

**Nebraska Ethics Advisory Opinion for Lawyers
No. 17-02**

Nebraska Ethics Advisory Opinion for Lawyers No. 13-02 is modified and amended. A Nebraska Licensed Attorney, acting as a private mediator but who is not certified under the Nebraska Parenting Act, would NOT be per se prohibited from mediating custody, parenting time, parenting functions, or support matters under Chapter 30 and 42 because that Attorney would therefore not be a mediator “involved in proceedings” if a proceeding has not been filed.

QUESTION PRESENTED/ISSUE

A request has been made by a Nebraska attorney to amend or completely withdraw Nebraska Ethics Advisory Opinion for Lawyers No. 13-02. As presently written, Opinion No. 13-02 concludes that a Nebraska Lawyer who is not licensed as a mediator under the Nebraska Parenting Act (Nebraska Revised Statutes §43-2921), should not mediate in cases involving proceedings or modifications where parenting functions are at issue (Nebraska Revised Statutes, Chapter 42 – Husband and Wife, and §§43-1401-1418 Infants and Juveniles).

ANALYSIS

The Opinion, as presently published, should not be withdrawn, but rather amended, to provide further clarification and guidance to the Requesting Attorney. The Analysis section of the opinion, on page 2990 states “The Requesting Attorney is subject to the provisions of the Nebraska Parenting Act if he wants to mediate disputes *which touch, in any manner*, subjects addressed by Nebraska Revised Statutes Chapter 42 (Husband and Wife) and §§43-1401-1418. (emphasis added). The Opinion is too broad as it pertains to the language, “*which touch, in any manner.*” This language should be stricken from the Opinion. Given this present language, the Requesting Attorney, under the Parenting Act, would not be permitted to mediate issues such a property division, determination of child support, or alimony while at the same time assisting parties who are developing a parenting plan when a proceeding or modification has been filed. For example, performing a child support calculation, would arguably, “touch” on the issue of custody as part of the calculation requires information on whether custody will be basic, joint or split custody. As another example, a private Nebraska licensed attorney (who is a mediator) discussing whether husband or wife is permitted to claim the minor child(ren) for taxes in a child support calculation would *touch* in any manner subjects under Chapter 42.

The Parenting Act applies to proceedings or modifications *filed on or after January 1, 2008*, in which “parenting functions” for a child are at issue under Chapters 30 and 42. Neb. Rev. Stat. §43-2924. Parenting functions are defined in Neb. Rev. Stat. 43-2922(17). The author understands the examples above probably would not fall directly in the categories identified in 43-2922(17), however, the “not limited to” language of 43-2922(17) could be argued to say paying child support is a “parenting function.” Given the present broadness of the Opinion, the Requesting Attorney would not be able to mediate financial matters involving children if a case has been filed. Thus, the “*touch in any manner*” should be stricken. If the language was stricken, the parties would be permitted to have the Requesting Attorney mediate some matters under Chapter 42 and 30 regardless of whether or proceeding or modification was on file.

Further, the Requesting Attorney, as a private mediator, would NOT be prohibited from mediating custody, parenting time, parenting functions, or support matters under Chapter 30 and 42 if a proceeding has not been filed. The Requesting Attorney would not be a mediator “*involved in proceedings*” if an action or modification has not been filed. This would be similar to parties selecting to have a priest, family member, counselor or the parties themselves develop a parenting plan before litigation because ultimately, the Court will review the proposed parenting plan to determine if the plan is in the best interests of the minor child(ren). The aforementioned is true regardless of whether the Requesting Attorney is a per se “Parenting Act Mediator” who has completed the training requirements under the Parenting Act. The distinction between whether or proceeding has been filed or not filed may be viewed unfavorably, however, given the manner section 43-2924 is set forth in the Nebraska statutes, and giving the statute its plain and ordinary meaning, that seems to be the critical distinction at the present time, unless the private mediator is agreed to by the parties and **approved by the Court**.

The Requesting Attorney is not a mediator under the Parenting Act as defined by Neb. Rev. Stat. §43-2922, as he has not completed the training requirement as defined by the Parenting Act §43-2938 and approved by the Office of Dispute Resolution. It is completely understood the Requesting Attorney is not interested in completing the training set forth in the Parenting Act and it is further understood the Requesting Attorney is not interested in becoming a per se “Parenting Act Mediator” and being on a list of approved mediators. However a recitation of the relevant parts of the statutes is necessary to address the Requesting Attorney’s inquiry. Neb. Rev. Stat. §43-2922(14) defines “mediation” as “a method of nonjudicial

intervention in which a trained, neutral third party mediator, who has no decision-making authority, provides structured process in which individuals and families in conflict work through parenting and other related family issues which the goal of achieving voluntary, mutually agreeable parenting plan or related resolution.” Neb. Rev. Stat. 43-2922, defines mediator as follows: (15) Mediator means a mediator meeting the qualifications of section 43-2938 and acting in accordance with the Parenting Act.

Neb. Rev. Stat. §43-2938, which sets forth a mediator’s qualifications under the Parenting Act, is as follows:

Mediator; qualifications; training; approved specialized mediator; requirements.

(1) A mediator under the Parenting Act may be a court conciliation program counselor, a court conciliation program mediator, an approved mediation center affiliated mediator, **or a mediator in private practice.**

(2) To qualify **as a Parenting Act mediator**, a person **shall** have basic mediation training and family mediation training, approved by the Office of Dispute Resolution, and **shall** have served as an apprentice to a mediator as defined in section 25-2903. The training **shall include**, but not be limited to:

(a) Knowledge of the court system and procedures used in contested family matters;

(b) General knowledge of family law, especially regarding custody, parenting time, visitation, and other access, and support, including calculation of child support using the child support guidelines pursuant to section 42-364.16.;

(c) Knowledge of other resources in the state to which parties and children can be referred for assistance;

(d) General knowledge of child development, the potential effects of dissolution or parental separation upon children, parents, and extended families, and the psychology of families;

(e) Knowledge of child abuse or neglect and domestic intimate partner abuse and their potential impact upon the safety of family members, including knowledge of provisions for safety, transition plans, domestic intimate partner abuse screening protocols, and mediation safety measures; and

(f) Knowledge in regard to the potential effects of domestic violence on a child; the nature and extent of domestic intimate partner abuse; the social and family dynamics of domestic intimate partner abuse; techniques for identifying and assisting families affected by domestic intimate partner abuse; interviewing, documentation of, and appropriate recommendations for families affected by domestic intimate partner abuse; and availability of community and legal domestic violence resources.

(3) To qualify as an approved specialized mediator for parents involved in high conflict and situations in which abuse is present, the mediator shall apply to an approved

mediation center or court conciliation program for consideration to be listed as an approved specialized mediator. The approved mediation center or court conciliation program shall submit its list of approved specialized mediators to the Office of Dispute Resolution on an annual basis. Minimum requirements to be listed as an approved specialized mediator include:

- (a) Affiliation with a court conciliation program or an approved mediation center;
- (b) Meeting the minimum standards for a Parenting Act mediator under this section;
- (c) Meeting additional relevant standards and qualifications as determined by the State Court Administrator; and
- (d) Satisfactorily completing an additional minimum twenty-four-hour specialized alternative dispute resolution domestic mediation training course developed by entities providing domestic abuse services and mediation services for children and families and approved by the State Court Administrator. This course shall include advanced education in regard to the potential effects of domestic violence on the child; the nature and extent of domestic intimate partner abuse; the social and family dynamics of domestic intimate partner abuse; techniques for identifying and assisting families affected by domestic intimate partner abuse; and appropriate and safe mediation strategies to assist parties in developing a parenting plan, provisions for safety, and a transition plan, as necessary and relevant.

(Emphasis added).

Training requirements for “Parenting Act Mediators” are set forth in the NEBRASKA STANDARDS PRACTICE AND ETHICS FOR FAMILY MEDIATORS

- I. Introduction
- II. Scope, Definition, Mediators Role, General Principle, and Effective Date
 - A. Scope. The Standards set out in the document shall apply to all family mediators **practicing under the Nebraska Parenting Act**. The Nebraska Office of Dispute Resolution (ODR) recommends that all family mediators practicing in the State of Nebraska adhere to these standards. (emphasis added).

Standard II Education and Training

A family mediator shall be qualified by education and training to undertake the mediation

- A. A family mediator **shall have taken basic and family mediation training approved by Nebraska Office of Dispute Resolution and shall have served as an apprentice**, which apprenticeship shall include co-mediating at least three parenting plan cases with at least two, and preferably three, different supervisory family members. (emphasis added).
- B. Training shall include, but not be limited to:
 - 1. Knowledge of family law and the Nebraska Parenting Act;
 - 2. Knowledge of and training in impact of family conflict on parents, children and other participants;
 - 3. Knowledge of child development child abuse and neglect, and domestic intimate partner abuse, including knowledge of provisions for safety, transition plans,

- domestic intimate partner abuse screening protocols, and mediation safety procedures;
4. Education and training specific to the process of mediation;
 5. Knowledge of the impact of culture and diversity in family members;
 6. Knowledge of resources in the state to which parties and children can be referred to for assistance.
- C. Family mediators should disclose their qualifications to mediate the family dispute.

Parenting functions pursuant to Neb. Rev. Stat. 43-2922(17) is as follows:

(17) **Parenting functions** means those aspects of the relationship in which a parent or person in the parenting role makes fundamental decisions and performs fundamental functions necessary for the care and development of a child. Parenting functions include, but are not limited to:

- (a) Maintaining a safe, stable, consistent, and nurturing relationship with the child;
- (b) Attending to the ongoing developmental needs of the child, including feeding, clothing, physical care and grooming, health and medical needs, emotional stability, supervision, and appropriate conflict resolution skills and engaging in other activities appropriate to the healthy development of the child within the social and economic circumstances of the family;
- (c) Attending to adequate education for the child, including remedial or other special education essential to the best interests of the child;
- (d) Assisting the child in maintaining a safe, positive, and appropriate relationship with each parent and other family members, including establishing and maintaining the authority and responsibilities of each party with respect to the child and honoring the parenting plan duties and responsibilities;
- (e) Minimizing the child's exposure to harmful parental conflict;
- (f) Assisting the child in developing skills to maintain safe, positive, and appropriate interpersonal relationships; and
- (g) Exercising appropriate support for social, academic, athletic, or other special interests and abilities of the child within the social and economic circumstances of the family;

Neb. Rev. Stat. §43-2927 **Training; screening guidelines and safety procedures; State Court Administrator's office; duties.** This statute states, “Mediators involved in proceedings under the Parenting Act *shall participate in training approved by the State Court Administrator* to recognize child abuse or neglect, domestic intimate partner abuse, and unresolved parental conflict and its potential impact upon children and families.” (emphasis added).

The language of the statutes above mandates, by use of the word “shall,” specific training under the Parenting Act if a mediator is going to be involved in filed proceedings or modifications that involve parenting functions 43-2922(17). The Parenting Act, when read in its

entirety requires the training in filed proceedings or modifications when parenting functions are at issue. It is understood the Requesting Attorney is an extremely accomplished attorney, and the attorney's credentials and qualifications as a private mediator are not in question. The Requesting Attorney believes he is not "acting in accordance with the Parenting Act" (Neb. Rev. Stat. §43-2922(15)), is not a "Parenting Act Mediator" (Neb. Rev. Stat. §43-2938(1) & 2939(2)), and he is not "involved in proceedings under the Parenting Act" (Neb. Rev. Stat. §43-2927(1)). Rather, he is chosen to perform a service by adults under no compulsion or referral from a court. The only way courts are involved in mediation under the Nebraska Parenting Act is by court rule (Neb. Rev. Stat. §43-2929(1)), referral (Neb. Rev. Stat. §43-2937(1)), or mandatory mediation (Neb. Rev. Stat. §43-2937(1)) when the parties themselves fail to develop an appropriate parenting plan on their own. This case is one where the parties are neither referred to—nor are they ordered to—mediation. Rather, the parties have chosen the Requesting Attorney to help them by mediating just like they might choose their lawyers or third parties such as their minister, family or counselor to provide the same assistance. The Requesting Attorney's argument is simply that the parenting act does not purport to regulate such private arrangements by mediator licensing, certification, or approval lists. In that, the Requesting Attorney, is correct, because the Parenting Act only requires *training* by saying: "Mediators involved in proceedings under the Parenting Act shall participate in training approved by the State Court Administrator. . ." (Neb. Rev. Stat. §43-2927(1)). If the Requesting Attorney is "involved in" a parenting act proceeding, then it is mandatory that he have the required training. The act requires that a mediator be on an approval list only when there is a "court referral". (Neb. Rev. Stat. §43-2937(1)). Additionally, the Act would may require the mediator to have the training under the Parenting Act even if he is agreed upon to by the parties to serve as a "private mediator" when proceedings are filed.

The only other regulations over mediators are in the Dispute Resolution Act and the Uniform Mediation Act. The Dispute Resolution Act requires thirty hours of basic training and an additional 30 hours in family mediation training. However, that act "shall apply only to approved centers and mediators of such centers." (Neb. Rev. Stat. §25-1919) The Uniform Mediation Act, which does apply to all mediators intervening when the parties are required to mediate, or holds himself or herself out as a mediator, does not require any licensing, certification, approval, or training at all. (Neb. Rev. Stat. §§25-2930-2942).

CONCLUSION

Therefore, the issue is whether the Requesting Attorney's situation is one where he is "involved in proceedings under the Parenting Act." The Requesting Attorney says he is not because there is no court involvement for his intervention. The Requesting Attorney is right if he acted before a case was filed. If there already is a case filed, and the parties are trying to comply with the Parenting Act by developing a parenting plan before they are ordered into mediation, it is debatable whether the Requesting Attorney is "involved in proceedings under the Parenting Act." The Requesting Attorney has referred to §43-2937(1) which states in part "Court referral shall be to a mediator agreed to by the parties and approved by the Court," however the next sentence states "The State Court Administrator's office shall develop a process to approve mediators under the Parenting Act."

If the Requesting Attorney and the parties definitively wanted to know if the Requesting Attorney would be permitted to mediate in filed proceedings and be approved by the Court as a "private mediator" since the mediator was "agreed to by the parties and approved by the court," the only way to know for certain from a practical standpoint is for the parties to inquire with the specific Court the parties are appearing before to see if the Requesting Attorney can be used and for specific direction on what his/her role is in the mediation if his/role is going to involve mediating "parenting functions." The other alternative would be for the legislature to provide further clarification by amending the Act itself to provide more concise language and definitions.

Issues that are outside the scope of the Committee's Opinion include what is the definition of a "private mediator," as that is not clearly defined in the Parenting Act statutes, as well as the definition of "involved in proceedings." Clearly, there would be no proceedings if a case has not been filed. "Private mediator" under the act for purposes of court referral of agreed to by the parties with approval of the Court is may be interpreted as a mediator who has fulfilled the training requirements under the Parenting Act and Standards Practice (and Ethics) for Family Mediators Training Requirements, as opposed to a mediator who has the knowledge, experience and number of mediations completed over time. HOWEVER, if the parties agree to a private

mediator and that private mediator is approved by the court, (See §43-2937(1) and §43-2923(4)), then that mediator, including the Requesting Attorney may be permitted to mediate matters under the Parenting Act, again, as long as he/she is approved by the court.