



# Mediation in child welfare<sup>1</sup>

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This information sheet describes the use of mediation in child welfare and summarizes key findings of evaluations that have been conducted in a number of areas across Canada and the United States.

## What is mediation?

Mediation is a process whereby a neutral and impartial person, called a mediator, encourages and facilitates the resolution of disagreements. In child welfare, mediation is used to help child welfare workers and parents resolve conflicts about issues related to a child's care, where a child will live, who will be allowed to have contact with the child, or who has legal custody of a child.

## When is mediation used in child welfare?

The main responsibility for the well-being of children in Canada rests with parents. However, if parenting falls below the standard of care which society deems is appropriate for the care of children, as laid out by the laws of each province and territory, the child welfare system may become involved. The type and degree of intervention is carefully regulated by legislation. When child welfare workers and families disagree about what is best for a child, a family court judge may be asked to make these decisions. For example, when child welfare agencies have concerns about the care a family is providing for their child or children, a judge may be asked to decide whether the child welfare agency should supervise the family through regular visits (i.e., supervision orders). Or a judge may make a court order to require that parents make specific changes to provide better care for their children (e.g. get help for anger management problems).

In some situations, a child and family service agency may remove a child from the family

home and place the child in temporary (or permanent) out-of home care because of concerns for his or her safety or welfare. If the family does not agree, the courts must decide whether child should be returned home, or whether the child welfare agency should have legal responsibility for the child's care on a temporary (or permanent) basis. When a child is living in foster care, the court makes decisions about whether, how often, and under what conditions, the birth family can have contact with the child. Courts can also make decisions about permanent living arrangements for children who are living in foster care.

Many of these decisions involve a family court trial (also referred to as litigation), where the judge hears evidence and arguments on each side and reaches a legally binding decision about what is best for the child. These issues do not have to be brought to trial if disagreements about the child's care and needs can be resolved in other ways. Many jurisdictions are adopting mediation or other decision-making processes (such as Family Group Conferencing) as an alternative way to resolve issues about children's care. These alternatives to the court trial process have been advocated because of the large volume of cases waiting to be heard in court. In addition, court trials are costly, time consuming, and tend to position families and child welfare workers as adversaries in decisions about children's care. When mediation is used to resolve disagreements in this context, it is frequently referred to as child protection mediation.

Child protection mediation offers several benefits over litigation as a way to resolve disagreements about the care that children need. It promotes collaborative problem solving and consensus building among parents and child welfare workers, and recognizes their common interests in promoting child safety and well-being. It

places greater emphasis on the integral role that parents play in caring for their children and provides greater opportunity for them to have input into decision that are made about their children's care. For Aboriginal peoples, mediation can assist in preserving and strengthening families, and can reduce some of the inequities experienced by Aboriginal people in northern areas. These include lack of legal representation, difficulty in understanding child welfare court processes, and lack of translation of legal and child welfare concepts into Aboriginal languages.<sup>2</sup>

### **What does child protection mediation involve?**

Child protection mediation is a process that involves one or more meetings in which all of the parties involved in the case come together to work towards resolving child welfare issues. Participation in mediation is generally voluntary. However, in some jurisdictions, judges have the option of ordering the parties involved in the case to try mediation before they have their case heard in court.

Child protection mediation typically involves parents and child welfare workers, but may also include other people who care for the child (e.g., adoptive parents, foster parents, and relatives who may want to become the child's legal guardians). Depending upon age and developmental status, a child may participate in one or more of the stages of mediation, or a lawyer may represent the child's interests. Lawyers for the other participants (e.g., the parents and the child welfare agency) are often involved to explain issues and options and review the agreement that is developed, but they may not attend the mediation sessions. If the child involved is Aboriginal, the mediation process should include members of the Aboriginal community and/or a delegated Aboriginal child welfare agency.

Prior to the meetings, mediators often review documents and speak with each participant to explain the process and assess concerns they may have about participating in the process.

During the meetings, mediators facilitate communication and guide the participants through a problem solving process. All participants are encouraged to express their wishes and concerns about the care and well-being of the child. Mediators aim to help child welfare professionals and families reach consensus about how to address child welfare concerns.

Three key features of mediation facilitate communication and collaboration:

- Mediators are impartial. In order for the process to be seen as fair, all participants need to feel that their perspectives are heard and considered. Mediators do not work for, or represent, the interests of any one participant, and they have no other involvement in the cases that they mediate.
- The mediation process is confidential. Information discussed in mediation cannot be used as evidence in court either for or against the people involved in the mediation, except when issues arise that must be reported by law (e.g., child abuse or neglect that is revealed in mediation). Confidentiality increases the chances of open and honest communication.
- Mediators do not have decision-making authority. Parents and child welfare workers have a shared responsibility for the development of a concrete plan to address the child's needs. The mediator's job is to facilitate the process of coming to a shared understanding.

Mediation generally requires one or two sessions, or up to about five hours in total. However, some types of decisions, such as who will have permanent custody of the child, may require more sessions. Agreement may be reached on some issues and not others. Mediation where agreement is reached on only some of the issues may take longer, presumably because parties continue to consider alternate solutions for outstanding issues until it is clear that an impasse has been reached.

The qualifications needed to be a mediator vary by jurisdiction. Mediators are typically professionals, such as lawyers or social workers, who have additional specialized training in mediation practice. They may also have training in, or knowledge of, child welfare, so that they understand the options available to families. In some jurisdictions, mediators are volunteers who have completed mediation training.<sup>3,4</sup>

A mediation agreement becomes legally binding once it is approved by the court. If mediation does not help parties reach an agreement on all issues, or if the parties are not satisfied with the outcome of the process, the case will either go to trial or will go on to another resolution process (e.g., a settlement conference with the judge).

### **What are the benefits of child welfare mediation?**

At least seven Canadian provinces, and many jurisdictions in the United States, use mediation as an alternative to trial for cases involved with child welfare. Many of these jurisdictions have evaluated the success of their mediation programs and the

participants' perceptions of the mediation process. Some of these evaluations have been conducted in Canada but many are from the United States. Research on the effectiveness of child welfare mediation has focused on three primary measures of success: the settlement rates, the amount of time saved over litigation, and participant satisfaction with the process.

### Reaching agreement

An agreement that is developed through mediation is referred to as a settlement. The aim of mediation is to produce an agreement that resolves all areas of dispute (i.e., full settlement). However, reaching agreement on how to address some, but not all, of the child welfare concerns (i.e., partial settlement) is also beneficial because it reduces the number of issues that have to be resolved in the court system. Many evaluations of mediation show that at least 60% of mediated cases reached full settlement.<sup>5,6,7,8,9,10</sup> Partial settlement was achieved in another 15% to 30% of these cases.

#### *What factors influence the chances of reaching an agreement?*

Some jurisdictions found that the chances of reaching a mutually acceptable agreement were influenced by the types of decisions being made. Low settlement rates (less than 40%) have been reported for cases that used mediation to decide on permanent custody arrangements, particularly if they involved discussions about terminating parental rights.<sup>11,12</sup> A pilot study conducted in Surrey, British Columbia, found that participants were more likely to reach consensus about the services or resources that families needed to provide better care for their child than they were about the changes that parents needed to make in their behaviour.<sup>13</sup> In addition, cases that entered mediation even though one or more parties did not want to participate were less likely to reach agreement.<sup>14</sup>

Some evaluations have found that agreement was less likely to be reached among parents who were also dealing with other problems such as alcohol or drug abuse problems, serious mental health issues, or criminal charges related to the maltreatment incident.<sup>15,16,17,18</sup> Parents with these ongoing issues were also less likely to attend the mediation sessions, even though they initially agreed to participate in the process.

### More timely decision making

Mediation has been shown to resolve child welfare issues more quickly than the courts for some situations. Examples include decisions about

permanent living arrangements for children living in foster care, decisions on whether families required supervision by child welfare workers, and decisions about the course of action required to meet the child's needs. Situations such as these have taken 25% to about 50% less time to resolve through the use of mediation.<sup>19,20,21</sup>

### Participants' satisfaction with the mediation process

#### *Parents' Perceptions*

Although the proportion of parents who provided feedback was low in some evaluations, they generally described their experiences with mediation as positive. Across jurisdictions, the majority of parents said that they were treated with respect, had the opportunity to discuss issues important to them, felt that their perspectives and contributions were valued, and saw mediation as a helpful and fair process. Some parents, however, identified areas of concern. For example, some parents stated that they misunderstood the objectives of mediation and the role of the mediator (e.g. believing that mediator had decision-making authority). Others indicated that they did not fully understand issues related to confidentiality, or that these issues were not explained to them.

#### *Professionals' Perceptions*

Professionals who were involved in the mediation process (e.g., lawyers and child welfare workers) have also reported positive experiences. Across jurisdictions, most professionals found the mediation process to be fair and helpful and indicated that they would use mediation again and/or recommend it to others. In some evaluations, professionals reported that mediation provided the opportunity to hear and discuss different perspectives in a more candid way than would be permitted in court.<sup>22</sup> However, one study found that 41% of workers felt that the child's voice was lost in the mediation process.<sup>23</sup> Other concerns included the need for effective screening criteria to identify families who are most likely to benefit from, and follow through with, the mediation process.

### Outcomes following mediation

Because the aim of mediation is to collaboratively develop solutions that are mutually beneficial, parents may be more likely to meet the expectations articulated in the agreement. Some evaluations found that parental compliance with service plans was

better among mediated cases than in cases where expectations were imposed by a judge. In one example, 40% of mediated cases and 25% of litigated cases were fully compliant with the agreement at least six months following approval of the mediation agreement.<sup>24</sup>

Some studies use subsequent court activity as an index of mediation success. Cases may go to court after mediation for reasons related to non-compliance or to change the plan. Some evaluations<sup>25,26,27</sup> have found that mediated cases were two to three times less likely than litigated cases to return to court.

### Potential barriers to use of mediation

The most frequently reported barrier to using mediation to resolve child welfare issues was the reluctance of professionals to refer.<sup>28,29,30,31</sup> For example, 120 cases were expected to go to mediation during a one-year pilot study, but low rates of referral resulted in only 28 cases being mediated.<sup>32</sup> In some jurisdictions, the volume of referrals to mediation improved as the program became more established, but in others it remained low, largely because of lack of judicial support.<sup>33</sup>

### Summary

Mediation is used as an alternative to court trials to resolve disagreements between child welfare workers and parents about a child's care, where a child will live, who will be allowed to have contact with the child, or who has custody of a child. The mediation process is facilitated by a neutral, trained person who helps participants express their perspectives and identify solutions to resolve child welfare concerns.

Evaluations indicate that mediation is effective in generating mutually acceptable agreements in the majority of cases. Even when full agreement is not reached, a substantial proportion of cases reach resolution on some of the issues. Decisions that are important for children's safety, well-being, and permanence are made more quickly because mediation processes are not affected by court delays. Participants in this collaborative decision making process reported positive experiences and were more likely to honour the terms of the agreement than those involved in cases where decisions were imposed by a judge. In addition, mediated cases were less likely than litigated cases to return to court after resolution. These findings suggest that mediation may result in plans that are more acceptable and/or more realistic. Some caution is required in interpreting these results because families who enter mediation may be different than families who choose, or are assigned to, litigation. For

example, they may be more willing to hear different perspectives and work with child welfare workers to find solutions to child welfare concerns.

Mediation can reduce the demands placed on family courts by focusing limited court resources on the situations that require judicial intervention. Mediation is less adversarial than court because it provides "win-win" opportunities, in which different perspectives are represented in plans developed to address child welfare concerns. Several evaluations found that the cost per case is lower in mediated than in litigated cases. More timely decision making, reductions in the use of court time, and lower costs, suggest that mediation may be an efficient, effective approach for resolving differences about children's care.

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