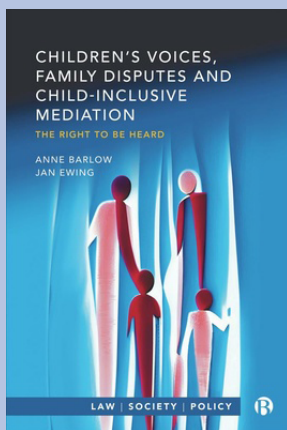


**CHILDREN'S VOICES, FAMILY DISPUTES
AND CHILD INCLUSIVE MEDIATION: THE RIGHT TO
BE HEARD BY ANNE BARLOW
AND JAN EWING**

MARIAN ROBERTS



Anne Barlow and Jan Ewing (2024)
***Children's Voices, Family Disputes
and Child Inclusive Mediation: The
Right to be Heard*** published by
Bristol University Press ISBN 978-
1529228915

Mediation as a practice intervention and as a theory richly informed by different disciplines (anthropology, law, psychology, social psychology and sociology) has been the subject of much scholarly research over decades. Research on family mediation in the West constitutes perhaps the largest body of empirical research of all mediation fields. Although the first services of family mediation in this country were established with their primary focus on the well-being of children, early research focused largely on settlement rates, cost-effectiveness, process benefits and client satisfaction. While research also covered mediation in relation to children and divorce, there has been a dearth of consumer evaluation of mediation and especially that relating to the views of children who themselves experience participation in the process. Children's views were first canvassed in a qualitative research study in Scotland (Garwood 1989). In the 1990s a Gulbenkian-funded study on the nature and purpose of the role of children in family mediation, carried out by National Family Mediation with researchers, addressed the central policy question: how can children's perspectives best inform a process in which the parents are the ultimate decision-makers? (National Family Mediation 1994) The answer lay in the concept of *consultation* which both resolved the

substantive question: namely, the nature of the mediation-specific role of children (compared to other child-related interventions); it also clarified precise language use, hitherto vague and varied (eg *seeing* children, *involving* children, *working with* children, etc). Consultation can happen indirectly by means of parents themselves consulting their children or by the direct consultation of children by the mediator. Whether children be directly consulted, how and at what stage were matters to be agreed jointly by the mediator, the parents and the child. Because the terminology of *child consultation* is now so routinely deployed, its conceptual origin and significance in this context have been erased—relevant here both for the record and because of the centrality of consultation as a recognized means of participation under Article 12 United Nations Convention of the Rights of the Child 1989 (UNCRC).

*Children's Voices, Family Disputes and Child Inclusive Mediation: The Right to be Heard*¹ is focused on children who experienced what is called child inclusive mediation (CIM) as the key research participants. The principle aim of this study was to “add a critical dimension to the recent debates about family justice in general ... and CIM in particular, by exploring some of these issues from the perspective of children themselves” (page 4). The research objective was “to capture the experiences of CIM from the perspective of different actors, identify the benefits and risks of CIM as well as the barriers and the facilitators to achieving engagement in the CIM process by parents and children” (page 157). The qualitative empirical approach adopted involved a reflexive workshop, focus groups and interviews that included members of the Family Justice Young People's Board (10), relationship experts (10), family mediators (20), parents (12) and children (20, 18 of whom were interviewed) with 12 families represented (an account of the design of the project is set out in appendix 1). The study's findings are set out in chapters 2 to 5. Chapter 6 draws together the conclusions of the study within a children's rights framework.

This book is to be welcomed for its more up-to-date findings based on a similarly sized cohort of child respondents as the 1989 Garwood study. This study corroborates Garwood's findings of the positive value of giving children the opportunity of having their voices heard in mediation in appropriate cases. However, some aspects of the book require further examination. First, the authors' adoption of a neoliberal paradigm to inform both their hypotheses about family mediation and their radical

¹ This book is based on *The Healthy Relationship Transitions (HeaRT) Research Study*, conducted in 2020 and 2021 as a second strand of a wider Wellcome Trust Centre-funded interdisciplinary research project, *Transforming Relationships and Relationship Transitions with and for the Next Generation*.

proposals for changes for the future; second, the lack of definitions of basic terminological concepts such as “child inclusive mediation”, “parental autonomy” and “relational family autonomy”; third, the adaptation of the Lundy model of child participation to the family mediation context; and fourth, a limited interpretation of the meaning of “participation” under Article 12 UNCRC.

The authors assert that “*the current norm* [of family mediation] ... [is] ... allowing parental autonomy to side-step the need to truly listen to children’s voices”, where children are treated as “passive objects” and where the needs and voices of children are “drowned out in the process” (see pages 21, 128, 102, emphasis added). Given that family mediation services were established with the express intention of focusing on the well-being of children, of taking their views into account, and of mitigating the harmful impact of parental conflict arising from family breakdown and where policies encouraging the consultation of children have been in place since 1994, these generalized negative characterizations become questionable.

A neoliberal paradigm with its free-market economic values and a methodological individualism that rejects notions of reciprocal obligations towards others may well throw light on attempts by the Ministry of Justice to co-opt mediation for diversionary and court cost-saving purposes.² Neoliberalism, however, sheds little light on understanding the history of the emergence of out-of-court family mediation in this country. A different intellectual paradigm, understood and experienced by those of us who have been directly involved over decades in the practice and development of family mediation and its regulatory framework, confronts neoliberalism precisely because of its failure to reflect the moral universe that informs the political and ethical origins of family mediation in Britain. These values and principles derive from the tradition of humanist ideas about equality and liberty as well as from the transatlantic *new consciousness* of the 1960s that informed the revival of alternative dispute resolution (ADR) approaches in the West in the late 20th century. That tradition exemplifies the values of respect, dignity, equity of exchange, reciprocity, fairness, voluntary participation and party control. This ethical framework countered the dominant prevailing value system of that time, that of adversarial approaches, impersonality, lawyer domination and rule-centred authoritarian command.

² See also analyses of court-sponsored settlement approaches in the context of the civil justice system by Genn & Ors (2007) and Palmer & Roberts (2020).

There is universal consensus on the definition of mediation as an ADR process. Mediation is distinguished from other dispute resolution processes by reference to the location of its decision-making authority. This lies with the participants themselves rather than with any third party such as a judge or arbitrator. In reformulating this defining characteristic of mediation in a neoliberal interpretation of “autonomy”, analytic differences are submerged and analytic categories conflated. A neoliberal discourse creates negative polarities of interest so that, as applied to families, “parental autonomy” is posited in opposition to the rights of children where, as this study claims, “purely bilateral separated parent decision-making ... ignores the wishes, feelings and growing agency of their children” (page 9). The assumption underlying “parental autonomy”, of a united common parental interest, does not accurately reflect the actuality of the family mediation process—the complex, difficult negotiation of contentious issues, complicated by interpersonal conflict, powerful emotion, broken communication, disparities of power and vulnerability (practical, personal, financial and legal) and the impact of third-party influences (new partners, stepchildren, grandparents, etc). Is the achievement of that hard-won consensual parental agreement, an outcome that is the primary purpose of the process, what the authors frame as “parental autonomy”?

The institutional location of family mediation has long been contested in this country. Some appear to have difficulty in conceiving of family mediation as constituting an autonomous form of professional intervention with its own carefully circumscribed boundaries, a form of intervention that is not dominated by the dyad of “justice” and “welfare” that characterizes the formal family justice system. It is certainly not clear on what basis mediation can be classified by the authors as an “administrative process” (page 136).

“Child inclusive mediation” is a term imported from Australia where CIM there refers to a wide-ranging and sophisticated practice involving a variety of support services for parents and children going through separation and divorce and that include group work, family therapy, counselling and the option of direct consultation. Findings of research focusing on the Australian experience highlight the vital resource, expertise, qualifications, training and infrastructure implications of this model which involves an extra six to eight hours of worker time per case (McIntosh 2000; McIntosh & Ors 2008). In comparison, what is termed “CIM” in this country usually involves only a comparatively brief intervention, a maximum of one hour of direct consultation with the child by the mediator with prior parental preparation and subsequent

feedback. Therefore questions arise about the applicability of research findings, based on the Australian model of CIM, to what is also termed CIM in this country.

In one Australian study quoted on the outcomes of CIM, a comparison of two groups of children, one where children were consulted directly and the other comparison group where children were not consulted directly, the parents of children in both groups reported positive benefits from the mediation process (Bell & Ors 2013). CIM did not prove to be more beneficial in terms of improving the parental relationship or the likelihood of resolving the dispute. The best predictor of resolution overall was the level of conflict, acrimony and co-operation. The children's experience of direct consultation was found to be generally positive, though it could lead to disappointment when raised expectations were not fulfilled. The other Australian research study referenced (Brown & Campbell 2013) reveals two important findings which are worth highlighting: first, respondents were confused about which interventions they had experienced (including counselling and CIM) and were unable to attribute benefit to any particular intervention. Second, while all parents interviewed had agreed with the principle that children should be included in discussions about their future, they did not want their own children to be involved at all. Given the significance of this finding, it is surprising that no explanation for this extraordinary discrepancy was recorded by Brown and Campbell. Their recommendation was for the replacement of the parental consent requirement with the imposition of direct child participation as "normal practice", an approach supported by Barlow and Ewing.

The adoption of the four-staged Lundy model of child participation (it includes space, voice, audience and influence), with which the authors approach their rights-compliant approach to child participation under Article 12 UNCRC, was devised in the context of an educational institution for assessing "pupil voice" (see Lundy 2007). Its application to a quite different institutional context—the informal, confidential and private dispute resolution process of family mediation—becomes problematic, particularly in fulfilling the "influence" component of the Lundy model. The systemic structures and mechanisms for the participation of children within the public arena of educational, civil and political decision-making (procedural requirements for information, advice, follow-up and evaluation, appeals, complaints, remedies and redress) would not all be either applicable or appropriate in family mediation. In addition, how the Lundy model's central premise—the indivisibility of Article 12 with other

rights under the UNCRC (in particular Articles 2, 3 and 6)—would apply in family mediation is not examined in this book.

Article 12 provides the main foundational principle for the dominance of the rights approach by which the authors assess CIM. In accordance with the Lundy model, Article 12 needs to be understood both as a fundamental right and also as a general principle that must be taken into account in the realization of all other rights. The Resource Guide on the UN Committee on the Rights of the Child General Comment No 12 makes clear that there is no one construction of the meaning of participation of children and young persons in decision-making under Article 12 (Lansdown 2011). Participation can take several forms and be constructed at different levels:

- ◇ *consultative participation* (direct and indirect) where parents seek the views and perspectives of children in order to better inform adult decision-making; respecting the rights of the child in the family requires the creation of a “participatory environment” that supports and encourages parents to listen to their children when making decisions that affect them;
- ◇ *collaborative participation* where decision-making is shared between the adults and the children and where children influence both the process and outcomes of any given activity; and
- ◇ *child-led participation* where children initiate and advocate for themselves; the adult role is to act as facilitator providing resources, etc.

Barlow and Ewing introduce their preferred approach to the participation of children in mediation with the concept of “relational family autonomy”: that is “collective decision-making” (page 131). This amounts to a neoliberal reformulation of *collaborative participation* where decision-making is shared between adults and children (see above). It is questionable why such a change is called for when the prevailing policy and professional practice guidelines under the Family Mediation Council (FMC) Code of Practice endorsing *consultative participation* in family mediation is already compliant with meeting international obligations under Article 12 (FMC 2024: paragraph 6.6). This Code of Practice affirms the importance of the consent requirements for all involved as well as respecting the professional discretion of the mediator in conducting the delicate and complex task of assessing the appropriateness of the direct consultation of the particular child in the particular case, with respect to the participants, the nature of the dispute and in all the circumstances.

What is perhaps remarkable is that so brief an intervention as child consultation and in so modest a process as family mediation can yield the benefits for children revealed in this and earlier research. Children do, however, need a much wider range of support services to meet their needs for well-being and resilience when families separate and divorce. The expectation placed on family mediation to meet those needs can be inappropriate.

There is no simplistic ideological prescription for better outcomes for children whose parents separate. Children need to be heard by their parents not only when they are in dispute. A balance has to be struck between respect for the privacy of a family's own decision-making environment and the need for protection of its members; between the rights and the obligations of the relevant Articles of the UNCRC; and between affirming parental authority for decision-making in mediation with acknowledgment of the rights of children to have their voices heard and respected. Clearly, more research is needed to identify approaches that best achieve the likelihood of improved outcomes for children in terms of their protection, welfare and autonomy.

The research in this book valuably updates understandings of children's direct experience of family mediation in this country and of where improvements can and should be made. However, the authors' "re-envisioned" CIM process, with their recommendations for fundamental changes to language use, policy and practice as well as to the law, goes much further than is evidenced by their research (page 136). If theory and research are to contribute to recent debates about the family justice system and also to be recognized to have significance for practitioners' understandings about their work, so too must relevance be accorded to the historical context of family mediation as well as to practitioners' considerable experiential knowledge. This currently informs collegiate consensus on the nature, purpose and the practice of family mediation in relation to children.

About the author

Marian Roberts *qualified as a social worker and as a barrister and has over 40 years' continuous practice experience as a family mediator focusing on high-conflict disputes over children. During the 1990s she was responsible for overseeing the creation and development of National Family Mediation's national training and professional practice framework. She is a former Governor and Chair of the Professional Standards Committee and is now a Fellow of the College of Mediators. She is an accredited mediator, trained in CIM, and professional practice consultant with the FMC.*

As a former Visiting Fellow and Guest Teacher at the London School of Economics and Political Science (LSE), she taught mediation modules on the London University Masters in Law (LLM) ADR course (since 1989), and on the LSE ADR LLM. She was Professorial Research Associate in the Department of Law at the School of Oriental and African Studies, teaching on its ADR LLM until 2015. Marian Roberts has published several books and many articles on the subject of mediation.

Email: robertsmarian1@gmail.com.

References

Bell, Felicity & Ors. "Outcomes of Child-Inclusive Mediation." *International Journal of Law, Policy and the Family* 27(1) (2013): 116-142.

Brown, Thea & Alan Campbell. "Parents, Children and Family Relationship Centres: What's Working?" *Children Australia* 38(4) (2013): 192-197.

Family Mediation Council (FMC). *Code of Practice and Guidance*. London: FMC, 2024.

Garwood, Fiona. *Children in Conciliation: A Study of the Involvement of Children in Conciliation*. Edinburgh: Scottish Association of Family Conciliation Services, 1989.

Genn, Hazel & Ors. *Twisting Arms: Court Referred and Court Linked Mediation under Judicial Pressure*. Ministry of Justice Research Series 1/07, May 2007.

Lansdown, Gerison. *Every Child's Right to be Heard. A Resource Guide on the UN Committee on the Rights of the Child General Comment No 12*. Save the Children UK on behalf of Save the Children & UNICEF: Child Rights Resource Centre, 2011.

Lundy, Laura. "'Voice' is not Enough: Conceptualising Article 12 of the United Nations Convention on the Rights of the Child." *British Educational Research Journal* 33(6) (2007): 927-942.

McIntosh, Jennifer E. "Child Inclusive Mediation: Report on a Qualitative Research Study." *Mediation Quarterly* 18(1) (2000): 55-69.

McIntosh, Jennifer E & Ors. "Child focussed and Child Inclusive Divorce Mediation: Comparative Outcomes from a Prospective Study of Post-Separation Adjustment." *Family Court Review* 46(1) (2008):104-124.

National Family Mediation (NFM). *Giving Children a Voice in Mediation*. London: NFM, 1994.

Palmer, Michael & Simon Roberts (eds). *Dispute Processes: ADR and the Primary Forms of Decision-Making* 3rd edn. Cambridge: Cambridge University Press, 2020.

Legislation, Regulations and Rules

United Nations Convention on the Rights of the Child 1989