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“We Make New Families:” Findings from A Family Court Mediation Study

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Abstract
Mediation was brought into family court cases as a divorce litigation alternative. Today, parents are not only encouraged but mandated across most U.S. states to consider mediation before further court action can be taken. Research has not kept up with understanding how publicly mandated and subsidized mediation services become part of court cases and possible case resolution. This article reviews how mediation has evolved from outside alternative to family court “workhorse” within a family dispute resolution paradigm centered on shared parenting as in the best interest of children. Research results from a family court mediation program are presented to highlight how parents encountered and responded to mediation as an embedded part of today's family dispute resolution paradigm/court system. Especially in cases that keep coming back to court, family dispute resolution has become a means of “making family” as much as supporting family separation. Implications for practice include limitations of a mediation service as provided in an under-resourced court and
ultimate reliance upon parents to uphold the best interest standard through ongoing co-parenting interactions.

Keywords
child custody mediation, court services, family court mediation, family dispute resolution, family law paradigm, mediation research

As the saying goes, breaking up is hard to do. As family court professionals know all too well, it is even harder when children are involved. Prior to the “no-fault” divorce reform, divorces required an adversarial process in which children could become collaterally damaged. This was well depicted in the 1979 movie, *Kramer vs. Kramer* (Benton, 1979), in which the well-being of little Billy hangs in the balance of a contested child custody trial. Each parent must take the stand against the other in defense of their claims and make a counter-argument to that of the other. Although the mother wins full custody from the court, she realizes post-judgment that this was wrong. In a tearful ending, she goes to the father for a private meeting. This time, they are focused on what is best for Billy. Although critics have noted the fictionalized aspects of the movie, the underlying questions it raised were of both public and professional concern about divorce; that it unnecessarily pitted each parent against the other at the expense of their children.

Mediation was introduced into family court to help address this concern. Pilot projects and experimental research identified how mediation can provide an alternative to the hostilities of an adversarial trial, and potentially transform litigation into a private deliberation between parents (Emery, 2011; Kelly, 2004; Shaw, 2010). Over time, court-based mediation services have become a core part of what Jane Murphy and Jana Singer describe as the “new family dispute resolution paradigm” (Singer, 2009; Murphy & Singer, 2015). In this paradigm, feuding couples are encouraged to lay down their swords and instead sit at the conference table of deliberation. Their potential child custody battle is reframed as a joint problem of co-parenting. Once seated, parties are directed away from fighting over their rights to the same child(ren) and towards working together, on the same side. Mediation has become the “workhorse” (pp. 662, Van der Steegh, 2008) of this paradigm. Family law reforms mandating mediation for child custody disputes have helped to transform a past innovation and experiment into a required part of the family law process. At the same time, the adversarial trial remains as a “judicial backstop” (Murphy & Singer, 2015): If mediation and/or other forms of “alternative dispute resolution” (ADR) fail, parents as litigants are given back their swords and can either try to fight directly, as in pro se litigation, or hire “gladiator” attorneys to fight for them in courts of law.

The family dispute resolution paradigm provides a way to reframe hostilities brought into court through divorce into the “forward-thinking” (Murphy & Singer, 2015), prosocial goal of what is best for children. Resolving the past *Kramer vs. Kramer* case has evolved into forming & maintaining a *Kramer & Kramer* partnership, dissolved once the youngest child reaches adulthood (See Schepard, 1999). Working within the goals of “therapeutic jurisprudence” mediation enables courts to provide a space for helping parties through the pain of “family separation” (a term inclusive of non-marital cases) as
well as family “renegotiation” (Emery, 2011), and even transformation. As one family court professional explained during research, “We make new families.”

Making families is an arguably much more difficult task under family law than presiding over a break up. Yet, family mediation (also called family dispute resolution) research continues to follow from its origins in law reform as a divorce litigation alternative. While this question is important, it may prevent seeing a broader and more ambitious goal of managing co-parenting schedules and responsibilities over time. Moreover, many cases today do not directly involve divorce because there is no marital history. In the U.S., 40% of children are born to single mothers and 43% of hospital births are paid for by Medicaid (Centers for Disease Control and Prevention, 2021; MACPAC, 2020). In an effort to recoup welfare spending costs, federal policies mandate efforts to identify fathers. Post paternity assessment, family court parenting orders may not only assign child support but also enable shared parenting placement. This means that the family court is not managing family separation as much as family formation. And, since both post-divorce and post-paternity cases can be filed multiple times, court-based dispute resolution can become an ongoing part of making family. As one beleaguered court official commented, “Family cases never die.”

There is a need for research examining mediation as the main means through which family courts attempt to transform child custody dispute cases from court battles over parenting to court sanctioned resolutions to share parenting. Yet, scholars continue to cite studies from the 1980s and 1990s for empirical evidence supporting mediation, which reinforces the role of mediation as limited to a divorce litigation alternative (e.g., Murphy & Singer, 2015). The initial research design in this study replicated past mediation studies in which mediation cases are studied as distinct from overall court contexts and processes. However, an anthropological part of the research design was expanded to more inductively ask how mediation works in practice. This article next briefly reviews empirical literature on mediation in resolving child custody disputes before describing the research study and results.

LITERATURE REVIEW

By the time Kramer vs. Kramer aired, divorce laws were already changing to promote more amicable negotiations (Papke, 1995). Mediation was pilot tested to help support these changes (Press, 2013). In mediation, disputing parties meet in a confidential rather than public setting. Their case is facilitated by a mediator rather than determined by a judge. Attorneys might not be present or asked to observe rather than speak (Cohen, 1991). Family law remains in the “shadows” as a last resort if mediation fails (Mnookin & Kornhauser, 1979). In the meantime, parties are encouraged to identify what issues they find most important using their terms and the particulars of their circumstances. This allows them to push the boundaries of family law by identifying solutions tailored to the specifics of their case. During the early days of divorce reform, for example, mediation enabled parents to override sole parenting and maternal preference presumptions.¹

Empirical studies and pilot projects of the 1980s comparing divorce mediation and litigation outcomes showed promising results (Emery, 2011). When cases were randomly assigned to mediation or court process (without mediation), case outcomes were generally better and hit the high marks of intended family law reform, such as settlement rate, party satisfaction, and cost savings (Emery, 2011). Over time, a key measure of mediation success has been whether mediation leads to agreements that can
become court orders, thus obviating the need for further court involvement. In this way, a clear benefit of mediation lies in its role as a litigation alternative. During these early days, however, not all professionals were in support. In his article, *Against Settlement*, Owen Fiss argued that mediation detracts from the public role of the courts in setting and enforcing social norms (Fiss, 1984). Private dispute resolution prevents the public vetting that litigants might seek as well as a public accountability that society might need.

Over time, answers to proponents and critics can be found within an ongoing co-evolution of family law and family court mediation. Mandatory mediation brought a second wave of study and of critique during the late 1980s and 1990s. A central question was whether the ideals of mediation as a private practice could be realized through mandated court services. For example, whether the “pure” form of facilitative mediation works as intended (Cohen, 1991). In professional debate, one set of critics argued that court-based mediation services enabled the courts to co-opt mediation (Welsh, 2017). That is, the power of the state to determine outcomes and to enforce public norms meant that mediators, as court-appointed professionals, became agents of this state power. Rather than enable private negotiation, “muscle mediation” (Folberg & Taylor, 1984) became a site of “coercive consensus” (Nader, 1997) in which parties were pressured to settle. Critics questioned what voluntary participation and therefore self-determination could mean in the context of required mediation services. Another set of critics argued that it was the *court* that had been co-opted (Fineman, 1988). In arguing against litigation, mediators and mental health professionals had successfully convinced legal professionals that child custody disputes are not legal cases as much as they are interpersonal problems that potentially harm children. In a sense, the concern was how mediators “muscled” their way into a decision-making role that usurped court responsibility to use its own processes to assess and resolve cases (Silbey & Merry, 1986).

Most critics did not argue against mediation per se. They were against the expansion of mediation as a private, voluntary process into a mandated court service. The concern that gained the most support was about domestic violence, in which shared parenting might sustain an abusive relationship. More reforms and specialized training followed to mitigate against coercive settlement and to enable exceptions in mediation referral for cases deemed inappropriate. For example, mediation sessions are commonly kept confidential from court decision-making, and professionals can argue against the use of mediation in cases they assess would be inappropriate.

Today’s family dispute resolution paradigm is thus complex. On the one hand, there is a general, normative expectation that child custody disputes are parenting problems best solved through private negotiation. A previously used private alternative has become a public mandate. One benefit to parents is that mandating mediation requires court budgets to provide mediation services to facilitate this negotiation. By offering low-cost services, the benefits of private mediation become a more affordable option. On the other hand, the value of mediation as a voluntary practice and the need to screen out inappropriate cases has also become normative. Common practice includes mandating an initial session but not full mediation participation, and the use of screening tools by professionals to assess if mediation may not be appropriate due to family violence, substance abuse, or mental health concerns. In other words, enthusiasm for mediation has been tempered through precautions to protect against the unintended consequences of mandating services.
In reviewing today's mediation practices within family court systems, commentators have raised several concerns. One is the lack of funding for family court services, and ongoing budget pressures to do more with less (Salem, 2014). Efficiency pressures can mean sub-standard services without sufficient quality control and oversight. Coupled with this is the trend in pro se litigation, which poses both questions of access to justice and case management (Applegate & Beck, 2013). In the face of fewer public resources for court services and less frequently accessed private resources in legal representation, there is a third concern about rising and increasingly diverse caseloads. This creates a gap between what courts can offer and the support litigants may need, which is one reason why Jane Murphy and Jana Singer argue that the family court has become “divorced from reality” (Murphy and Singer, 2015). Just as past mediation critics did not question (pure) mediation in theory as much as in practice, Murphy and Singer do not question the “new family dispute resolution” in theory as much as in how well it works in practice across caseload diversity and within an expanded vision of court roles and responsibilities.

While there were many early studies when mediation was first piloted and initially mandated, researchers have had difficulty finding grant support for ongoing research (Emery, 2019) and difficulty in data collection. Research since the 1990s has been sparse, and studies tend to pursue a piece of the puzzle, such as what mediator techniques are more effective (Charkoudian, Walter, & Eisenberg, 2018) and if divorce mediation services are better offered outside of court (Pruett & Cornett, 2017). What has been missing are studies that bring pieces together to update the holistic understanding of how mediation works in practice as an embedded part of the family court process. The initial research design replicated past mediation case studies of the ‘80s and ‘90s that compared mediation in theory and practice. The goal was to update through collecting more contemporary cases. However, as explained in the research methods section, this approach was insufficient to bridge gaps between family court cases of earlier decades and today. An anthropological component was expanded to collect and analyze the data more inductively. Study results presented in this paper highlight findings about how mediation has become a part of how one family court is “making new families” through dispute resolution.

METHOD
Research design
The research design in this study was an ethnographic, extended case study (Burawoy, 1998). Ethnography refers to a qualitative research approach in which the researcher conducts fieldwork to directly observe and engage participants in understanding their experience phenomenologically (Bernard, 2017). Anthropologists adopt the role of a learner while Immersed within the “fields” where social interaction of interest take place (which meant the courthouse and mediation sessions). The case study portion replicated past family court mediation studies, which meant collecting mediation case sessions and outcomes in order to compare mediation in theory and practice. When possible, mediation sessions were observed directly and audio-recorded with follow-up interviews with parents and mediators to test the researcher's interpretation of observations. An extended case study in legal anthropology refers to following cases beyond initial case outcomes (Nader, 2002). In this study, the extended study included following cases back to court and through court file review.
In anthropological research using a fieldwork approach, there is an initial research design that may need modification once the research begins. This is because even the best prepared social scientist is an outsider to local experiences, and the purpose of anthropological research is to gain an insider understanding of local social phenomena (Bernard, 2017). Anthropologists expect surprises, and to redirect questions and data collection in response to surprises. With needs for openness is also a need for institutional review board approval to conduct research. Data was collected with approval from the Marquette University Institutional Review Board.

Research site and participants
The family court mediation program in this study is part of a large, urban county courthouse system in the Midwest. It has a large and diverse caseload, serving an urban, rural, and suburban population. Ongoing budget pressures require the mediation program to be offered efficiently. The program is run by one full-time staff person, and mediators are paid as private contractors. They are paid $50 for each day they lead evaluation sessions at the courthouse and paid $200 per mediation (that is, they receive the court's mediation fee as their payment). Parents file in family court for divorce, restraining orders, child support orders or modification, and child custody and/or placement orders or modification. Under state law, as in many other states, parents in dispute over child custody (legal decision making) and/or placement (physical residence) must attend mediation before continuing in the court process (Applegate & Beck, 2013).

The mediation program uses a facilitative, problem-solving model that is known as, “Where the family and divorce mediation field began” (Milne, Folberg, & Salem, 2004). Comparable to other programs, the mandatory requirement is fulfilled through attending an evaluation (also called orientation) session at no charge to parties. If both parties agree, then mediation sessions are scheduled. Mediators are required to offer two 90-minute sessions. Mediators must also have completed a basic forty-hour mediation training and an additional twenty-five hours of specialized training in family court mediation and domestic violence. New mediators attend a monthly roundtable for discussing cases, and all mediators must attend annual training to remain on the roster. There are about thirty-five mediators on the roster each year. Mediation referrals may come through parent requests, through family law attorneys, or by court order. During part of the research period, participants were permitted to skip the evaluation session if they both agreed to mediation. The evaluation session requires an assessment of domestic violence and alcohol and other drug abuse (AODA) concerns through the use of a questionnaire reviewed with each parent by the mediator. Mediated agreements typically become the final court order, and failure leads to the appointment of an attorney as guardian ad litem (GAL) to investigate the best interests of the children and make custody and placement recommendations in a follow-up hearing. The best interest standard includes a presumption of joint legal custody and placement that “[a]llows the child to have regularly occurring, meaningful periods of physical placement with each parent and that maximizes the amount of time the child may spend with each parent, taking into account geographic separation and accommodations for different households.” These orders cannot be changed for two years unless there is a “substantial change in circumstance.”

Overall court caseload and mediation program statistics
Although this was a qualitative study, an effort was made to identify statistics that would help contextualize the role of mediation within the general family court caseload and evaluate the
representativeness of the study sample given the larger “population” of annual court referrals. For example, in 2013, there were 8000 cases involving child custody and 800 referrals to the court mediation program. Of those cases, 300 went to mediation (which means the parties attended an initial evaluation session if required, paid mediation fees, and completed mediation sessions). The mediation program agreement rate calculated by the mediation program was about 50–55%, which is comparable to agreement rates of mandated family court programs in previous studies (Kelly, 2004).

Access to paternity action files was limited because pre-paternity cases (that is, cases filed to determine paternity) are “closed” while post paternity and family case files are “open” to public access. Thus, a court file review of newly filed cases was limited to new filings of family cases. Family cases include divorce, post-divorce, and non-marital cases with voluntary paternity acknowledgment. Analysis of two random samples, one from new filing in 2011 and another from new filing in 2012, showed that cases referred to mediation were associated with more court actions. That is, the use of family court mediation services was associated with a greater rather than lesser number of court hearings. Thus, it seems that a mediation case study today is likely to include a disproportionate number of “high conflict” child custody cases.

Procedures
Most data were collected during two months in 2011 and three months in 2012. However, some additional cases, some court case follow-up, and an additional month of court hearing observations were added between 2012 and 2017. As background field research, 25 mediators were observed conducting over 100 evaluation sessions, and 10 interviews were conducted with mediators (seven of whom were later observed in mediation sessions). In 2020, a more in-depth court file review was mostly completed before the Covid-19 pandemic disrupted trips to the courthouse to view the family case files. For the mediation case study sampling, a convenience sampling approach was used. The mediation case study sample consists of 42 mediation cases, 60 mediation sessions, post-mediation debriefs with each mediator, and 35 post-mediation interviews with parents. Of the post-mediation interviews, both parents were interviewed in 15 mediation cases. There was a 54.7% agreement rate, which is comparable to the mediation program rate as a whole. Most parents did not have attorneys for the duration of their cases. However, all but one of the divorce cases involved attorneys (1/3 of the research sample were divorcing families). Parent refusal to participate in the research was rare. As one parent said, “I have nothing to hide.”

Anthropological field-based data collected in response to surprises
The research began with general field immersion and mediation observation/recording. However, surprises soon emerged once mediation observation began. While past empirical studies imply that the benefit of mediation lies in distinction from litigation, boundaries kept by professionals were less important to parents. Most treated mediation as a required part of the court process, and few experienced the court context as one permitting parents to do battle over their children. While competition was evident, it had to be handled within the discourse of the best interest standard or risk appearing to be an unfriendly parent or an uncooperative litigant. In addition, mediation participation for them was not academic; they were not interested in how mediation generally worked but rather how it impacted their case, as part of a larger court case with potentially long-term implications for their parenting (and co-parenting). Thus, while the general research design did not change, the
research questions shifted from a deductive set of questions based on review of prior research to a more inductive and field-based approach. For example, rather than focus on old debates about co-optation (by the courts or by mediation proponents), questions shifted to understanding how parents encountered and responded to mediation as a family dispute resolution “workhorse.”

RESULTS

“Pure” mediation amidst constraints

In the literature, “pure” mediation entails parties voluntarily participating in a facilitative, problem-solving process. The best evidence of this model in practice was found in how mediators are trained in the definitions and explanations of mediation given to parties. This included a 25-hour mediator training, roundtable discussions for mediators led by seasoned mediators and court officials (which included debate over “pure” mediation as a realistic goal), and mediator interviews. This model was also the one used by the court and mediators to inform and persuade parties to use mediation as a way to avoid litigation. Consistent messages came through court sources, such as information and pro se litigation forms found online and in a courthouse litigant assistance office (called the Justice Center), the mediation program brochure given to litigants as part of mediation referral, and in mediator explanations and direction during evaluation sessions and mediation sessions. The mediation program brochure provides an example of how mediation was presented to parties (emphasis in the original):

Mediation is a voluntary way to solve custody and placement problems outside of court. A neutral 3rd party (the mediator) meets with the two of you to help you find solutions to the problems you are having. ...(An initial) meeting is free. After that meeting you decide whether or not to continue mediation... The mediator may make suggestions and ask questions that help the two of you stay focused on solving the problem, but the mediator will not tell you what to do or decide the issues. And you are not forced to agree to anything. If you reach a full agreement or an agreement on some of the problems, the mediator will write up the agreement and submit it to the court before your next hearing. At the hearing the Commissioner or Judge will review your agreement. If you still support the agreement, an order may be entered based on your agreement...

While this fits the pure model, the brochure also contains the following warnings:

You must both attend the initial session. If you do not attend without a valid excuse, then you will be assessed court costs. If one of you does not agree or does not come to meet with the mediator that information is made part of the court record and MAY influence the decisions made in your case, such as who will be responsible for Guardian ad Litem fees...

Despite this consistent messaging, some parties experienced confusion. They arrived at the courthouse for the initial session and screening expecting to complete mediation. A common complaint in post-mediation interviews and learned in roundtable discussions was frustration in setting aside time for court only to have a short hearing as part of mediation referral, and then taking time to attend the initial session only to experience this as a short conversation followed by paperwork and a required payment. To schedule the mediation separately was to create yet another delay. As one attorney commented, family court litigants are often in such a fog that all they can hear, “is like the sound you
hear in a seashell.” However, other litigants did take time to prepare, some conducted their own research, and there were “frequent flyers” (a label from a family law attorney) who were well-seasoned litigants. In general, by the time litigants were interviewed post-mediation, they confirmed clear understanding that the purpose of mediation was to resolve child custody disputes and facilitate co-parenting. For example, when asked to define mediation, one party explained, “It's basically for people who seem like they can come to a decision and they just can't figure it out on their own,” and then added, “that's like what we're trying to do.” Other parties adopted the language and general discourse of family court mediation, such as asserting their position during mediation as what would be “[i]n the best interest of our children.”

Mediation that seems to work but not as expected

What case characteristics contribute to successfully reaching agreement? What case characteristics might make success more difficult? Professionals have raised concern that mediation works best in “simple” cases whose case characteristics resemble those in early pilot studies, such as divorces in middle class, nuclear families (Salem, 2009; Saposnek 2004). Examples of “complex” cases, are those in which parties are low-income, were never married, and/or have substance abuse histories (Ballard et al., 2011). Given the small scale of this study and wide variation in how parties engaged in mediation, this article cannot generalize about whether any specific case characteristic can help or hinder outcomes. However, the following case examples illustrate how case resolution can happen that challenge practitioner expectations that mediation works better in “simple” than in “complex” cases. It also includes examples of cases that challenge expectations that mediation agreement entails a substantial change to previous agreements (and court orders), and that mediation termination means that mediation failed in reaching a resolution.

1. **Case One, Family Formation.** As previously explained, paternity actions sometimes brought the formation of a family. In one case, a young couple’s relationship had been brief (a few months). They had modest means and the baby was born with special needs. In post-mediation interviews, the father alleged that the mother had initially tried to abort the baby by drinking large amounts of vodka, and described verbal fights exacerbated by drug and alcohol use. It might seem, then, that this could be a difficult case. Yet, each parent readily accepted the authority of the mediator who led them through a process of identifying their infant's needs and how placement with the father could begin. Initial resistance from the mother (concerning the child's placement) and the father (concerning the child's name) was resolved within two sessions. The father was eager to be involved and the mother's concerns were addressed under the mediator's direction. Three and a half years later, the case had only been back to court once, for a review of child support.

2. **Case Two: Family Re-affirmation.** In this case, the couple had been divorced for several years and were raising teenaged children. Despite the shared placement order, each child was now living predominately with one of the parents. The court filing was essentially to verify the new placement schedule through an official court order. Neither the court process nor the mediation substantially changed the proposed orders initially filed. Therefore, it seems that the effect was one of publicly verifying a placement change caused at least in part by the children's decisions.
3. **Case Three: “Getting Justice & Getting Even.”** In this paternity case, the parents had established co-parenting routines. Both noted how they were normally able to coordinate and communicate, and the mother expressed that the father had not been there initially but was a good father who was actively involved. However, the mother filed after the father took the child out of town during his placement time, despite knowing that the mother had not agreed to this. The mediator facilitated a conversation through identified differences of opinion about parenting the child as well as identifying the mother's concern that she was not respected by the father as a parent. In post-mediation interviews, none of the specific points of difference in parenting were raised again. In observing the amicable session, interviewing both parties, and reviewing transcripts, it seems that this may be a case of what Sally Engle Merry refers to as using courts to “[get] justice and [get] even” (Merry, 1990). The mother seems to have used the court to emphasize to the father that it was not okay to take the child out of town without greater consultation with the mother, and the father seems to have accepted this. Three and a half years later, there were no returns to court.

4. **Case Four: Mediation Termination in the Fog of Divorce.** In this case, the mediator met the parties during an evaluation session, conducted separate intake interviews, and then conducted an unusually long (four hour) mediation session. The father had been encouraged to mediate through advice from a therapist and his attorney. He was arguably well informed and agreeable to mediation as evidenced by how he responded during the evaluation session and intake. He reported that there had been discussions of how to share parenting. However, he also described being completely surprised when a fight on a Sunday resulted in divorce filing on a Monday and expressed tension as they continued to live in the same house. A four-hour mediation session resulted in a drafted agreement, which he rejected within 24 hours. The mediator recorded this as a termination. Over time, the parties requested return to mediation, which meant shifting to paying the mediator for private services. They reached agreement in one more session. During the post-mediation interview, the father described mediation as an overwhelming first meeting for setting a schedule. In observing sessions and conducting post-mediation interviews, it seems that the father had come to mediation prepared to agree on when he would be with his children but not thinking about how the schedule would also be an agreement about when he would not be with them. He was also caught off guard by changes the mother announced would be made during her placement time that violated what he had thought were inviolable agreements about raising their children regarding religiously based dietary restrictions. He reported needing more time and feeling pushed by the mother and mediator. By the second session, he had accepted the mother's right to no longer follow dietary restrictions during her placement time.

5. **Case Five: When Placement, Property Division, and Domestic Violence are Intertwined.** During the mediation session, the parties were so amicable that they chided the mediator for a long list of ground rules posted to the wall in large font, such as *Respect your co-parent*. They seemed to easily work towards a schedule but never came back to mediation. After that session, however, the father prevented the mother from leaving by pushing her against a wall. She called the police, and a domestic violence case was filed. Although they never came back to mediation, the case continued after the domestic violence case was
dropped. At one point, an attempted reconciliation lasted a few months. Review of the court file shows that the drafted mediation agreement became part of the stipulated divorce orders. In post-mediation interviews, each parent provided different explanations for why mediation failed, attributing it to timing of mediation ahead of property division and to attorney strategies. The mother also reported feeling intimidated. As the father explained, the mother wanted to assure that she could keep the house despite owing more than the house was worth, and child support would allow her to pay the mortgage. The mother explained this perspective as that of the father's attorney. She also complained that the domestic violence injunction prevented help with child care and cost an additional $2600 in attorney fees.

Muscle mediation
The previous examples suggest ways in which mediation seems to work as intended; that is, parenting disputes are resolved without resorting to further litigation. In observations of initial sessions (evaluation session) at the courthouse and mediation sessions, however, this success was achieved in part through “muscle” mediation more than “pure” facilitative approaches. Muscle can be divided into two types; a “stick” approach, which means warning against court as the worst alternative and a “carrot” approach, which means aligning mediation with a parent's love for their child(ren) and their desire to be a good parent. This section elaborates on stick and carrot methods.

The stick: “You Don't Want To Go There”
The stick approach warns parties against the dangers of mediation refusal. Among professionals, this was referred to as a “hard sell.” One mediator explained how to, “really get to them” by telling parties that court means, “[t]he government is going to decide,” and will add that, “[t]he government doesn't want to decide.” The more common strategy reminded parties that guardian ad litem (GAL) fees are higher than the flat mediation fee, and that the court might assign a greater proportion of costs to one party if the other refused mediation.

Among mediators who were more likely to offer a hard sell were well-seasoned mediators and/or family law attorneys. One divorce case provides clear examples. This attorney-mediator added longer intake interviews with each parent after the evaluation session at the courthouse and before the first mediation session. In one intake session, the mediator explained that they know what happens if mediation fails and that, “[y]ou don't want to go there,” to which the party immediately replied, “I do not.” The mediator then explained how this was intended rhetorically but this was good to hear. In another intake, the mediator said, “[y]ou don't want the courts involved in these kinds of decisions because judges, GALs, we don't do a great job—we try but this is where you don't want the court system butting into your life.” These points were elaborated on once more at the start of the first mediation session,

I do a lot of Guardian ad Litem work for (this county). That means that if you don't resolve things at this stage, I know very well what all goes on in the next stage as a lawyer who represents parties and more importantly as a guardian ad litem. You guys don't wanna go there. Okay? You just don't wanna go there, because once you get to that stage, if we can't figure out a way to resolve your issues here, you guys lose total control over what happens with your children and strangers are going to make decisions about that and what does that mean?
This left such a strong impression on one parent that they kept stumbling over terms during a post-mediation interview and exclaiming how much they did not want the “GIO.” This case never had a GAL appointed.

The “hard sell” and “muscle” approach to mediation could be stressful not only for the parties but also for the mediator. One mediator contrasted the “exhaustion” of family court mediation with the more relaxed time frame and open-ended work of private mediation (in non-family court cases) and therapy sessions.

The carrot: That mediation meets your Child's need for love and care

The carrot approach is used in appealing to parties as parents who love their children. This love, in turn, becomes the driving force behind a cooperative, co-parenting agreement. As one mediator said to parents,

I think you have to look at what do I have to do to get along with this person who I chose to have a child with, and we are not together now, but at some point, I'm thinking, you liked each other, enough to have a baby together. I mean try and think back to some of that... like it or not, you are in each other's lives... and it takes, two parents, to parent, and your child deserves the right to have you guys talk to each other and get along.

Mediators also appealed through asserting the view of a child:

When you look at things from your child's point of view... we know that they see themselves as half Mom and half Dad. And so, what we want to do is make sure we come up with a plan where you both are happy... so there is not a lot of animosity or hostility or resentment between the two of you. Because when kids see that coming from one parent to the other they take it on themselves and they feel personally responsible for it.

A common technique taught during mediation training and sustained by some mediators was to use this carrot approach to frame the entire mediation session. For example, mediators would engage parents in a cooperative exercise of identifying positive traits about their child, praise the child (and thus their insights) for being so wonderful, and list these traits on the same flip chart later used to draft parenting schedules and/or draft issues for resolution. This then might lead into asking what further traits the parents hoped to find in their child(ren) or for their child(ren) to find in them in the future. The follow up question is then a variation of, “What does your co-parenting relationship need to be so that you can get there?”

One mediator who was observed in early days of post-mediation training and then a few years later shows how this carrot approach might intensify over time. The following excerpts are from an early mediation introduction, which is closer to a pure mediation approach, and a later mediation introduction, to which the mediator adds a lengthy list of “assumptions.” In both introductions, the mediator also has a five-point agreement to mediate form for parties to sign:

**Earlier opening**: First of all, what I want to do, is congratulate you because this is the first step towards coming together and trying to figure out a way to co-parent. I want to tell you a little bit about how this is going to work. I'm going to help you... identify the issues that bother you and that you want to resolve. And then I'm going to help you figure out a way to resolve them.
I'm not going to advocate for any position. I'm not going to advocate for either one of you. And I am an attorney but I'm not playing that role today so I will not be giving any legal advice at all. Basically, what I am going to try to do is to facilitate a discussion between the two of you so that you can begin to understand the best way to co-parent (name of child) since you are going to be doing that for the next – 20 years. So, before we start, I just want to go over this agreement to mediate that you need to sign...

Then, 3 and a half years later, the mediator added a few child-centered phrases followed by a long list of “assumptions.” The lengthy text provides several examples of “carrot” type statements mediators used to “muscle” parents into working towards agreement for the sake of their children:

Later opening: ... And my role is to help you identify issues that you want resolved and to walk you through the process of trying to resolve them. (My role is) to not take sides -- I am a neutral third party throughout this -- and (my role is) to really act as an advocate for your children throughout this process. Your role is to identify any issues that you want resolved and to help explore options to resolve these issues together and then to select the best options for your children. ... Now there's just one more agreement that you need to sign, and this is the agreement to mediate... I want to go over a few assumptions with you, these are assumptions that I will use in mediation. Number 1 is: I will assume that the two of you do not especially like each other or maybe even hate each other, or maybe are indifferent towards each other, but that as co-parents you can cooperate together to come up with an agreement that is in the best interest for you kids, that would be my first assumption. Secondly, I’m going to assume that both of you love your children equally and that both of you want the best for your child. Third, I will assume that your children need and love you, equally, too. All the research shows that regular, continuous contact with each parent is the ideal for a child and so that's what I will assume is ideal for your children as well. Fourth, children do not like it when parents put the other parent down, they just do not like it and they usually, usually that kind of behavior backfires on the parent who does the talking because the child will secretly start defending the parent who's being insulted, and she/he ends up looking like a saint more than anything else to the child. Fifth, children often exaggerate what happens at the other parent's house, you may have experienced this already where children like to play parents against each other sometimes. You know it’s just their way of testing the parent to see, ‘How committed is this parent to me? How safe is this parent going to keep me?’ ... Sixth, a parent is often more effective when she/he is alone with the child, rather than he/she is parenting in front of the other parent, ... you are most effective in your (own) parenting style. ... And then seventh, it's rare for a parent to be effective at all stages of a child's growth. Sometimes you know one parent will be better at the baby/toddler stage, another parent may be better at the teenage stage. But rarely is one parent better at all stages so just recognizing that may help you understand your co-parenting a little better. Okay, so I want to just talk about what your goals are as co-parents and the issues of trust. The way I do this is I, I want you to think about your children as young adults, and one of them comes to you and says 'I want to thank you so much for not taking sides, not making me take sides between my two parents because as a result I feel like I was loved by both of you and you know I feel safe and secure and how I did throughout my childhood.' That's what you would like your child to come say to you when they
are all grown up and so my question to you is what kind of co-parenting behavior do you two need now to make that happen?

Making family
Another reason for the extended quote above is to explain how co-parenting was presented as both an ideal and an expectation that any parent who loves their child will have. Most time spent during mediation sessions was focused on establishing (or modifying) a parenting plan and addressing any disputes over custody, such as choice of school, start of therapy, or use of medication. Given emphasis in mediation literature on how it enables divorce and separation, a surprise in this study was how rarely mediators engaged parties to discuss separation and how hard they worked to re-direct parties who brought this up. For example, a mediator advised at the end of intake (and in preparation for mediation, “Try to look forward and not look back. We're kind of starting from a fresh place, with no background, you have to let go of all the stuff that happened and look forward. That's all we can do; we can't change the past.” In response to a direct question from a divorcing parent about whether they would discuss the marriage, the mediator said,

Not the marriage, I just want you to talk about now that you are going your separate ways, you still have this co-parent responsibility that is going to be with the two of you for the rest of your lives. So, you are going to be like business partners ... You have the responsibility jointly to raise your kids. And, so any issues that involve that ... and then try to figure out ways to, you know, minimize the arguing and the yelling.

Although mediation takes place “in the shadow of the law,” the law was only raised in terms of court process. For example, the “stick” approach to warn that, “[y]ou don't want to go there” into legal decision-making as an uncertain and forbidding place. To support the substance of what mediators argued, they did not refer to the best interest of the child as a legal principle. Instead, they asserted cultural norms of good parenting out of love for children and vague reference to social science research. A common use of the latter was to assert that research shows how harmful parental conflict is on children. Thus, parents were presented with the best interest of the child standard as what “we know,” as a kind of natural law (of love) also found in social science research.

Party responses & cases that “never die”
In post-mediation interviews, parties were asked opening questions to define mediation and describe any previous experience in mediation or family court. These structured questions then quickly led to an open-ended format that followed the lead of the research respondent. Most interviews lasted about an hour, and most respondents took open-ended time to raise what they had not been able to vet during mediation. Over time, there emerged a pattern in the responses about an agreement to mediation in theory but not given specifics of their case. It was a pattern of “Yes, but---” across many parent interviews. While frustration in mediation or court process was expressed, it seemed that the most pressing concern (when there was one) was a defense for why the person was upset and/or unwilling to compromise and cooperate with the other parent. For example, one person repeated that it was, “just wrong” that the ex-spouse had developed a relationship with a person who had both been a friend and this person’s in-law. Another argued that while it was understandable that the spouse was dating as they divorced, it was morally wrong that he found himself in the marital home, babysitting,
while his wife stayed overnight with a new boyfriend. In both mediation and in court hearings, however, these hurts are not relevant to the question of what children need from parents, and how to keep parents focused on their children's needs. What was partly fueling hostility, therefore, could not be addressed in mediation. The next case presented in this article is an example of a what a mediator called, “frequent flyers” in family court.

1. **Case Six**: At the start of the mediation in this post-divorce case, the mediator had asked a miracle question about how the parents wanted to co-parent so that their adult child could enjoy their wedding day and thank them for being there. In the post-mediation interview, the mother expressed resentment towards the mediator’s question and retorted that, “We never co-parented when we were married.” She reported that she filed because her teenaged child was upset with the father's new living arrangement. He had just moved in with a girlfriend who was not only still married but who also still lived with her husband and their children. The mother filed to increase placement time with the child. The mediator addressed conflict over the parenting schedule by asking each party to bring two calendars to the next session. However, as happened in other cases that did not resolve, the source of tension was not about schedules per se. In a post-mediation interview, the father complained that the research interview was more helpful than the three mediation sessions, although they did help him understand what her “issues” were and how he might respond when they got to court. Follow up in this case led back to a court hearing with a GAL report and then a follow-up judicial review. Observations of this process are in the next section to show how cases might move from mediation back to court.

Moving the muscle back into court: Follow-up hearings

Following cases from mediation back to court meant one of two things: a positive affirmation of mediation success in which a court official converted mediated agreements into court orders or a potential doubling down of “muscle” through asserting the authority of the court. This section focuses on the latter. In some of these cases, parties had been waiting for this court authority, hoping that a GAL investigation would work in their favor. As one family attorney explained, mediation was a necessary step before GAL appointments could take place. Others blamed the other party or the difficulty of the situation. Given the heavy-handed view of court presented by mediators to the parties, and the warning of how different and difficult it would be, a surprise was the informality of hearings and lack of overt reference to law. Most litigants were pro se, and thus judges and commissioners commonly had to engage them directly. This required translating legal process and language into more familiar terms. The officials often started with a conversational tone and seemed to be in more of a social work than force of law position. Although court hearings were typically quite short, there were times when commissioners or judges spent an hour on a case, effectively offering a mini-mediation using a more directive and yet still facilitative approach. As a result, the general purpose, substance, and process of court hearings were remarkably similar to mediation sessions. One commissioner explained during an interview that the goal is to find a solution with the parties and if that fails, “I have to pick a parent.” Talking with mediators who also served as GALs provided a similar response. Neither judicial officers nor GALs seemed especially eager to make final decisions unless there was third party evidence (i.e. court records) that showed a clear reason to choose one parent over the other, such as a domestic violence conviction. As a court official complained, the court lacks resources for investigation,
which adds to pressure in making decisions based on an already “indeterminate” (Mnookin 1975) legal standard. Putting pressure on parents to work on their own is a practical response to a lack of clear legal answers. Although clear legal answers from a professional perspective were elusive, the message delivered to litigants was clear and repeated the framing and advice of mediators earlier in the court process. As encapsulated in a larger banner kept in one judge's court, CHILDREN FIRST.

Returning to “Case Six” in this article, the parties were back in court following a GAL investigation. The commissioner followed the GAL's recommendation to increase placement time with the father. However, this was not the end of the case. There was a follow-up hearing with a judge who said,

This is a case that is not going anywhere. Many who come to family court choose not to communicate around the best interest of the child. I'm not sure what you want from the court. I left my magic dust back in children's court and I do not have a magic wand I can use now... I will play the game any way you want. I can make a decision, and you can come back when the child is 2 years older. And, when the child reaches 18, it's over.

Afterwards, the judge explained to the researcher that the purpose of the speech was to help ensure that the parties did not come back to court. Following the case through the court file, the judge had failed to stop the case from returning but was right about the outcome. The case did come back after two years, and yet again two years after that (concerning child support). At that point, the child was aging out of the best interest purview.

What this and other “frequent flyer” cases show is how mediation may become part of an interplay of parties and family law, played out over many years. For example, one father in the study had one paternity case that was ending as the child turned 18 and was in court for another paternity case for a child who was a toddler. For these litigants, it is easy to see how the family court system participates in “making family.” Mandated mediation is one step within this overall experience. In the rare cases in this study that escalated to a contested trial, the process and outcome at times extended pressure to co-parent and therefore comply with the same pressure parents had received through mediation, as described next.

Best interest ordering in the court
In the study sample, there were two cases that went to a contested trial. At that point, the adversarial process may finally come into view for those who heard the message to cooperate and share parenting without connecting that message to state law. There will have been a GAL investigation and perhaps a child custody evaluation. There are witnesses and swearing-in rituals. Yet, the best interest standard persists as an effort to enable both parents to spend time with their children, and therefore a need to find ways towards co-parenting.

1. **Case Seven:** This was a divorce case in which the mother may have had a presumed upper hand due to the father's criminal record, her assessment of his drinking problem, and a record of driving under the influence (DUI). The court file shows that the parties had submitted a proposed parenting plan that included placement time with the father every other weekend. Although the parties agreed to mediate and did complete a session, the mediation was ultimately terminated, and a Guardian ad Litem appointed. In a post-mediation interview, the mother explained that she had had to “go over (the) head” of the GAL, and filed a child
abuse/neglect case in children’s court against the father on the grounds that he was unsafe
around the kids due to association with people who sold drugs and his drinking. The GAL
ordered supervised visits, which the father opposed. At the trial, each party swore under oath
that it was in the best interest of the children for the mother to have sole custody without
scheduled time with the father. However, the judge countered the mother, saying, “So what if
he drinks?” The judge also told both parties that, “You are in too much of a hurry to get
divorced,” and that, “Children are not like pairs of shoes that can be separated.” The judge gave
them a new court date in order to review their positions. By the next date, the parents had
submitted an order that reflected the earlier schedule of every other weekend for the father,
without supervision.

2. **Case Eight**: In the mediation study sample, this was a mediation success. Followed over time,
however, the case came back to court after two years and this time received a different
assessment. The first time the parties had tried mediation was during divorce. The study sample
captured the second referral. Although the mother did mention during the evaluation session
that the father had once run her off the road during the divorce, she did not mention any court
records of past domestic violence. They reached agreement regarding placement within two
sessions. Two years later, the father filed for contempt and modification of placement. In a
quick follow-up interview (and the custody evaluation report), the mother explained that she
had been compliant with mediation because she felt that the father would, “keep pushing until
he got what he wanted.” This time, however, there were different professionals assessing
whether mediation was appropriate. As also found in the child custody report, the GAL
assessed the case as not appropriate for mediation due to the fathers “coercive, controlling
behavior.” The case eventually went to a formal trial. Just before the hearing, the father
received a DUI while the two younger children were in the car. At the hearing, the judge told
the parents that they had a long history of conflict and he would not let them take the stand.
The judge said that this would just allow them to cause more damage and the judge’s job was
to, “Stop the bleeding.” The judge also found that each of the older children had become
alienated from one of the parents but that it was “not too late” for the younger children. The
judge therefore awarded sole custody of the older children based on parental alliance, and sole
custody to the mother of the younger children with placement time with the father. Following
the case through the court file, this was not the end of court actions (nor of DUIs).

Mediation as the shadow of the court?
It is easy to see how mediation has become the family dispute resolution workhorse – and perhaps the
closest that parties come to sensing the shadow of the law. In referring cases from the bench, judges
and commissioners explain that this will be a way for the parties to resolve their dispute and be able to
better co-parent. While parents are encouraged to use mediation, they are discouraged from relying
on court hearings. It was not uncommon for people to wait about an hour for their hearing only to
have it last a matter of minutes and result in a new hearing date. They did not know that these delays
were in part due to scheduling challenges of a busy court in which one, or both, parties sometimes did
not show. One attorney-mediator also explained that the extra time can give attorneys and guardians
ad litem time to negotiate privately before appearing in court. What parents did soon learn is that a
way to avoid delays in their case was to get through mediation. Mediation termination means going
back into court process, which can mean another short hearing with another scheduled follow-up date. As one commissioner explained, trying to resolve child custody cases can be like combing snarls. While not much may be accomplished through individual hearings, eventually the problems get smaller and more manageable. On the family court's website, mediation is offered as a way to both resolve problems and move more quickly than in relying on the court, and thus “reduce or eliminate need for court appearances.” Parents who file seeking the court to support their position over the other parent's wishes regarding placement orders must first get past mediation referral and convince officials that their case somehow merits more than combing through co-parenting tangles.

DISCUSSION

Making family can be hard to do

The case examples presented here are not intended to generalize across family court cases. As one attorney commented regarding the research, the complexity and variation not only between cases but within cases makes it hard to offer any generalization. For example, one family law attorney complained of a time when a judge changed from what they said in chambers to what they then decided and ruled in court. A challenge in assessing outcomes and in social science analysis is an observation by Robert Emery that, “there are no truths in family court” (Emery, 2011). Rather than attempt to make broad generalizations, research results in this article are offered as insights into why mediation ought to be examined as more than a litigation alternative, and within a “new” family dispute resolution paradigm forged decades ago. What I propose is that the “new” paradigm emerging out of family law reforms of the ‘70s and ‘80s has evolved into a family law project of making families centered on shared child-raising. To repeat a quote from a court commissioner, “We make new families.”

What does this mean? In today's family court, hostility over adult separation/divorce (and new adult partnerships) are not relevant. Parties who cannot suppress their hostilities are preventing Mom and Dad from laying down their swords to focus on what is most important, the children. For example, one commissioner expressed “disgust” (after the litigants left the hearing) in response to a couple's reliance on a computer program that acted as a third party for communication. The bigger strategic problem for parents in family court is that any concern raised about the other parent risks violating the expectation that parents will support each other. This could help explain why the mother in case eight did not more clearly raise concerns about drinking or domestic violence behavior during the mediation evaluation and mediation sessions (or court hearings).

In returning to old debates, study results also provide data for more updates. For example, Owen Fiss argued that alternative dispute resolution pushed cases out of the public eye and avoided judges making hard decisions. Family law today seems to have absorbed this problem rather than resolved it. That is, the law grants equal rights to each parent and presumes (in most states) some degree of shared responsibility if not placement. As a court official explained, much of the pressure to co-parent is not based on the best interest standard as much as how it is “grafted onto an adversarial process” in which both parties can make equal legal claims. In reviewing past debate, a Family Court Review article from 1969 points out that hostility is not only derived through adversarial legal processes. Entitled, “We are Expecting Too Much of Marriage,” Judge Lindsley argued that professional hope to reduce
parenting conflict places too much blame on the law and insufficient recognition that marriages are frequent sources of conflict, and that children tend to exacerbate rather than ameliorate marital tensions (Lindsley, 1969). Along similar lines, John Dewar wrote more recently of “The Normal Chaos of Family Law” that comes from the “normal chaos of love” (Dewar, 1998). An expectation of parental hostility helps explain problems brought to professionals (in mediation and court hearings) that were mainly about parenting decisions and division of labor in child-care.8 Ironically, this means that an intervention intended to keep families out of court has also brought the state into the family (making) business.

What helps to resolve family cases? In examining which cases ultimately resolved, what seems most important for understanding parent perspectives was how willing they were to accept the family dispute resolution paradigm, and how able they were to uphold it -- given their perspectives and circumstances. A question for further research and debate is how public resources (such as through court services) might be used to support them (see Huntington, 2014).

Study limitations
Study results are not meant to fully describe one family court mediation program, nor to generalize all family court programs or the use of mediation by all litigants. Other court programs provide more services, which may improve or change outcomes. And, since most mediation cases were initially collected during 2011 and 2012, the foreclosure crisis created extra pressure for some (at least three out of 14 divorce cases). In addition, ethnographic field observation can risk a Hawthorne effect. That is, in some cases family court professionals may have amplified their efforts to support co-parenting given that they knew the research was on the family court mediation program and sometimes (erroneously) presumed that the study was an evaluation of family court services. In addition, focus on mediation cases means that sampling did not include all divorce cases involving child custody disputes, and excluded amicable divorces in parenting plans were devised outside of the court process. The best measure of success in the family dispute resolution paradigm is not in how mandated mediation works but in how many cases are never litigated in the first place (research in Australia found that 70% of separating parents did not use professional services (see Smyth & Moloney, 2019). In addition, there may have been court trials fought by “gladiator” attorneys, but this was never observed. Further study could also examine more closely the litigants who refused to attend the mandatory evaluation session and/or those who attended the evaluation session and refused the voluntary (at a cost of $200) mediation sessions to better appreciate how and why parties reject mediation in court settlement. Given a focus on collecting mediation cases, data regarding this is limited to the 100+ hours of evaluation sessions and three parent interviews with parents who attended evaluation but did not continue to mediation. Further study is needed to continue examination of how publicly mandated mediation becomes part of child custody disputes, dispute resolution, and the making of families through family law interventions.

CONCLUSION
While the language/framing of family separation is still grounded in divorce, divorce and its aftermath provides only a partial explanation for why cases are filed, how they resolve, and why a small number seem to “never die.” Meanwhile, mediation is asked to do more than during the ‘80s and ‘90s of previous family court mediation research despite ongoing budget pressures on resources. Back then,
its main role was in offering a divorce litigation alternative. Today, it is the family law system's “workhorse.” Results from this research suggests that the work done is twofold: untangling snarls in co-parenting conflict and sending a message that cases ought not to come back. The latter may seem harsh, but it was also observed in this research as a recognition that ultimate power and control over child-raising rests with the parents. As one judge said, “When they come for a divorce, I can help them. After that, I can't help them.” The shift from marital fault to the best interests of the child standard, coupled with great public support for child protection, seems to have put family court professionals into a position of child protection while also being constrained by parental rights and lack of resources to take time to work through conflict. We live in a society in which a judge might rule on placement orders but will not have the power to enforce what may require daily or weekly cooperation over a span of years. What was observed in these cases, therefore, was a public system with both great power and great helplessness. Whether the state truly had the ability to determine or help was dependent, in part, on how parents interpreted final orders and determined whether to file again at a later date. Therefore, professionals might want to consider adding another dimension to case assessment, screening, and calls for differential case management (DCM) (see Salem, 2009), which is parental alignment with the family dispute resolution paradigm.

Policy and practice implications
The current system relies on parents to know they can refuse mediation once past the mandatory first session, and it offers exceptions only for cases in which professionals assess domestic violence and perhaps alcohol and other drug abuse (AODA) and mental health issues. What if the parents in this study had been given more opportunity to reject mediation, experience the court system option directly, and also know that they could always return to mediation? This might put both the court system and the parents less on the defensive. Meanwhile, mediation and court failure to fully resolve conflict ought to become a professional and policy presumption. U.S. culture values the privacy of the family, and this means that the state has limited power over how parents apply policy and professional directives to co-parent for the sake of their children.

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CONFLICT OF INTEREST
I have no conflicts to disclose.
REFERENCES


Notes
1 For a review of changing legal norms from sole to joint custody, see Meyer, Cancian, & Cook (2017).
2 Support for this claim of “de-legalization” (pp. 364, Singer, 2009) can be seen in shifting language; yesterday’s child custody litigation is now approached as family dispute resolution. For a mediator argument in favor of “muscle” mediation, see Ferrick, 1986).

3 In the early days of family court pilot studies, court staff could spend several hours per case (e.g., Milne, 1983). Today, however, family court programs may rely on contracting out to private mediators who are paid per hour or mediation case.

4 In their analysis in Divorced from Reality, most discussion of family court mediation is limited to how it provides a litigation alternative. Their main concern about how the general paradigm operates is thus a critique more of family law and family court process than of family court mediation programs. Nevertheless, results from my research study suggest that their concerns ought to be part of analyzing the role and impact of mandated mediation in family dispute cases.

5 In the participant observation research method, the researcher engages (or simply observes) directly and then to follow-up with observation and ongoing, informal dialogue with research participants. Data are collected as field notes, which are then developed into analytic memos as insights and follow-up questions are shared and answered with research participants (Corbin & Strauss, 2014).

6 Given the small sample typical of qualitative studies, the study sample case statistics are compared with available mediation program statistics to help evaluate the representativeness of the sample. Then, each mediation case is studied through direct observation and recording (when permitted). The initial research questions for this portion of the study were taken from past research, and included comparing mediation as used in practice with mediation in theory and best practices, and evaluating mediation using such established measures as agreement rate and client satisfaction.

7 The initial strategy was to sample cases by using a more organic method of showing up at court and waiting for referrals and evaluation session outcomes. However, this approach yielded a modest number of cases to observe. This was due to no shows for the evaluation session, one or both parties declining mediation services, failure to pay for mediation sessions, mediator reluctance to allow observation of mediation sessions, and scheduling challenges. What yielded more cases was the kindness of several mediators who not only provided research permission but also contacted me as they scheduled cases.

8 Given that there is no longer a legal interest in marital fault, any space to work through a breakup required extra time and expertise. Professionals who offered this, such as the mediator who conducted individual intake interviews, are doing this as pro bono work.