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Ethnographic Observations of a U.S. Family Court Mediation Service #ADRRN18

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BY ASSOCIATE PROFESSOR ALEXANDRA CRAMPTON, MARQUETTE UNIVERSITY

This post celebrates the start of our 7th annual Australian Dispute Resolute Research Network meeting today at the Faculty of Law, University of the Sunshine Coast. Please follow the papers at the workshop on Twitter via the hashtag #ADRRN18 and via our [*Twitter*](https://mobile.twitter.com/adrresearch?lang=en) account. Alex will be presenting this paper today.

In the U.S., most family law is determined at the level of each state.

ADR was first used in family court for marital reconciliation [(Salem 2009).](https://law.marquette.edu/assets/news-and-events/courtadr/salem-triage.pdf) By the 1960s, several states provided such counseling through court services, and some programs became mandatory (Foster 1966).



During the 1970s, as law reform introduced “no-fault,” divorce, conciliation services transitioned to mediation services for resolving child custody disputes [(Salem 2009)](https://law.marquette.edu/assets/news-and-events/courtadr/salem-triage.pdf). Much of the focus was on reducing acrimony between parties by limiting the adversarial approach of formal legal procedures [(Murphy and Singer 2015)](http://nyu.universitypressscholarship.com/view/10.18574/nyu/9780814708934.001.0001/upso-9780814708934).



In the US, most empirical research on child custody mediation has come from studies of court-based divorce mediation services (e.g. [Kelly 2004)](https://onlinelibrary.wiley.com/doi/abs/10.1002/crq.90). The focus was on comparing mediation with court. Family court mediation scholarship continues to center on divorce mediation (e.g. [Shaw 2010](https://onlinelibrary.wiley.com/doi/abs/10.1002/crq.20006)) The resulting literature is bifurcated between findings of positive results ([Emery et. al. 2001](https://www.researchgate.net/profile/Robert_Emery3/publication/11945051_Child_custody_mediation_and_litigation_Custody_contact_and_coparenting_12_years_after_initial_dispute_resolution/links/541185830cf29e4a23296aab.pdf)) and criticism (Murphy and Singer 2015).



As mediation became mandatory, [many critics left the field](https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?referer=https://r.search.yahoo.com/_ylt=AwrC3PEc9.JbHlQAkgAPxQt.;_ylu=X3oDMTByOHZyb21tBGNvbG8DYmYxBHBvcwMxBHZ0aWQDBHNlYwNzcg--/RV=2/RE=1541629852/RO=10/RU=http%3a%2f%2fdigitalcommons.law.scu.e). Since the 1990s, studies have shifted from ADR/court comparison to identifying best practices. The most comprehensive recent study was a [2013 court ADR study in Maryland](https://mdcourts.gov/courtoperations/adrprojects).

Current, empirical research into child custody mediation in the US is [rare](https://holtzlab.psych.indiana.edu/research/ballard%20et%20al%20pppl%20cims%20paper%202013-28074-001.pdf). ADR studies involving direct observation, recording, and interaction with mediators and parents are even [more scarce](https://mdcourts.gov/courtoperations/adrprojects).

I began an ethnographic study of one family court mediation program in a large Midwestern, metropolitan (population 1.7 million) area in 2011. There are five family court commissioners and ten commissioners who conduct hearings regarding divorce, paternity actions, child custody disputes, child support enforcement, and domestic violence (as a civil action). There are about 11,000 new court filings each year, and about 800 cases of parental disputes that are referred to mediation. The agreement rate is about 50-55%. The mandatory mediation program fulfills a state law requiring that parents who file disputes regarding legal decision-making or child residence must first attend mediation before continuing in the court process. Exceptions can be determined by a judge or court commissioner, such as in family violence cases. The next step in the court process is appointment of a Guardian Ad Litem (an attorney) who makes an investigation and recommendation to the court.

I naively began my research questions where the empirical data largely had left off, which includes a [presumption that mediation is a court trial alternative](https://www.afccnet.org/Portals/0/The%20Current%20State%20of%20Court%20Connected%20ADR.pdf). My research design sustained this presumption, focusing on direct observation and recording of individual mediation sessions as separate from court process.



My research sample has forty-two mediation cases, thirty-six parent interviews (which includes fifteen pairs of parents), and ten mediator interviews. However, it was soon evident that my initial focus on mediation cases and case outcomes reflected a professional perspective, in which mediation is distinct from the overall legal process. Parents, meanwhile, were experiencing mediation more inchoately as it became part of their lives—and typically as a mandatory process embedded within a legal decision that one party had requested the court to make. Over time, the work has become more ethnographic, requiring greater immersion within court hearings, ongoing conversation with professionals and informal follow up with parents.

John Dewar [noted](https://onlinelibrary.wiley.com/doi/pdf/10.1111/1468-2230.00157) back in 1998 that family law is quite chaotic. My analysis has turned to sorting through the chaos of mediation as embedded within family law, which, in turn, is embedded within an even larger chaos of parenting and family. This was once famously [described in *Zorba the Greek*](https://www.youtube.com/watch?v=cHAqdZ2f5cM) as “the full catastrophe.”

Reflecting back to the original goal of the family court as a I find that mediation not only brings parents in conflict together but also brings them into a court intervention that neither party sought and which therefore can bring mixed results.

The old ADR debates centered on benefits and risks as if mediation itself was either a generally good intervention or not. And this evaluation was generally within comparison with court-based decision-making as if the court trial was a common option (e.g. Pearson 1982).

Today, however, the court trial is kept from parents, in part by using mediation as a “speed bump.” In general, family court mediation persists as a conciliation service, attempting to shift parties from an adversarial stance to one of cooperation or at least parallel parenting. Although parents are no longer encouraged to marry or stay married, they are expected to share parenting, which brings them back together.

The most surprising outcome of this research, then, has been how mediation brings parties back to a nuclear family form. The difference from the 1960s is that parents are mandated to mediation rather than marital conciliation – and the similarity is a concern for child welfare (written in law as the child’s best interests).



This pressure is met variably by parents who also vary in how savvy they are about their options for refusal. This means that family court mediation is not inherently empowering or coercive but rather depends upon the goals and interests of parents as they engage in conflict through a legal case that has been diverted to mediation.

My current work is to update the old research frame of evaluating mediation vs. court to better analyze the implications of ADR as embedded within family law, family court process, and the “full catastrophe” of family.

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