

Family Mediation Research: Is There Empirical Support for the Field? (An Update)¹

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The divorce rate began its sharp increase in the early 1960's and more than doubled by the end of the 1970s. This was accompanied by dramatic changes in cultural traditions, societal expectations, and divorce and child custody laws which led to increased reliance on the courts to adjudicate separation and divorce disputes, including decisions related to children. By the late 1970s, more than 1 million children under age 18 were affected by divorce each year, an increase that overburdened the capacity of courts to handle custody and access matters. Although the divorce rate decreased slightly in the 1980s and 1990s, a trend that continues, the number of families with children affected by parental separation each year has remained relatively stable.

During the 1970s and 1980s, the adversarial legal system was the only process available to assist families in resolving their disputes in most jurisdictions in the United States. Oriented toward determining a winner and a loser, this legal process for resolving divorce and custody disputes focused on proving guilt and innocence as a determinant of outcomes in what was essentially a psychological process of dissolving a troubled marital relationship. It was, and remains, an expensive, emotionally draining, and protracted process. There was increasing concern voiced by judges, legal and mental health professionals, and social scientists about the apparent negative effects of prolonged litigation on families, parenting capacities and communication, and children's adjustment.

In response to the widespread concerns about the detrimental effects of the adversarial process, and to reduce the exclusive reliance on adversarial proceedings in divorce and custody disputes, several alternative educational, legal, and dispute resolution interventions were developed over the next two decades (Emery, 1994; Katz, 1994; Kelly, 1994, 2002). These ranged from the most widely available and least expensive (divorce education programs), to divorce and custody mediation in the private and public sector, and innovations such as post-mediation and pre-trial settlement conferences.

Divorce mediation was promoted as a viable alternative to the adversarial process for settling separation and divorce disputes, including custody and parenting. Despite opposition from the legal profession and domestic violence advocates for women, and

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the difficulty of establishing statutes and practice in 50 different states, divorce and custody mediation in both the public and private sector continued to expand. Divorce mediation was promoted as a less time consuming, more cost effective, humane and satisfying method of divorcing than was the traditional adversarial process or litigation. Advocates for mediation stated that mediated agreements would result in better compliance and reduced relitigation. The process was expected to enhance problem-solving skills among the disputants, and promote cooperation and communication regarding children. In addition, mediation was viewed as more empowering and more likely to result in better adjustment of adults and children to the divorce than was likely to occur in the traditional legal system.

As is generally the case with new and significantly different models or interventions, none of these assertions had been empirically tested or validated. It was clear to this author, as well as other psychologist mediators with research backgrounds, that research was important to undertake if this new field was to be taken seriously and accepted by other professional disciplines, courts and the legal system, and the public. As a result, research was initiated in both the public and private sector in the 1980's to assess these claims, as well as understand other aspects of the mediation process. This was particularly important given the strident challenges and opposition to divorce mediation which mounted quickly in the first 10-15 years. Lawyers were openly skeptical that the process was more fair and less costly. They advised clients not to participate. Women's advocates, who questioned women's ability to negotiate equitable arrangements with men, made policy pronouncements advising women against participating in mediation. Ironically, these claims were made in the absence of empirical studies assessing the fairness and impact of adversarial divorce processes on participants, including those with a history of domestic violence. Many newspaper and magazine articles described the emergence of mediation, citing "experts" on both sides promoting and condemning divorce and custody mediation. The potential users, the public, needed reliable information.

Early research focused on the basic questions of settlement rates, client satisfaction, time and cost efficiencies, comparison of outcomes, compliance, and, to a lesser extent, impacts on parental conflict, communication, cooperation, and psychological adjustment (see Beck and Sales, 2000; Emery, 1994; Kelly, 1996). Some research was longitudinal, following families over a number of years to completion. This first-generation family mediation research, conducted in the United States, Canada, England, and Australia, constituted the largest body of empirical research among any of the mediation sectors.

Variations in research populations, methodologies, measures, and dispute settings have been the norm, making it problematic to generalize about family mediation or rely on a single study. Many research publications failed to provide basic descriptors, such as the nature of the population served, number of sessions and hours of service, the model (if

any) mediators used, and whether pre-mediation screening was used. Legal rules and cultural contexts of the jurisdictions that might affect outcomes were rarely described. Despite these problems, convergence on many questions emerged over two decades, indicating that major findings regarding family mediation were robust and replicable across settings.

The original article (Kelly, 2004) summarized a selected group of family mediation studies published over twenty years: four custody mediation programs in the public sector, two studies of public and private sector comprehensive divorce mediation, and three court-connected programs for mediation of child protection or dependency disputes. Studies selected for inclusion had adequate sample sizes, objective measures, appropriate statistical analyses, and, when available, comparison groups and longitudinal designs. The primary structural elements described in the family mediation research variously included the timing of intervention, whether it was voluntary, who paid, the level of self-determination, and the training of neutrals. The criteria used to determine success most often were settlement rates, satisfaction of participants, efficiencies in time and cost, and, to a lesser extent, evidence of changes in relationships and durability of settlement.

When these studies were undertaken, most mediation in the custody and divorce family sector occurred between male and female parties without lawyers present. The issue of who is capable of mediating such disputes became an important one, and the nature of the disputes, domestic violence, and characteristics of the parties were described as available. All group or gender differences reported were statistically significant.

In this revised article, for purposes of brevity, the detailed descriptions of the methodology and findings of these nine research projects in the original article have been deleted but the references retained for the interested reader. The studies considered included the following:

Studies of custody mediation in the public sector:

- 1) The snapshot studies of the Administrative Offices of the Courts, Judicial Council of California. See www.courtinfo.ca.gov/programs/cfcc/resources/publications/articles
- 2) The Mediation of Parenting Time and Responsibilities project, Colorado Tenth Judicial District (Thoennes, 2002a);
- 3) The Charlottesville Custody Mediation Project (Emery, 1994);
- 4) The Access and Visitation Grant Mediation Programs (U.S. Department of Health and Human Services (2002).

Studies of comprehensive divorce mediation projects:

- 1) The California Divorce and Mediation Project (Kelly 1991, 1996);
- 2) Family Mediation Pilot Project – Ontario, Canada (Ellis, 1994).

Studies of Child Protection Mediation:

- 1) Child Protection Mediation in Five California Courts (Thoennes, 1997);
- 2) Child Protection Mediation in the Colorado Fourth Judicial District (Thoennes, 2000);
- 3) Hamilton County Permanent Custody Mediation Program (Thoennes, 2002).

Summary of Findings

Based on a variety of methodologies, measures, and samples, the nine studies described suggested strong support for the use of mediation in family disputes. In public and private sectors, in voluntary and mandatory services, and when provided both early and late in the natural course of these disputes, family mediation was consistently successful in resolving custody and access disputes, comprehensive divorce disputes, and child protection disputes. **Mediation has given evidence of its power to settle complex, highly emotional disputes and reach agreements that are generally durable.**

Settlement rates in custody, comprehensive divorce, and child protection mediations generally ranged between 50 and 90 percent, with the exception of the most difficult child protection cases involving parental termination. Contrary to some expectations, mediation worked with angry and high conflict clients and sometimes for those with serious psychological and family problems. What was necessary were well-trained and experienced mediators. Profound distrust and a lack of fairmindedness on the part of one or both partners more often interfered with reaching agreements than degree of anger (as is true in litigation processes as well).

Client satisfaction was surprisingly high in all studies and settings on a large number of process and outcome measures. As would be expected, satisfaction was higher when clients reached full agreement as opposed to partial or no agreement. Those who used custody mediation were substantially more satisfied than parents using other court processes. Repeatedly, clients indicated that they felt heard, respected, given a chance to say what was important, and not pressured to reach agreements. They reported that mediation helped them to work together as parents, and felt that their agreements would be good for their children. Mediation clients in the private sector were significantly more satisfied on almost all measures of process and outcome than were those using adversarial divorce processes. This was true even after controlling for any differences between mediation and adversarial divorce samples. Where gender differences in satisfaction were found, the legal context appeared to be an important factor, as were the issues in dispute.

It is important to note that although many practitioners believed otherwise, mediation was not found to improve psychological adjustment of parents or children in measurable ways in any of the studies assessing this issue. In the author's opinion, this was not surprising, given the brevity of the intervention, and other social science research indicating the difficulty in affecting adjustment status with brief interventions. However, there were other important benefits for all family members. When contrasted to parents in adversarial processes, parents using a more extended comprehensive divorce mediation process (e.g., 4 – 8 sessions) experienced a decrease in conflict during divorce. Further, in the first two years following divorce, they were more cooperative and supportive of each other as parents and communicated more regarding their children, after controlling for any pre-intervention group differences. One study reported that twelve years following divorce, fathers who mediated custody disputes remained more involved with their children compared to fathers who litigated.

Cautions as well emerged from the research studies. Fifteen to twenty percent of parents of both sexes were dissatisfied with aspects of mediation process and outcomes. Although this represented **half** the rate of dissatisfaction of adversarial clients, it remains important to understand if this reflected a more rushed or coercive mediation process, untrained or inept mediators, or parents who were angry and dissatisfied with any divorce process and outcome that did not produce what they wanted. With the continuing trend to limit court-based custody mediations to one session, more difficult cases with multiple serious issues will not be given sufficient opportunity to settle, will have more settlements imposed, and settlement rates in the public sector may decline. It is likely that client satisfaction will decrease as well.

Future Directions in Family Mediation Research

This initial body of family mediation research has been elucidating and promising, and has generated far more understanding than the scant and mostly superficial assessments of various adversarial divorce processes, arbitration, or collaborative law. **Unfortunately, to date, this research has not led to more complex second-generation research, nor efforts to replicate these findings with other populations.** *This appears to be* in part due to a paucity of research funding for mediation, the complexity of what is required, but most troubling, an apparent diminishing interest in research questions in the field. It may also be related to the author's observation that the field and practice of divorce mediation has become more lawyer dominated, in contrast to an earlier interdisciplinary balance between lawyers and mental health professionals. Without training in research methodology, lawyers are less likely to initiate mediation research, and without training and mediation practice, psychologists with a research background are less likely to be interested in the mediation field.

Among the issues that need investigation are:

-The effectiveness and relative merits of the differing models used in family mediation, including facilitative, problem-solving, transformative, and evaluative

models of mediation (for descriptions, see Folberg, Milne, and Salem, 2004). No empirical research exists that explores and compares the efficacy of these different models, the purity of their processes and practices, for whom and what type of disputes they are most effective, and their respective outcomes. This is surprising given the ongoing and somewhat contentious debate regarding these models.

-The comparative effectiveness of varying mediation techniques and applications.

What is the relative effectiveness of using conjoint sessions versus separate sessions, or some combination of these. For what type of clients is one or the other more effective, more empowering, more or less expensive? How does this impact longer-term communication between parents? What is the most effective role of consulting lawyers for the parties in any model? What conflict management techniques are effective with high conflict couples? How does a high degree of structure in the mediation process affect conflict and communication between the parties?

-The mediation models and services necessary and most effective for participants when there is a history and/or allegations of domestic violence.

A sizable number of both women and men reporting some domestic violence in their relationship participate in, and sometimes prefer, mediation to adversarial alternatives (Ellis and Stuckless, 1996; Newmark, Harrell, and Salem, 1995). Since many states passed legislation prohibiting custody mediation if domestic violence had occurred or is alleged, further studies of this important issue have been discouraged. These statutes and policies were based on the belief that domestic violence was primarily that of males battering women. Since that time, considerable research has differentiated between male battering and other more common, less severe, and non-escalating patterns of violence in intimate relationships, including situational couple violence, female violence, and separation-engendered violence, each with its distinctive features and histories (see Johnson and Ferraro, 2000; Johnston & Campbell, 1993; Kelly & Johnson, 2008; Statistics Canada, 2001) Among these partners are many who are not afraid of each other, cease their violence at separation, and are capable of mediating their interests.

The exception has been research focused on specialized strategies and mediation models developed for high-conflict and violent parents who continue to chronically litigate child issues after the divorce (Johnston, 1994; Smyth and Moloney, 2003; Pruett and Johnston, 2004). These more intensive therapeutic mediation models, typically longer in length, integrated individual and group mediation sessions with counseling and have been demonstrated to be effective with this difficult population. Parenting Coordination was developed to reduce frequent re-litigation and high conflict between parents post-decree. This hybrid model combines mediation and arbitration and is typically practiced within the framework of a stipulation and court order (Kelly, 2002, 2014). Initial research has demonstrated effectiveness along a number of dimensions in several settings (Carter & Lally, 2014).

Research focusing on mediation process issues remains quite limited, primarily because such research is complex, expensive, and time-consuming (Kelly, 1996, 2004). The practice of family mediation would be advanced considerably if research analyses focused on mediator behaviors and interventions, participant characteristics and behaviors, and the relationship of these to outcomes. Understanding the interaction of emotions and personality attributes, including severe personality disorders, that individuals bring to the family mediation setting, and the styles and behaviors of mediators that diminish or enhance the likelihood of reaching agreements, is important to understand. When is the strategic use of mediator techniques such as active conflict and communication management and the structuring of agendas and behaviors effective, and when an impediment?

Despite the growth and maturation of the family mediation field over 35 years, there are still many questions to be posed by both practitioners and researchers working in collaboration. The accumulation of reliable and valid information would help the field define and refine practices, improve effectiveness, and promote excellence in the field.

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BIO

Joan B. Kelly, Ph.D. is a clinical child psychologist. For 45 years, her research, practice, teaching and publications have focused on research in children's adjustment to divorce, custody and access issues, divorce and custody mediation, applications of child development research to custody and parenting plans, and Parenting Coordination. She has published more than 130 articles and chapters, including a classic book, *Surviving the Breakup: How Children and Parents Cope with Divorce* (Basic Books, 1980).

Dr. Kelly was Founder and Executive Director of the Northern California Mediation Center for 20 years, and a mediator, forensic expert, custody evaluator, therapist, consultant, and Parenting Coordinator in high conflict custody cases. She was a founding Board member and President of the Board of Directors of the Academy of Family Mediators, and received the Distinguished Mediator Award from AFM, the Distinguished Research Award and the Meyer Elkin Award from the Association of Family and Conciliation Courts. She is a Fellow of the American Psychological Association. She recently retired.