

**MEDIATING CHILD PROTECTION DISPUTES - A CANADIAN  
PERSPECTIVE:  
ARE WE LEAVING ROOM FOR THE CHILD AT THE TABLE?**

**PREPARED BY:**

**ARLENE H. HENRY, BCOMM, LLB, CMED  
LAWYER & MEDIATOR**

**ARLENE H. HENRY LAW CORPORATION  
VANCOUVER, BC, CANADA**

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## **MEDIATING CHILD PROTECTION DISPUTES - A CANADIAN PERSPECTIVE: ARE WE LEAVING ROOM FOR THE CHILD AT THE TABLE?**

In British Columbia, Child Protection Mediations are typically conducted between the parents from whom the children have been removed and the removing agency, being the provincial Ministry of Children and Family Development (“MCFD”).

Although the provincial legislation is guided in part by the principle that “the child’s views should be taken into account when decisions relating to a child are made”<sup>1</sup> and further contemplates that children themselves may participate in mediation depending on their age, desire and level of cognitive development, in practice this does not appear to be occurring as frequently as one might have expected.

Some of the actual and probable reasons for their absence at the table are explored in this paper. As well, the effect on the outcome of the mediation by their presence or absence, is considered.

### **BACKGROUND**

#### **What is the Legislative Framework?**

In British Columbia, the *Child, Family and Community Service Act*, R.S.B.C 1996, c.46 (“*CFCSA*” or the “*Act*”), brought into force in 1994, sets out most of the law relating to the protection of neglected and abused children in the province. Section 91 of the *Act* states that the Minister for Children and Families may designate one or more persons as “directors” to perform the duties and tasks associated with ensuring the safety and well-being of children and providing assistance to families in accordance with the guiding principles set out in the *Act*. Every social worker, supervisor or team leader is a designate of the director.<sup>2</sup>

In October 1997, the Child and Family Development Division of MCFD and the Ministry of Attorney General, Dispute Resolution Office (“DRO”)<sup>3</sup> together established the Child Protection Mediation Program (the “Program”).<sup>4</sup>

The Program is founded upon certain provisions contained in the provincial *Act*, specifically:

- section 22, which provides legislative authority to use mediation to resolve disputes;
- section 23, which allows judges to adjourn cases for up to three months so that mediation can proceed; and
- section 24, which requires mediation to be a confidential process (with some exceptions).

#### **What Do We Mean By Mediation?**

Mediation, or assisted negotiation, is a process for working out disagreements with the assistance of a trained, impartial and neutral third party referred to, in British Columbia and generally throughout North America, as a mediator.

There are many styles of mediation; however, in child protection matters in British Columbia, the style primarily used is called interest-based mediation.

Interest-based mediation is a process that considers disputes not in terms of legal rights, but rather in terms of people's underlying concerns, desires, needs, hopes and fears, which are referred to as interests.

Typically, people in dispute think in terms of their "position", focussing on what they want or what they feel they are entitled to, rather than thinking about what is motivating them to hold such a position or what interests are behind their position.

The mediator encourages the parties to a dispute to focus on their common interests, and works with these people to create a mutually acceptable solution that resolves the points of dispute between them. "It is broadly acceded to in Canada that interest based negotiation will expand potential solution options beyond those suggested by the extreme positions the parties are otherwise inclined to take. Basing the negotiation in the interest of all at the table will produce a more detailed . . . solution than would a position based adversarial contest."<sup>5</sup>

In child protection matters, the negotiated resolution may include participation by the family in resources and/or services, return of the child under specific terms, permanent placement of the child with the Ministry, or any combination of these.

### **How Did We Come To Use Child Protection Mediation?**

One of the many initiatives of the DRO was to move disputes out of the court and provide ways to resolve them through more collaborative processes, such as mediation, rather than the more traditional adversarial processes.

Research showed that in many jurisdictions, both in the United States and to a limited extent in Canada, mediation in child protection matters was being considered and implemented with measurable success.<sup>6</sup>

A relatively small mediation pilot project (20 files) conducted in Victoria, BC in 1992, produced promising indicators. Several years after this initial pilot, a further, more expansive Mediation pilot project implemented by the DRO and MCFD, known as the Facilitated Planning Meeting Project ("FPMP"), was designed to reduce the time frame required to make effective decisions for children in need of protection and to reduce the number of cases which proceed to contested protection hearings.

The FPMP provided an opportunity to make mediation a more viable option for resolving child protection, building upon our early experience in BC and research and experience in other jurisdictions. The formal duration of the pilot project was from June, 2001 through August, 2002.

In June, 2002 an Interim Evaluation Report was presented which included qualitative feedback based on interviews with the various participant groups. The Final Evaluation Report on this pilot project was released in November, 2003, and the Project received the 2004 Premier's Award.<sup>7</sup>

### **What is the Objective of Child Protection Mediation?**

The intent of child protection mediation is to empower the participants to work together to develop or establish a plan of care for the child which is future-focussed.

What is not up for discussion at the mediation table is whether or not the initial removal was justified. The social worker is responsible for making that assessment and, if necessary, the court will make a final determination on that matter. Further, facts about the existence or non-existence of abuse or neglect cannot be mediated, although the consequent course of action to be taken by the parents and the Director, as a result of such alleged facts, can clearly be mediated.

MCFD policy on mediation states that neither the child, the child's parent(s) nor any other participant is required to:<sup>8</sup>

- agree with the reasons for the Director's belief that the child needs protection;
- make admissions about the circumstances of the child or the child's family; or
- accept blame or acknowledge faults for any acts, omissions or other conduct.

The benefits for mediation in a child protection context are similar to those identified in other civil litigation contexts:

- privacy;
- non-adversarial interaction;
- quick response time;
- possibility of more creative solutions;
- improved ongoing relationship between the parties (i.e., social worker, foster parent and the family);
- empowerment felt by the parties (particularly the parents);
- greater success and follow through with any agreement (because parties played a role in crafting the solution).

Mediation can be used at any time along the child protection continuum, wherever a social worker and another person are unable to resolve an issue relating to a child or to a plan of care for a child. Removal is not a pre-requisite to deciding to use mediation as a dispute resolution option. In fact, mediation is sometimes used as a preventative measure to create viable plans of care, the absence of which would likely result in a child being removed and more formal court processes being initiated.

### **What Mediation Model is Being Used?**

Early mediation models used in child protection met with limited success. They were not found to be very popular among MCFD staff and thus were seldom used and when used were not found to be very satisfactory.

Currently, the mediation model primarily used for child protection matters in BC is a variation of the model which was developed for and within the FPMP.

The pilot model was referred to as the "Facilitated Planning Meeting", the key elements of which were that:

- a senior, experienced social worker, referred to as the "court work supervisor", identified potential cases, received referrals, attended orientation sessions with the social worker, and attended the planning meeting
- an administrative staff person assigned a mediator to the case and scheduled meetings

- orientation sessions were held between the mediator and each party to determine issues, interests and procedural guidelines for the Planning Meeting
- a planning meeting was facilitated by the mediator, in which all parties meet to attempt to resolve key issues

The most important element introduced in the model was the “orientation session”, which is sometimes referred to in other mediation settings as “pre-mediation or interview sessions”. In an orientation session the mediator meets privately with each participant prior to the mediation session, preferably several days prior. The purpose of the orientation is to prepare the participants for the mediation and set the tone for moving into a collaborative process by building rapport, managing expectations, identifying needs or impediments to ensure full involvement by the participant, identifying and clarifying the parties’ issues and interests, identifying parties, explaining roles, discussing guidelines, and providing an overview of the process. For parents and children in a child protection matter, this orientation session is often quite cathartic. Many have expressed that this is the first time anyone has ever taken the time to listen to their “story”.

By the time the orientation is completed, potential solutions will often begin to emerge, upon which the participants will build during the actual mediation session moving towards resolution.

### **Who Participates in a Child Protection Mediation?**

Participation in child protection mediation is voluntary. Mediation can be initiated by any of a number of persons, such as the parent, the child, the social worker, legal counsel or the judge.

There are essentially two constants present at every child protection mediation table, namely, the person from whom the child has been removed, and the Director's delegate, being usually the social worker responsible for the file.

The *Act* itself contemplates that there are certain persons who are entitled to participate, while there may be an assortment of others that the parties would like present.

In deciding to include someone in the mediation process, the test in my practice is usually whether or not the additional person will provide added value to the process both during and after the session. It is also critical to identify any person who has the potential to dispute or undermine any agreement reached at the table, and consider diffusing this possibility by involving them in the process as well.

What is most important is that the primary stakeholders or persons required to be parties to a negotiated agreement be present, whether in person or by telephone, and that they have the requisite authority to agree to the terms of a negotiated agreement.

#### ***The Parent***

Although the person from whom the child has been removed is typically the parent or parents, it can also be such other adult who has either lawful or *de facto* custody of the child at the time of the removal.

### ***The Director***

The Director is always present, usually represented at the table by the social worker who has conduct of the file (which may or may not also be the worker who removed the child), and who is sometimes joined by his or her team leader or supervisor, or by the court work supervisor.

### ***Legal Counsel***

It is not a requirement that parties be legally represented in order to participate in mediation. In British Columbia, lower or non-independent income parents who have had their children removed usually qualify for government-funded legal representation in court and the tariff also includes attendance at mediation. Thus the reality is that in most all instances, the parent's legal counsel is in attendance, even if on the rare occasion it is by way of telephone.

The Director's legal counsel is sometimes also in attendance, although generally not as often as parent's counsel, and sometimes only by way of telephone. Overall practice seems to vary from region to region and office to office. It has been my experience, however, that their presence has typically been an asset and seldom ever a hindrance to the process.

The critical role of legal counsel at the table is twofold. One, they are able to ensure that whatever agreement is reached at the table is legally binding and not in conflict with the terms of any existing court orders or the legislation. Second, they are able to assist their client in understanding the strengths and weaknesses of their cases, in identifying the best and worst possible alternatives to a negotiated outcome through deliberate reality checking, and in creating possible solutions for the family which are innovative.

### ***Other Persons***

Other persons who might also attend a mediation would be those persons who have significant ties with the child or the family and who may potentially have a role in the proposed plan of care, such as the foster parent, other immediate or extended family members; or persons who could provide support or assistance, either at the table or after, with the programs and services, such as outreach workers, advocates (parental, child, mental health, etc.) If the child is an aboriginal child, then a designated representative of the applicable aboriginal community may also be in attendance.

### ***The Child***

Which brings us to the subject matter of this paper. Section 21(3) of the *Act* states specifically that if a child is 12 years of age or over, the Director must take the child's views into account before agreeing to a plan of care for the child.

As noted earlier, although the legislation is guided in part by the principle of inclusivism and further contemplates that children may participate in a mediation, the research shows that, in practice, this does not appear to be occurring as often as was likely envisioned by the drafters.

Interestingly, Table 6 of the *FPMP Final Evaluation Report* shows that of a total of 88 planning meetings held for 79 cases only 4 of the meetings (5%) had a child present.

### **The Child Protection Mediator Roster: Who are the Mediators?**

Section 9 of the *CFCSA* Regulation (B.C. Reg. 527/95) requires that a roster of mediators be established by the Director, and goes on to say that, "if a director and another person agree to mediation as a means of resolving an issue relating to a child or a plan of care, the director must choose from the roster a mediator acceptable to the other person".

In 1997, the DRO and the MCFD collaboratively established a roster of mediators. As of March 1, 2005, the Child Protection Mediator roster contains the names of 30 qualified mediators and identifies the regions throughout the Province which they readily serve. Where a particular region is without a mediator or is under serviced, others on the Roster make themselves available to travel to the region to provide the service.

It is critical that the mediators be seen as neutral and unbiased. Accordingly, the DRO contracts for these services from the private sector and is responsible for mediator oversight and management.

The current Roster is comprised of three "generations" of mediators: those who have been mediating in this practice area since the Program was first established in 1997; those who were brought on board in early 2001 as part of the FPMP Pilot; and the latest group who have been selected to the Roster to accommodate both the increased use of mediation in existing regions and the expansion of the service into regions beyond the Greater Vancouver area.

The Roster mediators come from varied backgrounds, and include lawyers and notaries, counsellors and therapists, consultants and educators.<sup>9</sup> The DRO is presently in the process of qualifying a new slate of mediators to still further expand the Roster to meet the continued increase in demand for these particular services. Seven persons have recently been selected to be added to the Roster as of April 1, 2005 for the Greater Vancouver area and another five persons as of May 1, 2005 for the interior of the province, together representing an increase in the roster of nearly 50%.

### **When Can Mediation Be Used?**

The timing of the Mediation within the protection process has a significant effect on whether a child will be present at the table. Mediation can take place at any point along the protection continuum, which itself can be measured in two ways. One way to measure is to consider the point along the child's own life line at which the child enters into the protection process. A second way to measure is to consider the actual point of entry into the process itself, a process which spans from the early preventative, interim, temporary, less intrusive stages, through to the long term, more intrusive, permanent planning stages.

Child's Life Line: With regard to a child's life line, a great number of the files mediated seem to involve children in their earlier years. Infants are brought into the system often directly from the maternity ward because their mothers have historical dealings with MCFD relating to their mental health, drug or alcohol issues and involvement with their previous children.

A second entry point along a child's life line occurs after they have entered the school system, when they become more visible in the community, thus increasing the possibility that teachers, teacher-aides, school counsellors, medical personnel, etc. will identify and report a concern to the Ministry.

In addition, it is noted from informal discussions with mediators, social workers and legal counsel, that of the files being mediated a majority tended to involve younger children, typically of primary, toddler and infant ages.

This tendency is consistent with what some would argue is an unspoken principle of the *Act*, namely the emphasis around children who cannot speak for themselves. Further, discussions with MCFD staff reveal that as children become older, the Ministry is less likely to remove them from their home environment. Instead, social workers seek to work with such children to educate and empower them in ways to address potential or actual protection matters. Clearly, that because they are able to speak for themselves, older children are viewed as having more options available to them to rectify untenable home situations, including initiating their own calls to the province-wide after hours hotline. As one mediator, himself a parent, recalls, young teens tend to “sofa surf” from the home of one friend to another or self-referral to community group homes or simply move to the streets when life at home is not to their liking.

The effect of these observations is that the children who are the subject of any related mediation described above are typically under the threshold age of 12 years and thus not seen at the mediation table.

Protection Process: With regard to the protection process itself, initial uptake in mediation use during the FPMP tended to see cases early in the court process. It is noted that the FPMP was specifically designed to refer cases to mediation early in the court process; cases eligible for early referral were intended to be contested matters between removal and the commencement of the substantive protection hearing.<sup>10</sup>

As the volume of files referred to mediation increased over the past 2 -3 years, the nature of the file changed as well. It seems social workers started to dig deeper into their file cabinet and chose to use mediation on files that had been long rambling within the process.

The result, of course, was that more and more mediators were assisting in mediating the terms of permanent custody orders instead of the interim and temporary orders more typically sought in the earlier stages of the protection process.

Since mediations which occur early in the protection process are usually focussed on working to maintain or reunite the family unit, the energy around the table tends to be more hopeful as a plan is created that usually involves the parent and the children attending and participating in various programs and receiving services designed to restore a strong foundation upon which the family can flourish. If a child is 12 years or older, the child’s participation is often critical in creating the plan since at that age children will vote or decide with their feet, if they are not in agreement with a plan to which they have had no input.

By contrast, mediations which occur at the permanent custody stage are typically more highly charged emotionally and are focussed on creating a more permanent plan for the child which will not be with the parent(s) and in many instances will also likely not include any ongoing contact with them.

In fact, these types of mediations present a greater challenge and often are not as conducive to having the child physically present at the table.

## **MEDIATORS' PERSPECTIVES**

In November, 2004, I prepared and circulated a written survey among my child protection mediator colleagues, a copy of which is attached as Appendix A. Of the then 34 mediators, 2 were on leave, 5 could not be reached and 27 mediators were contacted by email and provided with a series of questions relating to the incidence of children participating in their child protection mediations.

The response rate was most respectable, with responses received from 22 of the 27 mediators. Unless otherwise stated, all percentage references throughout this section will refer to a percentage of the 22 mediators who responded to the survey.

The experience level of the current roster mediators is varied, with survey results revealing as follows:

No. of Years of Experience	% of Mediators
1 - 3	41
4 - 6	27
7 - 10	23
11+	9

Although 59% [13/22] of the mediators indicated that they had at one time or another conducted a child protection mediation with a child at the table, the incidence rate was quite low. Sixty-one percent [8/13] of these same mediators indicated that only 1 to 3 of their many files have included children at the table, while for an additional 31% [4/13], only 4 to 7 of their files had children at the table. In my own experience, of the approximately 95 files which I have mediated since the late Spring of 2001, I have had fewer than a dozen files involving children 12 years of age and older. Of these, I have had only 4 files, or less than 5%, in which the children were actually present at the table.

Legislative provisions aside, the surveyed mediators identified some of the considerations which they rely on in deciding whether or not to include a child at the table, since it is generally accepted that it is the responsibility of the mediator to determine who should be at the table.

They cited many considerations including studying the individual child to ascertain the child's level of maturity, apparent vulnerability, ability to process and express their ideas and eagerness to participate.

Further still, many indicated that they consider whether :

- the child will have support from someone present;
- the dispute really includes the child or perhaps is more focussed on the relationship between the parent and the social worker;
- the child is in any jeopardy of being wedged into a loyalty conflict between caregivers;

- the child can be protected with sufficient precautions from emotional pressure, stress or possible recriminations which would outweigh any benefit to appearing at the table; and
- the child has a perspective that needs to be heard in the child's own voice, particularly when parents, social worker or both appear to not be hearing the child's expressed desires and needs. This is especially true in regards to older children within the subject group.

### **Effect of Child's Presence on the Mediation Outcome**

Notwithstanding that the mediators were clearly cautious in arriving at any decision to include a child, they were unanimous in believing that a child's participation at the mediation table affects the outcome of the mediation, positively and negatively.

From a positive perspective, their participation can clearly contribute to the durability of the negotiated plan of care. By being a part of the decision making process the child's commitment and likely adherence to the terms of the plan is greatly increased.

Participation can be very empowering for the child as the process often creates a secure environment for the child to feel safe to speak frankly both about what is going on emotionally, and about the child's preferred outcome. The parent may be more likely to "hear" what the child wants if the words come in the child's own voice rather than through that of the social worker, or other intermediary.

Conversely, the child's presence can also be very freeing for the parent, assisting in removing or neutralizing the feelings of guilt in having to make difficult decisions or admissions.

When present, the child may be more likely to understand what has been agreed to and better appreciate how the adults in the child's life have arrived at that particular agreement.

By contrast, the possible negative impact can potentially be quite damaging. The survey responses revealed a significant concern that it may be difficult to protect the child's emotional vulnerability, since the mediation discussions, by their nature, are generally quite adult-oriented, frank and revealing. In acknowledgment of this reality, several mediators felt it was not necessarily desirable to have children present and felt sufficiently skilled either to deliver the child's concerns and interests to the table themselves, or alternatively, to canvas other ways to bring the child's information forward.

### **At the Orientation**

Arguably, the first step to involving a child begins with the initial file review. If a file involves a child of 12 years or older, the child is entitled to be interviewed by the mediator.

Notwithstanding this observation, only 53% [10/18] of the mediators indicated that they have conducted orientations/interviews with all children over the age of 12 years. Those that did not, cited such factors as viewing the very decision as being optional, not being provided access to the child by the social worker, or the child deciding (perhaps prematurely) not to participate in the process. In

the words of one mediator, "I am increasingly doing more mediations involving children over the age of 12 years and yet increasingly, I am seeing less and less of these children".

Those mediators that have conducted orientations with children were asked whether they tended to encourage, dissuade or remain neutral on whether a child should participate at the table.

Twenty-four percent [4/17] stated that they felt their role was to encourage the child's attendance, viewing it matter of factly as the child's right to attend.

Forty-seven percent [8/17] believed that they remained neutral, by helping the child to understand what the experience would be like, so that the child could make their own decision to attend or not and by indicating to the child that there are a number of ways to make the child's views known by which the child could make their views known, including physical participation at the table. In fact, one such mediator noted that the "child should be able to participate in the absence of any compelling reason".

The remaining 29% [5/17] said that they tended to dissuade children, noting that the process at the table often can be quite toxic and always very adult-orientated and thus not necessarily in the best interest of the child to be present. Nevertheless these mediators felt fully responsible for ensuring that the child's concerns were accurately ported back to the table and that their voice was heard despite their absence. They expressed a desire to avoid placing the child in a loyalty conflict, particularly when the child did not want to be returned to the parent and felt uncomfortable making that statement in front of the parent. Finally, the nature of the file was also a factor for mediators, specifically where a file alleged abuse by the parent, the consensus was to dissuade in person participation by the child at the table.

### **Developmental Level**

The child's developmental level is another important component of the decision as to whether or not the child participates and to what extent. Sixty-three percent of the mediators [12/19] said that the child's cognitive ability would not necessarily affect their decision to conduct an orientation although their style of interviewing would likely vary. For as one mediator noted "most youth, despite their developmental level, can educate me about their lives or what is important to them".

It was further noted by another that "opinions of older children with developmental disabilities are important, but often are best provided by a person who understands their mode of communication and who have [sic] a trust relationship with the child".

Despite the legislative threshold, many mediators indicated that depending on the nature and level of the developmental delay, they may well decide not to include the child at the table, being more conscious of assessing the child's ability to understand, process and express needs and more mindful of inherent vulnerability to being involved in a largely adult arena.

If a child is severely delayed, the mediators rely on the social worker and others to provide information regarding the child's needs.

### **Separate Representation for the Child**

In files with children over 12 years, whether or not the child actually participated at the table, one third of 15 mediators indicated that aside from their social worker, these children never had separate representation at the table. Another 40% [6/15] of these mediators indicated that in their experience separate representation occurs seldom or only sometimes and only 27% [4/15] felt that separate representation occurred in most instances.

The nature of the separate representation has been quite varied from file to file and has come in the form of legal counsel, support workers, counsellors, child care workers, extended family members, interpreters, members of the aboriginal community and foster parents.

In my experience, of the approximately 95 mediations I have conducted, fewer than six of them have involved separate representation of any kind on behalf of the child. Similarly, Table 6 of the *FPMP Final Evaluation Report* shows that of a total of 88 mediations held for 79 cases only 2 of the sessions (2%) had a lawyer for a child present.

Most mediators felt that, where available, the child's advocate can speak effectively on the child's behalf at the table and, where there is no advocate, the mediators themselves felt capable and skilled to ensure the child's concerns were brought to the fore.

Whether or not the child is present, 86% [12/14] of mediators who responded felt that their own role at the table was affected when the participating child did not have separate representation and 50% of these same mediators felt that the effect on their role was significant. Some mediators have stated that the effect on their role has challenged their neutrality, as they have felt responsible both for ensuring that the child's interests identified in orientation were brought to the table, and for taking a greater role in protecting the child emotionally and otherwise throughout the process.

### **The Social Worker**

Notwithstanding that it is MCFD's clear view and intent that it is the social worker's responsibility to speak to the child's best interest and safety at the mediation table, the mediators were asked whether in their view this was in fact happening at the table. The survey showed that, 79% [15/19] of the mediators were of the view that it was mostly the case. Although several noted that the files were "way too variable to generalize", some of the observations offered included:

"Social workers tend to be more solution focussed and want to get the plan created and the protection pieces addressed. I am most often the one who speaks with the children"

"This is one of the challenges for the mediator, to shift/keep the focus on impact or relevance for the child, regardless of who is under discussion."

". . . they don't always find time to talk to all the significant people involved to get a full picture of the child's reality or the possibilities."

"Dynamics/personality between parent and [social worker] play a significant factor. Have participated in a mediation where [social worker] seem [sic] overly aligned with the parent. [Social worker]'s agenda didn't seem to align with any other participant at the table."

“ . . . the further along in the process that the mediation is taking place, then there tends to be a greater focus on the parent and peripherally on the child; it is not that the child is necessarily forgotten, but services for child tend to be all in place by this time and focus is on parent, trying to determine what whether [sic] it is possible for parent to do what is needed to have child returned.”

## **CONCLUSION**

The challenges faced in doing child protection work are varied and complex, and include: seeking a balance between ensuring the “safety and well-being of children” while still promoting the importance of the family unit, kinship ties and cultural identity; addressing the presence and impact of drug and/or alcohol addictions and/or mental health issues; addressing the impact for the family of their own educational and financial limitations; and dealing with the impact on both the protection process and the prospect of successful outcomes resulting from the limitation on and reduction of program resources.

Are we leaving room for the child at the table? I believe the answer to this question is yes. However, it is clear that, in British Columbia, despite the supportive legislative framework, children are not physically filling the seat left for them at the mediation table with any regularity.

There are clearly a number of factors contributing to this low incidence rate, some of which emerge from the survey results and include:

- timing within both the protection process and the child’s own life line
- lack of desire by the child to participate
- lack of desire by the social worker to have the child participate
- reluctance of the mediator to include the child
- developmental level of the child

Moreover, it seems to be recognized by all mediation participants, although to varying degrees, that it is imperative that a child’s interests and concerns be present at the table, in one fashion or another, to better ensure that the mediation discussions are focussed on the child in question.

In the survey responses, mediators repeatedly noted that there are a number of alternate ways to ensure that the child is very “present” at the table without actually having to physically attend.

We see that examples of the range of possible options available to achieve participation by the child, include:

- relying on the child’s advocate (legal or otherwise) to present the child’s concerns;
- having the mediator report out to the table information obtained during orientations sessions;
- placing a photo of the child at the table;
- having the child participate remotely, by telephone, from a separate room or by way of a written letter;
- as well as, of course, having the child attend in person.

Thus it seems clear that a child’s physical absence from the table is not necessarily detrimental either to the protection process or to the child, provided the child has a permanent place setting and the table setter is innovative in her table design.

## BIBLIOGRAPHY

- Alison MacPhail, Deputy Minister, Ministry of Children and Families. Plenary Address at The Continuing Legal Education Society of BC, *CFCSA Conference: New Directions* (March 14-15, 2005)
- Boshier, His Honour Judge Peter. (2001). *Can We Protect Children?* Australia: 3<sup>rd</sup> World Congress on Family Law and Children's Rights
- British Columbia Ministry of Attorney General. (June, 2002). *Bulletin: The Dispute Resolution Office*. BC, Canada: Ministry of Attorney General, Dispute Resolution Office
- British Columbia Ministry of Attorney General. (April, 2004). *Bulletin: Mediating in Child Protection Cases*. BC, Canada: Ministry of Attorney General, Dispute Resolution Office
- British Columbia Ministry of Attorney General. (#AG04002: 04/2004). *Child Protection Mediation: Questions & Answers*. BC, Canada: Ministry of Attorney General, Justice Service Branch
- British Columbia Ministry of Attorney General. (#AG04041: 04/2004). *Facilitated Planning Meeting*. BC, Canada: Ministry of Attorney General, Justice Service Branch
- British Columbia Ministry of Attorney General. (#AG04042: 04/2004). *Child Protection Mediation: Qualifications & the Selector Process*. BC, Canada: Ministry of Attorney General, Justice Service Branch
- British Columbia Ministry of Children and Family Development. (November, 2003). *Child Protection Mediation Manual*. BC, Canada: Ministry of Children and Family Development
- British Columbia Ministry of Children and Family Development. (nd). *What is Child Protection Mediation?* BC, Canada: Ministry of Children and Family Development
- Chicanot, J., & Sloan, G. (2003). *The Practice of Mediation: Exploring Attitude, Process and Skills*. Victoria, BC: ADR Education
- Joyce W. Bradley, Arlene H. Henry & Sharon B. Sutherland. Panel Address at The Continuing Legal Education Society of BC, *CFCSA Conference: New Directions* (March 14-15, 2005)
- Focus Consultants. (November, 2003). *Evaluation of the Surrey Court Project: Facilitated Planning Meeting – Final Report for Dispute Resolution Office, Ministry of Attorney General*. Victoria, Canada
- Sanchez, E.A., & Kibler-Sanchez, S. (2004). *Empowering Children in Mediation: An Intervention Model*. 42(3) Family Court Review 554-575
- van Pagée, R. (2004). *Family Group Conferencing as a First Choice: Empowerment versus Intervention*, in Part 2: Building a Global Alliance for Restorative Practices and Family Empowerment (pp. 131-144). Vancouver: The Fifth International Conference on Conferencing, Circles and other Restorative Practices (August 5-7, 2004)
- [www.ag.gov.bc.ca/dro/publications/bulletins/child\\_protection/](http://www.ag.gov.bc.ca/dro/publications/bulletins/child_protection/)
- [www.ag.gov.bc.ca/dro/publications/bulletins/office/](http://www.ag.gov.bc.ca/dro/publications/bulletins/office/)
- [www.mcf.gov.bc.ca/child\\_protection/](http://www.mcf.gov.bc.ca/child_protection/)

## ENDNOTES

1. *Child, Family and Community Service Act*, R.S.B.C 1996, c.46, s.2(d)
2. BC Ministry of Children and Families: *Child Protection Mediation Manual*, p.4
3. The Ministry of Attorney General opened the DRO in 1996. This step reflected the Ministry's commitment to a justice and conflict resolution environment that includes a wide range of dispute resolution options. [BC Bulletin: June 2002]
4. The DRO uses the term "dispute resolution" rather than "alternative dispute resolution" to emphasize that processes such as negotiation, mediation, settlement conference, mini-trial and arbitration, together with litigation, form a single continuum of dispute resolution options. Non-litigious processes are therefore seen as compliments to litigation, rather than alternatives. The primary focus of the DRO is on non-litigious dispute resolution processes. [BC Bulletin: June 2002]
5. Chicanot, Jamie and Gordon Sloan; p.15
6. BC Ministry of Children and Families: *Child Protection Mediation Manual*, p.4 provides footnote references to various to evaluation reports from Colorado and California
7. The Premier's Innovation & Excellence Awards program was launched in June, 2004. It is the public service's pinnacle employee recognition event. For the 2004 awards, a total of 77 nominations were submitted to a panel of independent adjudicators from the private sector, public sector and academia. The four category winners were chosen from among 15 finalists. The Surrey Court Project Implementation team from the ministries of Attorney General and Children and Family Development earned its award in the Partnership category which recognizes creative and effective joint or multi-party initiatives with other levels of government, the private and non-profit sectors or First Nations.  
<http://www.bcpublicservice.ca/premiersawards/>
8. BC Ministry of Attorney General: *Child Protection Mediation: Questions & Answers*: April 2004
9. Basic qualifications for child protection mediators includes 80 hours of core education in conflict resolution and mediation theory, at least 40 hours of which is mediation skills training, an additional 100 of related training in dispute resolution of in a "related" field, 20 hours per year of ongoing professional development and continuing education, and completion of a minimum number of mediations as primary or sole mediator. Roster mediators subscribe to the *Code of Conduct* for Family Mediation Canada, and must successfully complete a selection process consisting of a written exercise, an interview and reference checks. [BC Bulletin: April 2004] and [Ministry of Attorney General #AG04042: 04/2004]
10. Evaluation of the Surrey Court Project: Facilitated Planning Meeting – Final Report for Dispute Resolution Office, p.vii