

Family Mediation in England and Wales: Children's Voice

Amel KETANI¹

Abstract: Going through a divorce is always a difficult period for both ex-partners. It is said that family mediation exists to help both ex-partners reach a solution that they are both happy with. But what about the couple's children? Should children be included in family mediation? As discussed in this article, children appreciate being informed and having their views and opinions heard. When parents are trying to make agreements through mediation, it can also be very positive for their children to see their parents' mediator. This article aims to consider how best to include children's needs and interests in family mediation. The advantages and disadvantages of child-inclusive mediation will also be considered along with the role of the mediator in this context. This article argues that family mediators need to be aware of the children's wishes and concerns and that there are different ways family mediators can approach and implement this.

Keywords: Family mediation, child interest, role of the mediator, parents' needs, confidentiality, advantages and disadvantages of child-inclusive mediation.

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¹ BARRISTER, Mediator and Senior Law Lecturer at BPP University, London. This article was written in memory of El Hadi Darhmous.

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I. INTRODUCTION

Child-inclusive practice is best defined as giving children and young people the opportunity to have a conversation (verbal, written, through play or storytelling) with the professionals who are assisting their parents to make arrangements for the children's future. It enables consenting children and young people to share their experiences of parental/family separation and express their concerns and views, and for these to be sensitively considered with their parents so that their developmental needs can be better understood and taken into account within the dispute resolution process. Expert opinion and discussions with members of the Family Justice Young People's Board (FJYPB) left no doubt that concerns about parental pressure or that children might be too distressed to talk to a dispute resolution practitioner are not sufficient to prevent children exercising their right to be heard. Indeed, if parents put pressure on children who wish to have their voices heard they are highly likely to be putting pressure on them anyway. It is important to first consider expert opinions and findings in studies covering this area before analysing the potential solutions to the problems with child inclusive mediation. In this article, the following questions will be discussed: what are the expert opinions and findings in child-inclusive mediation, what should the role be of a family mediator when trying to include children's needs and interests in family mediation, what are the potential benefits and disadvantages of including children in mediation and how should the mediator deal with the child's confidentiality in family mediation?

II. EXPERT OPINIONS AND FINDINGS IN CHILD-INCLUSIVE MEDIATION

Walker¹ argued that while pressure and other high conflict situations resulting from a divorce can be particularly stressful for children, giving them information and support and hearing their concerns and worries in a skilled, sensitive way can be reassuring for children. Rather than escalating distress, enabling children to have a conversation with those involved in their case can alleviate it and

¹ WALKER, J., 'Child-inclusive dispute resolution: time for change' [2015] Fam Law 695.

help children to cope with the stresses that are apparent at home.² Indeed, the Council of Europe's Recommendations 2003³ stated that where children are concerned, the child should also be heard in the mediation process because he or she is recognised as having rights. Children should be allowed their say if a solution is to be found that is genuinely in their best interests.

Nonetheless a number of studies⁴ have shown that children and young people are rarely included in family mediation. The Mapping Paths to Family Justice Study⁵ found that child-inclusive mediation was used infrequently and had rarely taken place in their sample of mediation users. Parents and mediators may have similar misgivings, fearing pressure being put on the child and the risk of repercussions for the child. The question to be considered is: what should the role of mediators be to resolve this matter?

It can be argued that mediators should explore these opportunities with parents first of all and encourage them to consider the potential benefits and any concerns they may have in relation to their child being able to meet with a specially trained professional, alongside or within the mediation process, whether individually and/or with their siblings and possibly also with the family together. Communication needs to be two-way because children need explanations and reassurance, especially when communication between a child and a parent has broken down.

Since the views and wishes that a child expresses - or be unable to express - depend to a large extent on the child's perceptions, these perceptions may change as the child gains more understanding. A child's rejection of a parent may be a reaction to feeling rejected by that parent. A child needs to understand the reasons for a parent not being in touch for some time. In some cases, the child needs an apology from a parent, as well as an explanation of the reasons, before being willing to resume the relationship or, in some cases, to build a relationship from scratch. It can be argued that consulting children should mean having conversations with them, not plying them with questions and extracting answers for the benefit of adults who 'need to know'. The main value of such conversations is to unblock channels of communication so that children and parents can listen to each other and talk together with more understanding⁶.

² Ibid.

³ Council of Europe Recommendation Family mediation and gender equality, No 1639, 2003, para 6.

⁴ HAYES 'Family Mediators in the UK' [2002] Fam Law 760.

⁵ BARLOW et al. *Mapping Paths to Family Justice – Briefing Paper and Report on Key Findings*, Universities of Exeter and Kent, June 2014.

⁶ SAPOSNEK, 'Strategies in Child Custody Mediation: A Family Systems Approach', (December 1983) 2 *Mediation Quarterly* 29-30.

The Advisory Group⁷ took this direction and recommended the establishment of a non-legal presumption that children and young people aged ten and over should always be offered the chance to be involved directly in dispute resolution processes, thereby establishing child-inclusive practice as the norm.⁸ As a consequence, it can be argued that whenever a mediator undertakes mediation relating to children's issues, they will need to have arrangements in place at the start of the process to provide children and young people with the opportunity to be heard. This will apply to other dispute resolution practitioners. However many mediators questioned why the presumption should be applied only to children aged ten and over? The Minister of State for Justice and Civil Liberties in 2014, Simon Hughes MP, made it clear that since ten is the age of criminal responsibility in England and Wales, it can also be regarded as the age when a child can decide whether or not they want to be involved in dispute resolution processes. This does not imply that younger children who wish to be heard cannot be included, but simply that the presumption would not automatically apply to them.

It is plausible to think that a non-legal presumption, which the above Minister has endorsed, would change the way in which the inclusion of children and young people is facilitated and require dispute resolution practitioners to regard the involvement of children not as an exception but as the norm. Furthermore it not necessarily convincing why the age limit for mediation, mentioned by the Advisory Group, should correspond to the minimum age of criminal responsibility. Instead what is important to note is that children and young people who have experienced their parents' separation are very clear that there should be very few exceptions to hearing children's voices. Consequently, it can be argued that if they wish to participate (regardless of their age), that wish should be respected. Serious mental health issues and severe learning difficulties should be the main reasons for assessing that a child lacks the understanding and competence to have their voice heard. Therefore, it is arguable that the onus should be on the practitioners to support children who wish to participate and to support their parents to be able to benefit from children's participation in dispute resolution processes. In other words, it is essential that mediators have the best possible skills and competencies to undertake child-inclusive practice and make the welfare of children their priority⁹.

⁷ The Advisory Group works together to build awareness about benefits the mediation process brings to those who want a solution of their own choosing, not one dictated by the court system, within their own time frame, not the court timeframe and at a reasonable cost. www.gov.uk/government/uploads/system/uploads/attachment_data/file/417152/government-response-to-voice-of-the-child-advisory-group.pdf

⁸ WALKER, J., 'Child-inclusive dispute resolution: time for change' [2015] *Fam Law* 695.

⁹ MORROW, 'Children's Perspectives on Families' *Rowntree Research Findings*, (1998) 798.

III. FAMILY MEDIATOR'S ROLE IN CHILD-INCLUSIVE MEDIATION

At the moment of writing, both parents need to give their consent to their child's direct involvement and if one parent declines, the mediator cannot take it further. Parents may have concerns about the emotional impact on their children, while mediators may fear that seeing children directly may undermine and disempower parents, instead of empowering them. It also needs to be borne in mind that a large proportion of disputes between parents over arrangements for their children concern very young children who are too young to be consulted directly. 20% of the children in private law cases in a study conducted for the Ministry of Justice¹⁰ were under two years old and a further 18% were under four years old. Three quarters of the children (76%) in contested family proceedings were under ten years old¹¹. The emotional maturity of a child is not congruent with their chronological age and when children are not only of an age but mature enough and willing to be involved directly, calls to Childline¹² indicate that they are perfectly able to enter into discussions about the future, so long as they are not being asked to choose in an atmosphere of acute conflict where they feel caught in the middle ... These calls are a very persuasive argument in favour of a family mediation service which includes children ... an outside person to help everybody talk ... could be of considerable help to children, as well as to parents, in managing the feelings that threaten to overwhelm them¹³.

Moreover studies of child-inclusive mediation in Australia, Canada and New Zealand¹⁴ suggest significant benefits for children and their parents, provided there is careful planning with both parents and agreement as to the objectives, conditions and manner of including the child. Family mediators need to make sure that pre-conditions for involving the child can be met and parents need to understand and agree the conditions, timing and nature of any direct child involvement.¹⁵ Pre-requisites include the suitability of child-inclusive mediation in the circumstances, clarity about the role of the family mediator or other professional who will meet with the child, the principles and limits of confidentiality (a) for parents and (b) for the child, before, during and following a meeting with the child, and the need to seek the child's informed consent. Family mediators should follow guidelines covering these pre-requisites and parents must give written agreement to the terms of the child's

¹⁰ CASSIDY AND DAVEY, *Ministry of Justice Research Summary* 5/11 (2011) 8.

¹¹ *Ibid*

¹² Childline is a free 24-hour counselling service for children and young people up to their 19th birthday in the United Kingdom.

¹³ CHILDLINE, *Unhappy Parents, Unhappy children* (1998) 25.

¹⁴ Mediation Task Force Report, June 2014, Appendix 1.

¹⁵ PARKINSON, 'Child-Inclusive Family Mediation' [2006] *Fam Law* 483-488.

involvement. Mediation in Divorce (MID) provides a range of services for adults and children - child-centred and child-inclusive mediation, adult and child counselling and the Family Bridges Project.¹⁶ MID routinely invites young people to come in for a conversation about family changes and arrangements.

Following the analysis above, it can be argued that the family mediator's role can be a catalyst in facilitating better child-parent communication. It should not be in any way directive or controlling. Sensitive interventions by mediators can help parents to work out practical arrangements and consider how to help their children adjust, while also enabling children and young people to feel that their views matter too and that their parents are taking them into account. Family mediators may draw on their understanding of attachment and systems theory, family interactions and communications. All these are relevant to mediating with parents, children and young people and other family members. Mediators who take part in helpful and supportive conversations with a child or young person can reassure the child that their feelings about what is happening in their family are normal and understandable, without the child feeling interrogated or put under pressure¹⁷.

Due to the above complexities surrounding child-inclusive mediation, it is essential to discuss the benefits and possible disadvantages of including children in family mediation from the child's point of view.

IV. POSSIBLE DISADVANTAGES OF INCLUDING CHILDREN IN MEDIATION

Possible disadvantages of including children in mediation were highlighted by Cantwell¹⁸ in the following way:

- Involving children increases their distress and confusion
- Children will be upset if they become more aware of parental conflict.
- Children do not share legal responsibility with their parents. Their parents hold responsibility for them and children should not be drawn into parental disputes.
- Children should not be used as judges or arbitrators in parental negotiations.
- Power imbalances between parents and children lie outside the boundaries of mediation.
- Empowering children risks 'disempowering' one or both parents.

¹⁶ www.midmediation.org.uk.

¹⁷ WALKER, J., 'Child-inclusive dispute resolution: time for change' [2015] Fam Law 695.

¹⁸ CANTWELL, 'The Emotional Safeguarding of Children in Private Law' [2010] Fam Law 84-90.

- Parents' decision-making authority is undermined if the child or the mediator is seen as the expert.
- The mediator's role may be confused with the role of counsellor or child advocate.
- Involving children may create expectations that things will be made better for them.
- Children may feel under pressure to express their views and feelings.
- Children may fear being asked to make a choice.
- Children may not be reliable judges of their long-term interests.
- The mediator may become triangulated between parents and child.
- The mediator could be left holding secrets or confidences from a child that the child does not want shared with parents: this would be an untenable position for the mediator.
- The child's conflicts of loyalty may be heightened.
- Parents may be unable to manage their distress in front of the children.
- Parents may brief the child on what to say and put pressure on the child.
- Parents who are unable to co-operate do not necessarily gain this ability through hearing what their child says: they may refuse to take the child's views and wishes on board.
- Feedback to parents afterwards may result in them being angry with the child or interrogating the child.
- Young children who see their parents talking in a friendly way may think their parents are going to get back together again - feeding hopes of reconciliation.

V. POTENTIAL BENEFITS OF INCLUDING CHILDREN IN MEDIATION

Possible advantages of including children in mediation were highlighted by Parkinson¹⁹ as follows:

- Research comparing child-focused mediation with child-inclusive mediation indicates that child-inclusive mediation offers significant additional benefits in terms of positive relationships and agreements being maintained, with positive feedback from children.²⁰
- Children need explanations and reassurance that their parents may have been unable to give them.
- Children adjust more easily if there is better communication and they understand their parents' decisions more clearly.

¹⁹ PARKINSON, L., *Family Mediation* (3rd edn Family Law, 2014).

²⁰ Mediation Task Force Report, June 2014, Appendix 1.

- Involving children shows them that their wishes, views and feelings matter and that they are being treated with respect.
- Listening to children is a way of showing care.
- Involving children in mediation helps both parents to listen to their children.
- Parents may choose to explain their decisions and arrangements to their children in family meeting (some parents need the mediator's support to do this).
- Dispelling misunderstandings: for example that a child does not want to see a parent when the child actually wants to do so.
- Enabling children to ask questions, comment and contribute their ideas.
- Enabling children to express a worry or concern, such as where the family's pets will live.
- Easing communication and reducing tensions in parent-child relationships.
- Giving children an opportunity to see the mediator alone and talk about their feelings and concerns, without being anxious about how the parents will hear them.

In summary, it seems to be that positive reasons for including children need to be weighed against potential risks and problems. It can be argued on one hand that allowing the voice of the child into the mediation process acknowledges the worth of the child and alleviates distress. For instance, child-inclusive mediation can assist children work out the messages they may want to give to their parents (or other people involved) and to feel able to give these messages. It can also enable a child to receive a message from a parent who cannot give it directly, for some reason and with the child's agreement, giving feedback to parents to help them understand the child's concerns and feelings, so that these can be taken into account in the parents' decisions. However on the other hand, it can be argued that post-divorce adjustment of children depends on the interaction of a number of variables, including the quality of the relationships, the quality of the parental care, the child's environment and the wider family dynamics. It would hardly be realistic to expect that the truncated intervention of mediation would make substantial and permanent changes in the lives of children, particularly where the children do not participate. Nonetheless this should not undermine the potential of family mediation as a tool for parents who choose to co-parent after divorce, or the beneficial effects of parental co-operation for the children.

VI. CONFIDENTIALITY AND THE APPROACH TO THE CHILD

It is very important for mediators and parents to consider the boundaries of the mediator's discussions with a child or young person. Confidentiality

cannot be absolute and is conditional on a number of factors and considerations. Safeguarding procedures must be followed where a child is said or believed to be at risk of harm. The question to be considered is the mediator's duty in relation to confidentiality in this context.

It can be argued that the mediator's duties in these circumstances must be made clear in advance to all concerned, including the child and must be explained in an age appropriate way. Parents must give written consent and it also needs to be clear whether, if the child requests it, a message or other feedback may be given to parents following the meeting with the child.

Parkinson²¹ explained that as a child may not want any message to be given, the parents need to accept that they might not receive any feedback. This does not mean that meeting with the child was a waste of time. The child may find it helpful to talk with someone who has no stake in the conflict and may feel more confident, after talking things through, to say to their parents what they need to say, without using the mediator as intermediary. Younger children may wish to send a message which they ask the counsellor or mediator to give to their parents. For all these reasons and circumstances, Parkinson explains that it is therefore critical that the family mediator and parents are able to understand, accept and agree to the terms for any direct consultation/discussions with their child or children and explore how they will each and both manage the preparation for and any outcome from the mediator's discussion with the child or children²².

Moreover, the confidentiality in law of a child's views and wishes expressed in mediation, in terms of being non-disclosable to the court, is not yet sufficiently clear. This means that other factors in relation to the confidentiality of discussions between mediator and child are important to bear in mind. For example, if there are subsequent proceedings, parents - or the judge - may believe that it is important to know what the child has said in any private discussion with a mediator and may argue or consider that there is an over-riding obligation in law that would allow for any confidentiality of those discussions to be lifted. In the case of *Re J (A Child: Disclosure)*²³, the child's parents were divorced and the child's father had been granted staying contact. The child's mother was subsequently informed by the local authority that a credible complaint of serious sexual abuse had been made against the father, and that she should not allow unsupervised contact. The local authority refused to disclose details of the allegation or the person who had made it, but the mother and the guardian were later inadvertently informed of the complainant's identity. The complainant was an adult who alleged that the

²¹ PARKINSON, L., *Family Mediation* (3rd edn Family Law, 2014).

²² PARKINSON, L., *Family Mediation* (3rd edn Family Law, 2014).

²³ [2012] EWCA Civ 1204.

abuse had taken place over a number of years when she was a child. The mother applied for a variation of the contact order and full disclosure of the allegations. A medical report stated that it would be detrimental to the complainant's physical and mental health if she was required to give evidence, or if her identity or details of her complaint were disclosed to the parties. It further stated that the complainant's medical condition had at times been life-threatening, and stress would exacerbate it. The Court of Appeal was hence faced with a hard choice between respecting a child's confidentiality on the one hand, or providing justice to a parent, on the other hand. The Court observed that the stakes were high on both sides of the equation and came to the conclusion that the balance of rights came down in favour of disclosure of information concerning the child²⁴.

Nevertheless the problem also lies when mediators are likely to worry that, despite the privilege covering the mediation process and the confidentiality afforded to discussions within mediation, in exceptional circumstances the mediator could be called on to testify in court.²⁵ Experience drawn from the limited practice of child-inclusive mediation in England and Wales has not found that seeing a child alone has left a mediator burdened with confidences from children that they do not want anyone else to know. Children often want to give their messages to their parents themselves, at home or with the mediator's help. These are likely to be positive messages about how the child has been trying to help the parents, or about the kind of help the child would like from a parent. If a child asks the mediator to explain something to their parents on their child's behalf, the child's message should be written down and checked back with the child. If the message is negative and would be hurtful to a parent, the child may be helped to think of a less hurtful way of expressing it.

It can be argued that mediators can help children explain their worries to their parents and this can free children from some of their anxieties. Mediators also need to be aware that children may not be able to put their fears into words - and have the humility to recognise that they cannot alleviate a child's pain. There are family situations in which a great deal of loss has already occurred and where a child feels deeply estranged from one parent. There are also situations in which a child needs a parent to apologise for saying or doing something that has hurt the child. If the parent concerned is able to say to the child that he/she is genuinely sorry, considerable healing may take place.

Moreover, children are usually anxious about talking to an outsider and may fear saying something that will upset one or both parents. They are usually

²⁴ WALKER, J., 'Child-inclusive dispute resolution: time for change' [2015] Fam Law 695.

²⁵ Ramsay LJ, *Farm Assist v Defra* [2009] EWHC 1102 (TCC).

very protective of both parents, or they may side with one parent against the other parent. They may also fear adding to their parents' worries. Children may worry about things that their parents can deal with, once the parents understand what these worries are²⁶. For instance in the case of *Assist v Defra*²⁷ the judge held that the mediator should give evidence at trial (irrespective of the mediator's concerns over his ability to recall events). The judge stated that mediation was without prejudice and covered by privilege. However, in his view, while privilege could not be impliedly waived simply because of issues arising in the proceedings, parties themselves could waive the privilege. Parties could expressly waive privilege or impliedly waive privilege by making certain references based on evidence such as witness statements. The judge also made clear that mediation was confidential between the parties and the mediator, and this might be express or implied. Ordinarily it would require the permission of the parties and the mediator to waive confidentiality, but on the facts the court would order disclosure in the interests of justice.

VII. CONCLUSION

In conclusion it can be said that when family mediators are positive about the benefits of including children, they are more likely to be able to reassure anxious parents. However, one can be struck by the number of trained and accredited family mediators who indicated that they do not consider themselves ready to embrace true child-inclusive practice and by the many mediators who commented that the existing training is simply not sufficient. It hence seems to be that a competency-based approach should underpin future training for child-inclusive mediation, and this training should reflect the change in culture (with respect to the mediator's former approach and training), skills and approach required. The adoption of a whole family approach in dispute resolution means that practitioners have to acquire additional knowledge and skills and demonstrate additional competencies.

Finally it is plausible to think that involving children in mediation can help them to feel clearer and more confident about what they want to say to their parents, as well as what they need to hear from their parents. However, it appears to be that there are occasions when the child wants help to explain something to their parents. Even a limited agreement on a small step may be valuable in helping parents and children to talk and listen to each other. It is equally important to give explanations that are appropriate to their age and to

²⁶ [2009] EWHC 1102 (TCC).

²⁷ Ibid

convey reassuring messages, especially when communication between a child and a parent has broken down. The feelings and views children may express -or be unable to express- depend on the child's perceptions. These perceptions are liable to change as they gain a better understanding of their parents' positions and feelings. It can be argued that the main benefit of involving children directly is to re-open channels of communication between the child and both parents, so that they can listen and hear each other with more empathy and understanding.

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