

THE INCLUSION OF / FOCUS ON CHILDREN IN FAMILY MEDIATION: A REVIEW OF STUDIES AND FUTURE PROPOSALS

Carles Rodríguez-Domínguez¹ y Marina Roustan²

¹FCPEE Blanquerna. Universidad Ramón Llull. ²Universidad Autónoma de Barcelona

La mediación es un modelo para la resolución de conflictos respaldado por la comunidad internacional en Derecho de Familia, para ayudar a los progenitores que buscan soluciones a problemas familiares presentados en casos de custodia de menores. El objetivo del artículo es una revisión sobre las ventajas y/o desventajas planteadas en estudios que incluyen a menores en sus intervenciones, frente a intervenciones centradas en el menor en procesos de mediación familiar. En este estudio se realizó una revisión de estudios de Australia, Nueva Zelanda, algunos condados de EEUU, algunos estudios europeos; meta-análisis y estudios de revisión; investigaciones 'inclusivas del menor'; guías internacionales que apoyan escuchar al menor y estudios que plantean críticas. Aunque la mediación en otros países tiene cuatro décadas de existencia, en España surge a partir de la promulgación la Ley 1/2001 de Mediación Familiar en Cataluña, a la que prosiguieron otras normativas autonómicas, quizá por ello, no existan aún suficientes artículos en España. En algunos países se está produciendo un nuevo paradigma tendente a la inclusión del menor tras los hallazgos favorables en los procesos de mediación familiar, aunque es necesario un enfoque múltiple y flexible en la intervención en mediación familiar.

Palabras clave: Mediación familiar, Custodia de menores, Inclusión del menor, Mediación centrada en el menor.

Mediation is an established model for conflict resolution, backed by the international community in relation to family law, to help parents seeking solutions to family problems in child custody cases. The aim of this article is to review the advantages and/or disadvantages presented in the studies with child-inclusive or child-focused interventions in family mediation processes. In the present research, we carry out a review of studies realised in Australia, New Zealand, some counties in the US and in Europe; meta-analysis and review studies of 'child inclusive' investigations, international guidelines that support listening to children and also studies that criticise it. While mediation has existed for four decades in other countries, in Spain it has only arisen since the enactment of Law (1/2001) of Family Mediation in Catalonia, followed by other local regulations, which explains why sufficient studies might not yet exist. In some countries a new paradigm is emerging, aimed at the inclusion of children due to the favourable findings in family mediation processes, although a multiple and flexible approach in the field of family mediation intervention is necessary.

Key words: Family Mediation, Child Custody, Child-Inclusive, Child-Focused mediation.

Family mediation (FM) is an extrajudicial procedure, which was established in the 1970s to resolve conflicts and which has been applied to various areas of civil and criminal law, in order to circumvent the excessive judicialisation of conflicts.

An instrument of great social and legal significance, its development, like the rest of *Alternative Dispute Resolution*, responds to the need to improve access to justice as a political commitment of the European Union (García & Vazquez, 2013). The international community in relation to family law supports FM to help parents seeking solutions to complex family problems in child custody cases (Rigdon, 2013). According to Ortuño:

“in today’s society the cross-border element is no longer the exception but has become common and usual in both the business world and in interpersonal, family or social relationships. (...), many of the agreements reached in mediation will become effective at some point in countries other than that in which they were adopted and, therefore, they will circulate beyond the borders of a State” (Ortuño, 2005, pp. 74).

FM helps to finalise the agreements regarding the organisation of the regulatory agreement of the process of separation or divorce and the Parenting Plan (PP) that directly affects the cohabitation of the children with their parents. It returns to the parties the power to decide on the resolution of the marital crisis, favouring negotiated solutions (González-Capitel, 2001). FM was legally regulated in Catalonia (Law 1/2001), followed by other regional regulations, the approval of Law 15/2005 of 8

Correspondence: Carles Rodríguez-Domínguez. FCPEE Blanquerna. Universidad Ramón Llull. Císter, 34. 08022 Barcelona. España. E-mail: carlesrd@blanquerna.url.edu



July amending the Civil Code and the Civil Procedure Act, and Law 5/2012 of July 6, on mediation in civil and commercial matters.

FM is defined as *'the alternative voluntary resource for resolving family disputes by way of mutual agreement with the intervention of an impartial and neutral mediator'* contained in Law 15/2005 of 8 July, amending the Civil Code and the Criminal Procedure Act. This definition is deemed descriptive and insufficient for the requirements of this paper. From the viewpoint of communication, FM could be defined as *a structuring process resulting from the interaction between parents, children, professionals, different communication practices and processes, and social institutions*. This structuring process constrains and legitimises, whilst establishing, shaping and giving meaning to the communication. The incorporation of the children, parents and professionals underscores that the social processes are experienced by reflective subjects who participate in the social change.

The Hague Conference on Private International Law (HCCH) and the United States Department of State actively promote the use of FM in the Hague Convention (HC, 1980) on the Civil Aspects of International Child Abduction. Consequently, there is a growing demand for mediators with experience in international custody. In the *'Mayabmun report'* by Unicef (2013), there is a serious warning, regarding the evidence that parental abduction is a global problem, "despite the treaties in 2013, it is recorded that there are more than 72,000 cases annually in the United States alone. From Canada to Argentina there are 3,384,000 children that have been abducted internationally." (Unicef, 2013, p. 16; cited by Rodríguez-Domínguez, Jarne & Carbonell, 2015).

According to Rigdon (2013), Vigers proposes that mediators in this area require special skills and the ability to negotiate, and they must be trained in intercultural conflict resolution and have knowledge of the culture of the parents; the mediators should be aware of the dangers of intercultural conflicts in FM (Vigers, 2006, 2011, cited by Rigdon). Vigers recommends the establishment of a specialist system for FM that is able to respond to the specific challenges inherent in the system, such as the need to implement the voluntary agreements.

Vigers believes FM is the best mechanism to enable the child's voice to be heard and considered appropriately and, depending on the age of the children, proposes the *child-inclusive approach*, consulting the child's opinion – since the decisions affect their wellbeing – instead of the

focused method which does not include the child (Rigdon, 2013). Both methods require a trained mediator to interview the minors, preferably a psychologist, since various professionals (lawyers, social workers, etc.) are involved in FM.

"In international family disputes concerning children, the child's participation in the resolution of the dispute can serve different purposes. A) Listening to the views of children provides a deep understanding of their feelings and desires, which can be important information when it comes to determining whether a solution is in the best interests of the child. B) It can open the eyes of the parents to the child's wishes and help them to stand back from their own positions towards a common acceptable solution. C) The involvement of the child respects the child's right to be heard whilst at the same time providing an opportunity for him or her to be informed about what is happening" (Guide to Good Practice Mediation, HC 1980, pp. 69-72).

A meta-analysis that included five studies (Shaw, 2010) showed that FM was quantitatively superior to contentious litigation in the treatment of divorce cases, with a more positive effect than litigation in conjugal relations; it increased the parents' understanding of the children's needs. It was observed that FM and the adversarial system share the same goal: to present the court with a solution agreement. The two processes are similar in that they require personal revelation of the essential issues in the process, they use experts (specialists, lawyers, mediators) and they must be included in the agreement (Erickson, 1988, cited by Shaw, 2010).

In a meta-analysis, Amato and Gilbreth (1999) reported on 63 studies that examined the relationship between the noncustodial parent and the wellbeing of the child. Paying maintenance was positively associated with the wellbeing measures of the children. The frequency of contact with the non-custodial parent was not related to the child's results in general. Two additional dimensions of relations *'parent-child-feelings of closeness and parental authority'* were positively associated with the academic success of the children and negatively associated with externalising and internalising problems in children.

One of the main methodological problems in the study of FM is the need for a systematic and correlational analysis as opposed to an analytical methodology (Gámez, 2007). Each mediator must listen carefully to



perceive how the partners give meaning to their experience. Knapp points out that the importance of the story does not lie in the events described, but in the articulation of their meaning, which means that if a life is articulated in a series of events, it is not determined by them, because such events are existential (Knapp & Daly, 2002). Dialogic cooperation is needed if effective mediation is to be achieved (Roustan, 2010). These determinants can mark stereotyped or ideological prejudices, requiring evaluation in scientific studies. The international literature has generated a broad debate on this issue with various positions in favour of 'including the minor' or 'focusing on the minor' (Birnbaum, 2009).

In Australia, McIntosh (2007) evaluated an inclusive model of FM whose results included the cooperation of the parents post separation; conflict management; the relationships between the parents and the children; the nature and management of everyday organisation; the wellbeing and adaptation of the children; the children's understanding of the parental conflicts; and the perception of the conflict between the parents and the communication with the children. The study initially showed high rates of deficient communication between the parents, and conflicts between them, and it noted that the children experienced significant psychological disorders at the beginning of the intervention. However a year after the FM, there was a significant and lasting reduction in conflict. Most parents reported an improvement or a resolution of the difficulties that led to the FM. The children, at all ages, showed less frequency and intensity of child-parent conflict, and a lower level of anxiety in relation to the conflicts of their parents. The minors reported experiencing greater closeness with their parents and greater emotional availability of the latter; the children were more satisfied with the parenting plan and less willing to change it (McIntosh, 2007). This research provided evidence to support the implementation of the 'child-inclusive' model of FM. The method provided the minors with the assurance that their views would be considered significantly regarding the way their parents resolved their conflicts. This form of FM was associated with a significant level of repair to the parental

relationship and improvement in the parent-child emotional availability, the parents and children remained more satisfied after a period of one year after the mediation (McIntosh, Wells, Smyth & Long, 2008). Another study found that the long-term perspective -the result of the child-inclusive intervention- was significantly better for the children and the parents than with child-focused intervention (McIntosh, Wells & Long, 2009).

In New Zealand, a study explored inclusive FM examining the parent-child relationship regarding the parenting plan agreements. The results showed that the children reported that they liked to be heard and they were more satisfied with the parenting plan, expressing their desire to participate in the restructuring of their family relationships. FM was successful in reducing the conflict between the parents, increasing the conciliation and cooperation, and increasing the awareness of the negative effects of parental conflict and the importance of cooperating for the children (Goldson, 2006).

Previous studies emphasise the importance of including children in the decision-making process. The type of inclusion is less clear however (Birnbaum, 2009), as there are differences regarding how the children are interviewed by non-specialist mediators and specialised professionals, such as the expert psychologist in parenting coordination (Rodríguez-Domínguez & Carbonell, 2014).

In the USA, more than one million children are affected each year by the separation or divorce of their parents, so interventions that are palliative of the negative potential derived from divorce are necessary for the children (Ballard, Holtzworth-Munroe, Applegate, D'Onofrio & Bates, 2013). According to this study, child-inclusive and child-focused interventions showed positive results compared with mediation-as-usual (neither inclusive nor focused on the child): the parents reported more about learning something useful, and the mediators preferred child-inclusive and child-focused cases. In the cases that included the child, and in the child-focused agreements, more co-parenting time was obtained for the noncustodial parents, and there was a higher probability of including positive arrangements for co-parenting, including communication between the parents and other provisions assumed to be beneficial to the children (Table 1).

Critics argue the existence of conflicting objectives between protecting the minors from emotional harm and defending the litigants' rights in the process when stipulating the children's desires (Atwood, 2003). They claim that although there are arguments to advance the

Child-inclusive method	Child-focused method
Child-informative method	Method that does not include the child



thesis that children have rights, these rights are relational, because it is the parents who have the duty and the legal rights of the minors (Guggenheim, 2003). It has been suggested that children may be manipulated by a parent to take sides in a lawsuit for custody and the visitation regime, which creates anxiety and/or conflicts of loyalty (Emery, 2003; Garwood, 1990; Gentry, 1997; Saposnek, 2004), or that the participation of the children could undermine the parental authority and cause a negative intrusion to the children and the family relationships (Emery, 2003; Lansky, Manley, Swift & Williams, 1995), or that the child says what they believe the parent wants to hear, which would not benefit the child (Garrity & Baris, 1994). The child, trapped in the conflict of loyalties, often suffers from emotional turmoil, derived from the unresolved conflicts of the parents (Rodriguez-Dominguez, Carbonell & Jarne, 2014). Entrusting children with excessive power rather than helping them to develop strategies for stability in the separation of parents may overload them with inappropriate responsibility (Warshak, 2003). The results reported by Garwood (1990), Goldson (2006) and McIntosh (2000; 2007) suggest that children would not benefit from being involved in FM processes when, for example, the parents cannot make use of the positive feedback they are given; where the conflict is very high; or where the parents have mental health problems that prevent a positive working relationship. Not all children necessarily want or need to be heard, so unless there is a request from the child or the parents to be interviewed, there is no reason to do so (Kelly, 2003; Saposnek, 2004). A parent could use the child's wishes as a means to reach an agreement or, conversely, they could argue that the child has been affected by the mediation, thereby hindering the process (Emery, 2003; Simpson, 1991). The child may also feel unable to express their feelings if they imagine repercussions or their parents' irritation regarding their ideas and therefore they should not be confronted in that position (Drapkin & Bienenfeld, 1985). A multiple approach is necessary in the field of child participation (Kelly, 2004). The victims of a poorly resolved divorce are the children; in some cases they need to be heard; children can *mobilise* far more than the FM itself can; before excluding any element of the family system, they must first be included (Saguar & Viola, 2011). Belonging to a family means participating, through discourse and behaviour, in the family story. The systemic perspective of Bateson (1951),

underlined the importance of the story and communication in order to exist. Based on the analysis of communication, Bateson maintained that the discontinuity between a class and its members is continually and inevitably breached, and that a pathology may be established when there is a logical breach in communication.

The literature has shown that adults who suffered the divorce of their parents during their childhood could explain the observed high levels of depression in relation to their own marital history (Amato & Cheadle, 2005; Hurrell et al., 2006, quoted by Uphold-Carrier & Utz, 2012). The study by Uphold-Carrier and Utz (2012), showed a difference which offers an understanding of why parental divorce and marital status affects subsequent depression and illustrates the importance of the age of the children and adolescents in relation to the effects of their parents' divorce and their marital status. The study related the child's age and experience regarding the divorce of their parents, which led the children to think about divorce and become involved in conflicts more often, compared to those children whose parents were still married (Kessler et al., 1992; Webster, Orbuch & House, 1995, cited by Uphold-Carrier & Utz, 2012).

In the Netherlands, a study indicated that about 20% of children had no contact with the non-resident parent after the divorce of their parents (Eikelenboom, Harmeling, Stokkers & Kormos, 2005). Although there were several reasons for the separation, the authors note that one reason could be the process of '*parental alienation*', when the child disparages or excludes the non-resident parent. They distinguished four aspects: two of them with regard to alienation due to the resident parent and two in relation to estrangement due to the minor. Their findings support the importance of FM, because they found that '*parental alienation*' was significantly more frequent when no decisions were agreed regarding the children they had together, and these matters were settled in the courts (Eikelenboom et al, 2005).

In the US there are different parenting guides (e.g., the Missouri Parenting Plan Guidelines, the Michigan Parenting plan, Arizona's Guide for Parents Living Apart, the Indiana Parenting Time Guidelines). For example, the Indiana Guidelines identify and instruct the parents regarding the basic needs of the children: to know, and understand, that the decision of the parents to live apart is not the fault of the child; to develop and maintain an



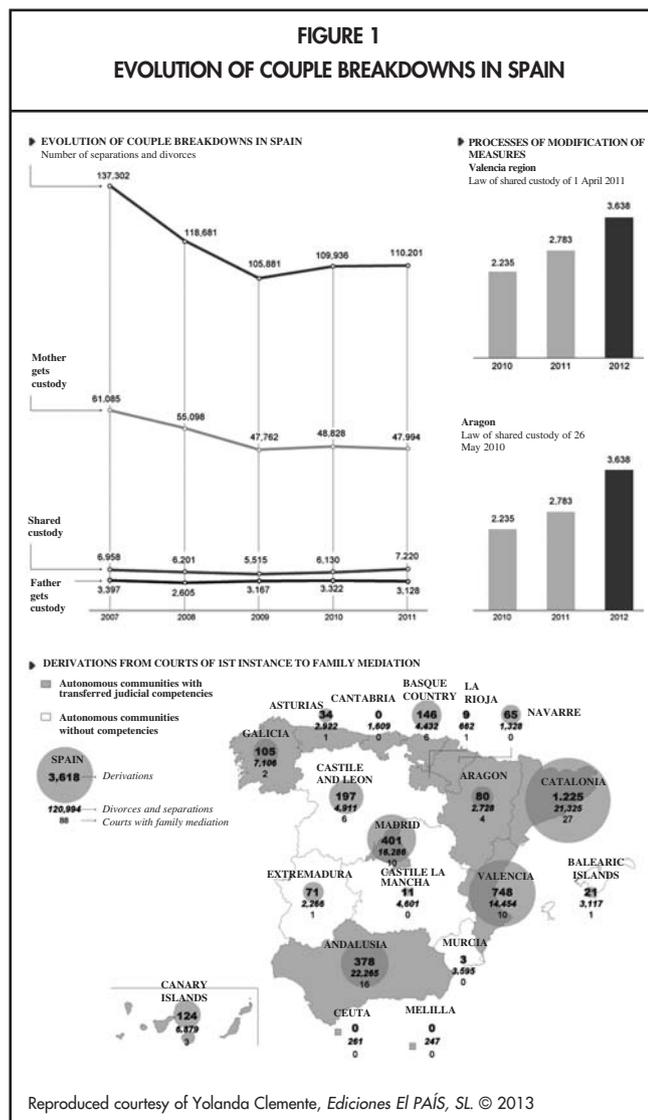
independent relationship with each parent and permanently sustain the attention and guidance of each parent; to release the children from having to align with either parent and protect them from the parental conflict; to maintain a safe and relaxed relationship with each parent without being placed in a position to manipulate the other parent; to be able to enjoy spending time consistently and regularly with each parent; the right to be financially supported by both parents, regardless of the amount of time that each parent spends with the child; to be physically safe and properly supervised by each parent; to develop and maintain meaningful relationships with other significant adults (grandparents, step-parents and other relatives) as long as these relationships do not interfere or try to replace the primary relationship of the

children with their parents (Indiana Rules of Court, 2013).

Considering the previous studies and the EFPA reference (2014) on 'the fundamental role in the protection of human rights' played by psychologists who intervene in 'prevention, strengthening resilience and the promotion of integration strategies' to improve children's human rights, aware that 'even in Europe the enforcement of human rights is being restricted' (EFPA, 2014), this study of review and reflection is justified. Further assurance is provided by the data in Spain: on the one hand, the derivation of the courts of first instance to FM has, in its short history of existence, been well implemented (see Figure 1), as stated in a report (CGPJ, 2013), 47% of the FM performed involve some kind of agreement – partial or total – which is considered excellent, referring to family agreements that may mean a path of dialogue that materialises in subsequent lower conflict in proceedings. Even so, the results offered by the Public Administration itself indicate the need for more training and improvement of the FM process in our country. In the family courts in Malaga, in 2013, 44% of the mediations that were initiated reached agreements (CGPJ, 2013); in Catalonia, in the same year, out of 3097 mediations that were begun, carried out by 1308 mediators, only 14.14% were able to reach agreements (GenCat, 2013). There are still insufficient national studies that analyse the insertion of the child in the FM processes.

EUROPEAN MODELS OF MEDIATION

There have been several models based on the orientation or purpose of mediation: a) based on the negotiation and settlement of assets, prioritising reaching an agreement, underestimating the risk considerations (Fisher, Ury & Paton, 1991); b) the cognitive-systemic style of Milán or the Haynes system, influenced by the systemic theories of the school of Milán (Haynes, 1981); c) therapeutic mediation, which attempts to heal the emotional trauma and create a plan of action to achieve agreements, aims to restore emotional well-being, focuses more on the family as a whole, and seeks to transform the post-divorce relations related to the children (Irving & Benjamin, 2002); d) transformative mediation, which aims to empower each of the parties with the greatest possible recognition of the needs and interests of the other party and their points of view (Bush & Folger, 1994); e) humanistic mediation, backed by the principles of humanistic psychology and person-centred therapy, is a non-directive and dialogical model which aims to heal the





trauma and achieve peace, emphasising assertiveness and seeking to neutralise the negative consequences of the conflict (Umbreit, 1995); f) narrative mediation, which aims to guide those involved to tell their stories or life events; from a theoretical position conflict is assumed as a social construct that is created within individually and subjectively intensified language. The mediator's aim is to deconstruct and minimise the saturation of the conflict, to facilitate the establishment of an alternative story for both parties, in order to rebuild together a new version capable of reaching agreements (Winsdale & Monk, 2001).

These mediation models can be applied to various types of conflicts, but the therapeutic model, which emphasises the emotions, the treatment of trauma with a systemic approach and an agreement plan, seems to be the most appropriate for dealing with family conflicts (Pali & Voet, 2009).

FINAL DISCUSSION

FM is an established model for conflict resolution, with four decades of history and just over a decade in our country. This study has focused on research which has been carried out in Australia, New Zealand, some counties in the USA and a number of European studies. We have included communication and epistemological studies (Bateson, 1951; Gámez, 2007; Knap & Daly, 2002); meta-analysis (Amato & Gilbreth, 1999; Shaw, 2010); review studies (Birnbaum, 2009); 'child-inclusive' research (Ballard et al., 2013; Drapkin & Bienenfeld, 1985; Eikelenboom et al., 2005; Goldson, 2006; McIntosh, 2000, 2007, 2008, 2009; Vigers, 2006, 2011); international institutions that support listening to the voice of the child (HC, 1980); and critics (Atwood, 2003; Emery, 2003; Garwood, 1990; Garrity & Barris, 1994; Gentry, 1997; Guggenheim, 2003; Kelly, 2003; Lansky et al, 1995; Rodríguez-Domínguez & Carbonell, 2014; Saposnek, 2004; Warshak, 2003). A paradigm shift tending towards the inclusion of the child is perceived after the favourable findings of FM processes in some European countries, New Zealand and Australia. The critical voices, please note, hail mostly from the US, in particular Arizona, so cultural differences and the different laws of the States should be taken into consideration. Moreover, the criticism comes mainly from the decades of the 80s and 90s, while in the 2000s the studies provide further support to the evidence provided from the child-inclusive research.

According to Kelly (2004), a multiple approach seems necessary in the field of intervention in children: 1) The type of intervention will need to be designed depending on the variables and circumstances that occur in the dissolution of the couple, where the method chosen meets certain specific conditions adapted to the individual case. It is based on the assumption that FM is a process of structuring transformation, which must consider the child's opinion, appropriate to their age (Vigers, 2011), so they can understand. It seems that there is agreement (Goldson, 2006; McIntosh et al., 2008, 2009) to include children between the ages of five and seventeen. It is consistent that, the hearing with the child should be realised by a specialised psychologist, due to their training and experience in evolutionary and developmental psychology.

- 2) Adolescents, in the stage of development and transition to adulthood, require parental support from their adult role models. Parents must, amongst other things, help adolescents in the appropriate balance between their need for independence and their need to be an active part of their family. This goal requires spending time and providing availability in the parent-child relationship, in order to provide skills that the adolescent can use later as an adult. The rules shared by the two parents must be clear, and parenting plans should include the necessary changes according to the age of the children. Negotiation, flexibility and limits that must not be crossed prevail. Adolescents should be included in FM whenever possible in order to consider their opinions.
- 3) When there are situations of high parental conflict or severe cognitive difficulties, alternatives such as parallel mediation or parenting coordination are better (Rodríguez-Domínguez & Carbonell, 2014).

Based on the studies reviewed, it seems an appropriate first choice to include the views of the children in FM, the focused method would come in second place and parenting coordination would be appropriate in cases of high conflict. According to the CGPJ (1986), mediation has proven to be helpful even when no agreements were reached, as improved communication and a decrease in tension between the parties has been confirmed. Given its short history in our country, there are still insufficient studies that have carried out *post hoc* monitoring of the parents. New studies comparing the results of intrajudicial FM and extrajudicial mediation are needed.



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