CHILD PROTECTION MEDIATION:
LESSONS FROM NORTH AMERICA

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I SUMMARY

The removal by the state of children from the care of their parents is a profound intrusion into personal and family life. Social services actions may be entirely justified and necessary to protect children from significant harm. Before the court can make a final decision on children’s futures – and the options will range from return home to adoption - parents and social workers are expected to work together to achieve best outcomes for children. However, the impact on parents on having their parenting capacity impugned and the threat of permanent loss of their children is that mutually entrenched, polarised and hostile relations are often the norm between social workers and parents, with parents denying there is any cause for concern and declining to engage in programmes/support services to improve parenting. Can mediation be used in this context to better engage parties and improve outcomes for children and their families?

PURPOSE

The use of mediation within statutory child protection litigation is widespread in a number of countries, but is not used in the UK. The purpose of this Fellowship was to visit a number of mediation programmes in the US and Canada to study the practical workings of Child Protection Mediation (CPM) and to consider its potential for use in this country.

The aim of CPM is to bring together all those concerned with children who are the subject of child protection litigation to meet in a neutral setting, with an impartial third-party mediator for confidential discussion to address the issues between them. The issues canvassed in the mediation meeting may range from questions central to the litigation, which would otherwise be determined by the court, to non-justiciable matters which may be not only the source of conflict between the parties, but serving to distract their ability to focus on the children’s welfare and future.
KEY FINDINGS

Child Protection Mediation has much to offer to all those involved in public law care proceedings. The aim of CPM is to achieve voluntary agreement and so avoid trial where possible. It is particularly well suited to the multi-party, multi-issue nature of care proceedings in which parents are required to effect and manifest significant change in their behaviour and parenting if children are to be returned to/remain in their care. A key part of CPM’s potential for reaching agreement and so to expedite permanency decisions for children is how it operates to make parents who feel marginalised, powerless and unheard become included in the decision making process and so, in turn, take greater responsibility for past parenting and their children’s future. CPM gives those in conflict in complex proceedings the opportunity to improve and enhance how they communicate so that more effective, collaborative, and child-focused working relations are developed. It is from this underlying groundwork that agreements may flow.

Specifically, CPM can add significant value to the child protection litigation by:-

- Enhancing procedural justice, in particular by enlarging parental inclusion and engagement;
- Improving trust and confidence in the often impoverished working relations between parents and child protection workers;
- Promoting a collaborative, problem-solving approach;
- Increasing parental understanding of the legal process, social workers’ issues about parental care of the subject children, and the requirements and expectations of parents in order to achieve the agreed return of children to their care;
- Enabling frank, open and honest discussions;
- Reaching mutually acceptable agreements about placement (interim and permanent), contact, work to be undertaken/services to be provided;
- Promoting greater compliance with agreements made.
A quantitative evaluation of the impact of CPM on reduction of costs and time is beyond the scope of this paper. However, it was the view of many involved in the CPM programmes visited that its use could often avoid the necessity for trial, and that the confidential forum the mediation provides significantly improves the ability of parties to be frank and realistic, to gain an understanding of each other’s positions, and to reach agreements which, because they are mutually accepted rather than imposed, achieve a higher rate of compliance.

Great care and attention is required in programme design and ongoing administration in order for any model of CPM to be successful and sustainable. Judicial and ‘stakeholder’ support is essential, as is specialist mediator training.

RECOMMENDATIONS

Child Protection Mediation is relied upon and considered highly effective in many other jurisdictions. There is a large body of literature which spans a number of decades, and developed guidelines from which we can take our lessons. Consideration of CPM’s incorporation into our own legal system is overdue. A carefully designed pilot project should be implemented where there is strong judicial support for this proposal.
II INTRODUCTION

1 For some years, it has been government policy to promote mediation as a better, faster and cheaper alternative to resolving disputes in the courtroom. There has been a particular focus on providing mediation for separating parents who are in dispute over money and/or their children – so called ‘private law’ family disputes. It is regarded as a truism that there is likely to be far greater adherence to agreements reached by parties themselves. For this reason, parents are urged to forge their own agreements, which suit their own wishes and needs, rather than have orders imposed by the court.

2 Contrast the position in the ‘public law’ sphere of family law care proceedings. Social services initiate court proceedings to seek the removal of children from their parents because the children are said to have suffered (or be at risk of) significant harm due to deficient parenting. Mediation does not feature on the child protection landscape, either within or prior to the issue of legal proceedings.

3 However, in North America (and other common law jurisdictions) the use of mediation - ‘Child Protection Mediation’ (‘CPM’) - in just these circumstances, when the state seeks to remove children from their family, is well established and extensively used. There is a large body of literature generated over several decades. Reading that literature raised questions for me about how CPM actually worked in practice, and why it is we do not use it in Britain. What is it that they are doing over there? How does it actually work? Does it achieve better results for children? Should we be considering the use of CPM here? In particular, I wanted to learn:

   a) How does CPM work in practice? What issues can it address within care proceedings?

   b) How do CPM schemes differ in approach, and which model(s) seem most effective?

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1 Mediation within public law care proceedings has received some, limited, consideration in England & Wales - see Appendix 1.

2 Child Protection Litigation: A No-Go Area for Mediation? was the writer’s dissertation on the use of CPM in North America, submitted for her M.Sc. in Mediation & Conflict Resolution, University of Strathclyde 2013.
c) Does CPM detract from a clear focus on the best interests of the child? Is it about compromise or the dilution of safeguards for children?

d) Does CPM interfere with the court process? Or does CPM add value for the courts?

e) Does CPM assist social services and parents to reach resolution of matters about which they are in dispute?

f) Does CPM give participants, parents in particular, an effective voice? Does it make the power imbalance between state and family more equal? Is this advantageous for the child?

4 The answer to these practical questions could not be gleaned merely from reviewing the literature. The purpose of my Churchill Fellowship research was, therefore, to get an understanding of how CPM works in practice, to compare and contrast a number of different CPM programmes, and to consider whether CPM could be used to our benefit in this jurisdiction.

5 I visited nine different programmes in seven different states (six in the USA and one in Canada). Each had unique ways of working and applying CPM. There was real benefit in being able to compare and contrast the very different programme models, to observe what worked to best effect, and what was less successful, and so to garner the information to construct a potential working model which incorporates the best practice seen. It was invaluable to have face to face discussions with those involved in both the litigation and CPM, including judges, lawyers, and mediators, and to compare the respective processes. Above all, the opportunity to be an observer at a large number of mediations gave me an understanding of the working of CPM which I could not have gained merely from reading. In order to preserve confidentiality, notes from observed mediations and comments by participants are anonymised and unattributed.
BACKGROUND

Nearly 30 years ago the idea that mediation might be effective in the area of child protection was raised by Bernard Mayer, an internationally recognised leader in the field of dispute resolution. Mayer noted the difficulties inherent in the exercise: safeguarding children, whilst preserving their family unit and its autonomy may be insolubly contradictory aims; further, the role of the social worker was a very difficult one, since it created a ‘structurally antagonistic’ relationship with the parents. Mayer speculated that abandoning the adversarial paradigm of legal proceedings in favour of a collaborative process, featuring a third party neutral, could in fact maximise the extent to which each party’s interests are met and provide a solution to the paradox of child protection in this context.

Today, child protection mediation appears to have been incorporated widely in North America. For example, Kathol’s 2009 paper, a survey designed to provide a ‘snapshot of current conditions in the field’, received 110 responses from child protection mediation schemes across thirty-three US states and two Canadian provinces.

In 2013, the Association of Family and Conciliation Courts produced a comprehensive set of Guidelines for Child Protection Mediation, described as reflecting ‘the collective wisdom and experience of successful CPM practitioners and programs throughout North America and important CPM research’. The purpose was to bring together, in comprehensive form, the large body of knowledge and best practice that had emerged over the past 30 years of child protection mediation. The Workgroup which carried out the project comprised judicial, legal, mental health, mediation and other child welfare professionals and representatives from many national professional organisations in the USA and Canada. The Guidelines’

3 Bernard Mayer, Conflict Resolution in Child Protection and Adoption, 7 Conflict Resolution Quarterly 69 (1985). Bernard Mayer is Professor of Dispute Resolution, The Werner Institute, Creighton University, Nebraska
4 Joan Kathol, Trends in Child Protection Mediation : Results of the Think Tank Survey and Interviews Family Court Review 47(1) 116-128 (2009)
expressed core values include recognition that the safety, permanency and wellbeing of children are paramount, that families and their children are critical participants in decision making, and cooperative relationships and collaborative decision-making enhance the effective resolution of child protection concerns. Further, guidance is given about programme design and development, the conduct of CPM, and monitoring and evaluation. An extensive and very useful bibliography is appended to the Guidelines.

WHY IS CPM NEEDED?

9 It would be a mistake to think of CPM as a direct substitute forum for the court. The mediator’s primary task is not necessarily to help the parties settle the issues upon which the court is the ultimate decision maker. The resolution of issues which are before the court may, in fact, be a large part of the outcome of CPM, but to understand its power and utility it is necessary to step back and consider the structure within which parties – parents in particular – are asked to work.

10 Care proceedings are a unique type of litigation. They are not about ‘simple’ issues of liability and quantum of damages. They are multi-party, multi-issue and deal with profound issues within family life. In particular, fundamental change is typically required of parents within the lifetime of the litigation, if they are to succeed in having their children returned to their care. Many parents struggle to achieve the change necessary. Resistance and denial are frequently exhibited by parents, to the frustration of practitioners working with them to achieve best results for the children concerned.

11 There are, within our legal process, in-built, systemic obstacles to achieving best outcomes for children and families. Put simplistically, parents within care proceedings are required to work cooperatively with the social workers who seek to remove their children from them. These parents will frequently be unemployed, have issues with substance misuse, mental health or cognitive difficulties, and/or domestic abuse – the ‘toxic trio’ - and have had poor experiences themselves of being parented as children. Social workers come into their lives and tell them, first, that their parenting is inadequate and harmful, second, that they are seeking to remove their children from them and third, that they must cooperate with social services – a task which many parents find impossible, in the circumstances, to countenance.
Within this requirement of cooperation is also a demand that parents must be ‘open and honest’. Many parents struggle to be open and honest when they know that anything they say may be taken down and used in evidence against them. Parents frequently deny the allegations of poor parenting and harm to their children, not necessarily because they dispute factual issues, but for fear that to accept what is alleged would be seen as admission of failure and parenting deficit, and make the return of their children less likely. A highly defensive position of denial and challenge is adopted, with blame often being allocated to others, including the social worker. That denial translates, almost by default, in the social worker’s eyes, into lack of insight. Parents and social workers adopt polarised and entrenched positions, and each regards the other as impossible to work with.

A well-structured programme of CPM can offer many benefits, but at its core is seeks to develop collaborative, child- and future-focussed relations between the family and the child protection workers. One mediator described it to me as follows:-

‘The process of mediation focusses the parties’ attention on the needs of the child and helps parties to be realistic in their expectations. We are taking the blame and shame out. People begin to see that adversarial processes are very positional.’

As with all mediation, CPM provides a safe, neutral, confidential forum for parents and child protection workers to discuss what is at issue and what is needed. It cannot be emphasised strongly enough that the structure and process values brought to CPM can be transformative for working relations between those who attend. It is the potential that CPM has to engender collaborative, rather than adversarial, working relations that is at the heart of its value, and which can contribute so much to the court process in child protection litigation.

WHAT CHILD PROTECTION MEDIATION IS NOT

It is crucial understand from the start what Child Protection Mediation is not. Informal discussion with some practitioners in England provoked rejection, out of hand, of the notion that mediation has a place within child protection. Objection
appeared to be premised upon an assumption that CPM involves compromise with regard to risk. CPM is *not* about reaching compromises with regard to risk or child safety and wellbeing; it is not about diluting safeguards, nor doing deals or trade-offs about what is acceptable parenting.

16 To the extent that ‘mediation’ carries the connotation of compromise, it is a misnomer in this specific field. One CPM programme manager said she wished to call it ‘anything but “mediation”’ because it was misunderstood as being similar to commercial litigation case settlement, where parties would compromise on what they sought and what they would accept, in order to achieve a trial-avoiding settlement. As a result, the programme manager felt, ‘mediation’ had become ‘hard to sell’ in relation to child protection.

**WHAT DOES CPM OFFER THAT IS DIFFERENT?**

17 There are certain key features common to all mediation which make it a unique process. Importantly, it is not ‘just another meeting’ and it potential participants should be disabused of that notion. My observation of CPM in practice suggested that, when it works best and effectively, it works primarily at an overarching, macro level, but what it does at that macro level enables the parties to resolve many specific, micro level issues.

18 All mediation conventionally has the key features of:-

- mediator(s) as third party neutral, with no stake in the outcome;
- a safe, neutral forum in which the participants can meet;
- ‘voice’ - enabling participants to be and feel heard on an equal footing; and
- confidentiality.

19 What was demonstrated in the mediations I observed was that when the protagonists in child protection litigation meet under these conditions, extraordinary results can be achieved. Why should these seemingly bland and anodyne

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6 One mediator told me that the Children’s Department did not understand mediation. They thought that they were doing it anyway because they had meetings.
characteristics of yet another meeting claim such profound impact? Before taking the reader to the more observational parts of this paper, reference to the background literature and research may assist.

MEDIATOR AS THIRD PARTY NEUTRAL – SAFE FORUM

20 Many people experience conflict as very frightening and adopt strategies such as avoidance or aggression as a coping technique. The presence of the mediator as a third party neutral means that the mediation meeting provides a safe place in which to articulate difficult, possibly overwhelmingly powerful and frightening emotions. The skilled mediator’s presence can act as a lightening conductor for those intense emotions and in so doing, it can enable parties to say things which are not only very difficult to say, but which they could not otherwise say to each other. One Children’s Guardian described mediation as:

‘A huge asset. It is much less threatening than the court room, where people cannot speak as openly. It is more trauma responsive and allows all to speak in safety.’

BALANCE OF POWER

21 The power imbalance between child protection professionals and parents draws the attention of many commentators in the literature on CPM. Mayer observed that it is important to ‘find ways of safeguarding children without furthering the sense of isolation and powerlessness that so many abusive parents have.’\(^7\) Those sceptical of CPM may bridle at the apparent focus on the rights and needs of the parents as a justification for mediation, and would prefer to maintain focus on the welfare of the child. However, the concern voiced by Mayer arises from an understanding that the structural imbalance of power between parents and those who represent the state, in itself, creates an impediment to the very working relationship which it is sought to achieve in order have effective child protection measures. Feeling powerless and marginalised, parents turn to strategies of threat, defiance, non-compliance and passive aggressive behaviour. CPM’s specific strength and benefit is said to be the empowerment of parents, so that facilitative, collaborative working relations with

\(^7\) Mayer (1985), *supra* note 3 at p.70
social workers are achieved, and thus workable plans can be forged to the child’s advantage. Mayer regarded parental empowerment as key to enhancing child protection because, as a mechanism, it is the single aspect which most increases parental compliance with child protection agencies.

22 Mayer offered a structural analysis of how, and why, parental empowerment achieves what is claimed, in terms of organisational compliance theory, as developed by Etzioni. He observed that in most child protection situations, the uninvited intrusion of child protection professionals is likely to engender a more alienative-compliance response from parents. It was in this context that his research considered whether and how the introduction of mediation might change the initial compliance structure, so enabling a normative orientation for social work-parental relations. If mediation is able to offer an alternative method of intervention, which:

‘treats parents as capable of active decision making, emphasizes the areas of goal congruence and interdependence between parents and workers and maximises the scope of control that parents can have over the nature and form of intervention’

then mediation may be able to offer a ‘less alienated approach to compliance orientation’ and, in turn, engender higher levels of normative compliance and lower levels of alienative compliance. Thus, mediation is likely to have an effect upon

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- Normative-moral compliance – based upon a moral commitment by the subordinate party to the goals and functions of the organisation, and an amenability to persuasion as a means of influence.
- Utilitarian-calcultative compliance: the subordinate party perceives that co-operation will yield the greatest rewards and so will be compliant as a matter of self-interest. Compliance is characterised by the use of rewards or promises as the primary form of influence.
- Coercive-alienative compliance is based upon the subordinate party’s belief that the only way to avoid punishment/negative outcomes is by co-operation. Compliance is characterised by relations of a coercive nature.
compliance by affecting both the type of power utilized and the parental attitude towards that power. Parents who feel less coerced into plans for child protection are likely to feel a greater sense of commitment to the plan. In turn, child protection workers who spend less time dealing with parental hostility and resistance are able to focus their energy and efforts into supportive interventions on substantive issues. Child protection mediation is said to be found to ‘alter the dynamics and the change the nature of the discourse between child protection workers and family members.’ This is not just because agreements are produced as an end product, but also because the parties felt that they were ‘contracting’ in a more global sense – to ensure joint decision making and ‘ownership’ of the agreement. A parent may be more committed to the mediated agreement, even though it is similar to a previous court order.9 The perceptions of professionals in child care mediation were that mediation increased the level of parental involvement in case planning.10

23 Barsky’s qualitative research analysed responses to mediation, and how it related to the process of empowerment.11 In particular, he identified four component parts/processes which he argued challenged the criticism that ‘empowerment’ is an ‘amorphous platitude’.12 Barsky noted that conventional social work practice, e.g. case conferencing also makes use of extremely similar methods. Mediation’s advantage is that mediator – specifically with a role that has no previous involvement and no stake in outcomes - may be able to engage the parties where there are poor relationships, empower the parents and give fresh perspectives which enable parties to consider broader set of options.13

24 The neutrality of the mediator generates a much greater balance in the power relations between the parties. None of the disputants are in charge of the meeting and the levelling impact of the presence of a third party neutral empowers parents, in particular, to participate. That sense of empowerment can work to enable parents to

10 Thoennes (2009), Thoennes N., What We Know Now: Findings from Dependency Mediation Research Family Court Review 47 (1) (2009)
12 Ibid. p. 130
13 Ibid. p. 123
step away from a carapace of blanket denial of any parenting deficit and accept that there are issues to be addressed. Professor McHale\textsuperscript{14} commented in discussion with me :-

‘CPM allows rebalancing of power. It is not about whether there are child protection issues to begin with but more a response to fact that there will be conflict when the state, under its ongoing duty of care, is involved with parents. If decisions are solely those of the social worker, it means there is a power imbalance.’

One mediator told me :-

‘It is very empowering to tell parents that not you are not a judge, no decisions are down to the mediator, and I am not an authority figure, and I will not tell anyone anything except if there is an agreement that everyone has sign up to.’

One programme manager said that CPM did work to an extent towards levelling the playing field between parents and child protection workers, that it makes adversaries work together and was undoubtedly good for judicial economy. A judge commented on how the removal of the adversarial quality of interactions ‘did a lot to make people able to be candid’.

VOICE

25 There is much in the literature on procedural and distributive justice about the importance of voice\textsuperscript{15}. A number of commentators emphasise the importance of parental voice as part of the empowerment process. Thoennes reported significant satisfaction from parents about mediation giving them voice and being heard. Over 90% felt the mediation had given them the chance to talk about issues important to them, they felt others listened to them and understood what they had to say, and that

\textsuperscript{14} M Jerry McHale QC, Visiting Professor, Lam Chair in Law & Public Policy, Faculty of Law, University of Victoria, BC. Previously Assistant Deputy Minister with the Justice Services Branch of the BC Ministry of Justice responsible for civil, family and criminal law policy and legislation, mediation and alternative dispute resolution, legal aid, and family law programs.

\textsuperscript{15} Distributive justice considers the fairness of outcomes; procedural justice the fairness and transparency of the process, and the extent to which litigants felt ‘heard’. Research indicates that procedural justice is as, if not more, important to litigants than distributive justice, though this research was not about litigation where the state seeks to remove children from parental care.
mediation clarified what they needed to do in order to have the child protection services agency close their case.\textsuperscript{16} Those that were able to make the comparison felt that mediation was ‘better than a court hearing before a judge’,\textsuperscript{17} Wildgoose and Maresca reported that the ‘majority of participants felt that they had been listened to, that their concerns had been dealt with and that the agreement reached was fair and mediation was preferable to the court system.’\textsuperscript{18}

26 It was pointed out to me by a number of mediators that while the emphasis may be on giving parents in particular the opportunity to be heard, this worked both ways: social workers get to explain their anxieties about the children and future proposals to people who have previously only ever shouted at them. This reflects a claim made generally in mediation, that people will frequently struggle to hear and internally absorb what is being said by a person with whom they are in conflict. As mundane as it may sound, a key – and highly effective - part of the mediator’s role is to summarise and repeat what has been said in order for each of the parties to actually ‘hear’ the content. The view of the Director of a Children’s Law Center was that mediation could ‘move mountains’:-

‘It allows parents to speak directly to social workers in a way they could not otherwise do, to tell their story, from their perspective and that this, in turn, makes parents more receptive to listen to what the issues and concerns are that social services have about their parenting.’

Another mediator in a different state commented:-

‘Parents value mediation hugely. It is the first time they properly get to talk to the social worker, and they get a lot out of it, even if not everything is resolved. They get the whole attention of the social

\textsuperscript{16} Nancy Thoennes, \textit{An Evaluation of Child Protection Mediation in Five California Courts} Family and Conciliation Courts Review, 35(2) (1997) pp.184-195 at p.188
\textsuperscript{17}McHale, M. J., Robertson, I., and Clarke, A., \textit{Building a Child Protection Mediation Program in British Columbia} 47 Family Court Review 47(1) (2009). Further, it is noted from the pilot study findings that 85\% of families preferred mediation to meeting with a social worker alone and 100\% of single mothers preferred mediation.
worker, and it can tell them how to fight for their children in a way that can be heard by them.’

Established mediation techniques were deployed to especially good effect. The re-iteration by the mediator of information, views, advice and so on, which may well have previously been stated, but never absorbed, enabled parties to actually hear and consider what was being said, and get clarification about content and purpose. One mediator said :-

‘When parents are given the opportunity to speak to a mediator, who is not a lawyer, social worker or a judge, they are more open to hearing all the difficult things that have been said to them before. It makes it much more likely that they will succeed, and not push against the system, but to take in all the things that the system is providing them, and be more successful and get children back and not have to go to trial. The big thing is that it saves money and the time of the court, and people are so much more willing to buy in if they are not in an adversarial place when told all this.’
PART I – SETTING THE SCENE

CONFIDENTIALITY

27 As with all mediation, the CPM meeting is confidential. What is discussed there may not be repeated outside the room, and in particular, cannot be relied upon in court. In all the schemes I observed there were the following exceptions to confidentiality:-

   (i) where new allegations/admissions of child abuse were made which were not already the subject of the proceedings (many at the meeting are mandatory reporters in any event);

   ii) where written agreement is reached which the parties agree may be disclosed;

   iii) where threats of harm to self or others were made.

28 Mediation is therefore the only forum within proceedings where parties can speak freely and confidentially. I was told time and again that this meant conversations take place which could not otherwise happen. This had particular force in enabling parents to have real discussions about their lives, their problems and the impact on their children, without fear that what they said would be used against them.

29 Further, it served to uncover true positions and understanding. Too frequently social workers fear that parents lack all insight because they decline to make any admissions, and maintain blanket denials that there is any deficit in their parenting. There appears to be nothing to work with, because there is no recognition of what the children have actually experienced, and what changes are needed, so there appears to be no basis for progress. However, the reality may be that parents are well aware that their behaviour or lifestyle is problematic, but fear that any public admission will count against them.
The stipulation of confidentiality appeared to work to yield specific benefits: parties were willing to communicate with each other and to tell each other things in a way which they were simply unable to do elsewhere. The impact of this was that relationships began to be forged; participants were forced to relate to each other as individuals, rather than as autocratic symbols of authority or demonised perpetrators of abuse and neglect. One mediator said:

‘I see the relief in parents when I tell them no one can go into court and talk about what we discuss, and it cannot go into a report. It really relaxes parents who feel “Wow, I can talk about anything and it won’t go against me”.

I was particularly worried that there appeared to be a risk that the rule of confidentiality could operate to compromise the judicial process. What if there were an admission by a parent, for example, that they were responsible for the injuries to the child, that they were person who had shaken the baby? Would that not result in a highly significant admission being known by everyone but the judge? I asked this question of every person at each programme I visited. None had ever encountered it presenting a problem, save in one instance when an attorney had raised in court issues that were confidential to the mediation. The responses indicated two possibilities. Either the programme model was such that discussions about the allegations of abuse and neglect i.e. what had brought about the court proceedings, fell outside of what could be discussed at mediation – as one mediator put it ‘The fact that social services have child protection concerns is not up for debate’; or, if they were permitted to be included in the ambit of the mediation, and a person was willing to make admissions within the mediation, then they were also willing to sustain that admission within the court arena. One attorney for Children’s Services commented:

‘Parents’ lawyers were initially very resistant, very worried that their clients would say things that could be used at trial. But I have never seen any issue on confidentiality arise in the mediations I have done.’

As noted above, the twin features of the mediator as third party neutral and the confidentiality of the meeting are common to all types of mediation. What I saw demonstrated the particular power that these features give to mediation within the arena of child protection. It was clear that the primary task of CPM, in a well modelled
programme, is to enable parties, typically polarised and entrenched, to forge different working relationships, with which they are then equipped to address many of the contentious issues between them. The confidentiality of the CPM meeting enables parents in particular to speak frankly and honestly about their situation. The outcome, long term, may or may not be the successful reunification of the family. In fact, many mediators and lawyers spoke of how CPM served to give parents a ‘reality check’ and that a discussion in which parents were heard, and not demonised, could serve to enable parents to reach the difficult conclusion that the best interests of their children lay in permanent care elsewhere.

MEDIATOR TRAINING

Every programme visited regarded CPM as a specialist area of mediation for which there should be specific training. A mandatory 40-hour training programme was common. In some states, education to Masters level was a pre-requisite of being a Child Protection mediator. That this is a specialist area of mediation is noted by numerous commentators\(^\text{19}\), who caution that it is conceptually wrong to view child protection mediation as merely another form of, or extension to, traditional family mediation. ‘It is not family mediation writ large.’\(^\text{20}\) There is debate generally about the question of specialist knowledge of the area of law to which the mediation relates, with some, arguing that it hampers and hinders when the mediator has situation-specific legal knowledge. That argument may be more difficult to sustain in CPM as lack of knowledge of the court process, and an understanding of the parameters within which the court makes its decisions could undermine the confidence the participants have in the mediators. From my observations, thorough knowledge not only of the legal process but also the coal-face practicalities was essential in order for mediators to be effective, and to have the confidence of the participants.


\(^{20}\) Linda Crush When Mediation Fails Child Protection : Lessons for the Future Canadian Journal of Family Law 23(1) (2007) p.55 at p. 71. Crush further comments (p.74) ‘it would be detrimental to all if existing court-funded mediation services were simply tasked to provide this specialist mediation as an adjunct to existing family mediation services.’
The extent to which mediators had case details varied markedly. A number of programmes had a standard, pro forma intake form which contained relatively limited information about the case. Many mediators felt that this was preferable as it helped them to guard against any unconscious bias or assumptions about the case and, further, that it helped to enhance their independence as standing outside of the court process. In contrast, some programmes gave the mediators the court file and all the documentation it contained. Even then, a number said that they chose not to read the file in order to guard against the creation of unconscious bias. That did mean that the mediator began with a fairly blank sheet, and that they had to ask a lot of questions, but those enquiries often brought out key information which parties held, unknown to the other participants. One mediator commented:

‘It is much better to talk to the parties than to have read the court file, which in any event may hold outdated or distorted information. A live update is much better.’

Not all agreed with this approach. One mediator (who was also a clinical psychologist) said she did feel the need to see the court file in order to understand the child’s experience. The view was also expressed that it was necessary in order to assess risk, for example, where there had been domestic abuse. Others felt that whilst this screening was essential, it could be achieved otherwise than reading the court file.

Are there cases which by their nature are unsuitable for mediation? There is particular debate about whether it is appropriate for mediation to take place if there has been domestic abuse. Some programmes would not mediate where there was an injunction in place between parents. Others chose not to have such a rule, but took great care to work out how it could be done safely, for instance by shuttle mediation (i.e. where a party remains in a separate room and the mediator/s ‘shuttle’ back and forth), telephone or Skype. Some mediators pointed out that attendance by victim and perpetrator at a mediation, with safeguards in place, could be very empowering for victims and often gave them voice in a way otherwise impossible, and could force abusers to face the reality of what they had done, and its impact.
37 Mediators warned against assumptions that there were classes of cases which were not suitable for mediation, for example, where a party has mental health issues. Risk assessments had to be case specific. Experience was that often a mediation could be extremely helpful where there were mental health issues, because it provided that person with an otherwise unavailable forum in which they could speak and be heard, and so served to calm rather than inflame. But mediators needed to be constantly alert to potential issues and risks, including the possibility of undiagnosed mental health issues.

FACILITATION/ORIENTATION

38 A number of programmes ran what they termed ‘facilitation’ or ‘orientation’ sessions with parents. These were specific sessions run by the mediator to explain the legal process to parents and family members, and the likely expectations of them. Whilst it might be thought that this is a task that would fall to the parents’ lawyers to undertake, it was the experience of many mediators that facilitation and mediation enabled parents to take in information which, although previously given, had not been absorbed. One mediator told me:-

‘So many people said to me that they have presented the same information to [the parents] and they have not heard it before – but they did hear it in mediation/orientation – as it is non combative situation.’

39 Both mediators and judges spoke of the benefits. One judge said:-

‘The social worker and attorney may have explained all that, but facilitation is when the penny drops, the light goes on.’

Her judicial colleague spoke of a letter from a mother who had been able to keep her seventh child, after the previous six children had been adopted. CPM had been used in the litigation regarding her seventh child. He recognised that other factors may have been instrumental, for example, that she herself had matured. However, in her letter she put it down to orientation and mediation work which had paved the way for her to understand what was happening in the legal process and to take part in it, rather than being alienated and perceiving herself as powerless to have an impact on outcome.
One programme had in place a seemingly small point of practice which had an impact out of proportion to its apparently triviality. Each parent was provided with a folder for their papers, a pen, a monthly calendar, a pro forma sheet with important contact details, a leaflet explaining the process and court etiquette, and a guide to their rights and responsibilities. The manager of the scheme commented how this was not only of practical assistance, but it validated their involvement in the process. They were no longer the only people in the room without a file and paper on which to take notes. She commented further that educating parents in what is happening is a ‘huge part of the puzzle’. Her programme also ran ‘Facilitated Pre-Hearing Conferences’ in advance of the first court hearing, at which the parties, their attorneys and a worker from Behavioural Health would attend, and, whilst it would look at visitation, placement and support services, it was designed primarily to assist the parents who were ‘often overwrought and not understanding what was happening’ get a better understanding of the court process, a more accurate understanding of what was being said against them, and the expectations of them.

PRE-MEDIATION MEETINGS

The incorporation of pre-mediation meetings with parties was not universal. The benefits, however, of a preparatory meeting appeared to be high. Some programmes would have telephone contact in advance to talk through the mediation process; others had short meetings with participants on the day immediately before the mediation began. However, where I did observe the mediator having a pre-mediation meeting with parents and family members, the impact appeared to be high. This is what occurred in one :-

The mediator visited the parents the evening before the CPM meeting to discuss their concerns and how the process would work. Extended family members were present. All were angry about the removal of the children which they deemed wholly unjustified. The father raged and wept about the unfair removal of their children; he banged the table with his fist and insisted the only thing they were going to agree on was the immediate return of their children. The next morning the mediator met with the social work team. The Team Manager voiced her
opinion that this mediation was going to be a waste of time. What was there possibly to discuss?

Once around the table, the mediator invited the father to speak first and to set out his concerns. In contrast to the man seen the night before, consumed with fury at social services, he spoke with a calm passion about the situation. His first sentence was “I know we have messed up” and went on to speak of the mistakes and bad decisions they had made, how his children must be beyond confused about what had happened and why there were in foster care, and how he wanted to work with social services to get things right. He accepted he had had alcohol problems, but did they know he had not had a drink in over a month?

The social worker, who began the meeting leaning back with arms crossed and a curled lip, began to lean forward and listen intently to what the father said. It was plain she had never heard him speak in this way before. What the father said lay the foundation for a highly productive mediation meeting.

The visit to the family the evening before the CPM meeting appeared to be very significant: it gave the parents the opportunity to vent intense, high octane emotions, and, having done so, the father in particular was able to be reflective – perhaps to a large degree unconsciously - about their own past behaviour, and be both intellectually and emotionally receptive to social services’ perspective on past events. To the observer, the shift was seismic.21

42 Lawyers and child protection workers are, of course, repeat players, who know how the legal system works and are familiar with mediation. For many parents, these are entirely novel processes. Pre-mediation meetings gave them the opportunity not just to vent their feelings but also to prepare themselves mentally and emotionally in advance of the CPM, to reflect on their situation, order their thoughts, clarify internally what they wished to say, what they wished to ask, and what they wanted on the agenda for discussion. Pre-mediation meetings worked well to focus minds. Observing the difference between programmes where pre-mediation meetings had

21 I would add that in my experience as a community mediator in the UK, using a model in which pre-mediation meetings with each party are a pre-requisite of the joint meeting, the pre-mediation meeting is an invaluable tool for participants to clarify and focus their thinking.
taken place and those where it did not happen, I thought it made a key contribution to the success of the CPM.

WHO ATTENDS?

43 CPM can assemble the whole group of interested parties, a number of whom would not otherwise meet. This would include: the parents, social worker and team manager, guardian, the parties’ lawyers, extended family members, often the foster carers; and anyone else felt relevant either to take part directly in discussions or to provide support. The attendance of the foster carers could be of great benefit. Parents and family can feel threatened by foster carers, especially where it is reported that their children are thriving in their care. Meeting at CPM had practical benefits – each often held important information unknown to the other – and also served to dispel assumptions and diffuse hostilities, patently to the child’s benefit.

44 In one programme there had been initial resistance to the principle that it was for the mediators to decide who should be at the table. It had ruffled some feathers with the social workers and children’s guardians in particular that they were not in charge of this issue and could not veto, for example, parents bringing someone in support. One mediator commented:

‘Social workers think that they drive the bus regarding who attends and the agenda. That is my job, which I do by consensus, and so that there are no surprises. There might be instances when people are sent away, but it is negative to do so and I try not to.’

45 Lawyers for the parties were to be present. In some States it was a given that each lawyer would attend, and you would no more fail to attend mediation than you would fail to attend a court hearing. Elsewhere there was a more lackadaisical approach and attorneys might give precedence to another matter. It was surprising that such an approach was tolerated, as the effect was invariably to make the CPM meeting, to which a large number of people had committed their time and efforts, stall and be ineffective.

46 The presence and behaviour of lawyers, and the role which they were allowed to adopt appeared, to some extent, defining of how the CPM operated. In some
programmes, it was hard to avoid the conclusion that the primary function of the mediation – intentionally or not - was to ease the tasks of the lawyers and streamline matters for the court. Where focus was on the contents of the petition (i.e. the allegations against the parents) and what was in issue for trial, the opportunity to maximise the utility CPM seemed to be missed. In other programmes, whilst attorneys were present, and had an essential role, they were, rightly, not the focus of the meeting.

CHILDREN’S ATTENDANCE

47 In some schemes, the child/ren would attend, if felt appropriate. Careful safeguards would be put in place including consultation with the child’s guardian and therapist.22 Children’s attendance would be carefully managed so as not to expose them to inappropriate information and/or behaviour. Supporters of child participation spoke of the opportunity it gave to a child to tell their parents, in a safe and protected environment, their feelings and wishes, and of the importance of parents facing the consequences of their past actions and omissions.

48 The question whether child attendance was appropriate divided opinion sharply. The supporters of child participation thought that to exclude the child meant they would have a sense that their voice was not being heard. It was said to be particularly paternalistic to exclude children from the mediation process. One children’s lawyer said:–

‘These children know what happened to them, they lived it, so you are not protecting them from anything they don’t already know.’

Another mediator pointed out that the mediation meeting offers children the opportunity to say things they could not say elsewhere :-

‘Last week three siblings insisted on coming to the mediation meeting. They were 9, 11 and 13. They wanted everybody to know and to hear what they wanted. They did not want to go back to their mother. They wanted

22 The notion that therapeutic assistance should only be made available to children after they had been placed permanently (as appears to be the clinical view in England & Wales) was anathema; the prevailing view was that the point at which children had been removed from parental care for reasons of abuse and/or neglect was likely to be the point at which they most needed therapeutic help.
visitation and wanted to say how they wanted to do it, that is, never to go to their mother’s house again. I called the minors’ attorney in advance to ask if they really wanted them to come. I was told that they were insisting. They came. I took them out at one point when harsher issues came up, and then brought them back in. Their mother sat, listened, and cried. They were very brave children, but that was the only place they could have had that conversation. The 11-year-old said in the mediation “Why did we not do this a long time ago?”.

The view of one experienced trainer was that the attendance of children could play an important part in parents gaining understanding of how their children feel and said that it was ‘very motivating and sobering’ for parents.

49 One programme had ceased the practice of the mediators meeting separately with children, as the mediators felt compromised when being asked to report what the child had said. Now, the child’s guardian would meet the child on the day to assess whether it would be suitable. That could be a difficult judgment call: one child had been very determined to attend the mediation and adamant about his wishes. Within ten minutes of the meeting starting he was overwhelmed and had to leave. One mediator told me of the case about a teenager ‘with a big attitude’ who was extremely hostile and thought all were against him. At the CPM meeting he heard everyone talking about him and what they were doing for him. ‘He was amazed to find that out.’ The mediator also felt it to be very good for children to see the adults in their life negotiating and coming to terms about matters in dispute – ‘Part of growing up is learning to negotiate.’

VOLUNTARY ATTENDANCE?

50 It is a central tenet of conventional mediation that attendance is voluntary. Most CPM programmes that I visited held mediation at the direction of the court. However, this did not appear to create difficulties and no-one suggested that the process was compromised because it was ‘involuntary’ in nature. The reality was, first, that although attendance was directed by the court, participation could not be mandated, and second, there was, in reality, no sanction for non-attendance.
WHEN DOES CPM TAKE PLACE?

51 There were different schools of thought about when to use CPM. At one extreme, the view was that it had no purpose or place within the statutory child protection system. One judge, who ran an Abuse & Neglect Court said that they did not use CPM at all: ‘Why bother? What is there to talk about?’ The impression given was that CPM was not just otiose, but a threat to the court’s authority. Such a bald response may suggest a lack of knowledge and understanding about how this specific type of mediation works, rather than an informed analysis and rejection. This view was also in stark contrast to the judicial views where CPM programmes were in place. The reasons for judicial support ranged from belief in and commitment to the underlying principles and that collaborative working was likely to produce better results for children, to keen enthusiasm because of the impact of the use of CPM on trial judge’s lists.

52 The second view was that CPM was of use, but only when a matter was listed for trial, or when substantive problems arose. Programme models that only harness CPM when fire-fighting is required appeared to lack a full appreciation of the benefits that early intervention CPM can achieve.

53 Other programmes had CPM embedded in the process from the start of the proceedings, and there would be an automatic referral to mediation after the first hearing. It was the experience of one mediator that:

‘Parents are in shock at the beginning of the case. They are being pressed for admissions, and it really polarises people. There is a real need for an early mediation intervention in order to better the parent-social worker relationship.’

One presiding judge spoke of their decision to change when mediation was used, and to bring it in from the beginning:

‘It works so well we decided to do it in every case at the beginning. At the end of the first hearing we call the mediator down to schedule with everyone when mediation is to take place. A judge can also refer a case back to mediation at any point to work on specific issues – visitation, bus passes, services, placement. In general I don’t have time as a judge to work through some of these
issues as well as a well-trained mediator who is much more likely to get parties to sit down to agree to things. It frees up my time. I don’t have to spend time on minutiae of the contact agreements. Mediators are well trained and get great results.

Mediation is a godsend. If they are bitching about money to get to visitation, I have little patience with that, when all the adults are acting like children, and blaming each other. It is a great resource for the court. When cases are mediated properly, it is great at root out problems.’

A colleague’s view was that :

‘Overall, mediation doesn’t necessarily shorten court lists or avoid trials, but it does get parents on board quicker, faster, better, and overall it speeds the process so cases get determined more quickly. It focusses them on what the issues are.’

My observation was that CPM offered most when used early and proactively. It appeared to me that to turn to mediation as a reaction when problems arose or when trial was listed missed the essential point of getting parties engaged in a problem-solving forum and collaborative working relationships from the earliest moment possible.

VENUE

The physical location of the CPM meeting was important and it appeared that some programmes may have been insufficiently sensitive to the impact of holding meetings in places that either lacked neutrality or appeared too court-connected.

In some programmes the mediation was held in the court house, directly across the corridor from the court room, often with a hearing following on immediately. At first blush, it looked efficient to hold CPM meetings at a location with which participants were familiar and that had integrated systems so that, for example, the mediators could look at the judge’s calendar from their computers and help directly with timetabling.

However, other programmes put a premium on emphasising the independent and neutral role of the mediator, and very deliberately held CPM away from the court
house. In one programme, the whole structure was designed to hold the mediation at arm’s length from the litigation. The CPM programme was funded and administered by a different government ministry; the mediators were independent, and community based, and the mediation took place at the mediator’s office.

57 The danger with holding CPM meetings in the court house was that, from the perspective of parents and family members, it risked being indistinguishable from the litigation process. The sense of CPM being a separate process, independent of the litigation, was lost. The venue was an issue to which parents were sensitive. One town was so small and remote that the only place to meet was in the offices of social services. In a preliminary meeting with the mediator, one of the parents asked why the meeting was being held in that building and protested ‘It is on their territory’.

58 Elsewhere the argument was made that if the mediation programme was housed elsewhere there was a lack of connection and it was difficult to get judges to order cases to mediation; to make a CPM programme effective it had to be institutionalised, and part of that was achieved by holding the mediation in the courthouse.

59 To the outside observer the benefits of having mediation in a physically neutral location appeared to far outweigh those of being in the courthouse. CPM is a process running in parallel with, but independent from, the litigation. To see a parent, in a mediation held in the courthouse, refer throughout to ‘You guys’, suggested that he viewed the mediator as part of the legal process, and without an identity distinct from the lawyers and child protection workers. The essential quality of independence appeared lost. The view of the Director of one programme visited was that mediation sessions should be held in social service offices ‘only as a last resort.’

‘A level playing field is at the very core of mediation. It is difficult if not impossible to overcome the inherent power imbalance that exists when [social services] has physical and legal custody of the subject minor. Even with impartial mediators conducting the session the [social services] office might not provide the neutral atmosphere necessary for a frank and thorough
discussion about the issues referred to mediation and other issues that might be impeding the case.'

REFRESHMENTS

60 The provision of refreshments had surprising significance. Some programmes held meetings that were relatively short and business-like, and offered little besides water. Others always made sure that there was a supply of biscuits and sweets – parents with drug and alcohol issues were often low on blood sugar. Another mediator always had cheese, biscuits and fruit. She explained that this may be the only meal the parents would get that day, and hungry people were fractious people who could not concentrate, and that sharing food was humanising.

61 The gold standard was set, however, by the programme that ordered in a proper lunch of soup and sandwiches and paused the mediation at that point. Everyone ate together. The talk was perhaps trivial – last night’s television, the game on Saturday – but the impact was high, albeit subconscious. This was a diverse group of people who had been in a high conflict meeting for some hours; they then broke off, ate together and related to each other socially, before resuming the formal meeting after lunch. As corny as it may sound, breaking bread together was significant, and gave the afternoon session a wholly different tone.

PART II WHAT GETS DISCUSSED - SUBSTANTIVE & ANCILLARY ISSUES

62 The focus of, and agenda for, the mediation varied between programmes. As noted above, for some the use of mediation appeared to be reactive and fire-fighting, i.e. when problems arose, or when the case had been listed for trial. In others, whilst mediation was not invoked only in the face of difficulty, the focus was very much on the forensic process and did not appear have a wider purview. The programmes which appeared to be best at harnessing what CPM has to offer recognised that the starting point is to use CPM as a very early intervention, and that the key to utilising CPM as a problem solving tool is first to use the forum as a way to address the impoverished working relations between the parties.
As already stated, at its optimum, the overarching purpose of CPM was to foster, at an early stage, child-centred working relations between the participants. At the forefront of this was how relations between the family and the child protection workers were inhibited from being constructive and positive because of the hostility, mistrust, misunderstanding, and miscommunication. The overt lack of faith in each other was seen repeatedly in the sessions I observed. The extent to which this was improved through the mediation process varied, but a clear picture emerged of how programme design and content could affect the likelihood of the mediation having a successful outcome.

During the research it was bewildering and educative to see how, time and again, poor or non-existent communication blighted working relations. On many occasions, rich seams of hitherto unshared information emerged in the course of the mediation. It was frequently unclear why essential pieces of information had not already been communicated. The answers were various: overworked social workers with a large and demanding caseload; parents and family members who did not realise the significance of certain information; a foster carer or family member who had not been consulted. One mediator said :-

‘It is amazing how often a topic comes up and I say “Surely you have talked about this before?” and am told “No, never” and it will be incomprehensible that it has not been not discussed before.’

One mediator told me of mediation taking place when the permanency plan was for adoption but because otherwise unknown information emerged at the meeting, the child was able to remain within the family.

The failure of social workers to return parent’s calls or keep family members abreast of developments was a frequent complaint. Whatever the merits of individual criticisms of this kind, what was clearly important to parents and family members was the opportunity the CPM process gave them to hold child protection workers to account for their actions and omissions. One mediator gave me this example :-
The child had been placed with the uncle, and he was expecting to adopt her. He was told at the mediation meeting that the Department plan was to reunify the child with his mother, because of the strong attachment. Whilst he was seemingly unfazed by what might have been thought to be a bombshell, what he was really angry about was the social worker's failure, for 'not contacting me in advance when you have promised to do so.'

66 Further, there were repeated instances of assumptions that information or wishes held by one party were known to all. In one mediation, I observed the following:

In a side meeting, the mother told the mediator how bad the social worker was and how difficult she found it to work with her. When asked what needed to be done differently she said that there was no excuse for not placing the child with her grandmother. However, it emerged this option had not been canvassed with the social worker. The mediator pointed out she had not even had a conversation with the social worker about this – 'She hasn’t said no, either.'

This example may seem basic to the point of being facile. However, the ability of CPM to tease out the reasons and justification for hostility and resistance was a repeated theme, and its impact should not be underestimated. This mother had resolutely set herself against working with the social worker. The enquiry by the mediator revealed the basis upon which the mother was antagonistic to the social worker, and he was able, almost conversationally, effectively to challenge her thinking and assumptions. Perhaps she had just chosen that issue as a vehicle for an overall hostility to social services’ intervention, or perhaps she felt her wishes and feelings were being ignored and she had not been consulted. What this does illustrate is the way that mediation can work, by unpicking the underlying rationale for particular thinking and stance, to move participants from entrenched positional thinking to addressing reality and their respective needs.

67 In other instances, it emerged that significant decisions had been taken on the basis of misinformation. For example :-

The social worker referred to how little the parents actually cared about their children, they hadn’t even bothered to buy them Easter baskets. The parents were incensed and protested vociferously: not only had they bought all the children Easter baskets, but how come the social worker didn’t know about it? Neither parents nor social worker knew that this was an issue for the other. The social worker in particular appeared to have drawn significant adverse conclusions about the parents, and their lack of love and commitment for their children, from this one issue, about which she was wholly misinformed.

68 It frequently appeared in mediation that parties had requirements of each other that were unknown to the other parties. One parent spoke of how she felt unable to talk to the social worker because she felt everything she said was interpreted negatively. The mediator asked social worker if she was aware of that? The reply - ‘Not until this moment’. Conversely, the same social worker thought the mother had refused to do undertake therapy, but had never discussed the issue with her. In the mediation it emerged that the therapist had ambiguous advice about the necessity for further therapy. The mother said ‘I wish I had known you wanted me to do this.’ Wherever the truth lay about this issue, it was plain that each made assumptions, and had never discussed with each other an issue central to the case and the child’s future.

69 Numerous instances were seen where this kind of ‘off stage’ disagreement threatened to undermine and destroy entirely the relationships between the parties, but where the opportunity that the mediation meeting gave to the parties to articulate what they needed to say, and have the opportunity to challenge what had been said about them, operated to prevent working relations being fatally compromised. The issues which caused deep disaffection were not confined to disputes between parents and social workers. The foster carer had attended the following mediation:-

The child had taken to calling the foster carer ‘mommy’. The mother was undermined, distraught, furious, and certain that the foster carer had put the child up to doing this.\(^{23}\) The mediator asked if the

\(^{23}\) The mother’s own attorney, unhelpfully, interjected that it was ‘usual’ for this to happen. The mediator recovered the situation when he said to her ‘I bet ten thousand professionals
social worker knew about this, and the team manager said she thought the child was playing the foster carer and the mother off against each other. She had observed that he would call the foster carer ‘mom’ and look at his mother to see her reaction. The mother was too overwrought to notice this. The team manager had not thought to address the issue. The foster carer was very upset by it, and said ‘It breaks my heart. As a mother I know how you feel.’ None of this had been conveyed to or discussed with the mother. The CPM meeting devised a strategy to address the reasons for the child’s behaviour which in turn which allayed the mother’s anxieties and, in particular, dissipated her distrust of the foster carer so that she could concentrate her emotional efforts on the central issues in the case.

This mediator commented :-

‘It is our job to get information out onto the table. We try very hard to do this. Verifying information is so important – there is a Russian proverb “Trust but verify”.’

70 In this instance, as in many, it was evident that the issue was so undermining to the mother that it served to distract her wholly from the larger picture of where the case was going and what she needed to be doing to regain the care of her son.

71 Other examples where CPM addressed the mistrust that had arisen because of misleading and inaccurate information included the police officer who, when removing the children from the family home, told the parents that they would get them back in 48 hours. This untruth became evidence to the parents that the Children’s Service Department was also part of the edifice of authority which tells lies and is not to be trusted. The mediator commented:-

‘CPM deals with the issues that judges cannot deal with as they are not equipped to deal with the emotional issues which can be stalling the process.’
72 It was apparent that one of CPM’s great strengths is that issues such as this can be addressed. It is not suggested that CPM is a panacea for resolving all issues of contention. However, it showed itself to be highly effective both in addressing substantive complaints, and, as importantly, in allowing challenge to, (and seeking accountability for), the decisions and behaviour of all who were involved with the children’s welfare. These types of issues may be thought of as side-shows to the main stage: however, unaddressed grievances, particularly where they go to issues of trust, serve powerfully to distract attention from the more fundamental issues. I saw CPM being highly effective as a clearing house for myriad, non-justiciable, issues and so paving the way for better focussed attention on the child’s needs and future.

WHAT GOES ON THE AGENDA?

73 Within certain parameters, nothing was off-limits for discussion and consideration within the CPM. Indeed, helping the parties set the agenda was a key part of the mediators’ role. Differences of approach between CPM programmes to certain key issues in agenda setting emerged during my research.

PLAN OF WORK

74 In America, the Adoption & Safe Families Act 1997 provides that each State must make ‘reasonable efforts’ to preserve and reunify families. A finding that there has been failure to make ‘reasonable efforts’ can impact upon federal funding. Whilst the safety of the children to be served is required to be of paramount concern, states are required to allocate funding to each of the following four categories of services:

- community-based family support services;
- family preservation services;
- time-limited family reunification services; and
- adoption promotion and support services.

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24 This does not apply in all cases. Exceptions include cases in which a court has found that the child has been subjected to ‘aggravated circumstances’ as defined in state law (including abandonment, torture, chronic abuse and sexual abuse); where a parent has killed or assaulted the child in question or another child; or where parental rights with regard to a sibling have been terminated otherwise than by consent.
‘Time-limited family reunification services’ are defined as services and activities provided to children (and their parents) who have been removed from the home and placed in foster care. Such services and activities may include:

- individual, group, and family counselling;
- inpatient, outpatient, or residential substance abuse treatment;
- mental health services;
- assistance to address domestic violence;
- temporary child care services and therapeutic services for families, including crisis nurseries;
- and
- transportation

75 The support offered to parents and the work required of them to achieve safe reunification was a central part of the discussion at mediation in those programmes where mediation was utilised from the outset. It provided a forum for frank discussion of needs and expectations. One judge’s view was that:

‘The process of mediation focusses the parties’ attention on the needs of the child and helps parties to be realistic in their expectations regarding custody.’

76 How well tailored the proposals were to the actual needs of the family was often controversial. A substantial part of the mediation was often devoted to debate about ‘The Plan’ and how relevant it was to a particular family’s needs. Parents’ attorneys repeatedly told me of their complaint that the plan for their client was a ‘cookie cutter’, a one-size-fits-all proposal. The ‘prescription’ model of planning was thought by mediators to be particularly counterproductive. Parents can be bewildered, resistant and resentful when they do not understand why they are being asked to undertake courses for which they see no need. The CPM provided a forum for the parties and their attorneys to debate what was thought to be needed, and why. The view prevailed with mediators that parents were far more likely to be committed to undertake work when they had taken part in devising the plan, accepted the need for participation in particular work, and understood what was expected. To use the jargon, the collaborative framework enabled parents to have ‘ownership’ of the problems and
‘buy-in’ to proposed solutions. One mediator described how the CPM engaged parents in particular in the process in a way that was crucial:

‘Child safety is critical, but at the same time when parents and families get meaningfully engaged, they start to take responsibility for their child.’

77 Whilst the ‘cookie cutter’ complaint may lack resonance and be less relevant to practice in the UK, what was interesting about this part of the process was how it brought focus to the issues at the heart of the case. The irrelevant or misconceived were identified and dismissed and there was a real drilling down into what was needed and why. In the mediations I observed parents and child protection workers came to an agreed conclusion about what was needed, what was otiose, and what was to be done. This was a world away from a parent ‘agreeing’ to undertake parenting classes or domestic abuse work because they had been told to do so, or advised that they ‘must’ do this if they want a chance of getting their children returned. It was also a world away from what too often happens in this jurisdiction: lawyers horse-trading in the corridor of the court, or having a meeting with the other advocates and, often, the Children’s Guardian and social worker about what is best/required/demanded – all in the absence of the very people who are to be required to undertake the work.

79 As noted above, the thought that there is likely to be greater adherence to a mutually devised agreement than to an imposed regime is not novel. In England, it is a mantra repeatedly told to parents in private law disputes over their children. Less explicable is why we do not promote the same approach within public law care proceedings.

PETITION ALLEGATIONS – THE THRESHOLD

80 There was a striking difference in practice between different CPM programmes as to whether the allegations which had brought about the issue of proceedings could or should form part of the mediation. Most, but not all, of the different models of CPM observed had as a ground rule that the fact that social services had child protection concerns was non-negotiable and as such, it was stipulated that the truth of allegations of abuse or neglect could not be subject to mediation. The rationale was that this was not the place to debate whether social services were right
or justified to have initiated protective measures. The purpose was to look to the future, not to consider the past, nor the allegations which had brought matters into the court arena. Attention was focused upon achieving an agreed plan. What would the parents have to do to achieve the return of their children to their care? What support needed to be put in by social services and other agencies? What were the alternatives in the event that the proposed plan failed?

Clearly, that is a slightly artificial construct, as it is inevitable that past events would arise in discussion to a greater or lesser extent. One mediator described how their programme had originally included discussion of the allegations:

“We started out fighting about the facts, but the only time we would ever do that now is if it was necessary for something from the file to be raised. The parent may disagree, but the social worker believes it to be true and is going to tell the judge, so, rather than it be the elephant in the room, it comes into the discussion.”

In some other programmes, the contents of the petition were not ring-fenced as such, and the extent to which the allegations were accepted could be discussed. The rationale for this was that it could often be the case that, with some ‘tweaking’, a wording acceptable to all parties could be agreed. This in turn would avoid the need for a trial on the issue. The drawback of this approach appeared to be that it changed the tenor of the mediation meeting to an opportunity for the lawyers to do negotiating over legalities and semantics. In the process, the focus on the child and the expectations of the parents was lost, and it felt more like a settlement conference than a mediation.

In another programme, mediators were clear that they were ‘not there to mediate why the children were removed, but to talk about the future’. However, whilst the allegations in the petition were not up for debate within the mediation, the question to parents ‘What is your understanding of why your child came into foster care?’ was highly important: it gave parents the opportunity to state their understanding and perspective, to correct factual misconceptions, and provided a measuring stick regarding their accountability for the situation or whether they were ‘still in denial’. One mediator said:-
'The process is all about the clients. You tell us your story, your concerns, what important for you right now. We used to get into fights about the facts but now we address ‘What are the issues?’ Whether or not you agree, the Ministry has these concerns and is asking you to do these things to address them. I’ve seen unbelievable things. Parents just wanted to be heard. And after that they’re not fighting anymore.’

One judge told me of his experience when an attorney:

The first CPM he had been directed to attend was as counsel for Children’s Services. The matter was scheduled for trial of the sexual abuse allegations and the daughter was due to give evidence against her father. He was entirely sceptical about the process and saw no purpose in having mediation. However, the structured meeting at which the father ‘was treated respectfully when he had expected to be demonised’ ended with the father shifting his position from outright denial to a position of ‘no contest’ to the allegations. The trial at which a child would have had to give evidence against her father was avoided.

PLACEMENT – WHERE DOES THE CHILD’S FUTURE LIE?

Parents are often faced with binary options within child protection proceedings. Either trial, and the humiliating but necessary exposure to which their parenting and lifestyle will be subject, or the alternative of conceding, and giving up their children by agreement. Many, understandably, find this impossible to contemplate. These are bleak alternatives.

Mediators and lawyers made frequent reference to the fact that the discussions in CPM provided a ‘reality check’ for parents about how capable they were of meeting their child’s needs. This was particularly important in discussion of a child’s future, permanent placement. As noted above, the confidentiality of the forum allowed real and frank discussion of all options. As one mediator told me:

‘I have had parents say “I know I cannot stop drugs, and someone else needs to look after my child.”’
is key to have the same mediator, same social worker, and attorneys. There is no judge in here but if parents feel respectfully listened to there is something about it, the bullshit stops. They are people who have had horrible shitty lives, and we are seeing if we can fix things, or not. Sometimes you can, sometimes not.’

The mediation meeting can uncover and probe the underlying issues which are preventing agreement. This is what happened in one mediation I observed:

The permanency plan was for the current foster carers to adopt the child. They attended the mediation, as did the mother. The mother came to the meeting wholly opposed to the plan adoption by the foster carers. However, it emerged that in fact her concern and anxiety was that she would not have continuing contact with her child. When she and the foster carer were able to talk directly to each other, reassure each other of their good intentions and discuss what future contact would look like, it became clear that the mother was not in fact opposed to the placement plan. The issues could be resolved, an agreement drawn up, and the necessity for a trial avoided.

86 The nuanced discussion which mediation could promote and accommodate offered a significant alternative to the stark alternatives of fighting or giving up for parents who were in a highly defensive frame of mind and felt their backs against the wall. It enabled them to have their views heard. Whilst emotions at times could run high, the presence of the mediator as a neutral third party was instrumental in allowing those emotions to be expressed, without the meeting becoming out of control. For parents, who had faced adversarial courtroom castigation for their parenting deficits and lifestyle choices, the mediation meeting was a place where informed, thoughtful, child-focussed joint decisions could be made. The mediator who had described the mediation process as ‘Taking the blame and shame out’ gave this example:

The father felt he had worked through the whole case plan. The Office of Children’s Services wanted to fast track to adoption as, despite the father having done what was asked of him, they did not believe he would be able to care adequately for his child. A mediation meeting held was attended by the
potential adoptive parents as well as the father. Meeting them, the father was able to feel comfortable with them, and to agree both the adoption and future contact. He described the meeting as ‘awesome’. The mediator commented on how the CPM had allowed the gap between people’s positions to be bridged, and how positively the mediation process will have affected the children’s lives.

The director of one programme reported a high level of resolution of placement issues:-

‘I have had so many mediated consents for permanent orders. It almost always happens at end of multi-mediation process, when there has been a plan which parents did not abide by, we come back to mediation and the parents say “We cannot do it.” But that is different from being told you are bad. I just did a mediation where the parents consented to a permanent order for adoption. The father was a belligerent alcoholic who blamed everyone else. By the end I was so impressed that he was so clearly putting his children’s needs ahead of his own. The adopters and parents went out for lunch.

In mediation you get over the fight, and now we problem solve. No process of being involved in the court system gives parents more involvement in the process than mediation.’

The theme that mediation empowered parents and made them part of the decision making process about their children’s future placement was repeated time and again. One mediator told me :-

‘I had a recent rural mediation. Both parents were said to be on meth, and being treated like meth heads and with very little respect. Mediation created space for their voice and suddenly their opinion mattered. The mother who had previously been opposed, agreed to consent to adoption and signed on the day. The father went away to think for a few days. Giving them voice had empowered them and enabled them to make the decision for themselves.’
It was widely held amongst the mediators, lawyers and social workers I spoke to that CPM enabled permanency decisions for children to be reached more quickly. An independent evaluation of a pilot scheme in British Columbia concluded that the time to make decisions about children was reduced by more than half, and child days in care were reduced by an average of 30%.25

ANCILLARY ISSUES

There is clearly a distinction between the primary issues with which the court is concerned - fact finding and the welfare permanency decisions for children - and the numerous other issues which arise in the course of proceedings. Trust and confidence between parties may frequently be undermined because of disputes over what the court would view as non-judicial issues and which may be regarded by some as veering towards the trivial. However, these matters can fester, cause acrimony, and, left unresolved, create deep resentment, especially for parents who feel powerless to achieve acceptable and satisfactory outcomes.

CONTACT ISSUES

Dissatisfaction over contact (‘visitation’) between parents and their children in foster care may be seen as somewhat peripheral to the court process. Judges have limited time, and, perhaps, limited enthusiasm for becoming involved in the detail of such disputes. However, disputes about parental and extended family contact can be highly contentious, have the power to cause immense resentment and to derail effective working between families and child protection workers.

Many instances were observed during the research of the mediation process enabling families and child protection workers to find their own, mutually acceptable, solutions to problems with contact. The forum it provided for parents and foster carers (easy targets for mutual demonisation), to meet and talk to each other was especially valuable. The resolution of issues about contact, both interim and on permanent placement, took many forms. Children might be placed with extended family members or formal foster carers. Misunderstandings, assumptions, lack of trust, lack

of information could all work to foment disagreement and dispute. Very often solutions to difficulties could be found, sometimes by the simple device of having everybody concerned in the same room at the same time. I also observed mediations where the issues were not resolved, but everyone gained an understanding of what was going on and going wrong. Even if total agreement was not reached, the process worked to enable all those involved – family, social workers, child guardians, foster carers – not just to have their own say and feel heard, but to gain an understanding of the perspective of others. When the reasons for a particular decision could be heard and questioned then, as a minimum, an understanding of its rationale could be achieved and, at best, mutually agreeable solutions would emerge.

ATTENDANCE

102 Parental failure to attend at agreed courses or at contact was raised repeatedly as a topic of complaint. What impressed was how the CPM worked to identify and address root causes. In some instances, it was clear that a drug-dependent parent had no appetite or commitment to become abstinent. On the other hand, one mother was required to take several buses to make a 40-mile trip, and, by the time she returned, she was at risk of losing her place in the homeless persons’ hostel where she lived and where beds were allocated on a daily basis. Whether she had not told the social worker or the social worker had not listened, it was a live issue of importance that was not being addressed outside the mediation. It again illustrates the more general point made above, that people who were key to the decision making about a child’s future were often doing so absent critically important information. The assumption that everyone had the same level of factual knowledge was repeatedly shown to be incorrect.

ACCEPTANCE & RESISTANCE

103 It is clear both from the literature and from this research that there can be resistance to the notion of CPM, in particular from social workers.26 One mediator identified particular problems as follows :-

26 See too Appendix 1 p 48 ff regarding social worker responses to a pilot mediation project in London in the 1990s.
Social workers treated mediation agreements as binding on the parents, but not binding on themselves;

Social workers changed their minds about what the child’s best interests were;

Lack of continuity in social workers; the new social worker often had not had the time/opportunity to read the background and existing agreement, a circumstance which would make parents furious.

Further, he was of the view that social workers need ‘a lot of educating’ about how mediation can actually help them with their job, but that it is not ‘their’ mediation, and mediators are not hired guns, there to fix things for them. One experienced social worker who undertook extensive training of new social workers said that CPM was ‘an opportunity for parents to see that we can be flexible too, and move position.’ However, it was recognised that whilst some social workers were ‘amazing at the table, others did not want to be there.’ She commented further on how it can work to ‘lower acrimony’, and her overall view was that ‘mediation is awesome.’

That mediation should be viewed by child protection workers as an opportunity rather than a threat was illustrated by one highly experienced attorney, who acted solely as counsel for the Children’s Department. She told me she had attended over 1,000 CPM meetings and said she could count on one hand those meetings which did not go well or when something good did not come out of the mediation process:-

‘There is nearly always much greater understanding of each other’s perspective. I have witnessed dramatic shifts – both from parents and social workers; information gets shared that, for whatever reason, had not happened before.

Best interest decisions are core to the meeting. Parents feel very powerless. The process of mediation does a lot to redress their sense of powerlessness. The results can be huge shifts, on both sides. I have seen my clients, social workers, seeing things in a very black and white way, then shifting to looking at the situation from a perspective not of what is not there and lacking, to what is there: what are the strengths to be worked with? Parents feel supported, heard and respected.’
A mediator from the same region said:

‘Social workers like it very much “So much better than going to court” was a quote I got last week. I ask them to come with an open mind. At end of the day they say “Holy crap, I never expected them to agree to any of that”.

106 A mediator from a different state said that social workers were sometimes reluctant to attend mediation, but that, in fact, when expectations were low the mediation tends to be the most productive, because people came with an expectation that they cannot communicate with each other and the process shows otherwise.

‘I find you have to allow people to vent, and once they have been able to – some have been holding on to things for a long time – so, if able to do this, they can then sit back and listen. I have had people say to me “That is the first time I have been able to talk to the social worker outside her office and without her just telling me what to do.” Parents come in thinking that no one, neither social workers nor attorneys will listen to them. But here the ground is level. No one is more powerful and better than the other. So they become willing to listen to each other and to communicate. It can be hard for those in power to step down but they realise that in stepping down, it enables communication. The most contentious ones are the ones that are the most successful.’

107 Another mediator spoke about how:

‘Mediation does shift the dynamics. People begin to move, and agreements they then reach are much more comprehensive and more detailed than court orders.’

108 Many spoke of the need to be flexible while CPM programmes bedded in:

‘It was a process that matured with experience. When we started out, it was treated like going to court. There were regular squabbles and everyone was very sceptical about having mediation and hearings. Now, I cannot think of the last time we had a squabble, and when we realised that mediation was getting rid of hearings, opposition
dropped away as an issue. 90% of team managers like it, and social workers cannot get enough.’

A number of mediators referred to the fact that parents and family members, though sometimes finding the prospect of mediation daunting, appeared to much prefer attempting to resolve issues through CPM than going to court. They spoke of parental ambivalence about court: on the one hand, it was frightening to go to court, but your lawyer spoke for you. On the other hand, parents felt very unheard in court hearings. What was high on their agenda at the time may have been of little import to the court, it was often difficult to understand what was actually going on, and, although the proceedings were about their children, parents felt marginal to what was going on in court, and that they were the least important people there.

One attorney who represented parents was disparaging about the use of CPM and described it as ‘just another way to get parents to conform and admit that they cannot parent their child’. His comments echo those of a number of commentators in the literature who raise criticism of CPM as creating a ‘false pacification’, and that there is a danger that parents may be dissuaded from mounting challenge through the adversarial trial process to the state’s assessment of their parenting and proposals for their children.27 However, this lawyer’s cynicism may have been linked to the characteristics of the particular programme in his County Court which felt very geared to the demands of the litigation and the lawyers’ needs, Other programmes had a wholly different flavour. Observation of other programme models lacked the sense of coercion for which this lawyer contended.

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27 Matthews commented on how such processes may in fact operate differently from the avowed intention when ‘behind a mask of neutrality, [they] serve to enforce the existing inequalities and produce ‘compromises’ which will invariably favour the more powerful’. (Matthews, R. Reassessing Informal Justice, in R Matthews (ed.) Informal Justice? (London: Sage 1988) ‘In an echo of the criticism that attention to procedural justice in fact creates a false consciousness, there remains the danger that mediation may, under the guise of neutrality, serve to reinforce power imbalances, and all that has really been achieved is a (false) pacification.’ (Robert MacCoun Voice, Control and Belonging : The Double Edged Sword of Procedural Fairness 1 Annual Review of Law and Social Science 171 – 201 (2005)
IV CONCLUSIONS

111 I set out to explore the mechanics of CPM, and how it works in practice. What I observed change my thinking from a narrow, overly-forensic perspective which focussed too much on whether CPM could ‘solve’ the legal disputes within the litigation, to an understanding and appreciation of the broader picture. I learned that a problem-solving approach has to start with an improvement of poor, hostile and mistrustful relations between parties. The key to achieving progress and forging collaborative working relations is to provide a confidential, safe, neutral forum where parents in particular feel less marginalised and more empowered in such a way that the core issues in the case can be addressed frankly and honestly, in a child- and future-focussed manner.

112 CPM can create the framework within which to address the forensic issues effectively because it feels a safe(r) place in which to admit deficit and face the reality of one’s situation. That the process served to ‘reality test’ parties’ positions – especially the parents’ position – was frequently reiterated to me by mediators.

113 CPM worked particularly well where it served to make parents feel heard, and included in the decision making process, and the yield included parents taking greater responsibility for their children and a higher likelihood of adherence to agreements reached. Inclusion in the decision making process was widely held to be highly effective in reaching mutually acceptable agreements about the wide range of issues which arise in child protection litigation, including those that would fall for judicial determination in the absence of party agreement.

114 Programme design varied greatly. The models which appeared to be less effective were those which appeared highly focused on the specific litigation issues and in which the clamour of lawyers’ voices was dominant. Holding the CPM meeting in the courthouse, on occasions immediately before going in front of the judge for a hearing, appeared, by undermining the independence and neutrality of the CPM and the mediator, to seriously detract from its efficacy. Making the CPM so close to the litigation, both in time and venue, blurred the distinction between these parallel
processes, and I was left wondering whether the parents felt any real difference between this and being in court.

115 My conclusion was that to optimise what CPM has to offer, it is of fundamental importance to recognise it as a separate process, albeit that it can be highly effective in achieving agreements about central issues which are before the court. Where it was not allowed to be its own process, and was too closely characterised having a function limited to solving the litigation issues, the less value it actually added to the court process.

116 I saw CPM being used to address myriad issues, including those central to the litigation and those of a more peripheral nature. The work that can be done in mediation can address and resolve many issues which are either highly consuming of court time, or fall outwith the court’s decision-making power. Far from distracting from focus upon the child’s needs and best interests, it appeared to me that addressing and resolving ancillary issues which were causing conflict between the parties in fact enabled and enhanced better focus upon the child’s needs.

117 Importantly, I saw nothing to indicate that CPM was used as a vehicle to attempt to dilute safeguards for children or compromise on issues of risk.

118 For all the above reasons, I would argue that CPM would add value to our existing court process and procedure.

119 Should we consider the incorporation of CPM into public law children protection litigation in this jurisdiction? To answer this I would suggest we need to ask ourselves how confident are we that the adversarial litigation process is a competent vehicle for achieving the best outcomes for children and families? The adversarial process, by its nature, disallows both honest communication, and creative and collaborative approaches to finding solutions. My observation of CPM in practice leads me to conclude that it is of great power and utility, and that we should be looking

‘...while not a panacea, mediation is for many cases – probably a majority – a superior vehicle for reaching agreements to protect children. Now, with considerable experience to draw from, we are satisfied that it is an exceptionally important tool not only because it brings a new, versatile and effective dispute resolution process to child welfare but also because it brings new process values that have the power to transform the culture of child welfare generally.’

I agree.
APPENDIX 1

A CHILD PROTECTION MEDIATION MODEL

Drawing the strands together from the different CPM models observed during my research in North America, I would suggest that a programme of CPM should, ideally, have the following features:

1. Early intervention: pursue collaborative, problem-solving working from the start and address the issues between the parties as soon as possible. Do not wait until matters are in crisis or trial is listed.

2. Mediators: specialist, trained, independent mediators, who understand how public law care proceedings work.

3. Co-mediators: highly beneficial to have two mediators, preferably one female and one male. CPM meetings are often complex, multi-party and a need for caucus/side meetings is frequently generated.

4. Funding: CPM funding should be structured so that the programme is autonomous and stands separately/is not under the control of, for example, the local authority.

5. Venue: locate the mediation at a neutral location. CPM in the court building may fail to create sufficient distance from the court process.

6. Pre-mediation meeting: especially important for parents to learn about the process and initiate thinking and reflection on their position, what they want to say and what questions they want to ask.

7. Attendance: should be mandatory for all parties and representatives; additionally, family support and foster carers should be considered for inclusion; attendance of the child/ren should be considered for at least part of the mediation.

8. Confidentiality: what is said at the meeting is confidential and may not be repeated/relied on outside the meeting, save for serious threats of harm to self or others. Agreements reached which all accept may be disclosed.
APPENDIX 2

The following is an extract from the writer’s 2013 M.Sc. dissertation Child Protection Litigation: A No-Go Area for Mediation?

CHILD PROTECTION MEDIATION: ENGLAND & WALES

a) Family Justice Review 2011

The government-commissioned wholesale review of the family justice system in England and Wales published its final report in November 2011. The Family Justice Review Final Review (the Norgrove report), runs to over 200 pages and makes over 100 recommendations. Only one concerned mediation in public law child protection proceedings – the recommendation that a pilot scheme be established on the use of a formal mediation approach in public law proceedings. In the body of the report, a low-key reference to mediation as one of three possible alternatives to conventional court proceedings suggests it ‘may have potential’, though the focus would appear to be limited to questions of contact or improving family member relations.

The cause of this tepid enthusiasm for child protection mediation may perhaps be gleaned from the Interim Report of the Family Justice Review which referred to the pilot study which took place in the 1990s:

‘with the intention of demonstrating that mediation was a possible alternative to court proceedings. However, the pilot suffered from lack of referrals and was not able to demonstrate that specialist mediation in child protection cases reduced the need for legal proceedings or was cheaper and less time consuming than care proceedings.’

The Interim Report noted that alternative approaches are used more in other jurisdictions, particularly New Zealand, Australia, the United States and Canada, and that one American study found evidence that child protection mediation could

29 Family Justice Review Final Report Ministry of Justice (November 2011)
30 Ibid., at paras 3.171 and 3.178
31 Family Justice Review Interim Report Ministry of Justice (March 2011)
32 Ibid., at para 4.273
33 Nancy Thoennes What we know now: findings from dependency mediation research, Family Court Review 47 (1) p21-37 (2009)
achieve agreement between parties in complex cases, improve parental engagement, work more rapidly than traditional court methods and potentially reduce costs, but there were widespread difficulties in setting up mediation services due to low uptake, lack of judicial support and ‘widespread scepticism’ among professionals.

b) **Final Report of the Alternative Dispute Resolution Project 1998**

The pilot study referred to in the Family Justice Review appears to be the only formalised attempt at child protection mediation to have taken place. The study was funded by the Department of Health, and conducted jointly by National Family Mediation and the Child & Family Department of the Tavistock Clinic.\(^{34}\) It described the proposed mediation intervention as ‘Specialist Child Care Mediation’ (SCCM) and was specific that it considered not only mediation expertise to be necessary, but also that mental health (adult but especially child) expertise was essential.

One of the co-managers of the project, writing in 2013, was clear that SCCM ‘should not be conceived of as the extension of family mediation’ arising in the private law spheres of separation and divorce.\(^{35}\) Amongst its distinguishing features, Roberts cited:

- **Context** – including the direct interest of the state in the process and outcome
- **Content** – greater complexity, often with mental health issues
- **Multi-party nature of participation** – both in terms of numbers of participants, and decision making capacity/authority
- **Inherent power imbalances**

The SCCM pilot project ran for some three years, but was not further funded. In that period, despite widespread publicity amongst professionals and courts for cost-free mediation, only thirty-six serious referrals were made of which only fifteen met

\(^{34}\) Professor Michael King, Marian Roberts and Dr Judith Trowell, Final *Report of the Alternative Dispute Resolution Project* unpublished, Department of Health (1998)

\(^{35}\) Marian Roberts *Specialist child care mediation: mediation in public law cases* June [2013] Family Law 749
the project’s criteria for acceptance. It was anticipated that parents’ lawyers might be reluctant to expose their clients to the process; what was unexpected was the resistance from social workers who appeared to be enthusiastic in principle, but not in practice. Resistance manifested itself both in lack of response and/or availability, and in attitude: ‘there is nothing we could possibly say’ or ‘there is absolutely no chance of progress’. A significant number of referrals were at a late stage and had already been through the court process, and appeared to be the most intractable, where the relations between the social workers and parents were at their nadir. Such last resort referrals may have inevitably handicapped the prospects for mediation.

Participant feedback indicated that whilst some felt that they had been heard and listened to, a significant proportion felt that this had not happened at all or only to a limited extent. About half felt that the sessions had been fair and impartial, a sizeable number were unsure and a minority felt that they were not. Thus, the authors concluded that for a majority mediation was not satisfactory, expectations had not been met, many felt frustrated, disappointed, angry, resigned and exhausted. In examining the reasons for the paucity of referrals, King noted that :

i) Social workers had committed themselves to a course of action to protect the child and promote the child’s welfare, and those who objected to or opposed that course would be perceived as ‘necessarily wrong’. Adoption of such a position may be part of the ‘protective armour that enables social workers to carry on with their difficult work without having continually to search their souls, to subject every decision made to constant and endless review’.

ii) The structure of social worker decision making, which is collective within a management hierarchy, is such that once a course is adopted, any change of direction is ‘difficult if not improbable’.

iii) The legal process is adversarial: this of itself may cause intransigence and intractability by obliging parties to take

36 Michael King The future of specialist child care mediation 11 Child & Fam. L. Q 137 1999
37 Ibid., p. 139
38 King et al. supra note 34 at pp.25 - 26. The breakdown between social workers and parents in these responses is not given.
up positions within the adversarial contest. ‘This virtually precludes any attempt at ‘partnership’.

The analysis suggested was, therefore, that the very nature of legal proceedings is antithetical to the possibility of effective mediation. Social workers, giving primacy to their duties to protect children, and committed to a certain course of action, will struggle to accept that there could be an alternative perspective or different mechanism by which to achieve child protection. King considered that ‘the most important issue’ for social services departments to answer is whether children ‘really benefit from this use of the courts. If not, then there is no reason why they should not at least attempt to resolve the issue through mediation as a way of shortening the process and reducing the antagonism between social workers and families.’ 39. He concluded, however, that where child abuse is in issue the legal and administrative framework within which social workers operate ‘make it extremely difficult for them to step out of those roles which the law has assigned to them and attempt to resolve the issue of the child’s future welfare through mediation…..’. Whilst the greatest advantage, particularly for the child concerned, would be for mediation to be tried before any decision to issue legal proceedings is made, King was pessimistic that there could ever be sufficient enthusiasm from social workers, as in the majority of cases, there is ‘no incentive for social workers to do anything other than to reach for the legal solution as soon as they encounter strong parental resistance.’ 40

c) Child care proceedings under the Children Act 1989

This report, commissioned to provide an evidence-based background and information on the process and nature of applications for care orders, described the area as ‘highly complex and under-researched’. 41

Brophy considered the ‘attempts at specialist ADR’ 42 and noted that within the UK, ‘formal attempts at developing and appraising a model of alternative dispute resolution in cases of child maltreatment are rare.’ In fact, the only scheme she

39 King (1999) supra., note 36, p. 141  
40 Ibid., p.149  
42 Ibid., Chapter 4
reviewed was the 1998 SCCM pilot project of King, Trowell & Roberts. Brophy noted that legal proceedings were described in the pilot study as ‘too adversarial, leading to further polarisation and conflict between parties while social workers were said to occupy conflicting roles: they were expected to intervene to protect maltreated children but also to preserve families by minimising the involve of local authorities and courts.’ The aim was to find a solution that protected the child without destroying the social worker-parent relationship and addressed the needs and interests of parents in a more collaborative process. Parents who felt more in control of the process were more likely to be cooperative. Difficult and painful outcomes might be less difficult to accept if agreed in a forum where there was commitment to the best interests of the child as the ‘central plank’ of the process.

However, Brophy also emphasised that the conception of care proceedings as an adversarial process, with a highly contested final hearing at which all evidence is challenged, is inaccurate. In most cases, the threshold criteria – the alleged factual basis of actual/likely significant harm suffered by the child – is not in fact in dispute and becomes agreed. She thus concluded that ‘research identifies that proceedings are a dynamic process and at several stages ‘inquisitorial’, and the process is more accurately described as a hybrid between adversarial and inquisitorial systems.

Unsurprisingly, Brophy concluded that the 1998 Pilot Project was ‘not able to demonstrate that specialist mediation in child protection cases reduced the need for legal proceedings, or that it reduced contested court hearings.’ Further, it was not possible to establish that mediation relieved role-conflict in social workers, nor that it achieved better and more cooperative relations outside the forum of mediation.

However, although based upon the reported outcome and responses to the SCCM project, this may be misleading conclusion, given the timing and type of case referral. As noted above, in most if not all referrals (the original report is unclear) it appears the substantive court decisions had already been taken, and the parties’ relationships may have been beyond the point of recovery in any event. Thus, the research may not have been a test of the extent to which mediation may succeed in

43 King et al., supra at note 15
44 Brophy, supra note 41, p 83
45 ibid, p 80
diverting cases from the court forum, or narrowing the issues before the court for adjudication.

Brophy also viewed ADR in the form of the SCCM pilot project as unlikely to work in the child protection arena without changes to its structure, in particular the voluntary nature of participation. Her contention that removal of voluntary participation would render its ‘principles theory and practice, unworkable’ may be readily agreed by some, but it is also clear that in many other jurisdictions, child protection mediation is court-directed, and this does not operate as a bar to its success.

d) Partnership by law ? The pre-proceedings process for families on the edge of care proceedings

The move to identify processes which may avoid adversarial litigation, and improve outcomes for children and their families, received further examination in this two-year study which considered the pre-litigation stage.\textsuperscript{46} The project examined the scheme whereby local authorities considering the issue of care proceedings, specified their concerns in a pre-proceedings letter and invited parents to attend with their lawyer\textsuperscript{47} at a meeting to discuss what could be done to avoid the matter being taken to court. The pre-proceedings process was seen both as a way, potentially, to avoid litigation but also as a means to reinforce the child protection plan, to indicate the gravity of concerns and to encourage parental cooperation in the shadow of possible court proceedings.

The pre-proceedings intervention was found to divert approximately a quarter of cases away from the court forum. Of these, in some two-thirds of cases there was improvements in parental care and the children remained at home. For the cases which did proceed into litigation, the pre-proceedings intervention did not operate to shorten the litigation and courts did not take particular account of the pre-proceedings work which in fact was considered, overall, to delay final decisions for children\textsuperscript{48}.

\textsuperscript{46} Judith Masson and Jonathan Dickens \textit{Partnership by Law ? The pre-proceedings process for families on the edge of care proceedings} University of Bristol and Centre for Research on Children and Families, University of East Anglia (2013)

\textsuperscript{47} Legal aid funding is available for this purpose.

\textsuperscript{48} For those cases with pre-proceedings intervention which did then result in the issue of proceedings, an average of 16 weeks’ additional delay was recorded; the authors suggest that this indicates local authorities do give parents sufficient time to achieve change.
The use of a pre-proceedings process may be seen thought to be as much about reducing delay as it is about diversion from the court process. It has its provenance in the concept of a pre-proceedings protocol as proposed in the Care Proceedings System Review\(^{49}\), which was particularly concerned with the rising costs of care proceedings. Whilst its terms of reference included identifying ways in which there may be diversion from the court process and support for families where possible, it relied upon the impact of early legal advice to parents to effect changes in parenting behaviour and engagement, rather than the use of any type of alternative dispute resolution. That may be regarded as a limited vision, particularly in the light of the recommendations which included the aim to ensure that applications to court for care orders ‘are only made after all safe and appropriate alternatives to court proceedings have been explored’.\(^{50}\) However, neither mediation nor ADR in any other form was given any consideration in this review.

Although some aspects of the pre-proceedings interventions studied by Masson and Dickens could be viewed as a negotiation process,\(^{51}\) they were not (and did not pretend nor aspire to be) mediation, and lacked many of mediation’s key features. Nonetheless, there were features which appeared, to some extent, to mimic mediation in both process and outcome. For example, the process was supported by social workers and their managers, who saw it as a more respectful way to work with families who were at risk of care proceedings; the presence of a lawyer at this earlier stage helped some families feel supported and for some it assisted engagement with social services and improvement in parenting. Thus, on one view, this was a process which some social services participants saw in terms of empowerment of parents and the promotion of autonomy for the family. However, as noted above, the primary use of the intervention was to make clear the gravity of the situation in order to encourage or induce greater parental cooperation. The meeting would usually be chaired by a senior manager within social services, accompanied by social worker and lawyer.

\(^{50}\) Ibid., para 5.12
\(^{51}\) Not all interventions could be so characterised: some were to deliver non-negotiable ultimatums to parents.
While understandable in terms of child protection, such a process is very distinct from mediation’s collaborative approach.

In their review of the pre-proceedings process, Masson and Dickens make passing reference to mediation within the child protection process. It is noted that in England and Wales there is ‘negligible’ experience of alternative dispute resolution in this area, and that whilst there was some use of this approach in other jurisdictions, usually within proceedings, ‘There were many complexities in establishing and sustaining these services and only limited evidence of their effectiveness.’ I would question the extent to which this is an accurate reflection of the use and experience of mediation in North America.

However, this examination of the pre-proceedings process and its theoretical backdrop canvassed many of the values which form a central part of mediation’s claimed advantages: greater empowerment and enhanced participation of parents; protection plans more likely to be more effective where parents have had genuine involvement in their formulation; engagement of resistant parents through the communication skills of listening and reflecting, regard for human rights considerations both procedural and substantive (‘the state respects family life through the way it takes decisions, not just the decisions it takes’), as is research which, in its consideration of the role of lawyers at the pre-proceedings stage, noted the impact of the involvement of a third party in conveying agency concerns.

e) Legal aid – policy re child protection mediation

Current thinking and policy appears also to be manifested in the question of the funding of child protection mediation. At present, no legal aid funding is available where parents and social services are in dispute with regard to issues of child protection. The research findings that advocates were largely focused on persuading parents to cooperate with social services are noted by Masson and Dickens, with the ‘obvious questions about the exercise of influence and control and the appropriate role of the lawyer’ op. cit. supra note 27 p 61.
protection, save that legal aid funds a lawyer’s attendance at the pre-proceedings meeting. Private family law disputes between separating parents now attract legal aid funding for mediation, but no longer for litigation. The Legal Aid Agency’s Guidance Manual gives an indication of the underlying policy approach:-

‘The issue in this [neglect] case relates to child protection concerns and it may be that this type of dispute would be unsuitable for mediation in any event. However, if there were a role for a mediator in these circumstances it would be to help improve the relationship between the LA [local authority] and the parent(s) in order to assist with communication and in defining the issues and concerns in an attempt to find solutions that may alleviate LA concerns about the child’s welfare. The fact that a failure to address these concerns could lead to the LA initiating proceedings would not be sufficient to bring this within the scope of legal aid funding in terms of Family Mediation. Again this work is more therapeutic in nature and could therefore fall within the potential remit of the LA under their duty of care.’ [emphasis added] 57

Further examples given identify how mediation may well be able to assist parents and local authorities come to an agreement about meeting the child’s needs. It is perhaps a bold assertion that ‘no legal disputes are involved in this type of matter so it would not fall within the scope of public funding’, notwithstanding that parental failure to address the alleged neglect would form the legal basis of an application to remove the child from parental care. One view might be that there is a legal dispute: is the child suffering significant harm such that the threshold for removal by the state is made out? However, the policy makes clear that it is only in disputes which have crystallised into ‘dispute about a legal right’, for example, contact with a child, that mediation would fall within the remit of public funding. If the intent of the policy is to save public funds, it may be thought short sighted to take such a narrow and limited view both of what a dispute over a ‘legal right’ may be, and also how cost effective mediation could be if its use negated the need for (frequently multi-party) care proceedings to be litigated.

56 Funding is available in some circumstance e.g. where the party has been victim of domestic abuse.
57 Legal Aid Agency Family Mediation Guidance Manual Section 7, 1st April 2013
APPENDIX 3:
SETTLEMENT LEVELS – ASSESSING EFFECTIVENESS OF CPM

A quantitative analysis of the effectiveness of CPM is not within the scope of this paper. This appendix is based on an extract from the author’s MSc dissertation on the use of CPM in North America Child Protection Litigation: A No-Go Area for Mediation?

The effectiveness, or not, of CPM is measurable on a number of scales, some more tangible than others. I would argue that CPM offers significant additional value, in any event, to those involved in child protection litigation but of course compliance with agreements, and the impact of CPM upon timescales, costs, and court time are important and significant factors to be considered.

a) Timescales

A 2001 evaluation of a Permanent Custody Mediation Projected found that the cases that reached an agreement in mediation took less than half the time to file the agreement with the court than the control group cases did to achieve final orders (2.2 months compared with 4.6 months).58 In a 2004 study, the time taken to reach permanency was reported to be approximately halved in those that were mediated, in comparison with those that were not.59

b) Agreement rates

Respondents to a survey by Kathol56, published in 2009, reported that full or partial agreement was achieved in a significant number of mediated child protection cases. Over 75% reported that full agreement was reached at least 50% of the time. Conversely, 82% reported that no agreement was reached in fewer than 25% cases.61

60 Joan Kathol, Trends in Child Protection Mediation: Results of the Think Tank Survey and Interviews Family Court Review 47(1) 116-128 (2009)
61 It was, however, an apparent weakness in the survey that few schemes had any sort of systematic review and evaluation process, but instead relied upon anecdotal feedback on what did or did not work.
Earlier studies have also shown compelling rates of settlement being achieved: for example, Mayer writing in 1989, reported full agreement in 90%, and partial agreement in 94% of cases, with a correspondingly high level of satisfaction recorded\(^\text{62}\). Thoennes’ 1997 survey of five Californian courts reported that 90% or more of mediated cases reached some agreement, and mediators considered 60% - 80% cases resulted in full agreement. Cases at the jurisdictional stage had lower, but still marked, rates of settlement (70%) whilst those at the dispositional stage recorded a settlement rate of 92%.\(^\text{63}\) An evaluation study in 2011 of the New York Child Permanency Mediation Program cited full agreements generally reported in 30-40% of cases, and partial agreement in 25-45%, and noted ‘In most programs around the nation, complete agreement rates range from 60 percent to 80 percent of the cases that attempt mediation.’\(^\text{64}\) Interestingly, the New York evaluation noted that less than 15% of cases sent to mediation pre-fact finding were able to produce settlements, compared to 40% of cases referred post-fact finding. However, cases sent pre-fact finding were generally able to produce some type of settlement, just not one covering all the issues in the case.\(^\text{65}\)

Kathol rightly pointed out that achieving agreement is ‘not necessarily the symbol of success in mediation’, as, even where agreement is absent, success in mediations may be manifested by the change in the nature of relationships, improved communication and/or involvement of families in the decision making process.\(^\text{66}\) Elsewhere, one mediator measured success by the extent to which the child care professionals and the family members developed a ‘mutual understanding of one another’s position’ – even if this got no further than an agreement to disagree.\(^\text{67}\)


\(^{64}\) Thoennes & Kaunelis *New York City Child Permanency Mediation Program Evaluation* Center for Policy Research September 2011 p. 45

\(^{65}\) *Ibid* p. 45

\(^{66}\) Kathol, *supra* note 39 at p123

There is a lack of clarity about what is meant by “reaching an agreement”, and the extent to which agreements are about substantive issues – the removal or return of children – or more ancillary issues. For example, McHale cites statistics from a pilot project that 92% of all issues referred to mediation were resolved, the highest rate (97%) for issues concerning services and resources, the lowest rate (83%) concerned behaviour and parenting issues. It is unclear to what extent ‘behaviour and parenting issues’ relates to the central question of future risk, and whether children had been or were on the cusp of removal from parental care. Thoennes records that in some schemes, mediation dealt with numerous issues ancillary to this but ‘only occasionally did the mediation session address the long-range goals of the case, such as reunification or termination of parental rights.’

A 2010 evaluation report of the Cook County programme in Chicago reported that in 74% of cases, some form of agreement was reached for the issues referred to mediation, and that ‘full settlement’ was reach in 35% of those cases. In particular, where the issue referred for mediation was permanency, full agreement was reached in 26% of cases, and partial agreement in 20%; where the issue was reunification, full agreement was reach in 25% of cases and partial agreement in 25%. The New York evaluation noted that mediated cases were somewhat more likely to have reunification, as opposed to adoption, as a goal than non-mediated cases, but queried whether this was because referral to mediation was more likely where the court perceived that reunification was more likely, ‘or whether mediation actually increases the likelihood of the professionals seeing a path to reunification.’

c) Case type in relation to settlement

It does not appear that it was only the simpler cases which were considered suitable for referral to mediation: comparison between mediated and non-mediated cases showed that a large proportion of families with substance abuse problems, mental health issues, previous child abuse reports and criminal convictions were referred. Further, screening for case suitability has also been considered to be unnecessary as no correlation between case characteristics and outcome had been

69 Thoennes (1997) supra note 43 at p.187
70 Supra p.45
71 Thoennes (2009) supra note 14 at p. 27
identified, and none were ‘highly predictive of failure’. Indeed, the scheme in Santa Clara County, California boasts that ‘the court refers only the most difficult, complex contested cases to mediation’.

However, the nature of the alleged maltreatment was said by Thoennes to be reflected in the settlement rate at the jurisdictional stage: cases with allegations of sexual abuse were less likely to settle than those involving allegations of neglect or physical abuse. This was considered to be because parents would tend to deny allegations of sexual abuse, whereas they may offer explanations for neglect or physical abuse allegations. However, at the dispositional stage, the type of maltreatment did not appear to have any influence on settlement rates. The Cook County evaluation found a ‘moderate association’ between the type of case and the probability of settlement, which neglect more likely to settle than abuse cases, and cases involving both abuse and neglect being even less likely to settle.

d) Compliance rate

Further, achieving agreement through mediation gives only a partial picture: whether agreements achieved in mediation are, in fact, complied with over time may be thought to be the decisive test of whether mediation has achieved the shifts in position and perspective for which it contends. High settlement rates do not automatically guarantee similar compliance rates. Thoennes recorded that a number, but not all evaluations, found greater ongoing compliance in mediated as opposed to non-mediated cases, and concluded that the evidence was ‘encouraging but incomplete’ in this regard. Anderson and Whalen reported that ‘Compliance with mediation agreements was high, in general’ but cautioned that the impact of mediation on increasing parental compliance was ‘unclear at this time.’

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72 Ibid. p. 30
74 Thoennes, (1997) supra note 43 at p. 192
75 Supra p11
76 Thoennes (2009) supra note 8 at pp. 35 & 36
77 Supra p. 4 and at p 8 ‘Adequate comparison data for non-mediated cases was not available for analysis.’
evaluation non-mediated cases were ‘about three times as likely’ to be non-compliant.\textsuperscript{78}

e) Court time

Anderson and Whalen noted that ‘Benefits are both financial and outcome related with respect to the best interests of children. Improvements in judicial economy was noted such that reduced demands on a judge’s time allowed for greater attention to other matters.’\textsuperscript{79}

The Michigan pilot programme evaluation was said to ‘affirm the usefulness and cost effectiveness of mediation in child protection cases.’\textsuperscript{80}

\textsuperscript{78} \textit{Supra} p.47
\textsuperscript{79} \textit{Supra} p.4
\textsuperscript{80} \textit{Supra} p.4