

CHILDREN IN FAMILY MEDIATION: A RIGHTS APPROACH OR THE RIGHT APPROACH?

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Abstract

This article explores the impact of three interlinked developments on both theoretical understanding of the specific role of children in family mediation and on its professional practice implications. First, the adoption of an imported terminology deviates from the clarity and precision of existing policy in respect of the nature and purpose of professional intervention in relation to children in mediation; second, current high standards of practice risk being compromised by an overemphasis of a rights approach to determining a child's direct participation in mediation; and third, how a failure to sufficiently recognize the impact on families of multiple harsh pressures, including poverty and deprivation, at a time of conflict and stress, risks both overstating the scope of mediation for meeting a child's needs as well as underplaying the complexities involved in relation to the direct participation of children in mediation. The article explores the tensions arising from these developments and the challenges, theoretical and professional, involved in protecting the ethical and professional principles of mediation while ensuring that the voice of the child can be heard in the process.

Keywords: ADR; mediation; family mediation; children in mediation; children's rights.

Childhood is entitled to special care and assistance (United Nations Convention on the Rights of the Child 1989, Preamble).

[A] INTRODUCTION

The subject of children, in whatever professional context, always provokes important, delicate and complex questions—about their rights and about their welfare: about their role in decision-making and what is meant by their “participation”; about the kinds of decisions that have to be made in circumstances that have often profound and long-lasting effects; about ethnic, cultural, economic and gender factors and other differences; about what children themselves think and want; and

about the need to balance respective and possibly competing interests in families. The focus on children in family mediation also brings to the fore more general themes that emerge in all fields of mediation practice. First, there is the role of third persons in mediation, themselves not parties or decision-makers yet who may be directly affected by the process and its outcome (Roberts 2003). Children, for example, are neither parties nor decision-makers in mediation yet are directly affected by the decisions of their parents, the disputants, who have decision-making authority. Second, there are distinctive features that distinguish mediation from other interventions, including other dispute resolution processes—of particular relevance is the way in which the mediation-specific role of children differs conceptually, ethically and professionally from their involvement in other forms of intervention, whether welfare investigation, judicial proceedings, child counselling, therapy, advice-giving, guidance or advocacy. Third, a tension can arise between the pursuit of individual rights and the ethics of collaboration and consensual, joint decision-making that distinguishes mediation.

Notwithstanding collegiate consensus on the specific role of children in family mediation, the nature of professional intervention and high-quality professional standard-setting and training by the family mediation representative and regulatory bodies in the UK,¹ terminological misconceptions, process misunderstandings and a paucity of relevant research are problematic. Furthermore, there can be a serious failure to sufficiently appreciate the impact, on disputes relating to children in particular, of the pandemic and of the harsh reality of the economic, financial, social, psychological and health struggles associated with family breakdown.²

This article explores, from the perspective of an experienced family mediator,³ how misunderstandings about the role of children in family mediation can arise as a result both of the imposition of unrealistic theoretical, policy and practice expectations on an essentially modest dispute resolution intervention, as well as from an underestimate of the complexities and difficulties of fulfilling appropriate professional expectations in practice. The article will focus in particular on the following

¹ The FMC; the College of Mediators; the NFM; and the Family Mediators Association (FMA).

² Dr Sheena Webb, a clinical psychologist, draws attention to the prevalence of trauma experienced by many families involved in public and private family law proceedings, how these systems themselves contribute to that trauma and the failure of professionals to understand or recognize the impact of trauma on behaviour (Webb 2023).

³ The author has over 40 years continuous family mediation practice experience and has been involved over decades in the development of the national professional regulatory framework for family mediation.

questions: first, does the adoption of an appropriated terminology, namely “child inclusive mediation” (CIM), imported from abroad but without its substantive content, create inaccurate public and professional expectations? Second, does a reliance on Article 12 of the United Nations Convention on the Rights of the Child (UNCRC) 1989 constitute a sufficient theoretical justification for promoting the increased direct participation of children in the mediation process? Third, does Article 12 privilege the role of professionals in respect of hearing the voice of the child?

[B] A BRIEF FAMILY MEDIATION HISTORY

Family mediation has always been associated with a greater concentration on the needs of children whose parents are separating or divorcing (see Davis & Roberts 1988; Kelly 2004; Ministry of Justice 2011).⁴ The first family mediation services in this country, set up in Bristol in 1978, and in Bromley, south east London, in 1979, were established with their primary focus on the wellbeing of children. These pioneering services provided mediation (then termed “conciliation”) with the express purpose of mitigating the harmful impact on children of parental conflict arising from family breakdown. The historical legal and policy context of this then pioneering form of family dispute resolution can be seen in the extensive body of reports and research studies that informed their establishment, initiated by the Finer Report of 1974. This report, in response to concerns about the social impact of divorce and separation, officially espoused a new spirit in which family breakdown should be viewed, affirming the need “to civilize” the consequences of breakdown. It recommended that the “winding-up” of marriage failure should be accomplished by “the *couple*” making the most rational and efficient arrangements for their own and their children’s future (emphasis added). The Finer Report gave first public recognition to the idea of *conciliation* in family disputes with its emphasis on reducing conflict and on the reaching of consensual agreement between the parties themselves (Finer Report 1974: paragraph 4.313).

A unique feature of family disputes is the continuing and interdependent relationship of the adult disputants, bound together forever as parents of their children (Fuller 1971). Children provide the common interest and mutual inducement for collaborative effort. Children may be seen, simultaneously, to be the cause of dispute, the weapons of dispute, the main casualties of dispute and, therefore, the best reason for ending the

⁴ For a recent comprehensive overview of the social, legal and research developments relating to children in family mediation in the UK, see Allport (2020: chapter 10).

dispute (Davis & Roberts 1988). Disputes over children frequently reflect this complex and paradoxical predicament.

The common view that family mediation can offer the “best setting” for the voice of the child to be heard has been linked to the presumption, embodied in the UNCRC 1989, the Children Act 1989 and the Family Law Act 1996, that the greater awareness of and greater attention paid to the views and feelings of children both acknowledges their worth and significance as well as alleviating distress at a time of separation and divorce. The research literature consistently indicates that children’s voices are an important component of the separation and divorce process, that in many cases children and parents have better relations and that there can be less parental conflict when children are incorporated in the process (McIntosh & Ors 2008; Birnbaum 2009). Notwithstanding, there has also been controversy particularly over the nature and purpose of the role of children in the mediation process. The issue has been not whether or not children should be consulted in the decisions that affect them—that, it is agreed in principle, would be good commonsense and be fair and just (Emery 2003). The vexed question that polarized positions focused on whether or not children should be involved *directly* in the mediation process and on the role of professionals in that process.⁵ By the 1990s, however, conceptual clarification of the nature of the mediation process, the greater practice experience of family mediators plus research findings (Garwood 1989; O’Quigley 1999; Wade & Smart 2002; Birnbaum 2009) combined with a fresh climate of thinking about the “voice” of the child in decision-making (see Article 12 UNCRC 1989; the Children Act 1989). This resulted in a convergence of views that resolved the debate for and against the direct involvement of children in family mediation. There was now consensus on the principles, policy and language use that could frame the approach to and the professional practice of family mediation involving children. The policy question to be addressed was this: “How can children’s perspectives best inform a process in which the parents are the ultimate decision-makers?” (Roberts 2014). The answer lay in the concept of *consultation* which clarified not only language use⁶ but also resolved the substantive question, namely, that children can be *consulted* as part of their parents’ decision-making in mediation. Consultation

⁵ Some North American researchers argue that mediation is not the appropriate forum for children to express their views; that, on the contrary, mediation can be a protective factor for children in providing a forum where parents can express their conflict without involving the children (see, for example, Kelly & Emery 2003).

⁶ This was necessary because the language used to describe the role of children in mediation was vague and varied, reflecting the prevailing imprecision about the professional nature of the intervention. Usages included the following—“working with” children; “involving” children; “seeing” children; “including” children; children “participating” etc.

could take place in either or both of two ways: indirect consultation by means of parents themselves consulting their children and bringing their views into the process—an approach that was seen to encourage parents to consider and take into account their children’s perspectives; direct consultation with children by the mediator within the process—of particular value when the perspective of the child was missing. Whether children should be consulted directly, and how and at what stage were matters to be agreed jointly between mediators and parents, requiring also the child’s consent (National Family Mediation (NFM) 1994).

These principles form the basis of the policy approach and practice guidelines in relation to children now in place and endorsed by all five member bodies making up the Family Mediation Council (FMC), the overarching self-regulatory body for family mediators in England and Wales.⁷ This approach positively promotes, as its core principle, the importance of incorporating the perspectives of children in parental decision-making with guidance as to how this can best be achieved.⁸ With the consent of the child, the parents and the mediator, children can be consulted directly by a specially trained mediator in a separate single confidential session (usually up to a maximum of one-hour) scheduled between two mediation sessions so that there can be both the careful preparation of parents in advance (including addressing the possibility of negative responses) and their receiving subsequent feedback from the mediator. The content and manner of that feedback (whether to parents jointly or separately) requires the child’s explicit consent. Children are not themselves involved directly in parental discussions, although occasionally children can participate in a final family meeting once agreement has been reached.

Family mediation is thus the only dispute resolution process in the country that has had in place, for decades, not only policy and practice guidelines but also rigorous quality assurance requirements in relation to the role of children and young people. It is the only dispute resolution process with the primary objective of enabling disputing parents to foreground their children’s needs, feelings and views and to reach consensual joint decisions informed by these perspectives (Roberts 2015).⁹

⁷ The five member bodies making up the FMC consist of the College of Mediators, the FMA, the Law Society, NFM and Resolution.

⁸ FMC Code of Practice and Guidance (2018: sections 5.23 & 6.6, “Welfare of Children”) states: “The Mediator must encourage the Participants to consider the children’s wishes and feelings. All children and young people aged 10 and above should be offered the opportunity to have their voices heard directly during the Mediation, if they wish” (section 6.6.1).

⁹ This is not to say that current policies and practice could and should not be updated and enhanced through collegiate endeavour.

It is significant that the recommendations in the Ministry of Justice Report on the voice of the child in dispute resolution (2015), while embracing all dispute resolution processes, made no mention of how what it termed “child inclusive” practice could be practicable in respect of lawyer negotiation, collaborative lawyering, arbitration or any other dispute resolution process. Sir James Munby (lately President of the Family Division) has lamented the lack of progress in relation to the greater participation particularly of older children in the family justice system, with the aim not only to improve the quality of judicial decision-making but also to value and respect the views of children themselves in respect of those decisions:

What has been achieved? *Nothing, absolutely nothing*, effective, despite continuing and unrelenting pressure for change since 2014 ... The deplorable reality is that what children want and need, what their welfare demands, is, according to the Ministry of Justice, too expensive” (Munby 2021:747, 748, emphasis in original).¹⁰

[C] WHAT IS “CHILD INCLUSIVE MEDIATION”?

The term, “child inclusive mediation” has been a relatively new import from Australia where there it refers to a wide-ranging and sophisticated child-related model and practice approach in comparison with what is termed “child focused” practice. CIM, piloted in two sites in Australia (in Darwin and Melbourne), aimed to embrace children’s concerns and interests in all aspects of overall practice, whether counselling or mediation (McIntosh 2000). Concerns that “child inclusive” practice (recommended as a “good practice” approach rather than “best practice”) might be understood to mean that all children should be seen in all cases was an assumption that was explicitly refuted by the consultants to the pilot (Commonwealth Department of Family and Community Services 2002). What was envisaged by “child inclusive” practice was that, throughout the process of mediating with parents, both the parenting role and the needs of children would be supported in a variety of ways, direct child consultation being one critical option, as well as other indirect ways, such as working with parents in group programmes or with families in

¹⁰ The meeting of children with judges is covered by Guidelines for Judges Meeting Children who are Subject to Family Proceedings 2010. The purpose of such meetings is to benefit the child, not to gather evidence. *Re C (A Child) (Ability to Instruct Solicitor)* (2023) also addressed a child meeting with a judge. In this case there was difference of view between an expert psychiatrist and the judge at first instance as to whether a 14-year-old boy was deemed competent to instruct solicitors. Notwithstanding helpful guidance, children’s meetings with judges persist in having “knotty and ambiguous features” in practice (Seagrim & Lewis 2023, 1455).

family therapy. Findings highlighted the vital resource, expertise, training and infrastructure implications entailed in implementing CIM. An extra six to eight hours of worker time per case were needed to be funded, and staff trained for direct consultation already had graduate training in psychology and social work and prior therapeutic work experience with children. Supervision was conducted by a clinical child psychologist.

While the term “child inclusive mediation” was adopted in this country, its wide-ranging practice approach was not replicated. Rather what the new terminology did introduce was an increased emphasis on the importance of offering the child/young person (from the age of 10) the opportunity to be directly consulted during the mediation process. In fact, it added nothing fundamentally new or different to prevailing practice, already incorporated into policy and practice directions as the “direct consultation of children” (DCC). As described above (see also footnote 5), the original professional clarification of the mediation-specific role of children also involved clarification of language use.

Policies and practice guidelines acknowledge that mediation, while potentially powerful in its impact, is a modest intervention.¹¹ Also recognized expressly are the range of services that may be more appropriate for meeting the needs and interests of children affected by separation and divorce—such as counselling and therapy, advice, guidance, social work and advocacy. Therefore the appropriation only of the Australian CIM terminology is problematic: first, because however well-intentioned and apparently benign, CIM reverts to a previous vagueness of language use that gives no indication (unlike DCC) of the precise nature of the professional intervention involved. Second, a new terminological hierarchy of practice approaches is created to incorporate the voice of the child in family mediation, privileging one approach, the direct consultation of children, over other consultation approaches. Third, CIM implies a false innovation, namely that prior mediation practice in relation to children was not inclusive of their wishes, views and feelings. Fourth, given the vagueness and breadth of what is conveyed by “child inclusive” practice, misunderstandings can arise and consequently misplaced and unrealistic expectations (public, professional and official) can be imposed on family mediation to meet the wider range of children’s needs associated with family breakdown.

¹¹ In a synthesis of findings from 17 studies (from Australia, Canada and the United States) on mediation in public law child protection cases, effective, properly trained and independent mediators were found to be “powerful enablers”, recognized to be key to successful practice where children’s interests were central (Wallace & Ors 2020).

Family mediation should not be expected to meet a lack of provision of more appropriate services for children, nor should mediation be criticized for failing to fulfil objectives that are not its business to fulfil.

[D] CHILDREN'S RIGHTS

The primary focus of family mediation services in seeking to mitigate the harmful impact of family breakdown has always been child-centred (see above). There has always been professional consensus on the objective of engendering more co-operative, post-separation parenting arrangements and of the need to respect the voice of the child in all dispute resolution processes.

Article 12 UNCRC 1989¹² provides the main foundational principle of the rights approach that now underpins research and policy recommendations for prioritizing the child's right to have a voice in family mediation (see, for example, Barlow & Ewing 2020; Family Solutions Group 2020; Ewing 2021). In drawing attention to international obligations, Article 12 needs also to be understood not only as a fundamental right but also as a general principle to be implemented "holistically" in relation to the realization of concomitant rights under the UNCRC, in particular Articles 3, 5, and 9 (respectively, the best interests of the child as the primary consideration and their right to care and protection; responsibilities, rights and duties of parents and appropriate direction and guidance in a manner consistent with a child's evolving capacities; and the right not to be separated from parents) (Lansdown 1995; Thomas 2007). Article 29(c) highlights too the aim of the education of the child to be directed, *inter alia*, towards respect for their parents. In addition, there is no one construction of the meaning of participation of children and young people in decision-making under Article 12. Participation can take many forms, be constructed in different ways and at different levels—consultative (indirect and direct), collaborative and child-led (Lansdown 1995). The requirements for participation of children within the public arena of civil and political decision-making (a process involving procedural requirements for information, advice, follow-up and evaluation, complaints, remedies and redress) must not be equated with requirements in respect of the

¹² Article 12 UNCRC 1989 states the child's right to express an opinion freely where capable and to have that opinion taken into account in any matter or procedure affecting the child. The views of the child are to be given due weight in accordance with the age and maturity of the child. Article 12, though ratified by the UK, has not been incorporated into domestic law.

participation of children in the context of the private ordering process of family mediation.¹³ If children have the right to express a view on matters of concern to them and to have those views taken seriously, then parents have a corresponding obligation to consult their children. This right of the child to participate in decision-making does not remove the ultimate authority of the parents to make decisions in relation to the child. It does, however, significantly affect the process by means of which those decisions are made (Lansdown 1995).

There is also no reason to presume that the implementation of Article 12 in respect of divorce and separation requires there to be a professional involved rather than a parent, grandparent, or other trusted adult. Is there something of a paradox in advocates of children's rights presuming the competence of children (that they will behave reasonably and sensibly in relation to the making of decisions affecting them) yet at the same time denying such a presumption of competence in respect of the parents' decision-making in respect of those children? There is no evidence to suggest that, in most cases, parents, however angry and distressed, are less committed to their children's wellbeing than a professional. On the contrary, decades of research findings highlight parents' own concerns about the impact of separation on their children and their primary concern to prioritize and protect their children, however angry and distressed they may be (see, for example, Saposnek 1983; Davis & Roberts 1988; Utting 1995; O'Quigley 1999; Birnbaum 2009; Nuffield Family Justice Observatory 2023). Many parents expressed this in the language of wanting "to put the children first", wanting to do what is "best for the children" or putting the children's interests "over your own", however difficult this task was acknowledged to be owing to tensions, emotional pain and conflict (Symonds & Ors 2022: 20).

There has long been a danger that the preoccupation of professionals regarding the issue of "children's interests" could give rise to a conflict, not between parents and their children, but between parents and those professionals who claim to know and be able to better protect the best interests of children (see Berger & Berger 1983). Yet greater significance is attached to the value of the direct consultation of children by a professional in family mediation than to the various other means of hearing the voice of the child.

¹³ A more recent theoretical perspective on the meaning of children's "participation" (in the political and social context) expands the notion of the "voice" of the child to encapsulate more elaborate understandings of a dynamic process of participation incorporating learning and change. In this context "consultation" can be seen as a limited understanding of participation in response to an adult agenda rather than as a collaborative process with children actively involved themselves in developing creative responses to the issues (Percy-Smith 2014).

The focus on Article 12 in providing the most compelling theoretical justification for endorsing the direct involvement of children and young persons in mediation requires consideration in the context of the more complex and difficult theoretical questions about children's rights that complicate the issue, such as those posed, for example, by Emery (2003), Guggenheim (2007), King (2007) and Ferguson (2013).¹⁴ These questions include, first, why disagreement between parents should act as a trigger for asserting children's rights and why children's views are accorded greater significance in relation to decisions taken at the time of separation than in relation to equally difficult decisions taken by parents in intact families? These decisions, often profoundly affecting their lives, such as moving to another part of the country, are imposed on children, not least the decision to separate and divorce itself, one which "society sanctions through its non-intervention" (Maidment 1984: 273; King 2007). Second, whether there is any evidence to assert that a theory of children's rights necessarily improves or increases the likelihood of improved outcomes for children, rather than through a "best interests" assessment, the welfare principle or an approach of duties owed to children (Ferguson 2013)? Third, whether there is any empirical evidence to suggest that giving children legal rights actually improves their lives (in terms of their protection, welfare or their autonomy)? Guggenheim (2007) argues that it is neither possible nor desirable to isolate children from the interests of their parents, or society as a whole, and that children's rights can serve as a screen for serving the interests of adults because these rights are relational, with the parents having the ultimate duty and legal rights in respect of minors.¹⁵

[E] CAPACITY AND CONSENT

Recent policy recommendations in respect of family mediation propose that there should be a statutory presumption (in order to ensure compliance) that "all children and young people aged 10 and above be offered the opportunity to have their voices heard directly in all processes

¹⁴ Emery highlights the view that as rights and responsibilities go hand-in-hand, to increase children's rights burdens them too with adult responsibilities, such as being put "in a position ... in direct opposition to their best interests: smack in the middle between their warring parents" (2003: 623).

¹⁵ Theoretical and empirical findings on the participation of children in a range of contexts highlight that having a voice does not necessarily lead either to inclusion or to any tangible outcome. What children say may not be the whole story of what they want and what they need. There may be a tension between having responsibility for decision-making and having a childhood (Percy-Smith 2005).

for resolving issues between parents including mediation and solicitor led processes” (Family Solutions Group 2020: 87).

This recommendation goes even further than the already controversial Recommendation 1 of the Voice of the Child Dispute Resolution Advisory Group (Ministry of Justice 2015) that this should be a non-legal presumption. This presumption privileges the right of the child to participate directly in a dispute resolution process (except where it would be unsafe) above all other considerations—whether the appropriateness of the circumstances or the process, the suitability of the dispute, or the parties, the views of the parents, or the professional discretion of the mediator. This recommendation takes no account of the multiparty consent requirements—of the mediator, each parent and the child—in place to ensure ethical and appropriate professional practice and currently embodied in all family mediation codes of practice and policies on children (see, for example, NFM 1994; College of Mediators 2002; FMC 2018). All these policies protect in principle and in practice that parental consent is essential for the involvement of their children in mediation.¹⁶

Several research studies agree that children would not benefit from being directly involved in mediation in certain circumstances, for example, where parents are so overwhelmed or are psychologically incapable of making use of the information given to them; where the conflict between them is high; where there are mental health problems that impede positive working relationships; where there are cognitive difficulties in children (of particular significance given the increasing numbers of children being diagnosed with neurodevelopmental disorders); where children may be manipulated by one parent; where mediators feel insufficiently equipped or skilled; and where parents are agreed on the needs of their children and are co-operating together (Kelly 2004; Birnbaum 2009; Kearney 2014; Rodríguez-Domínguez & Roustan 2015).

While a clear theme has emerged from research that children want to be involved in decision-making when their parents separate, whether or not parents go to court, it is also acknowledged that being involved in decision-making can put children in a difficult position (Emery 2003; Kelly & Emery 2003; Kearney 2014).¹⁷ Experience highlights the difficulties that can arise for children (and for mediators) when one or more parent

¹⁶ The FMC did not support Recommendations 19 and 20 of the Voice of the Child Dispute Resolution Advisory Group which proposed the dispensing of consent of both parents in relation to a *Gillick* competent child and of one parent in relation to a non-*Gillick* competent child (Ministry of Justice 2015).

¹⁷ Kearney quotes research that found a marked reluctance for DCC in Ireland other than in “suitable circumstances” (2014: 154).

fails to take on board their child's perspectives and the distress and damage that can be caused when the consultation of the child backfires and parental punitive action is taken against a child for having their say (despite advance preparation to prevent this).

A distinction can be drawn between children's desire to be included in certain aspects of the decision-making process and to feel their voices heard and taken into account—and the burden of children feeling that they had had the “final say” in decisions affecting them (Roe & Eyre 2021). A significant minority of children did not want to be involved in decision-making at all (ibid). As to the weight to be attached to the views of children, it is well recognized that views can change, especially on reaching adolescence. Research has shown that the most passionate of a child's convictions at the time of break-up can come to be later regretted (Wallerstein & Kelly 1980).

The phenomenon of the worryingly large numbers of children nowadays diagnosed with autism spectrum disorder (ASD) is a common experience in family mediation. Anecdotally, in the author's current mediation practice experience, in two out of every three families one or more child is described as having a neurodevelopmental disorder. This can create new areas of dispute between parents, for example, over the validity of the diagnosis itself and over the kinds of special arrangements that may be necessary to meet a child's particular needs. When it comes to consideration of the option of direct consultation of such a child, mediators, needing both expertise and a greater reliance on parental knowledge, exercise a heavy professional and ethical responsibility to assist parents in determining the appropriateness and capacity of their children to engage in and benefit from their direct participation in the process.

It is not surprising that the rate of divorce is higher (23.5% compared to 13.8%) for parents of children with ASD (Hartley & Ors 2010). Research identifies the several factors that account for the poorer wellbeing of parents (with their own mental health or other vulnerabilities) facing the uncertainty of (and disagreements over) the diagnosis of ASD, its long term prognosis, the stressful nature of ASD symptoms and behaviours plus the lack of public understanding and tolerance of such behaviours (ibid). These families experience extraordinary levels of stress, often exacerbated by social and economic deprivation and limited support.

Parents have been referred to as “gatekeepers” to children's access to a mediator (Barlow & Ewing 2020; Ewing 2021). This negative designation, implying undue parental control over and denial of a child's rightful opportunity to participate in the mediation process, may disrespect

the fact that parents, knowing their children better than anyone else, may well be acting in their child's best interest in deciding against their direct participation in mediation. Where there is disagreement between parents over consent, a new category of dispute is added to matters already in dispute. Furthermore, unlike counselling services, which are set up to give direct access to children, children cannot engage directly in mediation themselves without prior parental involvement. Parents are no more "gatekeepers" to their children's access to mediation than, inevitably, they are to almost every other major area of responsibility in their children's lives, whether health, education and so on.

[F] CONCLUSION

There are no simplistic prescriptions for better outcomes for children whose parents engage in family mediation. A professionally appropriate decision for the direct consultation of a child in the mediation process does require the careful consideration of all the circumstances of each family, the approval of the mediator, the consent of each parent, and the willingness of the child or young person to engage. Some disputing parents may be all too ready to absolve themselves from the difficulties of joint decision-making; the wishes of children, however strongly felt, cannot be conclusive; nor can children be reliably regarded as the best judges of their own long-term interests. Striking a proper balance between the rights and obligations under the UNCRC constitutes one of the many challenges for decision-making involving separating and divorcing families. Equally challenging is striking the "tricky balance" of affirming parental authority for decision-making with acknowledgment of the rights of the children to have their interests and perspectives heard and valued (Emery 2003: 626). If striking the right balance within families is not without difficulty, then what of the difficulties of striking the right balance between families and professional interveners?

While the question is not "if" but "how" and "when" children should have a voice in the decisions that affect them (directly or indirectly), there are still many unanswered questions that need to be addressed. These include, for example, what weight should be given to the voice of the child and who decides? Should there be an age when the views of children are determinative? What does the participation of the child really mean? Are children's views considered seriously or through the adult lens of what is in their best interest? How is the outcome to be evaluated—the settlement of the dispute or future family relationships? (Birnbaum 2009).

The answers to these questions lie in more robust theoretical and conceptual frameworks; co-ordinated research linking best practice approaches with an empirically based focus including the actual experiences of children;¹⁸ greater dialogue amongst practitioners, researchers, policy-makers and families and their children; and enhanced regulatory oversight of family mediation practice to include specialist training and practice protocols for mediators on such topics as special needs (neurodiversity in particular) and intercultural and gender awareness.¹⁹

Children need to be heard by parents throughout their lives, not only when they are in dispute. The needs of all children in situations of family breakdown deserve to be recognized and met, not only when their parents engage in dispute resolution processes. The onus for meeting those needs placed on mediation, now the officially endorsed and publicly funded primary family dispute resolution process, imposes inappropriate expectations. Moreover, mediation is based on certain ethical values that justify its use for disputants as well as for those who choose to become mediators. These values exemplify the standard of respect that lies at the heart of mediation as a dispute resolution intervention.²⁰ This foundational ethic of respect is essential for the mediator to have proper regard for the right of the parties, whatever the difficulties, to be the architects of their own agreements and for party competence and control, as distinguishing features of mediation, to have meaning.²¹ Where children are concerned, the fundamental issue at stake is whether separating/divorcing parents, like parents in intact families, can be trusted to make decisions about their own children.

¹⁸ With a growing private market of unregulated practitioners, research on family mediation based on the practice only of those who are fully accredited by the professional family mediation regulatory body, the FMC, should be considered authoritative.

¹⁹ Moscatti highlights the importance of recognizing the various forms of family life, the diversity of gender and sexual relationships, and the range of those with parental responsibility (Moscatti 2020; 2023).

²⁰ Albie M Davis is one of North America's most visible and articulate exponents of the importance of respect, as much as competence, in the practice of mediation (1984). It was through her efforts that the work of the early 20th-century scholar Mary Parker Follett became recognized as the "mother" of the ADR movement.

²¹ The Code of Ethics and Practice of the Mediators' Institute of Ireland (1 May 2021), under Fundamental Principles, S 97, 'Respect', states: "An underlying and fundamental principle of the Mediation Process is respect between the Mediator and the Parties and of the process. If this respect is missing in the process and the Mediator believes that the lack of the respect is or is likely to affect the process, the Mediator may terminate the mediation."

About the author

Marian Roberts, qualified as a social worker and barrister, has been in continuous practice as a family mediator since 1982, focusing on high-conflict disputes over children. She has been involved in the development of the national regulatory professional framework for family mediators and has taught on the LSE Alternative Dispute Resolution (ADR) Law Masters and on the SOAS ADR Law Masters. Her publications include *Access to Agreement: A Consumer Study of Mediation in Family Disputes with Gwynn Davis*; *Developing the Craft of Mediation: Reflections on Theory and Practice*; *A-Z of Mediation*; *Mediation in Family Disputes: Principles of Practice (4th edn)*; *Family Mediation: Contemporary Issues co-edited with Maria Federica Moscati*; and *Comparative Dispute Resolution co-edited with Maria Federica Moscati and Michael Palmer*.

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