

IN THE TENNESSEE ALTERNATIVE DISPUTE RESOLUTION COMMISSION

Advisory Opinion No.: 2019-0002

The Alternative Dispute Resolution Commission received a request for an advisory opinion from a Tennessee Rule 31 Listed Mediator. The request has been modified for purposes of response within the context of Rule 31. The Ethics Advisory Opinion Committee, consisting of Frank Cantrell, Richard Ladd, Jr., and Virginia Story, reviewed the request and issued the following opinion.

Inquiry:

Does a “standing order of reference” include the statutory requirement for mediation in divorce cases that have been pending for more than 180 days? Specifically, must filed divorce cases that go to mediation use a Rule 31 Listed Mediator?

Response:

Local Rules of Practice differ from jurisdiction to jurisdiction and may also differ based on the court where the matter is pending. Therefore, the Rule 31 Listed Mediator should review the Local Rules of Practice for each court they receive referrals from in detail, especially the provisions related to mediation. While some jurisdictions utilize a 180 day deadline, other jurisdictions do not have a time limit in the Local Rules of Practice. While some jurisdictions include a provision in the Local Rules of Practice requiring a Rule 31 Listed Mediator, others are silent.

The Ethics Advisory Opinion Committee does not recognize T.C.A. § 36-4-131 as a standing order to mediation per Rule 31; however, courts may comply with the statute through a standing order or an order entered in the individual case. Until the court where the matter is pending enters an Order to Mediate, then the Ethics Advisory Opinion Committee does not believe there is a standing order to mediate the matter.

For example, the parties could be given 30 days to voluntarily come to an agreement. Alternatively, the court could enter a scheduling order that outlines when the parties are required to go to mediation and may include who will serve as mediator. Once there is an Order of Reference to Rule 31 Mediation in place through the Local Rules of Practice or an Order entered in the particular matter, then a Rule 31 Listed Mediator must be used to conduct the mediation.

References:

Rule 31, Section 2(h)

(h) “Order of Reference” is a written or standing order of a Court or Judicial Officer entered in or related to an Eligible Civil Action in accordance with Section 3 herein directing the parties to participate in a Rule 31 Mediation.

T.C.A. § 36-4-131. Mediation Waiver or extension Domestic abuse

(a) Except as provided in subsections (b), (c) and (d), in any proceeding for divorce or separate maintenance, the court shall order the parties to participate in mediation.

(b) The court may waive or extend mediation pursuant to subsection (a) for reasons including, but not limited to:

(1) Any factor codified in § 36-6-409(4);

(2) Either party is unable to afford the cost of the mediation, unless the cost is waived or subsidized by the state or if the cost of mediation would be an unreasonable burden on either or both of the parties;

(3) The parties have entered into a written marital dissolution agreement or an agreed order resolving all of the pending issues in the divorce, except as provided in subsection (c);

(4) The parties have participated in a settlement conference presided over by the court or a special master;

(5) The court finds a substantial likelihood that mediation will result in an impasse; or

(6) For other cause found sufficient by the court.

(c) If the ground for the divorce is irreconcilable differences and the parties have filed with the court a properly executed marital dissolution agreement, and if there are minor children of the marriage, a properly executed parenting plan, the court shall not require the parties to attend mediation.

(d) (1) In any proceeding for divorce or separate support and maintenance, if an order of protection issued in or recognized by this state is in effect or there is a court finding of domestic abuse or any criminal conviction involving domestic abuse within the marriage that is the subject of the proceeding for divorce or separate support and maintenance, the court may order mediation or refer either party to mediation, only if:

(A) Mediation is agreed to by the victim of the alleged domestic or family violence;

(B) Mediation is provided by a certified mediator who is trained in domestic and family violence in a specialized manner that protects the safety of the victim; and

(C) The victim is permitted to have in attendance at mediation a supporting person of the victim's choice, including, but not limited to, an attorney or

advocate. No victim may provide monetary compensation to a nonattorney advocate for attendance at mediation.

(2) Mediation conducted pursuant to subdivision (b)(1) shall be concluded and a report provided to the court no later than one hundred eighty (180) days from the date the complaint for divorce was filed.

Local Rules of Practice

The AOC website provides weblinks to the Local Rules of Practice for the state's trial courts. Please visit <http://www.tncourts.gov/courts/court-rules2/local-rules-practice> for information as provided by the local courts. This website currently states: "This page provides the local rules of practice for the state's trial courts. However, please note that this listing may not comprise the entirety of local rules of practice, but reflect only the rules that have been provided by the listed districts. Additional rules may be obtained from the court clerks' offices in each district or county."

See, e.g., Rules of Local Practice in the Circuit and Chancery Courts for Sullivan County, Tennessee Rule 16.07. Mediation and Mediators

A. At any time during the divorce proceedings, the parties may choose to participate in a method of alternative dispute resolution and select their own mediator or arbitrator. However, either by the Court's own motion or by a motion of one or both parties, the Court will appoint a family mediator pursuant to Tennessee Supreme Court Rule 31. If the parties are unable to reach an agreement on a Permanent Parenting Plan within 120 days after the commencement of the action, the parties may submit a scheduling order to the Court including a referral to mediation or alternative dispute resolution or request for a waiver for just cause. The Court may designate a Rule 31 family mediator by court order. The Court may determine that the mediators' fees be taxed as court costs or that the case is appropriate for pro bono mediation.

B. The parties may directly negotiate the fees with the mediator. Each mediator must provide proof of three pro bono mediations to the Administrative Office of the Courts for annual approval.

C. Mediator reports shall be filed with the Court pursuant to Tenn. Sup. Ct. Rule 31. The reports shall include a 30-day report and a final report.

D. Judicial Settlement Conferences will not be available in cases affected by this rule, except on motion and a showing of exceptional circumstances.

E. If the Court finds that a party willfully failed to appear at a scheduled dispute resolution process without good reason, the Court may, upon motion, award attorney fees and financial sanctions to the prevailing party. See T.C.A. §36-6-404(a)(4)(D).

See, e.g., Local Rules for the Chancery and Circuit Courts for the 16th Judicial District, including Rutherford and Cannon Counties, Tennessee

Rule 12.04(A) Attendance at Mediation and Parenting Classes

(A) Except when a divorce is granted on the basis of Irreconcilable Differences or upon Default, no divorce shall be heard unless the parties have first attempted to resolve their contested issues before a Rule 31 mediator, who shall report to the Court the result of the mediation in accordance with the Tennessee Supreme Court Rule 31. Mediation may be waived by the Court in appropriate cases, and when the Court finds mediation should be waived pursuant to 36-4-131.

Date Issued: _____



Frank Cantrell



Richard Ladd, Jr.



Virginia Story