BEYOND THE COURTROOM DOOR: EXPLORING THE FEASIBILITY OF CHILD PROTECTION MEDIATION IN IRELAND

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DEDICATION

For Mam and Dad, and my Conor.

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PLAGIARISM DECLARATION

I hereby certify that this material, which I now submit for assessment on the programme of study leading to the award of Ph.D. in Law, is entirely my own work and has not been taken from the work of others save and to the extent that such work has been cited and acknowledged within the text of my work.

TABLE OF CONTENTS

ABBREVIATIONS

ACS:	Administration for Children's Services (New York)
ADR:	Alternative Dispute Resolution
AFCC:	Association of Family and Conciliation Courts
CAAB:	Children's Act Advisory Board
CAS:	Children's Aid Society
CASA:	Court Appointed Special Advocate
CDS:	Citizens Dispute Centres
CFA:	Child and Family Agency (Tusla)
CFSR:	Child and Family Service Review
CPM:	Child Protection Mediation
CYFSA:	Child, Youth and Family Services Act
DCFS:	Department of Children and Family Services
DCYA:	Department of Children and Youth Affairs
DMD:	Dublin Metropolitan District
DRC:	Dispute Resolution Centre
GAL:	Guardian Ad Litem
IRC:	Irish Research Council
LR:	Legal Representatives
LRC:	Law Reform Commission
MOU:	Memorandum of Understanding
MU:	Maynooth University
NCJFCJ:	National Council of Juvenile and Family Court Judges
OCL:	Office of the Children's Lawyer

Para:	Paragraph
MAG:	Ministry of Attorney General
MCFD:	Ministry of Children and Family Developments
PSB:	Participants from State Bodies
UNCRC:	United Nations Convention on the Rights of the Child
USA:	United States of America

ABSTRACT

In recent years, the Irish child protection and welfare system has witnessed an unprecedented level of increase in legislative and policy development. However, one area that remains relatively unexplored in Ireland is the use of alternative dispute resolution mechanisms, such as mediation, in child protection proceedings. By contrast, in other jurisdictions, such as in the United States of America and Canada, the incorporation of mediation within the child protection system has increasingly been advocated as a genuine alternative to wholly adversarial proceedings. Child protection mediation can provide parties with the opportunity to improve family communication, reduce high levels of conflict, avoid excessive litigation and reach a personalised agreement in the best interests of the child. Unfortunately, in Ireland, child protection mediation has not heretofore been fully explored or researched and a determination of its value in the protection of child safety and welfare has not been reached. Therefore, building on existing research regarding alternative dispute resolution processes, this thesis set out to explore the feasibility of child protection mediation in Ireland and the extent to which is could aid child safety and welfare.

The research adopted a triangulated research methodology approach through the use of surveys, semi-structured interviews and structured observations. The thesis analysed data from three research phases: Phase 1 examined child protection mediation with national stakeholders and the Irish judiciary; Phase 2 examined systems operating in certain jurisdictions of the United States of America and Canada, in which child protection mediation is increasingly recognised as an invaluable mechanism; and Phase 3 determined the extent to which alternative dispute resolution mechanisms are currently being used in child welfare and protection disputes in Ireland. The key finding from the study was that the implementation of child protection mediation in Ireland could aid child welfare and improve the quality of decision-making in child protection cases. However, this thesis is not advocating that child protection mediation should be used in all child protection cases and, therefore, it should not be seen as a panacea. Rather, this thesis presents the reasoned, evidence-based argument for considering the use of mediation, in certain aspects of child protection proceedings.

CHAPTER 1: INTRODUCTION

In Ireland, pursuant to section 3 of the Child Care Act 1991, there is a statutory duty on the Child and Family Agency (Tusla)[1] to promote the welfare of the child who is not receiving adequate care and protection. When the CFA intervenes, court intervention often ensues (especially where the parties are in dispute) to ensure the child receives adequate protection. In such cases, it is the role of the judge to determine what is in the "best interests" of the child.[2] At the heart of these legal disputes are the children. However, what must be remembered is that it is a child's future that is greatly impacted by the outcome of these proceedings.

It is widely accepted that courts can be intimidating places for parents and children alike (Council of Europe, 2011). Child protection proceedings, in particular, are extremely sensitive and highly emotive (O'Mahony, et al., 2016). The architectural design of the building can be unapproachable and uncomfortable (O'Mahony, et al., 2016); the adversarial nature of proceedings can exacerbate the tensions between the various parties, potentially damaging working relationships (O' Mahony, et al., 2016; Coulter, 2015; LRC, 1996); and the technical legal language used by working professionals can be difficult to understand, leading to a lack of parental understanding regarding the child care proceedings (O'Mahony, et al., 2016).

In recent years, in Ireland the "best interests" principle for the child has increasingly been regarded as being of paramount importance, underpinned by both national and international legislative developments; this is particularly evidenced by Article 42A of the Irish Constitution 1937[3] and Article 3 of the United Nations Convention on the Rights of the Child (UNCRC) 1989. But how do we actively serve the "best interests" of the child? Through adversarial processes? In appropriate cases, litigation may indeed be unavoidable, especially where a child is at immediate risk of danger/harm and in extreme cases of domestic violence and power-imbalance. However, could the "best interests" of the child be served in certain circumstances and contexts through alternative processes? Are there certain issues within a

[1] Throughout this thesis, Tusla (Child and Family Agency) will be referred to as the CFA; mainly because this is the term used in legislation and court applications (Coulter, 2015). The CFA was established in January 2014 under the Child and Family Agency Act 2013.

[2] Article 42 A.4.1. of the Irish Constitution requires that the "best interests" of the child shall be of paramount importance, whereas, the Child Care Acts refer to the "welfare" of the child as being of paramount importance. However, the statutory welfare principle must be interpreted by the courts in light of Article 42.A. This is discussed in depth in Chapter 2.2.3: Best Interests of the Child.

[3] The Thirty-first Amendment of the Constitution (Children) Act 2012 amended the Irish Constitution by the insertion of Article 42A.

child protection case that could be more appropriately managed outside of the courtroom? Obviously, such alternative processes may not adequately address the child protection concerns of abuse, neglect and maltreatment; it is solely for a judge to determine whether the threshold criteria of child protection concerns have been met. But could alternative dispute resolutions, such as mediation, be used to remove certain barriers which are preventing the case from moving forward efficiently and effectively in a court? These may include barriers such as the details of voluntary care agreements, pursuant to section 4 of the Child Care Act 1991, or disputes around matters such as access or the perceived attitude that a foster parent may have towards the birth family.

During the past two decades, courts and child welfare agencies around the world have begun to view the use of mediation, in some child protection cases, as a more proportionate response to certain issues within child protection cases. Many foreign jurisdictions, such as those in the United States of America (USA) and Canada, have gradually recognised child protection mediation (CPM) as an invaluable mechanism in the protection of the child's safety and welfare. CPM can offer a collaborative mechanism for parents and the child protection services achieving a just, cost effective and expeditious resolution of safety and welfare proceedings in the best interests of the child (Giovannucci, 2013; Madden & Aguiniga, 2013; Firestone, 2009). The aim of CPM is not to determine whether alleged mistreatment of the child occurred (Barsky, 1999); a judge must determine that the threshold criteria of child protection concerns have been met. Rather, CPM can be used to reach a settlement agreement that will ensure the child's safety and promote collaborative decision-making opportunities for the parties, provided it is in the best interests of the child before adversarial solutions are imposed on the family (Eaton, et al., 2007).

However, in Ireland, the use of mediation within child protection proceedings has not been suitably explored or researched in sufficient depth and detail to determine its value, if any, in the protection of the child's safety and welfare.[4] In fact, section 3 (1) (i) of the Mediation Act 2017 explicitly excludes proceedings under the Child Care Act 1991 to 2015 from its scope.[5] There are many reasons for this perceived resistance to CPM at policy level including, but not limited to concerns that the voice of the child could get lost within the mediation process, fear of potential power-imbalance in the mediation process resulting in a mediated settlement

[4] It is important to acknowledge that some researchers and academics have explored the potential use of alternative dispute resolution mechanisms in child care proceedings: see Corbett & Coulter (2019); Shannon (2018); Quirk, (2015).
[5] Section 3 (1) (i) of the Mediation Act 2017 states: "the Act shall not apply to: …(i) proceedings under the Child Care Acts 1991 to 2015."

that is not entirely voluntary, and the lack of a level playing field and sufficient safeguards for vulnerable parties facing state intervention.[6] However, in embarking on this research project, it quickly became evident that appropriate research should be undertaken to determine whether the implementation of CPM will aid child safety and welfare and improve the quality of decision-making in child protection cases. Therefore, the overall aim of this research study is to:

1. Investigate and evaluate the use of CPM as an alternative to adversarial processes in child protection proceedings; and
2. Determine through the identification and examination of the research data, the extent the roll-out of CPM can aid child safety/welfare in Ireland.

Nevertheless, before detailed analysis is conducted, it is important to understand the broader perspective of this research study, focusing on the background context of the research, how existing literature on the topic was used to inform the research, and the main areas of interest and motivations for engaging in this field of study. In addition, this chapter will provide a brief overview of this research, by outlining the aims, objectives and central research questions. Finally, the chapter will conclude by providing a general framework for the thesis structure.

1.1. BACKGROUND CONTEXT TO THE RESEARCH

Originally this research study was entitled "*Different Doors, Different Responses: Child Protection Mediation*". The rationale was based on the unfortunate reality that children often find themselves at the centre of a variety of legal disputes and, as a result, they may enter the court system through a number of possible doors. Some of these disputes involve disagreements between parents (private family law proceedings); others involve the possibility of state intervention due to child protection and safety concerns (public child protection proceedings).[7] However, what must be remembered, is that a child's future can be significantly affected by whatever door through which their family enters.

[6] Concerns surrounding the use of mediation in child protection disputes are examined in further detail throughout this research study.

[7] In Ireland, our law is categorised into criminal law and civil law. The difference between both is complex, however, broadly speaking, criminal law deals with crime, which is punishable by the State, and civil law deals with the rights and duties of individuals. The civil law jurisdiction can be further subdivided into private law and public law. Private law focuses on the individual relationships between private citizens (i.e., family law), whereas, public law is concerned with the relationship between the individual and the state (i.e., child protection law) (Hamilton, 2012).

According to Whelan (2018), the concept of the "door*" "represents the single point of entry for referrals"* (Whelan, 2018, p. 1). By the end of 2015,[8] there was a total of 43,596 referrals made to child protection and welfare services in Ireland in that year (Tusla (a), 2015); fifty-nine percent identified child welfare concerns (a problem experienced directly by the child which is likely to seriously affect the child's health, development or welfare)[9] and forty-one percent related to child protection concerns (harm in relation to the child which seriously affects or is likely to seriously affect the child's health, development or welfare).[10] This figure reflects that four out of every 100 children living in Ireland in 2015 required child protection and welfare services (Tusla (a), 2015). According to the Court Service Annual Report 2015, 10,217 incoming child care applications were made to the Irish courts during 2015 (Courts Service, 2015); orders were granted in seventy-six percent of cases.[11] The court only considers applications made by the CFA where it is seeking appropriate orders in respect of the care or supervision of a minor. As a result, in 2015, approximately twenty-three percent of referrals made to the CFA led to some form of court proceedings.[12] In addition, according to the Courts Service Annual Reports, between 2015-2018, there was a twenty-nine percent increase in the number of incoming child protection applications made to Irish courts.[13] However, while this increase is quite significant, it is reflective of a general upward trend in the number of child care applications/proceedings, and of the significantly increased demands placed on child protection working professionals. Therefore, there is a duty on child protection workers and professionals to consider new, alternative "doors" that can aid child safety and welfare in Ireland.

What was particularly eye-opening for me was the number of children in alternative care. According to the CFA (Tusla) Alternative Care Handbook (2014), alternative care is defined

[8] This doctoral research study commenced in January 2016, under the co-supervision of Dr Fergus Ryan (senior lecturer, MU), and Her Honour Judge Rosemary Horgan, Circuit Court Judge. This is why 2015 figures are being referred to.

[9] HSE Handbook on Child Protection and Welfare (2011) defines a child welfare concern "a problem experienced directly by a child, or by a family of a child, that is seen to impact negatively on the child's health, development and welfare, and that warrants assessment and support, but may not require a child protection response" (HSE, 2011, p. 6).

[10] HSE Handbook on Child Protection and Welfare (2011) defines a child protection concern "where there are reasonable grounds for believing that a child may have been, is being or is at risk of being physically, sexually or emotionally abused or neglected" (HSE, 2011, p. 5).

[11] As indicated in the Court Service Annual Report (2015) "the number of applications does not necessarily reflect the number of children in respect of whom orders are made, as several orders may be made in respect of an individual child."

[12] Albeit some of the court proceedings may have been related to referrals from the previous year.

[13] According to the Courts Service Annual Report 2018, there were 13,168 incoming child care applications made to the Irish courts during 2018; according to the Courts Service Annual Report 2019, there were 10, 224 incoming child care applications made during 2019.

as "*care provided by people other than birth parents*" (Tusla, 2014, p. ix). In December 2015, there were 6,384 children in alternative care in Ireland (Tusla (c), 2015). Under the Child Care Act 1991, the CFA has a statutory responsibility to provide alternative care services. Alternative care is generally provided in the form of foster care arrangements. In 2015, sixty-four percent of children in care were in foster care placements and twenty-nine percent were in foster placements with relatives.[14] Generally, children entered the care system through voluntary care arrangements (fifty-nine percent in 2015), pursuant to section 4 of the Child Care Act 1991 (Treoir, 2018). The remaining forty-one percent of children, however, entered care by way of a court order. According to Dr Carol Coulter (2015), that does not mean that all child care orders involved a highly contested court proceeding; however, a certain proportion would have (Coulter, 2015).

After examining these figures, I could not help but wonder whether certain aspects of a child protection case could be more appropriately managed outside of the courtroom through the use of alternative dispute resolutions, such as mediation. The use of mediation within statutory child protection litigation is widespread in a number of jurisdictions; however, unfortunately, it is not systematically used in Ireland. As previously mentioned, many foreign jurisdictions worldwide, such as some in the USA and Canada, have introduced CPM programmes for the purposes of reducing the length of a child's stay in alternative care and decreasing court system burdens. Internationally, CPM is seen as an effective service intervention used after a child welfare agency has removed a child from their home (Hehr, 2007). The main purpose of CPM is to develop a case plan to reunify the family as soon as possible (Hehr, 2007). Where family reunification is not possible, the goal of the mediation is to achieve the most permanent placement for the child within the time frame as specified by law (Lande, 2001). Given the importance of family reunification, and the safety and welfare of the child, it is essential that continued research and attention be given to determine the effectiveness of service interventions, such as CPM, in helping facilitate positive permanency[15] outcomes and family reunification (where possible) for children in Ireland.

[14] However, children are also placed in residential care (accounting for five percent of cases in 2015) and other care arrangements (accounting for two percent of cases in 2015). According to Coulter, "*the CFA has its own detailed analysis of the reasons why children are in care, though its figures do not distinguish between voluntary and court-ordered care*" (Coulter, 2014, p. 5).

[15] There can be some variance in how permanency can be defined, however, for the purpose of this research, permanency is mainly concerned with the legal definition of securing permanency. This can be achieved through "*reunification, long-term fostering, forms of special guardianship or adoption*" (Irish Foster Care Association, 2018, p. 3).

Subsequently, the thesis title was amended to reflect this: "Beyond the Courtroom Door: Exploring the Feasibility of Child Protection Mediation in Ireland."

1.2. MAIN AREA OF CONCERN

In Ireland, the primary legal framework for child care proceedings is the Child Care Act 1991.[16] As aforementioned, section 3 of the Child Care Act 1991 stipulates that the CFA must *"promote the welfare of children in its area who are not receiving adequate care and protection….and so far as is practicable, give due consideration, having regard to his age and understanding, to the wishes of the child"* [emphasis added]. Consequently, there is a statutory duty imposed on the CFA to be proactive in promoting the child's safety and well-being and apply for care orders and supervision orders as is necessary (sections 16 - 19 of the Child Care Act 1991).[17] Burns (2018) indicates that in practice this occurs by the social worker instructing a legal representative to make an appropriate application (Burns, et al., 2018). In addition, the Child Care Act 1991 also places a heavy emphasis on family reunification, provided that it promotes child welfare. One such example can be seen in section 3 (2) (c) of the Child Care Act 1991 which states that the CFA should *"have regard to the principle that it is generally in the best interests of a child to be brought up in his own family."* The importance of the child's welfare cannot be underestimated; however, the statutory welfare principle must be interpreted in light of the best interests principle, pursuant to Article 42A of the Irish Constitution.

Various studies have identified that removing a child from their family home, and consequently from the care of their parents, raises significant issues and concerns (Coulter, 2015); such as placement instability (Barber & Delfabbro, 2003; Mech, 2003). However, while the CFA has a statutory obligation to promote the safety and the welfare of the child, the CFA must also have regard to the rights and duties of the parents. It is essential, therefore, that a balance is struck between the rights of a marital family, who under the Irish constitution are recognised as the natural and fundamental unit group of society (Article 41),[18] and the imprescriptible rights of the child, whose safety and welfare may be prejudicially affected without state intervention (Article 42A). A child should only be separated from

[16] However, it should be noted that the Child Care Act 1991 must be consistent with the Irish Constitution and compatible with the European Convention on Human Rights Act 2003.

[17] There is some case law suggesting that the CFA has a duty to be proactive, such as identifying risks before harm is done; *MQ v. Gleeson and Others* (High Court, unreported, 13 February 1997).

[18] The concept of a "family" is firmly grounded in the Irish Constitution, and indeed in legislative provisions. Firstly, Articles 41 and 42 bestow strong rights and duties on the marital family and on married parents; unmarried fathers have no constitutional rights (See *State (Nicolaou) v. An Bord Uchtála* [1966] IR 567). This is further explored in Chapter 2.2.1.1: Evolving definition of the 'family' under the Irish Constitution.

his/her parents where it is necessary to ensure the "best interests" of the child are served.[19] This standard was affirmed by Horgan P. in the case of *CFA and AC & Anor* [2014] IEDC 17; the court stressed that the CFA is under a duty to protect the rights of the child and to take necessary steps to enable family reunification, subject to the safety of the child:

> *"The Agency* [CFA] *is equally under a positive obligation to consider family reunification (as emphasised in the case of Olsson v. Sweden (1989) 11 EHRR 259) and to regard reunification as the goal where possible and to provide access to the child in care for the parents unless such access is detrimental to the wellbeing of the child"* [para. 46].

Internationally, the United Nations Guidelines for the Alternative Care of Children (2010) clearly set out that permanency for the child should be ensured in a timely manner through family reunification, provided that it is in the "best interests" of the child. If this is not possible, the most suitable form of alternative care should be provided for the child *"under conditions that promote the child's full and harmonious development*" (United Nations General Assembly, 2010, p. 2). Unfortunately, a recent review of the Child Care Act 1991 carried out by the Ombudsman for Children (2018) highlighted that the Child Care Act 1991 *"does not make any explicit reference to the importance of carrying out actions and making decisions within the scope of the Act in a timely manner"* (Ombudsman for Children, 2018, p. 13).[20] Furthermore, the Council of Europe's Resolution 2232 (2018) also emphasises the need to resolve disputes in a timely manner and recommends that in order to achieve a resolution in the "best interests" of the child and the family alike, member states should:

> *"*[5.2] *give the necessary support to families in a timely and positive manner with a view to avoiding the necessity for removal decisions in the first place, and to facilitating family reunification when possible and in the child's best interests: this includes the need to build better collaboration with parents, with a view to avoiding possible mistakes based on misunderstandings, stereotyping and discrimination. These mistakes can be difficult to correct once trust has been lost"* [emphasis added] (Council of Europe, 2018).

The phrase *"build better collaboration with parents"* indicates some form of a problem-solving process between the parents and working professionals. As mentioned above, CPM promotes a collaborative decision-making process and provides the opportunity for all parties involved

[19] Article 9 (3) of the UNCRC.
[20] In contrast, in private law proceedings, pursuant to section 31 (5) of the Guardianship of Infants Act 1964, the court shall have regard to the fact that unreasonable delay may be contrary to the best interests of the child.

to be heard. Therefore, this research seeks to critically evaluate whether alternative dispute resolutions, such as the use of mediation, in appropriate situations, could be effective in facilitating positive working relationships between the families and child protection workers, with the ultimate goal of achieving child permanency outcomes and family reunification (where possible) for children in Ireland. The results of this study will provide a platform for future discussions regarding the practical use of mediation in child care proceedings; this will inform policy and state actors as to the potential benefits of developing CPM at a national level.

1.3. RESEARCH INTEREST

Initially, my interest in this research study derived specifically from working as a judicial assistant/researcher for Her Honour, Judge Horgan, formerly President of the District Court,[21] who has extensive experience in all aspects of family and child protection law. Working within the court system afforded me with the opportunity to witness the realities and in some cases the distresses of family and child protection proceedings brought before the Dublin Metropolitan District (DMD) on a daily basis. As mentioned above, in 2015, 43,596 referrals were made to child protection and welfare services (Tusla (b), 2015); how many of these cases could have been more appropriately resolved through the use of alternative dispute resolutions, such as mediation?[22] As a result, the original motivation for this academic endeavour stemmed from the increasing number of child care referrals and applications made to the courts, which emphasised an increasing need to address family and child protection disputes in a more holistic fashion.

At the outset of this study there was good quality Irish research within the discipline of child protection (including, but not limited to Dr Carol Coulter and the Child Law Reporting Projects; Dr Geoffrey Shannon and Dr Helen Buckley as Child Law Experts). A large proportion of this discussion has centred around the current state of family and children services used within the context of Irish courts (Shannon, 2018; O' Mahony, 2016; Parkes, et

[21] Currently, Judge Horgan is a judge of the Circuit Court. She was the former President of the District Court from 2012-2019.

[22] Alternative dispute resolution processes currently used in child protection cases will also be examined as part of this research (see Chapter 2.3.3: "ADR" process used in child protection disputes in Ireland). The two main types of ADR processes used in child protection cases are: (1) family welfare conference, pursuant to Part 2 of the Children Act 2001; and (2) child protection conference, for which there is no specific legislation, however, it is provided for under national policy of the Children First: National Guidance for the Protection and Welfare of Children (DCYA, 2017).

al, 2015) and the process of involving children in the decision-making process.[23] However, there is a notable lack of in-depth analysis in relation to the potential use of mediation within the child protection field.

During the course of initial review, it became apparent that while there was an expansive volume of literature which concentrated on the development of mediation (in general) and family mediation in Ireland (Connelly, 2017; Sweeney & Lloyd, 2011; LRC, 2010),[24] the Irish literature was limited in respect of the use of mediation within child protection disputes. Not only that but there have been several analyses of the various disadvantages that highly contested and lengthy adversarial disputes can have on children and parents (Coulter, 2013; lRC, 2008); however, the extent to which service interventions, such as mediation, could be beneficial in child protection cases has not been adequately explored in Ireland. There are a few researchers, for example, Dr Carol Coulter, who have briefly acknowledged the potential for the use of alternative dispute resolution mechanisms in child care proceedings. In her Interim Child Care Law Report Project (2013), she stated: *"one of the solutions that has been suggested is the use of alternative dispute resolution, including mediation, in child care proceedings"* (Coulter, 2013, p. 24). In 2015, Karen Quirk, a family mediator in Ireland, produced an article on whether mediation might usefully improve outcomes in child care proceedings that arise in Dolphin House.[25] Quirk (2015) interviewed nine stakeholders involved in child protection proceedings, and examined the literature and concluded that mediation might make a useful intervention in certain categories of child care cases, subject to certain conditions being met, particularly in relation to the safety of the child. However, it is clear that further ongoing research is needed, paying attention to stakeholders' perspectives, and legislative guidelines (Quirk, 2015).

Therefore, my interest in this research also derived from the gaps in the literature and the relative lack of in-depth research on mediation in child protection proceedings specifically in Ireland. There was no clear answer as to whether the use of mediation in child care

[23]This can be demonstrated through: (1) legislation - such as Article 42A of the Irish Constitution; Children and Family Relationship Act 2015; Child Care Act 1991; United Nations Conventions on the Rights of the Child 1989 (Article 12); European Convention on Human Rights Act 2003); and (2) the literature (Shannon, 2017; Parkes, et al., 2015; Coulter, 2015).

[24] Recently, there has been an increase in research conducted regarding mediation in international child abduction cases in Ireland. For example, in 2019, a child abduction seminar was organised by the Irish Branch of GEMME (European Association for judges interested in mediation), which explored the role of mediation in family law and child abduction litigation (Shannon, 2019; Clissmann, 2019; Dunne, 2019) (see chapter 2.5.3.: Child Abduction Mediation).

[25] Dolphin House is a Family Law Court in DMD.

proceedings could in fact aid child safety and welfare in Irish child protection courts, which emphasised a lack of reference points. Thus, this study endeavours to investigate the possibility of mediation being used as a viable alternative dispute resolution process within Irish child protection courts. In addition, this study focuses on identifying concerns or barriers, if any, which may affect the use and implementation of mediation as an appropriate alternative dispute resolution mechanism within certain aspects of child protection proceedings.

1.4. RESEARCH AIMS AND OBJECTIVES

The main research aim of this study is to investigate the current form of mediation in Ireland and whether CPM in Ireland can make a valuable contribution to the safety and welfare of children and families. This research explores the impact of CPM on child welfare and focuses on international research; with distinct consideration given to certain states in the USA and individual provinces in Canada where CPM programmes have been successfully implemented (Giovannucci, 2013; Crush, 2007; Lande, 2001). In order to achieve this aim, the primary research objectives are as follows:

- ***To evaluate the extant literature and research relating to mediation (in general), family mediation, and CPM:***

  As outlined above, there is a vast quantity of research and literature within the arena of family and child protection law. This study explores the most relevant national/international research pertaining to family and child protection law and outlines the history of Irish Governmental policy in the area of family and child care proceedings. In addition, this research study will employ a doctrinal legal research method by examining appropriate official publications (for instance academic journals/articles and books) and traditional sources of law such as constitutions, national and international legislation, directives, regulations, and case law. This will serve to provide a detailed examination and analysis of family and child protection law and the mediation literature relevant to the literature review.

- ***To explore the perspectives of stakeholders and the Irish judiciary in relation to mediation (in general) and initial perspectives on mediation in child protection proceedings as an alternative to adversarial processes in Ireland:***

  The overall rationale of this research study is to identify if there is a place for mediation in certain aspects of child protection proceedings; in particular, the details

of voluntary care agreements (pursuant to section 4 of the Child Care Act 1991), access disputes relating to children in the care of the State, access to services provided by the CFA, and foster placement issues/breakdowns. In order to answer the research question, it is vital to understand the perspectives of national stakeholders and members of the Irish judiciary involved in child protection proceedings. This will provide an overview of Irish stakeholders' current standpoint in relation to CPM; such as their initial perspectives towards CPM, and the extent to which they support/resist the use of CPM in an Irish context.

- ***To examine the situation in other jurisdictions, such as those that are part of the USA and Canada, where Child Protection Mediation is widely recognised as an invaluable service in the protection of the child's welfare:***
  Unfortunately, in Ireland CPM has not been explored in sufficient depth or widely researched to determine its value in the protection of the child's safety and welfare. Therefore, an objective of this study is to examine current circumstances in the field of CPM by conducting fieldwork in two jurisdictions each of which has a particular experience with CPM; the USA (four states were examined, namely Illinois, Oklahoma, Florida, New York), Canada (two provinces were examined, namely Ontario, and British Columbia). The primary focus was to develop a deeper understanding of CPM in order to determine whether mediation has a worthwhile role to play in adversarial processes and the extent to which CPM could aid child safety and welfare in Ireland.

- ***To identify and critique the possible concerns and/or barriers that may obstruct the use of mediation in Irish child protection disputes:***
  The research study will contribute to and seek to further enhance the vast body of literature that examines mediation (in general), and international literature on CPM by identifying and investigating barriers and/or concerns that may inhibit the successful implementation of mediation as an alternative dispute resolution mechanism within the Irish child protection system. As mentioned above, there has been a resistance to CPM at policy level (demonstrated by the exclusion of the Child Care Acts 1991-2015 from the scope of the Mediation Act 2017). There are many reasons for this resistance such as; how would the voice of the child be maintained in the process; and/or are the power-imbalances in CPM too stark for mediation? The research study aims to address these concerns by examining other jurisdictions (such

as those in the USA and Canada) where CPM is being utilised and explored. By addressing these concerns, attitudes towards CPM at a national level may change.

- ***To investigate the implications of the development of alternative dispute resolutions, focusing on mediation, in relation to Irish government policy for child protection:***
  The aim of this study is to interrogate the potential benefits of the use of alternative dispute resolutions, specifically mediation, in child protection proceedings. Findings of the study will inform policy and state actors as to the potential for the use of CPM at a national level. This research study will also explain the policy implications and suggest useful avenues for further research within this discipline.

1.5. RESEARCH QUESTIONS

An in-depth analysis and review of the literature, will be outlined in chapter 2, highlights that there is a lack of detailed research evaluating the potential use of CPM in Ireland. As contemporary research and literature was not enough to provide a clear picture of the development of CPM in Irish child protection system, several questions arose. The central focus of this research study is:

> ***"to determine whether child protection mediation can be a viable alternative, either in whole or in part, to adversarial processes and whether it can aid child safety and welfare?"***

From the main research question flowed a number of secondary questions. These questions developed organically during the research design process. The secondary questions sought to determine:

- In what cases might such ADR techniques be appropriate in child protection cases? What are the potential benefits and pitfalls of using such techniques?
- To what extent do national stakeholders and the Irish judiciary support or resist mediation in the child protection context? What are the reasons for such resistance, and do they have merit? Are these reasons legitimate and how may they be addressed?
- How, if at all, have other jurisdictions overcome the reluctance to adopt CPM and how have they implemented it?

- To what extent are alternative dispute resolution mechanisms, such as family welfare conferences (pursuant to part 2 of the Children Act 2001) and child protection conferences, currently being used in child protection cases?
- Will the implementation of CPM improve the overall collaborative decision-making process in child protection cases?

This research study's methodological approach primarily utilised a mixed-method qualitative design and data collection techniques; the methods of data collection used in this study included surveys, semi-structured interviews, and observations. This approach lends itself to a depth of understanding of those involved in child protection disputes and, therefore, I was *"relying on the informal wisdom that developed from the experience of researchers"* (Neuman & Wiegand, 2000, p. 313). As described in chapter 3 (methods and methodology), the research was concerned with capturing the immediate experiences of the research participants. However, while there is a body of international knowledge and experiences in this subject area, I, as the researcher, accept that it is unfinished and open ended (Goulding, 2005). Overall, the outcome of this research will allow for future opportunities for this research to be used to improve child care law reform processes with the specific aim to be practically useful to all those involved in child protection (families, children, child welfare agencies, members of the judiciary).

1.6. OUTLINE OF THESIS STRUCTURE

In order to achieve the research aims and objectives of this study (as described above), the doctoral thesis comprises of the following chapters:

a. *Chapter One – Introduction*

   The first chapter presents the introduction to the research, in which the justification for exploring this research subject is provided. This includes describing the importance of the research topic, setting out the background context of the research study, identifying the main area of concern, the aims and objectives, the research questions, and setting out a brief outline of the thesis structure. Hence, chapter one provides an overview of the entire research study.

b. *Chapter Two – Literature Review*

   The second chapter offers a critical review of relevant literature. The theoretical background of both the literature, legislation and case law is described and analysed.

The chapter begins by examining domestic and international legal frameworks of family and child protection law, which is related to the research topic of CPM and its possible implementation at a national level. This includes a review of the "best interests'" principle and how the voice of the child is heard and considered in legislation and legal proceedings, as well as in mediation processes, in Ireland; which is an important underlying theme throughout the thesis. The history and theory of alternative dispute resolution are explored, paying particular attention to the use and development of mediation and family mediation in Ireland to date. Finally, the chapter reviews international literature in respect of CPM, focusing on the USA and Canada.

c. *Chapter Three – Methods and Methodology*

The third chapter outlines the way the research was carried out and the methodological issues that are related to that. The chapter provides an overview of the appropriate research methodology employed throughout the research study and provides justification for the various methods used. It explores and explains the choice of data collection techniques, and critiques research-related ethical issues and the validation issues pertinent to the research. The study employs an interpretivist paradigm position, within the concept of relativism. In order to ensure credibility and validation of data, the study adopts a strategy of triangulation, through surveys, semi-structured interviews and structured observations. The sampling procedure is also explained and justified.

d. *Chapter Four – Data Collection*

The forth chapter presents the data that was collected throughout the course of the research study. Essentially, the research was broken down into three phases:

i. Phase 1: to explore the initial perspectives of child inclusive mediation amongst members of the Irish judiciary and working professionals involved in child protection proceedings

ii. Phase 2: to examine practices and perspectives from foreign jurisdictions (certain states in the USA, and provinces in Canada) where CPM has been implemented

iii. Phase 3: to observe child protection proceedings in the Dublin Metropolitan District to determine the extent to which alternative dispute resolution mechanisms, such as family welfare conferences, are currently being used within child care proceedings. In addition, Phase 3 also sought to interview working

professionals involved in child protection disputes and/or mediation in Ireland in order to understand their experiences of child inclusive mediation.

e. *Chapter Five – Analysis and Recommendations*

The fifth chapter comprises the analysis of the data and the results. The requirement to answer the research question, i.e., whether CPM can be a viable alternative to the adversarial process, helped shape the analysis and subsequent discussion. The data was analysed using a manual coding process and the outcomes were elaborated. Various themes emerged from the data, such as 1) power-imbalance between the families and child welfare agencies, 2) the appropriate mediation process that should be used and how one could ensure (where appropriate) enforceability of mediation agreements, 3) the importance of an appropriate professional background for the child protection mediator, and the necessity for effective training programmes, and 4), and what aspects of a case would best lend themselves to mediation. The chapter will also outline recommendations for further research within the realm of CPM and explore the study's potential contribution to knowledge and understanding, and the future development of policy.

f. *Chapter Six – Next Steps*

The sixth chapter builds on the analysis in chapter 5 and will set out a draft template for a potential test-pilot of a CPM programme that could be utilised in Ireland as a next step beyond the thesis findings.

CHAPTER 2: LITERATURE REVIEW

2.1. INTRODUCTION

In Ireland, the court system is predominately adversarial in nature.[26] For those involved within the child protection arena, it is common knowledge that child protection litigation can be protracted, contentious and costly (Buckley, 2003). It is often argued that its adversarial nature typically carries the potential to exacerbate emotional harm (Burns, et al., 2018; O'Mahony, et al., 2016). However, in consonance with the Child Care Act 1991, the "welfare" of the child is the first and paramount consideration. As a result, the adversarial model of court proceedings is applied slightly differently in a child care context (O'Mahony, et al., 2016; Coulter, 2015) and it is often argued that child care proceedings operate a mixed hybrid system incorporating elements of both adversarial and inquisitorial approaches (O'Mahony, et al., 2016).[27] While parents are provided the opportunity to contest an application for a child care order, the courts in such proceedings are encouraged to take a more inquisitorial approach in order to determine what is best for the child.[28] This can be seen in the judgment of O'Malley Iseult J. in the case of *A v. Health Service Executive* [2012] IEHC 288:[29]

> *"I accept that child care cases are not entirely analogous to other litigation; that the judge's role is more inquisitorial than usual and that there is a need to preserve a degree of flexibility in order to deal with exceptional circumstances. However, the normal rules are that courts act on evidence and that parties applying for an order must establish grounds for the making of the order"* [para. 22].

Despite this acknowledgement of a slightly more inquisitorial approach, commentators have repeatedly claimed that child care proceedings in Ireland remain rooted in an adversarial framework (Coulter, 2018; Halton, et al., 2018; O'Mahony, 2016). In her unpublished

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[26] Generally, in an adversarial system, the judge adjudicates on the arguments presented by each side; an inquisitorial system, by contrast, requires the judge to take a more proactive role and lead the inquiry into the facts and circumstances.

[27] Adversarial in that that CFA have to prove, on the balance of probabilities, that the parents have failed in their duty to care for their child, and the parents of the child are entitled to contest this application. Inquisitorial in that judges inquire into the appropriate care and protection of the child.

[28] This principle was laid down by O'Flaherty J., in *Southern Health Board v. CH* [1996] 1 IR 219 [para. 237].

[29] It must be noted that similar comments have been made by judges regarding divorce cases; such that the approach is not entirely adversarial and that the court is required to satisfy itself of certain matters whether the parties raise those matters or not. In the case of in the *W (A M) v. W (S)* [2008] IEHC 452, Abbott J. highlights that the court has an inquisitorial role in relation to proper provision: *"...there is no doubt that the Court cannot solely rely on the outcome of the ordinary adversarial process as it is obliged to do in other litigation, much less accept as a binding contract a consent between the parties without inquiry as it is obliged to do in ordinary litigation. Hence the obligation of the Court, of its own motion, to enquire into all relevant facts which may touch upon the adequacy and propriety of provision to be made or made in a divorce case"* [para. 24-25].

judgment in *CFA v. LG and SK* (2017), Ní Chúlacháin J. stated that child care proceedings are still, in certain important respects, adversarial in nature:

> "*It is sometimes said that the Child Care proceedings are in the nature of an inquiry rather than the normal adversarial proceedings this court is used to. That may well be the case, but it remains clear that the onus of proving the matters set out in Section 18 of the Act remain firmly on the CFA at all times and that there is no onus on the respondents to prove the contrary. Furthermore … the standard of proof in child care proceedings as in all civil proceedings before the court is the balance of probabilities … where the allegations and their consequences are … serious and grave … the standard of proof is to be applied in a rigorous and exacting manner.*"[30]

During a child protection proceeding, the social worker is generally invited to present evidence to the court as to why the CFA is making an application for the relevant order (care order/supervision order). Burns (2018) suggest that when presenting such evidence, social workers feel obligated to focus on the negative aspects of evidence in order to secure the order; for instance, mainly looking at the parents' failure to care for their child pursuant to the Irish Constitution of 1937 (as amended), and specifically, the test for intervention set out in Article 42A thereof (Burns, et al., 2018). Beckett (2007) describes this form of presentation of evidence as "destructive". What is said in evidence cannot be unsaid and may impact on the relationship of the various parties long after the litigation has concluded. The litigation dynamic tends to match the pace and pain of the litigant's metamorphosis from trust to mistrust, from best hopes to worst fears as they navigate the rapids in the reordering of their legal relationship. However, while it must be acknowledged that access to court is an important part of access to justice,[31] this thesis argues that there are some aspects of a child protection case that could be more appropriately managed through mediation. Child protection mediation (CPM) is internationally recognised as a process that achieves a voluntary, personalised agreement in the best interests of the child (Shannon, 2019; Kelly, 2007). It is used to avoid contested adversarial trials where possible (Lande, 2001). In addition, the use of mediation in child protection cases is seen to improve relationships between the various parties and promotes collaborative decision-making opportunities among

[30] *CFA v. LG and SK*, decision delivered 9th May 2017, unpublished, p.11. However, it must be noted that Ní Chúlacháin J. does not seem to be dismissing the claim that child care proceedings are more inquisitorial than usual.

[31] While access to justice is not an expressed right under the Irish Constitution, it can be implied as a personal right under Article 40.3.1 of the Irish Constitution. See Horgan J. judgment in *S (a minor) v. Minster for Justice and Equality* [2011] IEHC 31 [para.16].

the various parties before litigation or child welfare agency solutions are imposed on the family (Giovannucci & Largent, 2013). This research study, therefore, seeks to address the following research question: ***"to determine whether child protection mediation can be a viable alternative, either in whole or in part, to adversarial process and whether it can aid child safety and welfare?"***

This chapter will begin by examining in turn the development of family and child protection law, paying particular attention to the "best interests" principles and the voice of the child under national and international legal instruments and legal frameworks. It will go on to examine the current forms of alternative dispute resolution (ADR) mechanisms used within Irish legislation, focusing on the main principles and processes of mediation. This will then lead to a specific analysis of the revolution of mediation (in general) and family mediation in Ireland, in which a detailed analysis of the recent enactment of the Mediation Act 2017 will be offered, followed by a discussion surrounding the legislative history of the use of mediation in family law cases. Finally, as this research study seeks to determine whether the implementation of CPM will aid child safety and welfare in Ireland, a review of international literature will be conducted, focusing on the use of CPM in other jurisdictions, such as the USA and Canada, where CPM is increasingly recognised as invaluable in the protection of the child's safety and welfare.

2.2. FAMILY AND CHILD PROTECTION LAW

Shannon (2018) remarks that "*the past decades have witnessed a gradual but decisive shift in the dominant concerns of family law"* (Shannon, 2018). In the last three decades, Irish family and child protection law has changed out of recognition, and the best interests of the child and the voice of the child are, in principle, meant to be placed at the heart of legislative developments (Children's Rights Alliance, 2017). Statutory reform, such as that encapsulated within the Children and Family Relationships Act 2015, following the insertion of Article 42A of the Irish Constitution, highlights the continuing challenges that are experienced by those involved in family and child care proceedings.[32] Such changes and developments to Irish family and child protection law and practices also signifies essential and important steps towards meeting the requirements of modern Irish families, whatever form they may take, creating new rights for children and their parents (biological and non-biological). During the

[32] Arguably, the Children and Family Relationship Act 2015 highlights continuing challenges by addressing the diversity of family life in Ireland in a way that previous legislation did not.

past number of years, policymakers and members of the judiciary have shifted their sole focus from the family to recognise the status and rights of children in their own right.

The Irish Constitutional provisions on the family provide an important backdrop to child protection work in this jurisdiction. Articles 41 and 42 of the Irish Constitution place a strong emphasis on parental rights and family autonomy.[33] Article 42A indicates, moreover, that only in exceptional circumstances, where the parents have failed in their duty towards their children, can the State intervene in family life to protect the safety and well-being of the child (Article 42A.2.1). Recently, there has been an increased attempt to balance the rights of the family, which under the Irish Constitution is recognised as the natural and fundamental unit group of society (Article 41), and the imprescriptible rights of the child, whose safety and welfare may be prejudicially affected without state intervention (Article 42A). Therefore, in order to be able to answer the central research question of this study, the substantial and significant developments of family and child protection law and practices must first be analysed.

2.2.1. Evolution of family law in Ireland

2.2.1.1. Definition of the "family" under the Irish Constitution

Given the influence of Article 41 and 42 of the Irish Constitution regarding the rights of the family in this jurisdiction, it is important to spend some time examining the definition of the family in constitutional law. It is difficult to define what constitutes a family in twenty-first century Ireland, especially when contemplating Ireland's consistently changing demographic landscape. According to Ryan (2012), *"families are intrinsically organic and dynamic entities, expanding and contracting over time, founded on, enriched by and in some cases destroyed by emotions and sentiments that escape legal regulation and confinement"* (Ryan, 2012, p. 1; Dewar, 1998). While the Irish Constitution recognises the family as having significant rights and privileges, unfortunately the term "family" is not expressly defined under the Irish Constitution.

Unsurprisingly for 1930s Ireland, Roman Catholic social teaching clearly influenced and shaped many provisions of the Irish Constitution (O'Mahony, et al., 2016). The prevalence of Catholic teachings, according to Whyte (1980), is one the most far-reaching and persuasive influences, highlighting that the Irish Constitution was *"one more instance of the movement*

[33] The increased recognition of parental autonomy over their children can be seen in a number of case law, including, *Northwestern Health Board v. HW* [2001] 3 IR 622 and *N v. HSE* [2006] IESC 60.

regardless of which party was in power, since the establishment of the State to enshrine Catholic principles in the law of the land" (Whyte, 1980, p. 56). This influence is evident in the wording of Article 41, especially when dealing with the status of the family. Even though the concept of a 'family' is firmly grounded in the Irish Constitution, the family's authority is described as superior to that of the State over a range of matters; *"the State has a subsidiary role that goes no further than supporting the family"* (O'Mahony, et al., 2016, p. 132; Whyte, 1980; Keane, 2008). As a result, under Article 41 and 42 of the Irish Constitution, the family possesses inalienable and imprescriptible rights superior to all positive law, and therefore, the State has a very limited right to intervene in the area of family autonomy.[34] The State can only intervene in family life in exceptional circumstances where it is necessary to ensure the safety and welfare of the child. Article 41.1 provides:

> *"1° The state recognises the family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.*
>
> *2° The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State"* [emphasis added].

However, under the Irish Constitution, the judicial interpretation of the term 'family' is limited to a "marital family", highlighting that the nuclear family, as prescribed for under Article 41 and 42, is based on marriage alone.[35] Article 41.3.1 states *"the State pledges itself to guard with special care the institution of Marriage, on which the family is founded, and to protect it against attack."* Promoting stable families based on a marital union is but one example of how Catholic social teachings influenced Irish policy.[36] Consequently, under this provision of the Irish Constitution, unmarried fathers have no constitutional rights at all in respect of their

[34] The words "inalienable" and "imprescriptible" were defined in the case of *Ryan v. Attorney General* [1965] IR 294 where Kenny J. defined "inalienable" meaning as something that cannot be transferred or given way and "imprescriptible" as something which cannot be lost by the passage of time or abonnement by non-exercise.

[35] Notably, following the marriage equality referendum in 2015, Article 41.4 of the Irish Constitution was introduced to allow same-sex couples to marry; which states that "*marriage may be contracted in accordance with law by two persons without distinction as to their sex.*"

[36] The influence of the Catholic teachings is also notable in the Preamble which invoked the "*Name of the Most Trinity*" and acknowledges "*all obligations to our Divine Lord, Jesus Christ.*" In addition, Article 40.6.1 originally recognised blasphemy as an offence (removed under the thirty-seventh Amendment in 2018); Article 44 recognised the "special position" of the Catholic Church (removed by the fifth Amendment in 1973); Article 41.3.2 prohibited divorce (removed by the fifteenth Amendment in 1995); though, in more recent times a constitutional amendment has extended marriage to same sex couples (thirty-fourth Amendment in 2015). Therefore, it could be argued that such Amendments (such as the removal of blasphemy, and special position) highlight that the Irish Constitution is not frozen in time; it is an evolving document.

child's care and custody.[37] This "discrimination" was accepted in the seminal case of *State (Nicolaou) v. An Bord Uchtála* [1996] IR 567:

> *"…in this Article is the family which is founded on the institution of marriage… While it is quite true that unmarried persons cohabiting together and the children of their union may often be referred to as a family and have many, if not all, of the outward appearances of a family, and may indeed for the purposes of a particular law be regarded as such, nevertheless so far as Article 41 is concerned the guarantees therein contained are confined to families based upon marriage"* [para. 643 to 644].

The decision was determined on the grounds that a genetic link does not lead to automatic guardianship rights for the unmarried father. The position of *Nicolaou* was confirmed in subsequent cases of *JK v. VW* [1990] 2 IR437 and *W'OR v. EH* [1996] 2 IR 248.[38]

In recent case law a wider interpretation of the different categories of familial relationships, as protected under Article 41 and 42, has been contemplated by the Superior Courts. For example, in the case of *RX, QMA & CX v. Minister for Justice, Equality and Law Reform* [2010] IEHC 446, Hogan J. stated: *"the fact that marriage was (and, of course, is) regarded as the bedrock of the family contemplated by the Constitution does not mean that other close relatives could not, at least under certain circumstances, come within the scope of Article 41"* [para. 40]. Furthermore, the case of *STE v. Minister for Justice and Equality* [2016] IEHC 379 examined the personal rights of a father under Article 40.3 of the Irish Constitution when considering the deportation of an unmarried father who was living with the child and the child's mother: during Humphreys J. decision, he states *"The flexibility of living constitutional law should make one slow to accept the proposition that the Constitution should now be construed as less protective of the rights of the individual than international law"* [para. 39]. However, despite this development, in the recent Supreme Court decision of *OO (a minor) and Others v. Minister for Justice and Equality* [2015] IESC 26, Charleton J. noted that Article 41 of the Irish Constitution did not extend to grandmothers. The effect of this judgment indicates a return to the original concept of family confined to the nuclear family:

[37] It should also be acknowledged that unmarried mothers' rights are not as strongly protected as their married counterparts, though they do enjoy relevant constitutional rights under Article 40.3.
[38] This position is also reflected in recent case law; see *McD v. PL* [2010] 2 I.R. 199, *C. O'S & TB v. Judge Doyle & Ors.* [2013] IESC 60 (in particular MacMenamin J. in para. 24-25) and some obiter dicta in *M (Immigration - Rights of Unborn) v. Minister for Justice and Equality &* Ors [2018] IESC 14 (see para.12).

> *"It is clear that as one moves away from the nuclear family, to grandparents, to grandchildren, to uncles and aunts and thence to cousins of varying degrees, as a matter of moral imperative, the constitutional guarantee is either inapplicable or substantially recedes. The woman tending to her children within the home is the mother that is referred to in Article 41.2: the rights of grandmothers are not thereby constitutionally protected. The right to educate the child are guaranteed in the text to parents, but are not guaranteed to grandparents. While there is undoubtedly a natural affection and a desire to nurture, while passing on the wisdom of age and experience, between grandparents and their grandchildren, such guarantees as are given in the Constitution are to the mother and father and to their children"* [para. 26].

Unfortunately, the decision of *State (Nicolaou) v. An Bord Uchtála* [1996] remains the current constitutional provision today; unmarried fathers do not possess automatic guardianship rights. As a result, in twenty-first century Ireland, the Irish Constitution recognises the family based solely on the institution of marriage, as confirmed by case law. However, regardless of the parents' marital status, Article 42A.2.1 of the Irish Constitution qualifies the parents' constitutional and legal rights by stipulating that the State can intervene in family life, where it is necessary to do so, in order to promote the child's safety and welfare.

2.2.1.2. Evolving definition of the "family" under Irish legislation

According to Shannon (2014), up *"until recent decades, family life in Ireland has been synonymous with marriage"* (Shannon, 2014, p. 1). While the constitutional preference for the married family still remains largely intact,[39] legislative developments have recognised the constantly changing landscape of Irish family life. The definition of family referred to under the Irish Constitution appears quite narrow, especially when looking at Irish families in twenty-first century Ireland. Over the past decade, there has been an increased recognition of marriage breakdown (5,256 applications made to Irish courts in 2018) (Courts Service, 2018); there are a large number of couples who have identified as cohabiting couples (75,587 families identified as cohabiting couples with children (CSO, 2016));[40] and there has been a considerable proportion of children born outside of marriage/civil partnership (36.5 percent of all births in Ireland were registered as outside marriage/civil partnership (CSO, 2016)). These figures recognise the increasing diversification of family forms in Ireland today.

[39] See *CO'S & TB v. Judge Doyle & Ors.* [2013] IESC 60 (in particular para. 24-26).
[40] According to the 2016 Census, "of the 1.22 million families in Ireland, 152,302 were comprised of cohabiting couples This was an increase of 8,741 on the 2011 figure…" (CSO, 2016)

To cater for the changing landscape, a number of legislative developments have been passed to reflect twenty-first century families in Ireland. The law has developed to recognise for various purposes different family forms, and more importantly, provide legal certainty for all types of families, whatever their official status. For example, the Marriage Act 2015 recognises full-legal marriage between a same-sex couple; the Civil Partnership and Certain Rights of Cohabitants Act 2010, provides some legal recognition and protection for a couple who live together, with or without children, and are not married. Furthermore, the Gender Recognition Act 2015 allows persons who are transgender to be formally recognised in their preferred gender and also recognises a marriage of a transgender person subsequent to their change of gender (Bracken, 2016).

Of particular importance, was the enactment of the Children and Family Relationship Act 2015 on the 6 April 2015. This Act provides for laws in respect of guardianship, custody and access, as well as assisted human reproduction, and various other measures.[41] These provisions expand the range of parenting and guardianship options in particular for diverse and non-traditional families with children. Part IV of the Children and Family Relationship Act 2015 deals with guardianship, custody and access disputes, amending provisions of the Guardianship of Infants Act 1964. While some of the provisions are largely the same, there are some substantial changes, especially in respect of unmarried parents and their rights and responsibilities in respect of their children (discussed below in further detail).

2.2.1.2.1. *Development of guardianship rights in Ireland*

Understanding the history of guardianship rights in Ireland is also critical, especially when considering the evolving legislative landscape of the family in Ireland. According to the Courts Service website, a guardian is a person who has legal rights and duties in respect to the upbringing of their child (Courts Service, 2018). In *RC v. IS* [2003] 4 IR 431, Finlay Geoghegan J. accepted Minster Shatter's definition of guardianship as an accurate general statement of the law:

> *"Guardianship describes the group of rights and responsibilities automatically vested in the parents of a child born within marriage and in the mother of a child born outside marriage in relation to the upbringing of the child…Guardianship encompasses the duty to maintain and properly care for a child and the right to make decisions about a child's religious and secular*

[41] Note, the adoption provisions of the Children and Family Relationship Act 2015 were never commenced; however, similar provisions were enacted as part of the Adoption (Amendment) Act 2017.

> *education, health requirements and general welfare. The right to custody of a child is one of the rights that arises under the guardianship relationship"* (Shatter, 1997).[42]

Guardianship, custody and access of children in Ireland were regulated by the Guardianship of Infants Act 1964, as amended. Pursuant to the Irish Constitution, the courts have interpreted the provisions of the Guardianship of Infants Act 1964 to imply that married parents are automatically joint guardians and custodians of children born to them (section 6 (1) of the Guardianship of Infants Act 1964). In addition, the mother of a child, born outside of marriage, was deemed to be the sole guardian of that child; section 6 (4) of the Guardianship of Infants Act 1964 states that *"where the mother of a child has not married the child's father, and no other person is, under this Act, the guardian of the child, she, while living, shall alone be the guardian of the child."* Therefore, the parents must be married at the time of the birth of the child in order for the father to attain automatic guardianship status. However, a mechanism was provided under section 12 of the Status of Children Act 1987 (as inserted under section 6A (1) of the Guardianship of Infants Act 1964) whereby a natural father could seek to assert guardianship rights, which will only be granted where it is in the child best interests: *"the court may, on an application to it by a person who, being a parent of the child, is not a guardian of the child, make an order appointing the person as guardian of the child."*

The enactment of the Children and Family Relationship Act 2015 marked an enormous shift in family life in Ireland. Most notably, the legal position of unmarried parents' guardianship rights has been extended, pursuant to sections 43 and 49 of the Children and Family Relationship Act 2015. For example, under section 2 of the Guardianship of Infants Act 1964, as amended, a 'father' is defined as a father of the child who meets the specified cohabitation requirements, pursuant to section 2 (4A) of the Guardianship of Infants Act 1964. Section 2 states:

> *"father' includes a male adopter under an adoption order but subject to section 11(4), does not include the father of a child who has not married that child's mother unless…. (d) the circumstances set out in subsection (4A) of this section apply"* [emphasis added].

Section 2 (4A) of the Guardianship of Infants Act 1964, as amended by section 43 of the Children and Family Relationship Act 2015, in combination with section 6 (1) of the Guardianship of Infants Act 1964 provides for automatic guardianship for an unmarried

[42] Former Minster for Justice and Equality between 2011-2014.

mother and father who have resided together for at least one year after the commencement of Part 4 of the Children and Family Relationship Act 2015, three months of which has been since the birth of the child. Section 2 (4A) states:

> *"The circumstances referred to in paragraph (d) of the definition of 'father' in subsection (1) are that the father and mother of the child concerned—*
>
> *a. have not married each other, and*
> *b. have been cohabitants for not less than 12 consecutive months occurring after the date on which this subsection comes into operation, which shall include a period, occurring at any time after the birth of the child, of not less than three consecutive months during which both the mother and father have lived with the child"* [emphasis added].

Accordingly, any father who has lived with the mother of his child for at least one year (after the 18 January 2016), three months of which is after the child's birth, shall be entitled to guardianship automatically.[43] As a result, for the first time in the history of Irish family law, a non-marital father will automatically be the guardian of the child, provided that the cohabitation requirement under section 2 of the Act has been satisfied. In the circumstances that the cohabitation requirement is not satisfied, the unmarried father still retains a right to apply to the court for guardianship of the child. Similar provisions apply under section 6B to persons deemed parents under the donor-assisted human reproduction provisions of section 5 of the Children and Family Relationship Act 2015.

Quintessentially, understanding guardianship rights and official legal status of Irish families is vital when considering implementing a CPM programme in Ireland. When developing a CPM programme in Ireland, there is a responsibility on all those involved in child protection proceedings (such as relevant stakeholders, policy-makers and mediators) to have a thorough knowledge of family rights in Ireland; understanding the distinction between the constitutional preference for families based on the institution of marriage, and developing legislative frameworks which are increasingly recognising different family units.

[43] This is not retrospective and cohabitation prior to the commencement of this Act will not be taken into account. In addition, section 6C of the Guardianship of Infants Act 1964, as amended, concerns non-parents' guardianship and section 11E thereof in respect of custody. It is important to be aware of the fact that there are two separate issues; the expansion of the circumstances in which unmarried fathers can be guardians and the extension of guardianship to non-parents.

2.2.1.3. Modernisation of family law

In the last two decades, Ireland has modified and modernised numerous aspects of family law. While the modernisations have been slow and careful, no doubt due to the sensitivity of the area and wariness of public opinion, progress has been made regarding reforming the Irish family law system (Joint Committee on Justice and Equality, 2019). One important area that should be addressed, particularly when discussing the development of family law in Ireland, is the increased recognition of marriage breakdown. Originally, Article 41.3.2 of the Irish Constitution imagined that divorce would never be permitted in Ireland, stating *"no law shall be enacted providing for the dissolution of marriage."* Courts could grant nullity decrees under very specific and limited circumstances. Alternatively, the High Court was conferred with the jurisdiction of the former Ecclesiastical Courts to grant a decree of *divorce a mensa et thoro*, which was available in Ireland until the enactment of the Judicial Separation and Family Law Reform Act 1989.[44] This was not a divorce in the modern sense of the term. It was only available on limited "fault" grounds of adultery, cruelty or unnatural practices.[45] Most notably, the decree did not allow for remarriage. Moreover, ancillary relief was limited to alimony and custody. In essence, the spouse who was deemed "guilty" of misconduct was deprived of his share of the estate of the other spouse (section 120 (2) of the Succession Act 1965; LRC, 1983; Shatter, 1981).

In response to public calls for reform of the law on marital breakdown, various pieces of legislation were enacted in order to provide relief in relation to access, custody, spousal support and child support. This legislation represented the beginning of a modernisation of family law:

1. The Family Law (Maintenance of Spouses and Children) Act 1976, provided for maintenance orders for spouses and children where the other respondent spouse has failed to provide such maintenance to the applicant spouse and/or any dependent children of the family[46]
2. The Family Home Protection Act 1976 was introduced following several reports highlighting the vulnerable position of wives in the home[47]

[44]In reality, this remedy was rarely availed of, for example, between 1946-1070, twenty-seven orders for divorce *a mensa et thoro* were granted by the Irish Courts (Viney, 1970).
[45] According to Dr Róisín O'Shea doctoral thesis entitled "Judicial Separation and Divorce in the Circuit Court", it is still unknown how "fault" was interpreted by the courts as grounds for separation, or as a factor for divorce (O'Shea, 2013).
[46] Section 5 (1) of the Family Law (Maintenance of Spouses and Children) Act 1976.
[47]Section 4 of the Family Home Protection Act 1976.

3. The Family Law (Protection of Spouses and Children) Act 1981 allowed judges to bar spouses from the family home in cases of domestic violence.[48]

In 1983, the government established the Joint Oireachtas Committee on Marital Breakdown; making the constitutional ban on divorce a political issue (Kearney, 2014). Their report called for a referendum on divorce. However, the first divorce referendum in 1986 was rejected by a substantial majority.

In 1996, the Law Reform Commission issued a consultation paper on family courts, which continued to highlight the deficits in the family justice system and considered the process and procedure in respect of how family law disputes are resolved, and remedies are obtained:

> *"In the Consultation Paper, and again in this Report, we draw attention to serious deficiencies in the existing family justice system. The last twenty years have seen a growing recognition by society of the wide variety of problems associated with the breakdown of family relationships. Substantive family law has undergone a transformation during this period, with the introduction of a wide range of remedies and rights designed to protect vulnerable or dependent family members in the wake of breakdown, and to secure the fair distribution of family assets. Unfortunately, the means for the delivery of these new rights and remedies have not received the same level of attention. The structures which this society offers for the mediation and resolution of family conflict are inadequate in the extreme"* (LRC, 1996, p. ii).

In 1996, the Fifteenth Amendment of the Irish Constitution was passed which not only offered a "no fault divorce" after a period of separation of four out of five years but also, provided for the grounds for divorce in Ireland. The enactment of the Family Law (Divorce) Act 1996 introduced ordinary legislation addressing the option of divorce for the first time under Irish law. Even though the Act only came into operation on the 27 February 1997, the first divorce was granted in Ireland on 17 January 1997, pursuant to the provisions of the newly amended Article 41.3.2. Barron J., in the case entitled *RC v. CC* [1997] 1 ILRM 401, considered the various grounds for granting a divorce decree. Most notably, Barron J. noted that the High Court's jurisdiction to grant a divorce decree derived from the Irish Constitution and not from the Family Law (Divorce) Act 1996. The distinction between the Irish Constitution and divorce legislation was particularly prominent in respect of non-

[48]Section 2 of the Family Law (Protection of Spouses and Children) Act 1981.

dependent children. In this case, the court noted the provisions of Article 41.3.2 of the Irish Constitution, which stated that: *"such provision as the court considers proper having regard to the circumstances exists or will be made for the spouses, <u>any children of either or both of them</u> and any other person prescribed by law"* [emphasis added]. This differs from section 5 (1) (c) of the Family Law (Divorce) Act 1996 which states: "s*uch provision as the court considers proper having regard to the circumstances exists or will be made for the spouses and any dependant members of the family."* Therefore, according to Shannon (2002), the wording of the Irish Constitution *"does not preclude the possibility of non-dependent children"* (Shannon, 2002, p. 3).

More recently, in 2019, the constitutional provisions in respect of divorce were further amended. The Thirty-eighth Amendment of the Constitution (Dissolution of Marriage) Act 2019 amended two sections of Article 41.3, and as a result:

1. The "living apart" requirement, in order for a person to apply for a divorce, was removed from the Irish Constitution (previously, a person had to be living apart from his/her spouse for at least four years in order to apply for a divorce. The Family Law Act 2019 reduced the "living apart" requirement in the Family Law (Divorce) Act 1996 to two years during the previous three years).
2. The constitutional provision on foreign divorces has been simplified. Provision may be made by law for foreign divorces to be recognised under Irish law such that the persons involved will be able to remarry in the State if the divorce is so recognised.

Despite the fact that the legal remedy for divorce was only provided for in 1997, the Family Mediation Service was established in Ireland in the 1980s; seventeen years previous (Kearney, 2014). According to McGowan (2018), since 1989, *"family mediation has formed part of the legal framework governing all-issues separation and divorce in Ireland"* (McGowan, 2018, p.1; Conneely, 2002). In addition, since 1986, family mediation services have been provided free of charge by the state (Conneely, 2002). The advantages of family mediation were acknowledged in 1996, in the Law Reform Commission Report on Family Courts (1996), specifically mentioning that family mediation was designed to assist <u>separating couples</u> to resolve certain issues (such as finance, property and children) (LRC, 1996). The establishment of the Family Mediation Services expressly recognises that separation was a reality for many Irish couples ever before the introduction of divorce legislation.

2.2.2. Development of child protection law in Ireland

During the last three decades in Ireland, the issue of child protection has gained increasing prominence (Hayes & Bradley, 2009). The current importance of child protection can be underlined through several factors. First, the heightened awareness of child abuse (Buckley, et al., 1997) coincided with the increased understanding of child abuse to *"encompass the diverse nature and impact of different types of harm to children in a range of situations"* (Buckley, et al., 2010, p. 1). Secondly, as evidenced over the past number of years, child protection agencies and services charged with addressing the problem have expanded considerably (Buckley, et al., 2010). Thirdly, in recent years, there has been a significant increase in the number of child protection concerns reported to the statutory authorities (Tusla, 2017; Courts Service, 2017).[49] Fourthly, there has been an increase in pressure place on policymakers and practitioners to efficiently and effectively address problems of child abuse (Buckley, et al., 2010).

2.2.2.1. Child Care Act 1991

Prior to the enactment of the Child Care Act 1991,[50] the Children Act 1908 regulated child care policy in Ireland.[51] The purpose of the Children Act 1908 was the protection of children from cruelty, exploitation and parental neglect. However, according to Shannon (2017) between 1908 and 1991 there was little substantial reform of child law leaving a *"rather haphazard and outdated range of [available] remedies"* (Shannon, 2017). Therefore, prior to the introduction of the Child Care Act 1991, Ireland lacked a robust infrastructure for family and child care support services (Buckley, et al., 1997). The inadequacies of the Children Act 1908 were recorded in a number of reports, such as the Kennedy Report 1970 which exposed substantial level of physical, sexual and emotional abuse suffered by children while in the care of the State (Kennedy, 1970). However, the most notable call for reform came from the Kilkenny Inquest Inquiry of 1993 which emphasised the risks involved in the perception of

[49] In 2015, 43,596 referrals were made to child protection and welfare services in Ireland (Tusla (c), 2015, p. 10); in 2016, 47,399 referrals were made to child protection and welfare services in Ireland (Tusla, 2016, p. 26); in 2017, 53,775 referrals were made to child protection and welfare services in Ireland (Tusla (b), 2017, p. 10); in 2018, 55,136 referrals were made to child protection and welfare services in Ireland (Tusla, 2018, p. 11). This marks a twenty-six percent increase in the number of referrals made between 2015-2018.

[50] The Children Act 1908 (popularly referred to as the Children's Charter) regulated Irish child care law until the main part of the Child Care Act 1991 was implemented in 1995 and the full enactment of the Children Act 2001, which was not fully implemented until July 2007 (SI. 524/2007 Children Act 2001 (Commencement) (No. 3) Order 2007).

[51] While the Children Act 1908 was primary child care legislation in Ireland at that time, there was other legislation that also had direct impact on a child' welfare in Ireland, such as the Status of Children Act 1987 which abolished the legal discrimination against "illegitimate" children (Buckley, et al., 1997).

parents' rights prevailing over those of their children and scrutinised the State's failure to intervene in a timely manner in the context of long-standing familial abuse.

The implementation of the Child Care Act 1991, therefore, represented an urgently required answer to the call of many reforms in this area.[52] The enactment of the Child Care Act 1991 formalised and "*up-date*[d] *the law in relation to the care of children who have been assaulted, ill-treated, neglected or sexually abused or who are at risk"* (Explanatory Memorandum accompanying the publication of the Act). In fact, the introduction of the Child Care Act 1991 was described as *"one of the most important pieces of socially reforming legislation ever to come before the Oireachtas"* (Treacy, 1991). Those to be protected by the provisions are set out under section 2 of the Child Care Act 1991, which defines a 'child' as *"…a person under the age of 18 years other than a person who is or has been married."*[53] The definition of a child is restated under section 3(1) of the Children Act 2001.[54]

Section 3 (1) of the European Convention of Human Rights (ECHR) Act 2003[55] creates a statutory obligation on every "organ of the State" to act in compliance with the Convention provisions: *"Subject to any statutory provision (other than this Act) or rule of law, every organ of the State shall perform its functions in a manner compatible with the State's obligations under the Convention provisions."* The CFA is an "organ of the State" for the purposes of section 1 of the ECHR Act 2003 and must act in a Convention compliant manner.[56] Section 3 of the Child Care Act 1991 places a positive duty on the CFA which makes it a function of the CFA to proactively promote the welfare of children. Section 3 provides as follows:

> *"1. It shall be a function of every health board to promote the welfare of children in its area who are not receiving adequate care and protection.*
>
> *2. In the performance of this function, a health board shall –*

[52] The Children Act 1908 was critiqued for its inadequacy, most notably "in meeting the needs of children, the undesirability of widespread use of institutional care for children and the lack of State involvement in the provision of child care services more generally" (Buckley, et al., 1997, p. 7).
[53] Since the Domestic Violence Act 2018, it is no longer possible to marry in Ireland or for a person ordinarily resident in Ireland to marry under the age of 18. Section 45 Domestic Violence Act 2018 removed the facility for obtaining an exemption to marry under that age.
[54] Section 271 of the Children Act 2001 provides: "For the purposes of this Act, persons under 18 years of age who are enlisted members of the Defence Forces shall not be regarded as children in any case where they are subject to military law as governed by the Defence Acts, 1954 to 1998." This only applies to the Children Act 2001.
[55] A human rights treaty drafted by the Council of Europe in 1950, subsequently ratified by Ireland in 1953.
[56] SB & Anor v. Health Service Executive (Direction to Prevent Change of Placement) [2011] IEDC 10.

a. *take such steps as it considers requisite to identify children who are not receiving adequate care and protection and co-ordinate information from all relevant sources relating to children in its area…"*

Under section 3 (2) (b) (i) of the Child Care Act 1991, the CFA must "*regard the welfare of the child as the first and paramount consideration.*"[57] According to Buckley (1997), the promotion of the welfare of the child under the Child Care Act 1991 "*implies a shift from a reactive deployment of resources to a more proactive approach which aims to involve parents, children and carers and a desire to facilitate inter-agency collaboration although, in practice a reactive model largely operates*" (Buckley, et al., 1997, p. 17).[58] Notably, under Article 8 of the ECHR a child, in accordance with their age and maturity, has a right to *"receive all relevant information about family proceedings in relation to them, the right to be consulted and to express their views freely, as well as the right to be informed promptly and directly of the possible consequences of compliance with these views and the possible consequences of any decision*" (Phelan, 2015, p. 27).[59] In the case of *CFA and AC & Anor* [2014] IEDC 17, Horgan P. noted that the CFA has a duty to protect the rights of the child, by virtue of Article 42A.4.1 Irish Constitution, the ECHR and the European Charter of Fundamental Rights (EUCFR), and to take necessary steps to enable family reunification, provided it is in the best interests of the child.

One of the key underlying principle of the Child Care Act 1991 is that a child should remain in the home where possible and parents should be supported in achieving this (section 3 (2) (c) and section 3 (3) of the Child Care Act 1991).[60] However, a child may be removed in limited and exceptional circumstances, where it is necessary to promote the safety and welfare of the child. In such a situation, is the duty of the CFA to make an application to the court, for any of the following orders:

[57] In addition, section 24 of the Child Care Act 1991 provides that in any proceedings before the court in relation to the care and protection of a child that are brought under the Child Care Act 1991, the court, having regard to the rights and duties of parents, under the Irish Constitution or otherwise, is to have *"regard to the welfare of the child as the first and paramount consideration, and, insofar as practicable, give due consideration, having regard to his/her age and understanding, to the wishes of the child."*

[58] On the requirement for the CFA to be proactive see *MQ v. Gleeson*, unreported, High Court, Barr J., February 13, 1997 [1998] 1 Irish Journal of Family Law 30. See also, *Igbinogun v. HSE* [2010] IEHC 159.

[59] *T v. UK* App no. 43844/98 (ECtHR, 16 December 1999); *V v. UK* App no.24724/94 (ECtHR 16 December 1999).

[60] While keeping a child at home is not the sole aim of the Child Care Act 1991, it is a principle which informs the operation of the Act.

2.2.2.1.1. *Voluntary Care Arrangements*

Pursuant to section 4 of the Child Care Act 1991, voluntary care agreements are permitted in situations where the parents' consent to a short-term relinquishment of care. Section 4 (2) states:

> *"… nothing in this section shall authorise the CFA to take a child into its care against the wishes of a parent having custody of him or of any person acting in loco parentis or to maintain him in its care under this section if that parent or any such person wishes to resume care of him"* [emphasis added].

However, the consent of the parents is required and the parents are still entitled to withdraw this consent and resume care of the child at any point. Where a voluntary care arrangement is granted, the CFA is obliged to maintain the child as long as the child's welfare requires it. The CFA must also have regard to the wishes of the parents having custody of the child or a person acting in *loco parentis* (section 4 (3)), as they still continue to exercise parental responsibility.

2.2.2.1.2. *Emergency Care Orders*

Part III of the Child Care Act 1991 governs the protection of children in emergencies. Section 12 of the Child Care Act 1991 empowers a member of An Garda Síochána to remove the child where there are reasonable grounds for believing that there is an immediate and serious risk to the health and welfare of the child. In 2017, Shannon published findings on section 12 cases. While Shannon commended the work being carried out by members of An Garda Síochána, he highlighted the lack of formal training and inter-agency co-operation and communication, as a significant failure (Shannon, 2017).

When a child is removed by a member of An Garda Síochána, under section 12 they must be delivered to the CFA as soon as possible and the CFA is obliged (unless it returns the child to its custodians) to make an application for an emergency care order at the next available District Court sitting. Under section 13 of the Child Care Act 1991, a District Court judge may grant an emergency order in emergency situations (the removal must be propionate).[61] However, the District Court judge must be satisfied that:

> *"a. there is an immediate and serious risk to the health or welfare of a child which necessitates his being placed in the care of the CFA or*

[61] See *Hasse v. Germany* [2005] EHRR 19.

b. there is likely to be such a risk if the child is removed from the place where he is for the time being."[62]

The emergency order lasts for eight days or shorter as specified by the order (section 13 (2)). At the report stage in the Dáil Debates, a suggestion that this eight-day period be reduced to four days was agreed to be too short and almost inoperable in practice. Deputy Treacy observed that *"a period of eight days strikes a reasonable balance between giving the health board time to prepare an application for a care order and ensuring that parents are not deprived of the custody of their children for too long before having an opportunity to put their side of the case to the court"* (Treacy, 1990).

2.2.2.1.3. *Interim Care Orders*

Part IV of the Child Care Act 1991 provides for measures to be taken by the CFA and the orders to be made by the court where a child is believed to have been or currently at risk. The CFA has a duty to make an application to the court for an order, where the CFA is of the opinion that a child is in need/unlikely to receive adequate care or protection unless an appropriate order is made by the court. Generally speaking, a care order is one where the child is removed from the care of his/her parents and is transferred to the care of the state. Usually, the first step is for the CFA to apply for an interim care order, pursuant to section 17 of the Child Care Act 1991. An interim care order is made where there *"are reasonable cause to believe"* that the safety and welfare of the child is at risk. The interim care order usually lasts for 29 days but may exceed this period where the parents/guardians consent to a longer period.

2.2.2.1.4. *Care Orders*

Section 18 of the Child Care Act 1991 places a heavy-duty of the CFA to apply for a care order where it appears that the child is in need of care or protection which he is unlikely to receive unless the court grants such an order. A full care order is granted when the court is satisfied that any of the criteria set out in section 18 (1) have been met:[63]

"(a) the child has been or is being assaulted, ill-treated, neglected or sexually abused, or

[62] An emergency care order is a temporary measure, and therefore, the threshold for granting an order is lower than required for other care order under the Child Care Act 1991.
[63]The court must be satisfied that abuse and/or neglect of the child exists, compared to an interim care order, where the court must have "reason to believe" that the abuse/neglect exists.

(b) the child's health, development or welfare has been or is being avoidably impaired or neglected, or

(c) the child's health, development or welfare is likely to be avoidably impaired or neglected."

If the court grants a care order, the child in question will be removed from the care of his/her parents/guardians, and the CFA will assume the role of parent (responsible for promoting and safeguarding the child's health, development and welfare).[64] A care order can continue until the child is 18 years or *"for a shorter period as the court may determine"* (section 18 (2)). As a result, the threshold for reaching a care order is considerably higher than for an interim care order.

2.2.2.1.5. *Supervision Orders*

A supervision orders authorise the CFA to periodically visit the child at their home in order to ensure that the child's welfare is being maintained. In addition, the CFA can advise the parents/guardian as to the care of the child (section 19 (2)). This order is usually sought by the CFA in a situation where there are concerns about the child's welfare but those concerns do not require that the child be removed and taken into the care of the State. Supervision orders are provided for under section 19 of the Child Care Act 1991. Under this section, the court may grant a supervision order where there are *"reasonable grounds for believing*" that the safety and welfare of the child is at risk (section 19 (1)). As it is less interventionist order, the threshold for the application is lower than that required for a care order.

The supervision order can remain in force for 12 months and may be extended on the application of the CFA to the courts (section 19 (6)). The supervision order may also contain directions as to the care of the child, for example, requiring the child to attend *"medical or psychiatric examination, treatment or assessment at a hospital, clinic or other place specified by the court"* (section 19 (4)).

2.2.3. Best interests of the child

As mentioned above, in recent years, family and child protection legislative developments have increasingly recognised the best interests of the child as being of paramount importance.

[64] The CFA will only assume parental responsibility for a child where a full care order is made. An interim care order does not transfer parental responsibility to the CFA. See *CFA v. M&J* [2015] IEDC 03 where Toale J. states: *""Interim care orders do not have the effect of vesting parental responsibility in the CFA or its agents. The rights of parents must be respected by the CFA at all times in the context of whatever type of order (or none) which require that their children be in the care for the CFA"* [para.24].

One of the most significant measures in this regard, was the insertion of Article 42A of the Irish Constitution, following the constitutional referendum on Children's Rights in 2012. The Thirty-first Amendment of the Irish Constitution protects and recognises the rights of the child (though this is subject in some respects to the autonomy of the family unit) and establishes the circumstances in which the State can intervene in family life to promote the safety and welfare of the child. However, before the insertion of Article 42A, the Irish Constitution lacked a child focus; though Article 42 did not refer to children's rights and non-marital children could rely on personal rights as set out under Article 40.3 of the Irish Constitution. In the case of *Re Article 26 and the Adoption Bill 1987* [1989] IR 656, the Supreme Court held that where appropriate, a child has a right to invoke Article 40-44 of the Irish Constitution: *"The rights of a child who is a member of a family* [marital family] *are not confined to those identified in Article 41 and 42 but are also rights referred to in Article 40, 43, and 44"* (p.662).

In *G v. An Bord Uchtála* [1980] IR 32, the Supreme Court confirmed that a child born outside marriage is also entitled to constitutional protection (*inter alia*) under Article 40 (3) (though not Articles 41-42). O'Higgins CJ. identified that the rights of the child under Article 40.3 guarantee to protect the *"personal rights of the citizen from unjust attack"*, stating that *"the child has the right to be fed and to live, to be reared and educated, to have the opportunity of working and of realising his or her own full personality and dignity as a human being"* (pp.55-56). In this case, Walsh J. acknowledged that the non-marital child is equally *"entitled to be supported and reared by its parent or parents who are the ones responsible for its birth, as a child born in lawful wedlock"* (para. 67-68). This was before the enactment of Article 42A, which further enhanced the constitutional standing of children, both those born inside and outside marriage alike. Further, in *N v. HSE* [2006] IESC 60, Hardiman J. recognised the existence of the rights of the child but acknowledged that such a right is ordinarily vindicated by the placement of the child within their constitutionally family (Shannon, 2011).

In addition, up until the insertion of Article 42A, the Irish Constitution failed to expressly recognise the child as a juristic persona with their own individual rights.[65] Despite this, it is important to mention the judgment of Finlay Geoghegan J. in *FN & EB v. CO* [2004] 4 IR

[65]Before the insertion of Article 42A, Article 42.5 of the Irish Constitution did refer to the rights of a child and judges often acknowledged children as having rights (*F.N. & E.B. v. C.O.* [2004] 4 IR 311). The problem was that the Irish Constitution was often interpreted as prioritising marital parental rights over the rights of the child, and as assuming that a child best interests lay with the parents having custody of the child (see *Re JH* [1985] ILRM 302 and *N v. HSE* [2006] IESC 60).

311, where the High Court, prior to the enactment of Article 42A, recognised children as rights holders in relation to guardianship, custody or access decisions:

> *"It is also well established that an individual in respect of whom a decision of importance is being taken, such as those taken by the courts to which s. 3 of the Act of 1964 applies, has a personal right within the meaning of Article 40.3 of the Constitution to have such decision taken in accordance with the principles of constitutional justice. Such principles of constitutional justice appear to me to include the right of a child, whose age and understanding is such that a court considers it appropriate to take into account his/her wishes, to have such wishes taken into account by a court in taking a decision to which s. 3 of the Act of 1964 applies"* [para. 29].

The pre-Article 42A case law, however, suggests that, where a child's parents are or were married, the child's welfare is presumed ordinarily to be best served in the custody of his or her constitutional family. As Finlay CJ. remarked in *Re JH* [1985] ILRM 302:

> *"s. 3 of the Act of 1964 must be construed as involving a constitutional presumption that the welfare of the child, which is defined in s. 2 of the Act in terms identical to those contained in Article 42, s. 1, is to be found within the family, unless the Court is satisfied on the evidence that there are compelling reasons why this cannot be achieved, or unless the Court is satisfied that the evidence establishes an exceptional case where the parents have failed to provide education for the child and to continue to fail to provide education for the child for moral or physical reasons"* [emphasis added].[66]

According to Shannon (2011), *"the duty to defend and vindicate their* [the child's] *personal rights was, in effect, delegated to a third party (i.e., their parents)"* (Shannon, 2011, p. 249). Only in exceptional circumstances, as outlined under Article 42.5 (which was later repealed when Article 42A was enacted) of the Irish Constitution, *"where parents, for physical or moral reasons, fail in their duty towards their children, can the State as guardian of the common good endeavour to supply the place of the parents"* (Shannon, 2011, p. 249). This position was confirmed in the decision of *North Western Health Board v. H.W. and C.W.* [2001] 3 IR 622 and *N v. HSE* [2006] IESC 60. In the latter case, the Hardiman J. emphasised that the constitutional presumption in favor of parental autonomy could only be rebutted where a failure of parental duty had actually been established: *"the Constitution provides for the wholly exceptional situation where, for physical or moral reasons, parents fail in their duty towards their child. Then, indeed, the*

[66] In the case of *FN v. CO* [2004] 4 IR, Finlay Geoghegan J. found such compelling reasons to justify departing from the presumption.

State must intervene and endeavour to supply the place of the parents, always with due regard to the rights of the child" (para.18).

However, the Thirty-first Amendment of the Irish Constitution (Article 42A) ensured that the "best interests" of the child would be seen as being of paramount importance.[67] Article 42 A. 4. 1 provides:

> *"Provision shall be made by law that in the resolution of all proceedings –*
>
> *i. brought by the State, as guardian of the common good, for the purpose of preventing the safety and welfare of any child from being prejudicially affected, or*
>
> *ii. concerning the adoption, guardianship or custody of, or access to, any child,*
>
> *the best interests of the child shall be the paramount consideration.*
>
> *2. Provision shall be made by law for securing, as far as practicable, that in all proceedings referred to in subsection 1 of this section in respect of any child who is capable of forming his or her own views, the views of the child shall be ascertained and given due weight having regard to the age and maturity of the child."*

As a result, the child's "best interests" is now of paramount importance in law proceedings; this represents a slight shift from the "welfare" principle, statutorily recognised under section 24 of the Child Care Act 1991;[68] as the Irish Constitution takes precedence over domestic legislation. As a result, the statutory welfare principle, referred to under section 24 of the Child Care Act 1991, must be interpreted by the courts in light of the constitutional presumption of the "best interests" principle. Today, "best interests" is seen as a term that is interchangeable with welfare (Horgan, 2016; see also Kilkelly, 1998; 2016).

In practical terms, the "best interests" principle is a term mirroring what is contained in the United Nations Convention on Rights of Child (UNCRC) 1989.[69] The UNCRC is arguably the most important international document in respect of the child welfare debate which recognises specifically that children not only have interests but also hold certain rights. The preamble of the UNCRC reiterates the words of the United Nations Declaration of the Rights

[67] O'Hanlon J. in the case of *PP v. PK* [2016] IEHC 79, noted that Article 42A places the "best interests" principle on a constitutional footing.

[68] In a private family law context, Part V of the Guardianship of Infants Act 1964, as inserted by section 63 of the Children and Family Relationships Act 2015, sets out a detailed statutory framework or "checklist" of factors for ascertaining the best interests of the child. However, there is no such "checklist" in public child protection law cases for the welfare principle, and, therefore, the extensive definition provided in the aforementioned legislation may not be relevant when considering public law matters.

[69] United Nations General Assembly Convention on the Rights of the Child A/RES/44/25 (20 November 1989).

of the Child 1989, in stating, *"the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection...."* Ireland ratified the UNCRC in 1992, making a clear commitment to the rights of the child.[70]

Essentially, the UNCRC is underpinned by four guiding principles, which incorporate both justice and welfare rights, namely equality between children, the "best interests" of the child, the inherent right to life and development of the child, and the right of the child to express his/her views. Article 3 (1) also gives substantial prominence to the "best interests" of the child:

> *"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration"* [emphasis added].[71]

The term "best interests" allows considerable discretion to the court to decide what is best for the individual child based on the particular facts and circumstances of the case. This principle and the right of the child must now also be guided (at least in the private law context) by the factors or circumstances set out in section 31 of the Guardianship of Infants Act 1964 as inserted by section 63 of the Children and Family Relationships Act 2015.[72] In essence, this is the new statutory welfare checklist for courts to follow in determining "best interests" of the child in private law cases.[73] The "best interests" obligation requires the court (*inter alia*) to:

- Consider the possible impacts, short medium and long term, both positive and negative that a court decision may have on the child/children, as well as on the adult parties to the proceedings
- Consider the child's wishes and give weight to the children's wishes on a scale continuum according to child's age and level of maturity

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[70] However, while Ireland has ratified the UNCRC in 1992, it has not yet been incorporated into domestic legislation.

[71] It could be argued that the term "*in all actions*" could include alternative dispute resolutions such as mediation and; something that will be discussed in further detail throughout this thesis. Notably, the use of the word "*a*" could suggest that the best interests of the child might not be the only primary consideration.

[72] While these factors are primarily relevant to private law proceedings, they may be useful in a public law context.

[73] In the case of *T v. T* [2002] IESC 58, it was recommended that the practice of referring ad seriatim to each of the provisions of section 20 of the Family Law (Divorce) Act 1996 and noted that it was good practice to give reasons for the relevance and weight of each subsection of section 20 as they related to the matters at issue in each case

- Give the child the benefit in any balancing exercise between adult/child wishes (while noting that a child's wishes are not determinative of the outcome of a case)
- Ensure that the "best interests" of the child are paramount.

The genius of the "best interests" standard is its indeterminacy; it requires that each child's "best interests" is determined by the individualised factors that matter in relation to that particular child's well-being. Thus, the question to be considered is "what is best for *this* child?" not "what is best for children generally?" This is an important distinction, particularly so for this research. Child protection disputes are extremely complicated, dealing with substantive and highly emotional issues. Therefore, the use of mediation in child protection proceedings cannot be seen as a panacea.[74] CPM is not and should not be used to determine whether the alleged mistreatment of child abuse, neglect or mistreatment has occurred (Barsky, 1997); it is the role of the judge to determine whether the threshold for a care order or directions are met. Rather, CPM can be used in certain aspects of child protection cases in order to promote a personalised child centred parenting agreement that is in the child's and family's "best interests" (Anderson & Whalen, 2004). Therefore, this research study explores situations where mediation could potentially promote the "best interests" of the child, but on a case-by-case basis.

2.2.4. Voice of the child

The participation of children in family and child protection proceedings is not an entirely new concept in Irish Law (Browne, 2018). Since 1991, pursuant to section 24 (b) of the Child Care Act 1991, the Irish courts have had the discretion to listen to the views and wishes of the child (Browne, 2018). Further, the imperative to hear the voice of the child has been internationally recognised since the coming into force of the UNCRC 1989. Article 12 of the UNCRC represents one of the fundamental values of the convention and was given effect to in care proceedings by section 24 (b) of the Child Care Act 1991, which states:

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[74] In fact, the use of alternative dispute resolutions, in general, should not be seen as a panacea. For example, in the case of *Atlantic Shellfish Ltd & anor v. The County Council of the County of Cork & Ors* [2015] IEHC 570, Gilligan J. stated that: "*The reality of the situation with regard to mediation is that it is a two-way process between willing parties who agree to and participate in the mediation process with a willingness to reach a compromise, otherwise it becomes some other form of alternative dispute resolution. No party should be forced to attend mediation, as the bedrock of the procedure is to bring together the willing participants who wish to try to mediate a solution to the dispute that separates them. The emphasis is on participants in a dispute such as the present matter before the court to at least consider the benefits of mediation and in the particular circumstances of the present application, with regard to the consideration of any award of costs, the trial judge, or a higher court may, where it considers it just, have regard to the refusal or failure without good reason of any party to participate in any alternative dispute resolution process*" [para.18]. See also *Ryan v. Walls Construction Limited* [2015] IECA 214.

"In any proceedings before a court under this Act in relation to the care and protection of a child, the court, having regard to the rights and duties of parents, whether under the Constitution or otherwise, shall: (b) in so far as is practicable, give due consideration, having regard to his age and understanding, to the wishes of the child."

As a result, since 1991, the courts have had a statutory discretion to listen to the views of children involved in care proceedings. Despite this, up until recently, hearing the voice of the child in adversarial proceedings has proved problematic and often sporadic (Phelan, 2015). Consequently, encouraging the participation of children in decisions which directly affect them, within the context of family and child protection law, is a relatively recent development.

2.2.4.1. Voice of the child in family law disputes

In private law proceedings, the voice of the child can be heard directly through section 25 of the Guardianship of Infants Act 1964, as inserted by section 11 of the Children Act 1997. Section 25 enables the court to interview the child in any private law proceedings relating to guardianship, custody, access, or the upbringing of a child*: "In any proceedings to which section 3 applies, the court shall, as it thinks appropriate and practicable having regard to the age and understanding of the child, take into account the child's wishes in the matter."*

The jurisprudence has evolved since *RB v. AS* [2002] 2 IR 428 where Keane CJ. discussed speaking directly to children:

> *"It has long been recognised that trial judges have a discretion as to whether they will interview children who are the subject of custody or access disputes in their chambers, since to invite them to give evidence in court in the presence of the parties or their legal representatives would involve them in an unacceptable manner in the marital disputes of their parents. Depending on the age of the children concerned, such interviews may be of assistance to the trial judge in ascertaining where their own wishes lie"* [para. 447].

The circumstances in which a judge may interview a child were laid down in the High Court case of *FN & EB. v. CO* [2004] 4 IR 311 where Finlay Geoghegan J. held that a child has a constitutional right to have his or her views heard, provided that they are of sufficient age and maturity. Finlay Geoghegan's J. interpretation implies that the right of the child to be consulted on decisions in relation to guardianship, custody and access disputes is (or was at that time) a personal right of the child within the context of Article 40.3 of the Irish Constitution. Therefore, it is a right that the State pledges to vindicate as far as practicable:

> *"Hence section 25 (regarding ascertaining the wishes of the child) should be construed as enacted for the purpose of inter alia giving effect to the procedural right guaranteed by Article 40.3 to children of a certain age and understanding to have their wishes taken into account by a court in making a decision under the Act of 1964, relating to the guardianship, custody or upbringing of the child"* [para. 29].

Most notably, in ***O'D v. O'D*** [2008] IEHC 468, Abbott J. provides some guidelines for judges when interviewing children. While Abbott J. suggests that section 47 reports would be the normal means of hearing the voice of the child, he does recommend that there may be certain cases in which judicial interviews are appropriate. At paragraph 10, Abbott J. outlines the course of action the court should adhere to when talking to children:

> *"1. The judge shall be clear about the legislative or forensic framework in which he is embarking on the role of talking to the children as different codes may require or only permit different approaches.*
>
> *2. The judge should never seek to act as an expert and should reach such conclusions from the process as may be justified by common sense only, and the judge's own experience.*
>
> *3. The principles of a fair trial and natural justice should be observed by agreeing terms of reference with the parties prior to relying on the record of the meeting with children.*
>
> *4. The judge should explain to the children the fact that the judge is charged with resolving issues between the parents of the child and should reassure the child that in speaking to the judge the child is not taking on the onus of judging the case itself and should assure the child that while the wishes of children may be taken into consideration by the Court, their wishes will not be solely (or necessarily at all,) determinative of the ultimate decision of the Court.*
>
> *5. The judge should explain the development of the convention and legislative background relating to the Courts in more recent times actively seeking out the voice of the child in such simple terms as the child may understand.*
>
> *6. The Court should, at an early stage ascertain whether the age and maturity of the child is such as to necessitate hearing the voice of the child. In most cases the parents in dispute in the litigation are likely to assist and agree on this aspect. In the absence of such agreement then it is advisable for the Court to seek expert advice from the s. 47 procedure, unless of course such qualification is patently obvious.*

7. The Court should avoid a situation where the children speak in confidence to the Court unless of course the parents agree. In this case the children sought such confidence and I agreed to give it them subject to the stenographer and registrar recording same. Such a course, while very desirable from the child's point of view is generally not consistent with the proper forensic progression of a case unless the parents in the litigation are informed and do not object, as was the situation in this case" [para. 10] [emphasis added].

However, parents may object to this process (*C v. W* [2008] IEHC 469), so the circumstances may oblige the Court to adopt a more formalised procedure (*AB v. CD* [2011] IEHC 543).

In addition, the views of the child may be indirectly ascertained through the following means:

1. Child View Expert Reports:

   If the court is satisfied that section 3 (1) (a) of the Guardianship of Infants Act 1964 applies, namely proceedings exist concerning *"guardianship, custody or upbringing of, or access to a child*", the court, in accordance with section 32 of the Guardianship of Infants Act 1964, can appoint an expert to determine and convey the child's independent views to the court and their assessment of the child's maturity (section 32 (1) (b)). When deciding whether to make an order under the section, the court must have regard to (section 32 (3)):

   "a. the age and maturity of the child
   b. the nature of the issues in dispute in the proceedings
   c. any previous report…on a question affecting the welfare of the child
   d. the best interests of the child
   e. whether the making of the order would assist the expression by the child of their views on the proceedings
   f. the views expressed by a person referred to in section 31(2)."

   The expert then provides the views expressed to the court by way of a Report. It is open to the court or the parties in the proceedings to call the expert as a witness in the proceedings, as explained in section 32 (7): *"The court or a party to proceedings to which this section applies may call as a witness in the proceedings an expert appointed under subsection (1)."*

2. Section 47/Social Reports:

   Another prevalent method in which the views of the child are presented indirectly to the judge is via "Section 47 Report" or "Social Report" under section 47 of the Family Law

Reform Act 1995.[75] Section 47 allows the court to seek a report on "any question" concerning the welfare of the parties or their children. Section 47/Social Reports are not available in the District Court pending implementation of the relevant provision of the Children Act 1997. This facility extended in principle to the District Court in 1997, however, the relevant legislative provision has not yet been commenced.[76] The costs associated with a Report as outlined in section 32 or section 47 are also a matter for the parties to the proceedings; however, in cases of dispute the court will make an order. These reports are very expensive and can result in long delays (White, 2013).

3. Section 20 Tusla Reports:

Where in private law proceedings concerning a child the District Court has concerns about the welfare of a child or wishes to have the views of a child heard indirectly, the only provision open to the court is under section 20 of the Child Care Act 1991. A report can be ordered where "*it appears to the court that it may be appropriate for a care order or a supervision order to be made with respect to the child concerned in the proceedings, the court may, of its own motion or on the application of any person, adjourn the proceedings and direct the CFA to undertake an investigation of the child's circumstances.*"[77] The court may then direct the CFA to carry out an investigation and to prepare a report. This section is regarded by judges generally as unsuitable in private family law proceedings (White, 2013).[78]

4. Section 23 of the Children Act 1997:

Part III of the Children Act 1997 sets out the mechanisms by which a child, or a vulnerable adult operating under a mental disability (section 20 (b) of the Children Act

[75]According to section 47 (6) of the Family Law Reform Act 1995, a report may be procured by the court in proceedings under the Guardianship of Infants Act 1964, Family Law (Maintenance of Spouses and Children Act 1976, Family Home Protection Act 1976, Domestic Violence Act 1996, Status of Children Act 1987, Judicial Separation and Family Law Reform Act 1989, Family Law (Divorce) Act 1996, Child Abduction and Enforcement of Custody Orders Act 1991, the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, and in relation to decrees of nullity. Part IV provides a mechanism to all courts for indirectly hearing the voice of the child via an Expert Report under section 32 *or otherwise*. The cost of the Report must be borne by the parties to the proceedings.

[76]Section 47 of the Family Law Act 1995 is outside the ambit of a District Court judge by virtue of section 38 of the 1995 Act. This omission was legislatively rectified in 1997 by the Children Act 1997, which inserted a new section 26 into the Guardianship of Infants Act 1964. However, some twenty years later the corrective section remained un-commenced and still remains unimplemented notwithstanding section 141B of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 as inserted by the Children and Family Relationships Act 2015.

[77] Section 20 (1) of the Child Care Act 1991.

[78] See also section 12 of the Domestic Violence Act 2018.

1997),[79] may be protected within adversarial civil law proceedings, including child care proceedings. Section 23 of the Children Act 1997 allows for the admission of hearsay statements of children as evidence in proceedings where the court considers that:

> *"a. the child is unable to give evidence by reason of age or*
>
> *b. the giving of oral evidence by the child would not be in the interest of the welfare of the child."*

Notably, section 27 of the Guardianship of Infants Act 1964 and section 30 of the Child Care Act 1991 dispense with the requirement to have the children present in court. Section 23 of the Children Act 1997 sets out the safeguards to be put in place if admitting a statement made by the child outside the court as evidence in civil proceedings. If the court determines that the statement is admissible, the court must calibrate the weight to be attached to the statement (section 24) and determine whether the statement is credible (section 25).

5. Section 31 (2) (b) "Otherwise" of the Guardianship of Infants Act 1964, as amended:
Receiving the views of the child indirectly or "otherwise" is provided for under section 31 (2), as inserted by section 63 of the Children and Family Relationship Act 2015, which states that a court must have regard to *"the views of the child which are ascertainable (whether in accordance with section 32 or otherwise)"* [emphasis added].[80] This implies that the court has the possibility of securing the ascertainable views of a child through other unspecified means, for instance, through a Mediated Parenting Plan upon which the views of the child were ascertained, and their input sought and received in respect of the arrangements set out in the Parenting Plan.

To give an example of how this might occur in practice, according to the District Court Rules, Order 58, Rule 4 (12)[81] *"in any application concerning the guardianship of a child, the applicant shall complete and annex to the notice of application a statement of arrangements."* Completing a statement of arrangements allows the parties in the case to focus on the situation from the child's perspective and provide information that leaves each party in a better position to assess the reality of where the child's interests lie. This interlude creates a space for mediation where the parties can agree a Parenting Plan rather than

[79]Section 20 (b) of the Children Act 1997 states: "This part [Part III (evidence of children)] applies, with the necessary modifications, in the same manner as it applies to a child, to civil proceedings before any court, commenced after the commencement of this Part, concerning the welfare of a person who is of full age but who has a mental disability to such an extent that it is not reasonably possible for the person to live independently."
[80]Section 31 (2) (b) of the Guardianship of Infants Act 1964.
[81]S.I. No. 17 of 2016 (Custody and guardianship of children).

have a judge order how they will share the responsibility for their child. Where the court is asked to make an order by consent following a mediation process, it may be sufficient for the court to certify that the child has been given an opportunity to be heard in the proceedings, provided that the court is satisfied that the views expressed are freely expressed views of the child.

2.2.4.2. Voice of the child in child protection disputes

In public law proceedings, the voice of the child can be heard through section 24, section 25, section 26 and section 27 (2) of the Child Care Act 1991.[82] Generally, these sections provide that where the child requests to be present during the hearing or a particular part of the hearing of the proceedings, the court shall grant the request unless it appears that, having regard to the age of the child or the nature of the proceedings, it would not be in the child's "best interests" to accede to the request. Section 25 (1) states:

> *"The court may, where it is satisfied having regard to the age, understanding and wishes of the child and the circumstances of the case that it is necessary in the interests of the child and in the interests of justice to do so, order that the child be joined as a party to, or shall have such of the rights of a party as may be specified by the court in, either the entirety of the proceedings or such issues in the proceedings as the court may direct."*

The legislative presumption is that the child has a right to be present in court unless his or her presence is established to be contrary to his or her best interests. In public law child protection proceedings, the court is provided with a mechanism for child participation by section 25 and section 26 Child Care Act 1991 and the child may be provided with a Guardian Ad Litem (GAL), or a solicitor if they are joined as parties to the proceeding. Section 26 states *"the court may, if it is satisfied that it is necessary in the interests of the child and in the interests of justice to do so, appoint Guardian Ad Litem for the child."*

In child protection proceedings, the views of the child may be indirectly ascertained through the following means:

[82]Such options are only available to the District Court in public law proceedings and the costs are borne by the CFA.

1. Section 20 Tusla Report:[83]

Section 20 of the Child Care Act 1991, as amended by section 17 of the Children Act 1997, applies to certain types of civil law proceedings. Both the District Court and Circuit Court may seek an investigation under section 20 of the Child Care Act 1991 or an investigation under section 12 of the Domestic Violence Act 2018 from the CFA where concerns emerge from the evidence in private law proceedings or under the Domestic Violence Act 1996 that a public law order might be necessary to protect a child. In such circumstances, the court can ask the Social Work Department of the CFA to investigate the child's circumstances. The CFA must then consider whether it should:

"a. apply for a care order or for a supervision order with respect to the child

b. provide services or assistance for the child or his family

c. take any other action with respect to the child."

In circumstances where the CFA initiates an investigation but decides not to apply for a care order or a supervision order concerning the child concerned, it shall inform the court of:

"a. its reasons for so deciding

b. any service or assistance it has provided, or it intends to provide, for the child and his family

c. any other action which it has taken, or proposes to take, with respect to the child."

2. Appointment of a GAL

The GAL is another common way in which the voice of the child is heard indirectly.[84] However, while it is common for a GAL to be appointed to represent a child in child care proceedings, it is not a mandatory requirement and is left to the courts' discretion (Shannon, 2014; O' Mahony, 2016). According to the judgment of Horgan P. in *Health Service Executive v. SO & Anor* [2013] IEDC 19 [36], the role of a GAL is two-fold: to advocate the best interests of the child and inform the court of the child's wishes and

[83] Section 20 Reports is a provision that effectively operates as a bridge between private and public aspects of child law. Section 20 of the Child Care Act 1991 allows a court to direct an investigation where the court considers that a care or supervision order may be appropriate. This means the court must have some concern about the child's welfare not being met by its parents. So, it is effectively a "bridge" of sorts that allows child protection proceedings to emerge from what was originally a private law issue.

[84] Section 11 of the Children Act 1997 provides for the appointment of a GAL to act as a separate representative in guardianship (family/private law) applications. However, this provision has not yet been commenced.

feelings.[85] In public law proceedings, section 26 (1) of the 1991 Act allows for the appointment of a GAL. The legislation states that:

> *"If in any proceedings under Parts IV, [care proceedings], or VI [children already in the care of the CFA], the child to whom the proceedings relate is not a party, the court may, if it is satisfied that it is necessary in the interests of the child and in the interests of justice to do so, appoint a Guardian Ad Litem."*.

The Child Care Act 1991 does not set out any criteria for such appointments or define the role of the GAL; at present that are no nationally agreed standards for the role, qualification, appointment or training of the GAL. In 2009, the Children Acts Advisory Board (CAAB) published a document providing guidelines for good practice and standards for the role, appointment, training and qualification of GAL (CAAB, 2009).[86] The CAAB stated that the role of the GAL should be to *"independently establish the wishes, feelings and interests of the child and present them to the court with recommendations"* (CAAB, 2009, p. 3).

In 2017, following a consultation by the Department of Children and Youth Affairs (DCYA), the General Scheme to reform the GAL service was published.[87] The purpose of the General Scheme of the Child Care (Amendment) Bill 2018 was to replace the existing provision of section 26 of the Child Care Act 1991. Head 5 (subhead 1) of the General Scheme asserts *"the independence of a Guardian Ad Litem in the exercise of his/her function in ascertaining any views of the child and making recommendations on what is in the best interests of the child."*[88]

Overall, it is clear that Ireland has made considerable efforts to move the needs of the child centre stage as seen in the recently enacted Article 42A of the Irish Constitution and the Children and Family Relationships Act 2015. As demonstrated above, courts and child welfare agencies have adopted a child-inclusive approach to litigation, providing children with direct input into the decision-making process. However, the involvement of children within alternative dispute resolution processes, such as mediation, unfortunately remains quite

[85] The following cases also relate to the role of a GAL; *D.K. (a child)* [2007] IEHC 488, *H. S. E v.WR* [2007] IEHC 459, and *S.S. (minor)* [2007] IEHC 189).
[86] The Children Acts Advisory Board (CAAB) was established under section 20 of the Child Care (Amendment) Act 2007 and was dissolved in September 2011 under the Child Care Amendment Act 2011. The functions vested in the Minister for Health under the Child Care Acts, 1991 - 2011 were transferred to the Minister for Children and Youth Affairs in accordance with SI 488 of 2011, 3 (1), with effect from 1 October 2011.
[87] Department of Children and Youth Affairs, '*Reform of GAL arrangements in child care proceedings*' accessed 26 April 2019.
[88] General Scheme of the Child Care (Amendment) Bill 2018.

limited and is often determined by an adult agenda when it comes to whether and when to include the child (Gilmour, 2004; Kelly, 2004; Saposnek, 2004). This is an issue that will be explored as part of this research study.

2.3. ALTERNATIVE DISPUTE RESOLUTION

2.3.1. Revolution of alternative dispute resolutions (in general)

According to the Law Reform Commission Report (2010) entitled *Alternative Dispute Resolutions: Mediation and Conciliation*, the term mediation can have a variety of meanings depending upon the context in which it is used. Similarly, there has been a considerable amount of discussion regarding the meaning (or indeed use) of alternative dispute resolution (ADR) in Ireland. Some refer to ADR in the literal sense of the word "alternative", suggesting looking outside the courtroom setting to resolve a dispute (an alternative to adversarial litigation) (LRC, 2008). Others view ADR as any process where a decision maker is not required to determine a dispute (Bottomley & Bronitt, 2006). According to the Law Reform Commission Report (2008), ADR can be defined as:

> *"... a broad spectrum of structured processes, including mediation and conciliation, which does not include litigation though it may be linked to or integrated with litigation, and which involves the assistance of a neutral third party, and which empowers parties to resolve their own disputes"* (LRC, 2008, para.2.12) [emphasis added].

The definition highlights two essential points: (1) ADR is an alternative to adversarial court proceedings, and (2) ADR involves an independent (neutral) party to assist in the resolution of the dispute. In addition to adversarial proceedings, there are a number of ways to resolve conflict, which have been collectively referred to *"as frameworks under the umbrella title of ADR"* (Fakih, 2012, in Lee, 2013, p. 18).[89] As a result, even though this research study primarily focuses on mediation, various other forms of ADR processes, used in Ireland, will also be briefly discussed.[90]

Initially, the development of ADR began in the USA in the late nineteenth century as an attempt to avoid the shortcomings of the adversarial nature of litigation (Stempel, 1996;

[89] Further, Fakih (2012) mentioned that there is no definite list of ADR processes because various mechanisms and processes can be adopted and evolved as part of the resolution process (Fakih, 2012).
[90] See Chapter 2.3.2: Various Form of "ADR" Available in Ireland.

Sander, 1876).[91] As a result of the growing concerns about access, justice and efficiency, ADR advocates encouraged conflicts/disputes to be resolved, not only in public hearings, but also through various ADR processes such as negotiation, mediation, and arbitration (Sternlight, 2007). In this respect, the European Commission in the Green Paper 2002 notes that:

> *"ADRs offer a solution to the problem of access to justice faced by citizens in many countries due to three factors: the volume of disputes brought before courts is increasing, the proceedings are becoming lengthier and the costs incurred by such proceedings are increasing"* (European Commission, 2002, para. 5)

Nationally, this was acknowledged by the Law Reform Commission Report (2010) which indicated that:

> "*While the courts will always retain a central place in the civil justice system, it is increasingly recognised throughout the world that, in many instances, there may be alternative and perhaps more appropriate methods of resolving civil disputes in a manner which may be more cost and time efficient for parties*" (LRC, 2010, para. 1.04).

2.3.1.1. Meaning of "Dispute"

Firstly, the definition of a "dispute" must be addressed. According to Cathy (1996), *"a dispute is a product of unresolved conflict"* (Costantino & Mechant, 1996, p. 5). A comparison is often made between the dynamics of a dispute and the "conflict iceberg" (Riemsdijk, 2007). According to the Law Reform Commission Report (2008), the *"Gugel Iceberg Model for Conflict Dynamics"* illustrates *"that only a fraction of the issues in a dispute are immediately accessible"* (LRC, 2006, para. 1.06) (figure 2.1).[92] There is some consensus throughout that literature that ADR references a range of dispute resolution processes that provide an alternative to adversarial processes (Boulle & Nesic, 20001; Yarn, 1997; Martin, 1999). As documented in figure 2.1, above the water line focuses on the issues in dispute and reflects the dynamics between the parties in conflict. The personal interest of the parties is represented below the water line (or the submerged part of the iceberg); essentially it represents the fundamental factors that can contribute to any given conflict (LRC, 2008). Often, these underlying factors do not always

[91] The early attempts at ADR were essential to its development in the USA; however, ADR did not become mainstream until the late nineteenth century.

[92] The iceberg diagram is taken from Gugel —The Iceberg Model for Conflict Dynamics - Tubingen Institute for Peace Education. Available at http://www.dadalos.org/frieden_int/grundkurs_4/eisberg.htm.

surface during formal rights-based adversarial proceedings (LRC, 2008; Cloke & Goldsmith, 2000).

Figure 2.1: Gugel Iceberg Model for Conflict Dynamics (LRC, 2010).

Interest-based dispute resolution processes focus on the underlying needs and interests of the parties, as opposed to just their rights and issues. They seek to develop a dialogue while addressing the party's emotions and offering a framework for the resolution of the dispute (LRC, 2008). It is also essential to recognise the subject of "positions" and "interests" when trying to resolve a problem through ADR mechanisms. Positions are the specific demands that the person makes to realise their interest, whereas interests are what the person really cares about and what they want to achieve throughout the process. Generally, a person feels more secure and in control when they are armed with a position (Hicks, 2001). The challenge for mediators is to ask the parties to relinquish this "control" or to set aside their positions, focusing only on interests. This can make the parties feel vulnerable, and it is the mediator's role to ensure that neither side feels that their identity or core values are threatened. For example, a divorcing couple's dispute about parenting issues or the visitation schedule may be about control (position) or the parties' sense of identity which are connected to the parenting issues (interests) (Hicks, 2001). Similarly, in a child protection case, a dispute over access may be focused on the relationship/tension between the parents and the child welfare agency (position), or the parties' sense of identity as a parent and how that is being threatened (interests).

Figure 2.2 demonstrates two resolution systems. The pyramid on the left represents a distressed resolution system which focuses on determining power and less on resolving the dispute by reconciling interests. In contrast, the pyramid on the right provides for a dispute resolution system where the dispute is resolved through reconciling differences, and less on determining who is more powerful (Ury, et al., 1998). Focusing on the parties' interests, as opposed to power, results in a mutually satisfactory outcome rather than a system which generates a "winner" and a "loser". The challenge, however, for the mediator is to "*turn the pyramid right side up*" (Ury, et al., 1998, p. 10).

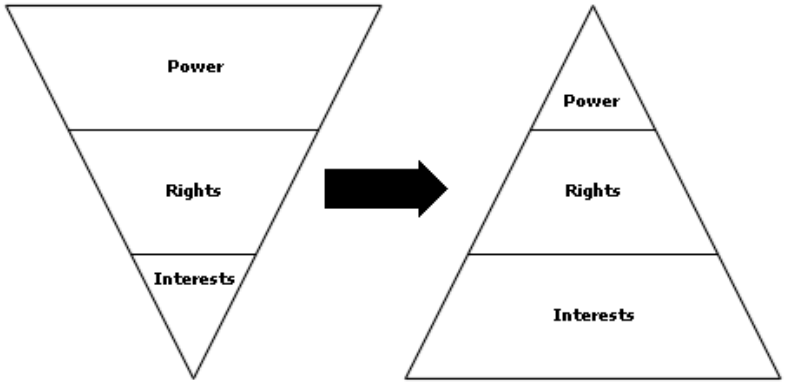

Figure 2.2: Moving from a Distressed to an Effective Dispute Resolution System (LRC, 2008; Sander, et al., 1985).

2.3.1.2. Identity-based conflict

The term "identity-based conflict" has predominantly been applied to social conflicts, usually based on ethnic, cultural, religious, and/or national-identify differences (Rothman, 1997; Woodward, 1997; Hicks, 2001). According to Rothman (1997), identity *"is people's collective need for dignity, recognition, safety, control, purpose, and efficacy"* (Rothman, 1997, p. 7). Given that identities are formed on multiple levels (for instance, individually, within family/social groups, nationally, culturally) (Hicks, 2001), resolving these conflicts can be tough and often requires the assistance of a third party/independent mediator/facilitator (Shamir, 2003). It is clear through the literature, that a useful way to resolve "identity-based conflicts" is to first identify the source or type of conflict. According to Riley and Sebenius, it is particularly important for the facilitator/mediator to have some understanding of the parties' identity-based conflict (Sebenius & Riley, 1997). This point was re-iterated by Hick (2001) stating *"mediators will be better able to assist parties through the thicket of their conflict the more aware we are of the thorns"* (Hicks, 2001, p. 39).

2.3.2. Various forms of "ADR" available in Ireland

Recently in Ireland, ADR is increasingly seen as a critical element of access to justice (LRC, 2010). Despite the fact it is recognised that many disputes can be resolved through ADR processes, there is no single formula to decide which ADR process is the most appropriate for a particular dispute (LRC, 2008). There are a variety of established ADR schemes and mechanisms in Ireland. According to Brown and Marriot (1999), "*there are many variations in relation to disputes: the range of subject matters is very wide; within any category, a multitude of issues can arise; various factors can influence parties who disagree; and there are some conflicts which are not readily amenable to dispute resolution processes*" (Brown & Marriott, 1999, p. 3). In fact, one of the more challenging aspects of ADR is to determine which ADR process is suitable to a conflict resolution. A number of ADR mechanisms are described below.

2.3.2.1. Mediation

Mediation is a confidential, voluntary dispute resolution process in which an independent third party (the mediator), seeks to assist the parties in reaching a mutually accepted agreement (Law Society, 2018).[93] In Ireland, mediation is now governed by the Mediation Act 2017, which came into force on the 1 January 2018. Overall, this statutory framework was designed to promote/encourage the use of mediation, as a genuine alternative to adversarial processes, for resolving a dispute. The objective of the Mediation Act 2017 is to promote and encourage mediation as a viable, effective and efficient alternative to the court-based litigation process, consequently reducing legal costs, speeding up the resolution of disputes and minimising the difficulties of adversarial proceedings (Department of Justice and Equality, 2017).[94]

[93] While this thesis focuses on CPM, it is important to acknowledge different areas where mediation is a useful dispute resolution tool. For example, mediation is used to resolve workplace disputes, presenting an opportunity for all the parties to be heard and reach a solution informally; see the Employment Equality Act 1998 – 2015, which contains provisions that allow a dispute between an employee and an employer to be resolved through mediation.

[94] The mediation process is discussed in more detail in Chapter 2.4:

2.3.2.2. Conciliation

Conciliation is a process similar to mediation in that an independent third party (conciliator) assists the parties to reach a settlement by negotiation (LRC, 2008). Conciliation is a voluntary process suggesting that the process can be terminated at any point and, by the same token, the parties are not obligated to accept any proposed or recommended settlement. Like mediation, conciliation is a confidential, non-prejudice process suggesting that communications, documents, and so forth, produced as part of the Conciliation process are inadmissible in any subsequent adversarial proceedings (subject to certain limitations). According to the Chartered Institute of Arbitrators, conciliation is rarely availed of in Ireland except in relation to construction industry disputes (CIArb, 2019).

As aforementioned, conciliation is a process similar to mediation, however, there are essential differences. The most notable distinction is that the conciliator must issue recommendations upon the parties in the situation where a settlement has not been reached; this recommendation is binding upon the parties unless either party rejects the recommendation within the specified time limit as stipulated by law (Law Society, 2018). In the United Kingdom, the Centre for Effective Dispute Resolution defines conciliation as *"a process where the neutral takes a relatively activist role, putting forward terms of settlement or an opinion on the case."*[95] Therefore, it can be stated that *"the conciliator has a more "interventionist" role in bringing the disputing parties together"* than in the context of mediation (LRC, 2010, p. 23).

2.3.2.3. Arbitration

Arbitration is a long-established ADR process where the disputing parties submit their dispute (by agreement) to a neutral and independent third party (arbitrator) for determination (LRC, 2008). The determination will be binding on the parties (LRC, 2008). It is generally acknowledged, that arbitration is the preferred method of dispute resolution in commercial agreements, including within construction and insurance industries (LRC, 2008). In Ireland, arbitration is governed by the Arbitration Act 2010. One reason for the enactment of the Arbitration Act 2010 was to ensure that Irish law was in line with international best practices; thus, the Arbitration Act 2010 adopted the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration, which was subsequently applied to all arbitrations which take place in Ireland.

[95] For more information, see www.cedr.co.uk

The main difference between arbitration and mediation relates to the role the arbitrators and mediators assume. An arbitrator acts like a judge by taking testimony, evaluating evidence and arriving at a formal binding decision. On the other hand, a mediator is a facilitator between the parties and gathers information by questioning all of the participants. In arbitration, the arbitrator makes a written/taped record of the arbitration hearing to refer to later when deciding the rights of the parties. However, in mediation, the mediator does not keep a record of the mediation session.

2.3.2.4. Hybrid practices

A hybrid dispute resolution process combines two or more traditional resolution processes into one. One of the most common hybrid practices is mediation and arbitration (referred to as "med-arb"). Med-Arb is a two-step process whereby the parties agree to mediate. However, where mediation fails to achieve an agreement, the dispute is automatically referred to arbitration (Law Society of Ireland, 2018). Mediation and arbitration are used in conjunction with each other, and the same person (the neutral party) acts as both the mediator and the arbitrator (Law Society of Ireland, 2018).

2.3.2.5. Expert determination

Expert determination is an ADR process where the disputing parties appoint a neutral and independent third party to make a final and binding determination on a dispute (LRC, 2008); the dispute must relate to that expert's particular area of specialisation (CIArb, 2019). This ADR process can be particularly useful in disputes involving technical or esoteric issues (LRC, 2008). An important qualification is that the parties agree to be bound by the decision of the expert determination in advance (LRC, 2008). As a result, the dispute is resolved through consensual oriented interaction between the disputants (LRC, 2010). In contrast to mediation, a party cannot unilaterally withdraw from expert determination. Another difference between expert determination and arbitration is the appointment of an expert to determine the dispute rather than any arbitral capacity (CIArb, 2019).

2.3.2.6. Adjudication

Adjudication is the legal process whereby an adjudicator or a judge reviews the facts and legal arguments of the case (as set out by the disputing parties) in order to reach a decision that determines the parties' respective rights and obligations (Law Society, 2018). This process is designed to be expeditious so as to avoid resorting to lengthy, highly contested, and expensive court-based proceedings. The Construction Contracts Act 2013 introduced statutory adjudication in relation to payment disputes under construction contracts (Law Society, 2018).

The essential distinction between mediation and arbitration, is that mediation is a process of negotiation where the disputing parties, with the assistance of an independent third-party mediator, attempt to reach an agreed resolution. However, in adjudication the adjudicator hears evidence and makes a decision that is binding on the parties.

2.3.2.7. Collaborative Law

In Ireland, collaborative law is primarily practised in family law, including divorce, separation and parenting disputes (Law Society of Ireland, 2018). In a family law context, collaborative law is a four-pronged process whereby the parties and their solicitors attempt to achieve a resolution that will benefit the whole family (Legal Aid Board, 2016). The parties try to reach a settlement outside of the courtroom; most notably, the legal advisors typically pledge not to represent the parties in contentious litigation, should the discussions break down (with the exception of steps to formalise an agreement or to seek a divorce order and ancillary orders by consent) (Legal Aid Board, 2016). Most notably, the legal advisors typically pledge not to represent the parties in contentious litigation, should the discussions break down.

It is challenging to outline the differences between mediation and collaborative law because both processes are a voluntary, non-adversarial interest-based form of negotiation. However, one main distinction is that in collaborative law, the parties must be legally represented, whereas, in mediation, the parties may or may not be legally represented. Another difference is the timing of when each process may be used. With mediation, parties generally do not avail of this process until litigation has started (although there is nothing to prevent mediation taking place before litigation begins). In contrast, collaborative law is often used at the outset of the dispute resolution process (generally before litigation has commenced).

2.3.3. "ADR" processes used in child protection disputes in Ireland

There are also two main types of ADR processes that are currently used in child protection cases in Ireland; namely the family welfare conferences and child protection conferences. However, according to Corbett & Coulter "*the legislative and policy basis for these conferences is not integrated with judicial child care proceedings*" (Corbett & Coulter, 2019, p. 42).

2.3.3.1. Family welfare conferences

In child protection and welfare services, a family welfare conference is used to address any concerns about the needs of the child and the ability of the family to respond to those needs. A family welfare conference is a model that brings together the family (including extended family members), child protection workers and service providers in order to establish a strategy that best addresses the child protection concerns. A family welfare conference has been described by the HSE as:

> "*… A structured, family-led, decision making meeting, where as wide a range of family members as possible come together to formulate a safe family plan in the best interests of the child. Essentially it is a method of family intervention that enable families to provide their own solutions to the difficulties they face.*"[96]

The family welfare conference was first introduced in Ireland in 2001, under the Children Act 2001, which replaced the Children Act 1908 in regards to juvenile justice.[97] The Children Act 2001 provides for family welfare conferences, in certain situations. Under section 7, a family welfare conference is initiated where:

a. *"the CFA receives a direction from the Children Court under section 77 to convene a family welfare conference in respect of a child, or*
b. *it appears to the CFA that a child may require special care or protection which the child is unlikely to receive unless a court makes an order in respect of him or her under Part IVA (inserted by this Act) of the Act of 1991, the CFA shall appoint a person (in this Part referred to as a "coordinator") to convene on its behalf a family welfare conference in respect of the child."*

[96] "Families Today", Family Welfare Conference Service- HSE. See (Kilkelly, 2008).
[97] The Act was signed into law in July 2001; however, the Act was not fully implemented until July 2007. The whole Act was commenced by S.I. 524/2007 Children Act 2001 (Commencement) (No. 3) Order 2007 on the 23rd July 2007.

If the court determines that a child is in need of care and protection, the proceedings can be adjourned and the parties could be directed to attend a family welfare conference (part II of the Children Act 2001; Children (Family Welfare Conference) Regulations 2004).[98] Therefore, according to Professor Ursula Kilkelly (2006), the role of the Children Court Judge:

> *"...extends beyond the traditional one of determining a criminal charge and the upholding of the child's constitutional rights. Instead, it demands that the judicial function be combined with that of counsellor, manager and administrator of youth justice; that makes the role not only the most influential and central position in the youth justice system but also the most challenging"* (Kilkelly, 2006, p. 135).

A family welfare conference, although instigated by either the CFA or the court's own motion, is convened by the person appointed by the CFA to act as a coordinator/convener, with such person to also act as the chairperson of the family welfare conference (Crowley, 2013). Section 9 of the Children Act 2001 lists those persons who are entitled to attend the conference:

a. *"the child in respect of whom the conference is being convened*
b. *the parents or guardian of the child*
c. *any GAL appointed for the child*
d. *such other relatives of the child as may be determined by the coordinator, after consultation with the child and the child's parents or guardian*
e. *an employee or employees of the CFA*
f. *any other person who, in the opinion of the coordinator, after consultation with the child and his or her parents or guardian, would make a positive contribution to the conference because of the person's knowledge of the child or the child's family or because of his or her particular expertise."*

According to Corbett & Coulter (2019), a family welfare conference could fall within the definition of ADR as stated in the Law Reform Commission Report (2008) (chapter 2.3.1) as there is an independent chair who provides a platform for the parties to try and resolve the concerns raised by the CFA (Corbett & Coulter, 2019). However, the circumstances in which a family welfare conference can take place are quite limited (Corbett & Coulter, 2019).

[98] It is important to note that family welfare conferences are not limited to child welfare concerns. Family welfare conferences have also been effectively used in multiple types of cases including criminal, juvenile justice, and victim/offender negotiations.

2.3.3.2. Child protection conferences

A child protection conference is an inter-agency and inter-professional meeting aimed at determining whether a child is at risk of significant harm (Tusla, 2015).[99] While there is no specific statutory basis for child protection conferences, the jurisdiction for the CFA derives from the Child and Family Agency Act 2013, and the statutory basis for much of the CFA's activities in order to safeguard children are provided for under the Child Care Act 1991 (section 3).[100]

A Child Protection Plan will be created in the situation where it is decided that the child is at risk of ongoing significant harm (Tusla, 2015). Furthermore, the child's name will be placed on the Child Protection Notification System. The social worker, in consultation with a Team Leader, can request a child protection conference where there are reasonable grounds for believing that a child is at ongoing risk of significant harm from abuse, including neglect. The child protection conference is convened by a conference chairperson (on behalf of the Area Manager). According to the CFA Information Booklet (2015), the purpose of a child protection conference is:

- *"to determine whether a child is at ongoing risk of significant harm and to list any children at risk of significant harm on the Child Protection Notification System*
- *to facilitate the sharing and evaluation of information between professionals and parent/s in order to identify risk factors, protective factors and the child's needs*
- *to develop a child protection plan when it has been determined that a child is at ongoing risk of significant harm"* (Tusla, 2015, p. 8).

The purpose of the child protection plan is to provide support to the child and the parents by making sure that any risk to the child is minimised and that the child is kept safe from harm.

In *A, and child X and child Y v. Child and Family Agency* [2015] IEHC 679, the High Court held that an application seeking an order of *certiorari* for judicial review in respect of a child protection conferences in relation to the welfare of the children and the continuing separation of the family would be denied. The Court observed that the child protection conferences are not generally subject to judicial review. As there were no exceptional circumstances in this

[99] Children First: National Guidance for the Protection and Welfare of Children 2011 identifies child protection conferences as central to identifying children at risk of harm.
[100] In addition, Article 42A of the Irish Constitution, and also the ECHR, oblige the State to act in order to safeguard children.

case to contradict the general rule and no evidence to support the claim of lack of fair procedures the reliefs were refused.

According to Corbett & Coulter (2019), a child protection conference could be considered to fall under the definition of ADR provided for under the Law Reform Commission Report (2010), as there is an independent chair that provides a platform for the parents to engage in the process and support parents with any concerns raised by the CFA. However, an important principle of ADR, particularly mediation, is confidentiality.[101] In contrast, with a child protection conference any information shared during the conference can be used as evidence in a child protection/care proceeding (Corbett & Coulter, 2019, p. 43).

It is important to outline, at the outset, that child protection conferences differ from CPM in a number of ways. The main distinction is in a child protection conference the chairperson is employed by the CFA, whereas with CPM the mediator would be independent from the CFA. The independence of the mediator helps to remove any potential power-imbalance and afford a neutral space for the parties to communicate. However, in child protection cases there is the potential disadvantage of the power-imbalance for the family as often the professionals meet first, decisions are taken and then the family are brought in to hear the outcome of what the professionals think. This will be discussed in further detail throughout the thesis.

2.4. MEDIATION, IN GENERAL

2.4.1. Defining mediation

As previously mentioned, in its broadest sense, mediation is a voluntary process of assisted negotiation in which a neutral party, a mediator, helps parties in conflict to try and reach an agreement (Lande, 2001). Mediation literature often makes comparisons with adversarial approaches when dealing with conflict. In contrast to the adversarial model of dispute resolution, where *"there will always be 'winners' and 'losers'"* (*Fitzpatrick v. Board of Management of St Mary's Tourneau National School & Anor* [2013] IESC 62), mediation focuses on the needs and interests of the parties rather than on their own rights. In a sense, mediation seeks to address why certain issues have arisen as being problematic for the parties in order to facilitate an agreement (MII, 2018). Accordingly, the mediation process is not constrained by substantive law, by formal legal definitions, or by the strict rules of procedure in the same way that the adversarial process is (Lowry, 1998). In contrast, mediation *"focuses on the future,*

[101]See Chapter 2.4.3: Core Principles of Mediation.

and how all the parties' interests can be maximized" (Barsky & Trocmé, 1998, p. 630; Stahler, et al., 1990).

At this stage, it is also important to acknowledge that there are different types/models of mediation that can be used, including, but not limited to facilitative, evaluative, or transformative mediation.

a) *Facilitative Model:* the overall purpose of the facilitative model is for the parties themselves to voluntarily reach a mutually accepted resolution that is in both of their best interests. The role of the mediator is to promote/facilitate open communication between the parties and ensure everyone's interests are maximised while remaining impartial. Recently, the Mediation Act 2017 adopted a facilitative mediation approach, where the mediator offers minimal assistance. This can be seen under section 6 (9) of the Mediation Act 2017 which states that *"it is for the parties to determine the outcome of the mediation."* However, an exception to this can be found under section 8 (4) of the Mediation Act 2017 which states that *"the mediator may, at the request of all the parties, make proposals to resolve the dispute, but it shall be for the parties to determine whether to accept such proposals."* This is in line with Article 3 (a) of the 2008 EU Directive on Mediation (2008/52/EC).

b) *Evaluative Model:* this form of mediation is often used in response to court-ordered mediations. The mediator evaluates the parties' positions, and subsequently makes an assessment of their strengths and weaknesses. Evaluative mediators make recommendations and assist the parties in making fair determinations.[102]

c) *Transformative Model:* the focus of transformative mediation is to empower the parties to recognise each other's perspectives, particularly their needs and interests, and encourages the parties to shift from the *"negative and destructive to positive and constructive"* (Noce, et al., 2002, p. 51). The role of the mediator focusses on the transformation of the parties or their perspectives rather than on potential settlement.

[102] This is something to bear in mind when considering the debates surrounding "mandatory" versus "voluntary" CPM sessions. See Chapter 5.2.4: Mandatory v's Voluntary Mediation.

2.4.2. Legislative history and development of mediation in Ireland

Since the enactment of the Amsterdam Treaty 1999, the European Commission 's stated view is that ADR process may be more suitable, for certain types of disputes, to respond to the needs and interests of the parties (LRC, 2008). In appropriate situations, ADR processes enable an interest-based model to be utilised in resolving the conflict, allowing for an expeditious and more cost-effective process. In contrast, the traditional legal framework of resolving disputes through adversarial processes, will provide the best solution in situations where, for example, there are public interests to protect or "*where power-imbalances may exist which put the parties on unequal footing*" (LRC, 2008, p. 10). The European Commission envisages that citizens and business must have the opportunity to make their own choices as to which form of ADR best satisfies their interests, while being fully informed of their rights and the protection afforded to them by law.

In 2002, the European Commission published the Green Paper on ADR in Civil and Commercial Law. The paper described mediation as a "political priority" and sought to outline the policy aims that could be defined at community level, as well as the policy instruments that could be used to achieve those aims.

The European Code of Conduct for Mediators was developed in 2004 in order to encourage a self-regulation mediation process in Europe. In May 2008 the European Directive on Mediation was adopted by the European Parliament and Council of the EU. The 2008 EU Directive on Mediation (2008/52/EC) sets the goal of building trust in the process of mediation within the EU.[103] Article 6 of the 2008 Directive outlines the various advantages of mediation over adversarial proceedings, such that it is cost effective, flexible and that *"agreements resulting from mediation are more likely to be complied with voluntarily and are more likely to preserve an amicable and sustainable relationship between the parties."*

In May 2011, the European Communities (Mediation) Regulations 2011 was enacted and brought the European Directive on certain aspects of mediation in civil and commercial matters into effect in national law.[104] The 2011 Regulations deal with the use of mediation

[103]While the overall aim of the 2008 Directive on Mediation is designed to encourage mediation generally, the Directive also reaffirms the value and importance of collaboration between the parties in family law disputes at a EU legislative level. Article 1 of the Directive states its aim as being: *"…to facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings."*

[104] S.I. 209 of 2011.

in cross-border disputes and state that the 2011 Regulations apply to all Irish courts. Of course, neither the 2011 Regulations nor pre-existing Court rules compel a party to mediate a dispute against its will. However, the court may factor in an unreasonable refusal of a party to participate in mediation in determining awards of costs.

The Law Reform Commission's Mediation and Conciliation Bill was the model for the Draft General Scheme of the Mediation Bill as published in 2012. According to the Minister of Justice at the time, Alan Shatter TD, the broad objective of the Mediation Bill 2012 was to "*promote mediation as a viable, effective and efficient alternative to court proceedings thereby reducing legal costs, speeding up the resolution of disputes and relieving the stress involved in court proceedings.*" The Mediation Bill 2012 incorporated many of the recommendations made by the Law Reform Commission in the 2010 Report entitled 'Alternative Dispute Resolution – Mediation and Conciliation' (LRC, 2010).

The Mediation Bill 2012 ultimately led to the enactment of the Mediation Act 2017, which came into force in Ireland from the 1 January 2018. The Mediation Act 2017 establishes a statutory framework which is designed to encourage and promote the resolution of disputes through mediation as a viable alternative to court-based proceedings. The Mediation Act 2017 places an obligation on solicitors and barristers to advise their clients on the mediation process and the estimated costs and time that the proposed litigation or mediation will take (section 14 and 15 of the Mediation Act 2017).[105] This suggests that solicitors and barristers must provide adequate information on the mediation process in order to be able to advise their clients on this ADR option.

However, while the implementation of the Mediation Act 2017 positions mediation within the legal architecture and provides a legislative framework and regulates the process, there are some major drawbacks. Most notably, section 3 of the Mediation Act 2017 which outlines what the Act will not apply to. Crucially for the purpose of this study, under section 3 (1) (i) of the Mediation Act 2017 the Child Care Acts 1991-2015 have been explicitly excluded from

[105] Under section 14 and 15 of the Mediation Act 2017, there is a statutory obligation placed on solicitors/barristers to discuss with their clients the menu of alternatives available for dispute resolution.

the scope of the Act.[106] This exclusion fails to acknowledge that there are certain aspects of a child protection case that could be more appropriately managed through mediation (such as access, foster placements breakdowns and the details of voluntary care arrangements). The exclusion of the use of mediation in child care proceedings will be further discussed throughout this research study.

The implementation of legislation and directives has actively promoted the use of mediation in Ireland as a viable option in resolving disputes. The 2008 EU Directive on Mediation has been an important vehicle for introducing national legislation surrounding mediation in EU Member States; for example, the implementation of the Mediation Act 2017 in Ireland. However, the goals stated under Article 1 of the 2008 EU Directive on Mediation, towards encouraging the use of mediation and especially achieving a *"balanced relationship between mediation and judicial proceedings"* have not been fully realised so far. Despite the persuasive arguments in favour of the use of mediation, the up-take of mediation in Ireland is relatively quite low when compared to adversarial proceedings. This can be seen in the Courts Service Annual Reports (2015-2018), where the number of private family law proceedings (such as incoming Guardianship, Custody and Access applications) and the number of incoming family

[106] The Mediation Act 2017 includes family law proceedings within the scope of the Act (with the notable exclusion of proceedings under the Child Care Act 1991 and the Domestic Violence Act 2018). Under section 2 it states that *""family law proceedings" means proceedings before a court of competent jurisdiction under any of the following enactments: (a) section 8 of the Enforcement of Court Orders Act 1940 in so far as that section relates to the enforcement of maintenance orders; (b) the Guardianship of Infants Act 1964; (c) the Family Home Protection Act 1976; (d) the Family Law (Maintenance of Spouses and Children) Act 1976; (e) the Family Law Act 1981; (f) the Status of Children Act 1987; (g) the Judicial Separation and Family Law Reform Act 1989; (h) the Child Abduction and Enforcement of Custody Orders Act 1991; (i) the Maintenance Act 1994; (j) the Family Law Act 1995; (k) the Family Law (Divorce) Act 1996; (l) the Protection of Children (Hague Convention) Act 2000; (m) the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010; (n) the Children and Family Relationships Act 2015; (o) subject to subsection (2), any other enactment which may be prescribed for the purposes of this definition."*

mediation sessions per year are documented.[107] For example, in 2018, mediation was used in eleven percent of incoming family law proceedings (guardianship, custody and access disputes). Mediation has been highlighted as a dispute resolution option in domestic family law cases for over two decades now and so it is interesting that it is not chosen by couples more frequently.[108]

	LITIGATION		**MEDIATION**	
	Incoming	**Resolved**	**Parties Attending Information Sessions**[109]	**Agreements Finalised**
2018	12,611	10,321	1, 348	365
2017	12, 442	13, 728	1,704	359
2016	12,488	12,128	1,884	439
2015	20, 312	18,351	2,382	549

Figure 2.3: Applications made in the District Court in respect of Guardianship Custody and Access Disputes (Courts Service, 2015; 2016; 2017; 2018).

2.4.3. Core principles of mediation

The Law Reform Commission Report (2010) examines the core principles of mediation. These values and principles are compliant with the Guidelines of the European Commission for the Efficiency of Justice. The Guidelines aim *"to enable a better implementation of the international legal instruments of the Council of Europe concerning efficiency and fairness of justice"*, and promotes the implementation of Council of Europe instruments and standards relating to alternative dispute settlement. It is essential to understand the values and principles of mediation,

[107] The mediation figures emanate from the mediation initiative, the Legal Aid Board and the Family Mediation Service of the Legal Aid Board in various District Courts around Ireland during that year. The Districts included Cork, Dublin (Dolphin House), Nass, Limerick and Tipperary. It should also be noted that these figures are relating to family (private law) proceedings in respect of guardianship, custody and access. These figures are not referring to child protection (public law) proceedings (which does not formally exist in Ireland).

[108] Particularly since the launch of the District Court Mediation Initiative in 2011. As discussed below (Chapter 2.5.1.2: Court Based Mediation Process), this initiative took place in Dolphin House Courthouse (DMD). This focus of this initiative was for the courts and mediation service to work together to make mediation more visible and accessible within the court system.

[109]According to the courts service annual report, "Parties contemplating proceedings in relation to access, custody or guardianship matters are initially invited to attend mediation information sessions. A formal mediation process is then offered to parties willing to engage with legal advice which is available on site via the Legal Aid Board" (Courts Service, 2015, p. 19).

particularly when considering the potential implementation of a CPM programme in Ireland. According to the Working Group (Strasbourg, 8-10 March 2006), the values and principles of mediation can be described as follows:

2.4.3.1. Voluntary participation

Mediation is quintessentially a voluntary process. Section 6 (2) of the Mediation Act 2017 indicates that *"participation in mediation shall be voluntary at all times"* (see also Moore, 1986). Mediation relies on the parties and, despite the statutory procedures designed to encourage it, remains a purely voluntary mechanism.[110] The voluntary essence of mediation is endorsed by the 2008 EU Direction on Mediation (2008/52/EC). The current mediation model adopted in Ireland emphasises the parties finding their own solutions through mediation.[111] As Turlough O'Sullivan stated at the Mediators' Institute of Ireland Symposium in 2008:

> *"People generally don't like solutions that are handed down from others. It is almost impossible to please everybody. Yet a mediated solution has a much better chance of doing that and equally importantly of preserving relationships hereafter"* (O'Sullivan, 2008, p.1).

Therefore, given the voluntariness of mediation, and the facilitative role of the mediator, mediation offers a genuine alternative to litigation.

The question arises, however, whether mediation can ever be forced? It may be argued that there is a difference between forcing parties to the table to hear about the benefits of mediation and subsequent participation in mediation. Attendance at mediation may be forced in some jurisdictions. However, one may argue that if the process is to be truly called 'mediation' actual participation in mediation must be voluntary. As Hedeen (2005) states:

> *"...[the] voluntary action in mediation [and conciliation] is part of the magic of mediation that leads to better results: higher satisfaction with process and outcomes, higher rates of settlement, and greater adherence to settlement terms"* (Hedeen, 2005, p.275).

The voluntary nature of mediation is something that will be discussed in more detail throughout this research study.

[110]Section 2 and section 6 (2) of the Mediation Act 2017 refers to the voluntary nature of mediation.
[111]The 2008 EU Directive on Mediation defines mediation as "a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator" (Explanatory Memorandum to Recommendation No. R (98) 1 on family mediation at 27 and 28.)

2.4.3.2. Confidentiality

Confidentiality is a core principle of the mediation process. The duty of confidentiality can be found under section 10 of the Mediation Act 2017:

> *"All communications, records and notes relating to mediation are confidential and shall not be disclosed in any proceedings before a court or otherwise except as required for a mediator to provide a report to the court where mediation was initiated at the invitation of the court, or where disclosure is:*
>
> *a. necessary in order to implement or enforce a mediation settlement*
> *b. necessary to prevent physical or psychological injury to a party*
> *c. required by law*
> *d. necessary in the interests of preventing or revealing:*
> *i. the commission of a crime (including an attempt to commit a crime);*
> *ii. the concealment of a crime, or*
> iii. *a threat to a party."*[112]

The primary purpose of mediation is to allow the parties to reach a personalised agreement. In order for this to be achieved, open communication is necessary between the parties and the mediators in the absence of fear or threat that any admissions or documents pertaining to the mediation process will be used as evidence in court-based proceedings, especially in the scenario where the mediation was unsuccessful (Brown, 1991; Bush, 1989). The only way to ensure open dialogue is to assure the parties that the process is confidential. As Hobbs (2006) notes:

> *"Confidentiality is a critical element of successful mediation. In order for the mediator, the attorneys and the clients to understand the central issues, the motivations, the pressure points and the risks of litigation, the participants must be assured the discussions cannot and will not be disclosed to others so they can talk openly... If discussions with the mediator are not confidential and privileged, the mediation process, the mediator's role and the potential for resolution are significantly diminished"* (Hobbs, 2006).

Mediation privilege asserts a right of confidentiality to all parties involved in the ADR process, ensuring that any information disclosed in mediation proceedings cannot be used

[112] The confidentiality of mediation is endorsed by Article 4-8 of the 2008 EU Directive on Mediation (2008/52/EC).

against any of the parties in later proceedings, except where required by law. According to the Commission *"mediation and conciliation privilege will also assist and enhance the administration of justice by facilitating full and frank disclosure and communication between disputing parties in an attempt to resolve their dispute with the assistance of a neutral and independent third party."* However, the exception to confidentiality is where there is (or there had been) a risk of harm to a child (Legal Aid Board, 2019).

2.4.3.3. Neutrality and impartiality

The concept of neutrality and impartiality are interlinked. The principles of neutrality and impartiality are generally accepted as being the cornerstones of the mediation process, and mediators (and indeed conciliators) *"should ensure that the principle of equality of arms be respected during the mediation and conciliation process"* (Council of Europe, 2002). The general view is that the mediator should be completely neutral and impartial in the mediation process. Moore (1986) summarises this approach, stating:

> *"Impartiality refers to the attitude of the intervener and is an unbiased opinion or lack of preference in favour of one or more negotiators. Neutrality, on the other hand, refers to the behaviour or relationship between the intervener and the disputant.... Neutrality also means that the mediator does not expect to directly gain benefits or special payments from one of the parties as compensation for favours in conducting the mediation. People seek a mediator's assistance because they want procedural help in negotiations. They do not want an intervener who is biased or who will initiate actions that are detrimental to their interests"* (Moore, 1986, p. 58).

The mediation process obviously requires engagement, and it is difficult to engage with the disputing parties without developing some connection with them; however, it is the duty of the mediator to remain neutral and impartial throughout the session. It must be acknowledged that it is very difficult for a mediator to remain absolutely neutral/ impartial as inevitably he/she will offer opinions, evaluate the position of the parties, or control potential power-imbalances between the parties.[113] Article 3 (a) of the 2008 EU Directive on Mediation defines mediation as *"a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the*

[113] As previously mentioned, there are different models of mediation, such as the facilitative model, the evaluative model and the transformative model (Chapter 2.4.1: Defining Mediation). The form of mediation whereby the mediator offers opinions/makes recommendation is referred to as an evaluative model and it must be explicitly agreed upon by all of the parties.

settlement of their dispute with the assistance of a mediator" [emphasis added].[114] The inclusion of the term *"parties… attempt by themselves"* implies that it is the parties that should achieve their own resolution; therefore, the mediator should not play the role of an advisor. According to the LRC (2010), this would imply *"that the definition, as set out under Article 3(a) of the Directive encompasses a facilitative model of mediation; however, it does not explicitly exclude other models of mediation"* (LRC, 2010, p. 21)

2.4.3.4. Power-imbalance

Mediation claims to empower the parties by enabling them to reach their own personalised agreements. However, it has been argued that mediation may not be appropriate in some cases where power-imbalances occurs (Firestone, 2009). Many critics of mediation are of the opinion that a fair and equitable outcome cannot be achieved where power-imbalance exits. They claim *"mediation 'works best when equals are bargaining with one another' and proves 'ineffective in cases of severe power-imbalances between the parties'"* (Agustí-Panareda, 2004, p. 26). This assertion is known as the "oppression story" (Agustí-Panareda, 2004); a concept that mediation can allow "*stronger parties to impose their will on weaker/vulnerable parties*" (Agustí-Panareda, 2004, p. 26). The rationale behind the "oppression story" is that mediation can emphasise power-imbalances and the system does not provide for sufficient and/or effective checks and balances (Agustí-Panareda, 2004). There are concerns that power-imbalance between the parties will be too stark for mediation, namely in respect of the following:

1. *Gender:* The concerns surrounding power-imbalances are often associated with gender issues (many mediation critics advocate that women should not participate in mediation because they are generally perceived to be the "weaker" party (Kelly, 1995)).

2. *Child Protection Issues:* Power-imbalance can also exist between the individual and the State. The State has a significant advantage over the individual because of their substantial resources to pursue a case, experience, and the fact that often it is the parents negotiating against a governmental entity that has taken (or might take) a child away from the parent (Firestone, 2009). Mediators need to address these issues competently, facilitating a process that promote positive collaboration/working relationships among the child welfare agencies and the families involved in the child protection system (Firestone, 2009).

[114] Article 3 (a) of the 2008 EU Directive on Mediation.

3. *Domestic Violence:* Potential power-imbalances and the safety of the parties are some of the concerns that can arise within domestic violence (Firestone, 2009). According to Association of Family and Conciliation Courts (AFCC)[115] Model Standards of Practice for Family and Divorce Mediation (2000), not every case is suitable for mediation and as a result "a *mediator should make a reasonable effort to screen for the existence of domestic abuse prior to entering into an agreement to mediate. The mediator should continue to assess for domestic abuse throughout the mediation process"* (Standard X(C)). It is the role of the mediator to safely terminate a mediation session in circumstances where a person's safety would be endangered and/or where there is significant power-imbalance between the parties that cannot be safely remedied.

2.5. FAMILY MEDIATION

2.5.1. The revolution of family mediation

Family mediation commenced in Ireland in the 1980s (Kearney, 2014). It is argued that family mediation, in private family law disputes[116] is seen as a genuine alternative to litigation in guardianship, custody and access proceedings, making up almost eleven percent of the total caseload (Courts Service, 2018).[117] However, despite this figure, according to the Law Reform Commission Report (2010), the use of mediation is still "*underutilised in this jurisdiction in evolving appropriate family law disputes"* (LRC, 2010, p. 106). Mediation promotes positive communication between the parties who may have a long road ahead of separated parenting following the breakdown of their personal relationship. Irish judges regularly extol the virtues of mediation and ask litigants in person, who bring guardianship, custody and access disputes to court, why they do not try and work out a comprehensive Parenting Plan through mediation. Mediated Parenting Plans present a dual opportunity for parents. Firstly, Mediated Parenting Plans provide parents with an opportunity to engage in a process through which they can develop a new relationship between them so that the child's best interests become the only focus for their mutual interaction. Secondly, it creates a practical and flexible schedule in which the parents may equally share in the life of their

[115] The AFCC is an American organisation that is dedicated to the resolution of family conflict.
[116] Mediation is widely used within private law disputes such as guardianship, custody and access. However, to reiterate, this doctoral research primarily focuses on the use (and potential use) of mediation in public law proceedings such as child protection cases.
[117] Figure 2.3: Applications made in the District Court in respect of Guardianship Custody and Access Disputes (Courts Service, 2015; 2016; 2017; 2018).

children rather than having to litigate. Most importantly, it promotes an open dialogue between the parties, who have a very long road ahead of them (Horgan, 2016).

In Ireland, there are two main family mediation processes used by the Legal Aid Board's Family Mediation Services:

a) Comprehensive-All-Issues Mediation; and
b) Court-Based Mediation Process (Legal Aid Board, 2019).

2.5.1.1. Comprehensive-all-issues mediation

During the 1990s in Ireland, there was a shift in mediation practices towards the "all-issues" model. This model was advocated by John Haynes (1981) and reaffirmed by the findings of a national evaluation of mediation in England and Wales; a study which encouraged local projects/services to try different models of mediation (Conneely, 2002).[118] The structure of the "all-issues" model includes:

a) Intake (Introductory Session)
b) Budget Planning
c) Other financial issues and pensions
d) Family home and other property
e) Parenting Plan Session
f) Finalising and Mediation Settlement

However, the structure of the mediation process, and the individual sessions, do not have to be carried out in the order as outlined above. According to Connelly (2002) *"the degree to which a mediation session is structured will depend to a large extent on the kind of issues being resolved and model used by the mediator"* (Conneely, 2002, p. 29). The mediation sessions are designed to cater for the individual needs and interests of the parties. There can be certain issues that need to be addressed with more urgency than others; for example, if a couple has just separated and are eager to agree on a parenting plan. The structure of the mediation session can also be influenced by the personal style of the individual mediator. However, generally, the mediation session works best when creative solutions can be facilitated in order to meet the particular needs and interests of the family, at whatever stage they are at. The "all-issues"

[118] See the 1989 Conciliation Report commission by the Lord Chancellor department from Newcastle University, England.

model can take between five-seven sessions in order to cover all the issue(s) (Legal Aid Board, 2019); however, the timing of the mediation process depends on the complexity of the issues being mediated and the willingness of the parties to efficiently and effectively engage in the mediation process. There is also time between the sessions to enable each party to be able to research certain areas, gather appropriate documentation (as required), and/or seek separate independent legal advice.

2.5.1.2. Court based mediation process

In contrast to the "all-issues" model, court-based mediation focuses on a single issue, rather than multiple issues (Legal Aid Board, 2019). Court-based mediation is either linked or based in a courthouse. A client may attend court-based mediation by:

a) A referral by a working professional, a judge or other, and/or
b) Seeking information about the mediation service of their own accord.

The court-based mediation process commences with an information session where basic information is taken from the client and put-on file (Legal Aid Board, 2019). During the information session, the mediator summarises the main principles of mediation; including, but not limited to confidentiality, and the voluntary nature of mediation. If the party 1 agrees, the mediator contacts party 2 to attend an information session (known as second information session), where basic information is gathered. If party 2 agrees, a mediation appointment is scheduled (Legal Aid Board, 2019).

When discussing court-based mediation, it is important to mention the District Court Mediation Initiative in Ireland (also referred to as the Dolphin House Initiative). An increasing number of litigants institute family law proceedings as lay litigants without the benefit of receiving advice from legal advisors about alternative methods of resolution (McGowan, 2018).[119] In recent years, there is an appreciable increase in lay litigants applying to the District Court to issue proceedings. Such litigants might only first consult a solicitor to represent them when their application is listed for hearing before the Court (McDaid, 2013). This gap was recognised in 2011 and the former Chief Justice, the Hon. Mr. Justice John L Murray launched a family law service, namely, the Family Mediation Service as an

[119] According to McGowan "nationally 47% of couples separating or divorcing between 1996 and 2011 sought no legal advice in relation to their situation and 1% went directly to mediation" (McGowan, 2018, p. 11).

in-house mediation service in the Dublin Metropolitan District Family Law Court in Dolphin House. Launching the initiative Mr. Justice Murray said:

> *"It is a key objective of the initiative to seek to engage parties in a mediation process prior to issuing court proceedings. In the majority of cases, issues arising from family breakdown are most likely to be best resolved through mutual agreement; mediation, particularly in advance of the 'locking of horns' in legal proceedings, is of primary importance in achieving this. It is important to note, however, there is no bar on persons getting information about mediation or persons attending mediation where court proceedings are already instituted. Equally important is that arrangements are in place to refer mediated settlements to a judge for approval; for example, in cases concerning the appointment of a guardian"* (Courts Service Press Release, 2011).

District Court staff in Dolphin House now link lay litigants in suitable cases to the Family Mediation Service court-connected mediation service.[120] As a result, the Dolphin House initiative has *"established a permanent mediator presence in the busiest District Court family law building in the country to promote mediation as a way of finding resolutions to disputes and offer support to families at traumatic times"* (Courts Service, 2015, p. 18).

The service is non-means tested[121] and provides immediate and general information on the mediation process (such as its overall purpose and the advantages of using mediation in the family law setting). If a party is interested in family mediation, a briefing session is first arranged to explain the mediation process and then the other party is invited to attend a mediation session. The "mediation option" is offered to lay litigants at several points throughout the course of District Court proceedings. According to the Court Service Annual Report 2018, there were 1,924 parties who attended information sessions (i.e., first and second contact information sessions) of which 365 reached finalised agreements (nineteen percent) (figure 2.4).

[120] The family mediation service is located in Dolphin House court building. The Dolphin House initiative was recently adopted by Carlow Courthouse in 2019.

[121] The Family Mediation Service is part of the Legal Aid Board. It is a non-means tested and free service, however, there can be significant waiting times. Each of the disputing parties must contact the mediation service themselves separately in order to book the mediation session. [For more information - www.legalaidboard.ie]. However, private mediators charge and costs vary widely depending on the value of the issues involved.

Family mediation initiative			
Venue	**Information sessions (Party 1)**	**Information sessions (Party 2)**	**Agreements reached**
Clonmel	23	10	7
Cork	15	9	9
Dolphin House	929	372	234
Dundalk	22	22	6
Ennis	65	44	34
Kilkenny	66	38	29
Limerick	136	34	15
Naas	79	37	22
Nenagh	13	10	9
TOTAL	**1,348**	**576**	**365**

Figure 2.4: According to the Annual Court Report 2018.

2.5.2. Legislative history of family mediation in Ireland[122]

In the context of family law, mediation was first given a statutory footing in Ireland under Part I of the Judicial Separation and Family Law Reform Act 1989; section 5(1) states that a solicitor, prior to making an application for judicial separation or when advising a client who is a respondent to such application, is compelled to ensure that the client is aware of alternatives to separation proceedings, such as mediation, as well as the possibility of reconciliation, and is obliged to discuss those alternatives with the client. Part II of the Family Law (Divorce) Act 1996 provides similar safeguarding measures,[123] as does Part IV of the Guardianship of Infants Act 1964 as inserted by the Children Act 1997.[124] Also, of note is the recently enacted Mediation Act 2017 which provides a statutory basis for the mediation process and encourages the use of mediation alongside the litigation process. However, while

[122] Currently in Ireland there are different streams of family mediation. Generally speaking, what is being described in this thesis is essentially separating couple's mediation, which was established in Ireland in the 1980s. However, over the past forty years, family mediation has developed considerably in Ireland, and as a result, mediation can and has been used to resolve many different types of disputes, not just family law problems (FMI, 2020). For example, during Phase 3 of this thesis it became apparent that there are certain issues within in child protection cases that are being revolved through mediation (which takes places in family mediation). In addition, there is also Elder Mediation in Ireland which includes (usually) the family.

[123] Section 6 (2) of the Family Law (Divorce) Act 1996. See also section 14 of the Mediation Act 2017, which provides that solicitors acting for an applicant in a civil dispute must *"advise the client to consider mediation as a means of attempting to resolve the disputes"* and provide them with information about the *"advantages of resolving the dispute otherwise than y way of the proposed proceedings."*

[124] Sections 20, 21, 22, 23, and 26 of the Guardian of Infants Act 1964 as inserted by the Children Act 1997.

section 14 (1) of the Mediation Act 2017 ensures that solicitors inform their clients about mediation, section 14 (4) indicates that this section does not apply to proceedings or applications under sections 6A, 11 or 11B of the Guardianship of Infants Act 1964, section 2 of the Judicial Separation and Family Law Reform Act 1989, or section 5 of the Family Law (Divorce) Act 1996. According to the members of the Select Committee on Justice and Equality on the Mediation Act 2017, one of the main reasons for such exclusion is that the mentioned Acts already contained such mechanisms, and if they were to be included in the Mediation Act 2017 it would give rise to duplication and possible confusion. This is particularly the case given that the obligations placed on solicitors are subtly different in each Act. For instance, section 6 (b) of the Judicial Separation and Family Law Reform Act 1989 indicates that the solicitor shall *"discuss with the respondent the possibility of engaging in mediation…"*, whereas section 14 (1) (a) of the Mediation Act 2017 places a positive obligation on solicitors to *"advise the client to consider mediation as a means of attempting to resolve the dispute the subject of the proposed proceedings"* [emphasis added].

In Ireland today, family mediation, in private law disputes is seen as an alternative to litigation, and in particular, there has been a focus on providing mediation for separating parents who are in dispute over money and/or their children. However, in contrast, mediation does not formally feature within the "public law" sphere of child protection cases within or prior to adversarial proceedings. It is important, therefore, to note the discrepancy between family mediation and CPM, because this distinction is a fundamental requirement for the successful implementation of a CPM programme in Ireland (Crush, 2005). The main distinction between the mediation processes is the rationale for participation. In family mediation, the parties seek to achieve a mutual resolution of a chosen issue(s) in the best interests of the family (Barsky, 1997); although this does not necessarily exclude the child's best interests (Crush, 2007). This is facilitated through an independent mediator, who attempts to mutualise common interest(s) between the parties in order to promote working relationships (in the interest of parenting) between the parties and resolve the issue(s) in dispute.[125] In contrast, CPM focuses on the best interests of the child rather than on the best interests of the family (Crush, 2007). While CPM can be used to promote positive working relationships, the central aim is to develop a child-centred parental agreement/plan that is in the best interests of the child. This is reiterated by Crush (2007), who highlights that the interests of the parties in family mediation and CPM are not quite the same:

[125] In addition, the mediator should use child inclusive practices; pursuant to the Legal Aid Board booklet on Family Mediation Sessions should be child-centred (Family Mediation Service, 2015).

> *"In family mediation, two parties come together to find a mutual resolution to a common issue. They are bound by a common interest, that of reaching an agreement that is fair and in the best interests of the two parties of the family group. Child protection mediation is not focused in the best interests of the family but on the best interests of the child"* (Crush, 2007, p. 72).

Another distinction is in respect of attendance during mediation. Generally, attendance and participation at family mediation is limited to the immediate family members; in addition, all parties are encouraged to seek the advice of a family law solicitor (Legal Aid Board, 2019). However, CPM endorses a multi-party mediation process. During Phase 2 of this research, the six visited CPM programmes indicated that CPM involves participation from the parents, the legal representatives for the parents, the child (depending on their age/maturity), the legal representatives for the child, the GAL/Court Appointed Special Advocate (CASA volunteers), the social worker, and their supervisors. In addition, others that may also be present include foster parents, other family members closely involved in the child's life, therapists and school personnel. The actual list of participants will be determined on a case-by-case basis at the discretion of the judge and/or the mediator.

A final distinction is that there is no legislative basis for CPM in Ireland. As aforementioned. section 3 (1) (i) of the Mediation Act 2017 explicitly excludes proceedings under the Child Care Act 1991 to 2015 from its scope. This exclusion could have two possible meanings:

1) Section 3 (1) (i) of the Mediation Act 2017 simply meant that the use of mediation in child protection cases falls outside the scope of the Act; while the Act does not apply to CPM, it does not necessarily rule out mediation being used in such contexts. For example, Order 49B of the District Court Rules implies a general preference for mediation. Order 49B states:[126]

   > *"The Court, on the application of any of the parties or of its own motion, may, when it considers it appropriate and having regard to all the circumstances of the case, order that proceedings or any issue therein be adjourned for such time as the Court considers just and convenient and—*
   >
   > *i. invite the parties to use an ADR process to settle or determine the proceedings or issue, or*
   >
   > *ii. where the parties' consent, refer the proceedings or issue to such process,*

[126]S.I. No. 9 of 2018 (Mediation and other alternative dispute resolution).

and may, for the purposes of such invitation or reference, invite the parties to attend such information session on the use of mediation, if any, as the Court may specify."

This order falls within the rules relating to civil proceedings. Child care proceedings are civil proceedings; consequently, does this mean that Order 49B applies to child care proceedings? However, there appears to be lack of clarity when it comes to the wording.

2) On the other hand, the exclusion of the Child Care Acts clearly implies a view that mediation is not generally considered to be appropriate in a child protection context. This point was reinforced by then Minister for Justice and Equality, Frances Fitzgerald TD, during the Dáil Debates (2017) on the Mediation Bill 2012:

"Moreover, while the Bill seeks to promote mediation as an effective and viable means of resolving disputes, it is inappropriate for certain types of disputes, such as claims against the State for alleged infringements of fundamental rights or proceedings concerning children under the Child Care Acts. The Bill outlines the areas where we feel it is not appropriate for mediation to be used" (Fitzgerald, 2017).

While the use of CPM is not "unlawful" in Ireland, the exclusion of CPM from the Mediation Act 2017 arguably casts a shadow over the use of CPM in practice. Many questions arise out of this exclusion. For example, if CPM falls outside the scope of the Mediation Act 2017, are the mediated settlements in child protection binding? Furthermore, the fact that CPM falls outside of the scope of the Act, are the courts sceptical or cautious towards any agreements that arise from CPM? Likely, the overall answer to both questions is that the court in a child protection case would only consider and enforce such an agreement where they are satisfied that it is in the best interests of the child. However, there is still a lot of ambiguity around the use of CPM in an Irish context. Unfortunately, in Ireland, questions surrounding the use of mediation within child protection proceedings have not been adequately explored or researched to determine its value, if any, in the protection of the child's safety and welfare.

2.5.3. Child abduction mediation

Before exploring CPM in detail, it is important to briefly highlight the use of child abduction mediation in Ireland, drawing on some parallels to CPM and the use of mediation in cross-border abduction cases.

The term 'child abduction' is generally used to describe a situation where a child is removed to another state by one person (the abducting parent/guardian) without the consent of the person with whom the child usually resides (Department of Justice, 2018).[127] International child abduction generally refers to the "wrongful removal/retention" of the child to another country by a parent/guardian. In Ireland, there are two primary instruments governing the abduction of children:

1. The Hague Convention on the Civil Aspects of International Child Abduction: incorporated into Irish law[128] by the Child Abduction and Enforcement of Court Orders Act 1991; and
2. Council Regulation (EC) No. 2201/2003 on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility, Repealing Regulation (EC) No. 1347/2000 ("the Brussels II *Bis* Regulation").[129]

Article 25 of Brussels II *Bis* states: *"Central authorities should cooperate both in general matter and in specific cases, including for purposes of promoting the amicable resolution of family disputes, in matters of parental responsibility"* [emphasis added]. The phrase *"amicable resolution of family disputes"* indicates that these authorities are obliged to facilitate communications between families/parents through mediation or other means. According to Kucinski (2020) *"it seems impossible to imagine a middle ground between two feuding parents in different parts of the globe…"* (Kucinski, 2020, p. 1). However, Kucinski goes on to state that in appropriate cases, mediation provides an opportunity to create more options and *"resolve more than just the preliminary issues of where the child will sit while litigation rages on"* (Kucinski, 2020, p. 1). It should be noted that mediation should not be used as an alternative to full adversarial proceedings. Rather mediation should run simultaneously with the Hague Convention proceedings. Therefore, similar to CPM, mediation is used to remove certain issues within the child abduction case and achieve a more amicable resolution in the best interests of the child.

[127] Article 3-5 of the Hague Convention set out the conditions that must be satisfied if the "removal/retention" is considered "wrongful".
[128] The Hague Convention applies between contracting states to the Convention, which includes most member countries of the United Nations with the notable exception of China.
[129] Prior to the introduction of the Brussels Regulation, most child abduction matters between European countries fell under the European Convention on Recognition and Enforcement of Decisions Concerning custody of Children and on Restoration of Custody of Children ("the Luxembourg Convention"). However, while the Luxembourg Convention remains enforceable, it has been largely supplanted in matters of child abduction by the Brussels Regulation. Article 60 of the Regulation provides that it shall take precedence over the Luxembourg Convention.

According to Sir Matthew Thorpe (2018), the use of mediation in child abduction cases has not always been considered suitable: *"The conventional view was that mediation had no role in applications for a return order brought under the Hague Abduction Convention"* (Thorpe, 2018, p. 576). This can be attributed to a number of plausible arguments, including:

- Professional practice of mediation was still in the early stages of development
- Time limitations required by child abduction law[130]
- Complexity of the law surrounding Hague Convention and Brussels II *Bis* (Thorpe, 2018).

Nonetheless, over the past decade, Thorpe argues that mediation has become a more common practice within the legislative framework, stating: *"What was once regarded as inappropriate is now regarded as the desirable norm, at least for exploration"* (Thorpe, 2018, p. 576). This can be attributed to a number of developments, most notably the adoption of the 'Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction – Part V – Mediation' which *"promotes good practices in mediation and other processes to bring about the agreed resolution of international family disputes concerning children which fall within the scope of the Hague Convention"* (HCCH, 2012, p. 11). The Guide highlights the important role that mediation can play in child abduction cases to ensure that the child can continue to see the non-abducting parent after the abduction and see the abducting parent after the child has returned to the Member State of origin.

In recent years, mediation has been used more frequently in child abduction cases in Ireland. According to Clissmann, *"it has already become standard that the High Court alerts the parties to the mediation services available in this country"* (Clissmann, 2019, p. 15). Similarly, to CPM, in appropriate cases, the use of mediation in child abduction cases can offer a more cost-effective means of resolving the dispute while decreasing the levels of tension between the parties and providing an opportunity to reach an amicable solution which is not imposed by a judge. This is endorsed under the preamble of the 2008 EC Directive on Mediation: *"Agreements resulting from mediation are more likely to be complied with voluntarily and are more likely to preserve an amicable and sustainable relationship between the parties. These benefits become even more pronounced in situations displaying cross-border elements*" (para.6).

[130] Article 11(2) Council Regulation (EU) 2201/2003 requires the Court to make its decision using the "*most expeditious procedures available*"; there is a general target of six weeks from issue to judgment (Thorpe, 2018).

2.6. CHILD PROTECTION MEDIATION

2.6.1. Defining child protection mediation

CPM is an ADR process utilised after a child welfare agency has removed a child from their home (Hehr, 2007). It is an evidence-based practice that provides families and the State with a process in which they can address and find sustainable solutions to risks to child safety and welfare and achieve a balanced, child-centred parenting agreement (Anderson & Whalen, 2004). The goal of CPM is to expedite permanency for the child (Landsman, 2003; Lande, 2001) and to reunify the family as soon as possible (Hehr, 2007). However, if reunification is not possible the goal of the mediation process becomes finding the most suitable placement for the child within the period established by law (Lande, 2001). Utilising CPM offers many advantages to all parties involved, some of which include:

a. Resolving issues in a timely manner (Kressel & Pruitt, 1989)
b. Reaching decisions that promote the well-being and the safety of the child (Giovannucci & Largent, 2013)
c. Satisfying various stakeholders in the child protection system (Barsky, 1997)
d. Empowering the parties to contribute to the resolution of disputes (Olson, 2009)
e. Using resources cost-effectively (Barsky, 1999; Kressel, 1989).

In addition, CPM also reduces tensions and promotes agreements and greater parental compliance (Giovannucci, 2013; Thoennes, 1997).

In order to determine whether the implementation of CPM will aid child welfare and improve the quality of decision making in Irish child protection cases, it is important to examine international systems where CPM has been implemented. This research will examine the systems operating in certain jurisdictions of the USA and Canada, in which CPM is increasingly recognised as an invaluable mechanism (Giovannucci, 2013; Crush, 2007; Lande, 2001), in order to provide an opportunity to build on "lessons learned".

2.6.2. USA

2.6.2.1. History of child protection mediation in USA

Before 1980, there was no record of mediation being made available in child protection cases in the USA. The first documented attempt to introduce CPM in the courts occurred in 1983 in Los Angeles when a juvenile court referee, Julius Libow, started talking with the parties

before court hearings.[131] His reports/results led to the formalisation of mediation in Los Angeles in the late 1980s (Olson, 2003; Libow, 1993). This resulted in the development of a "court-based" CPM programme in California; which eventually led it to be the first State to mandate mediation in child custody proceedings (Edwards, 2009). In 1995, the National Council of Juvenile and Family Court Judges (NCJFCJ) published a report, entitled *Resource Guidelines: Improving Court Practice in Child Abuse and Neglect Cases*. This report is arguably one of the most significant documents ever written regarding child protection cases and CPM. Notably, the report featured discussions around the various benefits of CPM and outlined recommendations for implementing court-connected CPM programmes in the USA. The American Bar Association subsequently endorsed this (Portune, et al., 2009). This report remains a crucial guide for courts across the USA and is seen as a practical guide for how CPM can be used in practice. For instance, it defines what a judge must do in order to complete the legal mandates, as stipulated in legislation, and what resources a child protection court must have in order to function efficiently and effectively. Interestingly, even getting CPM in these guidelines proved difficult as many committee members did not believe that CPM was appropriate. As a result, CPM lost its place in the main section of the book and found itself in its appendix (NCJFCJ, 1995, appendix B).

In 1997, the United States Congress passed the Adoption and Safe Families Act which introduced federal regulations and legislation and made the safety of the child the primary focus of the law, stating that *"timely attention to abused and neglected children requires close and concentrated collaboration among courts, social services, and the communities in which they function."* The implementation of this Act encouraged many jurisdictions to introduce CPM programmes, with the aim of assisting the child welfare agencies and courts in meeting the new requirements (Giovannucci & Largent, 2013). Today, CPM appears to have been incorporated widely across the USA; according to Kathol's 2009 paper, entitled *Trends in Child Protection Mediation: Results of the Think Tank Survey and Interviews*, there were 110 responses from working professionals in CPM schemes across thirty-three US states and two Canadian provinces (Kathol, 2009). In 2013, a comprehensive set of CPM guidelines was developed by the AFFC (Giovannucci & Largent, 2013). The AFCC Guidelines express the core values of CPM, namely "*that the safety, permanency, and well-being of children are paramount;*

[131] In many respects, the use of ADR in the juvenile court is in keeping with the less adversarial nature of this system. The juvenile court was, after all, created as a part of the "socialized court movement" of the late 1880s, and ushered in the notion of courts designed to focus on problem resolution, treatment, education, and prevention rather than punishment and a strict concern with legal justice.

that families and their children are critical participants in decision making; that cooperative relationships and collaborative decision-making enhance the effective resolution of child protection concerns" (Giovannucci & Largent, 2013, p. 8).

2.6.2.2. Background to child protection mediation programmes in several states in the USA

In recent years, CPM programmes have spread across North America. However, there are wide disparities between the various CPM programmes from state to state. As Barsky (1995) suggests, the term "CPM" is being used to describe different processes. One aim of this doctoral research is to examine CPM programmes operating in certain states of the USA and explore the largely uncharted potential of CPM in an Irish context. The research study aimed to gain an in-depth insight into the current circumstances in the field of CPM by conducting fieldwork in four individual states within the USA, each of which had a unique experience with CPM. It is important to understand the background to each of the aforementioned CPM programmes.

2.6.2.2.1. Chicago, Illinois

In 1994, the Illinois Supreme Court Special Commission on the Administration of Justice distributed a report recommending that a mediation programme be implemented in child protection cases. Subsequently, following an amendment to the Illinois Juvenile Court Act,[132] hearing officers were allowed to conduct informal pre-dispositional conferences, and an attempt to reach mediated agreements at the disposition phase began (Martin, 2009). Unfortunately, this effort was unsuccessful because, the child welfare agencies and the attorneys were not ready to collaboratively work on a case in an alternative dispute setting (Martin, 2009). According to Her Honour, Judge Patricia Martin:

> *"A key prerequisite to effective mediation or negotiation was lacking. The attorneys who represented the parents, children, and the Illinois Department of Children and Family Services in the child protection division were not yet ready to trust each other or to work collaboratively on cases. Not surprisingly, the effort failed"* (Martin, 2009).

In the early 2000s, there was another attempt to start a CPM programme, and in 2001 the Cook County Child Protection Mediation and Facilitation Program was launched, focusing

[132] 705 ILCS 405/2-21. 1, repealed by P.A. 89-17 '10, eff. May 31, 1995.

mainly on post-adjudication neglect and dependency cases.[133] The pilot programme was successful, and over the past number of years, the programme has expanded to include issues relating to guardianship, terminations of parental rights, and adoptions and ancillary issues that arise within child protection cases.

Today, the Cook County Child Protection Mediation and Facilitation Program is a court-based programme located at the Juvenile Court Centre, Chicago, Illinois.[134] The success of the programme, mainly the high participation rate, is based on its co-location and the method by which the mediation process was incorporated into the judicial system. The form of mediation seems similar to a "pre-trial conference" where parties *"are asked to participate in mediation before pursuing their appeal in a judicial process"* (Barsky, 1997, p. 165).

2.6.2.2.2. Tulsa, Oklahoma

In Oklahoma, the Alternative Dispute Resolution System was established to provide services to court systems and individuals who are interested in settling disputes outside of the court. Currently, the Alternative Dispute Resolution System in Oklahoma comprises of twelve community-based mediation centres (Early Settlement Groups) and eleven programmes developed by state agencies. In 1983, the Dispute Resolution Act was enacted and implemented in Oklahoma (Welch, 1984). Thereafter, the Administrative Office of the Courts was designated to centrally coordinate the state system. Potential mediator candidates are required to complete necessary mediation training (which is free of charge) and engage in practical experience which provided for under the authority of the Administrative Director of the Courts. The mediators for the Early Settlement Groups are volunteers, whereas, the mediators for the state-agency programmes are employed and mediation would be added to their list of duties. It is also the role of the Administrative Director of the Courts to certify both the mediator trainers and the mediation curriculum for the training programme.

The purpose of the system, as stated in the Act is *"to provide to all citizens of this state convenient access to dispute resolution proceedings which are fair, effective, inexpensive, and expeditious."* The Act also anticipates that *"such proceedings can also help alleviate the backlog of cases which burden*

[133] In Cook County (Chicago), dependency cases relate to children whose parents are deceased or otherwise no longer able to care for them and the state has to decide who will have permanent custody of them (Shack, et al., 2010).

[134] The is no real distinction between CPM and facilitation in Cook County. The processes are very similar, and typically the mediators conduct the sessions in the same way.

the judicial system in this state." According to the various working professionals that were interviewed, Tulsa County attempted to bring in mediation several years ago through the Earlier Settlement Group. However, the programme was unsuccessful, mainly due to the training process for mediators, qualifications/characteristics that made persons best suited to facilitate such a mediation session, and the attitudes of the working professionals. In 2016, the Juvenile Court Mediation Program commenced and utilised mediation, primarily in achieving permanency to termination cases, which according to one participant usually means *"that the state has filed a motion to terminate the parents' rights and then they will set a mediation to determine whether or not that is really necessary."* Since the programme started, 164 cases have been referred to mediation, and of the mediation cases that were completed, forty-eight percent of the cases avoided a court/jury trial.[135]

2.6.2.2.3. Tampa, Florida

ADR has been utilised by the Florida Court System since the 1970s, following the establishment of the first Citizens Dispute Settlement (CDS) centres. According to the Supreme Court of Florida in *Carter v. Sparkman* (1976), the use of alternative dispute resolution *"accommodates the resolution of individual disputes without the use of the judiciary in areas where other forums or procedures can readily provide adequate dispute adjustment."*[136] In the 1980s, the CDS was expanded to encourage research and education on ADR programmes, and provide assistance to the courts in developing court-connected opportunities to resolve disputes outside of the courtroom. In 1984, the Family Preservation and Support Services Act was passed by members of US Congress (signed into law by President Clinton in 1993). The aim of the Act was to increase public awareness regarding domestic violence across all states in the USA. In addition, the legislation also mandated states to make every reasonable effort to prevent or eliminate the need for removing a child from his/her home (the removal of a child from their home should be seen as a last resort); this was in line with the development of various child maltreatment programmes which was campaigned for by non-profit organisations. This led to amendments to Chapter 44 of the Florida Statutes, entitled "Mediation Alternatives to Judicial Action". The legislation was implemented in 1998 and provided civil trial judges the statutory authority to refer a case to ADR,[137] pursuant to rules and procedures as established by the Supreme Court of Florida (FL Courts, 2018). Further,

[135] According to a statistical analyst at the Tulsa County Juvenile Bureau.
[136] *Carter v. Sparkman*, 335 So. 2d 802, 807 (Fla. 1976).
[137] According to Rule 12.710 of the Florida Family Law Rules of Procedure, this includes mediation, non-binding arbitration, parenting coordination and an ADR process/combination of ADR processes which a judge has the authority to order.

in 1989, to ensure the participation of qualified persons as mediators and arbitrators, the Florida Legislature passed a bill granting absolute judicial immunity to court-appointed mediators and arbitrators.[138]

The Supreme Court of Florida, through the Dispute Resolution Centre (DRC), offers qualification certificates for mediators in the areas of the county court, family court, circuit court, dependency and appellate cases (FL Courts, 2018). All mediators are bound by the Florida Rules for Certified and Court-Appointed Mediators (FL Courts, 2018). Today, Florida is renowned for having one of the most comprehensive court-connected CPM programmes in the USA. According to an interviewed participant:

> *"Something that you need to understand is that Florida is very different than other states…Florida has institutionalised mediation within its core system (and some people might say that is bad). But it is hard to get into court on almost any issue without going to mediation first. In dependency and juvenile court there is judicial discretion, and it varies considerably…There is tremendous variability."*

2.6.2.2.4. New York, New York

The Permanency Program[139] of New York City (NYC) started as a test-pilot in 2002 which consequently led to the introduction of permanency mediation services in NYC, Albany, Erie, Monroe, Niagara, Oneida, Rockland, and Westchester (Thoennes & Kaunelis, 2011).[140] In 2001, the Office of Children and Family Services conducted a Child and Family Service Review (CFSR) for New York State. The review highlighted that a more substantial effort was required to ensure that permanency, such as adoption and reunification, was achieved on-time. (Administration for Children, 2004). In response to this review, the New York State developed a Program Improvement Plan, which incorporated many strategies, one of which was to expand child permanency mediation programme (Shafer, 2003). The aim of the permanency mediation programme was to *"expedite permanency and address other essential areas*

[138] Ch. 89-31, § 5, 1989 Fla. Laws 48, 50 (codified at FLA. STAT. § 44.307 (1989)).
[139] In New York, the program is referred to a child permanency mediation which aims to *"promote the timely obtainment of safe, permanent living arrangements for children served by the State's child welfare system"* (Colman & Ruppel, 2007, p. 1).
[140] Planning for child permanency mediation in NYC was initiated prior to the state-wide pilot in 2002. The NYC test-pilot was assisted by a NCFCJ brief (Introducing Child Permanency Mediation in New York State: Planning and Implementing a Multi-Site Pilot Project) and a process and outcome evaluation by the New York State Office of Children and Family Services Child Permanency Mediation Pilot Project: Multi-Site Process and Outcome Evaluation Study. R. Colman, J. Ruppel. New York State Office of Children and Family Services. March 2007) (Thoennes & Kaunelis, 2011).

that had been identified by the CFSR, such as ensuring visitation, supporting a relationship between the parents and child(ren) in care, creating individualized service plans, and promoting court and agency cooperation" (Thoennes & Kaunelis, 2001, p. 1; Children's Bureau, 2001).

Before the state-wide test-pilot initiated in 2002, planning for the use of mediation across NYC had already started (Coleman & Ruppel, 2007). Several years before the initiation of this pilot, various working professionals involved in child protection cases had organised meetings to determine whether a mediation programme could and should be implemented in NYC. The Child Permanency Mediation Program started in the NYC Family Court in January 2003.

The NYC Child Permanency Mediation Program ended in 2011 when there was a financial crisis in the court system and, as a result, many programmes were terminated. According to an interviewed participant: *"At the time the administration's interest in mediation had waned in our court, and the program was never restored. While interest has returned, it has focused on mediating custody/visitation cases which we are doing at present."*[141]

2.6.3. Canada

2.6.3.1. History of child protection in Canada

In Canada, the jurisdictional arrangements to deal with issues that may arise in the arena of family and child protection law varies from province to province. According to Crush (2005), CPM programmes in Canada can vary in respect of programme design and effectiveness (Crush, 2005). In 1974, the Federal Law Reform Commission of Canada recommended that a Unified Family Court model for family law be implemented in order to address the deficiencies with the traditional family law approach. The rationale was that the Unified Family Court would have a unified family law jurisdiction (including child protection), court affiliated services such as mediation and co-ordination with local agencies to assist families dealing with family breakdown. Unified family courts are located in a number of Canadian provinces, such as Ontario (17), Newfoundland (1), New Brunswick (8), Nova Scotia (3), Prince Edward Island (3), Manitoba (4) and Saskatchewan (3).[142]

[141] In NYC, there was Custody and Visitation Mediation Model and a Child Permanency Mediation Program. Both were cut due to the financial crisis that started in 2008. However, since 2011, Custody and Visitation Mediation Model has returned.

[142] The 'Family Court in Ontario' Paper presented by Jane Long, Senior Counsel, Family Policy and Program Branch Ministry of the Attorney General of Ontario, Canadian-Irish Family Law Conference Ireland, October 2010.

The enactment of statutory provisions is the main driving force of CPM in Canada. The enactment of provincial legislation has had a strong impact in the promotion of mediation in certain provinces in Canada; this has led to the development of strong infrastructure, brought together by legal and child welfare professionals. Today, the practice of CPM is well established in various provinces throughout Canada.

2.6.3.2. Background to child protection mediation programmes in several provinces in Canada

One aim of this research is to examine CPM programmes operating in the certain provinces of Canada and explore the potential use of CPM in an Irish context. As mentioned above, it is, therefore, important to understand the background to each of the aforementioned CPM programmes.

2.6.3.2.1. British Columbia

In the early 1990s, following the establishment of CPM programmes in the USA (1980s) (Theonnes, 1991), British Columbia began to consider whether CPM could be used as a viable alternative to adversarial processes. In 1992, the use of CPM was first tested in Victoria, British Columbia. The results from the one-year test-pilot study were very positive (Campbell, 1994; McHale, et al., 2007) and encouraged the Ministry of Attorney General (MAG) and the Ministry of Children and Family Developments (MCFD) to expand the use of mediation in welfare disputes (Braun, 2007; Campbell & Michael, 1994). In 1997, a province-wide CPM programme was introduced. Importantly, however, a legislative amendment occurred just before the CPM programme was established. In 1996, the provincial legislation, entitled Child, Family and Community Service Act (CFCSA), was announced, replacing the Family and Child Service Act (in place since 1980).[143]

As a result, following the positive response to the test-pilot carried out in Vitoria, the CFCSA included principles and provisions for mediation and other dispute resolution processes. The Act states that any interventions by the child welfare agencies (MCFD or delegated Aboriginal agency) should be carried out using the least disruptive measure possible that will ensure the child's safety and wellbeing. CPM is mandated in British Columbia, under section 22 of the CFCSA:

[143] The Family and Child Service Act provided a process for the resolution of child protection proceedings. the introduction of the CFCSA retains the need for the adversarial process to resolve such proceedings but also provides a number of alternatives for dispute resolution in child protection cases.

"If a director and any person are unable to resolve an issue relating to the child or a plan of care, the director and the person may agree to mediation or other alternative dispute resolutions mechanisms as a means of resolving the issues."

Section 23 (1) of the CFCSA outlines that a judge may adjourn the proceedings for a total of three months in order to allow mediation (or other ADR mechanisms) to proceed. Section 23 (2) of the CFCSA states that any agreement made in mediation (or other ADR mechanisms) may be reduced to writing and the agreement may then be filed with the court. In addition, section 24 of the CFCSA provides a "confidentiality of information" provision for the mediation process. The provision states:

"A person must not disclose, or be compelled to disclose, information obtained in a family conference, mediation or other alternative dispute resolution mechanism, except

a) with the consent of everyone who participated in the family conference or mediation
b) to the extent necessary to make or implement an agreement about the child
c) if the information is disclosed in an agreement filed under section23, or
d) if the disclosure is necessary for a child's safety or for the safety of a person other than a child, or is required under section 14."

In 1997, a province wide CPM roster was established in order to provide mediation services across the entire province. Mediators on the Child Protection Roster have to meet various standards set by the MAG and the MCFD, and need to have successfully participated in a selection process.[144] Since 2004, the CPM roster has been associated with the British Columbia Mediator Roster Society (now part of Mediate British Columbia Society) and consequently, the child protection mediators follow the relevant sections of the Society's Standards of Conduct (McHale, et al., 2001).

Nonetheless, despite significant progress regarding the implementation of CPM, initially, it did not expand as quickly as anticipated. This led to a second test-pilot in 2001 known as the Surrey Court Project. The project was successfully piloted and introduced a unique mediation process which focused on facilitated planning meetings. The process itself was redesigned to add two new features:

[144] See Mediate BC, which provides a directory of child protection mediators: https://www.mediatebc.com/find-a-mediator?RosterTypeId=3

- Mediation is supported on the ground from an experienced social worker (court work supervisor) who actively reviews and refers cases to mediation
- A pre-mediation "orientation session" is conducted by the mediator separately with each party in order to explain the process and identify issues and interests

Today, British Columbia has a range of "collaborative planning and decision making" processes which are available to families and children involved in child welfare systems;[145] including mediation, family group conferencing, integrated case management, family case planning conferences and family development response (McHale, et al., 2001). The two ministries (MAG and MCFD) continue to work closely together to promote and support the CPM programme in all regions throughout the provinces (McHale, et al., 2001).

2.6.3.2.2. Toronto, Ontario

In 1984, Ontario's child protection system moved towards a "family autonomy" model (Bala, 1999); focused on the integrity of the family.[146] In 1985, this family model was proclaimed in the Child, Youth and Family Services Act which promoted the best interests of the child and emphasised that Children's Aid Society (CAS) interventions are the least disruptive alternative for families.[147] As a result, from the early 1980s, child protection cases were increasingly dealt with on an informal or voluntary basis, with court proceedings and removal from parental care seen as a last resort. The recently updated Child, Youth and Family Services Act (CYFSA), which came into force on the 20 April 2018, is the main legislation that governs all Children's Aid Societies (CAS)[148] in the provinces. The main purpose of the CYFSA is to *"promote the best interests, protection and well-being of children."* One of the main changes to the Act was that it raised the age of eligibility to include those under the age of eighteen; in line with the United Nations Convention of the Rights of the Child. Previously a

[145] Information on Collaborative Planning and Decision Making is available online at: http://www.mcf.gov.bc.ca/child_protection/mediation.htm

[146] Family autonomy focuses on supporting the family and for the least disruptive measure to be used by the child welfare agency.

[147] Ontario Association of CAS: History of Child Welfare: online: http://www.oacas.org/childwelfare/history.htm [OACAS].

148 CAS is a "non-government organization", funded by the Ministry of Children, Community, and Social Services who are dedicated to ensuring the protection and well-being of children in the province. According the section 35 (1) of the CYFSA 2017, the mains functions of CAS are to: *"(a) investigate allegations or evidence that children may be in need of protection; (b) protect children where necessary; (c) provide guidance, counselling and other services to families for protecting children or for the prevention of circumstances requiring the protection of children; (d) provide care for children assigned or committed to its care under this Act; (e) supervise children assigned to its supervision under this Act; (f) place children for adoption under Part VIII (Adoption and Adoption Licensing); and (g) perform any other duties given to it by this Act or the regulations or any other Act."*

child was defined as a person under the age of sixteen, unless there was a court finding that indicated that a child was in need of protection.

Support from the Ontario Legislature for Alternative Dispute Resolutions (ADR) is apparent under the CYFSA. Section 17 (1) of the CYFSA imposes an obligation on the CAS to consider *"whether a prescribed method of alternative dispute resolution could assist in resolving any issue related to the child or a plan for the child's care."* While this section does not expressly refer to CPM, it indicates that there is a statutory obligation on the CAS to consider ADR in every child protection case.[149] In addition, section 95 of the CYFSA states that a judge may adjourn the child protection case, on the consent of the parties to participate in a "prescribed" alternative dispute resolution process.[150]

In Ontario, there are various forms of child welfare alternative dispute resolutions, including CPM, family group conferencing and various First Nations processes. CPM, according to the Ontario Association of Children's Aid Societies,[151] is defined as:

> *"A process where child protection workers and the family and any other person wishing to participate in a plan for the child, work together with the aid of a trained and impartial child protection mediator who has no decision-making power. The mediator assists the participants in reaching an agreement on the issues in dispute, in generating options for resolving their dispute and in developing a mutually acceptable plan that addresses the protection concerns identified"* (Ontario Association of Children's Aid Societies, 2018).

2.7. SUMMARY

Currently in Ireland, child protection disputes are predominantly resolved through adversarial processes. Both legislation and the literature quite rightly acknowledge that family and child protection cases are dealing with extremely sensitive and emotive issues (O'Mahony, et al., 2016). In particular, highly contested court proceedings can have potential adverse effects on families (Shannon, 2019; Matthews, 2009; Eaton et al., 2007), and can lead to a break down in trust between the parents and the child welfare agencies who often have a long road ahead. As a result of recently enacted statutory provisions (such as Article 42A), all

[149] Section 17 (2) of CYFSA refers to children who are First Nations, Inuit or Metis, acknowledging that they are entitled to receive services that include their specific traditions. Therefore, CAS would discuss different methods, including First Nations approaches of ADR with family.
[150] "Prescribed services", is defined under section 2 of the CYFSA and is funded by the Ministry of Children, Community, and Social Services.
[151] A membership organisation that represents all CAS's in Ontario.

proceedings must be resolved in the best interests of the child. What is best for the child is ongoing cooperation between the parents and the child welfare agency. Mediation, and other ADR processes, appear to result in more amicable and personalised agreements, with the attention of parents more likely to be centred on the child's needs (Shannon, 2019; Kelly, 2007). It appears from international literature that CPM can be a very dynamic method for resolving certain issues within child protection disputes (Shannon, 2019). It is therefore unfortunate that the Child Care Acts have been excluded from the scope of the Mediation Act 2017 in its entirety. The following chapters will continue to explore CPM and determine whether the implementation of CPM in Ireland will aid child safety and welfare.

CHAPTER 3: METHODS AND METHODOLOGY

3.1. INTRODUCTION

The primary focus of this chapter is to present the intended methodological approach for this research study. The study seeks to examine the current form of mediation in both Ireland and selected international jurisdictions, in order to determine the potential contribution of child protection mediation (CPM) in Ireland and to ascertain to what extent it could potentially aid child safety and welfare. First, the aims and objectives of the research study will be outlined in this chapter. This allows for justification of the proposed methodological approaches and will attempt to clarify the relationship or correlations between the research questions and the proposed choice of methodology. Secondly, theoretical and philosophical frameworks will be examined. This will be followed by a brief discussion of the appropriate epistemological and ontological positions applied in this study and the consequent methodological approach chosen for the study. Finally, this chapter will explore how the ethical considerations, limitations and data issues that this study posed were addressed and mitigated.

3.2. AIMS, OBJECTIVES AND CENTRAL RESEARCH QUESTIONS

Access to justice is acknowledged as a basic and a core fundamental human right, which is recognised and protected under the Irish Constitution (LRC, 2010). In its broadest sense, access to justice is an effective resolution of a dispute through adversarial processes or alternative dispute resolution (ADR) processes (LRC, 2010). Mediation is one form of ADR process which promotes access to justice and has the potential to provide greater flexibility, particularly since the enactment of the Mediation Act 2017 (Shannon, 2019a). Over the past few years, considerable emphasis has been placed on the development of and continued research into mediation (in general) and family mediation in Ireland (Conneely, 2017; LRC, 2010). However, there has been little detailed research or in-depth analysis regarding the use of mediation in child protection cases in Ireland.[152] Taking this into account, the overriding aim of this study is:

[152] See the master's research degree by Karen Quirke who explored the use of mediation in a child care context (Quirk, 2015). More recently, Carol Coulter and Maria Corbett issued a review entitled Child Care Proceedings: A Thematic Review of Irish and International Practice (2019). This report reviews ADR processes that are currently used in child care cases in Ireland (child protection conferences and family welfare conferences), and observes techniques and processes that other jurisdictions use to resolve certain issues within a child care proceeding.

"to determine whether child protection mediation can be a viable alternative, either <u>in whole or in part</u>, to adversarial processes and whether it can aid child safety and welfare?"

"*In whole or in part"* is an important aspect of the research question. As the researcher, I am aware that child protection disputes are extremely complicated, dealing with substantive and extremely emotive issues (O'Mahony, et al., 2016). Therefore, the use of mediation in child protection proceedings should not be seen as a panacea. As mentioned before,[153] CPM is not used to determine whether the alleged mistreatment of child abuse, neglect or mistreatment has occurred (Barsky, 1999); that is solely for a judge to decide. In other words, certain aspects of a child protection case are non-negotiable. Rather, CPM can be used in certain aspects of child protection cases in order to promote a personalised child-centred parenting agreement that is in the child's and family's best interests (Anderson & Whalen, 2004).

The overall objective of this academic study is to determine whether CPM should be implemented in Ireland, where appropriate. However, several additional objectives arose throughout the course of the research study. The secondary objectives of the research study are:

1. To evaluate the extant literature and research relating to mediation (in general), family mediation, and CPM.

2. To explore the perspectives of stakeholders and the Irish judiciary in relation to mediation (in general) and initial perspectives on mediation in child protection proceedings as an alternative to adversarial processes in Ireland.

3. To examine the situation in other jurisdictions, such as those that are part of the USA and Canada, where CPM is widely recognised as an invaluable service in the protection of the child's welfare.

4. To identify and critique the possible concerns and/or barriers that may obstruct the use of mediation in Irish child protection disputes.

[153]Chapter 1.1: Introduction and Chapter 2.2.3: Best Interests of the Child.

5. To investigate the implications of the development of ADR, focusing on mediation, in relation to Irish government policy for child protection.[154]

3.3. SELECTING THE RESEARCH METHODOLOGY AND METHODS

According to Bryman (1998), a research paradigm is *"a cluster of beliefs and dictates which for scientists in a particular discipline influence what should be studied, how research should be done, [and] how results should be interpreted"* (Bryman, 1993;1988, p. 4). In essence, a research paradigm is a theoretical lens through which the researcher's beliefs and principles are shaped (Guba & Lincoln, 1994). Therefore, a research paradigm is a specific way of perceiving the world. Within the context of research, a paradigm determines the appropriate research methods to be employed by reviewing the methodological aspects of the study and examining how the data should be analysed (Kivunja & Kuyini, 2017). Guba (1990) and others accurately suggest that a research paradigm is recognised by its epistemological, ontological and methodological characteristics (Guba, 1990; Bryman, 2016; Scotland, 2012).

3.3.1. Epistemology

Bryman (2016) suggests that epistemology pertains to *"the question of what is (or should be) regarded as acceptable knowledge in a discipline"* (Bryman, 2016, p. 27). Epistemological assumptions examine how knowledge can be *"created, acquired and communicated"* (Scotland, 2012, p. 9). There are several research paradigms that can emerge during research studies including, but not limited to "interpretivism" and "positivism". Interpretivism is an epistemological position which attempts to comprehend the individual human experiences within a subjective world (Guba & Lincoln, 1994), while positivism advocates that regardless of the researcher's beliefs there is a single objective reality to any research phenomenon (Bryman, 2016). Considering the fact that this research study sought to explore individuals' perspectives regarding child protection systems and CPM, an interpretivist approach was adopted. The rationale for employing an interpretivist epistemology was to ascertain a comprehensive understanding of the research participants' lived experiences, specifically in relation to child protection systems, mediation processes and CPM.

The interpretivist paradigm, as a result, recognises subjective realities and multiple meanings of social action (Bryman, 2016). It is accepted that knowledge, as a social development, involves many points of views and there may be various influences that could affect the

[154] For further information, see Chapter 1.4: Research Aims and Objectives.

participants' perspectives. Regarding this study, the following may have influenced the participants' perspectives: (1) current and past professional roles; (2) previous professional/personal experiences; (3) jurisdiction where they are currently employed (Ireland, the USA, and/or Canada). By utilising the interpretivist approach, the participant's knowledge of reality was viewed as an interpretation of reality- not a strict definition of reality.

This interpretivist epistemological position also incorporates elements of both a deductive approach (intended to test a theory by moving from the general to the specific) and an inductive strategy (intended to generate a new theory by moving from the specific to the general) (Bryman, 2016).[155] Yet, it must also be acknowledged that while the interpretivist paradigm explores individual meanings, responses may become susceptible to generalisations. This is a shortcoming of the research that will be addressed further in chapter 3.7 - 'Limitations and Generalisations of the Study'.

3.3.2. Ontology

According to Crotty, *"ontology is the study of being"* (Crotty, 1998, p. 10). The basic belief of the interpretivist paradigm position is one of relativism (Scotland, 2012). The concept of relativism believes that reality is subjective and can be interpreted in several different ways depending on the person and the particular position of that person (Cohen, et al, 2007; Guba & Lincoln, 1994; Guba, 1990). Within such a research paradigm, I acknowledged that a discoverable reality exists independently of the researcher (myself) (Pring, 2000) and thereby this research study focuses on how the individual (the research participant) interprets the world (Bryman, 2016). The relativist position emphasises the diversity of interpretations and accepts that *"no interpretation of that world can be made independently of human sensations, perceptions, information processing, feelings and actions"* (Peter, 1992, p. 74).

There are various examples of ontological positions that can be utilised within a research study; including, but not limited to "objectivism" and "constructivism". According to Bryman (2016), objectivism implies that an objective reality exists independently of social actors, whereas, constructivism asserts that social phenomena and their meanings exist co-dependently, continually being constructed by social actors (Bryman, 2016). While it is important to note that none of these ontological positions is considered to be superior over the others, one position may be more appropriate for certain research studies. Accordingly,

[155]Chapter 3.4: Research Design.

for this study, a constructivist paradigm was adopted because I believed that the research participants' realities or views regarding the world (particularly regarding child protection cases and CPM) was constructed by their own individual experiences. Therefore, the research participants may not only see the world differently from me (the researcher) but may also experience the world differently from each other. However, according to Guba & Lincoln (1994), these "*constructions are alterable, as are their associated 'realities'"* (Guba & Lincoln, 1994, p. 111), and *"may change as their constructors become more informed and sophisticated*" (Guba & Lincoln, 1994, p. 111). The constructivism-relativism paradigm lends itself to this particular research study because it explores the development of CPM programmes in other jurisdictions, in order to inform Irish policy and state actors as to the potential benefits of developing CPM at a national level.

Bryman (2016) also notes that the term "constructivism" can comprise "*the notion that researchers' own accounts of the social world are constructions"* (Bryman, 2016, p. 33).[156] As I was previously employed by the Courts Service as a judicial assistant/researcher for Her Honour Judge Rosemary Horgan, then President of the District Court, it was essential that I assessed the reliability, validation and reflexivity of the study.

3.3.2.1. Reliability

Reliability of research often refers to the consistency and replicability of the research findings (Bryman, 2016). Reliability is often connected with qualitative research and the extent to which a particular set of research findings are replicable (Ritchie & Lewis, 2004). In this study, qualitative techniques were the primary data collection approach used to capture the research participants' meanings and perceptions within a flexible research structure. In order to maximise the credibility of the research findings, a multi-method qualitative design was utilised across all three phases of the research. The qualitative methods employed in this study included the use of questionnaires, semi-structured interviews, and observations, which afforded a more thorough and multi-faceted examination of issues which would not have been gained from any single method.

What constitutes good qualitative data has been well-documented in the literature (Guba & Lincoln, 1985; Ritchie & Lewis, 2004). Important criteria for good qualitative data include qualities such as transferability and trustworthiness of research data. According to Guba &

[156] According to Bryman (2016), constructionism can also be referred to as constructivism (Bryman, 2016).

Lincoln (1985), the collected qualitative data must support the argument that the data findings *"are worth paying attention to"* (Guba & Lincoln, 1985, p. 290). Therefore, in order to ensure best practices and achieve consistent and replicable data, a rigorous qualitative method practice was established to:

- Develop research aims, questions and methodological approaches consistent with the study's outlined research paradigm
- Engage in a process of reflexivity
- Gather multiple perspectives on the various research questions to ensure accuracy in the research findings (internal validity)
- Enhance the quality of the data through a triangulation of methods; known as methodological triangulation.[157]

3.3.2.2. Validation

Another important criterion for good research is validation. According to Simon (2013), data validation *"could be operationally defined as a process which ensures the correspondence of the final (published) data with a number of quality characteristics"* (as cited by Di Zio, et al., 2016, p. 5). In essence, data validation ensures that the final data are of a certain level of quality (Di Zio, et al., 2016). It is argued through the literature that validation, as opposed to validity, better captures "*the quality of a constructivist approach*", highlighting that *"over time, everyone formulates more informed and sophisticated constructions and becomes aware of the content and meaning of competing constructions*" (Guba & Lincoln, 1994, p. 113).

Various scholars have argued that the interpretivist/constructivist paradigm primarily employs qualitative methods (Willis, 2007; Thomas, 2003; Glesne & Peshkin, 1992). Thomas (2003) claims that qualitative methods are usually supported by interpretivists/constructivists, because the interpretive paradigm *"portrays a world in which reality is socially constructed, complex, and ever changing…"* (Thomas, 2003, p. 6). As aforementioned, this study employed a constructivist-interpretivist paradigm. As an interpretivist researcher, qualitative techniques (semi-structured interviews) were utilised in order "*to understand in-depth the relationship of human beings to their environment and the part those people play in creating the social fabric of which they are a part"* (McQueen, 2002, p. 17). The research questions were therefore designed to examine the research participants' individual realities. In this study, I conducted semi-structured interviews with various working professionals involved in either mediation or child protection (or both). The various accounts

[157] Chapter 3.3.3: Methodology.

described by the working professionals involved in child protection disputes and/or mediation revealed how they inserted their own unique understanding of CPM and whether or not there is a need for such a process.

3.3.2.3. Self-reflexivity

Self-reflexivity is an integral aspect of good research. Reflexivity is described as *"critical self-reflection on how the researcher's background, assumptions, positioning, and behaviour impact on the research process"* (Finlay & Gough, 2008, p. ix). Therefore, reflexivity requires self-awareness/inspection (Kelly, et al., 2017). One aspect of reflexivity is aimed at maintaining objectivity. Self-reflexive practices should continue from the early stages of the research (developing research design), right through to data collection, analysis and presentation of research findings. Self-reflexive practices were applied to this study analysis in order to guarantee research validity. For example, after each semi-structured interview, brief field notes were recorded with self-reflexive commentary about the content and process of the interview. The aim of this was to "bracket" any biases of the researcher (myself); which according to Koch & Harrington (1998), is known as "bracketing bias" (Koch & Harrington, 1998).

In addition, self-reflexivity practices also encourage one to address one's own biases and motivations. Therefore, it was important to consider my former position as a judicial assistant/researcher working within the family and child protection courts in the Dublin Metropolitan District (DMD). During the research study, I demonstrated a clear understanding of my role as a researcher and not that of a judicial assistant/researcher. From 2015- 2017, I was employed by the Courts Service. In 2017 I received an Irish Research Council (IRC) Scholarship (Government of Ireland Postgraduate Scholarship). According to the terms and conditions of the IRC scholarship, I could not assume any duties that would affect my ability to engage in this research (IRC, 2019). Therefore, in order to exclusively engage in this research study, in May 2017, I left my employment with the Courts Service. While the early stages of the research study were largely theoretical, this employment position nonetheless raised a valid concern regarding limitations or restrictions to engage in this research and it may have been *perceived* that I was not entirely free to conduct this research uninhibited. However, this concern dissipated to a great extent when I vacated the role. Due diligence was demonstrated by ensuring that the research participants were aware of this previous role, with a view to full and frank disclosure of my subjective position.

3.3.3. Methodology

First, it is important to draw a distinction between the term's "method" and "methodology". According to Henn et al. *"method refers to the range of techniques that are available to us to collect evidence about the social world. Methodology, however, concerns the research strategy as a whole"* (Henn, et al., 2006, p. 10). Accordingly, methodology is a strategy that informs the choice of a particular method and what method should be utilised when collecting and analysing data (Crotty, 1989). It is unsurprising that different research aims and objectives require distinct methodological approaches. Overall, this study seeks to understand working professionals' perspectives on CPM. As a result, a qualitative research approach was chosen as being best suited to build a multi-source perspective.

In doing so, a strategy of triangulation was utilised. Originally, triangulation was considered by Webb (1996) as an approach whereby more than one research strategy would be used to ensure credibility and validation of data findings. Triangulation has also been used as a method to verify findings that have originated from qualitative data (Deacon, et al., 1998). There are four different forms of triangulation; data triangulation (where a piece of data or a finding is verified with several different research methods/sources), methodological triangulation (where more than one method is used within one research study), theoretical triangulation (where more than one theoretical scheme is employed in the interpretation of the phenomenon), and triangulation by investigators (where multiple researchers are involved in the research study). This study applied data triangulation as a research strategy (Easterby-Smith, et al., 2004). I considered multiple perspectives of CPM through the analysis of different data sources; predominantly surveys, semi-structured interviews and structured observations.

In addition, it could be argued that this research adopted elements of a socio-legal approach. The University of Sydney suggests *"Socio-Legal Studies is the study of legal ideas, practices and institutions in their social, cultural and historical contexts."* (University of Sydney, 2021). However, according to Harris (1983) *"there is no agreed definition of socio-legal studies: some use the term broadly to cover the study of law in its social context, but I prefer to use it to refer to the study of the law and legal institutions from the perspectives of the social sciences (viz all the social sciences – not only sociology)"* (Harris, 1983, p. 315). Schiff (1976) stated that the *"analysis of law is directly linked to the analysis of the social situation to which the law applies, and should be put into the perspective of that situation by seeing the part the law plays in the creation, maintenance and/or change*

of the situation" (Schiff, 1976, p. 287). Therefore, while this research did not deliberately adopt a socio-legal approach, there are elements of such an approach throughout, namely:

- The research sought to consider the impact of law in a social context, in particular, whether mediation works better than litigation in the child protection context;
- The research is concerned with the real-life effects of legal policy, as evidenced by interviews with stakeholders and observation of court dynamics to determine whether CPM is being used in practice;
- The research has some inter-disciplinary elements.

3.4. RESEARCH DESIGN

Initially, desk-based research was conducted. This was essential and assisted in creating a conceptual framework for the research study. The overarching aim of the desk-based research was first, to systematically review the literature around domestic and international legal frameworks of family and child protection law, and secondly to examine the history and theory of ADR processes, paying particular attention to mediation within family and child protection disputes.

After reviewing the literature through multiple sources (official publications and reports, legal literature and traditional sources of law (constitution, case law, legislation)), it became abundantly clear that there was limited research carried out in respect of the use of mediation in child care proceedings in Ireland. As previously identified,[158] there have been a few researchers and academics that have briefly explored the use of ADR processes in child protection proceedings (Coulter, 2013; Quirk, 2015; Shannon, 2019). However, it was clear from the desk-based review that ongoing research would be required to explore the extent to which CPM could aid child safety and welfare in Irish child protection disputes. Research was also necessary to determine what would be the initial reactions from national stakeholders and members of the Irish judiciary regarding the potential implementation of CPM in Ireland. In addition, although there was limited Irish literature in respect of CPM, there were some interesting insights into the use of mediation in child protection cases in foreign jurisdictions. As a result, while this is not a comparative study between jurisdictions, it became apparent

[158] Chapter 1.3: Research Interest.

that it would be useful to carry out a review of CPM systems in the USA and Canada to inform Irish stakeholders/policy makers.

After the desk-based research was conducted, a research design was formulated. As noted above, the study adopted a triangulated research methodology approach in order to produce a piece of research that amplifies the voices of the participants and robustly supports the research findings. Using a multi-method qualitative approach, the data was triangulated from online surveys amongst national stakeholders and members of the Irish judiciary, in-depth semi-structured interviews with national and international stakeholders involved in child protection disputes, and child care court observations. A multi-method qualitative approach was used in this study to improve the integrity and the validity of the research findings. The various research methods, used within this single study, appear to strengthen the data collection, therefore, offsetting any weaknesses.

The research study design includes a three-phase process which is described below.

3.4.1. Phase 1:

The research aims to interrogate the current status of and potential for mediation in the context of child protection disputes. This first phase explored the perspectives of Irish-based stakeholders and of the Irish judiciary in respect of mediation practices in Ireland as an alternative to adversarial processes. This phase sought to examine the extent to which the Irish judiciary and national stakeholders supported or resisted the potential use of mediation in the child protection context.

As outlined in Table 3.1, the number of participants varied across a heterogeneous group of professionals who have a range of experiences in child protection disputes/cases. Data collection took place via surveys between April–August of 2017. The study utilised a survey in order to ascertain the respondents' perspectives (Appendix A).

The online survey was sent to lists from databases in order to obtain the maximum number of responses. The persons surveyed in this study included:

1. *Members of the Irish Judiciary:* Members of *GEMME*[159] and District Court Judges involved in child protection cases.

[159] *GEMME* is an organisation that aims to encourage and facilitate judges and retired judges to receive training in mediators.

Members of the Irish judiciary were contacted in person through my connections working as a judicial assistant/researcher for President of the District Court at that time.

2. *Legal Representatives:* This included employees of the Legal Aid Board, members of the Association of Collaborative Practitioners, and employees/partners in various solicitor firms involved in child protection cases. The data indicated that twenty percent of the legal representatives identified themselves as barristers, sixty percent of the respondents identified as solicitors, and twenty percent of the respondents did not expressly mention if they practised as a barrister or a solicitor.

   The legal representatives were contacted either directly or indirectly. Some participants were contacted directly through email addresses provided via online databases for Irish legal counsel such as those supplied by the Bar of Ireland, or the Law Society of Ireland. Other participants were contacted indirectly through a recruitment poster (Appendix F), posted outside Chancery Street Courthouse (child protection court) in DMD, informing the prospective participants about the study. The recruitment poster asked the prospective participants to contact me, as the researcher, if they were interested in participating in the study or if they required any additional information. Once contacted, I provided the potential research participant with relevant information about the aims and objectives of the study, what was involved for the prospective participant and an overview of any risks or potential benefits.

3. *Participants from State Bodies:* The third category of participants are notably non-lawyers. They include employees from the Legal Aid Board (Family Mediation Service), the Irish Courts Service, the Ombudsman for Children, and members of T.I.G.A.L.A. (the Independent Guardian Ad Litem (GAL) Agency). The data indicated that twenty percent of the research respondents in this category were employed by the Court Service, twenty percent of this cohort of respondents were Guardians Ad Litem, twenty percent of the respondents were mediators, twenty percent of the respondents were psychologists, ten percent of the respondents were involved with family services, and ten percent of the respondents were employed as a social work team lead. These participants did not necessarily speak in a representative capacity but, rather, were asked to express their own views. Therefore, these

responses cannot be characterised as official corporate responses of the organisations for whom they work, but rather responses made in a personal capacity.

Participants from State Bodies were contacted individually through email addresses provided via online databases (which are publicly available) for each of the above-mentioned. Some working professionals may have required clearance from their supervisors in order to participate. In order to minimise any impact of the research, participants were contacted as soon as possible, to allow time for any unforeseeable issues that may have arisen.

Table 3.1: Overview of professional participants in Ireland (Phase 1)

Profession/Role	**No. of Participants**
Irish Judiciary 1. District Court Judges 2. Members of GEMME	21
Legal Representatives 1. Employees of the Legal Aid Board 2. Members of Association of Collaborative Practitioners 3. Solicitor firms involved in child protection cases	21
Participants from State Bodies a. Family Mediation Service b. Irish Courts Service c. Ombudsman for Children d. T.I.G.A.L.A. (the Independent Guardian Ad Litem (GAL) Agency) e. Family Services	11
TOTAL	***53***

The survey/questionnaire was designed to capture the experiences and opinions of those involved in mediation processes and/or child protection throughout Ireland (Appendix A). The survey focused on three areas:

1. *Mediation, in General*: I wanted to ascertain: (a) the respondents' perspectives on the term "mediation"; (b) if certain factors influence the respondents' decisions to recommend mediation; and (c) if (in the participants' experience) mediation is an

effective tool in litigation and what are the advantages/disadvantages of mediation as an alternative to adversarial processes.

2. *Child Protection System:* Questions related to the current child protection system, mainly the participants' views on: (a) the advantages of the child protection system; and (b) the disadvantages of the child protection system.

3. *Child Protection Mediation:* Finally, I concentrated on perspectives on CPM, focusing particularly on: (a) the respondents' perspectives on the term "CPM" and if respondents were aware of CPM being used as an alternative to court-based proceedings involving child protection disputes; (b) if they perceive there to be any advantages to CPM; and (c) if they have any concerns about using mediation in child protection cases.

3.4.2. Phase 2:

As previously mentioned, in other jurisdictions the practice of CPM is well-established. For the purpose of this research study, various jurisdictions in two countries, the USA and Canada, were selected in order to evaluate and compare their CPM programmes. The rationale behind reviewing CPM systems abroad was to determine the extent to which CPM aids child safety and welfare and to examine the process involved in designing and implementing a successful CPM programme. While this is not a comparative research study between jurisdictions, comparing and contrasting the development of each CPM programme within the various jurisdictions (but also within the states and provinces themselves) presented an opportunity to build on "lessons learned" from previously implemented CPM programmes.

There were several reasons for selecting USA and Canada for the purposes of this research study:

1. *Desk-Based Research:* Originally, desk-based research was conducted to explore all common law jurisdictions where CPM is and/or has been utilised. It quickly became apparent that both the USA and Canada have increasingly recognised CPM as an invaluable mechanism in the protection of child safety and welfare. This was evidenced through the Association of Family and Conciliation Courts (AFCC) report, entitled 'Guidelines for Child Protection Mediation' (2013), which briefly identified the distinction between CPM programmes in the USA and Canada. According to the report, the development of CPM programmes in the USA emerged through test-pilots during

the 1980s, and a subsequent report issued by the National Council of Juvenile and Family Court Judges in 1995, entitled 'Improving Court Practices in Child Abuse and Neglect Cases', which eventually led to legislative frameworks; for instance, the Adoption and Safe Families Act in 1997. In Canada, by contrast, legislative developments within each province were the driving force behind the successful implementation of CPM programmes. For example, in 1996, the province of British Columbia passed the Child, Family and Community Services Act, which encouraged ADR processes, including mediation, in child care cases. In 2006, the Ontario government enacted the Child and Family Services Act (now the Child, Youth and Family Services Act 2017), requiring child welfare agencies and working professionals to consider ADR.[160]

However, before deciding to focus solely on the USA and Canada, a number of common law jurisdictions (United Kingdom, New Zealand and Australia) were researched to determine the extent to which mediation is being used in child protection proceedings and whether these jurisdictions should be considered for the purposes of this research study.

- United Kingdom: mediation within statutory child protection litigation is not formally recognised in the UK (Teggin, 2016; Retter, et al., 2020). A form of ADR mechanism used in child protection cases includes "pre-proceeding process" (informally referred to as the "letter before proceedings").[161] This is a formal meeting whereby a letter is sent to the parents advising them that the child welfare agency (referred to in the UK as the local authority) is considering initiating proceedings and urges them to seek legal representation. This process provides an opportunity to avoid legal proceedings, focusing instead on addressing the current child welfare concerns. However, despite this, the pre-proceeding process would not meet the definition of ADR set out by the LRC as there is no neutral party involved in the meeting and evidence/information gathered during the pre-proceeding meeting can be submitted to court (Corbett & Coulter, 2019).[162]

[160] For further examination, see Chapter 2.6: Child Protection Mediation.
[161] Pre-proceeding process was introduced in 2008 and later reformed in 2014. See Practice Direction 12a - Care, Supervision and Other, Part 4 Proceedings: Guide to Case Management.
[162] However, since this research study started in 2016, there has been increasing interest in piloting CPM in public law proceedings in England and Wales. In 2020, a rapid review was carried out by the Nuffield Family Justice Observatory which aimed to explore CPM in Australia, Canada, and the USA. This review aims to inform any future developments in this area (Retter, et al., 2020).

- New Zealand: in New Zealand, family group conferences is a form of ADR utilised to engage families and children and promote a collaborate decision-making process regarding how best to meet the child's welfare needs. In 1989, family group conferences were incorporated within New Zealand's child welfare legislation[163], which states *"in the majority of the child welfare cases, a FGC* [family group conference] *was a pre-requisite before court proceedings could be initiated"* (Barn & Das, 2016, p. 943). Family group conferences would be similar to family welfare conferences utilised in Ireland. However, significant differences exist between CPM and family group conferences and would not be considered a form of child protection mediation (see chapter 2.3.3).
- Australia: in 2011, conciliation conferences were introduced as an ADR mechanism, pursuant to the Children, Youth and Families Act 2005.[164] The court can order any application to be referred for a conciliation conference. The conference is intended to facilitate early resolution of a court application through a non-adversarial process (Children's Court, 2016). This could fall under the ADR definition as set out by the LRC. However, for this research, I wanted to engage in field work to see first-hand the use of ADR mechanisms (particularly CPM) in practice. It would not have been feasible to research in Australia due to timing constraints and accessibility. Therefore, Australia was not included within phase 2 of this research project.

For these reasons (as identified above), I chose to exclusively investigate the USA and Canada to evaluate the practical workings of CPM and consider the appropriate model that could potentially be used in Ireland.

2. *Accessibility:* In October 2017, I registered as a visiting research scholar at the University of Tulsa, Oklahoma and worked very closely with Professor Marianne Blair, Professor of Law (now *emerita)* at the University of Tulsa (Oklahoma, USA). The University of Tulsa acted as a base from which I was able to contact working professionals involved in CPM systems operating in certain states in the USA and certain provinces in Canada. I invited the working professionals involved in child protection/mediation, via email, to partake in one-on-one semi-structured interviews (Appendix E). The research

[163] Section 22 of the Oranga Tamariki Act 1989, replaced, on 14 July 2017, by section 5 of the Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Act 2017 (2017 No 31).
[164] Sections 217 – 227 of the Children, Youth and Families Act 2005 (the Act) govern the operation of conciliation conferences in the Children's Court of Victoria. Updated guidelines are provided for at Children's Court of Victoria (Children's Court, 2016).

participants were accommodated to the best of my ability. The location of the semi-structured interviews was restricted to participants' places of work. For instance, mediators of Cook County Child Protection Mediation and Facilitation Program were interviewed in Cook County Courthouse. Times and dates were arranged that best suited each participant in order to make best use of their limited time and to maximise participation. Each interview lasted approximately sixty minutes. All participants completed the consent form before engaging in the semi-structured interview (Appendix G and H). Data collection took place between October 2017-December 2018.

3. *Differences between different states and provinces:* This research aimed to gain a detailed insight into the current circumstances in the arena of CPM by conducting fieldwork in four individual states within the USA and two provinces in Canada. Each state or province visited had a unique way of utilising CPM; particularly in respect of the specific issues that could be mediated, the timing for the mediation referral, and the question of mandatory attendance.[165] This allowed me to build a comprehensive account by comparing and contrasting the various programme models and designs, looking at what worked well, what was less successful and identifying best practices within each jurisdiction.[166] Due to timing constraints, it was impossible to visit each state in the USA or each province in Canada. Therefore, I chose states/provinces that had a unique way of implementing CPM; focusing on the development of the CPM programmes, and identifying any resistance to initial implementation.

The sites visited included:

USA (See Table 3.2)

a) *Chicago, Illinois:* This involved interviews with mediators employed through the Cook County Child Protection Mediation and Facilitation Program.
b) *Tulsa, Oklahoma:* This involved interviews with members of the judiciary and an in-court mediator at the Tulsa County Juvenile District Court; attorneys from Tulsa Lawyers for Children; GALs through the Court Appointed Special Advocates for Children (C.A.S.A); researchers and employees at the Parent Child Centre of Tulsa; committee members of the Child Protection Coalition.

[165] Chapter 2.6.2/3: Child Protection Mediation USA/Canada; Chapter 4.3: Data Collection-Phase 2.
[166] Chapter 4.2: Data Collection-Phase 1.

c) *Tampa, Florida:* This involved interviews with a mediator at My Florida Mediator.
d) *New York:* This involved an interview with a coordinator of the New York City Family Court Alternative Dispute Resolution division.

Canada (See Table 3.3)

a) *Toronto, Ontario:* This involved interviews with mediators from the Ontario CPM roster; social workers; and an academic involved in social work and child protection.
b) *British Columbia:* This involved interviews with mediators and trainers from the British Columbia CPM roster.

Phase 2 of this research study concentrated on a narrative approach as a method of inquiry (Gudmundsdottir, 2001; Carter, 1993) and employed primarily qualitative research techniques with those involved with CPM, including judges, attorneys, and mediators (hereinafter referred to as "working professionals"). Narrative inquiry has been described as an "umbrella term", which can be used to gather detailed experiences and stories of a person's life over a period of time (Ostovar-Namaghi, et al., 2015) while considering the relationship between individual experience and cultural context (Clandinin & Connelly, 2000). In order to explore the research questions, open-ended surveys and semi-structured interviews were carried out with 29 international research participants. The surveys and the semi-structured interviews (Appendix B) were designed to encourage a "*conversation with a purpose*" (Burgess, 1984, p. 102) in order to explore each working professional's perspectives and personal experiences of mediation. The overall intention of the research study was to survey/interview a sample of a heterogeneous group of professionals who have a range of experiences in child protection disputes/mediations (see tables 2 and 3).[167]

During the surveys/semi-structured interviews, the research participants were asked questions relating to their specific child protection system and additional services provided to the families and children in their jurisdiction. The objective was to understand the child protection system and the broader network of services and agencies that interact with families involved in child protective proceedings. However, the primary focus of the surveys and semi-structured interviews focused on CPM, mainly:

[167] The research study chose not to obtain a random sample that would produce arguable research data.

a) Each respondent's understanding of the term "CPM"
b) Specific issues that the participants believe can be mediated in child protection cases
c) How a child protection case would be referred to mediation and how the mediation process itself operates?
d) The timing of CPM referrals
e) Who is present during the CPM process?
f) If there are (from the participants' perspectives) any advantages to using mediation in child protection cases
g) If the respondents have (from their perspectives) any concerns about using mediation in child protection cases
h) How the child's wishes and best interests are heard within the CPM process?
i) The training that mediators are required to receive
j) If the respondent has any recommendations for parties setting up a CPM programme.

Table 3.2: Overview of data collected in the USA (Phase 2)

State	**Profession/Role**	**No. of Participants**	**Interview/Survey**
Chicago, Illinois	Mediators of the Cook County Child Protection Mediation and Facilitation Program	5	Interview
Tulsa, Oklahoma	Members of the judiciary, Tulsa County Juvenile District Court	1	Interview
	In-court mediator at the Tulsa County Juvenile District Court	1	Interview
	Attorneys from Tulsa Lawyers for Children	2	Interview
	Guardian Ad Litem through the Court Appointed Special Advocates for Children (C.A.S.A)	2	Interview/Survey
	Researchers and staff personnel at the Parent-Child Centre	2	Interview
	Committee members of the Child Protection Coalition	1	Survey
	District Attorney's Office	1	Survey

Tampa, Florida	Mediator at My Florida Mediator.	1	Interview
New York, New York	Coordinator of the New York City Family Court Alternative Dispute Resolution	1	Interview
TOTAL		**17**	

Table 3.3: Overview of data collected in Canada (Phase 2)

Province	**Profession/Role**	**No. of Participants**	**Interview/Survey**
Ontario	Registered Clinical Psychologist	1	Survey/Interview
	Adjunct professor of social work	1	Interview
	Child protection/family mediator	1	Interview
	Worker in the justice, educational, social services and child welfare fields	1	Survey
	Social worker, family group conferencing coordinator, child protection mediator	1	Survey
	Mediator with indigenous families and the Children's Aid Society	1	Survey
British Columbia	Child protection mediator & family group decision making facilitator	1	Survey
	Alternative dispute resolution manager and mental health professional	1	Survey
	Child protection mediator	1	Survey
	Child protection mediator and manager mediator development and practice consultant	1	Survey
	CPM trainer	1	Survey
	Mediator/Lawyer	1	Survey
TOTAL		**12**	

3.4.3. Phase 3

The aim of the final phase of this study was two-fold: (1) to collect data in order to develop an insight into the characteristics of child protection cases which would help determine whether certain aspects of a case could be more appropriately managed through the use of

mediation; and (2) to examine the extent to which ADR processes, such as family welfare conferences and child protection conferences, are currently being utilised in child protection proceedings in Ireland. The primary sources of data derived from:

a) *Court observations*: These took place in Chancery Street Courthouse (DMD). The observation data were collected over the course of seventeen days.
b) *Follow up questionnaires and interviews*: This included interviews with three members of the Irish judiciary and three working professionals involved in child protection proceedings and/or mediation.
c) *Previous research and statistics:* This involved the examination and analysis of child care statistics from the Courts Service Annual Reports, Tusla (CFA) Reports and data from the Child Care Law Reporting Project.

This phase of the research employed a mixed-method research design to conduct an in-depth exploration from multiple perspectives regarding the complexity of child care proceedings. This involved observing child care court proceedings in DMD, (focusing on the characteristics of child care cases), and then utilising qualitative questionnaires and interviews with the Irish District Court judiciary and working professionals involved in child protection disputes/mediations.

3.4.3.1. Observations of child care proceedings

The first challenge was to identify a specific courthouse in Ireland that should be observed as part of this research study. It was important to attend/observe a courthouse that would allow the researcher to experience an appropriately diverse and comprehensive selection of child protection cases; therefore, child care statistics were examined from the Annual Courts Service Reports and the Child Care Law Reporting Project. Preparation for Phase 3 began in 2019, and therefore, the latest figures available were those from 2018. The Irish State is divided into twenty-three districts (Courts Service, 2018). According to the Courts Service figures (2018), fourteen percent of all child protection proceedings were heard in Dublin, and seventeen percent of child protection cases were heard in Cork. The provincial cities of Waterford and Limerick accounted for seven percent each, with Galway, Letterkenny, Clonmel, Tralee, Drogheda, and Wexford together accounting for another twenty-seven percent of applications heard (Coulter, 2015). These cities and towns, therefore, were initially the priority for this research study. However, I decided to focus on child care proceedings in Chancery Street Courthouse (DMD) for a number of reasons:

1. *Ethical Approval and Ministerial Approval:* It was difficult to obtain both ethical approval from Maynooth University (MU) and Ministerial Approval due to the sensitivity of the data. In order to mitigate this, I applied for both forms of approval well in advance of the court observations, in order to avoid unnecessary delays. Ministerial Approval was obtained on 11 May 2018; however, ethical approval from MU was only granted on the 21 January 2019. Therefore, I could only focus on one District Court District due to timing constraints.
2. *High Volume and Diversity of Case Load*: Albeit not having the highest recorded number of child care applications, DMD still had a relativity high number of applications per year, as well as a sufficient diversity of case types.
3. *Logistical Difficulties:* DMD has a dedicated child protection court (Chancery Street Courthouse). This means that child protection cases are heard five days a week, making it more accessible to attend court cases in DMD. In contrast, in other District Courts, generally, child care cases are held on the same day with family proceedings, and often only a small number of child protection cases are heard on that day (Coulter, 2013). Therefore, due to timing constraints for the completion of this thesis and prior research commitments, it was decided that the research study would focus on child protection cases that arose in DMD.

In advance of observing child protection proceedings, judges of Chancery Street Courthouse (DMD) were contacted directly to inform them of the research goal for this particular part of the study, namely, to determine to what extent ADR mechanisms are currently being used in child protection cases. Before each child protection case, the judge informed the court that a researcher was present, in accordance with the Child Care (Amendment) Act 2007, section 3, as implemented by the Child Care Act 1991 (section 29 (7)) Regulations 2012 (SI 467/2012).[168] Ministerial approval for the study was obtained in May 2018 on the basis that any dissemination of research must be prepared and published in accordance with the rules of courts and must *"not contain any information which would enable the parties to proceedings, or any child to which the proceedings relate, to be identified"* (section 29 of the Child Care Act 1991).

[168] Prior to 2007, all child care proceedings had to be held *in camera* (in private), as stipulated in law, which meant that there could be no reporting of child care cases (independent of anonymised judgments issued by judges). However, as a result of the enactment of the Child Care (Amendment) Act 2007, barristers, solicitors, and persons specified under the Regulations to be made by the appropriate Minsters, subject to the requirement of anonymity (for more information see Chapter 3.7: Limitation and Generalisations of the Study.)

The methodological strategy was primarily based on the observations of child care proceedings in DMD. An integral part of the observations was to report on the observed cases and collect data on all observed cases dealt with in the courts, as per the collection sheet. The research study utilised a structured observation technique and formulated rules about what to look for when recording the court cases; this is known as an "observation schedule" (Bryman, 2016). The aim of the observations schedule is to ensure that cases are systematically recorded. Therefore, a data collection sheet was also prepared in advance of the court observations and was completed during every court case attended (Appendix C). However, it is important to note that the data collection sheet was only filled out when there was enough evidence produced in court to answer the questions on the collection sheet. There were several reasons for this: (1) some cases were adjourned without much information being given; and (2) there was only access to the evidence produced in court on that day (there was no access to court files associated with these cases) and, in some instances, therefore, questions on the collection sheet could not be answered. This may have been because the respondent(s) was/were not in court, or the case was in *for mention* and all evidence had been presented before the court at an earlier stage.

The data was collected from the child protection cases in Chancery Street Courthouse (DMD) over the course of seventeen working days. These statistics should be read in conjunction with the Courts Service Reports and the Child Law Reporting Project on all child care proceedings in the District Court (Court Service, 2017; Coulter, 2015).

Table 3.4: Overview of data collected in the DMD (Phase 3)

Type of Application	**No. of Applications**	**Percentage**
Interim Care Order	4	17%
Extension of Interim Care Order	7	29%
Care Order	2	8%
Extension of Care order	1	4%
Review of Care Orders (such as applications made under section 47 of the Child Care Act 1991)	2	8%
After Care Review	4	17%
Re-Entry (safety plan, school placement)	2	8%
Variation/Discharge of a Care Order	1	4%

Ex parte applications (Disclosure of documents etc.)	1	4%
Total Number of Cases:	24	

3.4.3.2. Interview /Questionnaires with Members of the Judiciary and Working Professionals

Once the court observations were completed, a working report with initial/preliminary research findings was drafted and produced. As previously mentioned, the data were collected from Chancery Street Courthouse (DMD). In order to ensure that the data were representative, the working report was distributed to members of the Irish District Court judiciary. The members of the judiciary were contacted via email, addresses for whom were obtained through my connections working as a judicial assistant/researcher for the then President of the District Court. The email informed the judiciary that child protection cases had been observed in Chancery Street Courthouse (DMD), that a report had been produced, and that assistance was needed to verify the content of the report/findings. While the questionnaire was entirely voluntary, the judge was asked to identify the District over which he/she was presiding and to share any additional experiences that they may have come across during their role as a practising judge. Once this was completed, the working report was amended to include the perspectives of the District Court judiciary.

Separately, I conducted a focused series of in-depth interviews with working professionals within the child protection field. The sample size for the semi-structured interview was three participants:

1. A representative from the Child Care Law Reporting Project
2. A mediator and employee with the CFA (Tusla)
3. An academic, who is also a mediator, who had experiences mediating child protection cases.

The sample size for the semi-structured interviews was restricted to three participants, as it was better to seek depth and understanding rather than breadth in data collection in terms of the sample size of research participants (Ritchie & Lewis, 2004). Following the conference mentioned below (chapter 3.4.3.3), research participants were contacted directly and a time and place was scheduled to conduct the semi-structured interview. At this point, the participants were provided with the Participants' Information Sheet and Consent Form (Appendix G and H). If the participant required, there was a "cooling off" period of up to two weeks where the participant could read over this form. Participation in the semi-structured

interview was entirely voluntary, and the research participant could withdraw consent at any time.

In order to minimise risk, only questions relating to child protection disputes and ADR processes with which the interviewers may have been involved were asked. As outlined above, I concentrated on a narrative approach as a method of inquiry when conducting semi-structured interviews by utilising qualitative research techniques.

Overall, this phase of the study employed a mixed-method research design to achieve an in-depth exploration. This aspect of the study combined observation of court proceedings and qualitative interviews with working professionals. All of the semi-structured interviews during this phase were audio-recorded (on the condition that the participant consented to the interview being recorded), and were subsequently transcribed verbatim and analysed to identify key themes.

3.4.3.3. National Conference

In October 2019, I hosted a National Conference (in conjunction with the Law Department (MU) and the Edward Kennedy Institute for Conflict Intervention (MU)) entitled 'In Whose Best interests? Exploring the Use of Child Inclusive Mediation in Ireland Today'. The overall aim of the conference was to explore the extent to which the voice of the child is or could be heard within a mediation process, and to examine the potential use of mediation in child protection proceedings. This presented an opportunity for me to disseminate initial research findings (particularly from Phases 1 and 3 of this study) and engage with working professionals involved within the child protection/mediation arena. The conference brought together representatives from the Child Care Law Reporting Project, the CFA (Tusla), the Legal Aid Board, the Office of the Ombudsman for Children, Children's Rights Advocates, members of the Irish judiciary and various experienced family mediators to discuss their experiences of child inclusive mediation and the challenges and opportunities that we face now and in the future (chapter 3.4.3.2). The outcome of this conference provided me with the opportunity to set up three follow up interviews with working professionals in Ireland to discuss my preliminary research findings from Phase 3. This conference allowed me to test and verify the outcomes of my research up to that date.

3.5. ETHICAL CONSIDERATIONS

Ethical approval for this study was sought and granted in several phases by MU Research Ethics Committee, and the CFA (Tusla) Research Ethics Committee. Generally, the principal ethical issue which emerged throughout this research study was the need to protect the research participants during this study. This ethical issue arose from having access to sensitive and identifying information through surveys, semi-structured interviews and child care court observations in DMD. Following a number of meetings with my supervisors, MU Research Ethics Committee, key personnel within the CFA and members of the Irish judiciary, it was agreed that all personal information that could identify the participants, and/or the child and families involved in child protection cases, would be redacted.

National and international research guidelines promote a "minimal risk" threshold (Economic and Social Research Council, 2018). Minimal risk in research implies that the anticipated *"probability and magnitude of harm or discomfort are not greater than those ordinarily encountered in daily life or during the performance of routine physical or psychological examination or tests"* (Economic and Social Research Council, 2018, p. 19). Therefore, I only chose to survey/interview working professionals involved in child protection disputes and/or mediation processes; no minors were recruited as research participants. While adult participants in this study may not by "definition" be deemed vulnerable, it could be said that the topic is a sensitive one and may give rise to situational vulnerabilities, especially in the context of court hearings. However, all potential participants were working professionals within the realm of child protection. They have been involved in child protection disputes and/or mediation in a working capacity in the past and have been trained to deal with sensitive topics. I also ensured that appropriate measures were in place to mitigate potential harm arising from the research process, such as preparing a Distress Protocol for a situation where a research participant might become distressed during the interview process. In such a circumstance, as the researcher I:

1. Asked the participant if they would like to take a break and if they would like the audio recorder to be switched off. If the participant continued to be upset, it would be suggested that the interview should either be postponed or come to an end.

2. After the conclusion of the interview, the participant would be asked if they could be contacted later on in the day to ensure that they are feeling well after the interview. Alternatively, I would ask if they would like someone from the local community (for instance, a religious minister, community worker, or public health nurse) to call them.

3. Before leaving, I handed each participant an information sheet with contact detail and the names of organisations and people that could be of some help to them after the interview.[169]

In addition, I was guided by MU Code of Research Integrity and Ethics Policies concerning child protection. Furthermore, to comply with the General Data Protection Regulation (implemented in Ireland from 25 May 2018), all surveys/interviews were conducted anonymously and the identity of the organisation remained anonymous, unless permission was expressly obtained to the contrary.

The study was also conducted within the Courts Service Ethical Governance Protocols and Procedures. As this research is broken down into three phases, ethical approval was required for each phase, and therefore, ethical considerations arose separately within each phase of this research.

3.5.1. Phase 1

MU operates a three-tier process of ethical review. The level of review required depends on the nature of the research sensitivity of the research topic (MU Research Development Office, 2019). MU ethical approval for Phase 1 was evaluated under tier 1, which allows for rapid review of standard/non-contentious applications. Ethical approval was granted on the 23 March 2017- 31 March 2020.

The main ethical consideration for Phase 1 was confidentiality, particularly for the members of the Irish judiciary, who wished to remain anonymous in order to maintain their judicial independence, pursuant to Article 35.2 of the Irish Constitution. Confidentiality requires that any identifiable information of the research participants that may have been obtained in the research data should not be disclosed to others without the explicit consent of the participants themselves; with the obvious exception of child protection concerns. Therefore, the data collection only took place with the consent of the participant. Participants were encouraged when discussing their work not to reveal the identities or identifying information relating to families or children who are or were the subject of child protection matters. If such identifying information was revealed, it was expunged from the record and anonymised. No information about the participants was passed on to government bodies in this research study. While some

[169] Fortunately, the Distressed Protocol did not have to be used during this research study.

extracts from interviews were published in journals, and conference papers, nothing was published from which any participant could be identified. It was also important, as the researcher, to explain who will have access to the data and why. Both of my supervisors only had access to anonymised versions of the surveys. In addition, all data gathered was compliant with the Children First 2017: National Guidance for the Protection and Welfare of Children.

3.5.2. Phase 2

MU ethical approval for Phase 2 was evaluated under tier 2, which is designed for accelerated review of a research proposal that may have received ethical approval elsewhere or have few contentious or non-standard aspects (MU Research Development Office, 2019). Ethical approval was granted on the 23 March 2017- 31 October 2020.; therefore, ethical approval remained effective until 31 October 2020.

One of the biggest ethical considerations in Phase 2 was to ensure that data protection concerns were considered while researching in foreign jurisdictions: the USA and Canada. Therefore, it was important to ensure compliance with all national and international data privacy laws. I worked with Professor Marianne Blair to ensure that data protection concerns were considered while studying at the University of Tulsa (Oklahoma, USA), the USA and in Canada. I also made best efforts to anonymise surveys and interview transcripts, and participants were given the opportunity to decide if they wished to remain anonymous. In addition, all transcripts from surveys and interviews were stored securely on a password-protected computer.

3.5.3. Phase 3

As mentioned above, ministerial approval was received for this phase of the research study on the 11 May 2018. MU ethical approval was evaluated under tier 3, which is the standard review for a proposal that requires greater scrutiny (MU Research Development Office, 2019). Ethical approval was granted on the 21 January 2019- 31 January 2020; therefore, ethical approval remained effective until the 31 January 2020 (by which stage the research had been concluded).

Data collected in Phase 3, particularly from the court observations, was extremely sensitive. Therefore, it was essential to guarantee that the research procedure was consistent with the current best practice standards of child protection. As per the Child Care (Amendment) Act 2007, I was obliged to protect the anonymity of the parties involved. However, a balance had

to be struck between the public's interests in the dissemination of knowledge regarding the use of ADR techniques in child care proceeding and the welfare of the children involved in the cases and the interests of their families in having their privacy protected. To ensure anonymity, I did not transcribe any child's names or the names of their families. I also redacted any personal information which would lead members of the public to identify the child or any parties involved in child care proceedings; this is in line with the Child Care (Amendment) Act 2007 and the Courts and Civil Law (Miscellaneous Provisions) Act 2013.

3.6. DATA ISSUES

All data collected by researchers registered in MU are governed by the MU Data Protection Policy and Procedure and the MU Research Integrity Policy, and should be in compliance with the Data Protection Acts and GDPR (MU Research Development Office, 2019).[170] It was imperative, therefore, for best practices to be followed for the following:

3.6.1. Obtaining consent

For consent to be valid, it must be voluntary and informed. The onus was on the researcher to demonstrate that the person consenting had been given the necessary and appropriate information in order to understand the research and make an informed decision and that the participant had the capacity to make such a decision. Information and consent sheets were provided to each research participant before data was collected within each phase of this research study (Appendix G and H). Sufficient information about the research aims, objectives and methods were provided in advance in order to allow the potential participants the opportunity to comprehend the information, ask questions if necessary, and consult with others before deciding whether to consent. Participants were also informed that they could withdraw their consent from the research at any stage.

3.6.2. Data collection

The data from the surveys, semi-structured interviews and structured observations are incorporated within this thesis (primarily discussed under chapters 4 and 5). As the researcher, only I had access to the participants' answers and I made every endeavour to keep them private. Both of my supervisors, Dr Fergus Ryan and Her Honour, Judge Rosemary

[170] In addition, before travelling to the USA and Canada, I ensured that there was appropriate professional indemnity insurance cover. This was granted from 1 October 2017- 30th September 2019.

Horgan, only had access to anonymised versions of the transcripts. All of this information is contained in the Participants' Information Sheet along with the Consent Form. This is in line with the Data Commissioner's Best Practice Guidelines (2007) entitled "Data Protection Guidelines on Research in the Health Sector".

3.6.3. Recording

As mentioned above, all of the semi-structured interviews were audio recorded, transcribed *verbatim* and analysed to identify key themes. The interviews were audio recorded in order to capture the interviewees' own language in their own terms. This procedure is important for detailed analysis of the qualitative data. However, it is important to note that court observations were not recorded.

All participants were given the opportunity to amend transcripts. Not only did this allow me to uphold research ethics, it also allowed the participants to validate what was said during the interviews and ensure that the written words in the transcript were those said by the interviewees and reflected their own unique perspectives (Hagens, et al., 2009). This allowed the participants the opportunity to approve the printed version of the interview transcript and/or correct errors or discrepancies that may have originated from poor recording quality. The participants were then given the opportunity to decide if they would like to remain anonymous. In this case, without their express consent, nothing was to be published or was published from which the participants could be identified. This approach broadly empowers the participants to ensure that their authentic voice is included in the research, while protecting their identity and minimising risk of harm arising from their participation.

3.6.4. Data storage

These paper-based semi-structured interviews, and observation field notes are kept in a locked cabinet in MU and the transcripts are stored securely on a password protected computer. They will be destroyed 10 years after completion of the study. It must be recognised that, in some circumstances, confidentiality of research data and records may be overridden by the courts in the event of litigation or in the course of investigation by a lawful authority.

3.6.5. Data disposal

As mentioned above, all electronic data will be overwritten, and paper data will be destroyed by confidential shredding 10 years after this research study is completed. This will be in accordance with the Data Protection Acts 1988 and 2003 and the EU General Data Protection Regulation (known as the "GDPR"), replaced the current Data Protection Directive 95/46/EC with effect from 25 May 2018. The research has been conducted within the Courts Service Ethical Governance Protocols and Procedures.

3.7. LIMITATIONS AND GENERALISATION OF THE STUDY

There were certain unavoidable limitations within this study; it is important to acknowledge their existence and their potential impact on the research findings.

3.7.1. Voice of the child and parents/guardians

A significant limitation of the study was the fact that children and parents involved in child protection cases or CPM sessions were not interviewed. Initially, it was intended to carry out interviews with children and families involved in such cases because, as Baroness Hale states in the case of *Re D (A Child) (Child Abduction* [2006]) UKHL 51: *"It is the child, more than anyone else, who will have to live with what the court decides"* (para.57). However, such interviews did not prove possible. The two main reasons for this were: (1) legal restrictions flowing from the *in-camera* rule; and (2) difficulties receiving ethical approval.

3.7.1.1. *In-camera* rule

Article 34.1 of the Irish Constitution states that justice is administered in public *"save in such special and limited cases as may be prescribed by law"* [emphasis added]. The *"special and limited cases"* which have been prescribed for under this provision largely revolve around family and child law proceedings as well as certain commercially sensitive cases. The *in-camera* rule helps to maintain privacy and the anonymity of the child. There is a concern, however, that the *in-camera* rule can potentially silence those who are most impacted by the outcome of family and child protection proceedings. While there have been recent amendments to the *in-camera* rule,[171] allowing members of the media and *bona fide* researchers limited access to such proceedings, it is argued that the *in-camera* rule is *"ill-defined in Irish law, leading to variable*

[171] Section 3 of the Child Care (Amendment) Act 2007, as implemented by the Child Care Act 1991 (section 29(7)) Regulations 2012 (SI 467/2012); Courts and Civil Law (Miscellaneous Provisions) Act 2013, section 8.

interpretations by different judges" (O'Mahony, et al., 2016, p. 5). The limited scope of the *in-camera* rule meant that I could not be sure if I would be held in contempt of court if interviewing parents and children about their experiences with the child protection system. Therefore, the views and experiences of children and parents/guardians were not recorded as part of this study.

3.7.1.2. Ethical approval

This research focused on child protection proceedings and the extent to which ADR could be used to more appropriately resolve certain aspects of these disputes. Child care proceedings centre around the alleged mistreatment of children, child abuse, child abandonment and neglect, all of which are extremely sensitive subjects and involve vulnerable parties. Therefore, if children and parents/guardians had been included directly in the research study, the vulnerability of such participants would also have presented major challenges and subsequently, receiving ethical approval would have been extremely difficult to obtain.

There would also have been challenges/risks inherent in research involving participants in child care proceedings, such as minimising the impact of very vulnerable children and adults involved in child care proceedings. Such interviews may feasibly cause harm by revisiting the facts of often quite traumatic cases in a context where supports may not be immediately available to offset the distress involved in revisiting such matters. In addition, there may have been risks associated with compromising revelations arising in interviews, particularly if crimes against or neglect of or risk to children were to emerge. Such research would also have been challenging given my lack of experience in child interview techniques. While I was conscious that this is a child-focused piece of research, I decided that this gap could not be filled without causing potential harm. The potential benefits of such research would likely be overborne by the potential harm that might have been caused.

3.7.2. CFA involvement

The CFA has a statutory obligation to protect and to promote the welfare of the child who is not receiving adequate care and protection. According to the CFA (Tusla) Quarterly Service Performance Data 2018, there was a total of 55,136 referrals made to the CFA in 2018; fifty-one percent (7,109) of referrals were welfare concerns and forty-nine percent (6,714) of referrals were abuse/neglect concerns (Tusla, 2019). When a referral is made to the CFA, an initial assessment is carried out to determine if the child is at significant risk of harm and

whether child welfare or child protection services, supports or interventions is required. According to the Courts Service Annual Report 2018, 13,198 supervision and care order applications were made to the High Court and District Court in 2018; which amounts to twenty-four percent of the total caseload. A tremendous amount of work is carried out by CFA pre, during and post adversarial proceedings. Bearing this in mind, I wanted to carry out interviews among social workers to understand the processes used and, therefore, their voice and experiences in this research would be very important. However, getting cooperation from the CFA initially proved very difficult. The first challenge was receiving ethical approval and this proved to be a very long process. Ethical approval was applied for in August 2018, and approval was finally granted on the 13 August 2019.

Originally, I had intended to interview social workers involved in child protection cases after the court observations (Phase 3). The purpose of this was to understand the case in its entirety and to ascertain if any aspect of the case had previously been, or could have been, more appropriately managed through ADR processes. However, when applying for ethical approval, I was advised by the CFA (Tusla) Ethical Approval Committee that it would not be feasible to contact social workers directly after a case, due to the work and time constraints placed on them. Instead, it was suggested that I should work closely with a CFA gatekeeper, who would contact social workers and social worker team leaders from Dublin and Mid Leinster geographical areas[172] on my behalf. However, again, it proved very difficult to get in touch with any CFA gatekeeper. As this was a condition of the ethical approval itself, I was unable to interview social workers for this study.

3.7.3. Data collection

The limitations of the research methodology also have to be considered. The case study method of inquiry, utilised in Phase 3, is subject to criticism in terms of generalisation. In this study, I observed child protection cases in the DMD over the course of seventeen days. This leads to the question; how can one demonstrate or maintain that DMD court observations are representative of all child protection cases in Ireland? However, according to Williams (2000), in many cases researchers can produce moderate generalisations, meaning that aspects of the investigation *"can be seen to be instances of a broader set of recognizable features"* (Williams, 2000, p. 215). Consequently, I drew comparisons with findings by other researchers such as the Courts Service Reports and the Child Law Reporting Project on all child care proceedings

[172] According to CFA (Tusla) Area Management/Service Director Structure.

in the District Court. In addition, upon completion of the court observation, I produced a working report regarding initial findings. The report was distributed to members of the District Court judiciary, alongside a follow-up questionnaire. The aim of the questionnaire was to verify the content of the report/initial findings and provide an opportunity for the Irish judiciary to share any additional experiences that they may have come across.

3.7.4. Heterogeneous group of working professionals

A possible limitation of the study is that it involved collecting the views of working professionals involved in child protection disputes and/or mediation which is based on the views, perceptions, experience and observations of one relatively narrowly-framed group of people in society. Given the sensitivity and confidentiality surrounding the area of this research, it was not feasible to survey/interview a larger number of persons. As such, this has to be treated with caution in that it constitutes the opinion of one group of people involved in the legal process. However, the nature and roles of these working professionals, and their particular highly relevant expertise in the specific filed under review, indicate that they are well-placed to offer balanced, measure and informed views about the matters raised.

3.7.4.1. GEMME representatives

Similarly, a potential limitation of this study was the profile of research participants from Phase 1; most notably selecting members of the Irish judiciary from the organisation GEMME. As outlined above, GEMME is an organisation that encourages members of the Irish judiciary to receive ongoing training in mediation. It could be argued that selecting this particular research participant profile could potentially skew the responses in favour of support for CPM.

This research utilised a purposive sampling method to select potential participants. The objective was to identify and select participants who have specialist knowledge about the phenomenon and would be in a position to answer the question most effectively (Creswell & Plano-Clark, 2011). For the purpose of this study, it was necessary to capture the views of the Irish judiciary who had knowledge of mediation (in general) and actively involved in ongoing training and could, therefore, make an informed decision as to whether CPM could be a viable alternative to adversarial proceedings. It was important to be aware of this limitation when collecting and analysing the data. However, upon reviewing the data collected (see 4.2: Data collection: phase 1), it became apparent that not all members of the judiciary involved in this research were in favour of child protection mediation, with several participants addressing a

number of concerns that they would have towards the possible implementation of a CPM programme in Ireland. Therefore, it did not seem that the participants' GEMME membership necessarily skewed their responses in favour of CPM specifically. In fact, the respondents' answers were quite nuanced on the merits of CPM.

3.8. SUMMARY

To summarise, this chapter has outlined in detail the mixed-method approach utilised throughout the current study. A triangulated research methodology approach was employed and this chapter has discussed the relevant methodology literature in order to justify the methodological approached chosen for this study. In chapter 4, this thesis progresses to discuss the data that was collected using these methods.

CHAPTER 4: DATA COLLECTION

4.1. INTRODUCTION

As previously mentioned in chapter 3, this research study employed a triangulated research strategy, integrating different methods of qualitative data collection. The study was divided into a three-phase process in order to determine whether child protection mediation (CPM) can be a viable alternative to an adversarial process and to what extent CPM could aid child safety and welfare. While some research questions were formulated from an early stage, some additional questions emerged organically from each phase. For example, in Phase 1 of this study, the researcher primarily collected data from members of the Irish judiciary and national stakeholders and subsequently carried out a preliminary analysis of that data. This, in turn, informed the type of qualitative data to be collected and analysed, and the type of methods to be adopted in the second and third phases of the study. Therefore, it is important to present the data collected from each phase, before data analysis occurs in chapter 5.

4.2. PHASE 1

Fifty-three working professionals involved in child protection proceedings took part in Phase 1 of this study.[173] The survey focused on three main areas: mediation (in general), child protection disputes, and CPM. The aim of this phase was to explore the initial perspectives of the Irish judiciary and national stakeholders to child inclusive mediation as an alternative to adversarial processes and to determine which members of the Irish judiciary and national stakeholders support or resist mediation in the child protection context.

Table 4.1: Brief overview of participants in Phase 1

Profession/Role	**No. of Participants**
Irish Judiciary	21
Legal Representatives (LRs)	21
Participants from State Bodies (PSB)	11
TOTAL	***53***

[173] Chapter 3.4.1: Research Design- Phase 1.

4.2.1. Mediation, in general

4.2.1.1. Understanding of the term "mediation"

In this appraisal, the Irish research participants (hereinafter referred to as "participants") were asked to outline their general thoughts towards mediation (in general). Overall, the data identified three main categories:

i. *Mediation resolves disputes:* The majority of the participants spontaneously indicated that mediation is a process where an independent third party/mediator assists/facilitates parties to resolve disputes (eighteen members of the Irish judiciary (judges); eleven Legal Representatives (LRs)); ten participants from state bodies (PSBs). This is broadly in line with the definition pursuant to section 2 (1) of the Mediation Act 2017, which states that mediation is *"a confidential, facilitative and voluntary process in which parties to a dispute, with the assistance of a mediator, attempt to reach a mutually acceptable agreement to resolve the dispute"* [emphasis added].

ii. *Mediation promotes personalised agreements:* A large cohort of the participants also believed that mediation takes a balanced approach to achieve a fair, personalised agreement (ten judges; ten LRs; seven PSBs). Some representative examples follow:

> *"The parties retain ownership of the process and the mediator facilitates the resolution of the dispute."* Judge

> *"Mediation is a process whereby an independent, neutral Mediator assists the parties to come to their own agreement through a collaborative process…The Mediator supports the parties in identifying their own issues and needs and in exploring how those needs can be addressed and how they might come to agreement."* LR

> *"Bringing together relevant parties with a view to reaching consensus or compromise..."* PSB

iii. *Mediation is a voluntary process:* A relatively small proportion of judges (two) and LRs (four) expressly addressed the voluntary nature of mediation compared to PSBs (five). The voluntary nature of mediation is endorsed by the European Union Mediation Directive (2008/52/EC). Article 13 of the Directive states that mediation "*should be a*

voluntary process in the sense that the parties are themselves in charge of the process and may organise it as they wish and terminate it at any time." However, it could be argued that the voluntary nature of mediation is self-evident; mediation is a voluntary option in Ireland in line with the Directive and there is a clear policy objective to ensure public awareness of the option and of the benefits of mediation as a viable alternative to adversarial processes.[174] For instance, selected participants commented as follows:

> *"Mediation is a voluntary ADR* [Alternative Dispute Resolution] *process which enables persons in dispute to achieve an agreement outside of court."* Judge

> *"My understanding of the term mediation is that it is a voluntary and confidential process whereby disputing parties submit to a process (i.e., mediation) in which a mediator facilitates them in coming to an agreement in full or partial resolution of the matters at issue in the dispute."* LR

> *"A voluntary process where two or more individuals agree, with the aid of a facilitator, to find a collaborative solution to a problem or dispute they are experiencing."* PSB

iv. *Mediation promotes positive relationships*: It is also worth noting that another category (unprompted), identified only by a limited number of members of the Irish judiciary (five) and LRs (three), was that mediation promotes positive relationships. These participants indicated that mediation promotes an open dialogue amongst the various parties, thus preserving a positive and healthy relationship:

> *"*[Mediation] *facilitate the settlement of disputes outside of the court process, in a confidential manner and with a view to preserving the positive relationship between the parties."* Judge

4.2.1.2. Factors that influence a decision to recommend mediation

The survey then asked the participants who would generally initiate the discussion on the possibility of choosing mediation as a dispute resolution option? According to the judicial

[174] The European Communities (Mediation) Regulations 2011 (SI 209 of 2011) published in May 2011 transposes into Irish law the EU Mediation Directive 2008/52/EC; See Also Law Reform Commission Report "Alternative Dispute Resolution: Mediation and Conciliation) (LRC 98 2010).

participants, the largest category (eleven of the twenty-one judicial participants; fifty-two percent (figure 4.1)) identified that it is LRs that sometimes initiate the discussion on the possibility of choosing mediation.[175] However, in contrast, according to LRs, the largest category (thirteen of the twenty-one respondents; sixty-two percent (figure 4.2)) identified that it is the Irish judiciary that sometimes initiates the discussion on the possibility of choosing mediation. PSBs, indicated that it is both the LRs (nine of the eleven respondents; seventy-five percent (figure 4.3)) and the Irish judiciary (seven the eleven respondents; seventy; sixty-four percent (figure 4.3)) that would sometimes initiate the discussion on the possibility of choosing mediation.

Meanwhile, six judges (twenty-nine percent of judges (figure 4.1)) revealed that they themselves would often initiate the discussion on the possibility of choosing mediation. While nine of the LRs (forty-three percent of LRs (figure 4.2)) noted that they would often initiate the discussion on the possibility of choosing mediation. Interestingly, ten of the LRs (forty-eight percent of that cohort (figure 4.2)) indicated that lay litigants would rarely initiate the discussion on the possibility of choosing mediation. The question must be asked, whether this figure reflects that the lay-litigants are not actually aware of ADRs, such as mediation, or whether they are aware of mediation, but prefer to go down that adversarial route?

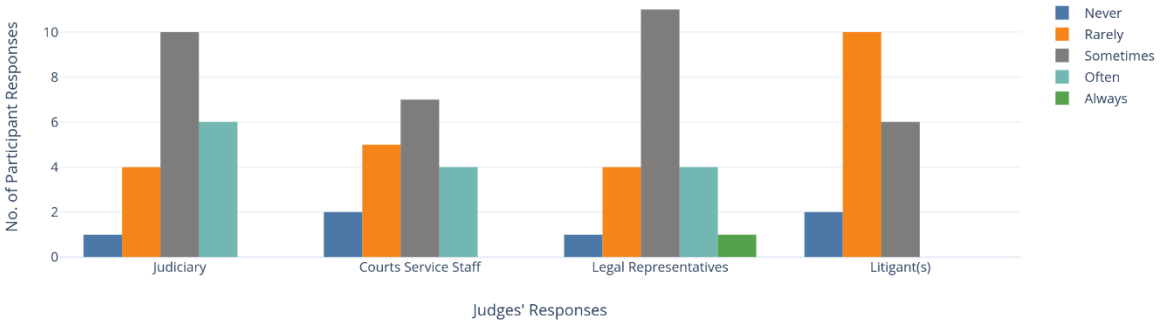

Figure 4.1: Judges' responses: Who initiates the possibility of choosing mediation as a dispute resolution process?

[175] This is in line with section 14 of the Mediation Act 2017.

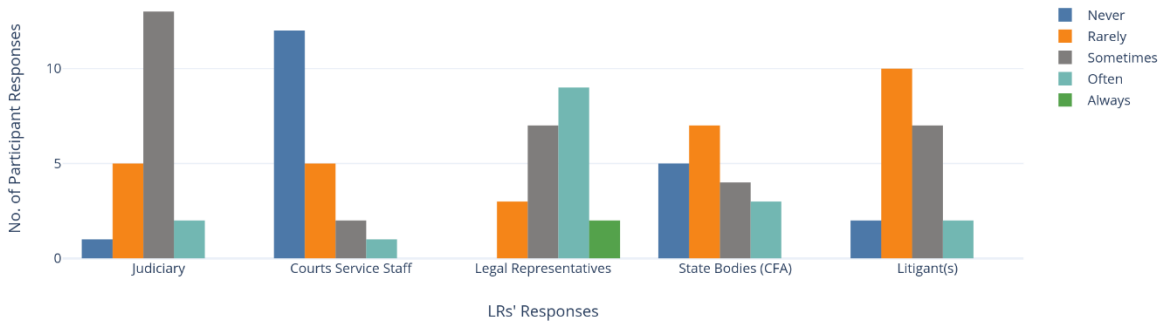

Figure 4.2: LRs' responses: Who initiates the possibility of choosing mediation as a dispute resolution process?

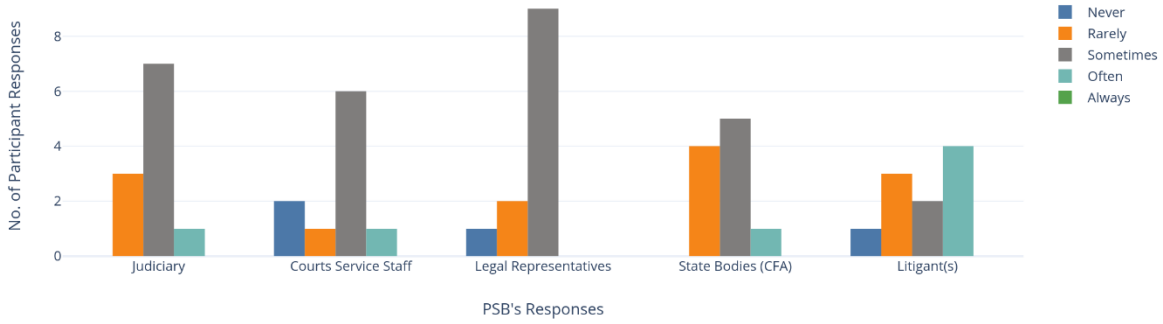

Figure 4.3: PSBs' responses: Who initiates the possibility of choosing mediation as a dispute resolution process?

The survey also enquired whether the participants would still recommend mediation even if it had not been suggested by a judge/LR/lay litigant. From reviewing the data, three judges (fourteen percent of judges (figure 4.4)) selected that they would always recommend mediation, while eight judges (thirty-eight percent) would often recommend mediation, and nine judges (forty-three percent) would sometimes recommend mediation.

In contrast, data from the LRs' survey reveals that the majority of the respondents would still consider the possibility of recommending mediation (in general), even if it has not been suggested by the judge/lay litigants (figure 4.5). The data indicated that six LRs (twenty-nine percent selected that they would always recommend mediation, while nine LRs (forty-three percent) would often recommend mediation, and five LRs (twenty-four percent) would sometimes recommend mediation.

The PSB survey reveals that the majority of the respondents will still consider the possibility of recommending mediation, in general, even if it has not been suggested by the judge/lay litigants (figure 4.6). According to the data, two PSBs (eighteen percent of the PSBs cohort) selected that they would always recommend mediation, while five PSBs (forty-five percent) would often recommend mediation, and two PSBs (eighteen percent) would sometimes recommend mediation.

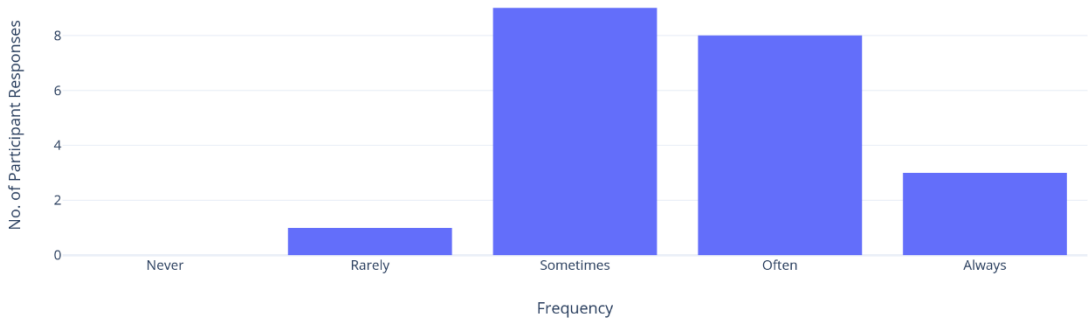

Figure 4.4: Judges' willingness to recommend mediation even if not suggested by LRs/litigants.

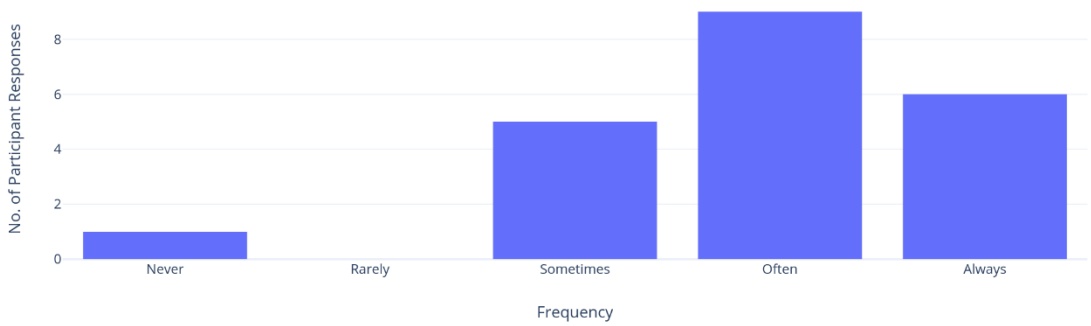

Figure 4.5: LRs' willingness to recommend mediation even if not suggested by judge/litigants.

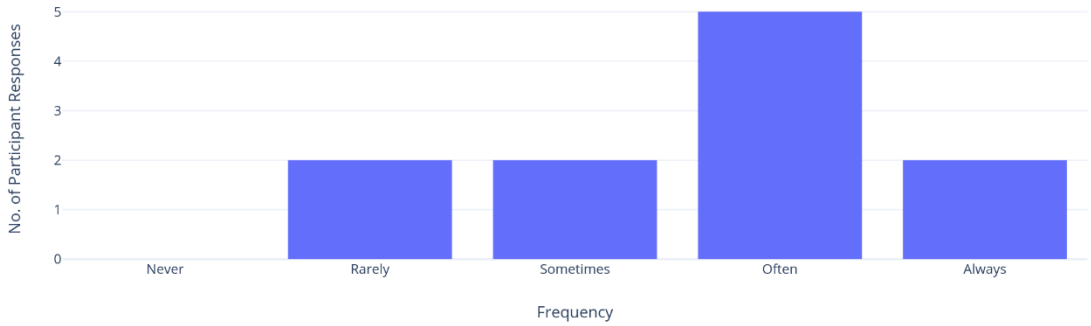

Figure 4.6: PSBs' willingness to recommend mediation even if not suggested by judge/litigants.

4.2.1.2.1. *Factors that would influence participants' decisions to recommend mediation*

All research participants identified several factors that would influence their decision to recommend mediation, including:

i. *Suitability of mediation in certain cases*: Participants from all three categories identified that the suitability of a case to be mediated would often influence their decision (six judges; five LRs; five PSBs). In addition, ten judges, twelve LRs and four PSBs indicated that it would sometimes influence their decision.

ii. *Encouragement from other working professionals:* Another factor that would influence a judge's decision to recommend mediation was whether or not there was encouragement from LRs to consider mediation. According to the data, four judges reported that this would often influence their decision and seven judges indicated that it would *sometimes* influence their decision. However, in contrast to the judicial participants, twelve LRs and four PSBs stated that encouragement from other working professionals would rarely/never influence their decision. Nevertheless, according to LRs, if a lay litigant refused to avail of mediation that would impact their decision to recommend mediation (eight LRs specified that this would often influence their decision and six LRs indicated that it would sometimes influence their decision).

iii. *Cost*: Participants from all three categories identified that their decision to recommend mediation was rarely/never influenced by an increase of cost for litigants (thirteen judges; eighteen LRs; three PSBs).

iv. *Enforceability:* Preoccupants from all three categories identified that their decision to recommend mediation was rarely/never influenced by whether the mediated agreement would be difficult to enforce (twelve judges; ten LRs; five PSBs).

4.2.1.3. Effectiveness of mediation

The survey data indicates that all three groups of participants generally view the use of mediation as an effective tool in litigation. However, the responses from the PSBs (figure 4.9) is more varied when compared against the judicial participants' responses (figure 4.7) and the LRs' responses (figure 4.8).

A large cohort of PSBs (seven out of eleven respondents) indicated that mediation is often an effective tool in litigation; compared to five out of twenty-one judicial participants and seven out of twenty-one LRs. Of the twenty-one judicial participants and twenty-one LRs, none reported that it would never or rarely be an effective tool in litigation or that they were unaware whether or not mediation was an effective tool in litigation. In contrast, one PSB noted that mediation would rarely be an effective tool and two PSBs reported that they were unaware whether or not mediation was an effective tool in litigation.

Judicial participants (three) and LRs (three) equally mentioned that mediation is always an effective tool in litigation; compared to PSBs where no-one indicated that mediation was always an effective tool. The largest category identified by both judicial participants (eleven) and LRs (eleven) reported that mediation is sometimes an effective tool in litigation; compared to one PSB who acknowledged that mediation was sometimes an effective tool.

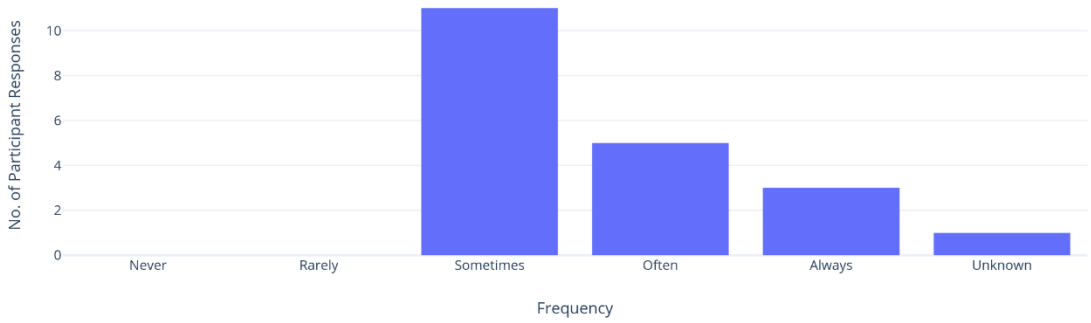

Figure 4.7: Judges' responses: Effectiveness of mediation.

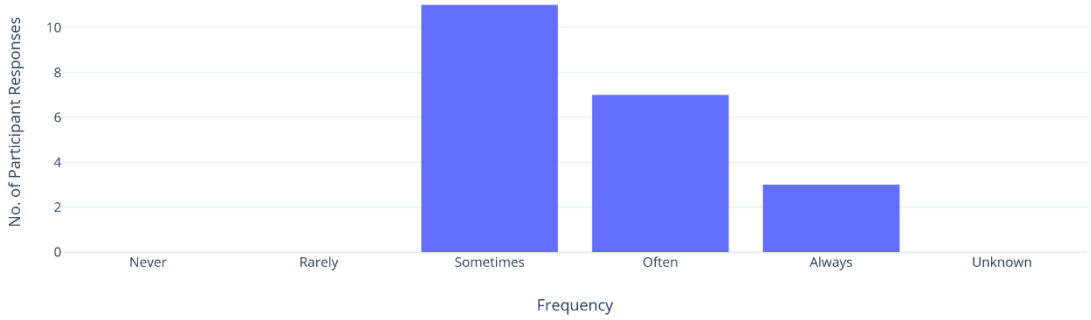

Figure 4.8: LRs' responses: Effectiveness of mediation.

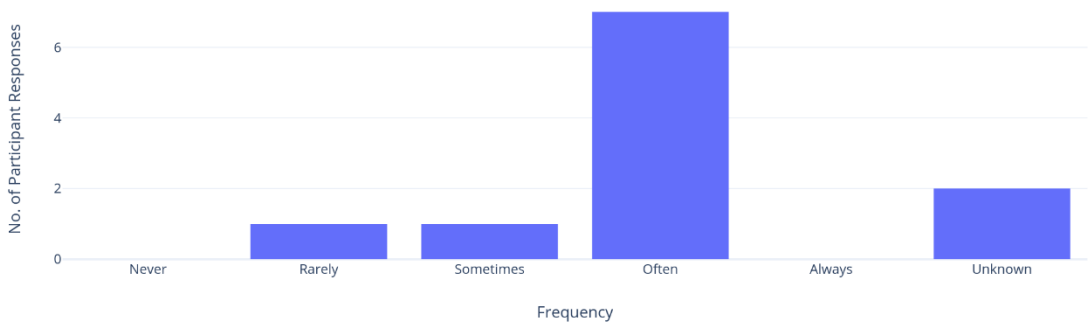

Figure 4.9: PSBs' response: Effectiveness of mediation.

4.2.1.3.1. *Advantages of the mediation process (in general)*

All of the participants (fifty-three) reported their views that there are advantages to the use of mediation as an alternative/supplement to court-based proceedings. The main advantages identified by the participants, without any prompting, was:

i. *Personalised solutions:* A large cohort of participants recorded that one of the most significant advantages to mediation was that it created a personalised solution between the parties (eight LRs; eight PSBs):

> *"The individuals can take responsibility for making decisions about the actual needs of each party and the family as a whole. In particular, mediation is a more appropriate forum for discussing the needs of the children in a separation or divorce. Parenting relationships last a lifetime and mediation is more likely to encourage cooperation and communication between the couple who will need to interact at some level around their children."* PSB

According to some PSBs (four) and LRs (six), this can subsequently empower the parties. A LR elaborated on this point stating that:

> *"The parties are the creators of their outcomes. They can form an agreement in respect of what works for them and works for their individual family unit. The parties keep their relationship more intact than within adversarial proceedings and in circumstances where children are involved which eases the tension within the family unit."* LR

ii. *Positive Dialogue:* A large proportion of judicial participants (fifteen), and a significant number of LRs (seven) recorded that one of the most significant advantages to mediation was that it created a positive dialogue between the parties. A judge commented on this, stating:

> *"…at some point, they* [parents] *will have to learn how to resolve their differences in matters relating to their children and the sooner they avail of mediation to teach them how to avoid court the better. I am further of the view that litigating such matters only promotes bitterness and further antipathy as statements said in court can be unpardonable and prevent the parties from ever being able to see that there is a third way. Compromise can allow both parties to win and retain their dignity."* Judge

iii. *Cost saving benefit:* One of the most significant advantages, identified by eleven LRs, was that mediation was cost-effective. In a similar vein, five judicial participants and five PSBs mentioned cost savings as a benefit of mediation, including savings to the courts as well as savings to the public. According to one LR: *"Mediation can offer a more efficient way of resolving issues without engaging in potentially expensive, adversarial court proceedings."* LR

In addition, one PSB acknowledged that mediation can reduce court and state agencies' costs: "*Mediation is also less costly than litigation, and there are savings to be made for the courts and state agencies, e.g., legal aid board as well as the parties."* PSB

iv. *Non-adversarial nature:* A certain proportion of participants indicated that the non-adversarial nature of mediation was an advantage (six judges; seven LRs; three PSBs). One participant recorded that the non-adversarial nature provides the parties with an opportunity to reach a personalised agreement, in which there is a greater chance of compliance:

> *"A less adversarial and therefore more conducive to amicable resolution allows parties to have full engagement in resolving difference, rather than having a "resolution" imposed, which is likely to lead to better "buy in" by parties."* Judge

> *"The parties are the creators of their outcomes. They can form an agreement in respect of what works for them and works for their individual family unit. The parties keep their relationship more intact than within adversarial proceedings…"* LRs

> *"Mediated agreements stand more chance of success than court-imposed solutions."* PSB

v. *Expeditious:* A small number of participants also suggested that another advantage of mediation was that it is expeditious (three judges; six LRs; two PSBs).

4.2.1.3.2. *Disadvantages of the mediation process (in general)*

Even though the participants overwhelmingly indicated strong support for mediation, all three categories (forty-six of the fifty-three participants) pointed to various disadvantages/potential disadvantages of mediation as an alternative to or supplement to litigation. The disadvantages spontaneously addressed were:

i. *Power-Imbalance:* Representatives from the members of the judiciary (five) identified that power-imbalance was a disadvantage (or potential disadvantage) to the mediation process. According to one judge, mediation should not be used *"if the power-imbalance is simply incapable of being balanced by an astute and experienced single."*

LRs (two) and PSBs (four) also identified power-imbalance as a disadvantage. In particular, one LR mentioned that the power-imbalances in child care proceedings could be too stark for mediation: *"…the inequality between the respective positions and resources of the participants is unlikely to achieve a fair outcome."* One PSB expanded on this point indicating that:

> *"A huge disadvantage is the fact that the two parties entering the mediation process are not equal in a decision-making balance - i.e., the parent and the social worker. Even if the mediation process takes place, ultimately, the social worker has statutory power over the parent and the agreements made in the mediation process are not always implemented."*

However, it is the role of the mediator to determine the capacity of the parties to meaningfully engage in the mediation process. This point was mentioned by a PSB: *"Few disadvantages unless one party is the subject of abuse and disempowered by the process in which case a thorough mediator should deem the case unsuitable for mediation in the first place."*

ii. *Enforceability:* Members of the judiciary (six) identified the enforceability of mediated agreements to be a disadvantage of mediation as an alternative to or supplement to litigation/court-based proceedings. As claimed by one judge: *"Enforceability can be a problem if agreements are not made orders of court and/or legally binding agreements with independent legal advice."*

A relatively small proportion of LRs (three) and PSB (one) identified the enforceability of mediated agreements as a disadvantage:

> *"Mediated agreement, in general, of their own right are not legally enforceable and need to be translated into a legally binding agreement. There are no repercussions within the process, other than abandonment, for delay or refusal to participate according to the rules."* LR

iii. *Exploit the process:* The main disadvantage addressed by the LRs (seven) was the parties may use mediation to exploit the process. One LR stated that *"… some litigants use the mediation process in a cynical manner to gain insight on the other party's case, without any genuine commitment to the mediation process."* This concern was also addressed by two judges and one PSB. As reported by one judge: *"The disadvantage is where someone uses the process for fishing e.g. Solely to extract information without any view of engaging constructively."*

iv. *Delay and Extra Costs:* Other disadvantages identified by the participants was the potential delay in resolving a dispute if the mediation is unsuccessful (two judges; three LRs; one PSB). Associated with delay if mediation was unsuccessful was extra costs (three judge and one LR). However, it is important to reiterate that thirteen judicial participants, eighteen LRs and three PSBs highlighted that their decision to recommend mediation was rarely/never influenced by an increase of cost for litigants. In addition, as mentioned above, five judicial participants and eleven of LRs indicated that an advantage of mediation was that it was cost-effective.

4.2.2. Child protection system

4.2.2.1. Advantages of the child protection system

The survey then sought to explore the participants' responses to the current child protection system in Ireland and the extent to which such proceedings address the needs of children in a prompt and efficient manner. From the data, thirty-two of the fifty-three participants identified several benefits, including:

i. *Child's rights and needs are met:* A percentage of LRs (five) and PSBs (seven) explained that the current child protection system identifies the child's needs and resolves disputes in the child's best interests. In addition, one judge indicated that the rights of the child are maintained and the child's wishes are ascertained through the current child protection system: *"Involvement of experienced judges to independently decide in the best interests of the child having regard to the principle of child welfare being paramount and to the rights of parents. Focus on the rights of the child and the child's wishes where ascertainable."*

However, despite this figure, there was a concern from one LR about the manner in which the child's needs are addressed in practice:

> *"I see very few benefits. It seems to me that much of the time one or other party to the proceedings (i.e., the Child and Family Agency (CFA) and/or the parents) are focused on their own position (and protecting themselves) as opposed to what is in the best interests of the children involved."*

ii. *Removing a child from unsafe environments:* Several judicial participants (four) highlighted that removing children from unsafe environments was one of the most substantial advantages of the current child protection system: *"Children are removed from unsafe situations in circumstances where their welfare requires it."* One PSB also indicated this as an advantage: *"For sure, children are often removed from difficult, damaging and unsafe environments and placed in more protective environments - this is vital."*

iii. *Guardian Ad Litem:* (GAL): A proportion of participants (four judges; two LRs; two PSBs) also recorded that the involvement of child welfare agencies (in Ireland, the CFA), particularly the appointment of a GAL, was an advantage. It is also worth noting, that a significant number of participants (fourteen judges; thirteen LRs; nine PSBs) indicated that the child's views and wishes are primarily heard through a GAL, allowing the voice of the child to be indirectly heard in the child care process. One PSB explained this point by stating: *"The protection of children is the objective and the use of the GAL service enables the voice of the child to be heard…"*

However, the same respondent also addressed a concern that *"there is not always provisions for this service and it can add to delays."* Furthermore, one judicial participant specifically stated that the involvement of child welfare agencies needs to be monitored:

> *"It would be very dangerous for children if there was no statutory agency in existence, but they require to be monitored. Statutory agencies often develop their own cultural or ideological issues not to mention their resources or lack of……..Social workers have a sense of honesty and transparency that is re-assuring: by this I mean that they are willing to disclose material to Judges which may result in the Judge reacting in a certain manner."*

iv. *Statutory Framework:* Several participants mentioned that the statutory framework of the current child protection system was an advantage (two judges; two LRs; three PSBs). One PSB elaborated on this point:

> *"Often, the children at risk get the protection they need. The state has the structure and the resources, through the child protection system, to collaborate with other state agencies in order to ensure that supports are put in place for vulnerable families. The child protection system in Ireland has monitoring systems in place (the judiciary, HIQA, CORU, CFA themselves). This is unfortunately not the case in other countries. In my view, this is hugely important in order to ensure service quality but also the fairness and the proportionality of the interventions for the families at the receiving end."*

4.2.2.2. Disadvantages of the child protection system

The vast majority of the research participants (forty-one of the fifty-three participants) outlined a number of drawbacks/disadvantages with the current child protection system, namely:

i. *Inappropriate system/Child and Family Agency (CFA):* Specifically, five PSBs identified that the current child protection system is inappropriate and is very difficult for parents and/or families to understand. In addition, four judges and six LRs indicated that the child welfare agencies, in particular, the CFA, and their

policies and procedures are a major drawback to the child protection system. Another judge endorsed this concern stating that there is:

> *"… a. lack of understanding by some social workers that child protection is rights-based system.* [A] *lack of continuity in responses and follow through by social work teams.* [A] *lack of proper protocols on the part of CFA particularly within their own organisation and with other agencies."*

One LR noted that: *"…the HSE* [today, the CFA] *often oversteps its powers impacting on parents in other ways. The system judge's parents instead of supporting them."* Another LR elaborated on this point stating that the system:

> *"fails to adequately address the need of a child to be loved in a family. Social workers are sometimes not respectful of parents. CFA is entirely unable to address or influence resource issues around accommodation and rehab which very often create or contribute to the issues leading to court applications."*

ii. *Lack of resources, training and funding:* Specifically, some of the participants identified lack of resources as a major disadvantage of the child protection system in Ireland (four judges; three LRs; four PSBs). As stated by one LR: *"The lack of resources causes high delays and lack of funding means many of the child's needs are not met."* One judge further developed this point: *"Lack of resource is partially the issue, but lack of joined up thinking, both within and without the CFA is just as damaging."*

Some participants also identified lack of training as a disadvantage of the current child protection system (two LRs; one PSB). In addition, lack of funding was also identified by three judges.

iii. *Damages relationships:* A number of participants identified that child protection adversarial processes can damage working relationships, particularly between the parents and the child welfare workers (two judges; one LR):

> *"So many care cases appear to be kept within the voluntary care long term. The adversarial 'winner takes all' nature of contested cases. In contested cases coming for monthly extensions of care tend to focus on parental failures on each occasion which*

can detrimentally affect positive working relationships between parents and social workers." Judge

"The adversarial approach to childcare is a serious drawback and only serves to exacerbate and further damage the relationship between social workers and parents thus negatively effecting the best interests of the child." LR

iv. *Delay:* Some other apprehensions specifically focused on delay in the current child protection system (three judges; two LRs; one PSB). However, one LR indicated that delays can depend on the individual circumstances of a case:

"Some are resolved promptly and efficiently in the interests of the children, but sometimes cases become subject to intractable delays. There can be many reasons for this, e.g., if a child is making a series of ongoing disclosures e.g. relating to CSA, while the case is ongoing. Other times cases can be delayed owing to an overly adversarial approach."

4.2.3. Child protection mediation

4.2.3.1. Understanding of the term "child protection mediation"

A large majority of participants (forty-three of the fifty-three participants) connected CPM with a number of positive words and phrases. According to one LR: *"I would welcome mediation and I think it would be hugely beneficial for all the parties involved and would assist parents in feeling their voice had been heard."* However, of this majority, nineteen of participants expressed that they are only in favour of CPM in certain situations; such as access disputes to children in the care of the State (pursuant to section 37 of the Child Care Act, 1991); details of voluntary care agreements (section 4 of the Child Care Act 1991); and applications for directions from the District Court (section 47 of the Child Care Act, 1991).

A relatively small number of participants indicated that CPM in Ireland is worth exploring as part of a pre-court proceeding mechanism process (two judges; one LR; one PSB). As reported by one judge, CPM is *"definitely worth exploring as part of the pre-trial process…. has been described as "civilised" way to achieve dispute resolution and lets parties retain control of the process."* Of all the participants, only one PSB reported that CPM in Ireland is worth exploring as part of the post-trial process, highlighting that *"…mediation has a role once this order has*

made where there may be problems with arranging access, problems between the parents and the social workers in carrying out the orders of the court. Mediation could assist parties on the ground trying to make the protection order work."

Several participants commented that CPM should never be used in serious cases (three judges; two LRs; one PSB), with one judge indicating that *"[child protection] mediation would be less likely the more serious the allegations and risks to the child's safety."* These participants expressly identified that the child protection issues should always be dealt with by a court; it is the judge that must determine the threshold issues of child protection:

> *"I would have a fundamental concern about a child protection process that does not, at minimum, reach a determination on whether alleged mistreatment of the child occurred. Without clarity on that key issue, how can an agreement be reached that promotes the child's safety? There may be aspects of child protection proceedings that are suitable to mediation, e.g. around access disputes, but on core issues such as threshold findings of harm/neglect, I do not think [it] will be possible to safeguard the best interests of the child through mediation where parents/carers do not accept harm has occurred."* LR

However, three LRs and two PSBs indicated that there may be a possibility for the use of mediation in child protection disputes, provided that child's voice is heard:

> *"I think such mediation is important and needs to be undertaken with care of the child/children. The voices of children need to be considered not just in the process of the mediation itself but in the design of the mechanism. I am supportive of a mechanism that holds the short to medium term safety interests of the child/children as the paramount consideration while minimising the long-term impacts for a child/children of living with the consequences of adversarial solutions."* PSB

4.2.3.2. Awareness of "child protection mediation" being used in Ireland

Overall, thirty-six of the fifty-three participants indicated that they were not aware of mediation being used in child protection disputes in Ireland. One of the reasons provided by the participants, was lack of information surrounding what CPM actually was and more importantly what it was not. For example, one judge and one LR explained that they were unable to respond to this question, as they were not fully aware of the facts or information. In fact, one judge expressed a desire for continued research stating: "*Child protection mediation*

needs to be explored. It is vital that Ireland continue to research whether child protection mediation can be seen as an alternative to adversarial processes. It allows the parties have control over the process."

However, a substantial proportion of participants pointed out that they were aware of mediation being used in certain child protection disputes, despite the lack of a legislative framework (seven judges; five LRs; three PSBs). Participants reported that, from their experiences, mediation in child protection cases was specifically used in child welfare conferences, within Dolphin House (DMD) and under section 37 and section 47 of the Child Care Act, 1991. According to one judge, CPM is often used within *"s. 37 & 47 issues and sometimes where the parents wish to enter into voluntary care agreements or wish to compromise care order hearings and enter into a consent order."* In addition, one PSB noted that they were involved in a form of CPM: *"I have been involved in a referral where a child was living with an aunt following a voluntary arrangement and the mother and aunt were trying to agree arrangements for the child's return to his family home."*

4.2.3.2. Potential advantages of mediation in child protection disputes

Overwhelmingly, forty-three participants indicated that CPM could potentially promote better outcomes for children and families (specifically when compared to adversarial processes). The participants identified several advantages of using mediation to resolve child protection cases.

i. *Non-adversarial nature:* This was the most frequently identified advantage by judges (five) and PSBs (three). As specified by one PSB: *"It will keep children at home and avoid the adversarial court system and the stigma of being in care."*

   Some LRs (three) also identified the ability to avoid adversarial processes and contested hearings as an advantage: *"Court-based proceedings result in a winner and a loser; this is impossible to remedy at a later date. if it is monitored and the mediators are sufficiently trained, in law and the procedures, it may be beneficial…."*

ii. *Empower the parties:* This was one of the main advantages acknowledged by the LRs (five): *"Studies show that allowing children to participate in proceedings concerning them have better outcomes. Also allowing families to have a greater role and control over their lives and families will lead to better outcomes."*

Some PSBs (two) also noted that mediation has the potential to empower the parents/parties. According to one participant, there is a clear power-imbalance for parents involved in child care proceedings, and the use of mediation may promote the voice of the parents and children:

> *"All research suggests that in almost all cases (except for very extreme and obvious situations), outcomes for children are better where on-going relationships with birth parents are fostered. In reality, the fraught nature of child-care proceedings can cause the alienation of often already vulnerable parents. Parents often feel demonised or that they are on trial. Access is often reduced to almost nothing after care-orders are made. The power balance is insurmountable for all but the few strongest parents involved. Mediation might promote an atmosphere that honours and listens to the voice of all parties involved, including the parents and children in a way that allows, where possible and desirable, for children to maintain strong family identities and on-going relationships with a parent who is encouraged and supported in being the best parent they can be."*

Furthermore, one judge noted that mediation has the capacity to empower the parents, but agreements must be made in the best interests of the child: *"Parental engagement in decision making is more conducive to empowering parents. But the voice of the child and the child's welfare interests must never be lost."*

iii. *Preserved working relationships:* Similarly, four judges and four LRs also found that the less adversarial nature of mediation preserves the working relationships between the parties and professionals. A judge elaborated on this point: *"Adversarial processes can impact on professional relationships between social workers,* GAL's, *LRs, and parents… [*it is*] better to avoid this detrimental situation in circumstances where parents are willing to be open and honest."*

iv. *Encouraging personalised agreement:* The survey results indicated that four judges, five LRs, and two PSBs stated that mediation encourages personalised agreements, allowing all parties the opportunity to addresses their concerns. As stated by one judge: *"An agreed solution is always better than an enforced solution."*

One LR elaborated on this point, stating:

> *"…it occurs to me that if all parties are involved in the Mediation process as stakeholders, they may take a greater interest in and responsibility for the outcome and this can only be of benefit to the children involved. If the parents have a real part to play (as opposed to defending proceedings where they are not on an equal footing with the CFA), they may accept responsibility for the process and play a more positive role in the outcome."*

4.2.3.3. Concerns about mediation in child protection cases

The participants also expressed concerns about the use of mediation in child protection cases (participants' responses are reflected in figure 4.10-12).

i. *Power-imbalance:* The largest cohort of participants mentioned that the power-imbalance between the child welfare agencies (such as the CFA) and parties is too stark for mediation (five judges; five LRs; four PSBs).

ii. *Skill/experience of the mediator*: The second highest category identified by the participants suggested that the experience and skill of the mediator are extremely important and vital to the success of the mediation process itself (four judges; five LRs; two PSBs). According to one judge: *"Mediators need to be skilled and accredited and balance inequalities, real or perceived…"* [See figure 4.10]

The survey participants were also asked what experience they would look for in selecting mediators in child protection cases. In selecting a mediator, the majority of participants would require mediators to have experience in handling child protection cases, in addition to the accredited mediation training courses available in Ireland (nine judges; seven LRs; nine PSBs). The participants also indicated that they would appoint mediators who have family law experience (five judges; five LRs; two PSBs).

iii. *Child safety:* Participants also reported that a concern they would have in relation to the use of mediation in child protection cases was that the agreements made might jeopardise the child's safety (four judges; three LRs; two PSBs).

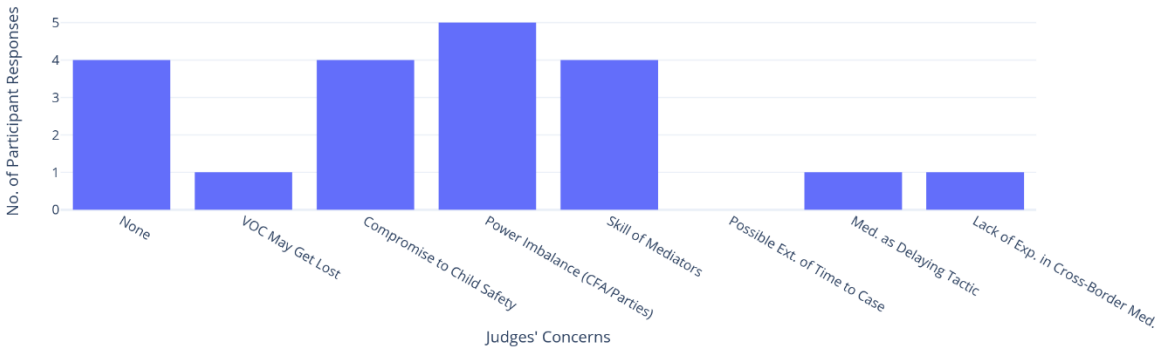

Figure 4.10: Judges' Concerns about Mediation in Child Protection Cases.

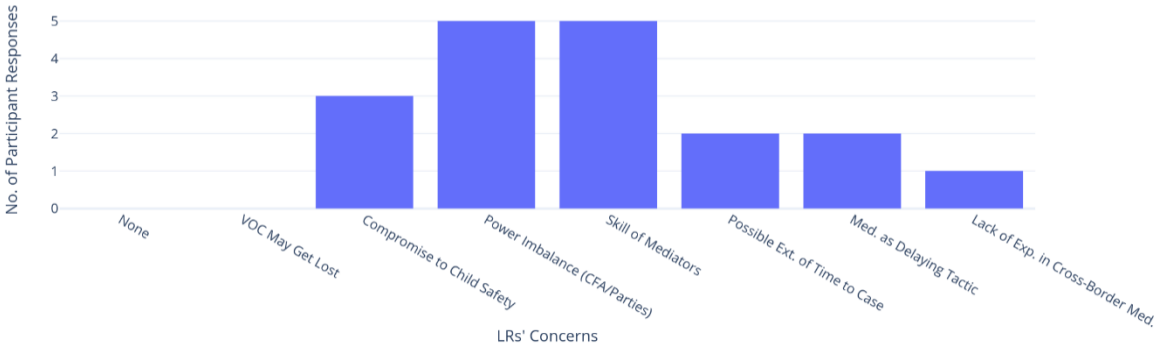

Figure 4.11: LRs' Concerns about Mediation in Child Protection Cases.

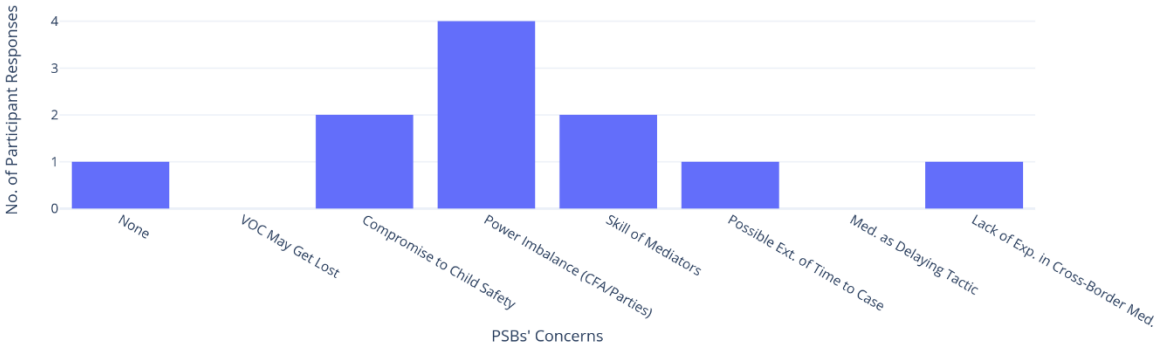

Figure 4.12: PSBs' Concerns about Mediation in Child Protection Cases.

4.2.4. Initial analysis from Phase 1

It is clear from the members of the Irish judiciary and national stakeholders (LR and PSB) that the use of mediation (in general) is readily seen as a viable alternative to adversarial processes in Ireland. Many participants connected mediation with positive words and phrases, most notably that it resolves disputes and that it promotes personalised agreements. Data from the survey respondents also indicated that the legal representatives are the most frequent cohort that initiates the discussion of the possibility of choosing mediation as a

dispute resolution option, closely followed by members of the judiciary. This is in keeping with the general statutory obligation placed on solicitors, as gatekeepers to the justice system, to discuss with their clients the menu of alternatives available for dispute resolution (Mediation Act 2017).

Regarding the child protection system, a number of research participants from Phase 1 indicated that a major drawback of the current Irish child protection system is the adversarial nature of the proceedings. This can often lead to contentious litigation and has the potential to exacerbate emotional harm (Buckley, 2003). Several research participants pointed out that the adversarial nature of proceedings can destroy working relationships, particularly between the parents and working professionals involved with the case, thus, negatively affecting the best interests of the child. This response indicates a need to explore whether alternative dispute resolutions, such as mediation, could be used to more appropriately manage certain aspects of child protection proceedings, thus encouraging and maintaining working relationships between all of the parties involved.

Interestingly many participants connected CPM with positive words and saw potential advantages; for example, that it could empower the parents, that the non-adversarial nature of the process could help de-escalate conflict, and that it could potentially improve working relationships between the parents and the child welfare agencies who often have a long road ahead. However, the majority of research participants were only in favour of the potential use of CPM in certain circumstances, such as access disputes, voluntary care agreements, pre-trial and post-trial process. In addition, many respondents highlighted various concerns that would need to be addressed before continued research is conducted. The majority of participants indicated that the power-imbalance between the parents and the child welfare agencies would be too stark for mediation, while others saw specific mediation training as a concern: how you could ensure a highly skilled mediator, capable of dealing with challenges of child care disputes. These concerns were considered more closely in Phase 2 of this research study. In addition, it is also important to stress that some research participants (fifteen of the fifty-three participants) also acknowledged that they had some experiences/knowledge of informal CPM type of interventions in the child protection context, despite the lack of legal architecture. This was further expanded on in Phase 3 of this research.

4.3. PHASE 2

Twenty-nine working professionals involved in CPM programmes in certain individual states of the USA and individual provinces in Canada took part in Phase 2 of this study. The general aim was to explore CPM programmes/systems in practice and address some of the concerns identified in Phase 1, namely the risk of power-imbalances among the parties, ensuring agreements are in the best interests of the child (focusing on the safety of the child), confirming suitability of a case to mediate, and guaranteeing well trained and properly skilled child protection mediators. The primary source of data is derived from working professionals' (engaged within the field of child protection cases) responses via surveys and semi-structured interviews.[176] While the overall aim of this study was to answer the research question, the researcher was conscious to provide the research participants with a platform to disseminate and share their own personal perspectives and lived experiences of CPM.

Table 4.2: Brief overview of participants in Phase 2

Jurisdiction	**State/Province**	**No. of Participants**
USA	Chicago, Illinois	5
	Tulsa, Oklahoma	10
	Tampa, Florida	1
	New York, New York	1
Canada	Ontario	6
	British Columbia	6
	TOTAL	**29**

4.3.1. Child protection mediation programmes in the USA

4.3.1.1. Chicago, Illinois[177]

4.3.1.1.1. *Specific issues to be mediated*

Pursuant to the Illinois Supreme Court Rule 99, all neglect, dependency, and abuse cases are eligible for mediation. However, in Cook County Child Protection Mediation and Facilitation Program (Illinois, Chicago) (hereinafter referred to as the Cook County Program), mediation

[176] For more information, see Chapter 3.4.2: Research Design: Phase 2.
[177] As previously mentioned (Chapter 3.4.2: Research Design- Phase 2), in November 2017, I interviewed five child protection mediators employed through the Cook County Program.

sessions are not intended to be discussions about the allegations that brought the family to the court's attention; rather, the session should focus on family engagement, improving communication, information sharing and relationship building. One interviewed participant indicated that the intended purpose of CPM is not the disposition of the case (which is for the courts' final determination); nonetheless, mediation can be used to encourage a collaborative approach to child abuse, neglect and dependency issues.[178] The participant elaborated on this point stating that:

> "*People often say 'how can abuse and neglect cases be mediated?' They are right; we do not mediate those allegations, that is for the judge. But there are people behind those allegations and families that have to deal with what is happening. That is what you saw today - the whole family saying ok this happened, now how are the children adjusting? What do the parents need? What do the foster parents need?"*

The Cook County Program has identified nine main categories that can be addressed at a mediation session. These categories are pursuant to the Circuit Court Rule 19A.19 that stipulates that "*the mediation program focuses on issues of return of home, visitation, placement stabilization, and any issues that are barriers to permanence."*[179] The categories include:

- *Case closure:* To remove barriers to closing the case, for example, transitioning from foster home to family home
- *Communication and relationships:* To promote open dialogue amongst the various parties, thus preserving a positive and healthy relationship
- *Placement:* To facilitate placement selection and stabilisation for the child during the adversarial hearing
- *Post-guardianship*: To address any issue that might occur when guardianship is closed
- *Permanency:* To ascertain whether the child will be returned to the care of their parents, or whether the child will be adopted or placed under guardianship

[178] According to Department of Children and Family Service (DCFS), "dependency" means the parent cannot care for the child. However, sometimes this happens for reasons that are not the parent's fault (Illinois Legal Aid Online, 2019).

[179] Rule 19A.19 was amended in July 2006 to comply with Illinois Supreme Court Rule 905. It currently states: "(i) (a) Pursuant to Supreme Court Rule 905(a), the CPM and Facilitation Program (Program) shall make mediation available in all cases involving the custody of or visitation with a child that are initiated under article II of the Juvenile Court Act of 1987. The program focuses on issues impacting temporary or permanent custody and visitation including but not limited to: placement, communication, relationship building and mending, preventing and resolving conflict, services, child welfare and court processes, and back-up planning for older caregivers. Any matter or conflict that may be interfering in any way with visitation or any custody determination is appropriate for mediation" (Circuit Court Cook County, 2018).

- *Reunification:* To alleviate barriers that must be overcome for the reunification of the family
- *Services:* To provide services for the child and the natural parents, for example, drug treatment, counselling services, or parenting classes
- *Termination:* To determine what termination of parental rights means to the parents and what their future path would look like post-adoption
- *Visitation:* To determine arrangements for visits with parents, siblings and extended family.

4.3.1.1.2. *Child protection mediation referrals*

A case can be referred to mediation at any point during the adversarial proceeding. The Circuit Court Rule 19A.19 states that *"all new cases shall be ordered to the Program for a facilitation session at the conclusion of the temporary custody hearing…"* Therefore, after a judge in the Child Protection Division has conducted a temporary custody hearing, anyone involved with the case, including the parents and their legal representatives, assigned social workers, court-appointed special advocates (CASA), amongst others can request that a judge order mediation. Ultimately, it is the judge that makes the final decision as to whether the case should be sent to mediation (Circuit Court Rule 19A.19, (3)). The judge can also decide to order the case directly to mediation. However, while the judge can order the parties to mediation, the parties do not have to enter into an agreement (figure 4.13).

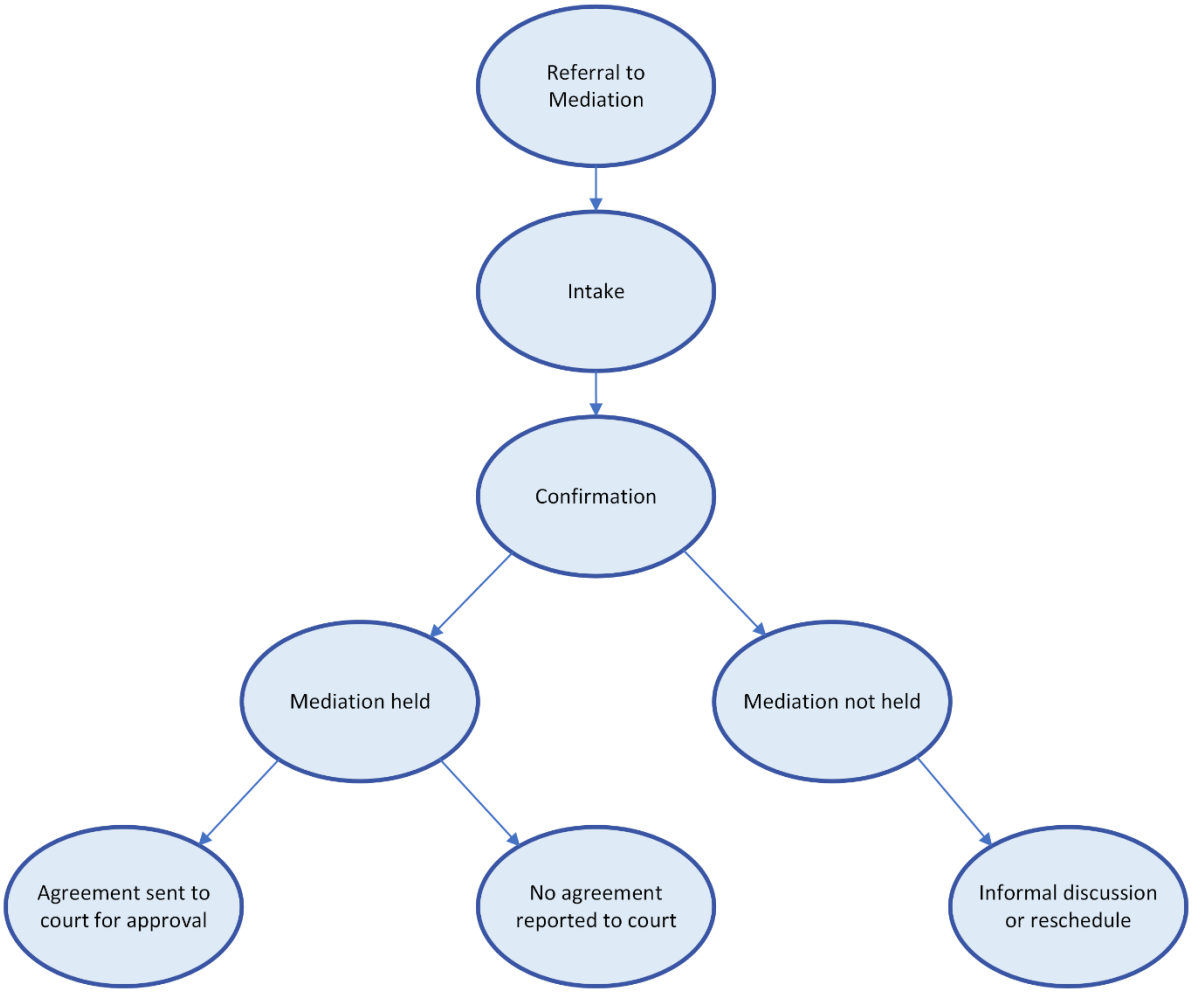

Figure 4.13: CPM Process Flow in the CPM and Facilitation Programme, Chicago (Illinois) (Shack, et al., 2010, p. 129).

The timing of mediation referrals in Cook County can be broken down into three stages:

i. ***Temporary Custody Hearing Stage:*** The first hearing to take place during the child protection process is the temporary custody hearing where the court determines if the child should be removed from their home.[180] After the temporary custody hearing, a case can be referred to mediation (Shack, et al., 2010). According to an interviewed participant from the Cook County Program, the benefits/opportunities of mediating after the temporary custody hearing stage are

[180] A temporary custody hearing must take place within forty-eight hours of the DCFS taking the child into custody protective custody. During the temporary custody hearing, the court must decide whether the child's safety would be at risk if they were returned home to their parents. Where the court determines that the child should be removed from the care of the parents, the court will appoint a DCFS worker, or an appropriate adult (to act as the child's temporary custodian). If the order is not granted, the DCFS must return the child after the 48hours are over.

that such mediation: *"Focuses on best interests, safety, and permanency" and serves to promote:*

- *Early engagement of parents/empowerment of parents*
- *Early discussion of court process and timelines*
- *Early discussion of concurrent planning*
- *Early delineation of roles and responsibilities*
- *Early engagement of other family members in the process*
- *Early identification of potential placements/relatives*
- *Early discussion/refinement of visitation plans*
- *Facilitation of relationship building/mending between any combination of parties*
- *Discussion of services for the child(ren) and parents*
- *Participation increases ownership of agreements"* (Reed, 2006).

ii. ***Adjudicatory Hearing/Dispositional Hearing:*** At the trial (the adjudication), the court must determine whether the child has been (or is likely to be) abused, mistreated or neglected. If the court decides that this threshold has been met (that the child has been, is being or is likely to be abused, mistreated or neglected) the court will advance to the dispositional hearing; this is the next stage in child protection proceedings and must be held within thirty days of the adjudication hearing) (Shack, et al., 2010). At the dispositional hearing, the court must decide whether it is in the best interests of the minor to return home to the care of his/her parents. The benefits/opportunities of mediating during/after the adjudicatory and dispositional hearing are that it facilities:

- *"Discussion of the possible terms for Dispositional order*
- *Discussion of the possible terms for orders of protection for reunification purposes*
- *Other benefits listed above under Temporary Custody Hearing"* (Reed, 2006).

iii. ***Permanency Hearing:*** If the child has not been returned home to his/her family home (i.e., family reunification has not taken place), the court will commence a permanency hearing; such a hearing shall subsequently take place at a minimum every six months in order to monitor the progress of the parents as they attempt to address the issues that brought their child to the courts attention (Shack, et al.,

2010). The permanency hearing must be held within twelve months of the temporary custody order. During the permanency hearing the court will set permanency goals which outline the steps everyone in the case should take during the next six-month period; this is to ensure that all of the parties are moving in the same direction. The benefits/opportunities of mediating during a permanency hearing are that it facilitates:

- *"Discussion of permanency options*
- *Exploration of caregiver's understanding and commitment to the permanency goal*
- *Discussion of placement in view of the permanency goal*
- *Discussion/identification of needs/services necessary for the achievement of the permanency goal*
- *Facilitation of relationship building/mending between any combination of parties*
- *Resolution of Custody Issues*
- *Discussion of "back-up plans" in cases moving toward adoption or guardianship*
- *Other benefits listed above under Temporary Custody Hearing"* (Reed, 2006).

4.3.1.1.3. *The mediation processes*

In the Cook County Program, the mediation sessions are facilitated by two mediators trained in child protection issues and mediation. Once a mediation referral is made by a judge, the mediation programme is contacted and two mediators are asked to present themselves at the courtroom and complete intake forms[181] with the parties who are present (this is facilitated by the co-location model) (figure 4.13).[182] At this stage, the date of the mediation session will be agreed upon; however, the mediation session must take place before the next court date. Prior to the commencement of the mediation session, the mediators will send out a confirmation letter to the expected parties and a brochure explaining the mediation process. In addition, the mediators will confirm attendance with each of the participants in advance of the mediation, usually the day before (Shack, et al., 2010).

[181] Intake forms include information about the parties, visitation information, issues that need to be discussed at the mediation session, and any existing child protection/domestic violence orders.
[182]The Cook County Program is located on the eighth floor of the Juvenile Court Center and, therefore, I in the same building as the court. See also, Chapter 2.6.2.1: Child Protection Mediation-History of CPM in USA.

The role of the mediators is to facilitate a conversation, create a space for information to be shared and educate and empower the families and the parties to come up with their own personalised agreement. One participant indicated that the sharing of information is one of the main advantages of CPM. The participants referred specifically to one case where lack of information/knowledge had a very negative outcome:

> *"…because of the lack of information, she* [the natural mother] *had planned a welcome home party because she thought her baby was coming home tomorrow after court. So, during the mediation session breaks, she is texting people saying that the party is cancelled. The mother was operating off no information or misinformation. The mother didn't understand until I explained to her that this person is taking care of your child and therefore, you want to create a working relationship with her, not one that is hostile because you never know when you are going to need her."*

The two mediators involved concentrate on revealing the needs and interests of the parties (as opposed to their rights), which ultimately aims to improve understanding. The mediators involved in the process do not provide an overall summary of the case. Instead, they provide a platform for each of the parties to share their own perspectives on the facts of the case, thus allowing the parties to achieve their own assessment.

Each mediation begins with an opening statement where the lead mediator describes the mediation process (such as the requirements of mediators' neutrality and confidentiality) to the parties, attorneys, and other participants that are present. Following this, each party presents a brief statement as to the issues that they would like to discuss during the mediation. The mediation starts with the family members; the reason being, according to one interviewed participant, is that "*it empowers the parties and to show them that they have a voice in this process.*" The mediators will outline the agenda (the main issues that will be discussed throughout the mediation session).

Generally, mediation sessions last approximately two and a half hours; however, the parties are requested to put aside three hours for the session (Shack, et al., 2010). The majority of mediations are completed in one session. However, on the agreement of the parties, a follow up session can occur in order to discuss unresolved issues (Shack, et al., 2010). Follow up mediation sessions can also be suggested by the mediators, or the parties themselves, to

discuss how effective the agreement is or to discuss any changes that have occurred to the family's situation. In addition, in certain circumstances, the court may refer the same child care case more than once to mediation as new issues and challenges arise (Shack, et al., 2010).

Once the parties come to an agreement through the mediation process, it is the court that is empowered to enforce the agreement. The judge will consider the "best interests" of the child before a mediation agreement is enforceable. A judge can only approve mediation agreements if they are safe, in the best interests of the child and adhere to statute.

4.3.1.1.4. *Who is present during the child protection mediation process?*

Generally, those who attend the mediation sessions include the parents, the legal representatives for the parents, the child, depending on their age/maturity, the legal representatives for the child (representing the child's expressed interests), the GAL[183]/Court Appointed Special Advocate (CASA volunteers) (representing the child's best interests),[184] the attorney for the state, the DCFS caseworker and their supervisors. Other participants can include foster parents, other family members closely involved in the child's life, therapists and school personnel. The actual list of participants will be determined on a case-by-case basis. The participants who were interviewed as part of this study indicated that getting everyone around the same table is very important. One mediator described the importance of this:

> *"Sometimes parents are meeting foster parents for the first time. There was a case where the mother met with the foster parents for the first time. You could almost feel the natural mother exhale when she realised that this is the lady that has my child. She can look her in the face and can ask her those questions that she wants to ask."*

[183] A GAL in this context is an attorney for the parties' child. The GAL is required to investigate the facts of the case, interview the child and the parties, and testify or submit a written report to the court regarding his or her recommendations in accordance with the child's "best interests". A GAL is appointed by a court of its own motion or on the motion of a party.

[184] A CASA volunteer gathers objective information and reports to the court regularly on the status of each child. This information is used by the court to determine if the child should be reunified with their family or prepared for adoption. The CASA volunteer works as a team member with the caseworker assigned by DCFS and the GAL assigned to the child. Each CASA volunteer is assigned to one case (usually one or two children) at a time and serves on that case until it closes.

4.3.1.1.5. *Advantages to using mediation in child protection cases*

The mediators interviewed at the Cook County Program identified several advantages to using mediation in child protection cases. One advantage, as recognised by all the participants, was that mediation promotes an open dialogue amongst the parties that helps everyone gain a better understanding of the case and each other's perspectives. One mediator stated:

> *"It is about having everyone together in the same place and at the same time. And more importantly, having everyone hearing the same information at the same time. So, ideally, this opens up a conversation…..for example, we are having those conversations where parents and foster parents can really talk."*

The mediators also reported that the non-adversarial nature of mediation was an advantage as it empowered the parties to reach their own solutions. One mediator stated that it gives the parents *"…the chance to be heard, the chance to finally speak about the things that they want to talk about."*

4.3.1.1.6. *Concerns about using mediation in child protection cases*

The only concern addressed by the participants was the possibility of power-imbalance between the child welfare agencies and the parents. However, the interviewees indicated that the skills of a good mediator would minimise this concern. The mediator's role is to facilitate the conversation and, therefore, he or she must be aware of certain issues, particularly power-imbalance, and needs to manage that. One mediator indicated: *"It is their conversation… but it is my job to facilitate that. So, if we need to break off, or if I need to take time to figure out how to manage the case to ensure there is no power-imbalance, I will. That is the mediator's role."*

4.3.1.1.7. *How the child's best interests and wishes are heard within child protection mediation*

As in court proceedings, the child's safety and best interests are of paramount importance. The interviewed mediators indicated that while there are legal definitions of "best interests" (Clark, 1988; Rompala, 2001), the term can be difficult to understand in practice with multiple parties. One participant expanded on this point saying:

> *"We use that term a lot, but each participant has their own thought as to what best interests mean. So best interests to the mother today was getting her children home. Best interests to the father was getting the daughter home. So best interests in terms of that global word comes layered because each person has their needs and interests to be met."*

According to 750 Illinois Compiled Statutes (ILCS) 5/506(3), in any proceedings involving *"support, custody, visitation, allocation of parental responsibilities, education, parentage, property interest, or general welfare of a minor or dependent child"*, the court can appoint an attorney to a child to serve in one of the following capacities:

1. *Attorney:* Represents the child's expressed interests
2. *GAL*: Represents the child's best interests, generally through reports but may be called as a witness in cross-examination
3. *Child Representatives:* Advocates for the child's best interests, after reviewing the facts and circumstances of the case. The child representative shall consider, but not be bound by, the expressed wishes of the child.

Pursuant to the Circuit Court Rule 19A.19 (iv) (a), if a child is to be included in the mediation, the mediators will interview the minor before the session begins to determine whether it is appropriate for the minor to participate in the session. Ultimately, the mediator decides whether the child will participate and to which the child will participate in the mediation process.

4.3.1.1.8. *Training of child protection mediators*

The Circuit Court Rule 19A.19 (ii) (b), states that:

> *"All mediators hired after the adoption of this rule shall successfully complete a minimum 40-hour mediation training skill program conducted by the Center for Conflict Resolution or comparably recognized training program, or provide verifiable evidence of prior successful completion of such a program and recent mediation experience acceptable to the Presiding Judge of the Child Protection Division"* [emphasis added].

In addition, the participants also indicated that, mediators should have a thorough understanding of the child protection system. This is line with the Circuit Court Rule 19A.19 (ii) (b) which states: *"Mediators shall also have knowledge and/or experience in the workings of the local child protection and juvenile court systems, the dynamics of child welfare administration, and local community resources."*

4.3.1.2. Tulsa, Oklahoma[185]

4.3.1.2.1. *Specific issues to be mediated*

The development of CPM in Tulsa Oklahoma originally occurred through the Juvenile Court Mediation Program in 2016.[186] As this programme is relatively new, the issues that can be mediated are quite restricted. In Tulsa County, mediation is primarily used to achieve permanency in cases, especially when a motion has been filed to terminate parental rights.[187] As such, the mediation programme, used in Tulsa County, is defined as Permanency Planning Mediation.[188]

As reported by several interviewed participants, the reason that Tulsa County primarily focuses on utilising mediation in termination cases is that there is such a high volume of termination of parental rights cases going to trial, which is (1) "clogging" up the jury docket; and (2) very costly for the state. According to a Tulsa County Juvenile court mediator:

> *"We are trying to unclog the jury docket. We have so many cases set for a jury because, typically, everyone wants a jury trial. But we don't have time or room to get everyone in for a jury trial. So, the courts will set a mediation, in the attempt to try and resolve these cases. Eighty percent of these terminated cases are being resolved through mediations. There are really high success rates, and I'm not saying that this means that the parents relinquish their rights, but we reach*

[185] As previously mentioned (Chapter 3.4.2: Research Design- Phase 2), between October- December 2017, I interviewed/surveyed nine working professionals involved in child protection disputes/mediations in Tulsa (Oklahoma), including members of the judiciary and an in-court mediator at the Tulsa County Juvenile District Court; attorneys from Tulsa Lawyers for Children; GALs/C.A.S.A workers; researchers and employees at the Parent Child Centre of Tulsa; and committee members and a director of the Child Protection Coalition.
[186] Chapter 2.6.2.2.2: Child Protection Mediation- Tulsa (Oklahoma).
[187] A motion to terminate can happen at any stage of a case. It also depends on the child themselves; if the child is under four, the parents only have 6 months to correct conditions before the state shall file a motion to terminate; if the child is over the age of six, then there is a 15-month limit placed on the parents to correct conditions before the state shall file a motion to terminate.
[188] Permanency mediation addresses issues involved in child care and protection cases, such as guardianship and termination of parental rights proceedings.

an agreement, or the state agrees to drop the motion to terminate and gives the parents more time. We reach a lot of agreements in mediation, and this is a good thing."[189]

However, the interviewed participants also acknowledged that the National Court for Juvenile and Family Court Judges (NCJFCJ) is encouraging Tulsa County to consider mediation earlier in a case, for example, right after the removal of a child from their home. An interviewed judge in Tulsa County elaborated on this point: *"They are pushing for an up-front, immediate mediation process to discuss all the issues in a case, such as what visitation rights do the parents have; what services and treatments are needed for the parents and the child."* However, during the interview, the mediator of Tulsa County Juvenile Court Mediation Program stated that while there is a need for the mediation programme to grow, a shortage of staff (mainly the attorneys and assistant district attorneys) and lack of days that the court can give to mediation are some of the reasons why the programme is struggling to grow.

4.3.1.2.2. *Child protection mediation referrals*

Mediation can be initiated at any time during an adversarial hearing, though it may address only permanency planning issues. Anyone involved with the case, including the parents and their attorneys, assigned social workers, a court-appointed special advocate (CASA) amongst others can request that a judge order mediation. The judge may also decide to send the case directly to mediation. However, it must be noted that the final decision to refer a case to mediation lies with the judge. According to one member of the judiciary that was interviewed: *"There are times when there is nothing to be mediated, and I would refuse to order mediation. I would also refuse to order mediation in serious deprived cases where it would not be in the child's best interests to have mediation, and it is better to go straight to determination."*

In Tulsa County, when a referral is made by the court to attend mediation, the mediator would receive an email from the case manager with the request, and the date for which the mediation is scheduled. The mediator would then prepare an "Order of Referral to Permanency Planning Mediation", which the judge would need to sign. The order of referral states that the case has been ordered to mediation, the name of the deprived child, a list of participants ordered to

[189] In Tulsa County Juvenile Division, the judicial proceeding regarding the termination of a parent's rights to a child is decided by a six-person panel of jurors. However, a party can waive their right to a jury trial. Generally, it is a non-jury trial where a court is determining whether the child is deprived, in need of supervision, or delinquent (Tulsa County, 2019).

attend, the date, time and location of the mediation (must take place before the next hearing date) and a brief description of the mediation process.

4.3.1.2.3. *The mediation processes*

In Tulsa County, the mediation sessions are facilitated by one mediator trained in child welfare issues. Pursuant to the Supreme Court of Oklahoma, ADR System Manual, there are five stages to the mediation process, which include:

- *Introduction to the ground rules and initial statement of intentions:* The mediator welcomes all parties to mediation. At this stage, the mediator's opening statement is important as it clarifies the mediator's role, establishes credibility, and sets the tone for the mediation process. The mediator will show the parties to their seats. The positioning of the parties is crucial for effective communication and for the mediator to retain control over the process. According to one interviewed participant, generally, the parents would sit to the left of the mediator, and the assistant to the District Attorney sits to the right of the mediator. The mediator would then explain the process, clarify ground rules and have the parties sign a "Consent to Mediate Form".
- *Problem Determination:* The mediator would ask each party to explain the situation as they see it. In Tulsa County, the mediator would always start with the parents as this, according to an interviewed attorney, *"gives them that sense of control that they are leading the discussion; that they are the primary participant in the case."* The mediator would then ask the parents' attorneys to speak, followed by the assistant to the district attorney, the child's attorney and any other parties present.
- *Generating of Alternatives:* The mediator asks each party to list the possible alternatives or options that would help resolve the situation.
- *Selection of Alternatives:* The mediator would encourage the parties to select the alternative resolution that appears to be workable. If an alternative is selected, the mediator would then assist the parties in planning a course of action to implement the alternative resolution selected.
- *Conclusion/Agreement:* If an agreement is reached, the mediator would summarise the agreed terms, write down the agreement on the "Mediation Agreement Form" and ask the parties to sign and date the mediated agreement. A copy of the Agreement shall be presented to the court by the attorney for the child or the assistant district

attorney prior to the next court hearing. It is at the discretion of the judge to sign/approve the Agreement, thus making it enforceable.

4.3.1.2.4. *Who is present during the child protection mediation process?*

It is the judge that orders a case to mediation to discuss permanency issues. However, while participation in court-ordered mediation is mandatory, there is no obligation on the parties to enter into an agreement following mediation. The "Order of Referral to Permanency Planning Mediation" indicates that all parties, participants, stakeholders, and counsel shall proceed in good faith to resolve the issues. This includes, but is not limited to the parents, the attorneys for the parents, the child (if appropriate as deemed by their counsel), the attorney for the child (who represents the child's "expressed interests"), a court-appointed specialist advocate (CASA) (who if appointed, represents the child's "best interests"), the attorney for the state; the caseworker and the caseworker's supervisors. Other participants can include foster parents, other family members closely involved in the child's life, therapists, and school personnel. The actual list of participants will be determined on a case-by-case basis.

4.3.1.2.5. *Advantages to using mediation in child protection cases*

The interviewed participants in Tulsa County identified several advantages to using mediation in child protection/deprived cases. One of the main advantages was that mediation allows the parties to reach a personalised agreement in the best interests of the child, in an expedited manner. By utilising mediation, according to one participant *"you are going to expedite permanency in the cases (the ones that are successful) by probably up to a year."*

The majority of the participants also indicated that it is healthier for the parents to come to their own resolution rather than having a decision enforced upon them by the court. Another identified advantage was that mediation may help promote an open discussion amongst the parties, and allows the parents understand what was happening and take responsibility for their actions and future decisions. One participant revealed:

> "*The primary benefit is helping the parents understand why we are at the position that we are at, and why it is important to their child that they do not force a trial because in that situation it means that the children might have to testify. It is an opportunity to explain the additional trauma that is associated with it. A lot of cases, it is explaining to the parents what the options*

are even if termination occurs. This is one of the reasons why we involve foster parents because a lot of times these foster parents have been involved and they get the opportunity to discuss what are they able and willing to do in order to maintain communication. So, most mediations are trying to explain and express to the parents why it is best to not move forward with the trial and what advantages are there to an amicable resolution to the permanency."

4.3.1.2.6. *Concerns about using mediation in child protection cases*

All of the participants indicated that they had, generally speaking, no concerns with using mediation to achieve permanency in cases, on the basis that the mediation process was used correctly and appropriately. The only concern identified was that the mediator must attain the appropriate training and have the necessary knowledge/experience of child protection/deprived cases: *"The success of the program depends on the skill of the mediator, mainly their personality, their training and their ability to have a tight structure in the process, while allowing for room/breathing space for each parent to say what they want."*

4.3.1.2.7. *How the child's best interests are considered and wishes are heard within child protection mediation*

Generally, in the mediation process, the attorney for the child represents the child's "expressed interest". Depending on the age and maturity of a child, the child is encouraged to attend the mediation process. If the child is pre-verbal, the attorney represents the child's "best interests". All the interviewed participants indicated the importance of the child being heard in the mediation process. According to one participant: *"In order to have a successful mediation, you need the child's voice to be involved."* The participants also disclosed that hearing the voice of the child can have an enormous impact on the outcome of the case:

> *"I have had several children come to mediations, and they have told their parents that they do not want to return home… This has a massive impact on the parents because it makes the decision making for the parents a whole lot easier. It's hard, and it's brutal, but sometimes it needs to be told. Then we have had children come in into the mediations saying that they do not want their parents' rights terminated. So, hearing what the children want can alter/change the assistant district attorney's position on the direction that the case should go. Children being in mediation is helpful, but if they are not there, the attorney will represent their expressed interest."*

4.3.1.2.8. *Training of child protection mediators*

In compliance with the Tulsa County Juvenile Division Policies and Procedures (2019), permanency mediators shall be trained and certified in compliance with the rules and regulations set forth by the Administrative Office of the Oklahoma Supreme Court. In Oklahoma, there are two types of mediators and training:

- *Early settlement volunteer:* A certificate to mediate was first introduced under the Oklahoma Dispute Resolution Act. Initially, qualification is obtained through state certification. Section A (1) of the Oklahoma Dispute Resolution Act stated that a programme coordinator will be allocated a volunteer and will work directly with the volunteer, allowing the volunteer to observe mediations and for the volunteer to be observed while conducting mediation sessions. The initial certification is valid for one year and after that, the qualification must be reviewed and reapproved by their programme director. In addition, the mediators must volunteer for the programme for a minimum of ten hours (section B (1)). However, the family certification requires a minimum of forty hours of annual service as a volunteer for the programme (section D (1)).
- *Mediator, in general:* alternative qualifications for mediating can be achieved under the District Court Mediation Act or the Choice in Mediation Act. Both Acts provided detailed guidelines as to the appropriate training that is required.

The participants also indicated that in addition to the required training, mediators should understand child protection proceedings:

> *"Mediators need to have a knowledge of the child welfare system and I absolutely think that they have to have experiences in the child welfare arena. They do not have to understand the detailed mechanics of the law, but they have to have a general idea of what best practices in child welfare policies are, and what laws govern child protection issues."*

4.3.1.3. Tampa, Florida[190]

4.3.1.3.1. *Specific issues to be mediated*

In Florida, mediation can be initiated at any time during a dependency (child protection) proceeding by a juvenile court judge; provided it is in the best interests of the child[191] As such, the mediation programme in Florida is known as child dependency mediation. The phrase "child dependency" describes cases in which a child is before the court, and where a public (Department of Children and Families (DCF)) or private agency is also involved.[192]

According to Florida's child dependency mediation literature, mediation can be beneficial at various stages throughout child protection proceedings (Edwards & Baron, 1995). The difficulty with the process is to maintain the programme guidelines, in order to allow for a productive resolution, as early as possible without *"compromising the effectiveness of any of the parties or participants who need sufficient time to be adequately prepared for mediation"* (Firestone, 1997, p. 225). According to the Eighth Judicial Circuit of Florida, the following issues could potentially be mediated:

- *"Case planning*
- *Custody*
- *Visitation*
- *Shared parental responsibility*
- *Temporary and long-term placement*
- *Foster care*
- *Relative placement*
- *Non-relative placement*
- *Shelter care*
- *Family dynamics*
- *Parent education*
- *Available services to families*

[190] As previously mentioned (Chapter 3.4.2: Research Design- Phase 2), in December 2017, I interviewed one mediator from My Florida Mediator (Tampa, Florida).

[191] Chapter 39 of the Florida Statues, Rule 39.4074 (2) states: "A court may refer the parties to mediation. When such services are available, the court must determine whether it is in the best interests of the child to refer the parties to mediation."

[192] According to Chapter 39 of the Florida Statutes a "private agency" is a licensed or state approved agency whether domestic or international that has been given legal authority to place a child for adoption.

- *Family reunification*
- *Termination of parental rights*
- *Adoption"* (Circuit8, 2016).

An interviewed participant indicated that you could:

> *"…mediate a case at any point in time. In many jurisdictions, the majority of cases might be the pre-adjudicatory type of phase, i.e., before the court has made a determination that the child has been abused and neglected and the parents would be asked to admit to the allegations or not and if they do, they would resolve adjudicating as well as the dispositional plan. But there are some areas of a case that would avail of mediation very early on, as early as when the child is removed. This type of mediation is mainly about where are we going to place the child when it is removed. But, those types of cases are mainly about placement and not much more, but it is often too early in the case to decide anymore. And then there are times where mediation is used in the termination of the case."*

4.3.1.3.2. *Child protection mediation referrals*

Any party involved with the case can request a court to refer the parties to mediation in accordance with Chapter 39 of the Florida Statutes (section 39.4075 (1))[193] and rules and procedures developed by the Supreme Court. to order mediation in a child protection. The judge may also decide to send a case directly to mediation. At this point, the court mediation programme would take the case and select a certified mediator (i.e., a Florida Supreme Court certified dependency mediator), to mediate the case. Chapter 39 of the Florida Statutes (Proceedings Relating to Children), section 39.4075 states that:

> *"(2) A court may refer the parties to mediation. When such services are available, the court must determine whether it is in the best interests of the child to refer the parties to mediation."*

While participation in court-ordered mediation is mandatory, there is no obligation on the parties to enter into an agreement.

[193] Chapter 39 of the Florida Statutes, section 39.4075, states: "At any stage in a dependency proceeding, any party may request the court to refer the parties to mediation in accordance with Chapter 44 and rules and procedures developed by the Supreme Court."

4.3.1.3.3. *The mediation processes*

All dependency mediations are subject to a screening criterion to determine if mediation would be an appropriate alternative for the dependency case. Throughout the mediation, it is the role of the mediator to screen and determine if all parties are effectively able to evaluate the best interests of the child; whether domestic violence is such an issue that the use of mediation would risk the safety of the parties;[194] and whether all parties have the capacity/competency to effectively participate in the mediation process.

Mediations are a privileged and confidential process, and therefore, discussions cannot be used against the parties in a court of law or disclosed to anyone who did not participate in mediation; subject to the exceptions noted in Chapter 44 of the Florida Statutes. If mediation is ordered in respect of a case, a notice of mediation will be sent to all parties who are expected to attend the mediation session; the notice explains the rules and regulations and the time and place of the mediation. This is line with the Florida's Rules of Juvenile Procedure, Rule 8.290 (d) - Referral:[195]

> *"(d) Except as provided by this rule, all matters and issues described in subdivision (a)(1) may be referred to mediation. All referrals to mediation shall be in written form, shall advise the parties of their right to counsel, and shall set a date for hearing before the court to review the progress of the mediation. The mediator or mediation program shall be appointed by the court or stipulated to by the parties. If the court refers the matter to mediation, the mediation order shall address all applicable provisions of this rule. The mediation order shall be served on all parties and on counsel under the provisions of the Florida Rules of Juvenile Procedure."*

Any party or participant ordered to mediation has ten days within which to make a written objection to the court about the order of referral (See Florida's Rules of Juvenile Procedure, Rule 8.290 (g), objection to mediation).

[194] While there is no prohibition on the use of mediation in dependency cases that include domestic violence issues, the imbalance of power among parties and safety concerns in such cases may make mediation inadvisable.
[195] In addition to Florida Statutes which are passed by the state Legislature and signed into law by the Florida Governor, the Florida Courts have also adopted rules to implement the laws passed by the legislature; such as Rule 8.290. Dependency Mediation that is the primary child protection court rile that governs child protection in Florida.

Generally, the mediator will start the process by identifying the specific issues that are to be mediated. The mediator facilitates the conversation, allowing the parties to potentially reach a personalised agreement. In Florida, the mediator may meet with individual parties or with the group as a whole. Generally, mediation sessions last approximately two to four hours or more depending on the number of participants and the issues to be mediated.

If a total or partial agreement is reached, all the parties will sign a written agreement prepared for review and approval of the agreement by the judge. See Florida's Rules of Juvenile Procedure, Rule 8.290 (o) - Report on Mediation:

> *"(1) If agreement is reached on all or part of any matter or issue, including legal or factual issues to be determined by the court, the agreement shall be immediately reduced to writing, signed by the attending parties, and promptly submitted to the court by the mediator with copies to all parties and counsel"* [emphasis added].

The case is returned to the court if an agreement cannot be reached. See Florida's Rules of Juvenile Procedures, Rule 8.290 (o):

> *"(2) If the parties do not reach an agreement as to any matter as a result of mediation, the mediator shall report the lack of an agreement to the court without comment or recommendation."*

The agreement is then presented to the court. Generally, the court will accept and approve all the decisions that were made during the mediation, and the agreement will then become a court order. See Florida's Rules of Juvenile Procedure, Rule 8.290 (p) - Court Hearing and Order on Mediated Agreement:

> *"On receipt of a full or partial mediation agreement, the court shall hold a hearing and enter an order accepting or rejecting the agreement consistent with the best interests of the child. The court may modify the terms of the agreement with the consent of all parties to the agreement."*

The mediation process may last between two and four hours, though, it may take longer depending on the number of participants and complexity of the issues to be discussed (Supreme Court of Virginia, 2002).

4.3.1.3.4. *Who is present during the child protection mediation process?*

Florida utilises a multi-party mediation process. Therefore, CPM typically involves the parents and their attorneys (if represented), the Department of Children and Families (DCF) caseworker and attorney, the GAL (if appointed) to advocate for the best interests of the child, foster parents, potential adoptive parents, extended family members and friends, and others working with the family. The child may also participate if ordered by the court or if agreed to by all the parties when not prohibited by the court (Circuit8, 2016).

The order from the court for mediation specifies who should participate in the mediation session. Appearances are covered in the ADR Handbook (ADR Center, 2018). Pursuant Florida's Rules of Juvenile Procedure, Rule 8.290 (l) - Appearances:

> *"(1) Order Naming or Prohibiting Attendance of Parties. The court shall enter an order naming the parties and the participants who must appear at the mediation and any parties or participants who are prohibited from attending the mediation. Additional participants may be included by court order or by mutual agreement of all parties."*

4.3.1.3.5. *Advantages to using mediation in child protection cases*

Several advantages were identified through academic research and interviewing research participants. According to the interviewed participant, mediation is about engaging all of the parties in a *"mutual problem sharing process that tries to find an outcome that the parents find acceptable."* From the participant's professional experience as a certified mediator for over thirty years, *"these parents still love their children. More often than not it is their own personal problems which they are going through are the cause of their abusiveness, not lack of love toward the child."* Therefore, it is essential to facilitate the crafting of a personalised plan that all the parties, including the parents, the child welfare agencies, the GAL, and the court would find acceptable.

Another main advantage of CPM is that it expedites permanency for the child. The interviewed participant reported that:

> *"One of the big factors, especially if used earlier in a case, is that it speeds up the process. Something we know with child abuse and neglect is having children in the system for a long*

period of time without parents getting the help they need or without any permanency plan is never a good thing. Research has indicated that the children and family are more likely to get services through mediation. The outcomes are more likely to be custom tailored to the needs of the child, than just a straightforward type of plan. There is less likelihood of re-litigation and parents are more likely to comply with an agreement that they participated in than one that is imposed on them."

4.3.1.3.6. *Concerns about using mediation in child protection cases*

Despite the persuasive arguments favouring mediation, there were also some concerns that were raised about the use of mediation in child protection cases, especially where there are issues of:

(1) *Power-imbalance between the parents and the state:* The state has a significant advantage over the parents for a number of reasons: (a) their near limitless resources to pursue a case; (b) their vast experiences and expertise in dealing with child protection disputes; (c) the fact that the parents are often the respondents in a case who are negotiating against the state to continue to care for their own child (Firestone, 2009).

It is the role of the mediators to effectively address these issues, and create a safe space for both the parents and child protection workers to successfully collaborate in a positive manner (Firestone, 2009). According to the research participant:

"To me, one of the most important things is that the mediators truly honour the spirit of what mediations are supposed to be about - empowerment to self-determine part of this process. A good mediator is not going to let the state force the parents; a good mediator is going to say to the parents if you don't want to do what the state is telling you to do, you can talk to the judge and plead with the judge - which would you rather do, have a discussion or have one side force the other side. Mediators need to conduct the process in such a way that allows the parents to have an equal voice in the process. And that the parents understand the process - some mediators start with a big complicated statement and many parents have no idea what they are talking about - a good mediator not only makes sure that the parents have a voice but also that the parents and all the parties understand what is going on. How you get good mediators, is to have good training and good procedures in place."

(2) *Imbalances related to domestic violence:* Domestic violence raises concerns about the safety of everyone involved as well as the imbalance of power between the parents (Firestone, 2009). The research participant indicated that "w*e know that domestic violence allegations are at a much higher occurrence in child abuse and neglect mediation than they are in family mediations, and therefore, clearly there are concerns in that area as well."* [196]

The AFCC Model Standards of Practice for Family and Divorce Mediation (2000) outlines that not every case is suitable for mediation and as a result "a *mediator should make a reasonable effort to screen for the existence of domestic abuse prior to entering into an agreement to mediate. The mediator should continue to assess for domestic abuse throughout the mediation process (Standard X(C)).*"

The participation of the GAL and child protection agency changes the dynamics when domestic violence is present as either may have informed the court of serious domestic violence concerns which might deter the judge from referring the case to mediation in the first place. In addition, the GAL and child protection agency representative can serve to inform the mediator of any lessor domestic violence concerns as well as be a voice on behalf of the child when a parent may be reluctant to confront the other parent who may be a spouse or child batterer.

In addition, the mediator should safely terminate a mediation session if they believe that anyone's safety would be endangered or that there is a significant imbalance of power between the parties that cannot be carefully remedied.

[196] This concern can also be seen in Ireland where the Mediation Act 2017 specifically excludes from its scope disputes which fall under the Domestic Violence Act 2018.

4.3.1.3.7. *How the child's best interests are considered and wishes are heard within child protection mediation*

In Florida, the court shall also determine whether or not a child should be present during the mediation session. As stated in Florida's Rules of Juvenile Procedure, Rule 8.290 (l) (4) – Appearances of Child:

> *"The court may prohibit the child from appearing at mediation upon determining that such appearance is not in the best interests of the child. No minor child shall be required to appear at mediation unless the court has previously determined by written order that it is in the child's best interests to be physically present. The court shall specify in the written order of referral to mediation any special protections necessary for the child's appearance."*

According to the interviewed participant:

> *"The hope is that there is a GAL that has spoken to the child ahead of the mediation - a good GAL should be a voice for the child as well as best interests for the child (the GAL is not representing the child, but they should at least be relaying the child's wishes). Also, it important to note that it varies from state to state whether a GAL is appointed."*

If the court is silent, the parties along with the mediator can decide whether they want to allow the child to participate. As explained by the participant, deciding whether or not to invite a child to participate in the mediation depends on a variety of things; *"in addition to age and maturity, the level of abuse and neglect should come into account, e.g., a case of child sexual abuse I couldn't imagine the child participating with the perpetrator. It is relatively infrequent that the child would directly participate, but we do have rules in place."*

4.3.1.3.8. *Training of child protection mediators*

In respect of training and qualifications, Florida is considered to have one of the most rigorous sets of guidelines for child protection mediators. A trained child protection mediator is referred to as a 'Florida Supreme Court certified dependency mediator'. Florida Supreme Court has established minimum standards and procedures for qualifications, certification, professional conduct, discipline, and training for mediators and arbitrators. According to Florida's Florida Rules for Certified and Court-Appointed Mediators Part I Mediator

Qualifications, to qualify as a Florida Supreme Court mediator, the following requirements must be satisfied:

- The candidate must complete forty hours of a Supreme Court certified dependency mediation training programme. This includes the opportunity to engage in simulations/role-play as a mediator and as a disputant: See Florida Supreme Court Administrative Order 17-25
- The candidate must hold a master's degree
- The candidate must observe four years' experience in family and/or child protection (dependency) issues or be a licensed mental health professional with at least four years' practical experience[197]
- The candidate must observe four dependency mediations conducted by a certified dependency mediator and conduct two supervised dependency mediations: (Supreme Court of Virginia, 2002). See Rule 10.100 (e) (3).[198]

According to the interviewed participant, mediation training is essential to ensure a successful mediation programme. When mediation first began in Florida, there was a debate as to whether there needed to be specific CPM training, or whether family mediation training would suffice. The participant outlined that:

> *"The first training we did in Florida was not a very long training session, and we thought we didn't need to make the training any longer because we were dealing with experienced divorce mediators. The feedback we got was that this training module was so inadequate and the more we looked at the extensive training it became apparent that we needed a five, full day, 40hr, training to cover everything that we needed to do."*

[197]According to the ADR Handbook, Rule 10.105 (b), mediation experience points shall be awarded in accordance with the following schedule: One point per year will be awarded to a Florida Supreme Court certified mediator for each year that mediator has mediated at least 15 cases of any type. In the alternative, a maximum of five points will be awarded to any mediator, regardless of Florida Supreme Court certification, who has conducted a minimum of 100 mediations over a consecutive five-year period.

[198] According to the ADR Handbook, Rule 10.105 (c), mentorship points shall be awarded in accordance with the following schedule: Ten points will be awarded for each supervised mediation completed of the type for which certification is sought and five points will be awarded for each mediation session of the type for which certification is sought which is observed.

4.3.1.4. New York, New York[199]

4.3.1.4.1. *Specific issues to be mediated*

The New York City Child Permanency Mediation Program started as a test-pilot in 2002.[200] The mediation programme in NYC was referred to as Child Permanency Mediation, however according to one interviewed participant: *"I always wondered why they chose that terminology; child permanency mediation - everyone else refers to it as child protection mediation. The goal is whatever the resolution of the case might be, the child should reach permanency."* The aim of the programme was to provide children with stable, permanent, and safe homes as quickly as possible through the provision of quality mediation to families with child abuse and neglect issues that require Family Court intervention. The cases that were often referred to child permanency mediation tended to be cases that had not responded to traditional management approaches. Cases that were most commonly referred to child permanency mediation dealt with issues such as custody and access. As reported by one participant, child permanency mediation was never used to *"mediate whether abuse or neglect had taken place; that is for the court to determine that. However, pretty much anything else could be mediated (a wide range of issues)."*

As stipulated in the NYC Child Permanency Mediation Program Evaluation (2011), several judges and court attorney referees[201] indicated that cases that are often referred to mediation generally have underlying issues that need to be given the time and space to be discussed and worked out. Some examples of cases frequently sent to mediation include:

- *"Cases that have issues around permanency that need to be resolved*
- *Cases involving a child ageing out of care*
- *Custody cases*
- *Termination of parental rights cases where there might be the hope of a voluntary surrender with visitation*
- *Cases where there is tension between a parent and a caseworker*

[199] As previously mentioned (Chapter 3.4.2: Research Design- Phase 2), in December 2017, I interviewed one coordinator of the New York City Family Court Alternative Dispute Resolution. Unfortunately, in 2011 the NYC Child Permanency Mediation Program ended as a result of a financial crisis in the court system. For this reason, I refer to the programme in the past-tense.
[200] Chapter 2.6.2.2.4: Child Protection Mediation- New York, New York.
[201] Court Attorney/Referees are quasi-judicial officers that are granted the power to hear and decide cases upon the consent of the parties.

- *Cases with visitation issues, including disagreement between parents and foster parents"* (Thoennes & Kaunelis, 2011, p. 36).

In contrast, the NYC Administration for Children's Services (ACS) caseworkers[202] had various different opinions on the type of cases that were appropriate for mediation. One caseworker was of the opinion that kinship care placement and custody cases were served best by mediation, while other caseworkers indicated that certain types of cases might achieve better results if they were sent to case advocates who can provide constant support to all parties involved in the case (e.g., cases where parties disagree about visitation) (Thoennes & Kaunelis, 2011). According to an interviewed participant, mediation can have very positive results in resolving foster placement issues because it can improve communication and promote positive working relationships:

> *"An example of a case where it really worked was where a child was in a foster placement (the mother had some form of mental health difficulties). The natural mother had a very good relationship with the foster mother and visited the child regularly. The foster mother wanted to adopt the child; and the mother's rights would be terminated. So, in the course of the mediation, the foster mother and the natural mother had a chance to talk, and it turned out that the mother would always be a part of the child's life and the reason the mother wouldn't surrender her rights was because in the past, she had surrendered her rights to two other children and they were very angry for "giving up" on them. So, she felt obliged to fight for this child. This all came out during the mediation. She realised how it was a totally different situation."*

4.3.1.4.2. *Timing of child protection mediation referrals*

The vast majority of referrals came from presiding family court judges or referees. However, anyone involved in child welfare cases, including the parents and their attorneys, assigned social workers, special advocates, amongst others, can request that a judge order mediation. Ultimately, it is the judge that has the final decision. One participant reiterated this point stating that *"anyone can request it but it is ordered by a judge."* The participant continued,

[202] In NYC, the ACS is the local service district which provides child protection services such as foster care, adoption and child preventive services (similar to child welfare agencies, designed to keep children safely at home).

indicating that one of the most crucial elements in a successful CPM programme is judicial support:

> *"There was many judges and referees that were very enthusiastic and then there was other judges that wouldn't touch it with a ten-foot pole."* She continued by saying *"…my considered opinion is that nothing could really have been done to change the judge's opinions towards the use of mediation in these cases. After years of trying to encourage people to use mediation, I think some judges believe that "this is my turf" i.e., these are my cases. I have been entrusted with this responsibility and I won't let anyone else have it (this sense of control)."*

4.3.1.4.3. *The mediation process itself*

Referral to mediation is made by the court at the permanency stage. This occurs after the judge has made a dispositional order on the case and the matter is before the court attorney/referee (quasi-judicial officers).[203] At this stage, if issues arise which are interfering with the compliance with the judge's order or with achieving the permanency goal and the court finds that the matter is appropriate for mediation, the parties will be ordered to attend an informational session explaining the mediation process (court rules outline that the first session to be mandated). Prior to the start of mediation, mediators are encouraged to review the court file (to become familiar with the issues and status of the case) and contact all of the parties and their attorneys. Since mediation is a voluntary process, at the end of the information session, parties and their attorneys will have the opportunity to choose whether they wish to continue with the mediation or return to court.

If the parties continue with mediation and an agreement is reached, the parties return to court. The agreement is reviewed by the court and any appropriate orders are made. Most permanency mediations are completed in one or two sessions lasting about two hours each (Thoennes & Kaunelis, 2011).

If no agreement is reached, the case is referred back to the court. In such cases, the mediator would outline that the parties had attempted to mediate but would provide no further information to the court.

[203] However, as the programme developed (and stakeholders became familiar with the process), referrals were also made earlier on in the case at the pre-fact-finding stage (before the court had made a finding whether a child had been abused/neglected).

4.3.1.4.4. *Who is present during the child protection mediation process?*

A primary goal of the NYC Child Permanency Program was to incorporate multiple voices into the dispute resolution process. This included: parents and their attorneys, the attorney for the ACS and the case manager from the foster care agency who is working with the family, the law guardian for the child and if the law guardian deems it appropriate, the child. Foster parents are also generally encouraged to attend the mediation, though their particular consent to an agreement is not necessary unless specifically ordered by the court. Other family members, therapists or service providers may also participate at the direction of the court or on the consent of all the parties.

4.3.1.4.5. *Advantages to using mediation in child protection cases*

Mediation empowers parents to participate in the decision-making process concerning their child yet keeps the focus on the best interests of the child. The process gives parents the opportunity to speak for themselves and to express their concerns directly.

Another advantage identified was that mediation can promote a positive relationship between the parents and the working professionals. By facilitating the development of good communication and a good working relationship between the parents and the case planner, mediation can remove barriers which impede the progress of the case. As one participant stated: *"Early on in the development of the program, we realized that the best use of our services was not merely to resolve cases, but also to identify and remove the barriers which were keeping cases from moving forward efficiently in court."*

Similarly, mediation can assist family members in working together towards the common goal of a permanent plan for the child without having to go through acrimonious adversarial hearings that would be destructive of their relationships and detrimental to the well-being of the child.

4.3.1.4.6. *Concerns about using mediation in child protection cases*

According to an interviewed participant, there were some concerns about using child permanency mediation when the pilot originally started. The main concern related to the on-

going training programmes in child permanency mediation and whether the skills obtained and qualifications received were appropriate in child welfare cases. The Office of ADR overcame this concern by introducing advanced child welfare mediation training (chapter 4.3.1.4.8).

4.3.1.4.7. *How the child's best interests are considered and wishes are heard within child protection mediation*

According to an evaluation study in NYC (2007), one argument against child permanency mediation was that it could diminish *"the focus on children's' best interests or safety*" (Colman & Ruppel, 2007, p. 4) However, one interviewed participant rejected this argument, indicating that mediation is a process where the voice of the child is heard, and where the children are empowered to contribute to the decision-making process. As one author put it, *"denying the child a voice …. reinforces …. the lessons learned most thoroughly by abused and neglected children, that* [they] *should not expect to have any control over* [their] *fate."* (Taylor, 2009) citing (Buss, 1999).

4.3.1.4.8. *Training of child protection mediators*

Mediators are specifically trained in order to facilitate child permanency mediation. There are three stages to the training:

i. *Basic mediation training:* The candidate must have successfully completed an OCA-sponsored or OCA-recognised initial mediation training programme consisting of a minimum of forty hours of instruction
ii. *Family mediation training:* The candidate must have successfully completed an apprenticeship as a family mediator and have mediated a minimum of twelve cases involving family issues
iii. *Child permanency mediation training:* The candidate must have successfully completed at least fifteen hours of permanency mediation training after hiring).

In addition, child permanency mediators are expected to have substantial knowledge of the child welfare and family court systems and have a background either in law or social work or have equivalent experience.

4.3.2. Child protection mediation programmes in Canada

4.3.2.1. Toronto, Ontario[204]

4.3.2.1.1. *Specific issues to be mediated*

The Child, Youth and Family Service Act (CYFSA) 2017 is the main piece of legislation that governs the Children's Aid Societies (CAS) (Child Welfare Agencies) in Ontario.[205] Section 95 of the CYFSA provides that at any time during child protection proceedings, the court can adjourn proceedings so that parties can attempt ADR *"to resolve any dispute between them with respect to any matter that is relevant to the proceeding."*[206] This indicates that there are no legislative restrictions on the type of dispute that may be resolved through CPM. However, it is generally accepted amongst the practitioners that the purpose of CPM is not to determine the child protection concerns; only a judge can make such a finding (Howard, et al., 1995). This was reinforced by one of the interviewed participants, stating: *"We are not negotiating whether or not a child is in need of protection. The CAS is involved because they believe there is a child in need of protection. So, let's mediate how to work together and mitigate risk."* This is a critical point; the fact that protection is required is non-negotiable. There are certain issues of the child protection that cannot be subject to mediation; such as where there is an active dispute about whether the child is in need of protection.

According to one interviewed mediator, some issues which could be more appropriately managed through CPM include: *"Custody and access; Customary care arrangements; Family communication; Terms of CAS involvement/plan of service task; File transfer from another agency; Adoption openness; Parent-teen conflict; and Reintegration strategies."*

In addition, it was stressed by the participants that CPM should not be used in situations where doing so may increase the immediate safety concerns or put any of the participants at risk of harm. It is the role of the mediator to identify and exclude cases from CPM in such situations. This process is referred to as "screening", and it begins as soon as the referral is received (see below).

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[204] As mentioned in Chapter 3.4.2, between November 2017-December 2018, I interviewed/surveyed 6 working professionals involved in child protection disputes/mediations in Ontario, including mediators from the Ontario CPM roster; social workers; and an academic involved in social work and child protection.

[205] Most Child Welfare Agencies are referred to as the CAS, but some are also referred to as the Child and Family Service, Family Connections).

[206] While the legislation does not refer specially to CPM, it is a prescribed method of child welfare alternative disputes resolutions in Ontario under section 17 (3) of CYFSA (as per Policy Directive CW 005-06).

4.3.2.1.2. *Timing of child protection mediation referrals*

A referral can happen at any stage of the child protection case (before, during or after the adversarial process). Section 17 (1) of the CYFSA states: *"If a child is or may be in need of protection under this Act, a society shall consider whether a prescribed method of alternative dispute resolution could assist in resolving any issue related to the child or a plan for the child's care"* [emphasis added]. The phrase "*is or may be in need of protection*" suggests that ADR methods can be used before or after a protection application has been initiated by CAS.

Anyone involved in the proceedings can suggest ADR on an open CAS file; including family members, LRs, child protection workers and similarly placed persons. However, it is generally the responsibility of the child protection workers to make such an ADR referral. Prior to initiating the referral, the child protection worker must have the consent of the parties.[207] If the matter is already in court, the parties may ask the judge to allow time for mediation in an attempt to resolve certain issues within the case, that are preventing it from moving forward; such as custody and access, an adoption plan, or reintegration process. In addition, under section 17 (2)/ (4) of the CYFSA, First Nations, Inuk, and Métis representatives need to be notified and consulted of the appropriate ADR methods that should be used where the child is either a member of one of these communities or identifies as part of one of these communities. Section 17 (2) states:

> *"If the issue referred to in subsection (1) relates to a First Nations, Inuk or Métis child, the society shall consult with a representative chosen by each of the child's bands and First Nations, Inuit or Métis communities to determine whether an alternative dispute resolution process established by the bands and communities or another prescribed alternative dispute resolution process could assist in resolving the issue."*

Section 17 (4) states:

> *"If a society makes or receives a proposal that an alternative dispute resolution method or process referred to in subsection (1) or (2) be undertaken under subsection (3) in a matter involving a First Nations, Inuk or Métis child, the society shall give notice of the proposal to a representative chosen by each of the child's bands and First Nations, Inuit or Métis communities."*

[207] This is not a mandatory requirement of mediation process in itself, but it is a requirement of the Freedom of Information and Protection of Privacy Act (section 21 (1) (a)) and of the CYFSA (section 21 (2)). As result of this legislation, CAS cannot give the mediator any information about a client without the consent of the parties.

It is important to acknowledge that the ADR referral process varies from province to province, but also within the province itself. For example, depending on the jurisdictions, an ADR referral can be sent to a designated individual within CAS, an independent child protection mediator (private), or to the local Transfer Payment Agency (TPA). Following that, a referral must be sent to the Office of the Children's Lawyer (OCL) in Toronto, Ontario.[208]

A representative from the office will then determine if it is beneficial to appoint a lawyer to represent the child in the ADR process. Section 17 (3) of CYFSA states:

> *"If a society or a person, including a child, who is receiving child welfare services proposes that an ADR method or process referred to in subsection (1) or (2) be undertaken to assist in resolving an issue relating to a child or a plan for the child's care, the Children's Lawyer may provide legal representation to the child if, in the opinion of the Children's Lawyer, such legal representation is appropriate."*

4.3.2.1.3. *The mediation process itself*

The first step for the mediator is "screening for appropriateness"; screening is also an ongoing process which takes places as soon as the referral is made (the initial appointment is also referred to as the "Intake Appointment"). There are various elements that the mediator would explore in the screening process, which include, but are not limited to, screening for the presence (or absence, where relevant) of:

- Domestic violence
- Verbal/emotional abuse
- Harassment
- Sexual abuse/assault
- Power and control
- Coercion
- Capacity
- Addictions
- Mental Health Problems.

[208] The Office of the Children's Lawyer represents children under the age of eighteen in court cases involving custody, access and child protection.

It is also important for the mediator to maintain neutrality throughout the entire process. During "Intake Appointments", sometimes the mediator will first meet with the person with less negotiating power; the purpose of this is to allow the mediator to conduct a pre-emptive safety planning assessment with a person before meeting with the other parties. This may relate to the design of a safe joint mediation session or a safe termination process. According to one participant: *"I think the Intake Appointment is beneficial for a few reasons. One, the big one, is safety planning to make sure people are safe…"* However, to date, there are no screening tools specific to CPM in Ontario.

Usually, the mediator will meet with all parties involved in the child care proceedings for one session (sometimes two depending on the circumstances of the case). If an agreement is reached during the mediation session, a Memorandum of Understanding (MOU) is drafted. Each party is given the opportunity to review the draft agreement with their LR. It is important to note that this MOU is not in itself legally binding, unless, or until, they are turned into a legal document. While a MOU may ultimately be turned into a legally binding document, by due legal process, the process of mediation alone does not go through the legal steps required to assure such legal due process.

Although the MOU is not a legally binding document, compliance does become an expectation of the CAS. If the parties make changes in the implementation of the MOU without informing the CAS, they should be prepared for the CAS to follow up and ask questions.

4.3.2.1.4. *Who is present during the child protection mediation process?*

Typically, CPM participants are limited to parents/guardians, legal representatives and social work professionals employed by CAS,[209] and of course the mediator. Members of the extended family and community may also participate, but this is on a discretionary basis. Occasionally, the child protection mediator would invite the child, the subject matter of the proceedings, to attend the mediation session; however, this would depend on the child's age and maturity.

[209] Note that the involvement of legal counsel during the CPM process, aside from the child's lawyer, is discretionary and is decided by the parties themselves and the mediator.

4.3.2.1.5. *Advantages to using mediation in child protection cases*

The participants identified various advantages to CPM. One advantage was that it empowers the parties to create their own personalised agreements. It was acknowledged that this provides the parties with direct participation and some measures of control over the proceedings:

> *"To me, that would be one of the main purposes of CP mediation - to empower the families and the parents. It really is about balancing that power in the room so that people can advocate for themselves because it then becomes a more sustainable plan (in the long term.) …. if you are part of the process, part of planning, you are more likely going to honour the agreement as opposed to somebody telling you what I have to do. It's more personalized and you are part of our development."*

Another advantage identified was that it allows the parties to redefine their problems through more open and participatory conversations and dialogues. This, according to one participant provides the parties the opportunity to explore their underlying interests and conflicts, and the mediator can provide the parties with a platform to comprehensively address these underlying issues.

4.3.2.1.6. *Concerns about using mediation in child protection cases*

The main concern regarding the use of CPM in Ontario was the lack of any requirement for on-going training (chapter 4.3.2.1.8). One participant revealed that:

> *"One of the biggest flaws in the system in Ontario is that there is no requirement for an internship specific to child welfare…. Unfortunately, at this time, there is no obligation to complete an internship specific to child protection mediation. Therefore, many mediators practicing child protection mediations have little to no experience in child welfare prior to becoming a mediator."*

Prior to July 2016, in order to become an accredited family mediator, the Ontario Association for Family Mediation did not require non-family lawyers to have specific family law training. Consequently, mediators accredited before July 2016 remain eligible to take the CPM training, having no previous family law training or experience.

Another concern addressed by a participant was the possibility of power-imbalance between the child welfare agencies and the parties. However, this concern could be minimised by having highly trained mediators and a well-developed structural process which can address and adjust for those power-imbalances. One scenario recalled by a participant summarises this position:

> *"Child Welfare Agencies have tremendous power, more power than police in a lot of ways. I used to be a protection worker and I remember being at a home where there had been a domestic. I showed up and I could hear the child crying, but no one would open the door. I turn to the police and ask "are you going to go in and break down the door?" And they replied "No, but you can, and we will go in right behind you". So, I actually had the legal authority to kick down the door, over the police…. That is why it is so critical for the mediators to be skilled and understand the processes to balance that."*

The participant indicated, therefore, that it is essential that child protection mediators remain current on service delivery models being utilised by the CAS, because this would assist with the mediators understanding of the process used within the CAS/child welfare agency. Accordingly, that can better equip the mediator to assist the families' working relationships with that particular child welfare agency.

4.3.2.1.7. *How the child's best interests is considered and wishes are heard within child protection mediation*

All resolutions must be in the best interests of and promote the safety of the child, pursuant to the CYFSA. Therefore, mediators must ensure that the parties place the best interests and safety of the child at the heart of the mediation sessions, and must encourage the parties to focus upon the needs and feelings of the children as well as upon their own needs.

When it is safe and appropriate to do so, the child should also be given the opportunity to meaningfully participate in CPM, and in all cases, there should be others present (such as a GAL and/or a lawyer from the OCL) who can discuss and present the child's interests, desires and perspectives so that the child's "voice" will be heard in every mediation. It is the role of the mediator to develop a mediation process in which all parties feel safe and can actively

participate. This may include considering a shuttle mediation process or a joint mediation process. According to one participant:

> *"I have had cases where it was actually a dynamic between the Mom and Dad and the Children's Aid Society was part of that process. When all was said and done, the child was brought in at the end. So, the joint message from everyone could be showed to the child at the same time. Those would be some of the safeguards to be put in place, but it is so individual."*

However, the circumstances of the case also have to be considered; regardless of the child's age and/or maturity, the risk of unnecessary suffering as a result of participating in the mediation process may weigh in favour of the child being excluded from the mediation itself (Hehr, 2007). Ideally, the child's LR will participate in the CPM process and advocate on the child's behalf.

4.3.2.1.8. *Training of child protection mediators*

In Ontario, in order to be a child protection mediator, you must be on the Ontario CPM Roster. Currently, the roster is managed by Ontario Association for Family Mediation on behalf of the Ministry of Children, Community and Social Services,

Interested mediators must complete a five-day course in order to be listed on the roster. However, to register for the course, the candidate must meet the following educational criteria:

1. *"Professional degree or diploma in social services/children services*
2. *Completion of at least 60 hours of training in Family Mediation (including 20 hours of skill-based training)*[210]
3. *Completion of 14 hours of domestic violence training*
4. *Completion of 10 family law mediation cases to the point of agreement, with submission of memorandum of understanding"* (Ontario Association for Family Mediation, 2019).

[210] Several organisations in Ontario offer appropriate certificates in family mediation. They include, but are not limited to 1) the ADR Institute of Ontario; 2) the Family Dispute Resolution Institute of Ontario; 3) Family Mediation Canada; 4) the Ontario Association for Family Mediation.

The five-day course is an evaluated course. Participants must successfully pass a written test as well as evaluated role play exercises. Upon successful completion, candidates will be added to the Ontario Provincial Mediation Roster.

4.3.2.2. British Columbia[211]

4.3.2.2.1. *Specific issues to be mediated*

In British Columbia, the Child, Family and Community Service Act (CFCSA) 1996 is the provincial legislation that governs child protection. Section 23 of the CFCSA states that the court may adjourn child care proceedings, for a total of three months, to allow for family conferences, mediation or some other form of ADR to be explored.

One of the aims of CPM in British Columbia is to improve the working relationship between the social worker and the family (McHale, et al., 2011). Thus, CPM is generally used between the child welfare workers and the parents to seek to work collaboratively and reach agreements which are in the best interests of the child.

Child protection issues that can be mediated, include, but are not limited to:

- *Services:* The appropriate services and supports that can be provided to the family as part of the safety plan
- *Access:* How often can access take place, where the access should be held, the length of access and other related matters
- *Permanency:* How long the child will be in alternative care
- *Reunification*: Is it a possibility, and what, if any, are the barriers preventing family reunification from happening?
- *Child's needs*: Focusing on the cultural, racial, linguistic and religious heritage of the child and how they are being catered for within the care placements
- Other matters Relating to the child's care or welfare.

[211] As mentioned in Chapter 3.4.2, between November 2018-December 2018, I surveyed 6 mediators and trainers from the British Columbia CPM roster.

4.3.2.2.2. *Timing of child protection mediation referrals*

CPM can occur at any stage of the child protection proceedings where there are child safety concerns (Legal Services Society, 2019). Any party involved in the child protection dispute can request mediation, provided that all parties are agreeable to engaging in the mediation process. If all parties are agreeable to the mediation, the referral is made directly to a mediator listed on the CPM roster. Usually, the child protection worker involved in the case or a legal representative will make the referral for mediation. This was acknowledged by all the participants: *"Often, legal counsel for the parties or social workers request mediation and the court adjourns for mediation (or prior to a hearing)."*

4.3.2.2.3. *The mediation process itself*

Mediation is a confidential process and therefore discussions generally cannot be disclosed outside of the mediation process itself. However, section 24 (1) of the CFCSA states that mediation discussions can be disclosed in the following situations:

> *"a) with the consent of everyone who participated in the family conference or mediation*
> *b) to the extent necessary to make or implement an agreement about the child*
> *c) if the information is disclosed in an agreement filed under section 23*
> *d) if the disclosure is necessary for a child's safety or for the safety of a person other than a child, or is required under section 14."*[212]

In British Columbia there are two distinct models of mediation that can be used through child protection proceedings: (1) CPM (pursuant to section 22 of the CFCSA); and (2) the facilitated planning meeting (as a result of the Surrey Project 2001).[213] In facilitated planning meetings, there is a mandatory requirement placed on the mediator to commence the process with individual orientation sessions prior to the meeting; this is referred to as a "pre-mediation meeting". During this pre - mediation meeting a specific agenda must be covered and a court work supervisor and child protection worker is obliged to attend. Finally, only one mediation session can take place. In contrast, during CPM the orientation session is optional and there is no required attendance from the court work supervisor or the mediation supervisor. In addition, more than one mediation session can be scheduled. However, regardless of which

[212] Section 14 of the CFCSA outlines the duty for reporting a child in need of protection.
[213]The first CPM pilot took place in Victoria, BC in the early 1990s. However, despite positive results, and the establishment of CPM programme and rosters, there was a need for further strategic development. This led to a second pilot project in Surrey, BC, known as the Surrey Court Project which involved designing a CPM process called a Facilitated Planning Meeting ("planning meeting") (for more information, see chapter 2.6.3.2.2).

ADR model is being employed, the mediator is chosen from the same child protection roster (McHale, et al., 2011). Since 2005, the importance of orientation sessions has been emphasised during mediation training. Therefore, in practice, the distinction between the two models is quite minimal. Although the research participants were not specifically asked if they carry out orientation sessions, all participants spontaneously indicated that they conduct pre-mediation meetings. One participant indicated: *"I would not do a mediation without completing this first. Parents need to build trust with the mediator."*

Depending on the issues, a mediation session can take between two to seven hours. If an agreement is reached by the parties, pursuant to section 23 (3) of the CFCSA, the agreement is filed to the court by the director (a person designated by the Ministry of Children and Family Development under section 91 of the CFCSA).

4.3.2.2.4. *Who is present during the child protection mediation process?*

Ultimately, it is for the mediator to decide who should attend the mediation session and, therefore, the number of participants can vary greatly. CPM would typically involve the parents, the child welfare worker and the mediator. The mediator will generally liaise with the parents and child welfare worker in order to decide who should attend the mediation session. Such people may include: the child (depending on their age and maturity); LRs; extended family members; and if the child is Indigenous, representatives of the Indigenous community or delegated Aboriginal child and family services agency.

4.3.2.2.5. *Advantages to using mediation in child protection cases*

The majority of participants expressed that the non-adversarial aspect of CPM was a major benefit. This, according to several participants, empowered the families to work together to achieve a child centred, personalised agreement:

> *"Generally, I believe that Child Protection Mediation can provide an opportunity to empower families to plan for the welfare of their child within the otherwise dis-empowering experience of involvement with child welfare authorities."*

Another advantage identified by the participants was that mediation promotes a positive dialogue between the various parties, particularly between the parents and the child welfare

workers. This allows the parties the opportunity to build on their relationships, improve communication and work collaboratively:

> *"[CPM is] a useful process in most cases. I do not see it purely as a mechanism to provide expedient agreements. The development of better working relationships between child protection authorities and their clients/families is, for me, one of the opportunities that mediation can provide."*

Another participant explained that developing relationships results in greater parental compliance in the agreements because *"…the parties have a say in the process and outcome, and more opportunity to understand perspectives by all sides."*

Other advantages identified by the participants were that mediation can achieve stability for the child earlier on in the case, can lead to expeditious agreements, and can be a cost-effective mechanism.

4.3.2.2.6. *Concerns about using mediation in child protection cases*

The main concern addressed by the participants was the possibility of power-imbalance between the parents and the child welfare agency. One child protection mediator indicated that this power-imbalance can affect the outcome of the mediation:

> *"Despite efforts to "power balance", child protection authorities have entitlement under law to direct matters (and so attitudes of specific social workers or child protection representatives can heavily influence outcomes); there may be little repercussion for social workers who do not follow through on agreements due to caseloads, budgets, systemic pressures, etc. Depending upon the process for appointing mediators, child protection authorities can heavily influence the mediation direction and outcomes."*

However, based on one of the participant's views, it is the role of the mediator to be aware of these issues and determine whether the case is in fact suitable for mediation: *"The mediator is tasked in the pre-mediation process to look for barriers to mediation and work with parties to address those barriers."*

4.3.2.2.7. *How the child's best interests are considered and wishes are heard within child protection mediation*

It is the duty of the mediators, child protection workers, and others who advocate for a child's best interests to support and encourage the child's meaningful participation in the mediation process. Section 2 (c) of the CFCSA highlights that *"the child's views should be taken into account when decisions relating to a child are made"* and section 4 (f) states that *"the child's views must be considered in determining what is in their best interests."* In addition, section 70 (c) of the CYFSA, which deals with the rights of children in care, indicates that the child has the right *"to be consulted and to express their views, according to their abilities, about significant decisions affecting them."*

There are several ways that a child could meaningfully participate in CPM; either directly (in-person) or indirectly (for instance, though the use of an advocate, or by recorded statement). However, while the child's involvement helps maintain the focus (i.e., to achieve a child centered parenting agreement in the best interests of the child), according to one participant, pre-mediation screening is fundamental in order to ensure that the child has sufficient capacity and maturity to engage in the mediation process. Certain safeguards are therefore put in place such as:

> *"Pre-screening of the children to determine their ability and stability to appear as well as their relationships with other family members or child protection representatives. Sometimes they are videotaped or recorded (voice or writing) rather than attend in person."*

4.3.2.2.8. *Training of child protection mediators*

In order to be a child protection mediator in British Columbia, you have to be on the CPM roster. This roster was established in 1997 and is provided for under section 9 of the Child, Family and Community Service Regulation (1995).[214] The following training and education are required to become an accredited child protection mediator:

- Eighty hours of training in conflict resolution, mediation theory, and skills training (this must include mediation simulations/role plays)

[214] Amended up to B.C. Reg. 149/2019, July 8, 2019.

- One-hundred additional hours of education in dispute resolution or in a related field (such as law, social work, and psychology, or any other professional discipline involving conflict management, negotiation, communication skills)
- Fifteen hours per year of continual professional development and education
- Complete a minimum number of mediation sessions as a primary mediator
- In addition, the mediator must demonstrate a knowledge of and experience in disciplines such as child welfare; family/domestic violence; indigenous context/families/communities; mental health/problems; and substance and addiction use.

Governmental support is crucial to the development of CPM in British Columbia. In addition to drafting specific CPM legislation (CFCSA) and creating an accessible CPM roster, the government has also expanded training opportunities for mediators in the private sector (McHale, et al., 2011). This has allowed less experienced mediators a chance to practice their skills in mediation under the guidance of a more senior mediator.

Furthermore, it is a requirement for all newly assigned mediators on the child protection roster to participate in initial orientation training. In addition, all mediators on the child protection roster must engage in continual development training, usually provided for through CPM related educational opportunities and practice consultation.

4.3.3. Initial analysis from Phase 2

It was invaluable in Phase 2 to have the opportunity to observe several mediations sessions and consult one-on-one with those involved with CPM, including judges, attorneys, mediators. This provided me with the opportunity to compare and contrast six individual CPM programmes (four programmes across the USA and two provinces in Canada) and to observe what worked efficiently, and what was less successful.

It is clear that the use of CPM, at least at some points in a case, has the potential to significantly benefit all parties who are involved in public child protection cases. As identified by the international research participants, the aim of CPM is to achieve a voluntary, personalised agreement that is in the best interests of the child and that it avoids contested adversarial trials where possible. In particular, all participants expressed that the use of CPM

can add significant value to child protection litigation by improving working relationships between the parents and the child protection workers and improving procedural justice by increasing parental inclusion and engagement. One main advantage that has been identified through mediation literature and each of the visited CPM programmes was that CPM can increase parental understanding of the legal process, of social workers' issues about parental care of the subject children, and of the requirements and expectations of parents in order to achieve the agreed return of children to their care. This has been referred to as "information sharing". This is in line with the guidance of the National Council of Juvenile and Family Court Judges, who noted that mediation could remedy the *"…partial and incomplete exchanges of information"* that take place in "hallway conferences", by providing *"all relevant parties…. a full exchange of information."* (NCJFCJ, 1995).

According to the majority of international research participants, the suitability of the case to be mediated is extremely important; not only to ensure the best interests of the child but also for the development of a successful CPM programme. Therefore, in chapter 5, the suitability of a case (what aspects of child protection cases would lend themselves to mediation) will be further explored. Along with the suitability of a case is the discussion surrounding the core principles of mediation. In Ireland, the voluntary nature of mediation is endorsed by the European Mediation Directive 2008. The voluntary nature of mediation is apparent in Canada. By contrast, however, in the four states visited in the USA, the participation of the parents in CPM was mandated. For that reason, in chapter 5, the thesis will further explore the debate regarding mandatory versus voluntary mediation, and I will consider whether an Irish judge should have the discretion to order the parties to attend a CPM information session. In addition, the importance of extremely well-trained mediators was identified by the international research participants. Participants from all six visited CPM programmes (Phase 2) indicated that child protection mediators would be expected to have substantial knowledge of child care law. However, Florida was the only state visited in the USA requiring certified family mediators to have additional child protection training before mediating child protection cases.

4.4. PHASE 3:

The overall aim of the study was to explore the extent to which ADRs, such as family welfare conferences, are currently being used in child care proceedings, and whether there is, in fact, a need to consider CPM as an alternative to adversarial processes. Essentially, the data collected in Phase 3 was broken down in to two parts: (1) observing child protection proceedings in Dublin Metropolitan District (DMD); (2) follow up interviews with members of the Irish judiciary, and three working professionals involved in child protection disputes/mediation. The observation data was collected over the course of seventeen days.

4.4.1. Background to The Cases

4.4.1.1. Applications

Applications primarily observed included Interim Care Order applications, extensions of Interim Care Orders, Care Orders, Reviews of Care Orders, Reviews of After-Care Plans, and Re-Entry of a case (figure 4.14). However, in many cases the hearing was very short (such as *for mention* hearings) and, therefore, the researcher did not report them. The majority of hearings (sixty-five percent) took less than an hour, eighteen percent took between one and two hours, and equally seventeen percent of cases took greater than two hours or more (generally for care orders).

The largest single category of hearings was extensions of Interim Care Orders, which accounted for twenty-nine percent of child care observations in this study. This figure is closely in line with the statistics documented in the Courts Service Annual Report (2017), which indicates that extensions of Interim Care Orders comprise thirty percent of child care hearings.

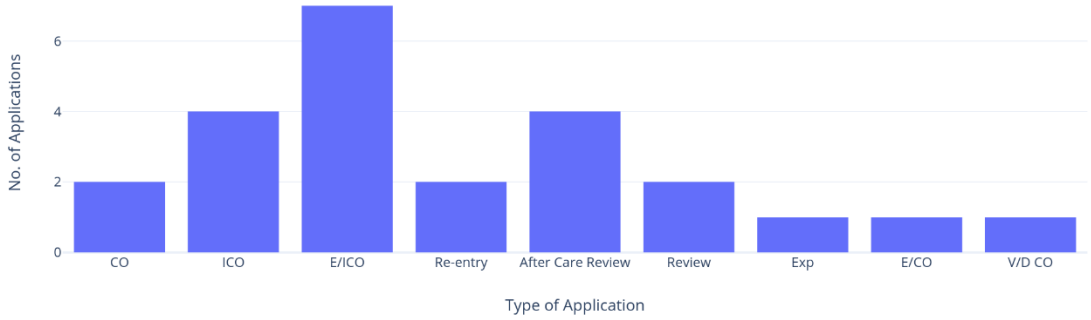

Figure 4.14: Type of applications in child protection proceedings, DMD, observed during this research study (number of cases observed).[215]

4.4.1.2. Applicant

In most cases, the "applicant" refers to the CFA. However, in one case the applicant was the parent. However, for ease of analysis of the statistics "applicant" as used in this study means the CFA and "respondent" the parent.

4.4.1.3. The respondents

In most cases, the "respondents" refer to the parents. However, in one case the respondent was the CFA. The researcher was unable to obtain information on the respondents' marital status. However, according to the Child Law Reporting Project (Final Report), thirty percent were sole respondents, with seventy percent cited as two respondents (although this does not generally mean the parents were parenting together or married).

4.4.1.4. Care of children

Approximately sixty-seven percent of the children in this study went into foster care. This is in line with the CFA (Tusla) performance data which indicated that by the end of April 2019, sixty-one percent of child in care were in foster care placements in the Dublin-Mid Leinster region. In addition, four percent of children were in a relative foster care placement, thirteen percent of children were in care as a result of a voluntary care arrangement, and five percent

[215] Abbreviations: E/ICO (extension of an Interim Care Order); ICO (Interim Care Order); VD/CO (varied discharge of a Care Order); E/CO (extension of a Care Order); Exp (ex parte applications). Results outlined on the y-axis are numbers, not percentages.

were in short-term placements. The remaining thirteen percent involved other care arrangements such as supervision orders.

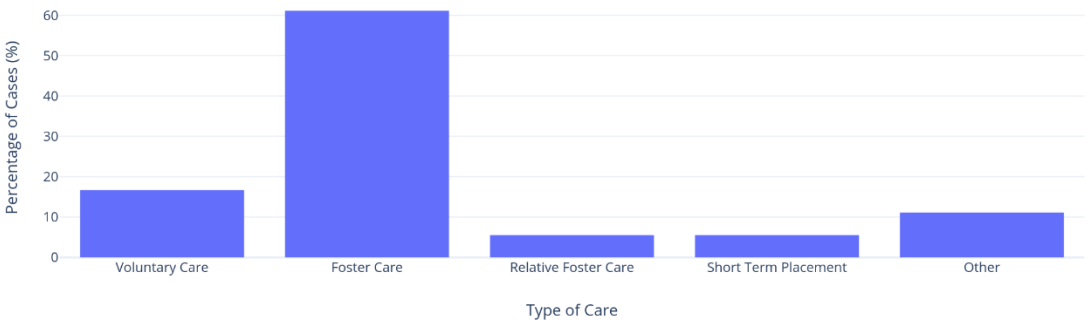

Figure 4.15: Type of care utilised for children in the care of the state (data is reflected in percentages).

4.4.2. Hearings

4.4.2.1. Main issues within a case

As previously mentioned, the Child Care Act 1991 places a statutory obligation on the CFA to promote the safety and welfare of children. The CFA can make an application under the Child Care Act 1991 where it believes that there are *"reasonable grounds for believing that a child may have been, is being or is at risk of being physically, sexually or emotionally abused or neglected"* (HSE, 2001, p. 5), or whose health, development and welfare has been or is likely to be impaired or neglected if such an order was not granted.[216] Therefore, alleged issues of child abuse and neglect are central to child care proceedings. The various applications that were made before the court, during the observation, are outlined in figure 4.14. However, it must be stressed that in addition, other issues can present themselves in a case; there is rarely just one reason for an order being sought. Issues can include problems experienced by the parents (cognitive disability, addiction) and the impact of these problems on the child (neglect, abuse).

i. *Access:*

In a significant number of cases observed (fifty-two percent), access presented as a barrier preventing the case from moving forward. This primarily concerned the number of access

[216] Depending on the type of order, the criteria upon which the court may grant an order can slightly differ; nonetheless, there are common feature across all orders made under the Child Care Act 1991.

visits per week (parents generally wanted access visits extended) or the duration of the access visit (parents generally wanted access visits to be longer). In one case observed, it was the child that expressed a desire for an increase in the number and duration of access visits. During this case, the GAL informed the court that access visits were going well, and that the child enjoyed spending time with her mother. However, there was difficulty with the access visits ending; mainly that the child did not want the visits to be over. In considering the best interests of the child (and indeed the voice of the child), the court extended the duration of the access visits.

In several cases observed, sibling access was brought to the court's attention; primarily concerned with increasing sibling access. In one case, access visits between the siblings had not taken place for several months (except for one access visit via Skype.) In another case, the child had not seen his/her siblings for seven years. It was outlined to the court that multiple efforts had been made by the CFA social work team to locate the child's elder siblings through the child's birth father (who was not currently engaging).

In some cases, the social workers had concerns about some of the conversations between the parents and child during access i.e., whether said conversations were appropriate.

ii. *Capacity and Substance Abuse:*

Drug and alcohol issues featured in twenty-two percent of the child protection cases observed in this study. Cases which concerned drug/alcohol abuse were often accompanied by homelessness (thirteen percent) and capacity issues (thirteen percent); but these were never the sole reason for the application being made. In one case observed, the mother's counsel reminded the court of the mother's capacity issues to effectively engage with the court proceedings/process and requested that the CFA social work team do everything they can to support the mother in fulfilling the steps outlined in the reunification plan. In another case, the GAL told the court that she had observed access visits between the parents and the new-born child and outlined how affectionate and loving they were towards their child. However, the GAL expressed a concern about the parents' ability to understand the child's needs and recommended a parenting class which might help the parents engage more effectively with the access visits.

Of particular note, during one court case observed, the social work team attempted to use mediation between the maternal family and the respondent mother. The aim of the mediation was to improve communication and generate support within the family unit. However, the mediation process did not work in this situation because of the incapacity of the mother to accept responsibility for child's mistreatment. The capacity of parents to engage meaningfully in the mediation process was expressed by a member of the judiciary (during the follow-up questionnaire): "*The limitations in my view are: (a) capacity/insight on the part of many parents - often due to addiction issues, but also intellectual functioning, lack of education; (b) lack of availability of a mediation service, coupled with cost issues."* The importance of "knowledge training" will be discussed in chapter 5.

iii. *Foster Placement:*

In twenty-two percent of observed cases various issues emerged within the foster care placement itself or with the foster carers; such as breakdown of placement, problems in the relationship between foster carers and parents, and the need for respite care. Despite this, in practice, seventeen percent of the child care proceedings observed were using alternative dispute resolutions in some capacity; most notably mediation was effectively being used between foster parents and the child in care to resolve foster placement issues. In one particular case observed, a foster placement breakdown issue was before the court. According to the CFA the breakdown arose from a "self-selected alternative placement" for the minor (i.e., the minor was staying with a friend). The problem raised by the CFA was that the "friend's family" was not an approved placement, and the CFA has a responsibility to ensure that the minor in the system was safe. In this case, the foster parents (who were acknowledged to be very experienced foster parents) suggested mediation to work out the disputed placement issues in relation to the minor outside of an adversarial environment. While the court was satisfied with the parties engaging with mediation to resolve these issues, the court wanted to know the time frame of adjournment to ensure the dispute was resolved in a timely manner and in advance of the child "ageing-out" of the system.

According to an interview carried out with an academic involved in child protection, there are two distinct elements to a child protection case: the decision to be reached by a judge on whether the legal threshold for making an order has been met and ancillary issues related to the child in care: "*The issue isn't going to threshold (I call them ancillary issues), e.g. care being provided for the child such as care placement, whether they are accessing certain services, whether there*

getting contact with certain family members- you know all those other pieces." Such issues can be provided for under sections 37 and 47 of the Child Care Act 1991, the latter of which states that a judge can make an order or direction affecting the child in care. However, these "ancillary issues", according to the interviewee, can have a significant impact on the child's safety and wellbeing and if not addressed *"…may have an implication on threshold somewhere down the line e.g. if they don't have access to a parent, they are not going to be able to work towards family reunification."*

One particular scenario raised by the interviewee, was the issuing of a passport for a child to travel outside of the jurisdiction with the foster carers for a holiday. While the participant did acknowledge that a judge would need to give consent regarding the issue of the passport to the child and allow the child travel abroad for a limited peri od, she also expressed that the underlying issues and frustration can be addressed in an ADR setting:

> *"The parents might feel grieved and they have been traumatised by the experience* [child care proceedings]. *Then the foster carers want to take their child away for a two-week holiday in Spain and they start fighting that aggressively through the courts. I have seen wrong proceedings taking up court time, lots of people involved and being paid and argue the merits on whether a child shouldn't be allowed to go on holidays. There is an element where I don't think that you need a judge to determine that issue. It could much better be resolved in an ADR setting where you allow the parents to vent their upset and frustration."*

iv. *Voluntary Care Agreements:*

Finally, in seventeen percent of cases observed, issues with voluntary care agreements emerged, such as withdrawal of consent to voluntary care or to specific details of the parenting agreement. In Ireland, voluntary care arrangements are provided for under section 4 of the Child Care Act 1991. It states that *"…where it appears to the CFA that a child requires care or protection that he is unlikely to receive unless he is taken into its care, it shall be the duty of the Agency to take him into its care under this section."* However, section 4 (2) makes it clear that a child cannot be taken into care against the wishes of a parent having custody of the child, or any person acting in *loco parentis*. When a child is placed into voluntary care, the parents or the person acting in *loco parentis* signs a Reception into Care Form. This is not an order. The parents can also withdraw their consent at any time; voluntary care lasts until the parents request the return of the child. However, if the social worker decides that it is not in the child's

best interests to be returned home, they can make an application to the court to keep the child in care.

4.4.2.2. Power dynamics

It was important to record the respondents' participation in the child care proceedings. During the child care observations, the researcher noted if the respondent parents were legally represented. Seventy percent of respondents were legally represented. However, it is important to note that some cases were at a very early stage and the respondent may not yet have obtained representation. In some cases, one of the respondents did not appear, or if they did, they indicated that they did not want legal representation. In some situations, even if the respondent did have legal representation, the lawyers indicated that they had not received any instructions from their clients, and therefore, could not comment.

The majority of respondents in this study, sixty percent, articulated their views through their legal representation. It should be noted that twenty-five percent of respondents indicated that in addition to their legal representation, they also wanted to give their own evidence.

Figure 4.16: Respondents participation in child care proceedings (expressed as a percentage).

4.4.2.3. Guardian Ad Litem (GAL)

The GAL is a common way in which the voice of the child is heard indirectly.[217] During the court observations, in eighty-eight percent of cases a GAL was appointed. This is significantly higher than statistics that arose from other research; for example, in the Child Care Law

[217]Section 11 of the Children Act 1997 introduced a provision allowing for the appointment of a GAL to act as a separate representative in guardianship (family/private law) applications. That provision has not yet been commenced.

Reporting Project reports that between December 2012 to June 2015 on average a GAL was appointed in fifty-three percent of cases. In has been argued, that the appointment of the GAL to date in Ireland has been ad hoc and largely unregulated. However, the Child Care (Amendment) Bill 2019, aims to change this.

During the observation, all appointed GALs had legal representation. A key feature of the observation was the prominent role played by GALs on a case-by-case basis. Their roles varied: in some cases, they supported the application made by the CFA, the after-care plan or a reunification process; in others they did not support the care order application lasting until the child reached the age eighteen, and put forward an alternative proposal of a two-year care order followed by a review; in others they argued for services the children needed such as therapeutic services, assessments and similar measures.

4.4.2.4. Signs of Safety Model

In several cases observed, the Signs of Safety model was utilised as a solution-focused framework for the parents and working professionals involved in the case. This programme, provided for by the CFA, offers the families an opportunity to actively engage with the process. In one case, this framework was used by the parents and working professionals to collaboratively agree on a "safety" plan in respect of the children involved in the case. The CFA social worker informed the court that the social work team was working with the family and working professionals to address any safety issues in respect of the children and identify appropriate services/supports that could be used. The purpose of utilising this mechanism was to avoid the children in this case coming into care. During the observation, the CFA informed the court the Signs of Safety model was running parallel to the judicial proceedings. In another case, a reunification plan had been devised and accepted by all the parties involved and the Signs of Safety model was used to help achieve the reunification plan.

4.4.3. Alternative dispute resolutions processes

The majority of child care observations in Chancery Street Courthouse (DMD), (eighty-three percent) highlighted that alternative dispute resolutions, such as family welfare conferences and/or child protection conferences, are not being used in child protection cases.[218] This

[218] A limitation must be placed on this figure; the researcher is drawing this conclusion from the absence of mention of alternative dispute resolutions in the court.

figure is unsurprising upon reflection on both the Irish literature and legislation; for example, mediation does not formally feature within the "public law" sphere of child protection cases within or prior to adversarial proceedings. This is strongly reflected in section 3 of the Mediation Act 2017, which specifically excludes disputes which fall under the Child Care Acts 1991-2015 from the remit of the 2017 Act. According to one member of the judiciary (during the follow-up questionnaire), the resistance to considering CPM at policy level could be attributed to legal representatives insufficient understanding regarding the use of mediation in child protection proceedings and their desire to engage in adversarial processes which generates a "winner" and a "loser":

> *"I also believe there is a general lack of awareness on the part of lawyers as to what mediation involves; many are uncomfortable with the idea, or see it as a threat to their business. There are also, sadly, many people who see litigation as a blood sport, and are determined to "win" in their terms, as opposed to looking at the benefits to the child of taking a more objective view."*

The need to build on knowledge and understanding of CPM was noted by the interviewed participants from Phase 3. According to one experienced academic in the field of child protection:

> *"For me it is a learning curve. My initial reaction was that it seems like a crazy idea- you are dealing with very vulnerable people and you are putting them in a situation of negotiation. That should be a red-light issue. I do think there is a little bit of…. almost like a marketing challenge in relation to ADR in child protection because when you unpack it and understand it, I think it has huge potential. I think it has benefits on a number of fronts that have been under explored and we actually should have it integrated into our system."*

Despite this, in practice, seventeen percent of the child care proceedings observed were using alternative dispute resolutions in some capacity; most notably mediation was effectively being used between foster parents and the child in care to resolve foster placement issues. When discussing this figure with an Irish mediator, she indicated that mediation, in the context of child protection proceedings, was being utilised in Dolphin House (DMD). The mediator indicated that:

> *"I usually found that they weren't coming to mediate child protection per se, but they had issues in terms of the HSE* [CFA]*- ongoing issues- that they wanted to come up and address. A lot*

of the times, the children were subject of care orders. Interestingly they did turn to us- looking for help. I felt confident enough from my research what I could or couldn't do."

However, she did specifically express that mediation cannot be used to resolve child protection disputes; that is solely for a judge to determine:

"We are not mediating child protection. This is an issue for the court. There is no question of mediating child protection, or other issues around the safety and welfare of children, in terms of child protection- you don't mediate that. But you are looking at the ancillary issues that could benefit the child(ren) or the family. In so doing, are we offering a useful service to the public at large? That was where I was coming from- and I felt there was."

In addition, in thirty-three percent of cases observed, mediation was mentioned throughout the child care proceedings. In such instances, generally members of the judiciary asked the parties if they had considered mediation to resolve some of the ancillary issues. In a number of cases, the use of mediation was suggested by the judge to resolve a certain barrier within a case e.g., cultural issues or foster care (relative or non-relative) placement issues. In one case, the judge suggested mediation as a "non-threatening" process which would provide a "safe space" for the mother to understand the various options and services available to her (this was in light of the evidence presented by the CFA that there needed to be a "buy-in" from the mother to understand what is required of her and meaningfully engage with the process). However, despite this, there is still some reluctance from the members of the judiciary, as evidenced by a member of the judiciary during the following up-questionnaire:

"In principle it is a good idea. However, in the context of child care proceedings it may be difficult for parents to engage in the process of mediation where there are reputational issues and where an Agency has already taken a child of you. It is likely that the parents would be suspicious of a mediation process unless it was seen as an important part in the reunification of children or as a means of determining agreed actions to ensure that a positive outcome would mean that the children was not taken into care."

4.4.4. Initial analysis from Phase 3

Overall, the aim of Phase 3 was to observe child protection cases in order to evaluate whether certain aspects of the observed cases might have been more appropriately managed through the use of mediation. Throughout the observations it became apparent that certain aspects of extensions of Interim Care Orders could have been more appropriately managed through

mediation (mainly, access and foster placement issues), compared to the issues that arose in Care Orders. The reasoning behind this appeared to be that the longer a case continued for, the more entrenched the parties' positions became, and the harder, therefore, it was to find a resolution. This will be explored further during chapter 5. In addition, initial findings indicate that CPM is happening in practice, albeit in a small proportion of cases (eleven percent), despite the lack of legislative framework. This was confirmed by follow up interviews with members of the Irish judiciary and three working professionals involved in child protection proceeding and/or mediation in Ireland.

From the court observations, it is clear that the use of CPM, at least at some points in a case, has the potential to significantly benefit all parties who are involved in public child protection cases. In addition, the process of reaching "voluntary care agreements" may, in some circumstances, be more appropriately managed through alternative dispute resolution, such as mediation. These findings indicate that there may be a role for CPM to play in Irish child protection cases.

4.5. OVERALL ADVANTAGES AND DISADVANTAGES OF CPM

Over the course of this research, it has become abundantly clear that the primary goal of CPM is to achieve family reunification (where appropriate), and where that is not possible, achieve the most effective placement for the child. The goal of CPM is largely in line with the provisions of the Child Care Act 1991 (the primary legal framework for child care proceedings in Ireland) which also places a strong emphasis on family reunification, provided that it promotes child welfare. Various advantages and disadvantages regarding mediation in a child protection context have been well documented and articulated within the literature.[219] However, providing research participants with the opportunity to describe and analyse the potential benefits and drawbacks of CPM proved invaluable to this research study; particularly when considering potential implementation in Ireland. Initial analysis of the data findings, identified through both CPM literature and the research data collected throughout Phase 1, 2 and 3 of this study, indicated the following strengths and weaknesses of CPM:

[219]Chapter 2: Literature Review.

4.5.1. Advantages

4.5.1.1. Non-adversarial nature

It has been argued that while the court system in Ireland is primarily adversarial in nature, the child protection courts have engaged in a more inquisitorial approach in order to determine what is in the best interests of the child; pursuant to both national and international legislation.[220] However, many argue that in practice the model used within the child care arena can be viewed as a hybrid system incorporating elements of both adversarial and inquisitorial approaches (Coulter, 2015). For example, the adversarial nature of proceedings provides the CFA with the opportunity to prove on the balance of probabilities that the parents have failed in their duty towards their child (Article 42A.2.2 of the Irish Constitution), whereas on the other hand, the inquisitorial nature allows the judge to inquire into the appropriate care and protection of the child.[221]

Despite this acknowledgement, several participants from Phase 1 and 3 of this research study highlighted that the child care proceedings remain rooted within the adversarial system. In particular, twelve participants from Phase 1 of this study expressly indicated that the adversarial nature of such proceedings is a major drawback of the current Irish child protection system. The participants expressed that this can often lead to highly contested court proceedings and has the potential to exacerbate and destroy working relationships, particularly between the child protection workers and the parents. One judge criticised: *"The adversarial approach adopted by the CFA and some lawyers with a win /lose attitude that is not in keeping with the duty to support families and is not in keeping with the inquiry system of the children court child care cases."*

In contrast, in other jurisdictions the use of mediation in child protection cases has been shown to improve working relationships between the various parties involved and to promote collaborative decision-making opportunities amongst the parties before legal processes or child welfare agency solutions are imposed on the family (Giovannucci & Largent, 2013). A review of all six mediation programmes visited during Phase 2 of this study indicates that the use of mediation in child protection cases can play a positive role in avoiding adversarial court proceedings. According to an interviewed judge in Tulsa County, Oklahoma:

[220] Such as the Child Care Acts 1991-2015, Article 42A of the Irish Constitution, and the UNCRC.
[221] A v. Health Service Executive [2012] IEHC 288.

> *"The adversarial system does not work for these types of cases; you are dealing with high tension, high-conflict cases and just real people, and the legal system, in my opinion, can trigger a lot of horrible reactions. So that is why I like any alternative dispute resolution, be that mediation or a well-run family group conference."*

4.5.1.2. Improves working relationships

It is clear from the data obtained during this study that working relationships can be damaged by the adversarial nature of child care proceedings. However, this is not an entirely new concept and has been reported on by several academics in this field (Corbett & Coulter, 2019; O'Mahony, 2019). In 1996, the Law Reform Commission issued a Report on Family Courts, indicating that sometimes the *"traditional adversarial mode of trial is unsuited to the resolution of family disputes"* (LRC, 1996, p. 101). The Commission continued by stating that the adversarial nature of the court system may *"exacerbate the tension between the parties and contribute to ongoing friction."* (LRC, 1996, p. 101). More recently, in the Child Care Law Reporting Project (2018), a judge noted that:

> *"… the social workers often feel betrayed when they have done a lot of work with a family, and then discover a breach of trust. This can affect the way a case moves forward, and can apply equally to parents in such cases. I refer to this because it illustrates the degree to which the parents' and the social workers' relationship has deteriorated, almost to the point where the social workers have difficulty acknowledging any positive aspects of the Respondent's parenting…"* (Coulter, 2018, p. 25).

In contrast, it is clear from all six mediation programmes visited as part of this study that the use of mediation in child protection cases can play a positive role in avoiding adversarial court proceedings, where appropriate. In other jurisdictions, such as the USA and Canada, the use of mediation in child protection cases is used to preserve and/or promote positive working relationships, particularly between the parents and the child protection workers (Giovannucci & Largent, 2013). According to interviewed participants from Chicago (Phase 2), mediation can promote an open dialogue amongst the parties which can allow each of the parties have a greater understanding of the cases itself, but also the other parties' perspectives. This can help defuse conflict and support the parents to understand their responsibilities. One child protection mediator (as stated above) stated: *"it is about having everyone together in the same place and at the same time. And more importantly, having everyone hearing the same information at the same*

time." Similarly, a participant from New York (Phase 2) indicated that CPM can remove certain barriers that impede the progress of the case. This can be achieved by facilitating the development of good communication between the various parties involved.

4.5.1.3. Promotes the well-being and safety of the child

As evidenced through the literature and this research study, CPM can be a very dynamic method for resolving disputes. As mentioned above, the goal of CPM is to expedite family reunification, where possible and appropriate. Where family reunification is not feasible, the goal must be the best available placement for the child; often referred to in other jurisdictions as child permanency. Achieving child permanency in a case was expressly mentioned as an inherent goal of CPM by all six visited CPM programmes (during Phase 2). Most notably, child permanency was expressly and spontaneously mentioned as an advantage by participants in Tulsa County and Florida. For example, participants from Tulsa County reported that mediations are used to resolve termination requests of parental rights without the need for a jury trial and are extremely helpful to achieve an expedited agreement in the best interests of the child. Similarly, according to the interviewed participant in Florida, mediation does not promise to resolve all the issues faced by the families, but it can promise to lead to a more expeditious solution, generating a working relationship amongst the parties in a less adversarial manner than litigation (Firestone, 1997).

In addition, participants from Tulsa County, Florida and also Ontario expressed that CPM leads to personalised agreements that ultimately lead to greater parental compliance. As previously mentioned, a research participant from Ontario stated: *"If you're part of the process, part of planning, you are more likely going to honor the agreement as opposed to somebody telling me what I have to do. It's more personalized and you are part of our development."*

On the other hand, participants from Chicago, New York, and British Columbia specifically focused on CPM promoting positive dialogue amongst the parties, which supports parents to understand their past and future responsibilities (the latter was expressly mentioned by participants from Tulsa County and Ontario). According to a participant from Chicago, a successfully implemented mediation programme can assist in sustaining a positive outcome for the child and their families:

"*For me, the biggest thing is, while we have no say in the legality of it, when people leave the mediation session, they leave with information, and they leave with things that are going to help push that case forward, or information that is going to allow the judge make the decision to either send the children home or make the decision to find them another permanent placement. So, in the spirit of that, I think it would be beneficial for Ireland to have a similar program.*"

4.5.1.4. Resolves issues in an appropriate manner

A significant proportion of representatives from Phase 1 (namely participants from state bodies) identified that the current child protection system in Ireland can be "inappropriate". One participant in particular identified several problems with the current child protection system:

"*There are very few purpose built access places;* [and] *little or no support given to the parents at the early stages of the intervention;* [it is a] *confusing system to navigate, who does what and why; what's the difference between social workers and social care workers or social welfare even; where does a parent sign up for legal aid; the large number of meetings a parent is expected to attend; intimidating number of professionals attending and also intimidating language used (by intimidating language I refer to the professional English used in meetings and the terminology used); psychological assessments and also parental capacity meetings are very difficult to go through both for the children in care and also for their parents; once the children are removed into care, there is a long and difficult path to family reunification in some cases, we have observed, after a full care order was given, there was no more contact between the social workers and the parents; extensive delays in accessing supports; the culture and the background of the migrant children coming into care often disregarded, misunderstood or not supported (this has a significant impact on the quality of the care plans put in place and a potentially a detrimental impact on the children in the future, as they approach adulthood); lack of cultural awareness of the front line staff involved in the child protection system; and various interpretations of the threshold.*" [222]

Another issue raised by both Phase 1 and Phase 3 Irish-based participants was that there was a high turnover of social work staff involved within a single child care case. According to several Irish-based participants, this can negatively affect a case because it can lead to

[222] These concerns, as expressed by this research participant, have also been identified in child protection literature (Chapter 1: Introduction and Chapter 2: Literature Review).

inconsistent case management and generally, a poor follow-up with the parents regarding potential reunification:

> *"High turnover of social work staff and sometimes inexperienced social work staff poorly supervised leading to inconsistent case management. Poor follow-up regarding consideration of reunification leading to cases where reunification should have happened earlier and then cannot due to attachment issues/failure to foster the relationship with the parent whilst child is in foster placement - I have seen this happen in a worrying way on a few occasions where parents have gone on to have subsequent children and are capable of parenting but cannot be reunited with an older child due to attachment issues - this is totally avoidable. Parents being further disempowered by feeling that the "system" is against them - alone in Care Planning meetings often afraid to speak - this is very common."*

Furthermore, an interviewed mediator from Ireland (Phase 3) also addressed that the high changeover of social work staff is a major barrier to the use of CPM in practice:

> *"Another "barrier" was that if you put in the referral to the HSE* [CFA] *on the Monday you would be doing well if you got a reply within two weeks. If you did get a reply within two-week, two week later, the person who turns up to the mediation might be different. There were all these issues, inexperienced social workers, constant change over of people, coming in too late."*[223]

However, high-turnover of social work staff can also be seen in other jurisdictions where CPM is actively being used. According to a US study carried out by Denne et al, (2019), high turnover rates can be associated with "worker burnout". Denne highlighted that workers involved in human social services are at a heightened risk of "burning out" which can diminish meaningful work performance and can lead to poor mental health consequences (Denne, et al., 2019). In particular, there are high burnout rates among social workers who are working with children and involved in court proceedings largely due to the *"complexity of advocating for both the abused child and abusive parent*" (Denne, et al., 2019, p. 2). Therefore, it is not surprising that *"child protective services have unusually high rates of turnover and diminished worker efficiency over time*" (Denne, et al., 2019, p. 2).

[223] It should be reiterated that this Irish mediator has been involved in cases where mediation was used in an Irish child protection case.

4.5.2. Disadvantages

Despite the persuasive arguments favouring the use of mediation in child protection proceedings in both foreign jurisdictions that were investigated as part of this study, the same concerns addressed by Irish-based participants in Phase 1 (namely power-imbalance and the appropriate skill of the mediator) were addressed by participants in the USA and Canada. Nevertheless, participants from all six CPM programme visited were able to combat these concerns indicating that in order for mediation to be effectively used in such cases, it is important to establish a mediation programme that is supported by a comprehensive training programme for child protection mediators (specifically). The participants expressed that the skills of a good mediator, within a well-developed structural process, can address and adjust for those power-imbalances, consequently minimising these concerns. The mediator's role is to facilitate the conversation and, therefore, he/she must be aware of certain issues, particularly power-imbalance, and needs to be able to manage that.

This point was also addressed by the Irish Law Reform Commission in 1996 where it was stated that: *"It is essential first that mediators themselves should, through their training, be able to identify inequalities in the bargaining strengths of the parties, and that they should be aware of techniques for redressing obvious imbalances"* (LRC, 1996, p. 89). More recently, the Legal Aid Board Handbook, entitled "Mediator Professional Practice" (2019), mentions that "…*it is the responsibility of every Mediator to monitor their own competence, including but not limited to appropriate supervision and case consultations"* (Legal Aid Board, 2019, p. 16).

A detailed analysis of the data will be discussed in detail in Chapter 5, alongside key research findings.

CHAPTER 5: ANALYSIS AND RECOMMENDATIONS

5.1. INTRODUCTION

The question posed by this research study was: ***"to determine whether child protection mediation can be a viable alternative, either in whole or in part, to adversarial processes, and whether it can aid child safety and welfare?"*** The answer to this research question was a qualified yes:

1. There are certain issues within a child protection case that could be more appropriately managed outside of the courtroom, through the use of alternative dispute resolutions (ADR), such as mediation
2. Child protection mediation (CPM) can be constructive in promoting the "best interests" of the child in certain circumstances and contexts.

However, it is important from the outset to be able to pre-empt any difficulties that may arise in the delivery of a CPM programme in Ireland. Therefore, in this chapter, the research findings will be explained and analysed with a view to identifying how best to roll out CPM in Ireland, anticipating and addressing in the design of such a programme any problems that may potentially arise. In addition, a number of recommendations for the successful implementation of a CPM programme in Ireland will be made with due regard to: (1) the appropriate nomenclature that should be used; (2) how CPM should be designed and developed in Ireland; (3) the suitability of a case to be mediated; (4) whether CPM should be a voluntary or mandatory process; (5) how the voice of the child can best be maintained within the process; and (6) specialist training.

5.2. KEY FINDINGS

5.2.1. Understanding the term "child protection mediation"

Ensuring a clear common understanding of the term "Child Protection Mediation" and what it entails is particularly important. During Phase 1 of the study, a significant proportion of Irish-based participants (forty-two of the fifty-three participants) connected CPM with a number of positive words and phrases.[224] The participants indicated that it could potentially promote better outcomes for children and families when compared with adversarial processes.

[224] While there are two separate issues here; i.e., (1) participants' understanding of CPM and (2) the participants' association of CPM with positive and/or negative sentiments are separate issues, I believe that they are related.

They suggested that CPM has the potential to empower the parents/parties. They also praised the non-adversarial nature of the mediation process and the manner in which it can improve and facilitate working relationships between the parents and the child welfare agencies, as well as encouraging parental involvement and maintaining strong family identities where possible. While overall the participants' perception of CPM was quite positive, there was a concern expressed by several participants regarding the lack of information surrounding CPM; primarily what aspects of a case can/cannot be mediated.

Similarly, the need to understand the term "CPM" and what it entails was also expressed by participants in Phase 3 of this research study. According to a member of the Irish judiciary: "*I also believe there is a general lack of awareness on the part of lawyers as to what mediation* [in a child protection context] *involves…"* This was expressed as a "marketing-challenge" by an Irish child protection academic: *"I do think there is a little bit of, almost like a marketing challenge in relation to ADR in child protection because when you unpack it and understand it, I think it has huge potential."* Therefore, "knowledge training" on what CPM is, how it works and what it can and cannot do would be extremely important to consider. As stated by an interviewed mediator during Phase 3 of this study, educating stakeholders about CPM is really vital: "*I found that people that were educated about the usefulness of mediation* [in a child protection context] *were able to use the mediation system to their advantage. The lawyers that didn't really understand mediation and how it worked, simply viewed it as being on their patch. Again, it is all about education."* For this reason, if Ireland is to explore the possibility of developing a CPM programme, it is essential that any misconceptions surrounding CPM are addressed at an early stage; all stakeholders involved in child protection must have a clear understanding of what CPM is, but more importantly what it is not. In addition, all stakeholders involved in CPM should have a thorough understanding of the principles and goals of mediation (in general), and particularly CPM, in order to be able to pre-empt any resistance that may arise towards potential implementation.

As earlier chapters have demonstrated, the very essence of CPM, akin to mediation (in general), is to achieve a voluntary, personalised agreement that is in the best interests of the child (and the parties) and to avoid contested adversarial trials where possible (Lande, 2001).[225] However, CPM sessions are not intended to be discussions about the allegations

[225] However, with CPM, the agreements are primarily focused on the best interests of the child.

that brought the family to the court's attention. As a child protection mediator in Chicago, (Illinois) observed *"people often say 'how can abuse and neglect cases be mediated?' They are right; we do not mediate those allegations, that is for the judge."* Rather, the mediation session should focus on engagement and understanding, exploring what the family and the child need in order to promote positive family engagement, and where possible, family reunification. This was reinforced by a Canadian child protection mediator, who indicated that CPM can *"assist the family in understanding the issues and receiving the help needed to care for their children."*

A key component of understanding CPM is to acknowledge the terminology surrounding it and the specific scope that the mediation processes propose. During Phase 2 of this study, it became clear that there was no widely accepted nomenclature to describe mediation in child protection cases across the USA. In fact, it appeared that the term used to describe the use of mediation in child protection cases was not always referred to as CPM. As a result, the programme aims and objectives could vary from state to state (Barsky, 1997). For example, in Chicago, the mediation programme is referred to as the *Child Protection Mediation and Facilitation Program*; so named because it can be used to resolve any issue within child protection proceedings. In Florida, the mediation programme is referred to as *Child Dependency Mediation*; however, while the phrase "child dependency" is seen as an interchangeable term with "child protection" in Florida, the court is focused on making a decision regarding the placement of a child and various issues that may be attached to this, such as providing required services, and visitation rights of the parents. In Oklahoma, the mediation programme is referred to as *Child Permanency Mediation*; solely used to achieve child permanency (i.e., the most suitable permanent home for the child as soon as possible) particularly in cases of the termination of parental rights. Similarly, in New York, the mediation programme was also referred to as *Child Permanency Mediation*; nonetheless, while the primary goal was to achieve child permanency, the mediation sessions were used to focus on ancillary child protection issues, such as custody and access issues, including disagreements between parents and foster parents.[226]

In contrast, the mediation programmes visited in the Canadian provinces that were the focus of this study (British Columbia and Ontario) are both described as "CPM" within statutory legislation. In British Columbia, CPM was greatly influenced by provincial legislation; such

[226] As mentioned in Chapter 2.6.2: Child Protection Mediation-USA, the NYC Child Permanency Mediation Program ended in 2011 as a result of the financial crisis in the court system.

as the Child, Family and, Community Service Act (CFCSA) 1996. The Act sets out the principles applicable to mediation and ADR processes. The CFCSA led to the establishment of the British Columbia Child Protection Mediation Program by the Ministry of Children (Crush, 2005). Similarly, in Ontario, it was the Child and Family Services Act (amended now and renamed to the Child, Youth and Family Services Act (CYFSA) 2017) that encourages and facilitates the use of ADR in child protection cases. In addition, section 3 (1) of Ontario Regulation 155/18 General Matters under the Authority of the Lieutenant Governor in Council (the Regulation) sets out the criteria for any ADR processes that take place under the CYFSA. The policy direction outlines methods of ADR, which include CPM.[227]

5.2.1.1. Research findings/recommendations

The first thing to consider is the appropriate nomenclature that should be employed to define the prescribed method of mediation that could be used in the Irish child protection system. This is an important issue, complicated by the fact that the relevant Irish legislation uses the phrase "child care" in its title (Child Care Act 1991). In addition, the Child Care Law Reporting Projects reports on "child care proceedings" and the Courts Service Annual Reports presents statistics on "child care". On this basis, an argument could be made that this form of mediation in Ireland should be referred to as "Child Care Mediation". However, this would cause possible confusion because "child-care" is a phrase that can also be used to describe day-time care arrangements for working parents.

On the other hand, the very essence of the Child Care Act 1991 is to protect a child. The phrase "protection" is mentioned several times through the Act; for example, the long title of the Child Care Act 1991 describes it as: *"An Act to Provide for the Care and Protection of Children and for Related Matters"*; under section 3 it indicates that it is the role of the CFA to promote the safety and welfare of the child, who is not receiving adequate care and protection; part III is entitled "Protection of Children in Emergencies"; and under part IV it is the role of the judge to grant an order (care order or supervision order), where it is decided that the child is in need of protection. Furthermore, according to the Department of Children and Youth Affairs website (2019), child protection *"is often the term used to identify government policy and its services working to prevent children being neglected and abused and to intervene when they are"*

[227] The policy also includes the following ADR methods: family group conferences, aboriginal approaches, and other methods deemed suitable by the relevant Children's Aid Society (CAS).

(DCYA, 2019). For all these reasons, it is submitted that "Child Protection Mediation" is the most appropriate terminology that should be used in Ireland.

The second aspect to consider is "Knowledge Training". During Phase 1 of this research, it became apparent that there was a general lack of consensus as to what CPM was amongst the Irish-based participants. However, according to Phase 2 participants from USA and Canada, in order to develop a successful CPM is it vital that there is a clear understanding of what CPM involves; otherwise, there is the potential for misunderstanding and the programme becoming something that it is not. Therefore, I recommend that before any discussion regarding implementation occurs, a series of "Knowledge Training" seminars/meetings should be organised to explain the goals and the processes of CPM to all stakeholders; for example, stakeholders should be able to draw distinctions between family mediation and other forms of ADR processes used in child protection cases (such as family welfare conferences and child protection conferences) from CPM. Enhancing stakeholders' understanding of CPM will encourage meaningful engagement, which is necessary in order to develop an effective and efficient CPM programme.

It is also important for family members involved in the child protection system to be educated on CPM.[228] Before a CPM session commences, the family should first be required to attend an "information session" regarding the mediation process itself. By engaging in some form of "knowledge training", the family will have some understanding of the mediation process, to ensure that expectations are managed. This will lead to a greater chance of meaningful family engagement in the session.

5.2.2. **Development of child protection mediation**

Understanding how CPM programmes have developed in other jurisdictions is critical, particularly when considering potential implementation in Ireland. It presents the opportunity to build on the "lessons learned" from previous programmes and outline a set of practical solutions for designing and implementing a successful CPM programme in an Irish context. The development of CPM programmes in both the USA and Canada (addressed in Phase 2) has been gradual; CPM programmes have been used both formally and informally

[228] While working as a judicial assistant/researcher I collaborated with the Courts Service and the Ombudsman for Children to develop a child-friendly information guide on "Your Right to be Heard". These leaflets should be considered when developing child/family-friendly information leaflets for CPM (Appendix I).

in both places for over thirty years. Nonetheless, there is a distinct difference between the development of CPM in the USA and in Canada. Not only that, but there is also a distinction between individual CPM programmes within the states/provinces themselves. For this reason, during Phase 2 of this research study, individual CPM programmes operating in certain states/provinces of the USA and Canada were examined. This originally occurred through desk-based research, followed by qualitative surveys and semi-structured interviews with working professionals involved in child protection and/or mediation. However, it is important to bear in mind that, strictly speaking, this was not a comparative study between the various jurisdictions; comparing and contrasting the similarities and differences between the development of CPM programmes across the jurisdictions, and within the individual states and provinces themselves, presented an opportunity to acquire knowledge and understanding from previously implemented CPM programmes. I will briefly summarise the development of each CPM programme visited during this research study.[229]

5.2.2.1. USA:

i. *Chicago, Illinois:* The first attempt to introduce ADR in child protection cases was in 1994, following a report commissioned by the Illinois Supreme Court Special Commission on the Administration of Justice and a subsequent amendment to the Illinois Juvenile Court Act (Martin, 2009). This initial attempt was unsuccessful because the working professionals (Department of Children and Family Services) involved in the child protection cases were *"not yet ready to trust each other or to work collaboratively on cases"*(Martin, 2009). A second attempt to introduce a CPM programme occurred in 2001, led by Judge Patricia Martin. The CPM programme originally focused on post-adjudication neglect and dependency and was later expanded to include ancillary issues such as guardianship, terminations of parental rights, and adoptions.

ii. *Tulsa County, Oklahoma:* The first attempt to bring in a mediation programme in Tulsa was in 2001 through the Early Settlement Group. The initial attempt was unsuccessful, mainly due to the lack of a comprehensive training process for mediators, an absence of qualifications/characteristics that made persons best suited to facilitate such a mediation session, and the attitudes of the working

[229]For more information, the reader is advised to revert to the literature review- Chapter 2.6: Child Protection Mediation.

professionals. In 2016, a second attempt was initiated by the Chief Judge of the Tulsa County Juvenile Division, Judge Doris Fransein and a court case manager, Ms Shanny Weaver. In this test-pilot, the judges of the division would order a case to mediation to resolve permanency issues in termination cases. This test-pilot has proved successful and is currently looking at expanding the various issues that can be mediated. The test-pilots illustrates that not all issues in child protection are the subject of CPM, even where it has been implemented.

iii. *Tampa, Florida*: Since the 1970s, ADR has been utilised by the Florida Court System. In 1998, there was a comprehensive revision to Chapter 44 of the Florida Statutes, which led to the implementation of the "Mediation Alternatives to Judicial Action". In 2004, Florida State Court System was divided into a multi-county circuit system (twenty judicial circuits, encompassing sixty-seven of Florida's counties). The establishment of a multi-county system provided for consistent court-connected ADR programmes across Florida. As a result, Florida has one of the most comprehensive and substantive CPM programmes, attributed by the codification of mediation in child protection in legislation and the establishment of robust training programmes.

iv. *New York, New York:* A test-pilot for a Child Permanency Mediation Program was initiated in NYC in 2001, in response to the perceived need for improved ways to handle child protection cases. However, prior to the commencement of the test-pilot, a number of stakeholders' meetings had taken place in order to determine whether a mediation programme could and should be implemented in NYC. The success of the test-pilot led to the introduction of permanency mediation services in 2003 in NYC, Albany, Erie, Monroe, Niagara, Oneida, Rockland, and Westchester (Thoennes & Kaunelis, 2011). Unfortunately, the NYC Child Permanency Mediation Program ended in 2011 due to a financial crisis in the court system.

5.2.2.2. Canada

v. *British Columbia*: The first attempt to introduce CPM was initiated through a test-pilot in Victoria in 1992. In 1996, British Columbia enacted the Child, Family and Community Service Act (CFCSA), which encouraged the use of ADR; section 22 of the CFCSA indicated that mediation is optional in child welfare cases. In 1997,

the British Columbia Ministry of Attorney General (MAG) and the Ministry of Children and Family Developments (MCFD) developed a province-wide system of CPM. In order to be compliant with the CFCSA, a provincial wide roster for child protection mediators was established in 1997. A second-test-pilot (Surrey Court Project) was conducted in 2001 which introduced a new mediation process, focusing on facilitated planning meetings (chapter 2.6.3.2.1 for more information).

vi. *Ontario:* The ADR programme was established in 2006 as part of a series of reforms regarding child protection services and how they should be delivered and funded in Ontario. Amendments to the Child and Family Services Act were passed in 2006 which required societies[230] to consider in every case whether the use of ADR could assist in resolving any issue(s) related to the child or the child's care plan; section 17 (1) of the Child Youth and Family Service Act 2017 (CYFSA) imposes a positive obligation on the CAS to use ADR in child care cases. This legislative development launched a government-funded child protection ADR programme (Leach, 2015). These provisions were included in the CYFSA, which came into force on April 30, 2018.

It is evident, therefore, that the development of CPM in the USA stemmed from test-pilots and "community buy-in", which eventually led to a legislative framework. In contrast, it appears that legislation was the primary driving force for the development of CPM in Canada; for example, in British Columbia, test-pilots were used to encourage prompt legislative changes. According to an interviewed participant in Ontario, legislation is a necessary component to successfully establishing a CPM programme: *"I think the legislation is required first and the reason I say that is because when it came into legislation in Ontario there was a whole paradigm shift."* This opinion was also shared by interviewed Irish-based participants from Phase 3 of this study. For example, when asked what would lead to a successful CPM programme in Ireland, an Irish mediator stated: "*a legislative framework. Mediation has always come across as the poor relative of the adversarial system. To give it the stamp of approval (so to speak), I would say it would benefit from some legislative framework."* The difficulty within Ireland, however, is that while we currently have a legislative framework that encourages and

[230] According to the CYFSA 2017 "society" means an agency designated as a children's aid society under subsection 34 (1).

regulates mediation (Mediation Act 2017), it deliberately excludes the Child Care Acts 1991-2015 from its scope. This leads to the question whether a specific legislative framework is, in fact, necessary for CPM in Ireland? This could include amending the Mediation Act 2017 to incorporate, rather than exclude, certain aspects of child care proceedings within the scope of the Act, or modifying Child Care legislation to encourage the use of mediation at a certain point or certain points in a child care case.

In addition, all six CPM programmes visited indicated that a successful CPM programme depends heavily on judicial support and encouragement. One participant from Chicago reported that it is important to obtain this support because *"if there is a professional that respects the program, they will use it."* A participant from Tulsa County elaborated on this point, indicating that the mediators should be hired as staff members in the courts themselves; this is what happened in Tulsa County - the mediator was already employed in Tulsa County Juvenile Court as a Case Manager. According to this participant, this was pivotal to the success of their programme because *"the judges knew the mediators that were based in their county; the judges felt comfortable with them and had developed relationships with them. Without that, I don't think the program would have gotten off the ground."* In addition, participants from Florida, New York, British Columbia and Ontario highlighted that "community buy-in" is also important, and that all stakeholders who would be involved in the use of CPM should be educated as to its possible uses and to the benefits of mediating certain aspects of child protection cases. According to a participant from Florida:

> *"To start a mediation program, you need community buy-in (stakeholders' group meeting from all the different perspectives - child protective agency, GAL, courts, all the different stakeholders - and design a program with their input because if you don't have their input it is very difficult to get this off the ground)."*

It is clear, therefore, that judicial support and "community buy-in" from working professionals, particularly legal representatives and members of the Irish judiciary, is important. Data from Phase 1 of this study revealed that the legal representatives are the cohort that most regularly initiates the discussion of the possibility of choosing mediation as a dispute resolution option. This is consistent with the general statutory obligation placed on solicitors to discuss the menu of alternatives available for dispute resolution with their clients. Section 14 of the Mediation Act 2017 states:

> *"(1) A practising solicitor shall, prior to issuing proceedings on behalf of a client:*
>
> *(a) advise the client to consider mediation as a means of attempting to resolve the dispute the subject of the proposed proceedings"* [emphasis added].[231]

Furthermore, under the Mediation Act 2017, solicitors are required to provide the names and addresses of suitably qualified persons who can provide mediation services (section 14 (1) (b) of the Mediation Act 2017). The practicing solicitor must then file a statutory declaration in court confirming that they have discharged this statutory obligation (section 14 (2) of the Mediation Act 2017). If the statutory declaration is not on the court file when the case is listed, the proceedings may be adjourned by the judge to facilitate an opportunity for the solicitor to inform their client about mediation and allow their client to consider it as an option (section 14 (3) of the Mediation Act 2017);[232] this may be the reason why the Irish-based participants (Phase 1), indicated that the judiciary are the second most likely category to initiate the discussion on the possibility of choosing mediation. However, it is important to bear in mind that Phase 1 of this research was conducted between April–August of 2017, yet the Mediation Act 2017 was not enacted until October 2017. While it could be argued that the discussion surrounding the possibility of choosing mediation may not have been as big of a factor prior to the enactment of the Mediation Act 2017, a family law solicitor would have been conscious of mediation as an option under family law as similar legislative requirements already applied prior to 2017 and still apply to judicial separation, divorce, guardianship, custody, and access applications. For example, section 6 of the Family Law (Divorce) Act 1996 states:

> *"If a solicitor is acting for the applicant, the solicitor shall, prior to the institution of the proceedings concerned under section 5 (b) discuss with the applicant the possibility of engaging in mediation to help to effect a separation (if the spouses are not separated) or a divorce…"* [emphasis added].

Similarly, under section 20 (2) of the Guardianship of Infants Act 1964:

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[231] The phrase "*issuing proceedings*" is important to acknowledge, as it indicates that this provision only applies when a solicitor is issuing proceedings on behalf of their client. It also pertinent to note that as the Child Care Acts do not fall within the scope of the Mediation Act 2017, this statutory obligation placed on solicitors does not apply to child protection cases.

[232] The practicing solicitor must then file the required statutory declaration in court.

> *"If a solicitor is acting for the applicant, the solicitor shall, before the institution of proceedings under section 6A, 11 or 11B, discuss with the applicant the possibility of the applicant—..... (b) engaging in mediation to help to effect an agreement between the applicant and the respondent about the custody of the child, the right of access to the child or any question affecting the welfare of the child, and give to the applicant the name and addresses of persons qualified to provide an appropriate mediation service"* [emphasis added].[233]

In any regard, the planning of a CPM programme would need to be a collaborative process that addresses the perspectives and experience of all the stakeholders (particularly those involved in child protection proceedings). The importance of stakeholders' engagement and "community-buy in" was also addressed by participants in Phase 3 of the study. One Irish mediator indicated that:

> *"If a judge and the stakeholders are engaged, I think it gives a certain benefit to the mediation process and the implementation of the process. Certainly, if it were to happen under a court framework, I think it would have a certain seal of approval and it might be less likely to be automatically dismissed. The other thing is that there needs to be a will on the part of the lawyers to support this. The big difficulty in all of this, is what is their incentive."*

5.2.2.3. Research findings/recommendations

The first question that needs to be addressed is whether the development of CPM in Ireland should commence with a test-pilot scheme in Ireland and/or through legislation (either by amending the Mediation Act 2017 and/or the Child Care Acts 1991-2015). However, stating that mediation is an option in child protection cases within legislation will not, in itself, guarantee the successful implementation of a CPM programme. Therefore, I would first recommend that an Advisory Committee (advocates for CPM) be established, which will develop and conduct a test-pilot scheme in Ireland (used to mediate a number of appropriate cases for evaluation proposes). If the outcome of the pilot proves to be successful, legislation should be amended to encourage the use of mediation in child protection. The logic behind this is described below.

[233] This point was also reiterated by Budd J, in the case of *L v. Judge Haughton* [2007] IEHC 316, where he ruled that many statutes contain obligations to produce mediation certificates. No such prerequisite existed for proceedings initiated under the Domestic Violence Act 1996 (or under the Domestic Violence Act 2018, which replaced the 1996 Act).

5.2.2.3.1. "Community Buy-In" and Test-Pilot

After comparing the development of each CPM programme examined in Phase 2, it became clear that the success or failure of a programme can ultimately be determined by the participation (or lack thereof) of key stakeholders in the consultation and implementation process. For example, in Chicago and in Tulsa County, the first attempt to introduce CPM failed because of misconceptions (and frustrations) of the working professionals involved in the programme. To reinforce this point, during the study fifteen out of the twenty-nine American and Canadian participants indicated that there was some resistance when CPM programmes were first introduced; this was mainly due to the "attitudes" of working professionals toward CPM. One participant from Canada indicated that:

> *"There is still resistance amongst everybody involved; some attorneys, some case workers, some judges even. In Cook County in Chicago, we are "control freaks", the attorneys don't like to give up control, so they are not only resistant to* [CPM] *here, they are really resistant to mediation. That is one of the reasons why it was slow to catch on here. You can still see that, and with the case workers too."*

An outcome from this research would support that no one person should be in a position to roll out a CPM programme on their own, particularly if there is any resistance. As a result, the first thing that I would recommend would be the establishment of an Advisory Group; a cohort of advocates for CPM. The Advisory Group would be consulted and listened to and would provide feedback on the implementation and evaluation of the test-pilot (subject to ethical approval from relevant bodies). The members of the Advisory Group should have relevant expertise within the field of child protection and mediation processes. In no particular order of importance, the composition of the Advisory Group should include representatives from the Irish judiciary, legal representatives (the Law Society of Ireland and the Bar Council of Ireland), mediators (from the Legal Aid Board, the Mediators Institute of Ireland, and other mediation establishments), the Child and Family Agency (Tusla) (particularly social workers and social work team lead), the Department of Children and Youth Affairs, and representatives from relevant Child Welfare Agencies, such as Barnardos, T.I.G.A.LA, and the Ombudsman for Children. The Terms of Reference for the Advisory Group, informed by the outcomes of this thesis, are to:

- Provide "information sessions" or "knowledge training" on CPM to relevant stakeholders and any person who would avail of child protection services (discussed above)
- Elect three members each to both the Implementation Committee and the Evaluation Committee (see below)
- Oversee the work carried out by the Implementation Committee and the Evaluation Committee in relation to the test-pilot (see below)
- Develop a robust, comprehensive training programme for child protection mediators
- Encourage policy and legislative developments in order to build towards a statutory framework that would regulate CPM in Ireland.

The outcome of this research suggests that an Advisory Group would help to achieve "community buy-in", which, according to Phase 2 participants, is important when implementing a CPM programme. However, giving the task of implementing to a larger group could potentially slow down the implementation process. Therefore, I recommend the establishment of two sub-committees (the Implementation Committee and the Evaluation Committee), additional to the Advisory Group. The main aim of the Implementation Committee would be to organise the roll-out of the test-pilot. The implementation would be made up of expert professionals, trusted within the system, with the authority and responsibility to operationalise the project. Members should include a representative from the Child and Family Agency (CFA) (Tusla), a specialist mediator, and a legal representative with relevant experience in child protection. The Implementation Committee should follow the test-pilot template provided for in chapter 6 of this thesis.

After the test-pilot is completed, an evaluation should be conducted by a separate committee (the Evaluation Committee). Members should include researches (such as post-doctoral researchers) and a project manager who have particular skills in the field of child protection and mediation. Having gathered data on the test-pilot, the Evaluation Committee should, at a minimum, consider the following:

- The efficiency and effectiveness of the referral process
- The optimum length of time a mediation should take place for
- The criteria for determining the suitability of a case to be mediated (what kind of cases should be included or excluded from the process)

- The participants' attitudes towards the use of mediation, while taking care to ensure that vulnerable persons are appropriately protected in the review process.

After the test-pilot is completed, the Advisory Group should have the opportunity to provide feedback and be able to critique the process involving 360-degree feedback. This will help foster a collaborative process, which has been recommended by Phase 2 participants.

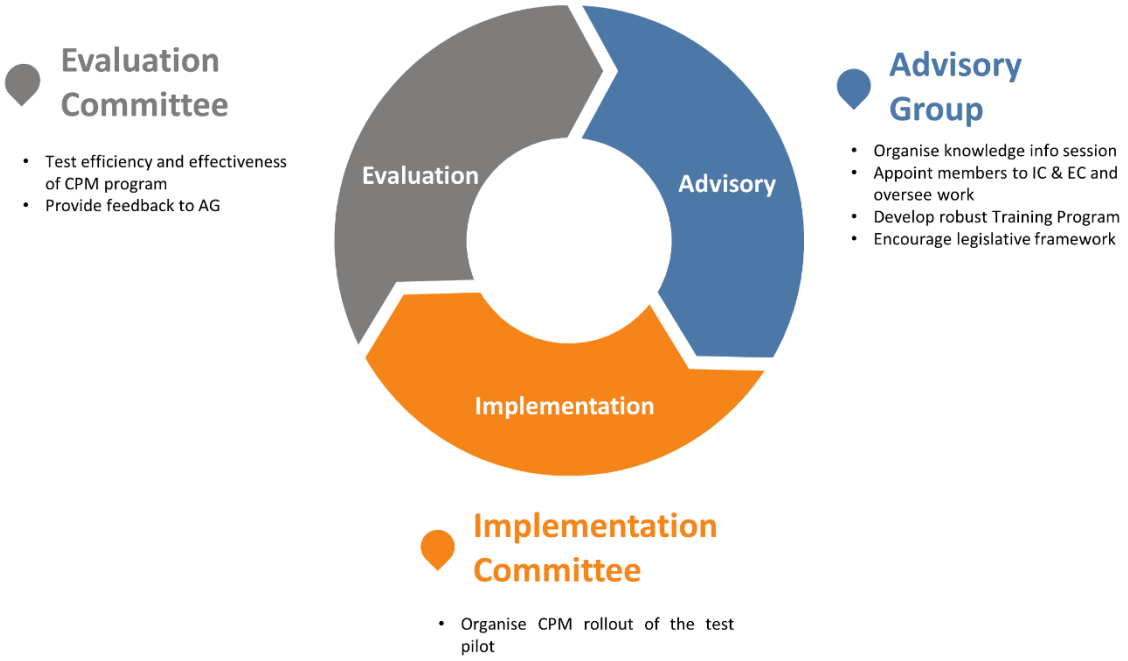

Figure 5.1: Proposed organisation workflow for "community-buy-in" and test-pilot.

5.2.2.3.2. Legislative framework:

Overall, legislation can provide a framework for CPM and help regulate the process. Data findings from Phase 3 of this research indicated that CPM is happening in practice, albeit in a small proportion of cases (eleven percent of observed cases). However, section 3 (1) (i) of the Mediation Act 2017 excludes the Child Care Acts in their entirety from the scope of the Act. As a result, parents/families and child welfare agencies who choose a less adversarial method of resolving certain issues (such as access and voluntary care arrangements) within child protection cases cannot avail of a regulated legislative framework. To me, this is a significant problem. I would, therefore, argue that CPM should be positioned within the legislative architecture. Acknowledging mediation as a legal process gives it more authority and weight. It is important that mediation should not solely be seen as a form of "alternative" dispute

resolution, but as a genuine dispute resolution tool – a recognised part of the process. Mediation should not be seen as a second-best option, but as an option that works best in many situations. Therefore, there is a real value in positioning CPM within the legislative system and value in enabling mediation-based legislation.

An outcome of this research is that CPM can be a very dynamic method for resolving certain issues within child protection disputes. It is therefore unfortunate that the use of mediation in child protection cases has been excluded from recent legislative developments (most recently the Mediation Act 2017). However, when considering CPM in an Irish context, the question that needs to be answered is whether the Mediation Act 2017 should be amended to provide for CPM? Or alternatively, whether the Child Care Acts 1991-2015 should be modified to encourage mediation in relation to certain aspects of a child care case?

As it currently stands in Ireland, section 3 (1) (i) of the Mediation Act 2017 states that *"the Act shall not apply to…(i) proceedings under the Child Care Acts 1991 to 2015."* The main problem with this provision is that it excludes the Child Care Acts in their entirety. It therefore fails to acknowledge that there are certain aspects of a child protection case that could be more appropriately managed through mediation (such as access, foster placements breakdowns and the details of voluntary care arrangements (chapter 5.4)). The exclusion of CPM in all child protection contexts only serves to discourage parents and child protection services from potentially using mediation to collaboratively achieve a personalised child-centred parenting agreement in the child's best interests. On this basis, an argument could be made that section 3 (1) (i) of the Mediation Act 2017 should be amended, to encourage the use of mediation in relation to appropriate aspects of a child protection case. However, as mentioned on several occasions, CPM is not appropriate in all child protection cases, and there are certain contexts in which CPM would not actively serve the best interests of the child. Therefore, CPM should not be seen as a panacea. With this in mind, if the Mediation Act 2017 was to be amended, the wording of the provision would have to be very specific, in order to acknowledge this. For example, the wording of section 3 (1) (i) of the Mediation Act 2017 could be amended as follows:

> *"The act shall not apply to…(i) proceedings under the Child Care Acts 1991 to 2015- except in limited circumstances, and in relation to matters specified by a judge, where the judge is of the opinion that it would be in the best interests of the child."*

However, the wording of this draft provision would not be sufficiently clear, particularly in relation to the implications of such a decision. For instance, if the judge rules that it is in the best interests of the child for mediation to be used to resolve an issue(s), would the whole Mediation Act 2017 apply? If so, what would that mean? Would this have retroactive effect or just operate from the date of the order? What would amount to "limited circumstances"? Therefore, I suggest that child protection specific legislation may need to be considered to encourage CPM in child protection cases.

In addition, it is important to note that the Mediation Act 2017 only excludes mediation in child protection cases from the scope of the Act; it does not necessarily rule out mediation being used in such contexts such as voluntary care agreements, foster placement breakdowns, or access issues pursuant to sections 37 or 47 of the Child Care Act 1991. Mediation in a child protection context is not "unlawful" in Ireland and accordingly various parties can and do mediate certain aspects of a child protection case in Ireland. For example, Order 49B the District Court Rules suggests a preference for mediation (in fact, Order 49B of the District Court Rules appears to be closely linked to the Mediation Act 2017; for example, rule 2 refers to "*civil proceedings to which the 2017* [Mediation Act 2017] *applies.*")

CPM needs only to be positioned within the legal architecture, with appropriate modifications to account for the particular nature and dynamic of child protection proceedings. For this reason, I recommend that the Child Care Acts 1991-2015 be first amended to encourage the resolution of child protection disputes (where appropriate) outside of the courtroom, including mediation; however, the issue of whether the child has been harmed and therefore needs protection arguably still must be the preserve of the judge. Currently, section 16 of the Child Care Act 1991 places an obligation on the CFA to apply for a care order or a supervision order if a child is in need of care and protection: Section 16 states:

> *"Where it appears to the Child and Family Agency that a child requires care or protection which he is unlikely to receive unless a court makes a care order or a supervision order in respect of him, it shall be the duty of the Agency to make application for a care order or a supervision order, as it thinks fit."*

I recommend that a new section 16 A be inserted into the Child Care Act 1991, which would encourage the CFA to consider the possibility of resolving certain aspects of a case, where

appropriate, through the use of mediation and other alternative dispute resolution mechanisms. Such a provision could read as follows:

> *"16A. (1) Where the Child and Family Agency (in this section 'the Agency') forms the view that a child requires care or protection which he is unlikely to receive unless a court makes a care order or a supervision order in respect of him, it shall be the duty of the Agency, prior to making an application for a care order or a supervision order as required by section 16, and having regard to the factors set out in subsection 5, to consider whether, in the particular circumstances, mediation would be appropriate as a means of attempting to:*
>
> *(a) Ensure the child receives the necessary care and protection through voluntary arrangements made with the consent of the parents or guardians or other persons having custody of a child,*
> *(b) Resolve matters that may be in dispute or may be disputed during proceedings taken under this Part,*
> *(c) Agree arrangements that would apply in respect of access to the child and other matters relating to the child's care should an order be made under this Part, or*
> *(d) Agree any other matter relating to care arrangements for the relevant child.*
>
> *(2) The Agency shall give reasons for its decision to propose mediation or to decline to do so, as the case may be.*
>
> *(3) If the Agency is unable to resolve an issue(s) relating to the child or a plan of care, the parties may separately make a request to the court to use mediation or other alternative dispute resolution mechanisms as a means of resolving the issue(s)."*
>
> *(4) A court before which proceedings have been commenced under this Part, having considered the factors set out in subsection (5) and any other factors which to it appear relevant, may, on the application of a party involved in proceedings under this Part, or of its own motion where it considers it in the best interests of the child and appropriate having regard to all the circumstances of the case, invite the parties to the proceedings to consider mediation as a means of attempting to reach the subject of the proceedings.*

The second insertion into the Child Care Act 1991 should outline the effect of mediation on adversarial proceedings. For example, a time frame should be established for how long a case should be adjourned for this purpose. I recommend that the use of mediation in child

protection proceedings should not delay the process inordinately.[234] The time frame for an adjournment should be left to the discretion of a judge; however, it should not exceed a period of three months. The justification is to resolve the issue in dispute in a timely manner (mediation should not unduly delay a protective outcome for the child). The one exception to this would be if mediation was used within an interim care order; in such a case, the timeframe should not exceed twenty-eight days because such orders are only granted for a period of up to twenty-nine days.[235] The relevant provision might read as follows:

> *"16A (5) Where, following an invitation by the court under subsection (1), the parties decide to engage in mediation, the court may adjourn the proceedings, for so long as the court considers necessary, but no longer than 28 days in the case of an application for an interim care order and in any other case no longer than 3 months.*
>
> *(6) In determining whether to propose mediation, the court or Agency (as the case may be) shall have regard to such factors as it considers to be relevant in the particular circumstances, and, shall, in particular, have regard to the following factors:*
>
> > *(a) Whether the urgency of the case requires that court proceedings be commenced without delay with a view to protecting the safety and welfare of the relevant child,*
> >
> > *(b) Whether mediation would be in the best interests of the relevant child,*
> >
> > *(c) Whether mediation would pose a substantial risk to the safety or welfare of the relevant child or any of the proposed participants in such mediation, including the parents or guardians of the relevant child or persons currently having custody of the relevant child or any of them, the mediator, or the staff of the Agency,*
> >
> > *(d) Whether the parents or guardians or persons currently having custody of the relevant child or any of them lack capacity to consent to, understand, or participate meaningfully in a mediation process, due to illness, addiction, or any other relevant factor,*
> >
> > *(e) Whether mediation would not be appropriate given the nature of the relationship between any two or more of the parents or guardians or persons having custody of the*

[234] There will inevitably be some delay. The aim should be that it is not unreasonable and that it does not prejudice the best interests of the child.
[235] This period was extended from eight days to twenty-eight days by section 267 (1) (a) of the Children Act 2011.

relevant child or any other persons, including where there is a history or substantial risk of violence or abuse and

(f) Any other factors which the Agency consider relevant and appropriate."

The third insertion into the Child Care Act 1991 should refer to the enforceability of an agreement. If an agreement is reached during the mediation session, I recommend that a Memorandum of Understanding (MOU) should be signed by all the parties and presented by the CFA to the court at the next hearing date. The MOU is not a legally binding document unless, or until, it is converted into a legal document;[236] subject to the best interests of the child. If the parties make changes in the implementation of the MOU without informing the CFA, they should be prepared for the CFA to follow up and ask questions. It would be the role of the CFA to file the MOU with the court. If the court is satisfied with the terms, it could be incorporated into the court's order (figure 5.2). The provision could read as follows:

"16A (7) (i)If, as a result of mediation or other alternative dispute resolution mechanism, a Memorandum of Understanding is made after a proceeding is commenced to resolve an issue(s), the CFA may file the Memorandum of Understanding with the court.

(ii) Where the court is satisfied that such an agreement is fair and reasonable and, in all circumstances, protects the best interests of the child and the parties, such an agreement may be deemed to be an order and the court may make such directions as appear to it to be proper."[237]

5.2.3. Suitability of a case

Firestone acknowledges that not all cases are appropriate for mediation (Firestone, 1997). The suitability of a case should always be borne in mind when considering CPM. As mentioned above, while forty-two out of the fifty-three Phase 1 Irish-based participants connected mediation with positive words, the majority of these participants were only in favour of the potential use of CPM in certain specific circumstances, such as resolving access disputes, confirming the details of voluntary care agreements, or matters arising in the pre-trial and post-trial processes. In addition, during Phase 2 of this study, representatives from all six visited CPM programmes pointed out that it is essential to determine the suitability of

[236] While a Memorandum of Understanding may ultimately be turned into a legally binding document, by due legal process, the process of mediation alone does not go through the legal steps required to assure such legal due process.

[237] Similar to section 24 of the Guardianship of Infants Act 1964 which allows certain parts of a custody agreement to made a rule of court.

the case for mediation. Participants made clear distinctions between the primary (substantive) issues of child protection (with which the court is concerned) and the numerous other (ancillary) issues that can arise throughout the course of child care proceedings. For example, all participants expressly mentioned that CPM should not be used to determine the alleged mistreatment, abuse, abandonment or neglect of the child (the threshold of child protection must be determined by a judge). Rather, CPM can be used to remove certain barriers in a case in order to achieve stability for the child, with the ultimate goal of family reunification.[238] This indicates that mediation can be used to resolve the ancillary issues with respect to the child in care. This point was further elaborated by an Irish mediator in Phase 3 of this study. She indicated that mediation in child protection cases can be used on:

> *"All the ancillary issues that arise in the context of these orders* [child care orders]. *For instance, where an interim care order is made, the terms and conditions of the placement. It serves to keep the communication lines open, rather than an 'us and them' stalemate situation. Once that situation has developed, I believe that it is very difficult to row-back. The importance of mediation in child protection cases is to understand its limitations."*

The use of mediation during proceedings seeking interim care orders and extensions of interim care orders particularly lends itself to mediation. Throughout the observations, it became apparent that certain aspects of extensions of interim care orders could be more appropriately managed through mediation (mainly, access and foster placement issues), compared to issues that arose in proceedings for care orders. This is in line with the mediation literature which acknowledges that the earlier mediation is utilised in a dispute, the greater the chance of success and re-establishing working relationships (LRC 2010; LRC 2008). It is widely reported that as a conflict/dispute continues, participants' positions often become entrenched and it gets harder to find a resolution. This point was expressed by a mediator interviewed after the court observations (Phase 3). The Irish mediator had acknowledged that she had some, albeit limited, experiences with mediating child protection cases in Ireland and noted:

> *"A lot of the time, the cases came too late - the care orders were made and the children were in care. It had been years and years of going back and forth, and back and forth, that things had gone too far. There was one obvious thing that struck me - relationships were very entrenched.*

[238]Where family reunification is not possible, the most permanent placement for the child should be achieved within the specified timeframe as provided for by the law.

> *The HSE* [predecessor of the CFA in this context] *had formed a view, cases had taken up a huge amount of time, and orders had been made."*

Similarly, an Irish judge also commented on this stating:

> *"Mediation could have an important part to play in child care proceedings however they are more likely to be beneficial in circumstances where parents are being encouraged to engage to ensure their children are not brought into care or in circumstances where engagement will be part of a process for the return of the children to their care. It would be difficult to see where mediation would be seen to be beneficial to parent in a fully contested child care proceeding."*

5.2.3.1. Specific issues to be mediated

When implementing a CPM programme, it is important to be clear on the issues that can and cannot be mediated. However, the primary basis of all CPM programmes should ensure that the child's best interests are being served. There should also be no immediate risk of harm for a child and there should be a relevant child protection issue. As mentioned in chapter 4, it quickly became apparent during the court observations that there were certain issues that can present in child protection cases, either prior to or during a formal process, which could be more appropriately managed in an ADR (mediation) setting. The following outlines certain aspects within a case where mediation could be used to effectively and efficiently resolve certain ancillary issues:

5.2.3.1.1. Access

During court observation in Phase 3, access presented as a barrier in fifty-two percent of cases. The process employed at present indicated that where parents or child protection working professionals are not satisfied with the access being provided, they may apply to the court, pursuant to section 37 (2) of the Child Care Act 1991. However, could the issue of access be more appropriately managed through the use of mediation? According to Coulter (2019), ADR could be appropriate in certain situations, particularly disputes centred around access, and *"people should not have to go back to court to get those kinds of issues dealt with. It would be much more appropriate and suitable for that to take place in a less stressed environment"* (Coulter, 2019).

In other jurisdictions, CPM is used to resolve access disputes. For example, in Cook County (Chicago), several categories of issue have been identified that can be addressed at mediation.

Circuit Court Rule 19A.19 outlines that "*the mediation program focuses on issues of return home, visitation, placement stabilization, and any issues that are barriers to permanence."*[239] In Florida, according to the Eight Judicial Circuit of Florida, *"Some of the issues which may be involved in Juvenile Dependency Mediation include: case planning, custody, visitation, shared parental responsibility…"* (Circuit8, 2016).

In addition, in British Columbia, CPM can be used to mediate access issues; particularly how often can access take place, the venue for access, the duration of access and other analogous matters. By resolving an issue, such as access, it essentially removes a barrier that prevents the case moving forward.

5.2.3.1.1.1. Access to services

Another point to note is that when we think about "access", we are often referring to "contact" with a child and/or a family member.[240] However, one interviewed participant from Phase 3 indicated that there is also an issue with access to services; separate to access in the legal sense, i.e., contact with a child. Indeed, "access to services" is quite distinct from the term "access" used within child protection law.

According to the participant, a lot of the issues surrounding access to services are largely speaking outside of the jurisdiction of the court: *"I have also seen where there is a lot of court time spent over something that is out of the judge's control e.g., access to services. You could look at some of those issues in different spaces as well."* The use of mediation to resolve access issues in respect to visitation and also services was highlighted by a judge in Tulsa County (Phase 2). The judge indicated that mediation can be used *"to discuss all the issues in a case; such as what visitation rights do the parents have, what services and treatments are needed for the parents and the child(ren)."*

In addition, during a CPM session observed in Chicago (Phase 2), the issue of parental access was raised, because the mother had missed several of her access visits with her child. Throughout the course of the mediation, the mother had the opportunity to share her story and it transpired that the access centre was a considerable walk from her accommodation, and

[239] Rule 19A.19 was amended in July 2006 to comply with Illinois Supreme Court Rule 905 (Circuit Court Cook County, 2018).
[240] According to the Courts Service website, access can be physical (seeing a child in person) or it can be remote/virtual (letter, telephone or other form of electronic communication) (Courts Service, 2018).

she did not have the money to pay for a bus pass. Consequently, she was walking for several hours in order to visit her child for one hour. This led to a productive discussion between the mother and the child welfare agency in which they provided her with an annual bus pass. Since then, the mother has not missed an access visit. This is a practical example of how mediation can be used to remove barriers which impede the progress of the case. Therefore, the use of mediation in child protection cases could also be used to explore and explain services and supports that are being or could be provided to parent/families, which may, in turn, lead to great parental engagement.

5.2.3.1.2. *Capacity and substance abuse*

Capacity issues arose in thirteen percent of cases observed during Phase 3 of this study. As mentioned in chapter 4, during one observed child protection case (Chancery Street Courthouse (DMD)), the social work department attempted to use mediation with the respondent mother and her family in order to generate a greater family support network and improve communication. However, mediation did not work in this case because of the incapacity issues of the mother to accept responsibility for the child's mistreatment. It can be argued that the capacity of the parties is a concern that can arise in any form of mediation, not just in CPM. It is the role of the mediator to balance the needs/interests of the parties with the integrity of the mediation process. Therefore, the mediator assumes the responsibility to determine whether the participants have the capacity to mediate. This point was confirmed by an interviewed Irish mediator during Phase 3 of this study. The mediator stated*: "every case falls to be considered on its own individual facts."* During the interview, she raised whether or not it is appropriate to mediate domestic violence cases; however, her rationale was that it is the responsibility of the mediator to understand their own limitations and what they are capable of:

> *"I have screened for domestic violence, for many, many, many years. And some of the most successful cases that I have had, are cases where there is domestic violence present. But again, there were reasons why I mediated, and I knew what I was doing; I was sufficiently on top of my subject to realise the usefulness of it and how far I should go. So, I don't except that you don't mediate cases of domestic violence. At the end of the day, I am thinking am I doing anything that is possibly endangering one or both parties."*

While the interviewed mediator is specifically referring to domestic violence issues (which are also excluded from the scope of the Mediation Act 2017), it raises the point of a mediator being aware of their limitations. A well-trained mediator who understands the importance of self-reflective mediation practice will keenly appreciate the importance of understanding their limitations. Mediator training and learning is a unique discipline and *"unlike learning a scientific formula or a mathematical equation"* (Hardy, 2009, p. 386). Hardy continues by outlining that *"a good mediator requires more than an in-depth understanding of the theoretical process of mediation"* (Hardy, 2009, 386); they also need to be flexible and self-aware within their mediation practice. According to (Moon) 2005, *"the process of learning is not, therefore, about the accumulation of material of learning, but about the process of changing conceptions"* (Moon, 2005, p. 16-17). Self-reflection is an inherent part of mediation and a perpetual requirement for any mediator (Hardy, 2009). A well-developed mediation training programme, which encourages a self-reflective practice, is vital for a successful CPM programme in any jurisdiction. Mediation training is explored further under chapter 5.3.7 (below).

5.2.3.1.3. Foster placement:

Foster placement issues arose in twenty-two percent of observed cases in Phase 3 of this study. In the majority of CPM programmes visited in other jurisdictions (Phase 2), mediation was used to resolve foster placement disputes. In particular, mediation was used to promote an open dialogue amongst the parties, which ensures that everyone has a better understanding of the case and each other's perspectives; this helps achieve a child-centered parenting agreement that is in the child's best interests. One child protection mediator from Chicago elaborated on this point by stating:

> *"I don't think the parents, or the foster parents, realise how much it benefits the child to have them meet. One of the very first cases that I mediated here, there was the parents and the foster parents, and after three months into the case, they met for the first time. The foster parents were completely unaware that there was a deceased sibling. What I remember most about it was the talk of food. So, the* [natural] *mother was saying what food would comfort her the most. And the foster parent asked how to make it and if the mother would share the recipe…. It allowed the foster parents to realise that this child not only lost her mom, but she also lost a sibling. It changed their whole perspective on what was happening and what happened. Ultimately, that kid benefited way more from that conversation."*

This powerful quote highlights the enormous impact that CPM can have on the outcome of a child protection case, primarily how it can be used to serve the best interests of the child in an efficient and expeditious manner and promote good working relationships.

5.2.3.1.4. Voluntary care arrangements

Finally, in seventeen percent of cases observed, issues with voluntary care agreements emerged, such as withdrawal of consent to voluntary care or specific details of the parenting agreement. As previously mentioned, when a child enters the care of the State, pursuant to section 4 of the Child Care Act 1991, the parents sign a Reception into Care Form; they have consented to the child being received into the care of the CFA. However, it must be stressed that the parents continue to exercise parental responsibility and therefore the CFA has to consider the parent's wishes as to how care should be provided. From my observations, the process employed at present by the CFA is hierarchical and is frequently achieved without the parents receiving independent legal advice in advance of signing the "Agreement". Frequently, the details of the Parenting Plan are left vague, with the potential for future disagreement. According to the preliminary findings of the 2019 study entitled 'Voluntary Care in Ireland' by Kenneth Burns, Conor O' Mahony, and Rebekah Brennan of the School of Applied Social Studies and School of Law at UCC, parents can experience "soft-coercion" in the context of voluntary care arrangements:

> *"Some parents may experience 'soft coercion', whereby they are told that if they refuse to sign a voluntary care agreement, a court order will be obtained instead…The absence of legal advice, coupled in many cases with difficulties in understanding, leave parents unable to question or challenge this assertion or realize that a court order might not necessarily be granted."*

As a result, in many instances, such voluntary care agreements have led to applications to court for an emergency, or interim care order, or an order under section 47 of the Child Care Act 1991 to override the consent of the parents for holidays or health treatment when the parents seek the return of the child. In addition, according to Coulter (2019), ADR mechanisms could also be used to resolve disputes *"…about education of the children or around going on holidays; for psychological and medical assessments of the child; and so on"* (Coulter, 2019). I argue that the process of reaching these "Agreements" would be more appropriately managed through mediation, although this is not current practice in Ireland.

5.2.3.2. Research findings/recommendations

It is critically important to be able to determine whether or not a child protection case is suitable for mediation. Data collected from all three phases of this research (and the literature) indicate that there are certain aspects of a child protection case that would not lend themselves to mediation, and where the use of mediation would not serve the best interests of the child. Therefore, consideration must be given to the type of process that would be capable of making such a determination. No one size fits all model will work; the suitability of a case will need to be decided on a case-by-case basis.

As aforementioned, I recommended that the Child Care Acts 1991-2015 should be amended in order to encourage the use of mediation in certain aspects of child protection disputes. However, such modifications should acknowledge a statutory obligation imposed on the judge to determine whether the use of mediation to resolve an issue(s) would serve the best interests of the child. Therefore, there is a responsibility on the judge to determine the suitability of an issue to be mediated (figure5.2). However, such issue(s) cannot include the child protection concerns of abuse, abandonment or neglect because it is the role of the judge to determine whether the threshold for a care order or other order or directions are met.

There should also be an obligation on the mediator to determine whether the case is suitable for mediation. As a result, I would also recommend that an initial assessment process be utilised as soon as the referral is received by the mediator (before the commencement of the mediation process) (figure 5.2). In other jurisdictions this is referred to as "Pre-Screening Mediation Session", and, therefore, I would recommend that this would be the appropriate terminology that should be utilised by the mediators in Ireland; however, for the parties the process should be referred to as an "Information Session". The aim of screening would be to determine whether:

1. The issue being referred is suitable for mediation
2. The use of mediation to resolve an issue(s) within the child protection case which would serve the best interests of the child
3. All of the parties are in a position to be able to actively participate in the mediation process without any risk of harm
4. The parties have the capacity to mediate; this would include issues such as mental and physical health, substance and alcohol abuse, intellectual ability and any other relevant

factors that may affect each party's ability to concentrate, negotiate and make decisions.

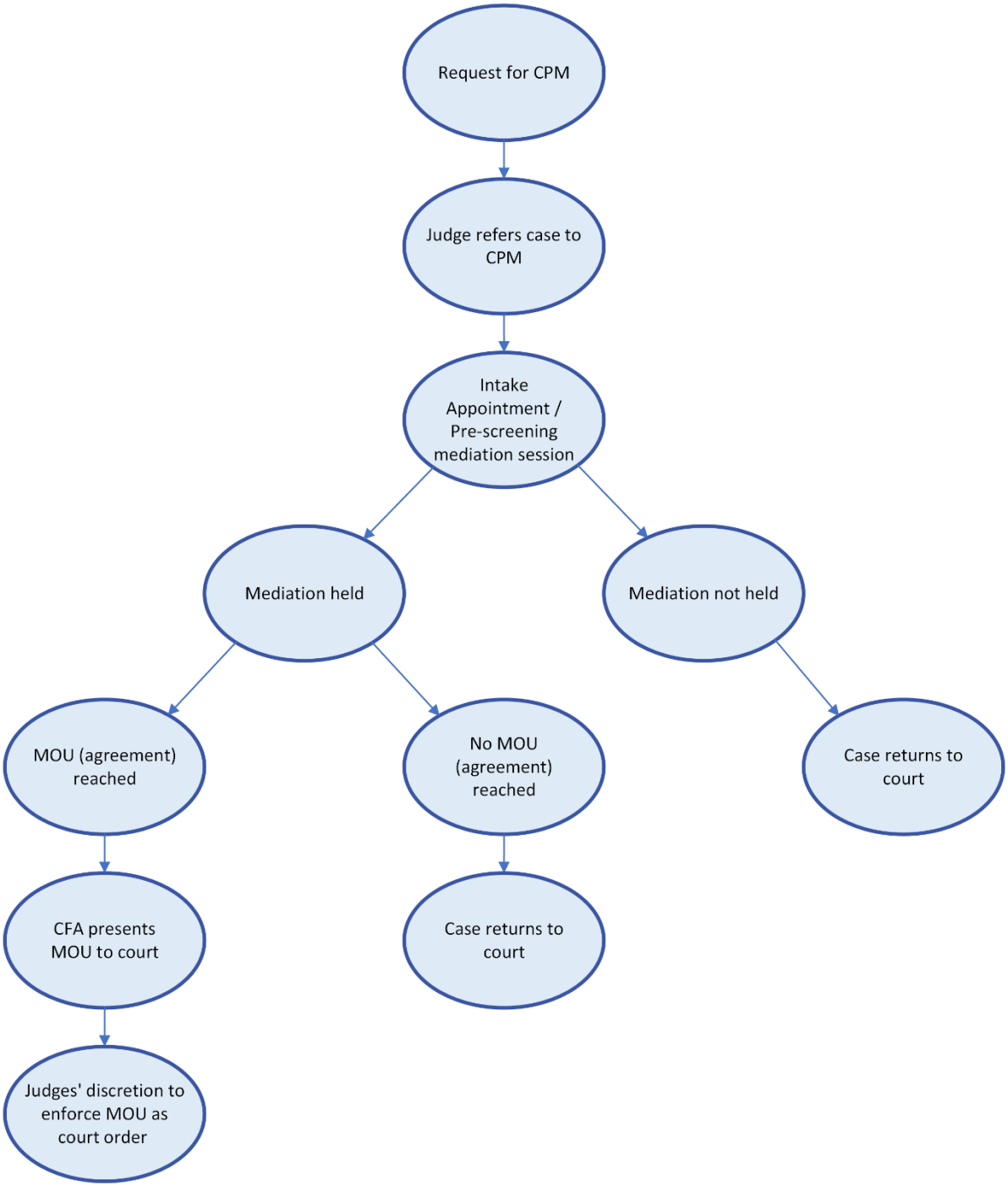

Figure 5.2: Proposed CPM referral process for Ireland during adversarial proceedings.

5.2.4. Mandatory v's voluntary mediation

A core principle of mediation is its voluntary nature, and as a result, to many, the term "mandatory mediation" may seem like an oxymoron. In Ireland, according to section 2 of the Mediation Act 2017, mediation is *"a confidential, facilitative and voluntary process in which parties to a dispute, with the assistance of a mediator, attempt to reach a mutually acceptable agreement to resolve the dispute"* [emphasis added]. The voluntary nature of mediation means that a person cannot be mandated to use mediation in order to resolve their dispute. In essence, mediation is a process that empowers the parties to reach their own agreements to the dispute. However, if there is no choice to participate in mediation, the power is lost and coercion is a possibility (Crush, 2005). Therefore, even though Irish statutory procedures are designed to encourage it, mediation relies solely on the willingness of the parties to participate. This was mostly recently demonstrated in the case *Searson v. Dublin City Council* [2020] IEHC 75, where the court *"made a formal invitation to the plaintiff pursuant to the jurisdiction conferred on the Court by section 16 of the Mediation Act 2017 to reengage in the mediation process. However, the plaintiff declined to do so"* [para.16]. In concluding, Barr J. commented that it was a pity that the plaintiff had not elected to continue with mediation, *"however, while the Court can make a formal invitation to parties to enter into mediation, it cannot force a party to do so against his will"* [para.21]. The voluntary essence of mediation is also endorsed by the 2008 EC Directive on Mediation.[241]

In the four states visited in the USA, the participation of the parents in CPM was mandated. In New York, a judge could order the parties to attend an informational session explaining the mediation process; this indicated that the first session is to be mandated. In Chicago, Tulsa County, and Florida, if the judge decided to order the case directly to mediation (court-ordered mediation), participation is mandatory; however, there is no obligation on the parties to enter into an agreement. According to one mediator in Chicago: *"It is court ordered* [CPM]. *So, the judge is ordering mediation to occur. We would talk to them and they might say that I am not participating or I am refusing to participate."* In Florida, while mediation is not mandatory per se, the court can order the parties to attend dependency court mediation. Chapter 39 (46) of the Florida Statutes entitled *Proceedings Relating to Children* defines mediation as:

[241] The European Communities (Mediation) Regulation 2011 (SI 209 of 2011) transposed into Irish Law by the EU Mediation Directive 2008/52/EC.

> *"A process whereby a neutral third person called a mediator acts to encourage and facilitate the resolution of a dispute between two or more parties. It is an informal and non-adversarial process with the objective of helping the disputing parties reach a mutually acceptable and voluntary agreement. In mediation, decision-making authority rests with the parties. The role of the mediator includes, but is not limited to, assisting the parties in identifying issues, fostering joint problem-solving, and exploring settlement alternatives"* [emphasis added].

This definition acknowledges the voluntary nature of mediation - allowing the parties to retain control of the process and reach their own agreement. However, according to Firestone, *"mediation programs should be court based or court supervised and have strong judicial and interdisciplinary support. Mediation is appropriate in only a selected number of cases, but when ordered by the court participation in mediation should be mandatory"* [emphasis added] (Firestone, 1997, p. 224).

In contrast, in Canada, the mediation process appears to be entirely voluntary. For example, in British Columbia, section 22 of the CFCSA stipulates that *"the director and the person may agree to mediation or other alternative dispute resolution mechanisms as a means of resolving the issue."* Under no section of the CFCSA does it mention that CPM is mandatory. Similarly, in Ontario, any ADR techniques (including CPM) available for families involved with the CAS are voluntary in nature; meaning that all parties need to agree to attend mediation and cannot be forced to do so. This can be seen under section 95 of the CYFSA:

> *"Any time during a proceeding under this Part, the court may, in the best interests of the child and with the consent of the parties, adjourn the proceeding to permit the parties to attempt through a prescribed method of alternative dispute resolution to resolve any dispute between them with respect to any matter that is relevant to the proceeding"* [emphasis added].

The voluntary nature of mediation is also endorsed under the Code of Professional Conduct for Ontario Child Protection Mediators which acknowledges *"that being part of the child welfare system is usually not voluntary. For the purposes of this code, all participants must consent to use mediation as the method of trying to resolve the dispute."* However, can CPM be truly voluntary if the parties know that the alternative may be a court-ordered solution? There is certainly at least an incentive to participate, though that may not be entirely inappropriate.

This raises the question of whether mediation would ever be forced (mandatory) in Ireland? It may be argued that there is a difference between forcing parties to the table to hear about the benefits of mediation and subsequent participation in mediation. In the 2010 Law Reform Commission Report on ADR, the Commission recommends that parties in a family dispute should be mandated to attend information sessions prior to the commencement of legal proceedings (LRC, 2010). Within the Report the Commission recommended that *"attendance at an information session on family dispute resolution processes including mediation, conciliation, and collaborative practice should, in general, be a statutory mandatory requirement in family law cases.* [Paragraph 6.17] *"* (LRC, 2010, p. 193). Following this, the Commission drafted a General Scheme of Mediation Bill 2012, and they appeared to recommend mandated attendance at the information session. Head 12(1)(b)(ii) stated that *"the court may - for this purpose direct the parties to attend an information session on the use and operation of mediation..."* However, while the Mediation Act 2017 includes provisions for information on the benefits of choosing mediation (section 16 and section 23),[242] and places a statutory obligation on solicitors to *"advise the client to consider mediation as a means of attempting to resolve the dispute, the subject of the proposed proceedings"* (section 14) [emphasis added], mandatory information is not provided for. It is unfortunate the Commission's recommendations regarding mandatory attendance in the family law context were not followed. However, many argue that if the process is to be truly called "mediation" actual participation in mediation must be voluntary. This point was addressed by a participant from Phase 3 of this study:

> *"I would have some difficulty with the notion of mandatory mediation. At the end of the day, I would be coming from the stance that it is a voluntary process and if people don't willingly engage, there is really very little to be achieved by force. In the nature of psychological reaction, people tend to hit back when they are forced to do something. So, it is not a great starting point. Whether mediation will remain voluntary in a child protection context is something that will need to be addressed."*

5.2.4.1. Research findings/recommendations

One of the core principles of mediation is that it is a voluntary process; therefore, the notion of mandatory mediation contradicts this central tenet. However, there is a distinction between mandatory attendance and mandatory participation. A judge should have the discretion to order attendance at a CPM information session, in appropriate child protection cases to

[242]In addition, section 16-19 of the Mediation Act 2017 allows the court to invite parties to consider mediation.

resolve ancillary issues (while having regard to the suitability of a case to be mediated). I would recommend that attendance at an information session on CPM be a statutory mandatory requirement in child protection cases. The legislative provision could read as follows:

> *"A court may, on the application of a party involved in a child protection case, or of its own motion where it considers it appropriate having regard to all the circumstances of the case—*
>
> *(i) invite the parties to use child protection mediation to resolve the issue(s) in dispute and*
>
> *(ii) for this purpose, direct the parties to attend an information session on the use and operation of child protection mediation."*

If mandatory attendance at information sessions was to become a statutorily mandated requirement, I recommend that the information session should coincide with the Pre-Screening Mediation Session (chapter 5.2.3).

5.2.5. Child participation

5.2.5.1. Voice of the child in adversarial proceedings

Recently in Ireland, there has been a growing emphasis on hearing the voice of the child directly or indirectly in public (child care law) proceedings; largely buttressed by the insertion of Article 42A into the Irish Constitution (see chapter 2.2.4: Voice of the Child). There are many advantages to hearing the child's voice, most notably that it provides the child with an opportunity to have their voice heard on matters that fundamentally affect them, thus providing the child with "*some agency in respect of his or her situation*" (Shannon, 2016, p. 25).

Current legislation requires that child has a right to be present in court unless his or her presence is established to be contrary to his or her best interests.[243] Under section 25 (1) of the Child Care Act 1991, where a child is subject to child care proceedings, a court may join that child as a party to the proceedings;[244] unless the child is already party to the proceedings.

[243] In the context of private law proceedings relating to children, the enactment of the Children and Family Relationship Act 2015 stipulates that the best interests of the child must now be considered within the framework for determining "best interests" as set out in section 31 (1) of the Guardianship of Infants Act 1964 and the individualised factors and circumstances set out in section 31 (2).

[244] In order for the child to join as a party, the child must be subject to proceedings under section IV, IVA, and VI (i.e., supervision order, interim care order, care order and special care order and applications concerning a child in care).

However, the judge must be *"satisfied having regard to the age, understanding and wishes of the child and the circumstances of the case that it is necessary in the interests of the child and in the interests of justice to do so."* According to section 25 (2) of the Child Care Act 1991, it is the discretion of the judge to appoint a legal representative. In addition, section 25 (4) outlines that *"the costs and expenses incurred on behalf of a child exercising any rights of a party in any proceedings under this Act shall be paid by the CFA."*

Section 26 of the Child Care Act 1991 provides for the appointment of a GAL: *"the court may, if it is satisfied that it is necessary in the interests of the child and in the interests of justice to do so, appoint a Guardian Ad Litem for the child."* The role of a GAL is to independently articulate the views/wishes of the child. This was recently conveyed by Ní Raifeartaigh J. in the case of *DH v. the CFA* [2019] IEHC 459. In her judgment, she outlined that the appointment of a GAL:

> *"…seems to me to be the best way of ensuring that there is an independent voice in court to convey the views of the child and articulate submissions on his behalf, from a party who has no interest of any sort in the outcome of the proceedings…… Her views* [the GAL's] *will not necessarily be determinative, but the Court will at least have input from an independent voice"* [para.41].

The importance of the role of the GAL was stressed during Phase 1 of this study. A significant number of Irish participants (thirty-six) reported that the child's views and wishes are primarily heard and expressed through a GAL. This is a significant finding because it indicates that if Ireland is to develop a CPM programme, the role of the GAL within the mediation process itself would need to be defined.

Of particular note is that section 26 (4) states that it is not possible for a child to be a party to the child care proceeding and also have a GAL appointed to them. This represents a major contrast to the USA and Canada. In the USA, the Child Abuse Prevention and Treatment Act 1974[245] indicates that states are required to appoint an appropriately trained GAL (which can include an attorney, court-appointed special advocate (CASA worker) or both), to represent a

[245] The Child Abuse Prevention and Treatment Act (CAPTA) 1974 is key US federal legislation which addresses child abuse and neglect. CAPTA provides financial assistance and guidance to USA states to support prevention, assessment, investigation, prosecution and treatment activities. In addition, CAPTA also provides grants to public agencies and non-profit organisations, including Indian Tribes and Tribal organisations, for demonstration programs and projects.

child who is involved in such proceedings (section 106 (b) (2) (A) (xii)). Generally speaking, a legal attorney is always appointed to a child and they would represent the child's "expressed interests".[246] Only in certain situations will a judge appoint a CASA worker (equivalent to the Irish GAL) to the child, who would then represent the child's '"best interests".[247] For example, if the child's attorney believed that the child's "expressed interests" conflicted with the child's"best interests", the attorney may seek the appointment of a CASA worker to represent the child's "best interests". Therefore, generally in CPM sessions conducted in certain states in the USA,[248] the child's "expressed interest", or wishes and views, are heard through the child's attorney and in certain situations, the CASA worker/GAL would attend to advance the child's "best interests".

Similarly, in Canada, a child may also be represented at any stage during a child care proceeding. In Ontario, section 78 (1) of the CYFSA states that *"a child may have legal representation at any stage in a proceeding under this Part."* If the child does not have legal representation, the court determines whether legal representation is desirable to protect the child's interests (section 78 (2)) and shall direct such representation (section 78 (3)). It is the role of the Office of the Children's Lawyer (OCL)[249] to represent children under the age of eighteen in court cases involving custody and access and child protection. In cases where the OCL lawyer is not already involved, under the Policy Directive CW 005-06, the CAS must notify the OCL when they make a referral for ADR. A "Notice Form" has been developed by the Ministry of Children, Community, and Social Services (previously referred to as the Ministry of Children and Youth Services). In such situations, the CAS would forward the Notice Form to the OCL. Upon receiving the Notice Form, the OCL ADR Intake Coordinator would make a decision as to whether a legal representative would be assigned to the child in the ADR process. In addition, in British Columbia section 70 of the CFCSA requires that a child shall be informed of all advocacy options, including the Office of the Representative for Children and Youth.

It is interesting to compare Ireland with the USA and Canada in respect of child participation. In the USA and Canada, a child may be represented by a legal attorney who advocates for the

[246] If the child is pre-verbal, the attorney represents the child's "best interests".
[247] Although the GAL should consider the child's expressed interest, and should inform the court of this, they need not follow it.
[248] For example, in Tulsa Oklahoma, a child is appointed an attorney through Tulsa Lawyers for Children and a GAL is appointed through a CASA for Children.
[249] A division of the Ministry of the Attorney General.

child's expressed interests, and/or, through the appointment of a GAL or a CASA worker. This comparison does not necessarily indicate a drawback to potentially implementing CPM in Ireland, but when reading the literature on CPM it is important that one is are aware of such a distinction.

5.2.5.2. Voice of the child in mediation

One question often surrounding mediation is the extent to which it can be child-centred and appropriately hear the voice of the child. As evidenced by all six CPM programmes visited during Phase 2 of this study, there is huge importance in the child being heard in the mediation process. In particular, many participants highlighted that hearing the voice of the child can have a significant impact on the outcome of a case. According to Igne Clissman, SC:

> *"Where parties feel that they have been part of the process which has led to the conclusion of the agreement, they may be more inclined to abide by it; the same is true of children and young people. Where mediation gives them the space to express their wishes, the inclusion of same, and the direct effect of those wishes on the decisions of the parties, may aid the child in coming to terms with whatever outcome is reached by the parties"* (Clissmann, 2019, p. 12; Murphy, 2019).

However, hearing the voice of the child in mediation is challenging. It appears, from all six visited programmes, that the voice of the child in CPM is largely left to the discretion of the mediator and/or the judge. In Chicago, Tulsa, and New York, it is the role of the mediator to decide whether the child will participate and the extent to which the child will participate in the mediation process. In Florida, it is the courts that determine whether or not a child should be present during the mediation session, and if the court is silent, it is the parties along with the mediator who decide whether they want to allow the child to participate.

In Ontario, section 3 of the CYFSA mandates that the voice of the child be heard in proceedings that affect them. However, it does not mandate that a mediator has to meet with the child. Therefore, depending on the situation, the voice of the child may be heard through their OCL, or the mediator. In British Columbia, a child may participate in the mediation process. It is the role of the mediator to meet with the child to explain the process and determine whether the child should directly attend the mediation session.

This is largely similar to the Irish mediation process in that the voice of the child in the mediation (specifically referring to family mediation) has been left to the discretion of the mediator (Parkes, 2013). This approach was reflected in the provisions of the Mediation Bill 2012 which envisaged that both the parents and the mediator would continue to act as gatekeepers in determining whether or not the children would be involved in the mediation process (Kearney, 2014). Section 18 of the 2012 Bill provided that:

> *"If in a family law dispute a mediator considers it appropriate to involve the child of a party directly in the mediation process, the mediator shall obtain the agreement of the parties; obtain consent of the child and provide or ensure the provision of appropriate facilities for involvement of the child in the process."*

This may suggest, therefore, that the involvement of children within mediation is quite limited and is determined by an adult agenda regarding whether/when to include the child (Gilmour, 2004; Kelly, 2004; Saposnek, 2004). However, this provision was not adopted in the Mediation Act 2017; in fact, nothing within the Mediation Act 2017 indicates how the voice of the child would be protected within the mediation process, be that through the discretion of the mediator, parent or child.[250] This is problematic as there is a big lacuna in the lack of the presence of the child concerned in the mediation process. Mediation (particularly CPM) is theoretically committed to the best interests of the child; however, there is no robust mechanism for hearing the child's views and wishes (Shannon, 2019).

The work carried out by the Legal Aid Board in respect of the Family Mediation Service must be commended as they are trying to fill the gap through child inclusive practices. For example, the Legal Aid Board Handbook on Family Mediation explicitly states that mediation sessions should be child-centred (Family Mediation Service, 2015) and that the needs, welfare and interests of the child involved is a priority (Family Mediation Service, 2015). More recently, the Legal Aid Board has published a Handbook on Mediator Professional Practice (2019), which outlines how to bring the voice of the child into the mediation session (generally).[251] It indicates that where it is appropriate, the mediator may discuss with the parents whether, and to what extent, it is proper to involve the child in the mediation process (while having regard to their age and maturity of the child). Subsequently, the Legal Aid Board has developed a

[250]The best interests of the child are maintained under section 11 of the Mediation Act 2017: "Where a mediation settlement relates to a child, a court, in determining any application with regard to the mediation settlement, shall be bound by section 3 (amended by section 45 of the Children and Family Relationships Act 2015) of the Guardianship of Infants Act 1964."

[251] See Appendix G: Child Inclusive Code of Practice (Legal Aid Board, 2019).

Code of Practice applicable to child inclusive mediation to ensure the best interests of the child are being met (Legal Aid Board, 2019).[252] Of particular importance is that the Code of Practice sets out the contra indicators for meeting with children; highlighting that it would not be suitable to meet with a child if any of the following apply:

1. *"Children do not consent*
2. *One parent/guardian does not consent*
3. *Child/young person is engaged with other professionals such as psychologists, psychotherapists, psychiatrists, counsellors or other health professionals*
4. *Where future provision for the children is subject to the completion of a Section 20 court report or subject to any court order or pending proceedings*
5. *Domestic abuse that remains actively intimidating and threatening*
6. *Mental health difficulties including addictions in the parents*
7. *High levels of conflict between the parents*
8. *Parents are trying to use the Mediator meeting with the child/children as a way out of their own impasse in negotiations"* (Legal Aid Board, 2019,para. 12).

However, despite this welcome development, there is still not a sufficient mechanism or standard way/procedure for the voice of the child to be heard in mediation. As stated by Shannon (2019), when it comes to hearing the voice of the child *"we have world class legislation but third-world infrastructure*" (Shannon, 2019a). This is a very big omission having regard to Article 42A of the Irish Constitution, the UNCRC and the plethora of Irish case law on the voice of the child (Clissmann, 2019). It appears that the voice of the child and their rights are only guaranteed protection if their parents resolve their legal disputes through adversarial processes (Kearney, 2014). In fact, it could be argued that in Article 42A of the Irish Constitution, the scope of the requirement to make provision for the views of the child being heard does not even apply to ADR processes. Article 42A indicates that:

> *"provision shall be made in the resolution of all proceedings (a) brought by the State, as guardian of the common good, for the purpose of preventing the safety and welfare of any child from being prejudicially affected…"* [emhphasis added].

This raises a question whether the word "proceedings" actually primarily refers to adversarial proceedings rather than ADR processes. Either way, it is arguable that children, whose

[252] The Code of Practice is informed by the multiple legal instruments, such as the Children First National Guidance for the Protection and Welfare of Children (2017), the Children and Family relationship Act 2015, and Article 3,5,9, and 12 of the UNCRC.

parents choose alternative dispute resolution such as a mediation process over adversarial processes, may be significantly disadvantaged as a result (Parkes, 2013).

Under international law, particularly Article 12 of the UNCRC, children have a legal right to be heard and to participate in decisions that affect them, a right which has been extended beyond legal proceedings. Article 12 of the UNCRC is much wider than the scope of Article 42A of the Irish Constitution and states that:

> *"States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child"* [emphasis added].

This phrase "*capable of forming his or her view*" indicates that determining to hear a child's voice is not dependent upon the age of the child but instead on whether a child can form a view and if the child is capable of forming a view then the child's view should be heard. In fact, the phrase implicitly presupposes that a child may not be in a position to express their views fluently or at ease because of a disability or a severe trauma that the child may have suffered. However, this does not absolve the courts, or indeed the mediator, from determining whether the child is capable of forming a view (Shannon, 2016). It is the responsibility of the judge and of a well-trained mediator to take every reasonable step in trying to determine the child's views and wishes. The extent to which this happens in practice will need to be addressed, not only in child protection proceedings but within the mediation setting generally, such as family mediation and CPM.

5.2.5.3. Research findings/recommendations

If Ireland is to develop a CPM programme, it is extremely important that there are appropriate provisions which cater for the voice of the child within the process. There will need to be a clear framework in order to ensure consistency in hearing the voice of the child in mediation, and that "*no matter where a child lives, he or she has the opportunity to have his or her views heard fully*" (Shannon, 2019a). This can be achieved through a detailed standardised Code of Practice which maps out the various methods of hearing the voice of the child. The following recommendations should be considered:

- The child's views and wishes must be included within the mediation in some capacity, either directly (for example the child could attend the mediation session or talk to the mediator in person), or indirectly (such as through their GAL or other appropriate

mechanisms).[253] It should be the role of the mediator and/or the judge to assess (on a case-by-case basis) the appropriate method that they believe would be most useful. Therefore, where it is deemed by the mediator and/or the judge that it is safe and appropriate to do so, the child should also be given the opportunity to meaningfully participate in CPM (Brown, 2018).[254]

- In all CPM sessions there should be someone present who can discuss and advocate the child's best interests, desires and perspectives in order to ensure that the child's "voice" will be heard in every mediation (such as a GAL). Therefore, in line with the current domestic and international legal instruments (most notably Article 42A of the Irish Constitution; Article 12 of the UN Convention of the Rights of the Child; Article 1(2) of the Brussels II EC Regulation 2003; Article 12 of The Hague Convention), mediators will be committed to bringing the voice of the child into the mediation process. However, mediators must have regard to the age, maturity and stage of development of the child.
- A mechanism that could be used in hearing the voice of the child in CPM is the Signs of Safety, adopted by the CFA in 2017 as part of the CFA broader Child Protection and Welfare Strategy (Tusla (a), 2017). As aforementioned (chapter 4.4.2.4), the Signs of Safety Model is a strength-based safety-organised approach to child safeguarding work and reflects best practices as underpinned by the Children First policy (Turnell & Murphy, 2014). In 2004, the Signs of Safety Model expanded to more actively involve children in the assessment. One such tool included the "Three-Houses Model" which takes the three key assessment questions of the Signs of Safety model (what are you worried about, what is working well and what needs to happen) and makes it more accessible for children (see figure 5.3). The questions are placed inside three houses - house of worries, house of good things, house of dreams. This approach has been found to be very effective by child protection professionals around the world (including Ireland) because "it focuses directly on the child's experience and voice, time and again creates this sort of breakthrough opportunity with parents who are 'resisting' professional perspectives and interventions" (Department for Child Protection, 2011, p. 21). This approach could be used by the child protection mediator in order to include the voice of the child indirectly in the mediation process.

[253]Such as the Signs of Safety Model adopted by the CFA in 2017 (Tusla (a), 2017).
[254] It should also be noted, that the mediator should only met with the child if there is *"a perceived benefit to meeting with them"* (Brown, 2018, p. 107)

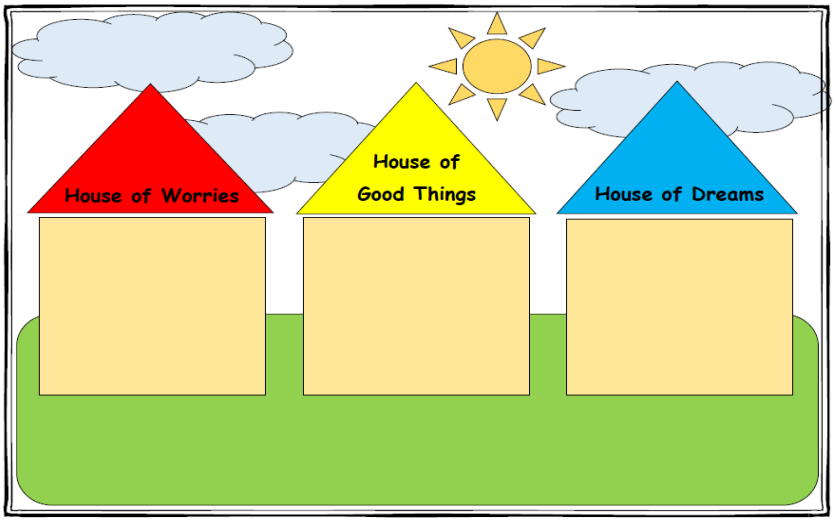

Figure 5.3: Three-House Model utilised by the CFA since 2017.

- If CPM is implemented, there should be a duty placed on the CFA to consult with the child on the nature of the service and ascertain if, and how, the child wishes to participate/be heard in the mediation process. It should also be possible for a child to indicate that he or she does not want to express any views or engage in any way with the proceedings. However, this obligation does not mandate that the mediator must meet with the child. It is requiring instead that the child has the opportunity to decide if they would like their voice to be heard within the process (Brown, 2018).
- If it is agreed upon by the mediator and the parties agree that it is appropriate to include the child directly in the mediation process, the mediator should be specially trained for that purpose. The mediator must also obtain the parents' written consent and the child's consent, in line with practice requirements. However, if the parties do not consent to the child being directly involved in the process, the mediator should ascertain the parties reasoning as this may impact whether the mediation takes place or not (Brown, 2018). Finally, the mediator must provide appropriate facilities to work with the child. Where a mediator hears a child's views and wishes directly, and has a reasonable concern that a child may be at additional risk (separate from the issues that brought the case to mediation in the first place), the mediator must assist the parties themselves to report concerns to the appropriate agency and should inform the parties that a notification from the mediation service will be sent to the CFA.

5.2.6. Specialist training

One concern expressed by the Irish-based participants during Phase 1 of the study was the need to have well trained and highly skilled mediators capable of facilitating the parties to resolve ancillary issues in a child care case. Irish participants indicated that adequate training is essential to achieve a successful programme and it is vital to address various issues that may arise within a mediation context; such as power-imbalances, the capacity of a person to engage in mediation, and the suitability of a case. A large cohort of Irish participants (twenty-five), specified that in addition to receiving adequate mediation training, a child protection mediator would also need to have previous experience handling child protection cases. Equally, all six visited CPM programmes (Phase 2) also identified that child protection mediators would be expected to have substantial knowledge of child care law. However, Florida was the only state visited in the USA requiring certified family mediators to have additional child protection training before mediating child protection cases.

In the past, the training regime for mediators in Ireland has been criticised. In 1996, the Law Reform Commission expressed serious concerns about a number of practising mediators with little or no training; this concern was also raised by the Family Mediation Service at that time (LRC, 1996). The Commission recommended *"a formal training course in mediation under the auspices of a university"* (LRC, 1996, p. 88). However, this is not to say that universities are the only institution that could carry out such training; other Higher Education and/or Further Education programmes could also equally be well placed to do so. Today, in Ireland, there are a number of accreditation bodies that use different standards in training and accrediting mediators.[255] For example, the Mediators Institute of Ireland training consists of:

a) Accredited Mediation Training - a sixty-hour (minimum) training course with a skills assessment
b) Mandatory additional training – thirty-two hours additional training for mediating with Separating Couples and mandatory Code of Ethics and Practice training
c) Continuing Professional Development training – the Institute sets annual requirements that need to be met in order to renew an annual Practising Certificate (MII, 2020).

[255] Accreditation bodies include CIArb and MII. Other bodies are trainers, which include the Law Society and Centre for Effective Dispute Resolution (CEDR).

However, there is currently no statutory basis for general mediation training or accreditation of mediators in Ireland. The Mediation Act 2017 indicates that the mediator must provide details as to their qualifications, their training and experience, and any ongoing continuing development training,[256] but it does not refer specifically to the type of mediation training to be undertaken. Similarly, Article 3 of the 2008 EC Directive on Mediation defines a mediator as *"any third person who is asked to conduct a mediation in an effective, impartial and competent way, regardless of the denomination or profession of that third person in the Member State concerned and of the way in which the third person has been appointed or requested to conduct the mediation."* Under this definition, there is no specific requirement for an individual person to be trained or accredited. However, Article 4 (2) states that: *"Member States shall encourage the initial and further training of mediators in order to ensure that the mediation is conducted in an effective, impartial and competent way in relation to the parties."*

It is clear from mediation literature that the person who mediates the child protection case is critical in ensuring the success of the mediation (Giovannucci, 2009). Reviewing the data collected from the six visited CPM programmes, it is clear that mediation training is very important. For example, in Tulsa County, the first attempt to implement the CPM programme in 2001 was unsuccessful, mainly due to the inappropriate training process for mediators (it did not include specific CPM training) and the consequent lack of relevant understanding/knowledge. Generally, throughout the USA, mediators must first complete 40 hours of basic mediation training. However, it is argued that CPM training should have two components: basic mediation training and child protection training (Crush, 2005). In this regard, Florida's mediation programme is exceptional. Under Rule 10.100 (e) of the Florida Rules for Certified and Court-Appointed Mediators, a dependency mediator must:

> *"For initial certification as a mediator of dependency matters, as defined in Florida Rule of Juvenile Procedure 8.290, an applicant must have at least a bachelor's degree and 100 points, which shall include, at a minimum: (1) 30 points for successful completion of a Florida Supreme Court certified dependency mediation training program; (2) 25 points for education/mediation experience; and (3) 40 points for mentorship. Additional points above the minimum requirements may be awarded for completion of additional education/mediation experience, mentorship, and miscellaneous activities."*

256 Section 9 (1) (a) of the Mediation Act 2017 stipulates that the Minster shall *"prepare and publish a code or codes of practice to set standards for the conduct of mediations"* which, according to section 9 (2) (a), may include *"continuing professional development training requirements for mediators."*

During dependency mediation training, mediators are taught basic mediation skills, given an overview of the Florida Rules and legislation, learn to identify emotions and how emotion can affect a party's ability to participate, study family dynamics, and learn the effects that sexual and physical abuse can have on a child and the family (Crush, 2005). Having completed the course, a person must then observe four mediations with a certified child protection mediator, co-mediate four mediations and then be observed doing four mediations alone. When the "mentorship" has been successfully completed and recorded with the certifying administrator, a person can work as a Child Protection Mediator. Overall, Florida has paved the way in respect of CPM training, and many jurisdictions around the world use it as a model when designing their own programmes. While there is some overlap in basic mediation skills used in mediation (in general), family mediation and CPM, each process requires unique techniques and individual training necessary to equip the mediator in successfully facilitating a mediation session. Therefore, if CPM is to be implemented in Ireland, a specific CPM training programme will need to be developed.

5.2.6.1. Research/findings/recommendations

In order to implement a successful CPM programme, a rigorous and cohesive training programme for child protection mediators needs to be devised and implemented. It is my recommendation that comprehensive training should be designed/developed for child protection mediators specifically and should not assume that family mediation training and CPM are interchangeable (Crush, 2005). This would ensure the availability of highly skilled child protection mediators who are well equipped to understand their limitations, and particularly how to manage the power dynamics in a mediation setting.

In order to attend a CPM training course, based on the Florida model, it is proposed that the applicant, at a minimum, must have completed:

- Accredited Mediation Training - a sixty-hour (minimum) training course with a skills assessment
- Mandatory additional training – thirty-two hours' additional training for mediating with Separating Couples and mandatory Code of Ethics and Practice training.

In addition, the following criteria should be considered, when designing a CPM training programme:

- All mediators should have four years' experience in family and/or child protection issues
- All mediators should attend additional training in CPM, to include pre- and post-training course work
- All mediators should observe four CPMs conducted by a certified child protection mediator
- All mediators should co-mediate four CPM sessions with a certified child protection mediator
- All mediators should be the lead mediator for four CPM sessions for accreditation
- All mediators should be required to keep detailed written records for every stage of the process.

5.3. OVERALL RECOMMENDATIONS/SUMMARY

The findings from this research study indicate that CPM can be a viable alternative to adversarial proceedings, and in appropriate cases CPM can be used to serve the best interests of the child. Based upon the research findings, I have arrived at the following conclusions and recommendations:

5.3.1. Specialist committees

- The first step that should be taken is the establishment of a CPM Advisory Group. The primary focus of the Advisory Group would be to promote a collaborative process and encourage "community-buy in". This would guarantee participant satisfaction by providing an opportunity for all the key stakeholders to have input into the design and implementation of the programme. In essence, the Advisory Group should guide the process (figure 5.1).
- The members of the Advisory Group should have relevant expertise within the field of child protection and mediation processes. The Advisory Group should include representatives from the Irish judiciary, legal representatives, mediators, the Child and Family Agency (Tusla), the Department of Children and Youth Affairs, Barnardos, and relevant Child Welfare Agencies.
- The primary tasks of the Advisory Group would be to:
    - Provide "information sessions" or "knowledge training" on CPM to relevant stakeholders and potential service users

- > Elect members for the Implementation Committee and the Evaluation Committee
- > Oversee the work carried out by the Implementation Committee and the Evaluation Committee regarding the CPM test-pilot
- > Devise a highly comprehensive CPM training programme
- > Encourage policy and legislative developments

- In addition to the Advisory Group, a separate Implementation Committee and Evaluation Committee should also be established to organise the roll-out of the test-pilot and evaluate the outcomes of the test-pilot (figure 5.1).

5.3.2. Terminology

- The Advisory Group should first ascertain the appropriate nomenclature that should be used to describe the use of mediation in child protection cases. As mentioned above, for the reasons on which I have already elaborated, I recommend "Child Protection Mediation".
- The Advisory Group should also consider the need for consistency in relation to various terms that could be used within a CPM programme. Therefore, in preparation for the commencement of a CPM test-pilot, I also recommend that a CPM Handbook is drafted by the Advisory Group and Implementation Committee. The following terms, amongst others, should be clearly defined within the CPM Handbook:
  - > Child
  - > Child and Family Agency (the CFA)
  - > Parents
  - > Proceedings
  - > Child Care Proceedings
  - > Mediation
  - > Child Protection Mediation
  - > Mediator
  - > Party.

5.3.3. Knowledge training

- The second task that should be considered by the Advisory Group is devising a framework for "knowledge training" or "information mediation sessions" to key

stakeholders involved in child protection cases and potential service users. As previously mentioned, there are some misconceptions as to what CPM involves. By providing such sessions, stakeholders will be supported to develop an understanding of what CPM is, and more importantly, what it is not.

- All working professionals involved with the development and implementation of the CPM programme should have availed of this training and at a minimum have a basic understanding of mediation (in general) and ideally CPM.
- In addition, before a family is encouraged to attend CPM, they should be mandated to attend a "knowledge training" session or an "information session" in order to inform them of the mediation process. I recommend that this would coincide with the "Pre-Screening Mediation" process carried out by the mediator.

5.3.4. Test-pilot

- Before developing and implementing a nationwide CPM programme, I recommend that a small number of cases, where appropriate, would be mediated for evaluation purposes. The implementation of the test-pilot should be conducted by the Implementation Committee and the evaluation should be carried out by the Evaluation Committee.
- The Implementation Committee should decide where the test cases/pilot should take place. I recommend Chancery Street Courthouse (DMD) for the following reasons:[257]
    - *It has a high volume of case load:* This would be important to consider because not all cases would be suitable for mediation
    - *It has a dedicated child protection courthouse:* Child protection cases are heard five days a week, making it more accessible
    - *It is located close to a Legal Aid Board office:* A Legal Aid Board office is located near Chancery Street Courthouse and would lend itself to: (a) ensuring the availability of suitable mediators; and (b) ensuring appropriate rooms and facilities to mediate in which mediation sessions can take place.
- The Implementation Committee should ensure that there is a forum in place to deal with any issue(s) that may arise with the test cases/pilot.

[257] Permission would need to be sought from the President of the Court (in this case His Honour, Judge Colin Daly, President of the District Court.

- The test cases/pilot outcomes should be examined by the Evaluation Committee and the outcome should determine whether CPM can be effective and efficient in resolving appropriate ancillary issues in child protection cases.
- The Implementation Committee should also encourage feedback from the Advisory Group and all key stakeholders and services users involved in the process. This would help foster a collaborative process.

5.3.5. Referral process

- The Implementation Committee will need to decide upon an appropriate referral process to be used. Initially, I recommend that CPM would only be initiated during adversarial proceedings (to begin with). This would provide the court with the capacity to monitor the process (figure *5.2*).
- I also recommend that a request to refer a case to CPM could be made by anyone involved in the child protection case; however, the final decision of referral should lie with the court.
- The Implementation Committee should consider whether the CPM programme should be voluntary or mandatory. I recommend that while the voluntary essence of mediation should remain intact, a judge should be able to mandate the parties to attend an "Information Session". As a result, there would be a mandatory obligation placed on the participants to attend this session, however, there would be no requirement on the parties to attend the actual mediation session or to reach an agreement (figure *5.2*).
- The Implementation Committee should draft an "Order Referral Form for CPM" which would be signed by the court when a case is being referred to mediation. The order form should be sent from the court registrar to the mediator, and should include the following: (a) brief information about the case; (b) the name of the child; (c) the list of participants that should attend; and (d) the issue(s) that should be discussed.

5.3.6. Child participation

- It is imperative that the child's views and wishes are included within the mediation process in some capacity, either directly or indirectly. Therefore, it would be the responsibility of the Implementation Committee to devise a robust mechanism for hearing the voice of the child within this context.

- I recommend that it should be left to the mediator (subject to the discretion of the judge) to determine the appropriate method that they believe would be most useful; this should be identified within the "Order Referral Form for CPM". If it is considered inappropriate to hear the child's views and wishes, the reasons should also be clearly outlined within the order form.

5.3.7. Training programme for CPM mediators

- The Advisory Group will need to establish and develop a comprehensive training programme which would ensure highly skilled child protection mediators (specifically) who are well equipped to understand their limitations, and particularly how to manage the power dynamics in a mediation setting.
- The Advisory Group should also ensure that the mediators are properly trained in hearing the voice of the child (directly or indirectly).

5.3.8. Legislative amendments

- The research recommends that CPM should be positioned within the legal architecture. Therefore, after the completion of the test pilot, legislation should be amended in order to regulate the process. From the analysis of the research data (as outlined in chapter 5.2.2.3.2), I recommend that the Child Care Acts 1991-2015 should be modified to encourage the use of mediation in this context; i.e., promote the resolution of child protection disputes (where appropriate) outside of the courtroom. This can be achieved by the insertion of section 16A within the Child Care Act 1991, which would (see chapter 5.2.2.3.2):
    1. Mandate the CFA to consider the possibility of using mediation in relation to certain aspects of child protection cases (where appropriate);[258]
    2. Provide a time frame for how long a case should be adjourned for mediation to take place – while an adjournment should be left to the discretion of a judge, this research recommends that the adjournment should not exceed a period of three months; (with an exception in respect of mediation relating to applications for an interim care order which should not exceed twenty-eight days);

[258] The onus should be placed on the CFA to take the procedural step of considering mediation as on option, and requiring the CFA to give reasons for ruling out such an option.

3. Enforce an agreement that may have been reached during the mediation session – this can be achieved via a Memorandum of Understanding which would be signed by all the parties, presented by the CFA to the court at the next hearing date and, if the court is satisfied with the terms, incorporated into the court's order.

As the outcome of this research has determined that CPM can be a viable alternative to adversarial proceedings, albeit in appropriate and specific circumstances, and can aid child safety and welfare, the next step is to develop a test-pilot scheme. This would provide a vital opportunity to test the effectiveness and viability of the CPM programme in Ireland, and make modifications where necessary. Chapter 6, which follows, outlines the test-pilot scheme.

CHAPTER 6: NEXT STEPS

6.1. INTRODUCTION

The overall aim of this research was to explore the potential of CPM in an Irish context and inform policy and state actors as to the potential benefits of developing a CPM programme at a national level. As mentioned in chapter 5, this research study supports the implementation of CPM. I envisage that this research would lead to a pilot scheme in the Dublin Metropolitan District (DMD). The first step in this regard would be to design a high-quality CPM test-pilot in order to further test and demonstrate the feasibility of CPM in Ireland. This chapter sets out a detailed plan and parameters for said test-pilot scheme. The overall aim of the test-pilot would be two-fold:

- To further explore and promote the use of mediation as an alternative way to resolve certain issue(s) within child protection cases in an expeditious manner
- To test the effectiveness and feasibility of CPM in a specific courthouse in Ireland (for the reasons I have outlined above, I recommend child protection cases that arise in Chancery Street Courthouse DMD), which would provide an opportunity to test the programme design, protocol and Order Referral Form for CPM without a significant amount of time and money being spent.

6.2. TEST-PILOT

6.2.1. Aims and objectives

It is vital that any stakeholder involved in child protection cases has an informed understanding of what CPM is and, in particular, what it is not. Evidence from other jurisdictions indicates that misunderstanding can lead to misconceptions which can consequently hinder the development of a successful CPM programme.[259] Therefore, the aims and objectives of this CPM test-pilot are as follows:

- CPM aims to promote a collaborative decision-making process between the family and child protection workers (involved in the case), with the assistance of an impartial mediator, in order to reach an agreement on how to resolve an issue(s) within a child protection case that is preventing it from moving forward
- CPM tends to cover a single issue or multiple issues related to a child protection case; **but not the child protection concerns themselves**

[259] See above, Chapter 5.2.1: Understanding the Term 'Child Protection Mediation'.

- The mediator must remain flexible and always remain connected with and responsive to the parties' needs, as underlying issues may appear as the mediation proceeds
- The mediator should have regard to the following principles:
    (i) Any resolution must be in the best interests of the child
    (ii) The continued recognition that the best place for the child is with their parent(s), unless the best interests of the child clearly require otherwise, and any intervention or support will have to be proportionate to the risk facing the child
    (iii) The safety, permanency and the well-being of the child is of paramount consideration. In addition, the need for family reunification (as per articles 9 and 10 of the UNCRC) should also be considered as an important principle in all CPM sessions
    (iv) Any power-imbalance between the parties must be addressed and managed so as to ensure equality of arms and procedural fairness
    (v) The voice of the child is essential in the decision-making process and should be included; albeit consideration must be given to the child's age, maturity and stage of development
    (vi) A good working relationship must be encouraged, where possible, between the various parties involved in the process
    (vii) Disputes are to be resolved in a timely manner.

6.2.2. Scope of the mediation

The suitability of a case to be mediated should always be of primary concern. When considering the implementation of a CPM programme, it is crucial to outline exactly what CPM can be used for; what issue(s) can or cannot be mediated. This research suggests that when designing a CPM programme, it is initially helpful to outline a list of specific issues where mediation could be used. This allows relevant stakeholders and parties the opportunity to become familiar with the process, without being overwhelmed.[260] Therefore, the overall scope of this CPM test-pilot are as follows:

- CPM **does not** determine the alleged mistreatment, abuse, abandonment or neglect of a child. However, in appropriate cases, CPM can be used to promote a collaborative

[260] Chapter 5.2.3: Suitability of a Case.

decision-making process between the parents and child protection workers (involved in the case), in achieving a just, cost-effective, and expeditious resolution in the best interests of the child.

- Mediation is an option that can be used at any point throughout an adversarial hearing. Mediation can be used to work through several issues, including:
  (i) *Care Plan*: Developing a plan for the child's future while in the care of the State, or after a care order has been granted by the court
  (ii) *Services:* Providing additional supports/services for the child and parents in order to ensure that the child's best interests are being served
  (iii) *Family Reunification*: Developing a plan for a child to be returned to a parent's or parents' care
  (iv) *Access*: Arranging how and when a parent or others (such as siblings or extended family members) may have access to a child
  (v) *Foster Placement:* Resolving any issues that might arise when the child is in foster placements; such as perceived attitudes a foster parent may have towards the birth parents or vice versa, or foster parents needing respite care
  (vi) *Voluntary Care Agreements:* Working out the details of parenting plan agreements
  (vii) *Communication:* Promoting open and honest communication between the various parties involved in the case
  (viii) *Other*: The parties, the mediator, and any participants, including the court, may agree that mediation will cover any other matters. These matters will fall within those deemed by the mediator to be suitable for mediation.

6.2.3. Core principles

It is important to outline a set of principles applicable to all child protection mediators. However, it is equally important that all participants involved in the CPM process understands the basic principles of mediation.[261] The principles of this CPM test-pilot can be compiled into four basic elements and generally follow the models of most mediation processes:

[261] Chapter 2.4.3: Core Principles of Mediation and Chapter 5.2.4: Mandatory v's Voluntary Mediation.

6.2.3.1. Voluntariness

- The mediator will outline to the parties that the process of mediation is voluntary. As a result, the participants (at any stage during the mediation) are free to withdraw from the process at any time.
- Under section 6 (6) of the Mediation Act, 2017, a notice in writing will be provided to the parties. It must be noted that the use of mediation in child care proceeding does not fall under the scope of the Mediation Act 2017. However, it is considered best practice that an Agreement to Mediate is used in all mediation processes. Specifically, the Agreement to Mediate must outline the confidentiality requirements of the mediation process. These provisions should be clearly explained to all the parties at the beginning of the mediation session (or earlier) so that the parties are able to make an informed decision about participating in the process. If any of the parties lack the capacity to understand these principles, a support person should be present to support them in understanding issues and/or concepts.
- It is at the discretion of the mediator to determine whether (or not) it would be beneficial and safe to facilitate a mediation process. The mediator is not required to state the reason for terminating the process except that in their professional opinion mediation is not an appropriate process for them at that time.

6.2.3.2. Neutrality and impartiality

- The role of the mediator is to assist all participants involved in the mediation. As a result of these considerations, mediators should be independent of the CFA,[262] whether they be self-employed or through a different agency entirely independent of the CFA.[263] Conflicts of interest should be studiously avoided in selecting the mediator.
- Throughout the entire process, the mediator will remain neutral/impartial as regards the outcome of the mediation and will not attempt to suggest how an agreement may be formed or predict the outcome of court proceedings. This is in line with the facilitative model of mediation.

[262] The role of the mediator must be clearly laid out. See the District Court Practice Direction DC 09 regarding experts which states, under section 9.5, that "*The letter of instruction for an expert must advise the expert that is the duty of experts to help the court on matters within their expertise. This duty overrides any obligation to the person from whom experts have received instructions or by whom they are paid.*"

[263] I recommend that the appropriate agency would be the Legal Aid Board, on the basis that the agency would receive appropriate training on child protection issues in order to fully understand the complex dynamics of child care cases. The agency would also have to be willing to adopt adequate CPM processes.

6.2.3.3. Power-imbalance

- The mediator will promote a process where the parties are able to meaningfully and equally participate in the mediation without fear, intimidation or manipulation. It is the role of the mediator to conduct the process in such a way as to remedy any disparity/power-imbalance between the parties. If the mediator decides that such disparity/power-imbalance would render the process unfair, and cannot otherwise be remediated, the mediator must safely terminate the mediation.
- In CPM, power-imbalances may arise between the parents and the CFA. The mediator can address these imbalances by providing the parents with an opportunity to actively engage in the process (Giovannucci & Largent, 2013). As such, the mediator will strive to:

  (i) Educate all participants involved (particularly the parents) of the CPM process (referred to above as "knowledge training")

  (ii) Include and encourage the parents to participate in the mediation process from the beginning

  (iii) Empower the parents at the start of the mediation; depending on the circumstances of the case, the mediator should start the discussion with the parents

  (iv) Ensure that the language used throughout the mediation is understandable to all participants

  (v) Treat all parties impartially and be neutral as regards the outcome of the mediation (Giovannucci & Largent, 2013).

6.2.3.4. Confidentiality

- An integral part of any mediation (including CPM) is confidentiality.[264] This principle ensures that the participants involved in the mediation feel safe to speak openly amongst other participants without fear that what they say can be used against them. All communication that occurs during the mediation, including notes pertaining to the mediation, are confidential and will not be disclosed as evidence in any court

[264] Tetunic & Firestone (2020) suggests that the highly sensitive nature of child protection proceedings make confidentiality essential. He states the purpose of this principle "*offers the needed reassurance that shared information will not be weaponized to injure family members or escalate family conflict*" (Tetunic & Firestone, 2020, p. 46).

proceeding, nor will the mediator be asked to give evidence (save in accordance with the law).[265]

- The mediator will make the participants aware of the privileges and limitations of confidentiality that may exist so that the participants can make informed decisions regarding the extent to which they will communicate openly in mediation (Giovannucci & Largent, 2013).
- The following factors should be considered:
    (i) The CFA will not give the mediator any information about the parties without the consent of the parties. As a result, the mediator will ensure that at the very least, the CFA has received verbal consent from the parties for the CFA to share their information with the mediator. Information to be shared includes, but is not limited to:
        - Name(s)
        - Contact information
        - File History

    (ii) When the parties consent to mediation, the consent should be one-directional. They are consenting to their information being disclosed to the mediator by the CFA. Therefore, the mediators will not disclose any information obtained in the course of mediation to anyone. However, the mediator has a statutory obligation to disclose information where a child protection/safety concern is raised[266]

    (iii) The mediator will not disclose any information to the CFA about the parties (outside the aforementioned duty to report), and as a result, the consent to alternative dispute resolution should not include a provision for the mediator to share any information with the CFA

[265] A template for such an approach can be found under section 9 of the Family Law (Divorce) Act 1996, section 9: "An oral or written communication between either of the spouses concerned and a third party for the purpose of seeking assistance to effect a reconciliation or to reach agreement between them on some or all of the terms of a separation or a divorce (whether or not made in the presence or with the knowledge of the other spouse), and any record of such a communication, made or caused to be made by either of the spouses concerned or such a third party, shall not be admissible as evidence in any court." However, the Children First Act 2015 places a legal obligation on a mandated person to report any concerns of child abuse or any child protection or welfare concerns to the CFA as soon as practically possible.

[266] This is a live possibility in child protection cases, and before implementation occurs, it will be necessary to flesh out a detailed protocol on this point. Any protocol developed should be in line with the Children First Act 2015, the Children First National Guidance 2017 and Tusla's (CFA) Child Safeguarding.

(iv) For the mediator to disclose any personal information about the parties to anyone (including the CFA), the parties must consent ahead of time. This consent will take the form of a short agreement, signed by the parties and put on file before any communication, either verbal or written, takes place. Any discussion or correspondence should only cover the issue(s) that has /have been agreed for the purpose of the same.

6.2.4. Referral process

Considerable emphasis should be placed on the CPM referral process. After reviewing the data from Phase 2, it is clear that each individual state/province has designed its own specific referral process that works within their own child protection system. For the purpose of the test-pilot, the referral process is as follows:

- CPM should only be used in the following circumstances; (1) voluntary care agreements (pursuant to section 4 of the Child Care Act 1991) and (2) to resolve a certain issue(s) during adversarial proceedings where the judge is of the opinion that it would be in the best interests of the child (as outlined above- chapter 6.2.2).
- Anyone involved in a child protection case (including the parents, their legal representatives, the CFA, the GAL, amongst others involved in the case) can make a request to the court for mediation to be used to resolve a certain issue(s) (outlined above). The judge would also be able to send the case directly to mediation. However, the final decision to refer a case to CPM should lie with the judge. If the judge refers the case to mediation, the parties are mandated to attend the Pre-Screening Mediation /Intake Appointment.[267]
- When a case is referred to CPM by the court, the registrar will then prepare an "Order of Referral Form for CPM" which will then be signed by the judge. The Order of Referral Form for CPM would state the following: (a) that the case has been ordered to Pre-Screening Mediation/Intake Appointment; (b) a brief outline of the case; (c) the name of the child; (d) the list of the participants who are ordered to attend the session (a judge can mandate the parties to attend the "Information Session.
- CPM should not significantly or disproportionately delay the child protection proceedings. As a result, the time frame for an adjournment should be left to the discretion of a judge; however, it should not exceed a period of three months. However,

[267] Chapter 6.2.5: Pre-Screening Mediation Session and Chapter 6.2.6: The Mediation Process.

regarding interim care order applications, the timeframe should not exceed twenty-eight days.

- Once the mediator receives the Order of Referral Form for CPM, the mediator should contact the parties to schedule a time, date and location for the mediation session. The mediator should contact the parties in the order in which they are listed in the Referral Form to avoid any perceived biases.

6.2.5. Pre-screening mediation session:

It is the role of the mediator to determine if the case is suitable for mediation and whether the parties have the capacity to engage in mediation. Before the commencement of the mediation session, there will be a "Pre-Screening Mediation" session (known to the parties as the "Intake Appointment"). The purpose of this session is to determine whether mediation is the right process for the parties. This will always be carried out by the mediator.[268] The aim of Pre-Screening Mediation in the test-pilot should consider the following:

- Screening should take place in relation to all CPM sessions and should commence as soon as the referral is received by the mediator from the court registrar.
- If the mediator is of the opinion that the case is not suitable for mediation, the mediation session should be terminated safely and as soon as possible.
- Where a CPM session mediation does take place, the mediator will uphold the principles of mediation (voluntary nature, confidentiality, impartiality/neutrality) and ensure the process is conducted in a professional manner.
- In particular, the mediator should consider the following:

6.2.5.1. Family violence

- The use of mediation in a child protection case is not necessarily excluded where family violence exists. The use of CPM is not appropriate where the safety of any party (or the child) may be endangered and/or where the party is unable to safely advocate for his or her needs and interests (Giovannucci & Largent, 2013). However, victim empowerment is a key principle in handling family violence cases effectively (Giovannucci & Largent, 2013).
- If there is a plausible evidence that family violence has occurred or there is a real risk that it may occur, the mediator must determine, on a case-by-case basis,

[268] Chapter 5.2.3: Suitability of Case.

whether mediation can be safely conducted (Giovannucci & Largent, 2013). When the mediator is evaluating the impact of family violence, it is important to consider not just physical abuse but the various other forms of abuse that may occur (Giovannucci & Largent, 2013). Regarding family violence, the mediator should also be looking out for the following:

- Verbal/emotional abuse
- Psychological abuse
- Harassment
- Sexual abuse/assault
- Financial abuse
- Power and control
- Coercion (and coercive control)
- Abuse of a person's intellectual capacity (Brown, 2018).

- If the mediator is of the opinion that the case (with family violence) is appropriate for mediation, the session(s) should be configured to maximise everyone's safety. This could be achieved by: (1) the parties using different entrances (one for the victim and perpetrator); (2) the mediation session being conducted in separate rooms; and/or (3) the mediation session being scheduled on different days (Giovannucci & Largent, 2013).
- The mediator should be well trained in respect of family violence and be competent in best practices. Some techniques to achieve this goal include the following:
  - Careful screening of cases
  - Meeting in a "safe" facility
  - Keeping the victim and perpetrator in separate meeting rooms
  - Utilising a co-mediation model
  - Allowing the victim or alleged perpetrator to bring a support person (Giovannucci & Largent, 2013).[269]

[269]Mediation is a non-judgmental process. To promote equality, all parties should have the option to request a support person to attend the mediation session. However, the mediator should have discretion to determine whether or not the support person should be permitted to attend.

6.2.5.2. Capacity issues

- The mediator is also screening for "capacity", which includes issues such as mental and physical health, substance and alcohol abuse, intellectual ability and any other relevant factors that may affect the parties' ability to understand, concentrate, negotiate and make decisions.
- The new General Data Protection Regulation means that mediators cannot ask for medical information about the parties from their medical professionals (at least without the parties' consent). Mediation can proceed if the mediator assesses that the client has the capacity to mediate; i.e., is able to meaningfully engage in the mediation and make informed decisions on their own behalf. A determination of incapacity need not preclude a person from participating in mediation; the mediator can consider the presence of a support person if they are deemed sufficient to aid the process.
  (i) If the individual appears to be mental and/or emotionally unstable, mediation should not proceed at that time.
  (ii) In respect of substance abuse, the mediator will ask all parties if there are any concerns with respect to substance use for themselves or the other party. When dealing with substance use, the mediator will focus on the effect of the substance use on the child, and less on the actual substance itself. If the substance is having a negative impact on the child, there is a reason for concern. If either of the parties is actively using substances, and the substance is having a negative effect on the family dynamic, the mediator will have further discussion with the participants. Substance use can also impact a person's ability to make a good decision and affect them even when they are not under the influence. Under no circumstances should an Intake Appointment or a joint mediation session proceed if anyone appears to be impaired.
  (iii) The mediator will also be aware of other addictions from which a person can suffer. Understanding this information will also help the mediator manage the situation if the addiction issues are raised during the joint mediation session.

6.2.6. The mediation process

It is important for the mediator to remain neutral throughout the entire mediation process. How the parties perceive the mediator and the process will dictate how they interact with the mediator and the process. Therefore, it is vital that all the parties, particularly the parents

and the CFA, see the mediator as a neutral and impartial person. Strategically meeting with a certain identified group (such as the social worker, the mother, the father, foster parent) first has the potential to create a perceived bias. Therefore, the mediator will contact the parties in the order in which their contact information is listed on the referral form. All appointments will be strictly based on calendar availability; not the parties' identified title or role.

- During the Pre-Screening Mediation/Intake Appointment, the mediator will welcome the party into the room, introduces him/herself and check with the party/parties that their names are correct and confirm how they would like to be addressed.
- During the Pre-Screening Mediation/Intake Appointment, the mediator will build rapport, creating a good working relationship with the parties. By the end of this session, the mediator will have a sense of the party's emotional readiness to mediate, their capacity to negotiate and their preferred style of communication.
- At the beginning of the Pre-Screening Mediation/Intake Appointment, the mediator will outline the key principles of mediation:
    - The voluntary nature of mediation
    - Confidentiality and the limits thereof
    - The mediator's role (neutral/impartial and duty to report)
    - Explanation of the procedure for making their agreement binding if they reach one.
- The mediator will inform the parties how mediation works, describing the process and the issues that will be addressed and confirming with each party their willingness to go ahead with the mediation process.
- When meeting with the family members, the mediator needs to understand the family perspectives as to why the CFA is involved, and the dynamics between the different family members. The mediator needs to ensure that each participant's Intake Appointment is treated as a blank canvas before starting. It is also critical that the mediator does not share information from anyone else's Intake Appointment, including information derived from the CFA Intake Appointment.[270]
- The mediator will also explain to the party that just because they want to proceed with mediation, does not mean it will automatically move forward. Part of the Intake

[270] As mentioned above (Chapter 6.2.3.4 (iv)), in order to disclose any information, the mediator must have consent from all the parties.

Appointment process is screening to ensure that the people and the case dynamic are appropriate for CPM. If the mediator screens the case out of mediation, all the information gathered by the mediator up until that point is confidential and cannot be shared.

6.2.7. Participation of children

Developing appropriate provisions and mechanisms for hearing the voice of the child (either directly or indirectly) in the mediation process is exceptionally important. The following should be included in the test-pilot:

- It is the role of the mediator to ensure that the voice of the child is heard within the mediation process; either directly or indirectly. The mediator must ensure that it is safe and appropriate for the child to participate. However, in all cases, there should be a person present who can advocate for the child's views and wishes (such as the GAL or an EPIC worker).
- If the mediator decides to include the child directly in the mediation process, the mediator must be specifically trained for that purpose. In addition, the mediator must inform the parents regarding the participation of the child. The mediator should follow the **Legal Aid Board Child Inclusive Mediation Code of Practice (2019).**
- If either parent does not consent, the mediator needs to have some discussion with the parents to understand their reasoning. This may have an impact on whether the mediation moves forward.
- Where a mediator has a reasonable concern that a child may be at additional risk (separate from the issues that brought the case to mediation in the first place), the mediator will assist the parties to report the concerns to the CFA and any other appropriate agencies. The mediator should also inform all the parties that the CFA will be notified of any concerns relating to child safety.

6.2.8. Agreement to mediate

All of the programmes researched for this study had an "Agreement to Mediate" form. All of the parties involved in the mediation, including the mediator, would generally sign the agreement prior to the commencement of the mediation sessions. For this test-pilot the Agreement to Mediate should include the following:

- In most instances, the parties will have been given the Agreement to Mediate either by post or in the individual information sessions. The mediator will summarise the following key points:
  - The mediation process
  - The role of the mediator (and duty to report)
  - The approximate duration of the mediation
  - The principles of mediation; including (1) confidentiality and potential limitations; and (2) the voluntary nature of mediation
  - What happens if an agreement is reached?
  - What happens if an agreement is not reached?
  - If court dates have been discussed with the mediator, clarity will be sought about dates, if they have adjourned or intend to adjourn (if the date is in the immediate future).
  - The mediator will then inform the parties that once the Agreement to Mediate is signed, all communication should be open. If the parties wish to have a confidential conversation (caucus) with the mediator after the Agreement to Mediate is signed, the party must inform the mediator that the content is confidential.

6.2.9. Enforceability of agreement

One concern raised by Phase 1 participants was how to ensure the enforceability of mediated agreements. Therefore, it is important to clearly outline how such agreements, within child protection cases, may be enforceable. Generally speaking, the following provisions should be borne in mind:

- A mediator shall inform the parties that the Memorandum of Understanding (MOU) is not a legally binding document unless, or until, it is converted into a legally enforceable document (in practice, this would also be stated in the Agreement to Mediate). While a MOU may ultimately be converted into a legally binding document, by due legal process, the process of mediation alone does not go through the legal steps required to ensure such legal due process. The MOU is, therefore, not legally binding unless, or until, the parties have followed all accompanying steps to formally adopt the document as a legal contract. In other words, signatures in of themselves do not make the MOU legally binding. For example, section 11 (2) of the Mediation Act 2017 states "*a mediation settlement shall have effect as a contract between the parties to the*

settlement *except where it is expressly stated to have no legal force until it is incorporated into a formal legal agreement or contract to be signed by the parties*" [emphasis added]. CPM agreements should be included the proviso set out in section 11 (2).

- The mediator should inform clients that, while the MOU is an agreement, if they wish it to be legally binding, other steps will be required. At the end of the mediation session(s) parties are once again advised to get legal advice. The parties should have a legal representative review the MOU and give their opinion on its contents. A legal representative (usually a solicitor) should be asked to advise the party so as to ensure that the participant fully understands the document and its implications. The legal representative will also offer suggestions on any items that need further discussion or changes.
- Where an MOU has been reached, and the parties wish the MOU to become a legally binding agreement, it is the role of the CFA to present the MOU at the next court date. A "sunset clause" should be inserted into the MOU, which would outline an agreed expiry date for when the MOU should be presented to the court.[271]
- The CFA will inform the court whether an agreement has been reached in part, or whether there are outstanding issues. It is the role of the judge to determine whether the MOU is in the best interests of the child, and the judge has full discretion to decide whether or not to enforce the terms of the MOU in the form of a court order or direction.

6.2.10. Termination of Mediation Session

The mediator should have the skill to understand when a CPM case should be adjourned, terminated, or postponed. Therefore, the following should be referred to within the test-pilot:

- Not all mediations go forward, and there can be many reasons why that is the case. Ultimately, it is at the mediator's discretion to determine if they can facilitate a process that is beneficial and safe. If not, the mediator has an obligation to screen the case out. There is also an obligation on the mediator to inform the parties that mediation is not taking place or cannot safely take place.
- Some examples of why CPM may not move forward include but are not limited to:

[271] The "sunset clause" is to ensure that the MOU to presented to the court within a certain timeframe and prevent any unnecessary delays.

- A serious incident recently occurred and one or more of the parties is profoundly emotionally affected such that they cannot carry on a useful conversation or make important decisions
- The mediator strongly suspects that one or more of the parties intends to use the mediation to escalate the dispute (threaten, gather information for personal reasons or to share with the court)
- One party seems incapable of listening to anything the mediator or the other party have to say
- One of the parties is unwilling to participate.

6.3. CONCLUSION

This research study set out to explore the feasibility of CPM in an Irish context and the extent to which it could aid child safety and welfare in Ireland. Overall, CPM can be seen as a collaborative decision-making process which empowers the parties to reach a personalised agreement in the best interests of the child. As a result, I argue that CPM would be a viable component within the Irish child protection system and would be constructive in promoting not only the bests interests of the child but also the general welfare of the family and society. An important outcome of this research demonstrates that CPM can be a very dynamic method for resolving **certain issues** within child protection proceedings; such as access disputes, foster placement breakdowns, details of voluntary care agreements. However, CPM should not be seen as a panacea. The suitability of a case to be referred to CPM must be determined on a case-by-case basis, in line with the "best interests" principle set out under Article 42A of the Irish Constitution. The importance of developing a rigorous CPM training programme, therefore, cannot be overstated.

In addition to the main research question, this thesis posed several secondary questions. I believe that I have answered all the research questions throughout this doctoral thesis.

To conclude, I want to focus on one specific secondary question: "*Will the implementation of CPM improve the overall collaborative decision-making process in child protection cases?*" In other jurisdictions, the use of mediation in child protection cases is recognised as an invaluable mechanism in child protection proceedings, and, one that, once implemented, can have a

positive impact on the outcome of a child protection case. Most notably, CPM can improve working relationships (particularly between the parent(s) and the child protection workers), and provide a platform for the parties to understand each other's perspectives in order to reach a collaborative agreement in the best interests of the child. As a result, I conclude that CPM can actively promote a collaborative decision-making process **in appropriate** child protection cases. However, as aforementioned, child protection proceedings are complex cases dealing with highly challenging and emotive issues. The use of mediation in a child protection case should only be considered for mediation if the parties are willing to work collaboratively on the issue(s). Once again, this highlights the importance of a well-designed CPM programme in order to ensure particularly well-trained child protection mediators.

CPM would be a welcome alternative dispute resolution to the generally adversarial nature of child protection proceedings. The formal, structured incorporation of CPM into law and practice in this jurisdiction is long overdue. Nonetheless, in order to develop and implement a successful CPM programme, I recommend that a number of issues need to be further explored, and detailed practical guidelines developed. In line with the recommendations set out in the thesis, it is important that appropriate time is invested in the following:

a) Determining the appropriate framework and structure for an effective Irish CPM programme
b) Establishing firm guidelines and protocols for the operation of such a CPM programme
c) Consulting and collaborating with all relevant stakeholders
d) Positioning CPM within the legal architecture
e) Developing a rigorous CPM programme, with appropriately skilled mediators.

In one concluding interview, a US participant (director of the ADR programme within their Administrative Office of the Courts) stressed:

> *"In my opinion, Child Permanency Mediation will greatly expand in the future as a viable way of efficiently moving cases through the system* [child protection system] *and giving the stakeholders greater input into the process as a whole and certainly the outcome. Of course, there will be challenges, such as mediator and staff availability, but the positives far outweigh the challenges, with the ultimate goal of getting the child/ren reunited with family, whether it be*

biology family or a new family. I certainly would endorse Ireland trialing such a programme, and am confident they would find many benefits."

My research findings support this comment fully.

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Construction Contracts Act 2013

Courts and Civil Law (Miscellaneous Provisions) Act 2013

Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010

Domestic Violence Act 1996

Domestic Violence Act 2018

European Convention on Human Rights Act 2003

Family Law Act 1995

Family Law Act 2019

Family Law (Divorce) Act 1996

Family Law (Maintenance of Spouses and Children) Act 1976

Family Home Protection Act 1976

Family Law (Protection of Spouses and Children) Act 1981

General Scheme of the Child Care (Amendment) Bill 2018

Gender Recognition Act 2015

Guardianship of Infants Act 1964

Judicial Separation and Family Law Reform Act 1989

Marriage Act 2015

Mediation Act 2017

Protection of Children (Hague Convention) Act 2000

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S.I. 209 of 2011 European Communities (Mediation) Regulations 2011

S.I. 174 of 2018 Data Protection Act 2018 (Commencement) Order 2018

Succession Act 1965

Status of Children Act 1987

USA Legislation

Adoption and Safe Families Act 1997

Child, Family and Community Service Regulation 1995

Child Abuse Prevention and Treatment Act 1974

Dispute Resolution Act 1983

Family Preservation and Support Services Act 1993

Illinois Juvenile Court Act 1987

Other

AFCC Model Standards of Practice for Family and Divorce Mediation (2000)

Chapter 44 of the Florida Statutes, entitled "Mediation Alternatives to Judicial Action"

Chapter 39 of the Florida Statutes, entitled "Proceedings Relating to Children"

Rule 8.290 of the Florida's Rules of Juvenile Procedure

Canadian Legislation

Child, Family and Community Service Act 1996

Child, Youth and Family Services Act 2017

Child and Family Service Act 2006

Other

Policy Directive CW 005-06

Ontario Regulation 155/18

Treaty

Amsterdam Treaty 1999

Directives

Directive on Mediation: Directive 2008/52/EC

Data Protection Directive 95/46/EC

Other

Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility

APPENDIX A: PHASE 1 (SURVEY WORKING PROFESSIONALS IN IRELAND)

PART 1: MEDIATION

1. **What is your gender?**

Male ☐

Female ☐

2. **Generally, what are your thoughts on mediation, in general?**

3. **In your experience, who initiates the discussion on the possibility of choosing mediation (in general) as a dispute resolution option?**

	Never	Rarely	Sometimes	Often
Judiciary				
Court Service Staff				
Legal Representatives				
Litigants				

4. **Generally, at what point and how many times would you discuss the mediation process?**

	0	1-3	3-6	More than 6
Before a full adversarial hearing				
During a full adversarial hearing				
After a full adversarial hearing				

5. **Would you recommend mediation (in general) even if it has not been suggested by the legal representative/litigants?**

Always ☐

Often ☐

Sometimes ☐

Rarely ☐

Never ☐

6. **How often is your decision to recommend mediation (in general) influenced by the following factors?**

	Unknown/Irrelevant	Rarely/Never	Sometimes	Often

The litigant refused to use mediation				
The lawyer has no active role in mediation				
There are not enough experienced mediators				
The case is not suitable for mediation				
Mediation increases the expense for litigants				
Insufficient/no encouragement to consider mediation				
Appropriate case will settle in trial anyway				
It is difficult to enforce mediation agreements				

7. **In your experience, is mediation/conciliation an effective tool in litigation?**

Always ☐
Often ☐
Sometimes ☐
Rarely ☐
Never ☐

8. **In your view, what are the advantages (or potential advantages) of mediation (in general) as an alternative to or supplement to litigation/court-based proceedings?**

9. **In your view, what are the disadvantages (or potential disadvantages) of mediation in general) as an alternative to or supplement to litigation/court-based proceedings?**

PART 2: CHILD PROTECTION

10. **How often would you engage in child protection cases per month**

0	☐
1-5	☐
6-10	☐
More than 10	☐

11. **In your view, to what extent do such proceedings address the needs of children in prompt and efficient manner?**

12. **In your view, what are the key benefits of the current child protection system?**

13. **In your view, what are the key drawbacks or disadvantages of the current child protection system?**

14. **How are the child's views and wishes heard within the current child protection system?**

PART 3: CHILD PROTECTION MEDIATION

15. **Generally, what are your thoughts on child protection mediation?**

16. **Are you aware of mediation being used as an alternative to litigation/court-based proceedings involving child protection disputes?**

Yes	☐
No	☐

17. **If you stated yes to question, please state where?**

18. **In what context(s) (if any) do you believe child protection mediation might promote better outcomes for children and families (when compared with court-based proceedings)?**

19. **What concerns, if any, would you have towards the use of mediation in child protection cases?**

- None ☐
- The voice of the child might get lost ☐
- Agreements might be compromises that jeopardize child safety ☐
- The power-imbalance between the child welfare agencies and the parties is too stark for mediation ☐
- Neutrality / experience / skills of mediators ☐
- Extension of time to case resolution if mediation is not successful ☐
- Potential to use mediation as a delaying tactic ☐
- Lack of experience in cross-border mediation ☐

20. **If mediation were to be used in child protection cases, what qualifications and characteristics would be most appropriate in a person best suited to lead/facilitate such mediation?**

- Judicial mediators ☐
- Mediators who are lawyers ☐
- Mediators who have family law experience ☐
- Mediators who have experience in handling child protection cases ☐
- Mediators who have experience in cross-border mediation ☐

21. **Any additional comments?**

APPENDIX B: PHASE 2 (DISCUSSION POINTS: WORKING PROFESSIONALS IN THE USA/CANADA)

This document is both a survey and a template for questions to be asked during the semi-structured interview. If this document is used for a semi-structured interview, this document will operate as a "conversation with a purpose" (Burgess, 1984) and questions will be left open-ended.

---

1. BACKGROUND QUESTIONS

1.a. Name: _____

1.b. Gender: _____

1.c. State: _____

1.d. Email Address: _____

1.e. Role in the system, professional background, and length of time

2. CHILD PROTECTION MEDIATION[272]

2.a. Generally, what are your thoughts on child protection mediation?

2.b. Generally, are you aware of mediation being used as an alternative to litigation/court-based proceedings involving child protection disputes?

Yes ☐

No ☐

2.c. If you stated yes to question, please state where?

2.d. Do the courts in the State where you work currently use mediation in child protection cases?

Always ☐

Often ☐

272 Note: The aim of CPM is not to determine whether alleged mistreatment of the child occurred (Barsky, 1999), but rather to reach a settlement agreement that will ensure the child's safety and promote collaborative decision-making opportunities for the parties before adversarial solutions are imposed on the family. (Eaton, Whalen, & Anderson, 2007, Edwards, 2009).

Rarely ☐

Never ☐

2.e. If rarely/never in your opinion why is mediation not being used in child protection cases?

Lack of funding ☐

No available mediators ☐

Lack of support or interest from the court ☐

Lack of support or interest from the attorneys ☐

Lack of support or interest from the families ☐

Use of other dispute resolution tools ☐

Concerns of power-imbalance between the parties ☐

Enforceability of mediated agreements ☐

Other (please state) ☐

2.f. In your opinion, what is the main purpose of mediation in child protection cases?

Resolve placement issues ☐

Non- adversarial nature of mediation promotes personalised agreements ☐

Achieve stability for the child early in case ☐

Promotes a positive dialogue between the parties ☐

Cost-effective ☐

Other (please state) ☐

2.g. In your opinion, why would a child protection case end up in mediation?

Ordered by a court ☐

Agreement of the parties ☐

Both ☐

Other (please state) ☐

2.h. To your knowledge, is mediation training available in this State?

Yes ☐

No ☐

2.i. If. If yes, please reference who provides the mediation training

2.j. If no, please state why you think there is no mediation training available in your State?

2.k. When mediation is being used in child protection cases, what qualifications and characteristics would be most appropriate in a person best suited to lead/facilitate such mediation?

Judicial mediators ☐

Mediators who are lawyers ☐

Mediators who have family law experience ☐

Mediators who have experience handling child protection cases ☐

Other (please state) ☐

2. l. What, if any, are the advantages of using mediation in child protection cases?

2. m. What, if any, concerns do you have about using mediation in child protection cases?

3. CHILD PROTECTION MEDIATION, IN PRACTICE

3.a. How often would you engage in child protection mediations per month?

0 ☐

1-5 ☐

6-10 ☐

More than 10 ☐

3.b. In your experience, generally, at what point do mediations in child protection cases most often occur?

Before an adversarial process ☐

During an adversarial process ☐

After an adversarial process ☐

3.c. In your experience, is mediation in child protection cases an effective tool in litigation?

Always ☐

Often ☐

Sometimes ☐

Rarely ☐

Never ☐

Unknown/Irrelevant ☐

3. d. In your view, to what extent do such proceedings address the 'best- interests' and needs of the child in a prompt and efficient manner?

3. e. Do you participate in family group conferencing or similar programmes?

Yes ☐

No ☐

3.f. If yes, does the use of mediation in child protection cases affect the use of family group conferencing or similar programmes.

4. ADDITIONAL

Any additional comments?

APPENDIX C: PHASE 3 (OBSERVATIONS IN DMD)

In terms of reporting this case, for the purposes of this research entitled "Different Doors, Different Responses: Child Protection Mediation"[273]*, nothing is to be reported or broadcast which would lead members of the public to identify the child or any of the parties involved in the Child Care proceedings. This is the legal position since the Courts and Civil Law (Miscellaneous Provisions) Act 2013 became law.*

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1. BACKGROUND QUESTIONS

1(a). Region: _____

1(b). Type of application: _____

1(c). The Applicant: _____

1(d). The Respondents (parents/grand parents etc.) : _____

1(e). The Children (age/maturity): _____

1(f). The Care of Children: _____

1(g). Duration of the case (to date): _____

1(h). Length of Hearing: _____

2. THE HEARING

2(a). Reason for hearing/seeking order:

2(b). Main issues within the case:

2(c). Relationship/dialogue between the CFA and the parents: i.e. was there open communication between both parties?

2(d). Parents understanding of the process: if applicable, did the parents follow the terms of the reunification plan etc?

2(e). Parents opportunity to be heard during the process:

[273] As mentioned previously, the research was originally entitled Different Doors, Different Responses, but subsequently changed to "Beyond the Courtroom Door: Exploring the Feasibility of Child Protection Mediation in Ireland".

2(f). Best interests of the child: i.e. was the voice of the child heard?

2(g). Any form of ADR used within the case: e.g. family welfare conferences etc (explain why/why not)

Yes ☐
No ☐

3. ADDITIONAL

Any additional comments?

APPENDIX D: PHASE 3 (DISCUSSION POINTS - RE REPORT ON COURT OBSERVATIONS, DMD)

1. BACKGROUND QUESTIONS

1.a. Name: _____

1.b. Email Address: _____

2. REPORT

2.a. Do you agree with the content of this report? Please elaborate on your answer

Yes ☐

No ☐

2.b. Generally, are you aware of mediation being used within child protection cases?

Yes ☐

No ☐

2.c. If you stated yes to question 2.b., please state the context?

3. ADDITIONAL

APPENDIX E: RECRUITMENT LETTERS

Phase 1: Recruitment letter for Legal Representatives and Representatives from State Bodies

Dear X,

My name is Rebecca Murphy and I am currently pursuing a PhD in Maynooth University under the co-supervision of Her Honour, Judge Rosemary Horgan, President of the District Court and Dr Fergus Ryan (senior lecturer in Maynooth University). The research is entitled Different Doors, Different Responses: Child Protection Mediation. In its broadest sense, the project attempts to determine if child protection mediation is a viable alternative to adversarial process in child protection cases.

I am writing to you today to ask for your assistance in the completion of a survey which seeks to explore the opinions of legal representatives to mediation in general and the roles that the Courts see for mediation. Within the survey there is essentially three parts: (1) mediation, (2) child protection and (3) child protection meditation. There may be question that you feel you are unable to answer. Please feel free to answer honestly e.g. "I don't know" etc. as the aim of the survey is to ascertain Ireland's current position towards mediation (in general) and child protection disputes.

The survey is entirely voluntary and anonymous and will only take place once you provide consent. The completion of this survey should take no more than 20 minutes and you can leave at any time or refuse to reply to questions you do not want to answer.

The link to the survey is given below: https://www.surveymonkey.com/r/DYJMYXL. I welcome the opportunity for you to distribute this survey to colleagues who are involved/interested in child protection cases and/or mediation.

If you have any further questions, please do not hesitate to contact me via email.

Warm regards,

Phase 2: Semi-Structured Interviews with Working Professionals in Canada and USA

Dear X,

My name is Rebecca Murphy and I am currently pursuing a PhD in Maynooth University, Ireland, under the co-supervision of Her Honour, Judge Rosemary Horgan, President of the District Court and Dr Fergus Ryan (senior lecturer at Maynooth University). The research is entitled Different Doors, Different Responses: Child Protection Mediation. In its broadest sense, the project attempts to determine whether the implementation of child protection mediation will aid child welfare and improve the quality of decision-making in child protection cases.

As part of my research I would like to examine the child protection systems operating in certain jurisdictions making up the United States of America and Canada and then explore child protection mediation as an alternative to adversarial processes. I am writing to you today to ask for your assistance in the completion of a survey which seeks to explore the opinions working professionals involved in child protection mediation in other jurisdictions. The survey is entirely voluntary and anonymous and will only take place once you provide consent. The completion of this survey should take no more than 20 minutes and you can leave at any time or refuse to reply to questions you do not want to answer.

The link to the survey is as follows: https://www.surveymonkey.com/r/YLTLQ7H. (However, I have also attached a word document of the questions, and if you would prefer you can fill out the answers on the word document and return via email.)

I also welcome the opportunity for you to distribute this survey to colleagues who are involved/interested in child protection cases and/or mediation.

If you have any further questions, please do not hesitate to contact me.

Warm regards,

Phase 3: Follow up questionnaire with the Irish District Court judiciary

Dear Judge,

My name is Rebecca Murphy (former judicial assistant to President Horgan) and I am currently pursuing a PhD at Maynooth University, Ireland. The research is entitled "Different Doors, Different Responses: Child Protection Mediation".

Over the past few weeks, I have been observing child protection cases in Chancery Street Courthouse (DMD). The aim is to determine the extent to which alternative dispute resolutions, such as family welfare conferences etc., are currently being utilised in child protection disputes. As per my ethical approval, once all research was gathered, I would assemble and distribute a working report to the members of the judiciary. Please find attached.

I am writing to you today to ask for your assistance in the completion of a short survey which seeks to verify the content of the report/findings and share any additional experiences you may have come across. The survey is entirely voluntary and anonymous and will only take place once you provide consent. The completion of this survey should take no more than 10 minutes.

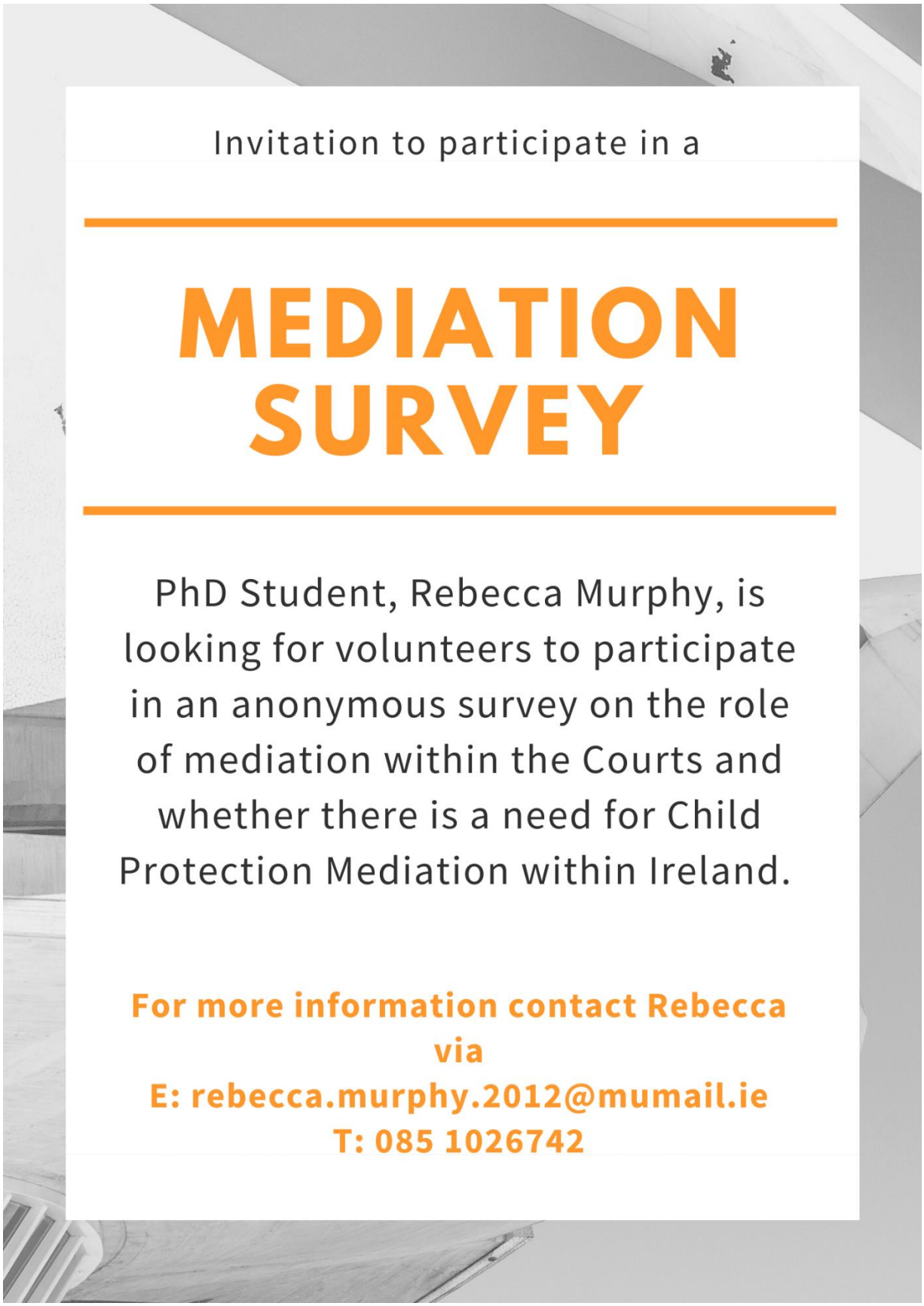
I attached a word document of the questions. Please return via email. I also welcome the opportunity for you to distribute this report/survey to colleagues who are involved/interested in child protection cases and/or mediation.

If you have any further questions, please do not hesitate to contact me.

Warm regards,

Rebecca Murphy

APPENDIX F: RECRUITMENT POSTER



APPENDIX G: PARTICIPANT INFORMATION SHEET

Dear Participant,

This letter invites you to take part in a research study entitled ***'Different Doors, Different Responses: Child Protection Mediation'.*** Before you decide whether or not to take part, it is important for you to know why I am doing this research and how you can help inform this research. This sheet will hopefully answer any questions you might have, but if anything remains unclear please feel free to contact me. If you agree to take part, please tick the attached consent form. If you wish to take part, but you need the consent form in a different format, please contact me to let me know.

Who is conducting this study?

I am Rebecca Murphy, a research student at the Department of Law, Maynooth University. I am doing this research to determine if child protection mediation is a viable alternative to adversarial processes. This research is a part of my doctoral study programme, and is co-supervised by Dr Fergus Ryan and Her Honour, Judge Rosemary Horgan, President of the District Court.

What is this research about and what does it involve?

This research involves a three-phase process, which is described below. However, for the purpose of this study, the researcher is only looking for research participants for Phase 3;

> Phase 1: explore the perspectives of national stakeholders and the Irish judiciary in respect of child inclusive mediation
>
> Phase 2: examine the systems operating in certain jurisdictions of the United States of America and Canada, in which child protection mediation is increasingly recognised as an invaluable service
>
> Phase 3: observe child welfare proceedings in the Dublin Metropolitan District to determine to what extent alternative dispute resolutions, such as family welfare conferences, are currently being used by the parties and explore the perspectives of Tusla, namely social workers and social worker team leaders involved within child protection cases. Please note, the participant data will be combined with court observations.

How can you help?

This semi-structured interview seeks to explores national stakeholders' response to child protection proceedings and to what extent ADR mechanisms are currently be utilised in child protection disputes. I am interested to hear about current practices regarding ADR, if ADR is encouraged/discouraged, and current practices regarding child protection disputes.

The semi-structured interview is entirely voluntary and will only take place once you provide consent. The completion of this semi-structured interview should take no more than 30/40 minutes and you can leave at any time or refuse to reply to questions you do not want to answer.

Do I have to take part?

No, participation is entirely voluntary. You may withdraw your consent at any time.

What will happen if I take part?

The completion of the semi-structured interview should take approximately 30/40 minutes. The semi-structured interview will seek to explore your experiences of ADR within the Courts, your involvement with child protection disputes, and your opinion on child inclusive ADR and child protection mediation. If you do not want to answer any of the questions, you do not need to do so.

What happens if I do not want to carry on with the study?

You can choose to withdraw from the study at any time, without giving a reason. If during your participation in this study you feel the information and guidelines that you were given have been neglected or disregarded in any way, or if you are unhappy about the process, you may contact the Secretary of the Maynooth University Ethics Committee at research.ethics@nuim.ie or +353 (0)1 708 6019. Please be assured that your concerns will be dealt with in a sensitive manner.

What will happen after the completion of the semi-structured interview?

Research participants will have access to the semi-structured interview transcripts. The transcripts will be sent to the participants once all the data has been gathered. A phone call/email will be made to the participants to remind them of the interviews that had been conducted, and to request their permission to send them the transcripts for their responses. Participants will be asked to decide on the method of transfer (via post or email). The transcripts will then be sent to the participants with an accompanying letter which will advise them that should they find reason to correct, clarify or make additions to the interview, they are invited to do so.

Findings from the semi-structured interviews will be used to write the thesis on child protection mediation. They will also be used for further publications arising from this study, such as conference presentations and academic journal articles. All participants will be given a copy of draft report/publication before it is published to correct, clarify or make additions.

How will the information be treated?

Only I will have access to your answers and will keep them private. No personal identifying information will be shared by the researcher with any other party. While some extracts

from interviews may be published, nothing will be published from which you could be identified. Both of my supervisors, Dr Fergus Ryan and Her Honour, Judge Rosemary Horgan, will only have access to anonymised versions of the semi-structured interview. All data gathered will be compliant pursuant to Children's First to include in the event of a disclosure, state that data will be anonymised rather than kept private.

Who can I talk to if I need further information about participating in the study?

I can be contacted at rebecca.murphy.2012@mumail.ie or alternatively on 01 474 7258

Confidentiality

All findings from this study will be kept confidential. This means that any identifying information will not be used. The paper based semi-structured interviews will be kept in a locked cabinet in Maynooth University and the transcript will be stored securely on a password protected computer and destroyed 10 years after completion of the study. It must be recognised that, in some circumstances, confidentiality of research data and records may be overridden by courts in the event of litigation or in the course of investigation by lawful authority. In such circumstances the University will take all reasonable steps within the law to ensure that confidentiality is maintained to the greatest possible extent.

Taking Part

If you have read the above information and are happy to take part in the semi-structured interview, please contact me or my supervisor to make arrangements for the interview at:

Rebecca Murphy
Department of Law
Maynooth University
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Many thanks for your kind co-operation.

Rebecca Murphy

APPENDIX H: CONSENT FORM FOR PARTICIPANTS

Consent to take part in research study **'Different Doors, Different Responses: Child Protection Mediation'**	Add a tick next to the statement if you agree
I confirm that I have read and understand the information sheet, dated 15 January 2019 explaining the above research study and I have had the opportunity to ask questions about the study.	
I understand that my participation is voluntary and that I am free to withdraw at any time without giving any reasons and without there being any negative consequences. In addition, should I not wish to answer any particular question or questions, I am free to decline. If during your participation in this study you feel the information and guidelines that you were given have been neglected or disregarded in any way, or if you are unhappy about the process, please contact the Secretary of the Maynooth University Ethics Committee at research.ethics@nuim.ie or +353 (0)1 708 6019. Please be assured that your concerns will be dealt with in a sensitive manner.	
I understand that the interview is being recorded, and I consent to this. I understand that there is a possibility that the researcher will use direct quotations from this audio recording, and I consent to this.	
I understand that my name will not be linked with the research materials, and I will not be identified or identifiable in any material that results from the research. I understand that my responses will be kept strictly confidential. I understand that findings from the semi-structured interviews could possibly be used for further publications arising from this study, such as conference presentations and academic journal articles.	
I understand that I have the opportunity to review my transcript.	
I agree to take part in the above research study and will inform the researcher should my contact details change.	

Please sign if you consent to participate I this semi-structured interview	
If you have agreed to participate in the semi-structured interview, are you willing to allow the researcher to record the interview?	
Date	
Name of person taking consent	Rebecca Murphy

Researcher:

Rebecca Murphy

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Supervisor:

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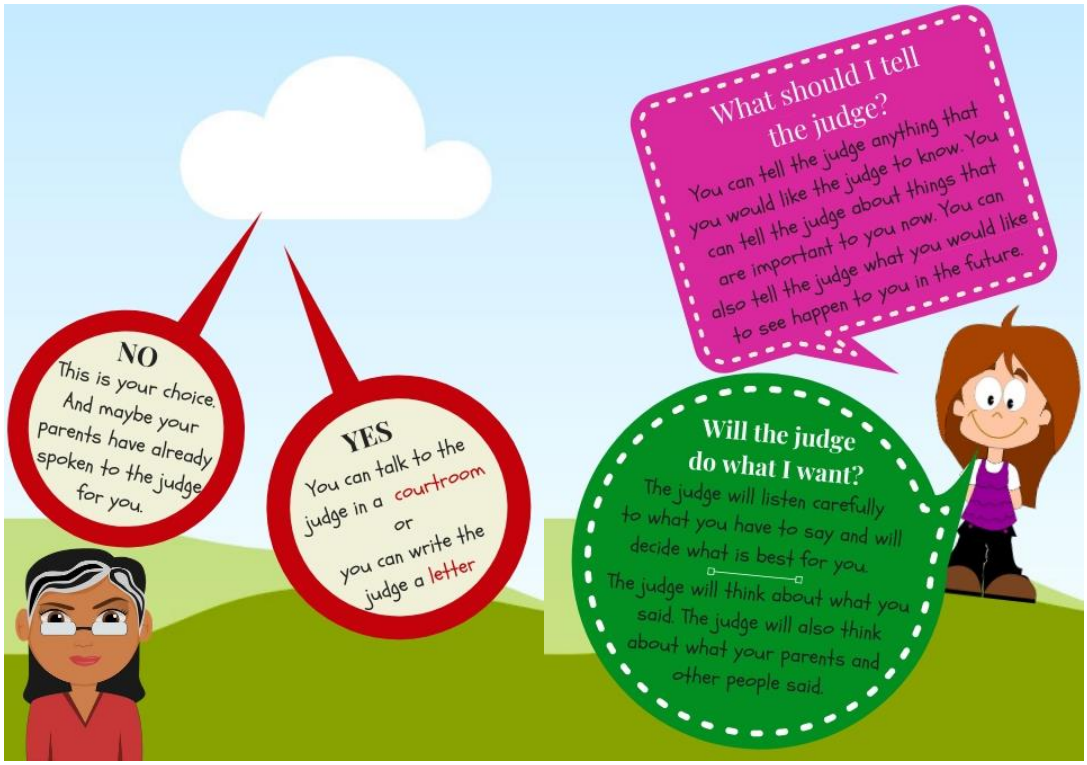
APPENDIX I: CHILD FRIENDLY INFORMATION LEAFLETS

As mentioned in Chapter 5.2.2 (Development of Child Protection Mediation) in collaboration with the Courts Service and the Ombudsman for Children, I developed a child friendly information guide on "Your Right to be Heard". These leaflets should be considered when developing child/family-friendly information leaflets for CPM in Ireland.

Leaflet for a child under the age of 12:


NO
This is your choice. And maybe your parents have already spoken to the judge for you.
YES
You can talk to the judge in a courtroom
or
you can write the judge a letter
What should I tell the judge?
You can tell the judge anything that you would like the judge to know. You can tell the judge about things that are important to you now. You can also tell the judge what you would like to see happen to you in the future.
Will the judge do what I want?
The judge will listen carefully to what you have to say and will decide what is best for you.
The judge will think about what you said. The judge will also think about what your parents and other people said.


If you have any questions or would like more information, please contact ISPCC (Child Line), Barnardos, the Ombudsman for Children.
You can ask a parent or someone important to you to help you.
Where can I get more information?
THANK YOU
FOR READING THIS LEAFLET
WHAT HAPPENS NEXT?
Please tell us what you would like to do by filling out the form below.


Would you like to TALK to a judge and share your thoughts?
Yes
No
Would you like to WRITE to a judge and share your thoughts?
Yes
No
Would you like someone else to tell the judge your thoughts?
Yes
No
If you ticked YES please write down your name and address
NAME:.....
Address:.....
.....
Know your rights
If you want more help, see courts.ie

Leaflet for a child, over the age 12: