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ADR and Litigation Involving Social Problems

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Abstract

This Article addresses remarks of the Corporation Counsel of the City of New York, Michael Cardozo, regarding the use of ADR in legal disputes involving municipal government. It also highlights the special responsibilities of class counsel in the ADR context in class action litigation on behalf of vulnerable families and individuals. Specifically, the Article addresses ADR resolutions in *Sheppard v. Phoenix*, No. 91 Civ. 4148(RPP), 1998 WL 397846 (S.D.N.Y. July 16, 1998), *Marisol v. Giuliani*, 185 F.R.D. 152 (S.D.N.Y. 1992), and *McCain v. Dinkins*, 84 N.Y.2d 216 (1994). The Article concludes with a discussion of ADR in the context of litigation on behalf of homeless New Yorkers. ADR can simultaneously prevent harm to vulnerable populations and keep parties out of court when the government falls out of compliance with legal rights and protections. ADR should not be used to wipe away fundamental legal rights protecting homeless families.

KEYWORDS: Sheppard, Marisol, McCain, ADR, vulnerable families, social responsibility, social problems, homelessness

ADR AND LITIGATION INVOLVING SOCIAL PROBLEMS

*Steven Banks**

INTRODUCTION

This Essay draws on my experience in the alternative dispute resolution (“ADR”) field, which is based largely on my role as counsel in the *McCain* litigation on behalf of homeless children and their families in New York City (“the City”) in which court rulings and orders require the provision of safe, suitable, and adequate emergency housing, assistance, and services.¹

John Feerick² was a member of a Special Master Panel in the *McCain* litigation, and my colleagues at The Legal Aid Society and I had the opportunity to work closely with him during his two-year tenure in that role. As a Special Master in that litigation, he made a number of significant systemic reform recommendations calling for the government to redouble its efforts to prevent family homelessness, and to provide increased access to permanent housing to alleviate family homelessness.

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1. See, e.g., *McCain v. Koch*, 502 N.Y.S.2d 720 (App. Div. 1986), *rev’d in part*, 511 N.E.2d 62 (N.Y. 1987); *McCain v. Dinkins*, 84 N.Y.2d 216 (1994); *McCain v. Giuliani*, 653 N.Y.S.2d 556 (App. Div. 1997).

2. John Feerick is the former Dean of Fordham Law School and is well-known for a lifetime of work as a mediator and proponent of alternative dispute resolution initiatives. He has been appointed to lead a number of civic and judicial commissions which have recommended systemic reform in a range of areas. Currently, he is a law professor at Fordham; leads Fordham’s Feerick Center, which concentrates on solutions to urban social issues; and is the first Chair of the recently created New York State Commission on Public Integrity. See John D. Feerick Faculty Information, <http://law.fordham.edu/ihhtml/fac-2bioPP.ihtml?id=507&bid=91> (last visited Nov. 15, 2007).

Kenneth Feinberg³ served as a Special Master in the *McCain* litigation before John Feerick. Mr. Feinberg made significant contributions by devising dispute resolution mechanisms that preserved the core legal right of class member homeless children and their families to receive lawful shelter and services, while at the same time freeing the court, the plaintiff class, and the government defendants of the need for ongoing motion practice to enforce those rights.

This Essay will address the remarks of the Corporation Counsel of the City of New York, Michael Cardozo,⁴ regarding the use of ADR in legal disputes involving municipal government, and will highlight the special responsibilities of class counsel in the ADR context in class action litigation on behalf of vulnerable families and individuals.

I. USING ADR TO RESOLVE DISPUTES INVOLVING SOCIAL PROBLEMS

Michael Cardozo has concluded that ADR can be a constructive method to resolve public policy disputes—which he calls “social problem” litigation—“in the right case, at the right time, with the right processes, and with the right mediator.”⁵ I agree with that assessment. For example, mediation efforts made before juvenile delinquency charges are filed in family court could avert many of the cases in which young people in New York City are prosecuted in delinquency proceedings. In such cases, The Legal Aid Society’s Juvenile Rights Practice is appointed to represent children between the ages of seven and fifteen who are charged with misconduct. The City’s Office of the Corporation Counsel serves as the prosecutor in these delinquency cases.⁶ The forum in which delinquency cases are heard is the New York City Family Court.⁷

3. Kenneth Feinberg was the Special Master for the 9/11 Victim Compensation Fund and has been a pioneer in developing innovative approaches to resolving disputes. He spoke at the 2006 Feerick Center symposium about his experience as the 9/11 Fund Special Master and his remarks were published in the May 2007 Fordham Urban Law Journal. Kenneth Feinberg, *How Can ADR Alleviate Long-Standing Social Problems?*, 34 FORDHAM URB. L.J. 785, 785-96 (2007).

4. Michael Cardozo’s remarks at the 2006 Feerick Center symposium were published in the May 2007 Fordham Urban Law Journal. Michael A. Cardozo, *The Use of ADR Involving Local Governments: The Perspective of the NYC Corporate Counsel*, 34 FORDHAM URB. L.J. 797 (2007).

5. *Id.* at 804.

6. N.Y. FAM. CT. ACT § 254(a) (West 2006).

7. N.Y. FAM. CT. ACT § 115(a)(vi) (West 2006).

Annually, the Society's Juvenile Rights staff represents some 4000 children in these juvenile delinquency cases.⁸ A substantial number of these cases could be diverted from prosecution through mediation before the filing of delinquency charges with the aim of putting in place an appropriate service plan to prevent the charged misconduct from occurring in the future. Such an ADR-grounded approach could prevent children from suffering the immediate trauma and potential long-term stigma of a juvenile delinquency prosecution, let alone a juvenile delinquency adjudication.

At the same time, such pre-filing mediation would conserve limited judicial resources in the overburdened family court, as well as target prosecutorial and defense resources for more substantial delinquency cases. Overall, the juvenile justice system would be well served by implementing a pilot pre-filing ADR system to divert potential delinquency cases.

In light of the clear benefits that can readily be obtained for vulnerable children through a pre-litigation ADR process, these cases meet Michael Cardozo's "right case, at the right time, with the right processes" standard.⁹ At the same time, finding "the right mediator" can certainly be achieved,¹⁰ especially with potentially skilled mediators receiving training and experience at the Feerick Center in how to address social problems grounded in a legal framework where ADR participants come to the mediation table with underlying enforceable legal rights.

In other "social problem" contexts, I also believe that it is appropriate to try to resolve disputes without litigation whenever possible. Toward that end, at The Legal Aid Society we provide the government with prior notice of potential "social problem" litigation to the extent that it is practicable. In some cases, the client needs may be so pressing, and health and safety concerns may be so paramount that only very limited prior notice can be provided. In other cases, more extensive prior notice is provided. In all cases, client interests must be the determining factor with respect to the prior notice process.

Unfortunately, experience at The Legal Aid Society over the last three decades has shown that the governmental response to prior notice of potential litigation is decidedly mixed. For individual clients, the governmental bureaucracy frequently cannot move

8. *See, e.g.*, Legal Aid Society of New York, Juvenile Rights Practice, <http://www.legal-aid.org/en/whatwedo/juvenilepractice.aspx> (last visited Nov. 15, 2007).

9. Cardozo, *supra* note 4, at 804.

10. *Id.*

quickly enough, and litigation is all too often the only viable option to prevent irreparable harm to clients. In other cases, where systemic reform is clearly needed, multiple government agencies and multiple levels of government may be unable to address client problems in a meaningful and comprehensive way without a class-wide order.¹¹ Even when such a class-wide order is in place, administrations and commissioners come and go and government defendants can easily fall out of compliance without enforceable relief in place to protect vulnerable class member children and adults from the same harm that the original plaintiffs experienced.¹²

II. EXAMPLES OF “SOCIAL PROBLEM” LITIGATION AND THE NEED FOR ENFORCEABLE RELIEF

Michael Cardozo cites three examples of seemingly successful ADR resolutions of “social problem” litigation—*Sheppard, Marisol*, and *McCain*.¹³ Each of these cases, however, is its own cautionary tale about the harm that can befall clients when ADR is used to address social problems in class action litigation in the absence of an underlying enforceable order to protect vulnerable children and adults.

Sheppard, though it accomplished a lot, is really not an ADR case. In that case, a forty-eight page consent judgment enforceable in federal court was entered under pressure of an imminent trial date, and the post-judgment proceedings were conducted under court auspices.¹⁴ Although two “joint expert consultants” who had been selected as the plaintiffs’ and defendants’ trial experts were formally agents of the parties and not the court, they functioned similarly to masters or monitors in other Legal Aid litigation.¹⁵

11. See, e.g., *M.K.B. v. Eggleston*, 445 F. Supp. 2d 400, 437-40 (S.D.N.Y. 2006) (granting preliminary injunction on behalf of immigrants, including survivors of domestic violence, to stop the erroneous denial of applications for public assistance, Food Stamps, and Medicaid by eligible immigrants; the erroneous denial of requests by immigrants to be added to a public benefits case; and the erroneous discontinuance or reduction of public benefits received by immigrants because of a misapplication of rules concerning immigrant eligibility for public benefits).

12. See, e.g., *McCain v. Dinkins*, 84 N.Y.2d 216, 217 (1994).

13. See *Sheppard v. Phoenix*, No. 91 Civ. 4148(RPP), 1998 WL 397846, at *1 (S.D.N.Y. July 16, 1998); *Marisol v. Giuliani*, 185 F.R.D. 152, 157 (S.D.N.Y. 1999); *McCain*, 84 N.Y.2d at 216.

14. See *Sheppard*, 1998 WL 397846, at *1 (approving settlement). The course of post-judgment proceedings is described in the opinion terminating the litigation. See *Sheppard v. Phoenix*, 210 F. Supp. 2d 450, 452 (S.D.N.Y. 2002).

15. See *Sheppard*, 210 F. Supp. 2d at 452.

Sheppard was very successful in ending the excessive use of force for the prisoners in the particular maximum security unit at issue in that case, which it ended after the City took the specific remedial steps recommended by the experts.¹⁶ Unfortunately, this cooperative, problem-solving process had no apparent effect beyond the narrow bounds of the litigation, despite the judge's hope that "what was learned will be expanded within [the Department of Correction] and that other institutions will adopt similar policies with similar results."¹⁷ In the rest of the City jail system, rampant excessive force continued.¹⁸ *Sheppard* did not have a happy ending for the scores of prisoners in other City jails subject to that excessive force, who suffered fractured eye sockets, blindness in an eye, broken jaws, perforated ear drums, brain injuries, lost or broken teeth, lacerations, other broken bones, and internal injuries.¹⁹ In the absence of ongoing class-wide relief on behalf of clients in the rest of the City jail system, The Legal Aid Society had to start again and bring a new case, *Ingles*.²⁰ *Ingles* has also been settled with a systemic remedial plan of correction in place, but only until November 2009.²¹

Similarly, *Marisol* is often cited as an ADR model for ending judicial oversight of a social problem—the troubled child welfare system.²² In *Marisol*, the plaintiffs exchanged long-standing court orders with respect to foster care placement that were no longer grounded in the day-to-day needs of children and families for an ADR panel of experts who would recommend systemic improvements in the child welfare system, including enhanced training and supervision initiatives.²³ Those recommendations were widely embraced as sensible ones and both the expert panel and oversight by the court were phased out over time, with the recommendations as the legacy of the litigation.²⁴

16. *Id.*

17. *Id.* at 460.

18. *See, e.g., Ingles v. Toro*, 438 F. Supp. 2d 203, 208 (S.D.N.Y. 2006) (approving settlement agreement in challenge to systemic guard brutality in the New York City jails resulting in a multi-million dollar settlement of damage claims and an agreement to implement system-wide reforms, including installation of video recording cameras and implementation of new training and investigative protocols, to be monitored and enforced over a four-year term).

19. *Id.*

20. *Id.*

21. *See id.* at 209.

22. *See Marisol v. Giuliani*, 185 F.R.D. 152, 156 (S.D.N.Y. 1999).

23. *See id.* at 157-59, 166.

24. *Id.* at 172.

Now fast-forward to December 2005, January 2006, and even August 2007 when headlines cried out about the tragic deaths of children who were known to the City's child welfare system.²⁵ Child welfare worker caseloads had climbed, and the recommendations of the expert panel were honored only sometimes.²⁶ There were no class-wide orders to enforce to protect these children from harm, to maintain appropriate caseloads, or to enjoin the City from failing to continue the implementation of the remedial recommendations of the experts.

The *McCain* litigation is a continuing example of the importance of preserving fundamental enforceable rights as time goes on and public officials change. During the Koch and Dinkins Administrations, for example, there were a number of points when government officials implemented promising remedial plans and consideration was given to ending the litigation and vacating basic appellate and trial court orders requiring the provision of shelter and services to homeless children and their families.²⁷ Maintaining

25. See, e.g., James Barron & Al Baker, *Bloomberg Orders Inquiry in Death of Abused Girl*, 7, N.Y. TIMES, Jan. 14, 2006, at B1; Michael Brick, *Murder Charges Detail Torture of Seven-Year-Old*, N.Y. TIMES, Jan. 18, 2006, at B3; Nicholas Confessore & Ann Farmer, *Cause of Baby's Death Is Not Determined; City Agency Had Been in 'Contact with Mom'*, N.Y. TIMES, Jan. 13, 2006, at B5; Manny Fernandez & Leslie Kaufman, *Days After Child Agency Visit, a Near Drowning*, N.Y. TIMES, Jan. 26, 2006, at B1; Alan Feuer & Thomas J. Lueck, *Long Chain of Alarms Preceded Death of Girl*, 7, N.Y. TIMES, Jan. 13, 2006, at A1; Editorial, *Fixing Children's Services*, N.Y. TIMES, Jan. 23, 2006, at A18; Leslie Kaufman, *After Girl's Death, Child Abuse Reports Surged*, N.Y. TIMES, Jan. 21, 2006, at B4; Leslie Kaufman & Jim Rutenberg, *Agency Suspends Supervisors After Girl's Death*, N.Y. TIMES, Jan. 19, 2006, at A1; Leslie Kaufman & David M. Herszenhorn, *Discrepancies Emerge in Case of Girl Killed*, N.Y. TIMES, Jan. 15, 2006, at A1; Leslie Kaufman & Al Baker, *Four-Year-Old Bronx Boy Is Dead*, N.Y. TIMES, Jan. 31, 2006, at A1; Leslie Kaufman, *Welfare Unit Moves Children From Parents*, N.Y. TIMES, Jan. 27, 2006, at B1; Mike McIntire & Al Baker, *Mayor Makes Pledge of Accountability in Girl's Death*, N.Y. TIMES, Jan. 17, 2006, at B5; Mike McIntire & Leslie Kaufman, *Police Role in Abused Girl's Case Still Unclear*, N.Y. TIMES, Jan. 16, 2006, at B1; Richard Perez-Pena & Andy Newman, *Behind Spotlight, Child Deaths Are Just One Gauge of System*, N.Y. TIMES, Jan. 18, 2006, at B1; Joyce Purnick, *Much Concern, Just Too Late For One Girl*, N.Y. TIMES, Jan. 23, 2006, at B1; Jim Rutenberg & Mike McIntire, *Caseworkers Missed Chances to Save Nixzmary*, N.Y. TIMES, Jan. 31, 2006, at B1; Jim Rutenberg & Leslie Kaufman, *Mayor Acts To Coordinate Child Welfare*, N.Y. TIMES, Jan. 25, 2006, at B1; Fernanda Santos, *Hundreds Mourn Slain Girl*, N.Y. TIMES, Jan. 17, 2006, at B1; Editorial, *The Short, Sad Life of Nixzmary Brown*, N.Y. TIMES, Jan. 20, 2006, at A16.

26. See, e.g., Al Baker, *Plan to Hasten Abuse Inquiries Failed One Girl*, N.Y. TIMES, Jan. 21, 2006, at A1; Leslie Kaufman, Mike McIntire & Fernanda Santos, *Child Welfare Offices That Couldn't Be Fixed Fast Enough*, N.Y. TIMES, Jan. 20, 2006, at B1; Mike McIntire, *A Struggle to Aid Children In an Office Full of Quarrels*, N.Y. TIMES, Jan. 29, 2006, at A27.

27. See, e.g., *McCain v. Dinkins*, 84 N.Y.2d 216 (1994).

those same court-ordered protections from irreparable harm was essential, however, to stop the universally criticized Giuliani Administration's attempts to bar homeless children and their families from even seeking shelter from the elements, let alone obtaining the shelter and services which they desperately needed.²⁸ Similarly, those court-ordered legal protections were a crucial shield when the current City Administration attempted to consign homeless children and their families to a lead-infested, makeshift shelter behind bars in the decommissioned Bronx House of Detention.²⁹

Ironically, the current City Administration has argued in court that long-standing appellate and trial court orders requiring the provision of shelter from the elements and related services for homeless children and their families have suddenly become obsolete. The need for these core court-ordered legal protections, however, is as essential for clients as ever. For example, a new City procedure permitting the denial of "immediate needs" shelter for reapplicant families has been implemented at a time when one out of every three families is erroneously denied shelter on their initial applications.³⁰ As a result, some children and their families—like the original *McCain* plaintiffs some twenty-four years ago—have ended up sleeping in public spaces or outside. Others have only been spared that irreparable harm when the Coalition for the Homeless paid to put them up in a hotel room or The Legal Aid Society intervened with the City. Still, other vulnerable children and their families—in contravention of core rulings and orders—must miss school or employment or become ill when they are

28. See, e.g., *McCain v. Giuliani*, No. 41023/83 (N.Y. Sup. Ct. Dec. 9, 1996) (interim order).

29. See, e.g., Diane Cardwell, *Talks Continue on Jail as Homeless Shelter*, N.Y. TIMES, Aug. 17, 2002, at B3; Michael Cooper, *Jail Reopens As a Shelter for Families*, N.Y. TIMES, Aug. 12, 2002, at B1; Bob Herbert, *The Wrong Shelter*, N.Y. TIMES, Aug. 29, 2002, at A25; Leslie Kaufman, *City Ordered Not to Use Jail as a Shelter*, N.Y. TIMES, Aug. 31, 2002, at B1; Leslie Kaufman, *Judge Orders City to Defend Use of Jail as a Shelter*, N.Y. TIMES, Aug. 29, 2002, at B3; Leslie Kaufman, *Shelter Units For Families Will Increase, Officials Say*, N.Y. TIMES, Aug. 21, 2002, at B3; Sarah Kershaw, *Jail Closed as Shelter to Children After Report of Lead-Based Paint*, N.Y. TIMES, Aug. 15, 2002, at A1; Jennifer Steinhauer, *Inner Circle of Bloomberg Aides Put Homeless Shelter in Old Jail*, N.Y. TIMES, Aug. 14, 2002, at B1; Jennifer Steinhauer, *A Jail Becomes a Shelter, and Maybe a Mayor's Albatross*, N.Y. TIMES, Aug. 13, 2002, at B1; Jennifer Steinhauer, *Mayor's Style Is Tested in Sending Homeless to Old Jail*, N.Y. TIMES, Aug. 16, 2002, at B1.

30. See, e.g., NYC Department of Homeless Services, <http://www.nyc.gov/html/dhs> (last visited Nov. 15, 2007).

forced to apply and reapply for shelter on a night-to-night basis and receive only overnight shelter placements.³¹

Likewise, the City implemented a permanent housing relocation program for homeless children and their families that resulted in a significant number of families being relocated to lead-infested buildings and unsafe and substandard apartments, which they could not afford on an ongoing basis—again just like many of the original *McCain* plaintiffs twenty-four years ago.³² Under threat of litigation to enforce core court orders in the *McCain* litigation and sustained media attention, the City scrapped this dangerous housing relocation program, which it had previously touted as a reason why core court orders protecting homeless children and their families were no longer needed.

As the current Administration leaves office in 2009, if the City gets its way, homeless children and their families will face a new administration stripped of the very court-ordered legal protections that have prevented harm from occurring or continuing during prior City administrations.

III. ADR IN THE CONTEXT OF LITIGATION ON BEHALF OF HOMELESS NEW YORKERS

Where does this leave matters? In terms of ending litigation, social problem litigation should end just like any other litigation—with an enforceable resolution. Indeed, after relief has been granted through a negotiated settlement or a judicial ruling, parties

31. See, e.g., Leslie Kaufman, *The City Says They're Not Homeless, But They Stay Nightly in Shelters*, N.Y. TIMES, Sept. 4, 2007, at B1; Leslie Kaufman, *Homelessness: Tackled, Not Beaten, By a Mayor With Formidable Goals*, N.Y. TIMES, July 22, 2007, at A25; see also Carrie Melago, *City Shelter Kids Missing Classes*, N.Y. DAILY NEWS, June 6, 2007, at 20.

32. See, e.g., Lisa L. Colangelo & Nicole Bode, *Bronx Beep Tells City: Get the Lead Out!*, N.Y. DAILY NEWS, Jan. 16, 2007, at 5; Emi Endo, *Report: Families Placed in Housing Face New Hazards*, NEWSDAY, Feb. 2, 2007, at A18; Leslie Kaufman, *With a Record Number of Homeless Families, the City Vows to Improve Aid*, N.Y. TIMES, Mar. 19, 2007, at B1; Benjamin Lesser & Tina Moore, *Outrage on Lead in City Bldgs*, N.Y. DAILY NEWS, Jan. 15, 2007, at 7; Tina Moore, *Better Get Lead Out, Legal Aid Warns City*, N.Y. DAILY NEWS, May 13, 2007, at 22; Tina Moore & Benjamin Lesser, *City Moves to Get Lead Out of Apts.*, N.Y. DAILY NEWS, Feb. 3, 2007, at 7; Tina Moore & Benjamin Lesser, *Families in Filth & City Pays*, N.Y. DAILY NEWS, Feb. 2, 2007, at 8; Tina Moore, *Housing Program Head Vows Tougher Inspections for Lead*, N.Y. DAILY NEWS, Mar. 16, 2007, at 12; Tina Moore & Benjamin Lesser, *How City Is Poisoning Kids; Many Families Placed in Lead-tainted Apts.*, N.Y. DAILY NEWS, Jan. 14, 2007, at 5; Janny Scott, *Homeless Given Apartments in Buildings Called Unsafe*, N.Y. TIMES, Feb. 2, 2007, at B2; Editorial, *The Homeless Maze*, N.Y. TIMES, Mar. 25, 2007, at 9.

generally only see the inside of a courtroom again if there is non-compliance with that relief or if one party seeks to alter the status quo. Social problem litigation should be no different than any other litigation.

ADR, however, can play a crucial role on the road to compliance. The problem in *Sheppard* was that the ADR was designed to end the excessive force problem in the maximum security unit at Rikers. The rest of the City jail system escaped reform, which resulted in harm to clients and the need for further litigation.³³

In contrast, in *McCain*, two different approaches to ADR have been tried and each has had differing but important results. One ADR approach, in which Kenneth Feinberg participated, was aimed at providing a mechanism for resolving client problems resulting from non-compliance with core appellate and trial court rulings without the need for ongoing litigation.³⁴ A second ADR approach, in which John Feerick participated, used experts to help formulate a systemic reform plan to achieve compliance with legal requirements.

The second approach foundered in *McCain* over the question of whether compliance with core appellate and trial court rulings and orders or the elimination of those legal requirements is the goal. For vulnerable children and their families, governmental compliance with legal requirements to protect them from harm must be paramount. The City's relentless focus, however, has been on eliminating those legal requirements and protections. Regrettably, the 2003-2005 Special Master Panel focused on social policy concepts rather than constitutional mandates by essentially declaring that it would be helpful for the City to be free of appellate and trial court rulings and orders. This conclusion, however, is inconsistent with those core judicial rulings and orders, and the basic notions of how litigation is resolved in our system of government.³⁵

This outcome from the second Special Master effort in *McCain* does not mean that ADR has no role in resolving "social problem" litigation. It just means that unless parties can mutually agree that vulnerable children and their families have enforceable legal rights,

33. See *Sheppard v. Phoenix*, No. 91 Civ. 4148(RPP), 1998 WL 397846, at *1 (S.D.N.Y. July 16, 1998).

34. See *McCain v. Dinkins*, 84 N.Y.2d 216, 226 (1994) (finding municipal non-compliance).

35. The City itself has acknowledged that only the court—or the parties themselves by agreement—can end the claims of class member homeless children and their families and thereby extinguish fundamental rights established by court orders. See Cardozo, *supra* note 4, at 812.

ADR cannot fulfill its potential to help parties stay out of court and achieve lasting systemic reform through compliance with those legal protections.

Fundamental legal rights can sometimes be seen by the government as an impediment to what it wants to do. But, after all, we are a nation of laws and the role of the judiciary is to enforce those laws, even when the government perceives such judicial enforcement as inconvenient.

The current City Administration has frequently said that executive branch commissioners and not the courts should ultimately run the shelter system, prison system, and child welfare system. While it is hard to argue with that position, the executive branch of government does not have unfettered discretion in these “social problem” matters. Indeed, as we all learned in civics class when we were younger, ours is a system of checks and balances. The judiciary is a well-recognized check on executive action that harms children and their families and contravenes fundamental legal rights, like the court-ordered right to shelter and services.

CONCLUSION

In “social problem” litigation like *McCain*, ADR can be a mechanism to prevent harm from occurring to children and their families in need of shelter from the elements. At the same time, ADR can help keep parties out of court to the greatest extent possible if the government falls out of compliance with fundamental court-ordered legal rights and protections. ADR, however, cannot and should not be used to wipe away fundamental legal rights that are in place by court order to protect vulnerable homeless families from harm.