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I. INTRODUCTION

The determination of custody and visitation arrangements for minor children is an event normally accompanying a divorce, and it may also be a part of other proceedings involving the care of minor children. The process for determining child custody and visitation is important to the parents, the children, the courts, and society. Historically, this was a judicial decision in contested cases, and the standards used by courts have varied over time.

Mediation, as an adjunct to the court’s determination of child custody and visitation, began its rise in popularity in the early seventies.1 As states moved away from fault-based divorce toward no-fault dissolution of marriage, courts and legislatures embraced mediation as a less divisive way for couples to navigate the often painful process of deciding custody and visitation issues, which marked a shift toward the best interest of the child standard.2

While mediation has many proponents, it is not without its critics. Criticisms have included concerns about the fairness of the process for women and whether mediation is simply another way to force the parties into a settlement of the issues to save the court time and resources. Because some states have chosen to mandate mediation of child custody and visitation issues, the purposes and efficacy of mediation in child custody and visitation are extremely important and should be carefully examined. There is little quantitative or qualitative research on these issues. This Article describes a qualitative research study that explored mediators’ understanding of the purposes of mediation in child custody and visitation in the Tenth Judicial Circuit of Illinois, a state that has recently mandated mediation for these issues.

II. A BRIEF HISTORY OF THE STANDARDS FOR CHILD CUSTODY AND VISITATION

The roles that parents play in the lives of their children, both during marriage and after divorce, have changed over time.3 Under early Roman laws, the children

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2 Id. at 71.
3 Joan B. Kelly, The Determination of Child Custody, 4 THE FUTURE OF CHILDREN 121, 123 (1994); Lynne M. Kohm, Tracing the Foundations of the Best
of a family were considered the property of their father, and he could sell
the children or put them to work.\textsuperscript{4} Mothers did not have legal
rights to their children, even upon the death of the father.\textsuperscript{5} Such
a patriarchal view of child custody continued for centuries into the new
world.

The first known divorce in the United States occurred in 1639.\textsuperscript{6}
At that time, the colonies followed the patriarchal legal system where
fathers were entitled to the custody of their children as if they were property.
In an early Virginia custody dispute, the court continued this tradition by
giving the husband complete control of his children except if there was
gross misconduct on the husband’s part or if the “interest or happiness of
the child imperatively required it.”\textsuperscript{7}

Following the British Custody of Infants Act of 1839,\textsuperscript{8} British courts
dramatically changed custody decisions of young children. The statute
required courts to award custody of children under the age of seven to
their mothers and to provide mothers with visitation rights for their
children seven years and older.\textsuperscript{9} This statute impacted custody
law in the United States\textsuperscript{10} and became known as the “tender-
years doctrine,” which presumed that mothers were more capable of caring
for infants and children of a tender age.\textsuperscript{11}

This presumption was followed by the United States’ courts and was
virtually unchallenged until the 1960s when it was criticized due to its
heavy bias toward women.\textsuperscript{12} After much debate, the Uniform
Marriage and Divorce Act was drafted in 1970 and amended by the American
Bar Association in 1974.\textsuperscript{13}

\textit{Interests of the Child Standard in American Jurisprudence, 10 J.L. \\
& FAM. STUD. 337 (2008).}

\textsuperscript{4} Kelly, supra note 3, at 121.
\textsuperscript{5} Allan Roth, \textit{The Tender Years Presumption in Child Custody Disputes}, 15 J. FAM. L. \\
\textsuperscript{6} GLENDA RILEY, \textit{DIVORCE: AN AMERICAN TRADITION} 3–4 (1991) (“The first
American couple to divorce obtained their decree in 1639 from a Puritan court in
Massachusetts. Anecdotal evidence indicates that untold numbers of other colonists simply
deserted their unwanted or offending mates.”). \textit{Id.}
\textsuperscript{7} Latham v. Latham, 71 Va. 307, 332 (1878).
\textsuperscript{8} 2 & 3 VICT., c. 54 (Eng.) (Women of unblemished character were given access to
their children in the event of separation or divorce). For a look at the British case that led to
this statute, see Lucy S. McGough, \textit{Protecting Children in Divorce: Lessons from Caroline
\textsuperscript{9} Kelly, supra note 3, at 121–22.
\textsuperscript{10} Although the Pennsylvania Supreme Court had acknowledged the “tender years”
doctrine much earlier in \textit{Commonwealth v. Addicks}, 5 Binn. 520 (Pa. 1815).
\textsuperscript{11} \textit{BLACK’S LAW DICTIONARY} 1480 (7th ed. 1999). (“The doctrine holding that
custody of very young children (usually five years of age and younger) should generally be
awarded to the mother in a divorce unless she is found to be unfit.”). This entry further
asserts that the doctrine has been rejected by most states and replaced by a presumption
of joint custody.
\textsuperscript{12} Kohm, supra note 3, at 368.
\textsuperscript{13} See Harvey L. Zuckman, \textit{The ABA Family Law Section v. The NCCUSI: Alienation,
Marriage and Divorce Act adopted the best interests of the child standard for child custody decision-making. Today, when deciding child custody issues, most state statutes and courts focus on what is in the best interests of the child, an approach that does not give judicial preference for either parent. However, the “best interest” determination must often be made in the context of an adversarial process between two competing parents. Yet, because states have recognized that the adversarial process itself is not necessarily conducive for safeguarding the best interest of the child, many jurisdictions have begun using mediation to assist in making child custody and visitation determinations.

III. A BRIEF HISTORY OF MEDIATION IN CHILD CUSTODY AND VISITATION

Mediation is defined as “a method of nonbinding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution.” Prior to 1980, mediation was within the discretion of many state courts, but it was not required. In 1980, California became the first state to mandate mediation in child custody and visitation cases.

The stated purpose of the California law was to “reduce acrimony which may exist between the parties and to develop an agreement, assuring the child or children’s close and continuing contact with both parents after the marriage is dissolved.” Early criticisms of the law centered on three flaws that were later corrected by the California legislature: (1) it did not specifically consider the best interest of the child; (2) it did not provide for judicial protection of women who may suffer an imbalance of power in the marital relationship; and (3) it did not provide any exception to mandated mediation for cases of spousal abuse. As more states embraced mediation in child custody and visitation cases, those states benefited from California’s (and other states’) early experiences and mistakes. Over the fifteen years following California’s mandate of mediation, only six states adopted mandatory mediation, but over thirty states provided for some form of mediation in child custody and visitation cases.

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18 Gaschen, supra note 16, 470–71.
19 As of 1995, the six states with mandatory child custody and visitation mediation were Delaware, Main, New Mexico, Oregon, Washington, and Wisconsin. See id. at 469 n.3.
20 Id. at 472.
Perceived benefits of mediation in family court include: lower costs to the parties and courts; a decrease in docket congestion; increased control of the parents in making decisions for their children; increased compliance with the courts’ orders; increased communication and conflict resolution skills; and fewer post-decree petitions to the court. Many of these perceptions and assertions have been anecdotal and without research substantiation. Mediation has been criticized as a process that may take advantage of women due to the possible imbalance of power in the relationship and that “mandatory mediation provides neither a more just nor a more humane alternative to the adversarial system of adjudication of custody, and, therefore, does not fulfill its promises.” Conversely, mediation has been praised as “show[ing] more promise than litigation as a fair and effective method for resolving custody disputes for both men and women.” Given this range of contentions, specific research addressing the benefits and purposes of mediation seems warranted. Further, the perceptions of those who have been trained and directly involved in mediation, that is, the mediators themselves, should be relevant and insightful.

IV. MANDATORY MEDIATION IN CHILD CUSTODY AND VISITATION IN ILLINOIS

While Illinois permitted mediation in child custody and visitation cases for a number of years, the Illinois Supreme Court mandated mediation beginning January 1, 2007. In 2006, the Illinois Supreme Court adopted a set of rules for child custody proceedings dubbed the “900 series.” The stated purpose of the 900 series rules is to “expedite cases affecting the custody of a child, to ensure the coordination of custody matters filed under different statutory Acts, and to focus child custody proceedings on the best interests of the child, while protecting the rights of other parties to the proceedings.” Mediation is mandated in all cases

21 Laurel Wheeler, Comment, Mandatory Family Mediation and Domestic Violence, 26 S. ILL. U. L.J. 559, 559 (2002); Zylstra, supra note 1, at 72.
22 Id. at 562; Zylstra, supra note 1, at 72.
23 Wheeler, supra note 21, at 563 (citing SARAH R. COLE, ET. AL., MEDIATION: LAW, POLICY, PRACTICE §12:2 at 122–23 (2d ed. Supp. 2001)).
24 According to this website, “... studies show that mediated agreements are more likely to be complied with than decisions imposed by arbitrators or judges. This success may be because the parties take an active role in the decision-making process.” However, there is no citation of authority to support this premise. Arbitration & Mediation, http://www.statelawyers.com/Practice/Practice_Detail.cfm/PracticeTypeID:8 (last visited Sept. 13, 2010).
26 Gaschen, supra note 16, at 487.
27 ILL. SUP. CT. R. 905, available at http://www.state.il.us/court/SupremeCourt/Rules/Art_IX/ArtIX.htm#900. This rule is part of Article IX, Child Custody Proceedings, Rules 900-942, of the Illinois Supreme Court.
28 Id. R. 900(a). The Committee Comments to Rule 900 state that “Rule 900 emphasizes the importance of child custody proceedings and highlights the purpose of the
involving the custody and visitation of a child, \(^{29}\) whether pursuant to a petition for
dissolution of marriage or otherwise, unless the court determines an impediment to
mediation exists. \(^{30}\) The issues of early concern that were apparent in California are
not present in Illinois because the 900 series rules focus on the best interests of the
child, and give the courts discretion to excuse cases from mediation if an
impediment to mediation exists, such as an imbalance of power or spousal abuse.

The mandate for mediation includes the requirement that each judicial circuit
in Illinois addresses mandatory training for mediators. \(^{31}\) The Committee
Comments recognize that different populations and resources in the circuits will
necessitate differences in local rules. \(^{32}\) The qualitative research described herein
was conducted in the Tenth Judicial Circuit in Illinois.

rules that follow, which is to ensure that child custody proceedings are expeditious, child-
focused and fair to all parties.” ILL. SUP. CT. R. 900(a) cmt.

\(^{29}\) ILL. SUP. CT. R. 905 cmt., stating:

[t]he Committee believes mediation can be useful in nearly all contested
custody proceedings. Mediation can resolve a significant portion of custody
disputes and often has a positive impact even when custody issues are not
resolved. The process of mediation focuses the parties’ attention on the needs of
the child and helps parties to be realistic in their expectations regarding custody.

ILL. SUP. CT. R. 905 cmt.

\(^{30}\) Id. The Committee Comments to Rule 905 state:

[p]arties may be excused from referral under both paragraphs (a) and (b) if
the court determines an impediment to mediation exists. Such impediments may
include family violence, mental or cognitive impairment, alcohol abuse or
chemical dependency, or other circumstances which may render mediation
inappropriate or would unreasonably interfere with the mediation process.

ILL. SUP. CT. R. 905 cmt.

\(^{31}\) See Id. Rule 905 does not provide any minimum educational or background
requirements for mediators in child custody and visitation.

\(^{32}\) ILL. SUP. CT. R. 905 cmt. states:

Rule 905 requires each judicial circuit to establish a mediation program for
child custody proceedings. Local circuit court rules will address the specifics of
the mediation programs. The Cook County model for mediation programs,
which provides county-employed mediators at no cost to the parties, may not be
financially or administratively feasible for every circuit. Alternatively, some
circuits have required approved mediators to mediate a certain number of
reduced fee or pro bono cases per year as identified by the court. The individual
judicial circuits may implement rules which are particularly appropriate for
them, including provisions specifying responsibility for mediation costs.

Id.
The Tenth Judicial Circuit is centrally located within the state, and it has adopted local circuit rules in compliance with Illinois Supreme Court Rule 905 on Mediation. The local circuit definition of mediation is:

a cooperative process for resolving conflict with the assistance of a trained court-appointed, neutral third party, whose role is to facilitate communication, to help define issues, and to assist the parties in identifying and negotiating fair solutions that are mutually agreeable. Fundamental to the mediation process, described herein, are principles of safety, self-determination, procedural informality, privacy, confidentiality, and full disclosure of relevant information between the parties.\(^{33}\)

The local circuit rules include the following requirements for mediators:

(1) have a law degree or master’s or higher degree in a social science field related to marriage and family interpersonal relationships.\(^{34}\) Retired judges who have served in family court are deemed qualified;\(^{35}\) (2) maintain the license if the mediator is engaged in a licensed discipline;\(^{36}\) (3) be a member of the Association for Conflict Resolution or Mediation Council of Illinois;\(^{37}\) (4) complete a specialized training course in family mediation of at least forty hours. A particular course was specified as meeting the requirements and a procedure exists to have other courses or experience be evaluated for sufficiency;\(^{38}\) (5) maintain professional liability insurance;\(^{39}\) and (6) obtain continuing education.\(^{40}\)

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\(^{34}\) Amended Order § II(B)(1).

\(^{35}\) Id. Notably, this requirement is part of the formal education section of the local rule, not part of the training section. However, in practice, this language is interpreted to mean that retired Illinois family court judges are “grandfathered” as to the training requirements.

\(^{36}\) Id.

\(^{37}\) Id.

\(^{38}\) Id. § II(B)2. The following issues must be included in the training program: conflict resolution; psychological issues in separation, dissolution and family dynamics; issues and needs of children in dissolution; mediation process, skills and techniques; and screening for and addressing domestic violence, child abuse, substance abuse and mental illness.

\(^{39}\) Id. § II(B)(3).

\(^{40}\) Id. § II(C). Continuing education requirements include: “All approved mediators are required to complete ten (10) hours of circuit-approved continuing education every two (2) years of which two (2) hours must cover domestic violence issues and provide evidence of completion to the Chief/Presiding Judge or his/her designee every two (2) years.”
V. METHODS

A. Subjects and Sampling Frame

Subjects were mediators from a single judicial circuit within the state of Illinois. Three mediator categories were designated: (1) attorney-mediators, (2) counselor-mediators, and (3) retired judge-mediators (referred to as judge-mediators). Attorney-mediators and counselor-mediators had completed the required forty-hour training course, however, judge-mediators were exempt from this requirement, and none in our study had voluntarily attended the training. All subjects had been actively involved with mediation cases over the previous two years.

Although some circuits in Illinois utilized mediation for contested child custody and visitation cases for some time, mediation did not become a state-wide mandate until January 1, 2007. The circuit chosen for this study began mandatory mediation at that time. Our interviews were conducted during the third quarter of 2009. Accordingly, the mediator subjects in this study drew their impressions from mediation experiences that had occurred over the previous thirty months. The researchers determined that such a restrictive selection methodology would allow the greatest degree of respondent experience similarity, particularly with regard to the relative recency of mediation training and the similarity of economic context within which mediations were conducted.

The researchers began the exploratory and pilot phases of this study by recognizing the presence of three somewhat distinct groups of mediators. The first group was comprised of attorneys who also served as mediators. In most cases, these individuals were family practice attorneys who engaged in limited mediation activity. There was general agreement within this group that successful mediation required them to take off their attorney hat and put on their mediator hat. Understandably, all attorney-mediators recognized and abided by the commitment that there could be no overlap between family-practice clients and mediation clients.

The second group consisted of counselors who also served as mediators. Similar to attorneys, counselor-mediators accepted that counseling clients could

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41 See supra note 34.
42 Interviews were conducted after applying and receiving approval from Bradley University’s Committee on the Use of Human Subjects. As part of the approval, confidentiality of the identities of the interviewees was required. In addition, each interviewee signed an informed consent, which also promised confidentiality. Each interviewee was told that he/she would not be identified in any article published about this research other than as an attorney-mediator, counselor-mediator, or retired judge-mediator. Each interviewee quoted in this Article was contacted and read the quotation and asked whether it was accurate. Therefore, in the text of the Article, each quote is identified only as being made by an attorney-mediator, counselor-mediator, or retired judge-mediator.
43 Tenth Circuit Medication Rules R. 3(B); Amended Order § III R.3(B).
not be mediation clients. Although a rotational system of mediators was in place for situations when clients and their attorneys had no mediator preference, this feature of the mediation process was rarely used. Consequently, counselor-mediators conducted relatively few of the mediations that had occurred in the circuit under consideration. Specifically, of the external cases referred, counselor-mediators conducted two percent, attorney-mediators conducted thirty-eight percent, and judge-mediators conducted sixty percent.

The third group included retired judges who served as mediators. These judge-mediators handled the overwhelming bulk of the mediations within the circuit being studied. As noted earlier, judge-mediators were “grandfathered” into the mediation system and were not required to participate in or complete the forty-hour mediation training program.

B. Qualitative Analysis

Qualitative methodology was used to attain perspectives for this study. The researchers selected participants from the list of approved mediators from the Tenth Judicial Circuit of Illinois. In person, interviews were conducted with fifteen mediators. Interviews within each of the three mediator categories continued until saturation was achieved. As such, three judge-mediators, six attorney-mediators, and six counselor-mediators were interviewed. Additionally, two non-mediators within the circuit who had extensive experience with the mediation process since its mandated inception (a sitting judge and a non-mediator family attorney) were interviewed to assure that saturation had been achieved.

While considerable speculation and a variety of assumptions have surrounded mandated mediation, our research goal was to discover the critical approaches or theories underlying this strategy by listening to those directly involved. We began with no a priori model. Rather, our model was discovered by carefully studying the interviews. This approach, known as “grounded theory” is a key methodology

44 Id.
45 See supra notes 34 and 35.
46 The key in our study is not the number of cases, but the level of interviewing depth and the method of analysis. See Anselm Strauss & Juliet Corbin, Basics of Qualitative Research: Techniques and Procedures for Developing Grounded Theory 11 (1998). Notably, many classic qualitative studies have been built on sample sizes that are quite small. For an excellent review of some of these classic studies, see Ellen Brantlinger et al., Qualitative Studies in Special Education, 71 Exceptional Child. 2, 195, 198–199 (2005). Doctoral dissertations utilizing this methodology are often limited to less than ten respondents.
for exploring a deep understanding of a complex social phenomenon. In short, our methodology provided depth by letting those directly involved explain the underlying themes rather than have the researcher impose them for verification. In their classic work, Glaser and Strauss outline the dynamics of this qualitative methodology, and their framework guided our investigation. Glaser and Strauss’s methodology has become a widely accepted method for careful study of important social issues.

Our study used careful methodology commonly used in qualitative research. First, we interviewed until we reached “the theoretical saturation point.” In other words, we continued our interviewing process until it became clear that additional perspectives were not being added. As Taylor and Bogdan note, “[q]ualitative researchers typically define their samples on an ongoing basis as the study progresses . . . [R]esearchers consciously select additional cases to be studied according to the potential for developing new insights. . . .”

Our analysis of the interviews was also uniquely rich. Interviews were audio taped to ensure accuracy. Each interview was studied and coded using a line-by-line approach. Further, two researchers, working independently, coded each interview. Next, all three researchers met to reach agreement or in qualitative terms, achieve “concordance.” This is a discursive and reflective process that requires researchers to act as the “devil’s advocate” whenever interpretative differences appear. The primary researchers conducted all analysis and coding. This process of sitting together for hours and pouring over each interview allows one to “listen to the data.” That is, themes emerge from the words of the participants. Given the parameters that we imposed, our sample size of fifteen is actually considered quite acceptable and rather large.

Confirmability—the use of additional documentation to confirm or help assure confidence in the respondents’ perspectives—was achieved through external data (secured from the circuit court under consideration, which provided checks on mediator perceptions of the extent of mediation and mediation success rates). In addition, the qualitative techniques of respondent validation and member checking were utilized. Here, each participant was contacted, apprised of the study’s results,

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48 See generally GLASER & STRAUSS, supra note 47 (In grounded theory, no theory is brought to the table. Instead, the results are analyzed without a theory in order to develop a theory. In one approach, theory is a tool; in the other, it is the goal.).

49 Id.

50 See generally ANSELM L. STRAUSS & JULIET CORBIN, BASICS OF QUALITATIVE RESEARCH: TECHNIQUES AND PROCEDURES FOR DEVELOPING GROUNDED THEORY (1998) (discussing conceptual and analytical strategies for qualitative research); STEVEN J. TAYLOR & ROBERT BOGDAN, INTRODUCTION TO QUALITATIVE RESEARCH METHODS (3d ed. 1998) (describing the techniques and methods used in qualitative research).

51 TAYLOR & BOGDAN, supra note 50, at 26–27.


53 Id. at 1116.
and asked to confirm that their personal perspectives were indeed included in our results. Additionally, the interviews with the non-mediator sitting judge and family practice attorney helped confirm that key perspectives were not omitted from consideration.

VI. RESULTS

Attorney-mediators, counselor-mediators, and judge-mediators bring different educational foundations, training, experiences, and perspectives to their work as mediators. Accordingly, it seems reasonable that some of the disparity in desired mediation outcomes or purposes could be affected by the perceptual and experiential base of each mediator. In this regard, our findings revealed important distinctions across groups.

In general, attorney-mediators and judge-mediators approached mediation with the primary goals of reducing the adversarial logjam between parents, resolving all or some of the custody and visitation issues, and thereby expediting the remaining court process. This theme of “expediting the process” was dominant. As one judge-mediator noted:

Some of these cases are highly contested, deeply bitter. I was in the domestic court myself . . . so I’ve seen it all practically. And the mandatory mediation is just passing some of that work off . . .

However, counselor-mediators, while focused on resolution, also sought to provide parents with interpersonal and relational skills that contributed both immediate and longer-term impacts. Their goals seemed to be both achieving an outcome and helping parents understand how child-oriented decisions could be achieved between parties with a history of adversarial encounters. The significance of these dual outcomes was emphasized by all counselor-mediators. Counselor-mediators expressed that successful mediators should facilitate helping parents “to do the interpersonal work” in order to get “the resolution done.” However, counselor-mediators were keenly aware of the fine line and accompanying risk between emphasizing skill development and potentially straying off-task.

Attorneys seem to be trained in the adversarial system . . . They bring that more directive, leverage-seeking, you’d-better-do-this-or-this-will-happen kind of style to mediation . . . It might force an outcome, an agreement even, but none of the qualitative benefits of mediation really occur . . . Counselors struggle in that . . . we want to help people . . . empathize with people . . . care about their feelings . . . We can get lost or involved in the emotional aspects and not stay focused on the task aspects of mediation.

With these initial thoughts in mind, we will explore the perceived goals, or categories, of mediation outcomes that were revealed from our study.
A. Categories of Mediation Outcomes

“I’m convinced that the court system doesn’t work very well with people who are in the process of divorcing, especially when there are minor children.” (Attorney-mediator)

To a large extent, the mediators we studied shared the sentiments noted above. Fundamentally, the purpose of mediation is for the parental parties to reach a resolution rather than accept a court-imposed decision.54 Within this broad purpose, our analysis revealed five deeper mediation impact categories. Those impact categories include: the immediate court impact of streamlining or expediting court time; the extended court impact that may save court time in the future; the impact on the child; the impact on the parents; and finally, a joint parenting assumption that impacts any resolution reached. Each impact category will be discussed, and the relative focus of each mediator group will be noted where relevant.

1. Immediate Court Impact – Streamlining or Expediting Use of Court Time

Successful resolution through mediation serves both an immediate and an extended impact for the courts. Initially, we will examine the immediate court impact.

First, successful or partially successful mediation streamlines or “expedites” court time.55 Mediation is a commodity that is increasingly important for all court systems in order to preserve judicial resources, given the increasing demands on our judicial system.56 Participants acknowledged that contested custody cases often develop “a life of their own,” extending for weeks or months. Further, because such cases are usually handled in isolated segments of time with lengthy gaps between sessions, the flow and efficiency of these cases is problematic. One

55 Thomas Vu, Note, Going to Court as a Last Resort: Establishing a Duty for Attorneys in Divorce Proceedings to Discuss Alternative Dispute Resolution with Their Clients, 47 FAM. CT. REV. 586, 589 (2009).
56 Ben Barlow, Divorce Child Custody Mediation: In Order to Form a More Perfect Disunion, 52 CLEV. ST. L. REV. 499, 509 (2005). “The United States has one of the highest divorce rates in the world and . . . this rate has continuously grown over the past 140 years.” Id. (internal citation omitted). “The United States Census Bureau reports that the marriage and divorce statistics forecast that, in the future, ‘the percentage of first marriages ending in divorce may be as high as 50 percent[, which] is up from an estimate of one-third of marriages made by demographers in 1976.’” Id. (citing ROSE KREIDER & JASON FIELDS, UNITED STATES CENSUS BUREAU, ECON. & STATISTICS ADMIN., NUMBER, TIMING, AND DURATION OF MARRIAGES AND DIVORCES: 1996, at 3, 19, available at http://www.census.gov/prod/2002pubs/p70-80.pdf).
attorney-mediator captured this argument by commenting, “I’ve seen a lot of cases where a lot of time and a lot of court resources and a lot of heartache have been solved by a good mediator getting in and helping people reach agreements.”

Some mediators noted that the mere presence of mandated mediation may streamline the process by incentivizing the parties toward more immediate action. For example, one attorney-mediator took a very practical, utilitarian line of reasoning:

People realize, ‘Oh my gosh, here’s somebody else we have to pay, and here’s more time we have to take off. And maybe we ought to rethink this thing.’ As a result, we see a lot of cases where the parties end up with an agreement on custody and visitation even before they go to the mediator. But I think three years ago, when they wouldn’t have had to go through mediation, they’d just say, ‘Well, we’re going to ride this horse all the way through the system.’

A number of reasons for this “streamlining argument” were noted. For example, mediation may “weed out those cases that need to be tried so they can be tried faster.” Further, parental engagement with an impartial negotiator may facilitate a more open and frank discussion of issues than would occur in other settings, particularly the adversarial courtroom setting:

Cases that do go to trial are tried more efficiently because the issues have been narrowed and to certain extent because the parties have had a chance to blow off steam at each other. And that’s a valuable thing. They don’t do that necessarily when they are sitting with their attorney. There’s a certain magic about being face-to-face in a room with a stranger that allows them to say what’s on their mind. (Judge-mediator)

Second, mediated or partially mediated resolutions allow those issues that do require court determinations to be achieved with greater efficiency than would be present without the use of mediation. In part, this perceived outcome arises from success begetting further success. Having achieved at least some degree of agreement, parents may be predisposed to anticipate and expect further agreement.

Third, the mediation process was perceived by many mediators as one that reduced the level of acrimony that is experienced in court. It was noted that this may arise from a sort of “emotional purging” that can occur during mediation. It may also arise if parents learn interpersonal resolution skills that broaden their capacity to address confrontational and problematic issues. Reduced acrimony may thus be a product of the emotional release and grounding that can occur during the mediation process.
2. Extended Court Impact

Respondents indicated that mediation could have longer-term, or extended court impact. Here, a number of mediators argued that well-handled mediation processes could foster the attitude, perspective, and skill base to enhance parents’ capacity to resolve future differences on their own, rather than returning to court for an imposed determination. Admittedly, some respondents argued that such hopes were heroic at best and naïve at worst. However, counselor-mediators generally heralded this extended impact argument. Of course, this outcome is predicated on the assumption that improving attitudes and skills are important goals in addition to just reaching closure on the issues. Considerable disagreement revolved around whether this was even a reasonable and appropriate goal of mediation. We cannot, from our data, attribute this preference to any single group. It appears quite idiosyncratic and arises from each mediator’s unique set of professional and life experiences.

3. Child Impact

In its most optimistic form, mediation exists because it has a better, or more positive, impact on the children than what would result if the court process progressed without the intervening step of mediation. Nearly all mediators in our study agreed that the court system was “no place” for children. One attorney-mediator noted that “the court system is not good for divorcing couples and kids.” Therefore, to the extent that mediation led to a reduction of court time, the impact of mediation on the children was viewed favorably. Further, most mediators noted that mediation held the potential of yielding better decisions (than the court process) that could result in immediate and long-term benefit for the children.

In addition, a number of respondents believed that if parents could place the child’s interest as their sole and paramount concern, parents could abandon or mitigate their adversarial stances in at least custody and visitation matters. Respondents felt that this approach allows the parents to jointly reach better overall decisions for their children than those that would be court-imposed. One judge-mediator emphasized this stance at the outset:

I don’t want [the parents] to think about custody and visitation. I think custody is a fighting word. I think visitation is something you do with people in jail or at funeral homes. I talk instead about parenting rights and obligations and parenting time. How can we divide that in the best interests of the children?

4. Parental Impact

Three themes emerged under the parental impact category. Although interrelated, each will be discussed individually.

An initial outcome could be termed the “parental resource argument.” Through mediation, both time and money (including lower fees to attorneys) may be saved. The impact here should not be minimized, as this practical outcome can push parties toward resolution. In short, the parties know that if mediation is unsuccessful, they must return to court for what can be an expensive and painful process.

There’s probably nothing like a contested custody case to stir up the kinds of feelings that may never be assuaged. It’s just a dreadful kind of thing to have to go through. So, I think that mandatory mediation . . . does focus the parties’ attention. . . It forces them really to understand . . . ‘The judge has told us he’s gonna in effect keep our feet to the fire.’ So I think the combination of legalism and psychology and time and energy and money [make it work].

Emphasizing that money and time expenditures can be reduced through the use of mediation rather than the court, one mediator-attorney described his explanation to contentious parents:

The chances that they are going to get along better down the road and do what they need to do for the kids through difficult times isn’t that great. This is your opportunity to try to work things out . . . You don’t have to like each other, but . . . you’re going to be doing this forever. And if you are fighting tooth and nail now, you’re spending thousands of dollars a piece on attorneys, and you have to call in all kinds of witnesses to talk about what a horrible parent . . . the other person is or whatever.

A number of mediators suggested that one of the key effects of mediation was a contribution to, and enhancement of, parental empowerment. In short, when parents make decisions rather than abide by court imposed decisions, they feel better about the overall process and gain initiative to pursue further resolution on matters beyond those of custody and visitation. Here, mediators suggested that parental clients were generally more pleased with the mediation solution, largely due to the integral and involved role they played in the process. A counselor-mediator noted that the “parties feel good about talking it through.” Mediators stated that courts, by nature, create an adversarial condition, while mediation encourages the parties to explore resolution.

A related goal of mediation is simply to enhance parental interaction in a focused problem-solving setting.58 The impact here is drawn from a psychological

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58 Vu, supra note 55, at 589.
base, assuming that as parties increase activities and interactions, recognition of shared sentiments will likely emerge. This line of thinking was noted by two attorney-mediators who suggested:

And then you’ve got [parents] talking. You’re seeing how they’re talking to each other, how they’re listening to each other, how much do they respect the other person’s role in the child’s life. And then you can go back to the custody issue and see if you can make progress there. . . .

. . .

I think generally when you get people talking, the process kind of takes care of itself, especially when they come back over a series of weeks. They consider it and look at the big picture.

In part, this arises from the mediation setting, which is contrasted with the uncomfortable, adversarial, and unfamiliar court setting. Mediation was described as a controlled setting where parents were made to feel safe. Although mediators utilized differing boundaries and ground rules, all mediators reported specific procedures to assure parental safety, freedom to openly express their needs, and checks against dominating or intimidating behaviors from either parent.

Importantly, respondents noted that parents could gain or develop enhanced resolution and parenting skills through the mediation encounters. Clearly, counselor-mediators felt more strongly about this role than did attorney-mediators or judge-mediators. One counselor-mediator expressed it carefully:

You’re bringing in people who used to love each other and who now do not like each other . . . . If we can teach them new skills to get along with this person who is going to be part of their life forever because they have children, then to me, it’s (mediation) a wonderful service.

The divorce may have a history of people being unable to communicate . . . . I can see people who haven’t literally talked to each other about their children for weeks or months. I think one of the biggest benefits . . . is helping people to have some insights into what needs to happen for them to communicate about some of these issues and cut away some of that very important emotional involvement so they can start to address the practical and factual issues . . . . (Attorney-mediator)

In addition, one counselor-mediator commented that one of the goals of mediation should be to “help people live better lives.” Another counselor-mediator expanded on this perspective:

The court, by itself, isn’t going to make conflict go away – even in making decisions. It won’t do it. The attorneys, in adversarial situations, certainly won’t. Mediation will help put people on the right step if it’s
done well. It empowers them to really learn how to talk and solve problems.

While commendable, this goal is not without controversy. Some mediators argued that such lofty hopes exceeded the intent and logical perspective of mediation. For example, most counselor-mediators recognized that establishing a productive method of dealing with differences and developing personal conflict skills demanded that more time be committed to the mediation process. In fact, the majority of counselor-mediators were comfortable taking extra time or extra sessions than those specifically mandated. One counselor-mediator noted that the first mediation session usually took about two hours and the desired outcome was to secure a parenting agreement. This mediator felt strongly that “knocking out the parenting agreement” during the first session was the “hook” to get the parents to come back for subsequent sessions and devote the time and energy for further progress. This mediator even noted that “if you can’t get that done (the parenting agreement), . . . I don’t think [the parents] see a reason to come back.”

Counselor-mediators recognized that a fine line exists here—one that may be particularly problematic for those with counseling backgrounds. Without question, mediators must remain focused on the specific custody and visitation issues at hand, thus avoiding tendencies to delve into deeper counseling issues. One counseling-mediator expressed the approach and the challenge succinctly:

I tell them, I have one goal, and my goal is to finish this co-parenting plan and statement and get you a Memorandum of Understanding so that you have more control over your family than the courts do. Is that what you want? ‘Oh, yea, that’s what I want.’ Good, then let’s get back to business. ‘But, I hate him.’ Well, I’m sure you both hate each other, but we have this issue that we need to get done. So let’s get back to business.

The sensitivities noted above are certainly not the exclusive purview of counselor-mediators. A number of the attorney-mediators noted similar concerns. However, counselor-mediators more commonly emphasized the importance of skill development.

Most attorney-mediators and judge-mediators emphasized an approach to mediation that focused on the primacy of securing a solution. Other behavioral effects could occur, but generally, they were viewed as residual effects to the dominate goal of “getting it done.” Recall that these mediators, drawing from their experience base, often saw the key contribution of mediation as streamlining the use of court time and resources.

On the other hand, counselor-mediators emphasized an emotive-skill-resolution approach to mediation. Here the emotive component, the mediator begins the mediation by listening to and acknowledging the parents’ stories. This approach is based on a fundamental belief that people have to believe that their unique stories are heard and that their feelings are acknowledged before
meaningful progress can be made. Certainly, the nature of this activity varies, as the depth of animosity covers a broad range. The distinction between mediation and counseling is that these feelings and the complexity of issues driving them are not addressed in mediation. Mediation does not have the luxury to talk about the past.

Next in the skill phase, parents are taught the fundamental, or basic, skills of how to relate to one another. Essentially, the mediator helps parents see how they can move from vested self-interest to child-centered compromise. Through this process, counselor-mediators felt that a resolution could be structured and secured. The emphasis on a jointly-discussed resolution over a “get-it-done” solution was evident. Here is the way one counselor-mediator expressed the model:

You have to acknowledge people’s feelings. They have to be heard. Then, you have to say, ‘This is extremely difficult. I’m sorry that you all are going through this situation. What can we do to get to the point where we can move forward?’ Then . . . give them the resources, and stay focused on your path.

Again, we must emphasize that while all counselor-mediators in our study adhered to this emotive-skill-resolution approach, select attorney-mediators and judge-mediators also employed behaviors consistent with the parameters of this approach. For example, one attorney-mediator noted that “courts deal with facts, but mediation is better with emotions and continuing relationships.”

Nearly all mediators indicated that a fine, and often impenetrable, line had to be crossed before skill enhancement had any or much chance of success. Namely, parents had to be able to progress beyond raw emotion and focus on interactive and negotiating skills. Here, the mediator’s capacity to help the parental parties listen, hear, and understand were stressed over and over again. Most mediators assumed that such an approach established ground for more fruitful exchanges. An attorney-mediator expressed this view:

I might respect their privacy and say okay well you know what he’s talking about . . . We don’t have to discuss it, but does it help you make your decision . . . in terms of what to do with the visitation?

A final parental advantage of mediation is that parents can learn skills in mediation that help them deal more effectively with issues that may arise down the road.

I think I do a better job of reducing the conflict and emotional baggage so that not only the mediation session but to some limited extent later they can use those same kind of skills. (Attorney-mediator)
5. A Joint Parenting Assumption

A number of mediators possessed a strong bias toward joint parenting. These individuals felt, in general, that such arrangements were more favorable to the interests of the involved children. One counselor-mediator expressed this argument quite strongly:

Mediation in some ways presupposes the better outcome for kids [is] to have parents in their lives and have joint custody, which goes against the old school of law which says . . . unfortunately, that moms are the better parents and should have primary custody. Dads – they provide – so if they see the kids every other weekend, that’s good enough.

B. Summary of Impacts

Five sets of conclusions and related impacts are derived from this study. In this section, we will highlight each conclusion and address its significance for the mediation process.

First, all participating mediators expressed positive impressions of the mediation process, and viewed mediation as a useful adjunct to the court’s processes and procedures. As we noted earlier, in many cases, mediation helped reduce court resources by securing agreements on custody and visitation matters and decreasing time spent in court. However, even when mediation produced no settlement (or partial or limited settlement), participants recognized that mediation often helped parents express emotions, thereby reducing some degree of subsequent tension. Further, the mediation process helped the parties to begin more productive communications about child-focused issues, thereby building a more positive basis for future interactions. Accordingly, residual issues and subsequent problems may more likely be resolved without court involvement in the future. Although we have no definitive measures here, mediator impressions were strikingly consistent.

This line of reasoning leads to a second conclusion regarding how we determine or “measure” the success of mediation. Here, we recognize that measuring the success of mediation must be a multi-faceted process. In an ideal sense, mediation is clearly successful when a full agreement on custody and visitation is secured, signed, and directed to the court. However, a partial agreement also represents a degree of success, and all mediators in our study valued the contribution of such agreements. In many cases, the tough work necessary to secure a partial agreement was viewed by the mediators with a sense of accomplishment.

Furthermore, the participating mediators noted that even when items of formal agreement could not be secured, some level of success was probably attained. Hopefully, the parental parties learned interactive communication skills that would enable them to handle future problems with greater effectiveness. The mediators,
quite realistically, noted that in some cases emotions were just “too raw” and hurts “too deep” to achieve any level of agreement. However, the mediation process provided an important forum for needed interaction.

This leads to a third conclusion. Part of the value of mediation arises from the mediation format and setting that is quite distinct from that experienced in court. Not surprisingly, parents often feel unsure and intimidated by the unfamiliar court setting. Consequently, they depend on their attorneys and engage in the court process with an “assumption of representation.” In contrast, our mediator respondents indicated that mediation is built on an “assumption of participation,” wherein parents are provided an opportunity to be actively involved in decisions.

The participative imperative arises from a series of seemingly small yet critical decisions that are made by the mediator. For example, most mediators extend their schedules to provide parents considerable flexibility of meeting times. These schedules may include evenings and weekends. Further, as our mediator participants noted, parental participation requires a comfortable and safe setting for the parents. A sense of parental control and freedom must be established, and these conditions generally emanate from the mediation setting and the basic ground rules that are established by the mediator. Importantly, mediators understood the need to address parental grieving, regardless of its stage of development. With an eye focused on securing agreement, mediators still accepted withdrawal, denial, emotional release, and angry retorts from parents as parts of the mediation process. In fact, they recognized that such responses were often necessary precursors to subsequent agreement. Although methods varied, each mediator established mechanisms to enhance the foundations needed for maximum parental participation.

The conclusions expressed above lead to a fourth conclusion: successful mediators must practice a “melding of skills.” Here, the distinctions between attorney (judge)-mediators and counselor-mediators were most apparent. As noted in our Results section above, attorney-mediators and judge-mediators, through training and experience, focused on a “solutions approach” to mediation. Counselor-mediators, drawing from their background, emphasized an “emotive-skill-resolution approach” to their mediations. Successful mediators must understand the demands of each unique situation, recognize the needs of the parents, and assess the emotional state of events in order to select and practice a “balance of skills” that fits the situation. In essence, the mediator must be sure that his or her behavioral approach is directed by the situation and not by personal comfort and preference.

The skill of blending skills and behaving “out of preference” can be achieved. However, sensitivity and practice are required. These needs underscore the

importance of mediation training, and they lead us to conclude that additional, regular training and refresher programs throughout the year should be required. Further, the importance of all mediators participating in mediation training is critical.

There is a final point on the fourth conclusion. We have uncovered a philosophical distinction among mediators regarding their desire for solutions versus resolutions. Solutions are decision outcomes, while resolutions imply a “meeting of the minds,” an open, freely discussed, and negotiated agreement. We believe that both perspectives are important, and the proper blend is situational.

Our fifth conclusion deals with the practical question of mediator selection. This study revealed that attorneys preferred to use attorney-mediators and judge-mediators over counselor-mediators. The reasoning was straightforward. The attorneys believe that understanding the court process, and sharing with parents the likely impact of an unsuccessful mediation, will provide attorney-mediators and judge-mediators with advantages that were not possible with counselor-mediators. Further, attorneys noted that they felt comfortable knowing how attorney-mediators and judge-mediators were likely to think and process decisions, and accordingly, felt that a bias toward these mediators was reasonable for their clients’ best interests. Interestingly, the impact of this conclusion runs counter to that of conclusion four. In short, it appears that attorney preferences trumped parental needs when mediator selection was addressed.

VII. CONCLUSION

In summary, all mediators conceded that child, court, and parental impacts are important considerations when examining the purpose and outcomes of mediation. However, the emphasis on this triad of interests varied considerably among the mediators we interviewed. The relative weight given to the interests of the child, parent, or the court varies depending on the mediator’s underlying theoretical approach to mediation. For example, one might argue, convincingly, that the interest regarding the impact on the judicial system should predominate, and any other effects (on the child or parent) should be viewed simply as residual. On the other hand, others may argue that child, parental, and court interests must work in concert. The greatest impact and promise of mediation comes when all elements of the triad can gain some level of recognition.

60 Solutions to child custody and visitation issues can include sole custody by one parent with visitation by the other or joint custody. Many variations regarding the days and times of visitation, holiday and vacation schedules, consultations required of each parent, and religious education are often part of such solutions. Among these many possible solutions, a resolution occurs when the parties work through their conflict and arrive at the solution that both can accept. Mediation is often praised as the best method of achieving resolution. See Robert D. Taichert, Mediation Is the Best Means of Dispute Resolution, 76 CPA J. 64 (2006).