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Family Justice Services Division

**Characteristics and Outcomes of
Dispute Resolution Processes
Related to Family Justice Issues**

A Review of the Literature

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EXECUTIVE SUMMARY

This report presents the findings of a literature review which examined the outcomes and factors related to outcomes of dispute resolution processes used in family dispute matters

A number of specific themes or questions were addressed in the literature review:

- *What is the scope and emphasis of the literature describing outcomes of family justice processes to handle family disputes?*
- *What are the gaps in literature or problems in approaches to the research?*
- *What are the outcomes and benefits of using dispute resolution in family matters?*
- *What are the specific outcomes of dispute resolution on issues such parental and child adjustment?*
- *How does dispute resolution compare with litigation in resolving family disputes?*
- *Are any specific client characteristics associated with success or lack of success in dispute resolution?*
- *Are any specific service characteristics associated with success or lack of success in mediation?*
- *Do outcomes and impacts of dispute resolution change over time?*
- *Are there specific issues for which dispute resolution should not be used or for which it is not effective?*
- *What is the level of client and service provider satisfaction with dispute resolution?*

The scope of the mediation literature related to the dispute of family matters is vast and covers a period of almost thirty years. One of the unique characteristics of the literature is that it encompasses many different disciplines including law, sociology, economics, communications, social work, anthropology, counselling and psychology. This broad scope has limited the development of theory and the integration of theory into practice.

The mediation literature has focussed on four main themes: a description of the theories that underlie mediation, a description of mediation processes and interventions, an assessment of program outcomes and effectiveness and broader based critiques of the assumptions or values underlying mediation. There is a general consensus that a significant proportion of the literature has focussed on program outcomes research and that there has been a lack of literature on issues such as the process of mediation and mediator responses that may effect outcomes. Issues such as the best ways of handling imbalances between disputants, clients with different types of spousal abuse histories and models for those chronically in dispute are all topics that need further attention.

The review looked at ten specific outcomes that have been analyzed in relation to mediation. In terms of the level of agreements reached the consensus in the literature is that mediation programs of all types

(including court and community-based, voluntary and mandatory mediation) usually achieve a settlement rate 50-85% of the time. Most settlement rates are in the higher range.

Compliance rates for mediated agreements are generally higher than for litigated agreements. A recent twelve year post settlement study indicated that mediated parents were substantially more in compliance on issues such as child visitation. There is also some data which indicates parents are also more compliant in providing child support payments.

The literature notes the complexity of comparing re-litigation rates of mediated and litigated clients. Some studies show that mediated clients tend to be more litigious prior to settlement than litigated clients but less litigious post settlement. It may also be that clients who mediate are more litigious in general. The literature suggests that parents who mediated return to court less frequently in the short term but over the long term re-litigation rates between the two groups are similar.

Although the literature notes the importance of parental conflict as a determinant in terms of child adjustment there is no definitive evidence that mediation reduces parental conflict and acrimony over the long term. In addition, there is little evidence that mediation improves the long term psychological adjustment of parents in areas such as depression. Although parental levels of depression generally decreased and marriage termination acceptance increased post settlement, this was generally ascribed to the passage of time rather than to the type of dispute settlement process.

There is also little evidence in the literature that mediation improves child adjustment or leads to decreases in child behavioural problems, particularly when parental acrimony is not successfully addressed.

There is evidence that mediated nonresidential parents remain more involved with their children post settlement than parents who have litigated. Substantive differences in all areas of nonresidential parental involvement were found in one long term study.

The involvement of parents with histories of spousal abuse and violence in mediation still remains somewhat contentious in the literature. There is evidence in some studies that the level of spousal abuse among clients is high but that these clients are as satisfied with the mediation process and outcomes as parents who do not have this background.

Comparing the costs of mediation and litigation processes is complex because of the different variables involved. Most studies indicate that the costs involved in reaching a mediated agreement are lower than for a litigated settlement. However, several studies have suggested that many cost related factors have not yet been taken into account. For example, some mediated parents may be able to settle quickly through a litigation process thus reducing costs.

Client satisfaction with mediation is an outcome area that has been extensively examined in the literature. The satisfaction of rates of mediated clients are consistently reported to be in the 60-85% range and are higher than for litigated parents. In some studies differences are found between men and women in the rate and level of satisfaction. Women appear to feel empowered by mediation. Both disputants appear to rate mediation agreements as fair and to feel their concerns are heard. Even when an agreement is not reached most disputants are satisfied with mediation.

The model of mediation that appears to offer the most benefit to disputants is one that uses a somewhat therapeutic approach, offers more, rather than fewer sessions and includes follow-up contact with clients in the first three months after settlement. One study of mediator styles found that a problem solving style where the mediator more actively searches for the attitudes or behaviours fueling conflicts around co-

parenting was more effective in reaching agreements than a more settlement oriented style. There is also some evidence that mediator gender results in different outcomes for the disputing parties: female mediators had more involvement and identification with the process and outcome of the mediation.

Very little is still known about the communication characteristics of clients and how these may affect outcomes in mediation. Some studies have attempted to identify the communication typologies that exist in non-conflicted communication. Others studies have attempted to define the parental communication patterns that are not appropriate for mediation.

Typologies to describe relationships where there has been abuse have also been identified in the literature. Some couple typologies have been identified where the parents are more likely to engage in long litigious procedures. Other studies have noted that the role of the respondent (non-initiator of the mediation) has the most significant role in the mediation process although this has often been ignored.

Families with young children (under 6) were identified in one study as having a lower rate of agreement and higher needs due to issues such as chronic conflict, abuse and mental health issues.

The literature notes that there are a number of client groups who have not been adequately addressed in the literature. These include the seriously mentally disordered, ethnically diverse clients, and those in chronic dispute.

1.0 INTRODUCTION AND DESCRIPTION OF THIS DOCUMENT

This report presents the findings of a literature review which examined outcomes, and factors related to outcomes, of dispute resolution processes used in family dispute matters. Although much of the literature under this topic is categorized under divorce mediation this review focused on findings related to issues involving children (e.g. access, custody and guardianship).

Section 2.0 describes the questions addressed by the literature review as well as sources of the literature, gaps and limitations. Section 3.0 presents information on the characteristics and history of mediation and its response to the impacts of separation and divorce. Section 4.0 describes the overall scope and emphasis of the mediation literature, and Section 5.0 describes the outcomes of family mediation in relation to ten issue areas. Section 6.0 examines client satisfaction as a distinctive outcome. Section 7.0 looks at service characteristics and Section 8.0 client related factors that appear to be linked with mediation outcomes.

2.0 DESCRIPTION OF THE LITERATURE REVIEW

2.1 Specific Questions Addressed by the Literature Review

This literature review focused primarily on a description of the outcomes of dispute resolution in family dispute matters and the client and services characteristics associated with these outcomes. A number of specific themes or questions were addressed. These are:

- What is the scope and emphasis of the literature describing outcomes of family justice processes to handle family disputes?
- What are the gaps in literature or problems in approaches to the research?
- What are the specific outcomes and benefits of dispute resolution on issues such as settlement rates, compliance with agreements, family functioning, child health and adjustment?
- How does dispute resolution compare with litigation in resolving family disputes?
- Are any specific *client* characteristics associated with success or lack of success in dispute resolution?
- Are any specific *service* characteristics associated with success or lack of success in mediation?
- Do outcomes of dispute resolution on clients and families change over time?
- Are there specific issues for which dispute resolution should not be used or for which it is not effective?
- What is the level of client and service provider satisfaction with dispute resolution?

2.2 Purpose of the Literature Review

Besides contributing general background information to the Family Justice Services Division (FJSD) this report will provide both contextual and methodological data to assist in the development of a research design for a study examining the impacts of dispute resolution on clients provided with services through Family Justice Centres in BC.

2.3 Literature Sources and Search Protocols

Three methods were used to search and identify the mediation literature.

- A search was made of significant databases and abstracts commencing with OVID, a broadly based periodical search tool. The OVID search includes references to the Canadian Research Index, Clin Psyc, Dissertation Abstracts, Index to Canadian Literature, PsycInfo, Social Work Abstracts Plus and Wilson Social Services Index.
- An internet search was used to identify non-published documents or program materials.
- *Family Mediation Facts, Myths and Future Prospects* (C. Beck and B. Sales, 2001), comprised an extensive review of mediation literature over the past twenty-five years. It was used to identify and verify other references.

2.4 Scope and Limitations of the Literature Review

The literature review is focused on the outcomes of dispute resolution programs that address child related matters in dispute. The vast majority of mediation studies fall within this rubric. Although a large proportion of these studies were completed in the 1980s, most of the literature cited in this review covers the period from 1990 to the present. Several comprehensive reviews of the literature were used to address the earlier research.

The mediation literature is extensive. For example, Beck and Sale's 2001 review of past mediation literature includes 27 pages of mediation references from the 1970s to 2001.

To address these limitations a sample of specific studies addressing specific issues of mediation were selected for review along with several literature reviews, one of which assessed various aspects of the literature since the earliest use of mediation in family dispute matters. It should be noted the mediation research is complex and the establishment of the comparability of programs or research resulting from these programs was beyond the scope of this project.

2.5 Definition of Terms

Although the Family Justice Services Division uses the term dispute resolution to describe mediation (and related forms of conciliation type services), in most of the literature the term mediation and dispute resolution are used interchangeably. In this report the term mediation is used to describe the dispute resolution process that occurs between family members (usually the parents) and a trained mediator. The experience and background of mediators (attorneys or those with other skill sets) and placement of the mediators (in court or community-based programs) is highly variable.

3.0 HISTORY, DESCRIPTION AND VALUE OF MEDIATION

3.1 History of Mediation

Mediation is part of a dispute resolution tradition which dates back over centuries. Divorce mediation was initiated in the 1960s in the United States when probation officers and family workers began experimenting with informal methods of dispute resolution. It gained momentum with changes in the law governing divorce (from fault to no-fault based). Court conciliation staff were probably the first to offer mediation services akin to those that exist today.

H. Irving, a family court counsellor and social worker in Toronto, was one of the first in Canada to develop and evaluate the use of conciliation counselling as an alternative to litigation in 1974 (C. Beck and B. Sales, 2001). The counselling offered in Irving's work was very much like the mediation that is offered today.

Over the past twenty years the models and processes by which mediation has been delivered have expanded but the core definition and operating principles have remained the same.

3.2 Definition and Description

According to Folberg and Taylor (1984), mediation is,

A task-oriented, time-limited, alternative dispute resolution process (an alternative to litigation) wherein the parties, with the assistance of a neutral person or persons, isolate disputed issues in order to consider options and alternatives and to reach consensual settlement (as quoted in Beck and Sales, 2001, p. 3).

Family Mediation is often contrasted, in terms of process and results, to litigation as a means of resolving disputes. According to Kitzmann (1994),

In contrast to litigation, parents in mediation are encouraged to contain their painful emotions, to communicate with each other and to cooperate in making custody decisions and in rearing their children after separation. In short, parents are encouraged to separate their marital and parental roles (Kitzmann and Emery, 1994, p. 150).

Mediation is intended to be a self-empowering process. Maxwell (1999) defines four elements of the process.

- Participation in a facilitated process of communication;
- An attempt to frame interests in mutual terms;
- An appeal to fairness;
- Placing power in the hands of the parties themselves.

Self empowerment and self determination is achieved by mediation through:

- Assisting the parties to settle their conflict through the learning of cooperative dispute resolution skills;
- Allowing each parent to air their grievances while the other parent listens;
- Providing a more comfortable, less adversarial and less threatening forum (than a courtroom) in which to discuss and resolve issues;
- Focusing on the needs and best interests of children which may assist in limiting the damage to them;
- Focusing on the needs of the child to order to limit parental acrimony and consequent psychological damage to the parents;
- Developing agreement terms that, because of their mutual and collaborative input, are more likely to be complied with over time. (C. Beck and B. Sales, 2001, p. 16)

Other benefits to clients and the court system have also been ascribed to mediation. These include the reduction of the burden on the court system, reduced costs, quicker resolution, and improvement in consistency and level of child support payments.

3.3 Impacts of Separation and Divorce

Separation and divorce constitute a major psychosocial transition which involves a multiplicity of stressors. These may result in serious psychological damage to parents and children.

When contrasted with other marital classifications, separated and divorced individuals manifest a higher rate of admission into public and private psychiatric facilities. Separated and divorced individuals also show a higher rate for suicidal ideation and intent, as well as homicidal tendencies, and significantly higher rates of alcoholism and substance abuse than the normal population (Miller and Veltcamp, 1995, p. 271).

Delaney (1995) notes that children of divorce are at greater risk for depression, anxiety, fear, chronic grief, poor academic performance, anti-social behaviour and learning difficulties. Reactions are often gender related; boys show more impulsive, aggressive and anti-social behaviour, girls may become withdrawn, depressed and experience somatic symptoms.

The literature describes some of the mediating factors that affect the post divorce period. Delaney notes that,

Sustained conflict between the parents is strongly associated with amplification of systems of maladjustment in children, regardless of age or gender (Delaney, 1995, p. 436).

Exposure to parental conflict as the main factor through which children are affected by divorce is noted throughout the mediation literature (Delaney, 1995; Kitzmann and Emery, 1994; Shaw and Emery 1997). Children are exposed to unresolved conflicts as they witness the dissolution of the relationship, the continuation of legal battles over finances and custody and through the addressing of post separation decisions (visitation schedules, routine decision making and child rearing).

The anxiety, frustration and anger resulting from the divorce is frequently made more difficult by the adversarial legal process which mediation attempts to counter:

Mediation programs are designed to resolve custody and other divorce disputes in a less adversarial manner than litigation. Proponents of this alternative method of dispute resolution hope that the functioning of families may improve as a consequence (K. Kitzmann and R. Emery, 1994, p. 150).

Other factors related to child functioning such as maternal depression (Shaw and Emery, 1987) may also be affected by the type of method used to resolve family disputes resulting from separation and divorce.

Shaw and Emery also note that other factors such as income affect post separation adjustment..

In Hetherington's (1981) study of middle class families, many of the stressors associated with divorce were transient, since the families regrouped and attained a new equilibrium. In a lower-class sample, however, many of the stressors associated with the parental separation are chronic and do not abate as time passes. (Shaw and Emery, 1987, p. 278)

Specific impacts of mediation on the outcomes of separation and divorce are discussed in detail in Section 5.0.

4.0 SCOPE AND EMPHASIS OF THE LITERATURE

This section describes the scope and emphasis of the mediation literature as well as identifying some of its current gaps and limitations. Issues related to gaps in the focus of mediation research (as reported in the literature) are also identified.

4.1 Scope and Focus of the Literature

Mediation literature addressing family dispute matters is vast and spans a time period of almost thirty years. A significant proportion of the literature related to program outcomes was published in the 1980s.

One of the unique characteristics of mediation literature is that it reflects many disciplines. Although this has enriched the field it has led to a diversity of theory and a frequent lack of integration of theory into practice across disciplines. In a comprehensive review of the literature, Beck and Sales (2001) note that

Understanding the theories used in divorce mediation literature is challenging because mediation scholarship is spread across many different disciplines (e.g. law, sociology, economics, communications, social work, anthropology, counselling, and clinical and social psychology). Theories relevant to one discipline are often irrelevant to another discipline, as are variables of interest, empirical research designs, and levels of analysis. . . . The result is that the available theoretical or conceptual scholarship or empirical research do not incorporate the breadth of factors or relevant contexts needed for a complete understanding of the field. (Beck and Sales, 2001, p. 168)

The authors identify four broad themes of the mediation literature:

- Literature that focuses on the theories underlying mediation;
- Literature that describes different types of mediation processes or interventions;
- Literature that provides data on mediation program outcomes and effectiveness;
- Literature that critiques the principles or values underlying mediation.

The literature describing the outcomes of family mediation programs comprises the largest proportion of the literature. Table 1 presents a more detailed description of these categories.

Table 1: Broad Types of Evaluation Literature

Adapted from Family Mediation: Facts, Myths and Future Prospects (Beck and Sales, 2001)

Emphasis of Literature	Description
Literature that describes underlying theories of mediation	<ul style="list-style-type: none"> • Attempts to identify the theories underlying family mediation. • Not necessarily associated with a specific intervention. • Examples include: the transformative approach, and narrative approach. In the transformative approach conflict is seen not as a problem to be solved but as a potential for growth. • Theories are still being developed and are not yet fully articulated. • There is a lack of empirical testing of theories against program procedures.
Literature that describes (1) the process of mediation and (2) the types of intervention	<ul style="list-style-type: none"> • Process research focuses on providing valid and generalizable knowledge about the process of providing a mediation intervention. • Intervention research describes the specific types of interventions used. • Mediation theories are often borrowed from other disciplines. • Most mediation models use a problem solving orientation. • An example of a specific intervention model is TFM (therapeutic family mediation) which combines assessment, goal-directed therapy, mediation and follow-up. • An example of the literature includes an analysis of mediator/disputant exchanges in order to identify patterns to understand dynamics, development and escalation within the process of mediation. This will assist in predicting disputant behaviours and increasing the effectiveness of mediation. • There is a limited amount of research that integrates communication, negotiation, conflict and family process theories.
Literature that provides outcome based data	<ul style="list-style-type: none"> • Comprises the greatest proportion of mediation literature. • Focuses on evaluations and assess the merits of specific mediation programs. • The focus is on program results not the components of the intervention. • Addresses questions such as client response, association between demographic variables, level of agreements, agreement compliance, level of relitigation and factors associated with compliance or settlement. • Theory building is not usually the focus of this literature. • Often uses comparison data (e.g. litigation versus mediation) as a context in which to assess results.
Literature that addresses conceptual critiques of the premises underlying mediation	<ul style="list-style-type: none"> • Focuses on the validity of the underlying premises or operating principles on which mediation is founded e.g. Feminist critiques theorize that the assumptions underlying negotiation theory and practice are gender biased and systematically exclude feminine voices and concerns (Gray, 1994 in Beck and Sales, 2001)

4.2 Gaps and Limitations of the Mediation Literature

A number of authors have identified specific gaps in the family mediation literature. Hahn and Kleist (2000) note that there is an over-representation of research and literature related to outcomes of specific mediation programs.

After 15 years of first generation research, the easiest research has been done. Basic, useful, and supportive information about the effectiveness of mediation has emerged from a number of different outcome studies. (Hahn and Kleist, 2000, p. 165)

A focus is now required in the literature on the process of mediation, the impact of different types of communication on clients, and the process required to reach agreements. Kelly (1996) and Hahn and Kleist (2000) identify the following specific gaps in the current mediation literature:

- An exploration of client empowerment processes;
- Ways in which imbalances between disputants are addressed;
- The types of interventions that are most effective in cases where there is an intimidating or violent client;
- Ways to handle closure of cases;
- The practice models that are appropriate in specific settings and for specific types of clients;
- The adaptations that need to be made for ethnically diverse clients;
- The models of mediation / arbitration that are most appropriate for those who are chronically in dispute;
- The specific interventions mediators engage in and how they are linked with program outcomes and effectiveness;
- Whether and how family mediation can be conducted with clients who suffer from serious mental health issues.

Another limitation of the literature is that the focus has been on empirical rather than theory driven research. The development of theory would lead to the development of a definitive typology of disputes and procedures that could, for example link dispute characteristics with factors affecting resolution. Beck and Sales (2001) note that this type of theory development remains elusive because of the variability in dispute resolution itself, and the fact that couples may use more than one type of technique to resolve a dispute.

Another major limitation of the literature is the lack of data from sustained programmatic research.

Programmatic research generally occurs when scholars remain with a topic over time, focusing energy and resources on building, developing hypotheses and interventions, testing them and returning to refine their theories. This type of research is quite rare. (Beck and Sales, 2001, p.178)

Beck and Sales (2000, 2001) also note that a clearer definition of the models (and the elements of these models) used in mediation is required. There is also the need for more literature addressing the function of hybrid models (e.g. mediation/arbitration), and follow-up to mediation (type, frequency and content of follow-up)

A definition of models is predicated on the establishment of a clear definition of mediation which can describe many types of interventions. There is also a need for more research using rigorous randomized control group comparisons although the ethical and methodological difficulties involved in implementing this type of research are noted.

5.0 OUTCOMES OF FAMILY MEDIATION

This section summarizes the literature related to the outcomes of family mediation on ten specific areas related to agreements, court actions and parent and child outcomes. These areas are:

- The level of agreements reached;
- Compliance with agreements;
- The degree of re-litigation;
- Joint custody arrangements
- Parental conflict and communication;
- Continuing involvement of non-residential parent;
- The psychological adjustment of the parents;
- Adjustment of children;
- Sense of empowerment;
- Cost.

A significant proportion of the mediation research involves a comparison of the effects of mediation with litigation processes. Where this comparison is being made this is noted.

Whether mediation leads to increased client satisfaction is a frequent topic in the literature. Outcomes in this area are presented in the following section of the report.

5.1 Level of Agreements Reached

In a review of ten years of mediation research Hahn and Kleist (2000) note that clients reach agreements in divorce mediation 50-85% of the time, with most studies showing settlements in the mid to upper range. This was found to be true for "court-based or community-based" services, private mediation, custody mediation and comprehensive divorce mediation offered in mandatory and voluntary mediation (settings) (Hahn and Kleist 2002, p. 166).

Emery et al (2001) have completed a number of long term studies comparing randomly assigned mediation and litigation clients. They found that most disputing parents reached an agreement in mediation. Only 11% of mediated families proceeded from the petition to an actual court hearing, in comparison with 72% of the families in the litigation control group (Emery et al, 2001, p. 323).

In a study of 169 mediated low income clients and 61 non-mediated cases Jones and Bodtker (1999) found that mediated clients were successful in resolving agreements in all areas in 44% of the cases, and in 17% of cases there were agreements on partial issues. In 38% of the cases no issues were resolved.

Settlement rates appear to be stable even when considering difficult clients and specific case characteristics.

Walker (Walker et al, 1994 as quoted in Hahn and Kleist, 2000) reports that higher rates of agreements have been reported in comprehensive divorce mediation compared with custody (only) mediation suggesting that agreements may be more difficult to reach when these are single, not multiple issues.

Kelly (1996) suggests that higher settlement rates (over 85%) may suggest more coercive processes although there has been little research done on directiveness related to settlement rates. In a large study of a widely implemented mandated mediation program in California of 1,388 clients, 46% reached agreement in two weeks, 20% scheduled further mediation and 30% proceeded towards an adversarial process. This study suggests that settlement rates may not be higher in mandated settings.

Zuberbuhler (2001) in an assessment of a program introducing the early introduction of mediation to resolve parenting issues found resolution of all parenting issues in 61% of cases. In another study of never married parents Raisner (1997) found that agreement rates between both never-married and married parents who had mediated were in the 85% range.

5.2 Compliance with Agreements

Compliance with agreements is a benefit for the disputant and the court system. Compliance may lessen the need for additional court hearings, which could lead to a reduction in court-related costs. Compliance with agreements related to child support can also reduce economic distress for families. One of the principles of mediation is that compliance rates will be increased through the development or enhancement of improved communication and cooperation between parents through the dispute resolution process.

Hahn and Kleist (2000) in their ten year review of the mediation literature report higher rates of compliance in mediated agreements in comparison to litigated agreements. This includes compliance in the areas of access/visitation, child and spousal support and division of property. Beck and Sales (2001) also note that the literature "modestly" supports the idea that mediation leads to greater compliance. In terms of compliance with visitation, they describe two major studies (Pearson and Thoennes 1985, 1986) that suggest that compliance with visitation rates were higher when couples mediated rather than litigated.

A twelve year follow-up study comparing mediating and litigating parents corroborates this finding. Results indicated that non-residential parents (NRP) in the mediation group saw their children significantly more than those in the litigation group (4% of mediated NRP had no contact in the past year compared to 45% of the litigated parents) The mediation group also reported that children were more likely to know when the next visit would be (52% mediation, 28% litigation) (Emery et al, 2001).

In terms of child support payment compliance Bautz and Hill (1991) found that couples who used mediation missed fewer child support payments. Of those mediating couples who also chose joint legal custody 96% did not miss a single child support payment.

Kitzmann and Emery (1994) also found that mediation increased compliance with child support requirements. In a study quoted by Beck and Sales (Emery, Mathews and Wyer, 1991) a review of court records indicated that overdue child support notices were sent to 71% of the litigation fathers but only 51% of the mediation fathers. This difference was not, however, statistically significant.

In relation to compliance with child support agreements the authors (2001) suggest that research indicates that the most powerful predictor of compliance is not the method of reaching an agreement but the payer's ability to pay which consists of four elements, including:

- The income of the non-custodial parent;
- The total amount owed per child
- The total percentage of income owed.

The strongest predictor of compliance for child support was the payer's employment.

Kelly (1996) describes two studies that found no difference in child support payment compliance between the mediation and litigating groups. However, several studies have found that mediation fathers are more likely to pay "extras" for their children and to agree to cover college expenses.

5.3 Degree of Re-litigation

Since divorce litigation comprises a large proportion of case loads in most civil courtrooms, reducing the number of initial hearings and subsequent court appearances is one of the goals of mediation. Beck and Sales (2001) in a review of the mediation literature found that:

- Those clients who reach agreement through mediation are less likely to return to court.
- In the short term (1-2 years post divorce) mediation is likely to reduce re-litigation by up to 30%.
- Even those clients who do not achieve agreements in mediation may be less likely to return to court than litigants.

Person and Thoennes (quoted in Dillon and Emery, 1996) found that,

Couples who reached agreements in mediation were less than half as likely to re-litigate within two years after settlement than were those whose disputes were settled in court. (Dillon and Emery, 1996, p.132)

Jones and Bodtker (1999) found that mediation clients were involved in more court actions prior to mediation in comparison to the litigation sample (suggesting that the mediation cases may have been more complex) but after litigation those court contacts dropped substantially. Eighty-two percent of the mediated clients in their study did not return to court post settlement.

Some studies however, show few differences between litigating and mediation groups in terms of re-litigation. Emery, Mathews and Kitzmann's (1994) one year follow-up study on mediated and litigated families found no significant differences between the mediation and litigation groups in terms of returns to court or efforts to make changes in agreements. Returns to court were frequent for *all* families.

While short term re-litigation results favor the mediation approach, longer term data suggests that the benefits of mediation related to re-litigation may gradually erode over time.

In a study of mediated and litigated parents nine years post settlement Dillon and Emery (1996) found that there was little difference in the mediation and litigation groups in terms of the attempts to change arrangements on custody, visitation and support or in the methods used to make changes. The mediation clients were more likely to have requested a lawyer. However, there were no differences in the total number of contacts with the legal profession.

Beck and Sales (2001) note that there are methodological problems related to examining re-litigation. One issue is the difficulty of defining re-litigation. Does re-litigation mean a return to court for any or a contested matter? Re-litigation *could* mean parental consensus on a change to an agreement. This may not imply a continuing dispute between parents. In other cases mediators may *encourage* clients to return to mediation or court to modify agreements if circumstances change.

The pre-settlement characteristics of mediating parents must also be considered when addressing outcomes related to re-litigation. Many parents referred to or using mediation may be high conflict and more likely to have complex litigation histories.

Because past behaviour is often the best predictor of future behaviour it seems reasonable to assume that those clients will be more litigious after mediation than those clients without the long history of contentiousness and litigation. (Beck and Sales, 2001, p. 110)

In order to accurately compare re-litigation rates the authors note that the best approach would be to compare high conflict litigation and high conflict mediation clients.

5.4 Impact on Joint Custody Arrangements

Miller and Veltcamp (1995) in a three year study comparing rates of joint custody of mediated and litigated parents indicated that there was a much higher level of joint custody among the mediated group (70% to 14%).

Kelly (1996) in a review of family mediation research also concludes that, . . . in general, mediation results in more joint legal custody compared to adversarial processes.

*Whereas physical custody and visiting agreements did not differ in mediation and litigation groups in Virginia (Emery, 1995), in California, a less conservative jurisdiction, mediation resulted in the selection of more joint custody **language** and expanded visiting patterns. In Canada, Richardson (1988) found more shared parenting agreements in the mediated group. (Kelly, 1996, p. 377)*

In a study of 217 divorced couples Bautz and Hill (1991) found that individuals who used mediation tended to chose joint custody of their children. Of the mediated respondents 67% chose joint legal custody compared to 38% of the litigated respondents. This difference was statistically significant.

5.5 Impact of Mediation on Parental Conflict and Communication

A fundamental premise of mediation is that a more equally balanced dispute resolution process will lead to improved parental communication and cooperation that will in turn result in better child functioning.

While mediation's goals of decreasing relitigation and increasing compliance are particularly appealing to legal professionals, mediation is also hypothesized to increase communication between parents, decrease bitterness and tension, and clarify the best interests of the children. Given the strong emotions and animosity associated with the divorce process, it can be argued that an adversarial method of dispute resolution such as the traditional litigation process can serve to fuel the hostility of the disputing parents. (Emery and Wyer, 1987 as quoted in Emery and Shaw, 1996, p. 132)

Delaney (1995) notes that parental conflict is the major predictor of child adjustment related to separation and divorce.

Research has overwhelmingly supported the absence of parental conflict during and post divorce as a positive predictor for children's healthy emotional and psychological adjustment to parental divorce. (Delaney, 1995, p. 437)

A one year post settlement study by Kitzmann and Emery (1994) found support for mediation's goal of improving child adjustment but the brief mediation intervention involved in the study failed to produce substantial changes in parental conflict.

Bautz and Hill (1991) found that the couples in their study who used mediation were more likely to describe their post divorce relationship as "harmonious" (73%) or "cordial" while litigants more commonly described their relationships as "strained" (41%).

In a review of mediation research (Kelly, 1996) reports that in general mediation research has demonstrated "small but more often short-lived" increases in cooperation and improvement in communication following custody mediation. Her review concludes that parents using comprehensive divorce mediation report less conflict *during* the divorce process than litigating parents and less conflict, more cooperation and more child-focused communication at final divorce.

However, a study of child custody, contact and co-parenting twelve years after initial dispute resolution (Emery et al, 2001) indicated that although co-parent acrimony was somewhat lower in the mediated group than in the non-mediated group this difference was not statistically significant. According to the authors the failure to find a significant difference in this dimension may be due to attrition. High conflict couple litigants were more likely to drop out of the study than high conflict mediated couples.

A recent study of court-related predictors of parental cooperation and conflict after divorce that looked at the predictive values of divorce education, mediation, child custody arrangement and means of relationship termination found that being involved in mediation was *positively* related to parental conflict after divorce. (Toews and McKenry, 2001). The divorce education program and having joint legal custody appeared to be more effective in reducing conflict in this study. This research however, had a low response rate.

In their more comprehensive review of the mediation literature Beck and Sales (2001) note that despite some exceptions in the literature most studies suggest that mediation has a limited ability to alter basic relationship patterns or promote parental cooperation. Several studies (Pearson and Thoennes 1988, 1989 quoted in Beck and Sales 2001) found that mediating and litigating couples identified the same number of problems in areas such as child visitation.

Several authors note these somewhat ambivalent results may be due to the complexity of the issues and relatively short term duration of mediation and length of follow-up time addressed by most of the research. Resolution of parental issues is a long process and the effects of separation have an ongoing effect on family functioning.

. . . respondents reported conflicts about appropriate involvement by non-custodial parents, arguments about co-parents' current spouses, difficulties with parent choosing to relocate in other states, and general feelings of anger and frustration related to coping with single parenthood that have persisted for years and may never be resolved. The picture of divorce mediation that is painted by research examining only the two years following resolution gives a very limited view of its effects. (Dillon and Emery, 1996, p. 139)

5.6 Continuing Involvement of the Non-residential Parent

Dillion's and Emery's (1996) nine year post settlement study found that mediation favored non-custodial parent involvement with children on two measures. The litigation group was significantly more likely to be rated as not involved in current decisions while the mediated non-custodial parent was marginally rated as equally involved. Mediated mothers were more likely to report communication of once a week or more than were litigated mothers.

Bautz and Hill (1991) also found that non-custodial parents who used mediation also saw their children more than did parents who used the adversarial court process.

Vestal (quoted in Lowenstein, 2001) found that through mediation parental alienation syndrome (whereby the parent became alienated and ceased to have contact with the child) could be detected and steps taken to restore the relationship of the non-custodial parent.

The results of Emery et al's (2001) twelve year post settlement study indicates positive outcomes of mediation related to the involvement of the non-residential parent post settlement. Substantive and significant differences were found on four key measures of non-residential parent involvement in child rearing: visitation frequency, telephone contact, influence on the residential parents' decision making and on all ten items of a standardized test measuring non-residential parent involvement (the NCPI or Nonresidential Parent-Child Involvement scale). As noted by the authors,

Given the pervasive policy concern with the lack of involvement of non-residential parents it is very important to recognize that 30% of non-residential parents who mediated saw their child weekly or more (vs. 9% who litigated) or, conversely, that 11% who mediated had not seen their child in the past year vs. 35% who litigated. (Emery et al, 2001, p. 330).

According to the authors, this litigation study offers the best evidence to date that:

“relative to adversary settlement, mediation causes nonresidential parents to maintain higher levels of contact and involvement with their children after divorces.”
(Emery et al, 2001, p. 330)

Noteworthy in this study is the fact that reports of regular involvement of the non-custodial parents were most evident in reports by the *residential* parents.

5.7 Psychological Adjustment of Parents

The literature notes that “anger, depression, frustration, worry and continued attachment to one’s spouse” are all responses of parents involved in a divorce process (Beck and Sales, 2001, p. 73). Kelly et al (as quoted in Beck and Sales, 2001) found 60% of divorcing clients were moderately to extremely angry at their spouses.

There is, however, little evidence in the literature that mediation is associated with decreases in variables such as maternal depression or feelings of attachment.

Kitzmann and Emery (1994) state that,

despite the hopes of the proponents of mediation . . . there is little evidence that mediation is associated with decreases in general parental conflict, depression or unresolved attachment to the spouse (Kitzmann and Emery, P. 1007).

Emery, Mathews and Kitzmann (1994) found that mothers declined in depression over time and that men were initially more un-accepting of marital termination but that this did not differ according to whether the parents settled by litigation or mediation.

In their twelve year post settlement study Emery et al (2001) found no differences between the litigation and mediation groups in reports of depressive symptoms or acceptance of marital termination among women. Noteworthy in this study is the significant level of increased level of acceptance of marital termination by men over time (this trend occurred in both mediated and litigated groups).

Emery (1994) as quoted in Beck and Sales (2001) has suggested a number of reasons why there has been a failure to find differences in psychological functioning between the litigated and mediated parents.

- Few studies have addressed psychological functioning in detail and the emphasis has been restricted to only a few areas of enquiry focusing on depression post separation or divorce. Other psychological issues that might be relevant such as anxiety have not been well researched;
- Although parents and children report significant distress at and after relationship dissolution they do not always score significantly higher on traditional measures (which may be designed for psychiatric patients). The measurement scales, therefore, may not be sensitive enough to capture significant changes among disputing parents;
- Decreases in psychological symptoms such as depression may be due primarily to the passage of time rather than to the type of settlement process used. The impact of the

passage of time is a significant factor and must be accounted for in the assessment of any psychological change in individuals.

Many authors agreed that the impact of mediation on the psychological functioning of the parents over time is likely to be limited considering the short duration of the intervention.

Mediation is not a panacea. Perhaps a five-hour intervention focused on resolving a child custody dispute should not be expected to improve parents' mental health twelve years later. (Emery et al, 2001, p. 330)

5.8 Adjustment of Children

The literature suggests a strong correlation between the psychological adjustment of children post divorce and the level of acrimony of parents.

In a study looking at child and family coping one year after settlement Kitzmann and Emery (1994) found no differences in the level of children's problems in families that had used mediation or litigation.

The authors found that a decrease in parental conflict over the first year after settlement associated with fewer behaviour problems, however, mediation had little effect in reducing conflict or in changing outcomes related to children. The authors found that children of parents who had gone through mediation one year earlier did not show fewer problems nor did they show better parent-child relationships. Some study results suggest that there may have been slightly more child problems in the mediation group.

This study also showed more of an *association* between parent and child problems in the mediation group suggesting that parental problems were not adequately being sheltered from children. The authors speculate that the brevity of the mediation intervention, the lack of psychological impact of mediation on parents and limitations of measurement tools may have contributed to these outcomes.

In a nine year post settlement study(Dillon and Emery, 1996), mothers in the litigation and mediation groups were equally likely to report that their children were having behavioural problems. However, fathers in the litigation group were more likely to report that their children had behaviour problems needing treatment.

Although a twelve year follow-up study did not assess psychological adjustment of children per se it did note that mediated families made significantly more changes in their children's living circumstances during the post settlement period. The number was not large in most instances and may suggest greater (and appropriate) flexibility on the part of mediating parents. However, 18% of the mediated families made four or more changes in children's residences in a short period of time which may have an impact on child functioning.

In a ten year review of the literature (Hahn and Kleist, 2000) suggest that over-all, there is little evidence in the literature that mediation assists with over-all improvements in the psychological adjustment of children.

5.9 Spousal Violence

While there is controversy in the literature in terms of whether mediation is appropriate in cases of spousal violence (see Section 8.2), there is agreement on the need to understand the different typologies of violence and their suitability for mediation.

Fischer (1993 quoted in Beck and Sales) argues that relationships characterized by a culture of violence are very different from relationships with isolated acts of violence.

For the abused spouses, the pattern of abuse and pattern of domination and control are long-lasting, leaving them in a state of emotional exhaustion, and perpetual fear for their own lives as well as the lives of their children, friends and extended family. Thus, for these abused spouses, several factors indicate that meeting face-to-face and airing concerns is extremely detrimental. (Beck and Sales, 2001, p. 30).

There is also consensus in the literature that the rates of violence in many families undergoing mediation is likely to be high. Davies et al (1995) found that 69% of women and 53% of men in a sample of parents attending family court conciliation counselling identified violence in their relationships; in about 40% of the cases the abuse/violence was very recent. Of those reporting abuse 73% of the men and 79% of women rated their experience of violence as significant. The satisfaction rates for mediation were high (84%) and there were no differences between those who reported abuse and those who did not. The authors conclude that,

. . . the experience of physical and/or emotional abuse does not appear to be an important or principal factor affecting client satisfaction with (conciliation) counselling. (Davies et al, 1995, p. 335)

5.10 Cost Outcomes

Increasing the efficiency and reducing costs of client contact with the legal system is one of the strongest forces behind the development and growth of family mediation. As well as costs related to government programs several authors have noted that, "legal fees in contested divorces can be extremely high reducing the standard of living for each partner for a period of time after the divorce." (Beck and Sales, 2001, p. 99) This may have devastating consequences particularly for poor to moderate income families.

The literature suggests that comparisons of costs associated with mediation and litigation are complex and may not have been comprehensively addressed when assessing the cost factors associated with mediation.

Skeptics have pointed to the additional (and unknown) expenses incurred by clients for attorney consultation before or during mediation and for attorney review of the memorandum of understanding process encouraged by many mediators after completion of negotiations. They have also suggested that mediation clients may be more cooperative, and therefore would have reached agreement less expensively, had they been using the services of two attorneys negotiating final marital settlement agreements on their behalf. (Kelly, 1990, p. 15)

Despite the limitations of the research there is evidence in some of the literature that mediation does result in cost savings, particularly under certain conditions.

Kelly (1990) compared under the costs associated with comparable couples who were using either an attorney supported adversarial process or comprehensive divorce mediation to resolve all issues. She found that the comprehensive mediation costs were far less than the costs of litigation. Specific cost comparisons of the two groups are presented below.

Table 2: Comparison of Mediation and Litigation Group Costs to Reach Settlement

Cost Item	Mediation Group	Litigation Group
Mean Cost per Couple	\$ 2,224 (range 283-6,057)	\$ 5,464.00
Median	\$ 1,988	\$ 2000-2,350
External Attorney Fees	\$ 3,010	\$ 4,350
Total Divorce Costs Mean	\$ 5,234	\$ 12,226
Median	\$ 3,428	\$ Unknown

Fifty percent of mediation clients had retained or consulted with an attorney prior to entering mediation. These fees were included in the analysis.

Kelly found that combined costs per couple for litigation were 134 percent more than for the mediation couples even though the mediation couples had often consulted lawyers. Fifty percent of the mediated population paid less than \$2,000.00 for their comprehensive mediation; 25% of the litigated respondents paid \$5,885.00 to \$60,000.00 per person. There was no difference in divorce complexity, extent of reported marital conflict, initial levels of anger, cooperation or amount of anticipated areas of disagreement between the two groups. The author notes that cost effectiveness of mediation may be greatest in high asset/high income areas.

In a review of mediation research Hahn and Kleist (2000) describe studies by Emery (1994) that found mediation parents reached resolution of their disputes in less than half the time and at less cost. Pearson (1994, quoted in Beck and Sales, 2000) found that the average legal fee for an individual who successfully mediated was \$1,650.00, while the litigated respondents spent \$2,360.00 per person. When mediation was unsuccessful the cost was \$2,101.00.

A major factor affecting cost is the time spent in the legal system. In general the research seems to support agreements being reached more quickly in mediated cases. Pearson (1994 as quoted in Beck and Sales, 2001) found that only successful mediation translated into time savings. Unsuccessful cases took up more time in the court system, a duration of 14.2 months if they were mediated unsuccessfully and also needed litigation. Successful mediation cases required only 8.5 months; litigation cases were completed in 10.8 months.

Despite the difficulties in collecting, comparing and evaluating cost data Hahn and Kleist (2000) concluded that it is likely "custody and comprehensive mediation in the public sector also saves the government money" (Hahn, 2000, p. 166). In California, the number of custody trials has been reduced to less than 2%

of those parents disputing child issues saving court time and expense (Depner as quoted in Hahn, 2000, p. 166)

Beck and Sales, however, note that these cost comparison studies have not necessarily been able to address some of the variables that would accurately assess cost savings to the courts from using mediation programs. According to Fix and Harker (1992 as quoted in Beck and Sales, 2000) the following questions still need to be addressed:

- At what stage are cases directed to DR ? How many court resources have already been expended in filing cases, pretrial conferences, appearances etc?
- What is the cost of DR *programs* compared with savings in litigation – related expenses?
- What is the success rate of DR programs? How many cases are not resolved and still involve litigation?
- Of those cases successfully involved in DR programs how many would have settled prior to trial?
- Although mediation may deter litigation in the short term how many parents will return to court over the long term to resolve issues in dispute?

6.0 CLIENT SATISFACTION

Another important goal of mediation is to increase the satisfaction of clients with the legal process used to resolve disputes. Because of the significance of this area there is extensive literature addressing this topic.

With the exception of a very small number of studies most of the literature indicates that 60-85% of mediation clients are satisfied with mediation. Conversely only 30-50% of litigants report being satisfied with their court experiences (Beck and Sales, 2001 Hahn and Kleist, 2000). Although those who reached agreement in mediation were more satisfied 30-60% of those who did not reach agreements also reported they were satisfied. In most studies comparing mediating and litigating clients the mediation clients are significantly more satisfied.

There are some gender differences related to satisfaction. Kelly and Duryee (1992) report the findings of women from a combined group of 184 people who received mediation. Women found the mediation process more satisfactory than men and were more satisfied with the outcome of mediation. The author speculates that one of the reasons why women may find the mediation process satisfactory is that it provides an opportunity to air their views. Women also reported that they gained confidence in their ability to stand up to their spouse as a result of the mediation.

This greater sense of empowerment may be related to the structure of mediation, which insists that the interests and views of each disputant be articulated and treated with respect. (Kelly and Duryee, 1992, p. 45)

In a study of parent satisfaction one year after settlement Emery et al (1994) found that fathers who mediated were substantially more satisfied with the process of dispute resolution and its effects on them, their children and relationship with the mother one year after settlement. Mothers who mediated were somewhat less satisfied than mothers who litigated. The authors note these results may be affected by the rate of attrition but that the "hypothesis that the increase in the satisfaction rates of fathers would lead to the greater satisfaction among mothers was not supported." (Emery et al, 1994, p.128)

Jones and Bodtker's comparative study of 169 mediated and 61 non-mediated cases indicates a higher rate of satisfaction for those using mediation. They conclude that,

Disputants who used mediation were much more satisfied than disputants who did not. Disputants in mediation were significantly more likely to feel that the agreement reached was fair, that their concerns were heard and respected, and that the means of handling the dispute was beneficial to their parenting. (Jones and Bodtker, 1999, p.25)

Davies et al (1995) reported that there were no significant differences in satisfaction levels between client groups undergoing mediation who report abuse and who do not.

Depner et al (1994) conducted a large-scale snapshot study of the California court-based mediation program based on 1,388 families seen in mediation in 75 courts. Eight to nine clients out of ten rated mediation as beneficial. This favorable response was sustained within diverse client groups and for different models of mediation. Even clients who did *not* reach an agreement reported the service was helpful by providing helpful information and referrals. There was a statistically significant tendency for

mediation to be rated as more helpful by parents with less education and lower incomes and by ethnic minorities. There was a statistically higher tendency of women to feel intimidated in mediation but a high proportion of mothers and fathers reported that mediators listened to their concerns.

Hahn and Kleist (2000) report that the features of mediation most rated highly by clients center around:

- The ability to communicate to the other spouse in a comfortable setting;
- The opportunity to express individual viewpoints and talk about the children;
- The opportunity to have concerns taken seriously;
- The opportunity to hear helpful ideas from the mediator about parenting issues.

A number of studies report that clients in general give mediators high ratings for their impartiality, sensitivity and skill (as quoted in Hahn and Kleist, 2000, p. 167). Men and women in mediation also generally felt their rights were protected more than in the litigation group. According to Emery (1994 as quoted in Hahn, 2000)

"Mediation parents were more likely to report that they each had "won" some of what they wanted; in contrast litigation parents significantly more often described a "win-lose" outcome." (Hahn and Kleist, 2000, p. 167)

In terms of over-all outcomes related to client satisfaction Beck and Sales (2001) summarize the relative frequency of the following client positive rating assessments in the literature:

- Mediation helps parents focus on the needs of the children (positive ratings of 60-80%)
- Mediation provides an opportunity to air grievances (positive ratings of 70-80%)
- Mediation keeps the discussion on track (positive ratings of 70-80%)

Beck and Sales (2001) also report issues to consider when comparing satisfaction levels of those parents who have mediated with those who have litigated. Some research data suggests that litigated clients are not dissatisfied with the entire court process but only with specific components or aspects. Some parents may also expect more of the legal system and be more significantly disappointed if there are deficiencies.

Satisfaction levels of mediated clients also appear to decrease over time.

In all cases, fathers who mediated were significantly more satisfied than fathers who litigated. In fact, fathers who mediated were more positive than fathers for every measurement item. However, with one exception, fathers reported less satisfaction with both mediation and litigation at the 12-year follow-up than they had reported one month after dispute resolution. (Emery et al, 2001, p. 327-328)

Finally several authors note the limitations of the client satisfaction level as a type of measurement. Client satisfaction does not necessarily correlate with other mediation outcomes such as a decrease in the level of parental acrimony. While important, client satisfaction alone is not an adequate measure of the effectiveness of mediation.

. . . measures of satisfaction should not take the place of objective measures, however, nor should objective measures take the place of subjective ratings, such as satisfaction. Both are important but should be considered separately. (Beck and Sales, 2001, p. 83)

7.0 PROGRAM OR SERVICE CHARACTERISTICS LINKED TO MEDIATION OUTCOMES

A number of program characteristics or mediation approaches have been identified as affecting outcomes. This section addresses results of the literature in relation to the following factors:

- Model and characteristics of the mediation
- Mediator characteristics (approach, gender, styles)
- Duration of program and prescreening
- Level of coercion

7.1 Models and Characteristics of Mediation

While each mediation program has unique characteristics Beck and Sales (2001) identify four broad models of mediation each involving different approaches and characteristics: the Legal, Labour Management, Therapeutic and Communication/Information Models. These are summarized in Table 3.

Table 3: Models of Family Justice Mediation

Model	Description
Legal Model	<ul style="list-style-type: none"> • Usually mandated • Settlement orientated • Usually time / session defined • De-emphasis on emotional, relational issues • Mediator discusses options, and the advantages and disadvantages of certain options • Often involves attorney consultation
Labour Management Model	<ul style="list-style-type: none"> • Often involves a set list of criteria (e.g. assured access to children by both parents) • Mediators are seen as educators, and problem solvers • Mediators balance power, and protect needs of children • May hold private caucuses (e.g. conciliation sessions with individual client) • Focuses on reaching agreement
Therapeutic Model	<ul style="list-style-type: none"> • Focuses on addressing and resolving emotional issues, developing an equitable agreement and meeting the needs of children • Mediators take active and directive roles concerning needs of children • May focus primarily on custody and visitation rather than division of property • Services likely to be of longer duration • Model encompasses a wide range of therapeutic approaches (e.g. cognitive-behavioural, family systems)
Communication/Information Model	<ul style="list-style-type: none"> • Uses lawyer – therapist mediation team: lawyer addresses issues related to agreements, mediator addresses needs of children and communication issues • An assessment phase determine readiness for mediation • Once an agreement is reached lawyer – mediator drafts the agreement

Beck and Sales (2001) note that few studies have compared the efficiency and effectiveness of specific mediation models such as those described above. Studies examining the degree and consistency of model implementation and compliance of the mediator with elements of the model are required.

One of the difficulties of assessing the efficacy of specific models is the reluctance of programs to randomly assign clients to specific conditions (including litigation and mediation groups), partly because of ethical considerations and also because of the complexity of cross comparability and measurement. In general there is a consensus in the literature that to be most effective in terms of addressing issues such as parent conflict and parent/child adjustment the most successful mediation program model is one that:

- Uses a therapeutic orientation that focuses on changes in relationship quality between the parents;
- Allows for a greater number of sessions to work through the conflictual history and to change ingrained patterns;
- Incorporates follow-up or "booster" telephone calls to clients so that any problems that arise in the first few months after settlement can be addressed.

Follow-up or booster sessions are identified as important. One study has indicated that post mediation problems generally surface within the first three months after settlement and should be addressed in this time period. According to Felshner and Williams (quoted in Beck and Sales, 2001),

If the goal is to ensure that clients successfully comply with the terms of their agreements and amicably negotiate further disputes rather than merely producing agreements to justify program funding, then sustained support to clients is critical. (Beck and Sales, 2001, p. 73)

Pruitt (1995) in a study of different models of mediation including a mediation/arbitration model found that a focus on settlement alone did not ensure later compliance or improved relations between the parties. He also notes the importance of "relationship therapy" for the long-term solution of marital difficulties.

Agreements about substantive issues cannot easily substituted for such therapy when relationships are tense. Similar conclusions have been reached by most marital therapists, who now de-emphasize the development of marital contracts and emphasize the importance of problem solving training and insight into the dynamics of the relationship. (Pruitt, 1995, p.375)

Pruitt also notes the draw-back of caucus or individual conciliation sessions in terms of successful outcomes because they foster a relationship *with the mediator* rather than with the disputing party. In his view arbitration/conciliation as a part of mediation "should be used as a means to foster joint problem solving rather than as a substitute for it." (Pruitt, 1995, p.376)

In terms of other broad characteristics associated with effectiveness Miller and Veltkamp (1995) describe four variables that should be addressed by a mediation program to ensure it is effective. These include:

- The nature of the conflict;
- The situational stress factors involved;
- The strategies to be utilized by the mediator;
- The personality characteristics of the mediator.

7.2 Mediator Characteristics

7.2.1 *General Approaches and Mediator Styles*

Studies analyzing the characteristics and qualities of family dispute mediators have shown that mediators are more effective when they:

- Are more active in structuring the mediation process;
- Focus more on problem solving;
- Discuss options and solutions rather than facts;
- Maintain flexible control;
- Interview more frequently when conflict between the parties is high;
- Shape communication by agreement-orientated directives;
- Focus on the interests of clients;
- Have superior communication skills and competence.

Beck and Sales (2001) analyze the value/importance of "neutrality" as shown by the mediator and the impact this stance may have on mediation outcomes and effectiveness. Two concepts of neutrality are described: (1) neutrality as impartiality where there is an attempted absence of bias and the mediator does not express values, and (2) neutrality as "equidistant," where the mediator balances the power/relational process between the two parties. Under the latter definition some power imbalances may exist at specific points in the mediation process but, by the end, a balance of power is achieved.

Neither of these concepts are well defined or utilized in practice. However, in an in-depth three year investigation of mediation Kressel and Fronk (1994), identified two styles of mediation that reflect broadly identified these approaches: the settlement and the problem oriented styles. These styles were then assessed in terms of their success in reaching settlements.

The settlement oriented and problem oriented styles are summarized in Table 4.

Table 4: Description of Settlement and Problem Solving Approaches to Mediation

Settlement Oriented Style (SOS)	Problem Solving Style (PSS)
<ul style="list-style-type: none"> • Focuses on the <i>settlement</i> of the dispute • Mediator attempts to stay neutral • Mediator is preoccupied with narrow issues presented by the two parties • Mediator does not probe or question clients, conflicts, circumstances or needs • Efficient model if couple highly motivated to end the dispute 	<ul style="list-style-type: none"> • Less concerned with settlement • Mediator embarks on an active search for the dysfunctional or destructive attitudes, perceptions or behaviours that might be fueling the conflict around co-parenting • Proposals are presented for breaking impasses • Mediator reinforces constructive problem solving • Mediator encourages the psychological ownership of the agreement

The authors note that a mediator's style is relatively consistent from case to case despite different issues and dynamics. Mediators,

appeared to operate below the level of conscious awareness; style was something mediators "did" without fully recognizing the underlying coherence or "logic" behind their style. Mediators were capable of articulating why they adopted the style they exhibited when their style was pointed out to them, but this took a conscious effort . . . mediator style could be modified but this took explicit direction or "training." (Kressel and Frontera, 1994, p. 72)

The authors found the two styles were clearly associated with different outcomes and degrees of effectiveness.

- The settlement oriented style had adequate results in terms of reaching agreements if there was a low level of conflict between the disputant and there was no severe pathology in the case;
- The settlement oriented style was much less effective when the couple was in conflict;
- The problem-solving style was more likely to result in agreement (57%, to 43%);
- In cases where no MOU was reached all but one was the result of using the settlement oriented style;
- The problem solving style was more likely to result in a durable agreement; 70% of those mediated using PSS had no post mediation court actions of any kind, compared to 30% of the SOS clients;
- In terms of attitudes towards the mediation experience 2/5 clients using the SOS felt the agreement was reached too quickly. In the cases of the PSS clients were more willing to discuss agreements and points of mediation and 6/12 felt their relationship had improved as a result of the mediation.

The authors conclude that:

From this perspective it can be argued that the settlement oriented style mediator is insufficiently active with regard to searching for the integrative potential in the conflict: the mediator enacting the SOS version of the role does minimal information gathering and the concern about maintaining "neutrality" seems to inhibit the search for a strategic direction. The preoccupation with getting a "settlement" would also seem to place the mediator's emphasis on seeking compromise – the lowest common denominator of settlement – rather than on initiating a search for more creative solutions.

By contrast, the problem oriented style is a model of the mediation role that has as a fundamental theme the need to search for integrative solutions. Thus, the PSS mediator assumes major responsibility for doing much of the cognitive work regarding the sources of the conflict. Quality problem solving is unlikely to emerge unless somebody is hard at work thinking about what has gone wrong and making this a focus of discussion. The parties are unlikely candidates for this diagnostic focus for obvious reasons, hence intervention by the mediator will usually be necessary if problem solving is to be achieved.

7.2.2 Mediator Gender

Swenson (1992) looked at mediator gender in terms of settlement and other outcomes. He found a number of outcomes related to settlement and client satisfaction related to mediator gender. These included the following:

- If parents did not settle, the mediation was related as less productive if the mediator was female;
- Female mediators spent more time and effort trying to make the relationship work especially with clients who do not reach an agreement;
- There was no difference in client perception of mediator qualities such as sensitivity or impartiality by gender;
- Female mediators had greater involvement and identification with the process and outcome of mediation and the emotional issues of clients;
- Having a same sex mediator is better in terms of offering support to clients;
- Female mediators with female clients had the lowest rate of direct communication with the other client;
- Female mediators tend to be more positive about the results of the mediation.

7.3 Duration of Program and Prescreening

In a review of the literature Hahn and Kleist (2000) report no clear relationship between hours or sessions reported and the results of the mediation. Beck and Sales, however, quote a study by Pearson and Theonnes (1989) that indicated the most dissatisfied clients are the ones participating in only one session of mediation.

What is not clear is the number of sessions that would be adequate to produce satisfied clients or the effect of the number of sessions might have a long-term agreement compliance. It seems to be self-evident that the programs offering a more "relational approach" have a greater number of sessions and that these types of programs are associated with higher compliance rates.

According to Kelly (1996 as quoted in Hahn and Kleist, 2000) prescreening to eliminate cases with a history of violence, very high conflict or unwillingness to divorce does lead to increase settlement rates.

7.4 Level of Coercion

There are few studies looking at coerciveness in relation to dispute settlement. In a study of a large mandatory mediation program Depner (1992 as quoted in Hahn, 2001) found that 46% of the cases mediated in a two week period reached agreement, plus 20% scheduled further mediation. A projected settlement rate of 60% plus in this sample is similar to the results in mediation that is voluntary. Hahn and Kleist, in their ten year review of the literature also note that settlement rates remain consistent (between 50-85%) in all types of mediation, including mandatory and voluntary mediation.

8.0 CLIENT CHARACTERISTICS RELATED TO MEDIATION OUTCOMES

Couple and individual characteristics may affect appropriateness for and the outcomes of mediation. This section reviews five client based characteristics related to mediation outcomes and/or effectiveness.

8.1 Family or Individual Characteristics (typologies)

Researchers have attempted to develop family or personal typologies that would assist in determining the most appropriate candidates for mediation. Beck and Sales (2001), as well as others, have identified a pattern of enmeshed interaction which may be inappropriate for mediation. This type of spousal relationship is characterized by disorganized structure, negative intimacy, frequent and direct fighting, impasse, chaos, and related characteristics. In this type of relationship the couple continues to dispute in order to maintain a level of intimacy in the relationship.

Essentially the couples become stuck in endless negotiation and dispute for the sake of disputing, negotiate and renegotiate interminably, derive little benefit from it and ultimately achieve no settlement. (Mathis & Yingling, 1990 as quoted in Beck and Sales, 2001, p.32)

Beck and Sales also identify a "demand-withdraw" pattern of couple interaction that is unlikely to benefit from mediation.

The "demander" will monopolize the speaking time, criticize, and make demands, and the "withdrawer" will defend his or her position, which leads to more demands, and so on. (Beck and Sales, 2001, p.34)

Rudd (1996) notes that very little is still known about the communication characteristics of those who participate in mediation and how these may affect the outcomes. She found that some participants used "pro-social compliance-gaining strategies", a compliance-gaining type communication where one person engages in such a way as to achieve a certain behaviour from the other. The author defines eight types of pro-social strategies including ingratiation, promises, esteem, altruism, direct request and empathy. More verbally aggressive clients who were not using these mechanisms were less satisfied with mediation. The results of her study suggest that in order to improve mediation mediators need to teach more specific pro-social communication skills to each participant.

8.2 Violence and Empowerment Issues

Whether mediation is appropriate in cases where there is a severe imbalance of power and control in a relationship has long been a controversial issue in the field of mediation. One perspective is that mediation is inappropriate in *all* cases of spousal abuse and violence.

Family disputes where one party has perpetrated violence against the other should not go to mediation. There are a number of reasons for this conclusion: the imbalance of power created by violence is extreme and is too great for a neutral mediator to redress, the nature and history of the relationship between the parties makes consensual decision making impossible and mediation is highly likely to result in unjust and exploitive agreements. (Aster, 1994, quoted in Davies et al, 1995, p. 326)

The literature also notes that domestic violence, power and control issues are complex and need to be understood in terms of their duration, intensity and characteristics before a decision about mediation can be made. Attempts to address and understand "typologies of violence" have been a on-going topic in the mediation literature.

One typology (Johnston and Campbell, 1993 as quoted in Davies et al, 1994), describes four profiles of inter-parental typologies and inter parental violence.

- Ongoing and episodic male violence;
- Female-initiated violence;
- Male controlled violence;
- Separation and post divorce violence.

According to the authors these typologies imply the need for differential clinical diagnosis and intervention. Discrimination between the various types of violence suggests for whom and what kind of mediation may be appropriate. For example, battering men and psychotic-paranoid individuals are primarily unsuited for confidential mediation. In other types of cases mediation methods need to be adapted to ensure physical safety, to rebuild trust, and to guarantee a balance of power between the divorcing parties. (Johnston and Campbell, 1993, p. 189 as quoted in Davies et al, 1995)

Typologies have been developed to describe relationships post settlement. Ahrons and Rodgers (1987, 1994) as quoted in Beck and Sales (2001) noted five types of couple relationships post settlements some of which may be less prone to settlement. The typologies identified are: perfect pals, cooperative colleagues, angry associates, fiery foes and dissolved duos. The latter two types of couples are more likely to enter into long, litigious post divorce proceedings. For example,

"angry associates" retain bitter and resentful feelings about their past marriage and resentment about the divorce process. Often these couples have long battles over financial matters and over custody and visitation . . . anger with each other is still an integral part of their divorce relationship, and they continue to do battle. Although the ex-spouses are still able to co-parent their children, the children often get caught in the middle of their parents' struggles. "Fiery foes" are similar to angry associates although . . . they are unable to parent . . . or accept each other's parenting rights . . . nonresidential parents visits usually decline. "Dissolved duos" completely sever contact with each . . . often one disappears. (Beck and Sales, 2001, p. 66)

Kelly (1996) notes that the focus on the appropriateness of mediation for victims of domestic violence has led to a variety of screening and service procedures that have been incorporated in court and agency services. She agrees that a discriminatory approach to the issue is necessary, but that, under certain conditions, the literature supports the benefits of mediation in many cases.

Research suggests that in those families in which both spouses were aggressive, not fearful, and were interactively violent with each other in the marriage, or in cases where women were violent or where there was one or at most two incidents of separation-engendered violence after a nonviolent marriage, mediation may be not only appropriate when particular safeguards are in place but may be more beneficial to the parties than the usual adversarial divorce process. (Ellis, 1995 as quoted in Kelly, 1996, p. 381)

In general, Kelly also notes that women are more likely to view mediation as being empowering and helping them to stand up to their spouses. In the literature, she reports women also rated themselves as more financially capable and knowledgeable as a result of the mediation process. Women (and men) in litigation were more likely to say that their rights were protected than those in litigation.

Several authors note that the timing of mediation in spousal violence cases may be particularly central. Separation is one of the most dangerous times for abused spouses. Because separation limits the contact, power and control of the abuser, Fischer et al (1993, quoted in Beck and Sales, 2001) note that some abusers will pursue mediation simply because it offers an opportunity for him/her to meet the spouse face-to-face. Some court-mandated mediation programs have reported serious security problems or incidents involving threats and acts of violence towards the abused spouse or mediator.

Apart from the exceptions described above there are many studies that indicate that high levels of anger and marital conflict are not necessarily barriers to mediation and achieving agreement (Hahn and Kleist, 2000). However, the success of these clients presupposes an emphasis on communication and relational issues. Davies et al (1995) found that a significant proportion of those attending voluntary mediation reported that physical and emotional abuse was a significant issue for them. Much of this was recent abuse. However, 84% of the clients were satisfied with the counselling they received and there were no significant differences in satisfaction levels between women who reported abuse and those who did not.

Maxwell (1999), however, questions the use of mandatory mediation where domestic violence exists. She notes that despite a discussion of typologies the "very nature of an abusive relationship makes a fair, safe or mutually acceptable settlement an impossibility" (as quoted in Maxwell, 1999, p. 338). She suggests that most mediation services have done an inadequate assessment of violence and its comprehensive impacts before deciding to provide services. She recommends further acknowledgement, understanding, screening of domestic violence and recognition of the effects (including dissociated coercion which may include denial, minimization, amnesia or dissociation) on the part of mediators.

Without an awareness of the nature of dissociated coercion, coercion control, and the physiological and psychological dimensions of family violence, a mediator is ill prepared to understand the control dynamics of the relationship. A mediator can expect that statistically at least one out of four women that he or she sees will be suffering from trauma-induced sequelae that make negotiating with her perpetrator on anything resembling an equal playing field impossible. (Maxwell, 1999, p. 343)

8.3 Families with Young Children

Pruett et al (2000) looked at the needs of divorcing high-conflict parents with young children. These families are characterized by high need, frequent contact with the legal system and exposure of young children to

intense and chronic conflict. There was a high level of mental health needs in this group. Substance abuse, spousal abuse and child abuse were issues in 39% - 58% of the cases. The authors note the high stress levels in families with very young children under 6 years of age. Families often required assistance on parenting matters in mediation.

Prior to the completion of her study, only 25% of this group reached agreement. Families with younger children (0-3) were more likely to accept a follow-up settlement recommendation than families with children of over 6 years of age.

8.4 Whether Client was Complainant or Respondent

Pruitt (1995) identified the roles of complainant and respondent as affecting the outcomes of mediation. The complainant is usually the person in the relationship who initiates the mediation and tries to get the other partner (respondent) to change in some way. The author found that complainants were more competitive, made more demands and posed more issues to be solved in mediation. Respondents were more self-critical, took on more responsibility for the problem, made more comments prejudicial to their position and were more yielding. Complainants were more aggrieved but respondents developed more ideas for solving the dispute. Despite the more dominant role of the complainant they were less satisfied with the agreement and conduct of the mediation. The authors concluded that,

. . . it became clear that the respondent's experiences in mediation are usually more important in the long run than the complainants' experiences . . . though complainants tend to be more vociferous . . . mediators should pay more attention to the respondents' sensitivities. (Pruitt, 1995, p.375)

8.5 Mediation with Serious Mental Health Disorders

Little is known about the effectiveness of mediation with those with serious behavioural or mental health disorders. According to Hahn and Kleist (2000) and Beck and Sales (2001) these issues have not been addressed in the research and few programs have been modified to meet their needs.

9.0 CONCLUSIONS

The literature addressing mediation in family dispute matters is vast and covers a period of almost thirty years. One of the unique characteristics of this literature is the diversity of disciplines that are represented. These include law, economics, social work, education, clinical and social psychology. This scope has led to problems in defining the models of mediation and the characteristics of the models (for example, mediation style) that are most likely to be effective. Most of the mediation literature has been comprised of program outcomes research.

There continues to be gaps in the literature in relation to a number of substantive areas :

- There is a lack of sustained *programmatic* research that analyzes the outcomes of mediation over a longer period of time (more than 2 years);
- There is a need to explore and analyze the factors that support client empowerment and the ways in which a power imbalances in the family dispute can be addressed;
- There is more literature required on typologies of abuse and violence and how these may effect service entry and delivery;
- More information is needed on the program adaptations that are required to provide services effectively to groups such as the chronically litigious, ethnically diverse clients and those with mental disorders. Research has also noted that families with very young children have unique stressors and a level of problems (eg. violence, alcohol /drug problems, and mental health issues that make mediation problematic);
- More data is required on the specific interventions involved in the mediation process and how these are linked with program outcomes and effectiveness. Although there is limited research on mediator styles, the literature suggests that a problem oriented style is more effective than a settlement oriented style in reaching permanent settlements.
- More research is also required on the function and value of hybrid models, for example, those combining mediation/arbitration.
- There is a dearth of literature on the importance of the number of mediation sessions offered (court or non-court) placement of programs, and the value of follow-up sessions, although several authors believe the latter to be critical.
- There has been a lack of randomized critical group studies to accurately assess issues such as cost and re-litigation in a more definitive manner.

One of the problems in determining outcome results is that there is often a lack of comparability in programs which can be mandated, voluntary, community or court based, accessible or fee based and staffed by volunteers, trained mediators or attorneys.

Despite the limitations of the program outcomes literature several themes describing mediation outcomes have emerged. In general (although there some exceptions in the literature) mediation can be said to result in:

- A moderate to high rate of settlement (50-85%) which exists across all types of mediation programs (court, community, voluntary and mandated);
- A high rate of compliance with agreements in comparison with litigation. A recent long term study suggests that compliance with child access/visitation is significantly better than occurs with litigated clients;
- A higher rate of compliance with child support payments although settlement type is not necessarily the most important predictor of this issue;
- A trend towards less litigation in the early period post settlement, although re-litigation rates of mediated and litigated parents may equalize over time. Some studies have shown mediated parents to be more litigious before mediation;
- More shared parenting or joint custody agreements than occur with litigated disputants;
- Modest, small or short lived improvements in parental acrimony and conflict. Mediation does not seem to result in robust or lasting changes in this area. This is important because parental acrimony has been shown to be the most important predictor of child adjustment;
- A higher level of continuing involvement of the non-residential parent with the children;
- A limited impact on the adjustment of children;
- Little evidence of improved parental adjustment. Depression levels among parents decrease over time among disputants, but this is linked to the passage of time rather than to the type of settlement;
- High levels of client satisfaction with the process and outcomes of mediation (60-85%) compared to the satisfaction level of litigants (30-50%). Even people in mediation who do not achieve agreements are generally satisfied. Disputants are likely to feel their concerns were heard, that the agreement is fair and that the process is empowering. Clients also note that mediation helps keep the discussion on track and helps parents focus on the needs of the children;
- Decreased costs. Although cost comparisons are complex, the literature has shown mediation to be substantially cheaper than litigation as a settlement process.

A therapeutic oriented model that focuses on addressing and resolving emotional issues is noted in the literature as being most likely to address some of the underlying issues around parental conflict and long term parent/child adjustment. This model would also employ booster or follow-up sessions after settlement. In terms of mediation "styles" the problem oriented approach has been identified with an increase in longer

term settlements. The problem oriented approach focuses on the dysfunctional elements that fuel the conflicts around co-parenting rather than being solely directed towards reaching an agreement. However, a limited analysis has been made of some of these potential typologies and of their characteristics.

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