frontloading of reasonable efforts services, meaningful and timely outcomes, and systems reform. The chapter on the Protective Custody Hearing, like the others, details how to achieve a meaningful hearing and outcomes for families. The Facilitated Pre-Hearing Conference agenda mirrors the concepts of the *RESOURCE GUIDELINES*, the Protective Custody Hearing, and key decisions the court should make.

The Facilitated Pre-Hearing Conference explores several basic issues including:

- Identification of both parents
- Eligibility under the Indian Child Welfare Act
- Placement of children (including identifying extended family members)
- Family time (visitation) plans for parents, siblings, and extended family
- Provision of reasonable efforts services

By taking time for a Pre-Hearing Conference before the Protective Custody Hearing, we have found that more information is obtained in a confidential, non-court atmosphere; the process is more meaningful for parents and family members; family strengths can be explored and built upon; and often the parties come to an agreement voluntarily before the Protective Custody Hearing takes place.

### WHY A FACILITATED PRE-HEARING CONFERENCE?

Parents and children come to court in trauma. Parents have serious personal problems resulting in their children being removed, and children suffer trauma by being taken from their parents and placed in foster care. Before implementing Facilitated Pre-Hearing Conferences, we held a 15-minute Protective Custody Hearing where parents were advised of their rights and possible dispositions because we didn't have time for the full one-hour hearing recommended by the *RESOURCE GUIDELINES*. The prosecutor offered an affidavit to support continued foster placement of the child and probable cause finding. Virtually every case was an "exigent circumstance" in which no reasonable efforts could be offered to prevent the removal or return of the child home. Supervised visitation was offered twice a week for one or two hours. A Pretrial was set. With no opportunity for parental buy-in or participation, the Protective Custody Hearing was not productive or meaningful, and was a terrible way to treat families.

As an Omaha Model Court goal, we decided to try the Facilitated Pre-Hearing Conference as a pilot. We discovered it provides an opportunity to problem solve with full stakeholder participation. Pre-Hearing Conference facilitators mediate the agenda so that the parties can address underlying concerns and explore options in an effort to resolve issues.\*\* The facilitators apply good judgment and sound analytical skills. They model respect, civility and dignity. Their neutral role takes the pressure off others by leading the problem-solving conversation. Parents are encouraged to build on their strengths, participate in services, and meet their children's best interests and safety.

\*\*An important consideration in dependency cases is the existence of domestic intimate-partner violence in the family. If it is determined that domestic violence is present, our court follows the recommendations in NCJFCJ's *Effective Intervention in Domestic Violence & Child Maltreatment Cases: Guidelines for Policy and Practice* (the Greenbook), as well as the Nebraska Parenting Act, enacted in 2008, concerning the need to ensure victim safety. Due to this article's topic and space limitations, however, I will not cover the specifics of mediator/facilitator training, specialized process for domestic violence cases, specialized gender-specific mental health and substance abuse dual diagnosis treatment, infant and toddler best practices, nor the 0-5 Family Drug Treatment Court.

### GETTING STARTED

Our Model Court convened stakeholder meetings for almost one year. We received and studied the Pima Model Court materials and asked them to train us. After working out the perceived barriers the best we could, we picked a start date: July 28, 2004.

One of those barriers was lack of space. The Pima Model Court has conference rooms for Facilitated Pre-Hearing Conferences, but we do not, so we use our courtrooms and push counsel tables together to make a neutral square. That decision meant having judges do work in chambers that would not cause scheduling conflicts. Additionally, due to our extremely busy docket, we could not provide 45 minutes for the Facilitated Pre-Hearing Conference and 45 minutes for the Protective Custody Hearing as Pima County does. We adapted and offered one hour total. The majority of the time is devoted to the Facilitated Pre-Hearing Conference, which makes the Protective Custody Hearing that follows shorter but more productive. If we gain a new judgeship, the time allocation may increase.

Each community interested in this process must work out the issues of parent and child trauma-informed practice, training, buy-in, time allocation, place for the Facilitated Pre-Hearing Conference, funding for the mediators, confidentiality issues, and security for the safety of the participants.

### THE PROJECT GAINS ATTENTION AND SUPPORT

Once word got out about our pilot project, some Nebraska courts borrowed our Facilitated Pre-Hearing Conference User's

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Guide and Information Form and started doing the Pre-Hearing Conferences without training. Other Nebraska courts, and some out-of-state courts, observed our court before starting (The latter is a better idea than the former!) After the National Leadership Summit on the Protection of Children was held in 2005, the Nebraska Supreme Court implemented the *Through the Eyes of the Child Initiative* and adopted our Facilitated Pre-Hearing Conferences. The Nebraska Supreme Court continues to support and encourage Facilitated Pre-Hearing Conferences, which provides significant credibility to the importance and value of this problem-solving tool.

The Nebraska Supreme Court rightfully keeps a watchful eye for equal access to justice for all. Facilitated Pre-hearing Conferences are optional and up to the judge. My hope is that we will have statutory authority or a Nebraska Supreme Court procedural rule for mandatory Facilitated Pre-Hearing Conferences so that all of our courts provide this problem-solving tool to families when children enter foster care.

### ISSUES EMERGE REGARDING COMPLIANCE/NO ADMISSION AGAINST INTEREST

Unless the Facilitated Pre-Hearing Conference is carefully introduced (an example appears below), some stakeholders may

appear to show compliance, but because they rush the agenda and quickly complete the checklist, they miss a significant opportunity to help the parents and the children. Our goal is that each agenda topic be fully discussed as a rich area of family-centered practice.

At the time we started this project, the rule of settlement conferences had always provided that such conferences were confidential and could not be used for proof at trial or admission against interest. Some (particularly defense counsel and prosecutors) had a hard time believing it. To resolve any doubt, Nebraska now has a statute that clarifies that Facilitated Pre-Hearing Conferences (and Family Group Conferences) are confidential. Neither the discussion nor a parent's willingness to voluntarily participate in reasonable services efforts constitutes an admission to the allegations of the petition or against interest. (See: Nebraska Revised Statutes Section 43-247.01 (Reissue 2008)).

### ARE THERE ANY CASES WHERE A FACILITATED PRE-HEARING CONFERENCE WILL NOT WORK?

NO. Various prosecutors, Guardians ad Litem, defense attorneys, Child Protective Services caseworkers, or judges sometimes think that a case should bypass the Facilitated Pre-Hearing Conference and go straight to the Protective Custody Hearing. They often attempt to do this if protective custody and/or foster placement are resisted and the parties want to litigate.

However, these issues and others are routinely worked out when the judge leads, convenes, and insists on having a Facilitated Pre-Hearing Conference. I have yet to be disappointed by the outcome of a thorough and meaningful Facilitated

Pre-Hearing Conference. More importantly, the parties are not disappointed with the outcome. When a disputed matter remains, the litigation moves forward quickly because the issues are narrowed.

### IS THE FACILITATED PRE-HEARING CONFERENCE "POLLYANNA"?

NO. I have tough cases just like all judges do. But in my sixteenth year on the bench, I find the adage "the judge who rules least rules best" rings true. Like custody cases, families can best work out resolution of their issues themselves—with the sort of assistance and oversight that the Facilitated Pre-Hearing Conference provides. The judge needs to inform parents whose children are in foster care that: our cases are civil, not criminal; they will not be punished in our court; and they will be shown respect, dignity, fairness, and encouragement while being held accountable for their actions. The judge can encourage parents to meet their children's needs.

Judges need to remind parents that their children have a right to a decent life with a safe, stable, and loving caregiver—and *time is of the essence*. The 12-month (or sooner) permanency planning clock ticks away. Children in foster care suffer a great deal of trauma and their rights must be respected and enforced too.

Beginning abuse and neglect cases with a Facilitated Pre-Hearing Conference is consistent with the *RESOURCE GUIDELINES*. Most cases work out with timely reunification. But in cases where reunification will not occur, parents usually

### Two Case Examples

**CASE #1:** A father is charged with felony abuse (he threw his baby against a wall, killing the child). The mother is charged with failure to protect, and both parents are charged with domestic violence in the presence of the children and inability to care for the two surviving toddlers. A petition was filed alleging abuse and neglect with a prayer for termination of parental rights under the aggravated circumstances section of the Adoption and Safe Families Act. No one thought that a Facilitated Pre-Hearing Conference should occur; they wanted the court to proceed immediately to the Protective Custody Hearing. Not surprisingly, counsel also asked for an in-chambers conference to tell me why this case was "special." (Is there any family that is not special?) Both requests were denied. I would not allow the parents to be excluded from any discussion about their children and themselves.

I directed everyone into the courtroom. I entered and stood behind my bench. In my role as judicial leader and convener, I set a problem-solving tone by addressing the parties and extended family members as follows:

*Good morning. My name is Doug Johnson. I am the juvenile court judge in this case. I want to introduce what we are going to do before the Protective Custody Hearing. A Petition alleging abuse and neglect with termination of parental rights allegations has been filed. Neither will be heard today but may be in the future. There is a pending felony charge against the father and he is presently incarcerated. I know difficult tensions are present, but this is a problem-solving court.*

*Your family is so important that we will take the time to have a meaningful opportunity to build on family strengths, talk about*

*issues, and meet the best interests of the children. We have set aside an hour for a Facilitated Pre-hearing Conference. We have an agenda [I point to the chart] of important topics that can help your family. Today, we have two trained mediators, Ms. King and Ms. Riley, who are neutral and will make no decisions regarding the case. They are trained listeners who bring special skills to facilitate the Pre-hearing Conference. Everyone will be respected and given an opportunity to participate. We will try to come to mutual understanding and agreement about the agenda topics and how issues might be resolved. If the charges are true, we can work together to find solutions.*

*Please know that, by statute, what is discussed in this Pre-hearing Conference is confidential and not an admission against interest. Parental statements or participation in services cannot be used for trial, here or elsewhere. Neither I nor my court reporter will be present and no record is being made.*

*When a child is placed into temporary custody with Child Protective Services, that agency has a duty to provide reasonable efforts services pre-adjudication to return the child home, or if not, then to another permanent home. [I did not say that relinquishment of parental rights counseling could be offered, but it could, and was.] Coffee or water is available if you like.*

*I encourage you to participate in the Facilitated Pre-hearing Conference. Please use the form to write down information as you work through the agenda. Copies will be made for each of you.*

*Please tell my bailiff when you are ready for the Protective Custody Hearing, but take your time. Ms. King and Ms. Riley, are you ready? Thank you. [I then left the courtroom.]*

At the Protective Custody Hearing, I found that all of the agenda topics were thoroughly addressed and felt it was

relinquish parental rights, I think because of the respectful process and frontloading of reasonable efforts services. Judicial leadership is not just our words but our demeanor and example in setting the problem-solving atmosphere.

#### A FEW FINAL OBSERVATIONS

In spite of almost five years experience holding Facilitated Pre-Hearing Conferences, not all stakeholders buy into this process. Some think the parties do not have enough information at this stage of the case. Change is difficult. But perhaps the greatest difficulty is the frequent turnover of personnel. Training is a never-ending challenge. With ongoing training, positive experience, and the judge's leadership, the stakeholders come to realize that everyone benefits: Parents receive timely services; children's best interests and safety are met. The family, caseworkers, attorneys, and the Bench streamline case flow by working together at the beginning of the case.

Some colleagues leave it to the parties to decide if they want to do a Facilitated Pre-Hearing Conference. I do not. I think it is the role of the judge to lead, teach, and encourage participation in spite of some who want to have a quick hearing. This lets everyone know what is going to happen and why it is important.

Through Facilitated Pre-Hearing Conferences, more children return home sooner. There are early admissions to allegations. The Dispositional Hearing folds into the adjudication because the parents have already been working on a rehabilitative case plan. We have timely case closure. In some cases, the prosecutor notions to continue the adjudication for several months in

anticipation of dismissal. This is because of full and voluntary parental participation in services which are correcting issues of concern regarding the children. The majority of those cases are dismissed.

We thank the Pima County Model Court for its pioneering leadership, sharing of materials, site visits, and trainings to assist us in getting started five years ago. I encourage you to learn more about the Facilitated Pre-Hearing Conference by contacting me or the Pima County Model Court.



#### ABOUT THE AUTHOR:

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observe the Omaha Model Court.

appropriate not to offer reasonable efforts for reunification due aggravated circumstances. However, reasonable efforts were required to achieve the permanency objective of adoption. Therapeutic parenting time, grief counseling for the parents and siblings, mediation, and relinquishment counseling were offered to resolve the permanency issue.

In this case, the Facilitated Pre-Hearing Conference helped ensure that the two children in this family had a chance for a permanent home. The permanency objective of adoption was achieved shortly after the mandatory six-month placement with the relative adoptive/foster parents. One child was placed with a foster/adoptive relative from day one. The other child was placed with his intervening biological father who received custody. We never adjudicated the petition or the termination of parental rights.

**CASE #2:** A baby was born prematurely due to the mother's use of marijuana and lack of prenatal care. Doctors and nurses at the hospital stated the mother seemed depressed and not attentive to her newborn, who remained in protective custody in the Neonatal Intensive Care Unit. A two-year-old sibling was also removed and placed in a shelter.

The Facilitated Pre-Hearing Conference was held, and all agenda items were covered except reasonable efforts. At the Protective Custody Hearing, I asked why. The caseworker stated that the Initial Family Assessment had not yet been completed and she had no idea what services to offer this family. I asked if everyone had read the petition. They said yes.

I mentioned that it appeared fairly easy to determine what

reasonable efforts services should be offered because this case resembled 80 percent of all of our cases (in Nebraska as well as nationally). Namely, the children were placed into foster care because of parental mental health and substance abuse issues with co-occurring problems of inadequate parenting skills, lack of adequate housing, and lack of a legal source of income.

It strikes me as illogical for Child Protective Services to say it doesn't know how to help a family when it had enough information to decide that children needed to be removed and placed in foster care. The Facilitated Pre-Hearing Conference and Protective Custody Hearing are opportunities for judges to make sure timely reasonable efforts services are provided.

Accordingly, I ordered Child Protective Services to arrange and pay for: mental health and substance evaluations and treatment if recommended; safe relative or foster placement of the children with their mother for bonding and attachment; an infant and toddler parenting coach; early childhood evaluations (Part C of the IDEA [20 U.S.C. Section 1431 (200)]; medical examinations for the family; and dental examinations for the toddler and mother. With time and progress, we would work on achieving adequate housing and a legal source of income. I also invited the mother to observe our 0-5 Family Drug Treatment Court to see if she might be interested in joining. I gave her early childhood books to read to her children. The mother was reminded that her participation in services was voluntary, and her participation or statements could not be used as an admission against interest or to prove the allegations of the petition. She was grateful to get help on day one.