PROCESS PLURALISM AND SYSTEMIC RESISTANCE TO
CHILD PROTECTION MEDIATION IN ONTARIO

by

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ABSTRACT

This paper focuses on the use of mediation within Ontario’s child protection system. Applying the process pluralism framework advocated by Carrie Menkel-Meadow, the systemic resistance to child protection mediation [CPM] in Ontario is explained. To address this resistance, a particular approach of structuring conflict resolution is evaluated through the lens of process pluralism. It is concluded that increasing the use of CPM at the dispositional stage of a child protection proceeding will improve results for children and their families.
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I. INTRODUCTION

Scepticism toward the value of the litigating family conflict has led to a paradigm shift from adversarialism to collaborative and forward-looking dispute resolution. In Ontario, mediation has been successfully used in family law for more than three decades. Child protection mediation [CPM] is an adapted form of mediation designed to address the unique issues and circumstances arising in the field of child protection. Notwithstanding the growth and success of mediation within the family law context, CPM has not been approached with the same enthusiasm from the child protection community. Despite the abundance of literature supporting the use of mediation to resolve child protection conflict, prudently instituted mediation projects have faced systemic resistance. This general reluctance toward CPM is attributed to a lack of “buy-in” from the child protection community, a group of stakeholders that includes judges, child protection workers, lawyers, and family members drawn into the process. At the forefront of the resistance to CPM is the risk of harm to children and state-imposed

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3 Child protection mediation (CPM) has been defined as a confidential process where an impartial third-party assists the parties to exchange information, develop underlying issues from stated positions, discuss their concerns, and collaborate to potentially create their own solutions. In CPM, parents, attorneys, other professionals, and in some cases children, young adults, other family members, and foster parents, gather to exchange information and work together to form an ongoing collaboration that is usually absent in the adversarial proceedings. CPM allows families and professionals to take time that is usually not available to them during the litigation process to identify issues important to the child and family and to create a case plan or placement agreement that is targeted and unique. When handled correctly, CPM empowers parents by engaging them in the decision-making process; see Kelly Browe Olson, “Family Group Conferencing and Child Protection Mediation: Essential Tools for Prioritizing Family Engagement in Child Protection Proceedings” (2009) 47 Fam. Ct. Rev. 53 (WL) at 1 [Olson].
coercion upon vulnerable children and families. This risk stems from the nature of mediation – an informal, consensus-based process that operates short of the procedural safeguards associated with the court system. Trepidation toward CPM is not surprising given the high stakes conflict that arises in the area of child protection. Reconciling the limitations of CPM with its potential to yield high-quality solutions for children and their families is the goal of this paper.

Process pluralism, as advocated by Carrie Menkel-Meadow, can assist theorists and practitioners to reconceptualise how mediation should be used in the child protection system. According to Menkel-Meadow, process pluralism invites choice in dispute resolution processes for functional or other reasons. These choices include litigation. Drawing from the work of Lon Fuller, Menkel-Meadow suggests that each dispute resolution process, including litigation, has its own uses and morality. Once the functionality of a process is determined, the appropriate venue can be chosen depending on the circumstances of the case.

Process pluralism can assist CPM to attract widespread acceptance amongst stakeholders operating with the system by clarifying its particular use. It is not enough to create new process institutions if it is unclear which problems they are designed to address. In order to grasp the underuse of CPM, a more sophisticated understanding of the different processes and forms of conflict resolution on behalf of the child protection community is required. In the child protection context, different stages of process and

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6 Ibid., at xxxii.
7 Ibid.
8 Ibid., at 324.
case characteristics will lead to a particular type of process.\textsuperscript{9} Hence, the techniques, procedures, and mechanics of both mediation and litigation favour certain types of problems or conflict.\textsuperscript{10}

As a component of process pluralism, legal professionals have a crucial role to play in guiding their clients to a suitable dispute resolution forum. The most appropriate dispute resolution venue is one that not only accounts for needs and interests of the parties, but more importantly, the short and long term procedural and substantive affects the process has on children. In 2006 the Ontario Legislature imposed an obligation upon child protection agencies to consider prescribed alternative dispute resolution processes prior to litigation.\textsuperscript{11} By implication, child protection agencies – as provincially-run bureaucracies – cannot arbitrarily refuse to participate in CPM. In fact, many child protection agencies in Ontario have expended resources to facilitate the expansion of alternative processes such as CPM and “family group conferencing”\textsuperscript{12}. Alternative dispute resolution mechanisms, including CPM, are based on consensus. If child protection agencies are obliged to attempt CPM in appropriate cases, whether or not CPM is used is largely dependent upon the willingness of parents to participate. Therefore, an examination of the underuse of CPM would be incomplete without due attention to the children at risk of harm and the perspective of the parents drawn into the system. Since

\textsuperscript{9} Ibid., at 16.
\textsuperscript{10} Ibid.
\textsuperscript{11} Child and Family Services Act, R.S.O. 1990, c. C.11, s. 20.2(1) [CFSA].
\textsuperscript{12} Kelly Browe Olson defines family group conferencing as family-focused, strengths-oriented, and community-based processes where parents, older children, extended family members, social service professionals, and others gather and act collectively to work on problems and make decisions for and with families. Family group conferencing is different from CPM in that it is more focused on strength-building within the extended family, and during the conference, the family is deliberately allotted a period of time to work through information and create a plan of care without professionals in the room. Family group conferencing specifically encourages child protection agencies to recognize children in the context of their family; see Olson, supra note 3 at 1 and 3. The option of family group conferencing is not specifically discussed in this paper.
the progression of CPM has been slow in Ontario despite its availability throughout the province, it is suggested that parents contesting a child protection agency’s intervention are not participating in CPM for one of two reasons: either contesting parents are receiving information that leads them to decide that CPM is not a viable option; or, they are not receiving any information about CPM and are completely unaware of this alternative to litigation. It is argued that lawyers must recognize the validity of process pluralism and undertake to play a more proactive role to better serve their clients. This suggestion is not out of reach because legal professionals typically possess process consciousness, are aware of procedural rules, and are concerned about “voice” and procedural fairness.\(^{13}\)

Child protection cases in which litigation would otherwise be an option, i.e. cases involving intervention by a child protection agency [CPA] that is contested, are the sole focus of this paper.\(^{14}\) A CPA has the authority to disrupt the status quo against a parent’s will while attending to suspected child abuse and neglect. This intervention, if contested, is typically addressed through the litigation process. Upon the presentation of evidence by all litigants, if the court finds that a child is in need of state protection, a judge must decide whether or not a court order is necessary to ensure the child is protected. If a court order is granted, the dispositional stage of a child protection proceeding will commence. This second stage involves planning a child’s future and may include certain parental obligations.

\(^{13}\) Menkel-Meadow 2003, *supra* note 5 at 491.

\(^{14}\) Although not specifically discussed in this paper, it is noted that alternative dispute resolution (ADR) processes such as mediation can also be used to resolve child protection conflict outside the realm of litigation. Alternative dispute resolution processes such as child protection mediation can be used at any point of a CPA’s involvement with a family provided that all safety concerns have been addressed, the process is voluntary, and the protection concerns are accepted by all parties. In fact, the court process is never initiated where parents are willing to cooperate with a CPA. CPA-parent cooperation. When conflict surfaces and parents are generally cooperative with a CPA, ADR can be used as a problem-solving tool and a way to marshal the assistance of extended family members, friends, and other applicable experts.
As Menkel-Meadow suggests, litigation clearly has its place, and it should not be completely eliminated.15 Applying the process pluralism framework, it is asserted that litigation ought to dominate the first stage of a contested child protection proceeding. In these circumstances, due process facilitated by the court system is critical because it gives responding parents a fair opportunity to refute the alleged protection concerns or demonstrate that these concerns have since diminished. Litigation is a forum that provides an impartial, yet authoritative, skilled decision maker whose role is to carefully evaluate formally presented evidence. The court scrutinizes the legitimacy of a CPA’s protection allegations, checks that CPAs are held accountable for their actions, ensures that the CPA has exhausted all less intrusive measures of intervention, and analyzes the attempts of a CPA to assist a child’s family in mitigating parenting concerns.

However, if a CPA’s allegations are endorsed by the court, CPM, while simply an alternative to litigation, is highly suitable to address conflict arising at the dispositional stage of a child protection matter. The benefits of CPM can be maximized when it is used in complement to litigation at the dispositional stage.

Presently, the Ontario Legislature’s position is that CPM is suitable for both stages of a child protection proceeding in Ontario. The majority of academics and practitioners, however, take the position that the issue of whether or not a child is in need of state protection is not to be mediated. To further develop the status of CPM in Ontario, explicitly mandating that litigation be used during the initial stage of a contested child protection proceeding, and hence restricting the use of alternatives to litigation to the dispositional stage, will significantly protect the interests of children in addition to preventing unwarranted state intervention. Ontario’s bifurcated child protection

15 Menkel-Meadow 2003, supra note 5 at 322.
proceeding provides an excellent opportunity to draw a vivid line between the appropriate and inappropriate use of CPM. This will have the effect of clarifying the role of CPM which will, in turn, increase its usage.

This paper will begin with an overview of Carrie Menkel-Meadow’s account of process pluralism. This will be followed with an outline of the child protection system in Ontario. Applying the process pluralism framework to the existing child protection paradigm, a more cogent role for CPM will be established. A discussion of the child protection lawyers will then be necessary to evaluate their role in expanding the use of CPM. Overall, processes pluralism is a desirable direction for Ontario’s child protection system, however, the adversarial paradigm deeply entrenched within the system must be reconceptualised before significant development can occur.

II. PROCESS PLURALISM

Exactly how CPM should operate within the child protection system in Ontario is uncertain. Many academics and practitioners praise the use CPM, while others have drawn attention to the significant inadequacies associated with this process. This uncertainty has resulted in resistance toward CPM. However, theory and practice suggest that CPM can be beneficial for both children and their families. Notwithstanding, for CPM to gain acceptance or “buy-in” amongst stakeholders operating within the system, a systematic application of CPM is required so that safety risks to children are prevented and procedural protection against state coercion is not foregone. Applying Menkel-Meadow’s theory to this dilemma will demonstrate not only the validity of process
pluralism, but also, that the viability of CPM will increase if its role within the child protection system is clarified.

Within the process pluralism framework, Menkel-Meadow is careful not to dichotomize or compare litigation and other alternative processes. In her view, litigation and other dispute resolution forums have developed their own purposes and norms and produce different outcomes. With an understanding of the particular purpose and type of outcome of each dispute resolution process, one can choose a process that is most conducive to the issue at stake. Therefore, Menkel-Meadow suggests that instead of labelling dispute resolution processes, save for litigation, as “alternative” dispute resolution processes, these alternatives should instead be considered “appropriate” dispute resolution [ADR] mechanisms.\(^{16}\) Menkel-Meadow informs us that “appropriate” dispute resolution offers the possibility that parties can participate in the resolution of their problems and disputes and that they can find solutions that are helpful, efficient, and tailored to their needs.\(^{17}\)

Menkel-Meadow describes two components of the ADR movement. The quantitative approach focuses on reducing the quantity of time and money spent within during the traditional court process.\(^{18}\) The qualitative approach, however, is centred on increasing the quality of solutions or resolutions that result from ADR processes such as mediation to achieve social justice.\(^{19}\) Pursuant to process pluralism, this paper focuses on the qualitative approach. According to Menkel-Meadow, a high-quality solution is one that: reflects the client’s and the other party’s total set of needs, goals, and objectives in both the short and long term, promotes the relationship the client desires with the other

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\(^{16}\) Menkel-Meadow 2003, \textit{supra} note 5 at 352.

\(^{17}\) \textit{Ibid.}

\(^{18}\) \textit{Ibid.}, at xxi.

\(^{19}\) \textit{Ibid.}
party, enables parties to explore all possible solutions that might make each party better off or one party better off with no adverse consequences, provides an achievable solution and has not raised more problems that need to be solved, and one that provides that the ultimate solution is fair or just. As Menkel-Meadow suggests, the key to arriving at quality solutions is to motivate the parties to recognize that the court process will not give them what they want by win-lose judgments.

Procedural justice is a central element of process pluralism. Menkel-Meadow draws from the work of Stuart Hampshire, supporting his supposition that while the definition of universal justice will always be controversial, it is more attainable to recognize that fairness in procedures for resolving conflicts is a fundamental kind of fairness and one that it is acknowledged as a value in most cultures, places and times; fairness in procedure is an invariable value, a constant in human nature. For example, the opportunity for all parties to be heard on decisions affecting them the ability to have impartiality and fairness govern any decision-making process is almost a universal concept of procedural fairness. Menkel-Meadow suggests that the elements of procedural fairness inform process pluralism which is of “defining importance” to the modern dispute resolution movement.

Process pluralism, as a mechanism used to achieve social justice through procedural fairness, has several key components. It must be recognized that different processes, by definition, develop their own process norms, justified by different

\[20\text{ Ibid.}, \text{ at 83.}\]
\[21\text{ Ibid.}, \text{ at 242.}\]
\[22\text{ Ibid.}, \text{ at xii.}\]
\[23\text{ Ibid.}, \text{ at xiii.}\]
\[24\text{ Ibid.}\]
conceptions of their purpose.\textsuperscript{25} For example, adjudication involves the adversary advocacy of competing parties and principles, often beginning with a contested trial and then proceeding to appellate resolution and decision.\textsuperscript{26} Mediation, on the other hand, is a less formal means of party engagement, unfettered dialogue, followed by consent and agreement which will produce an outcome that both, or all, parties have participated in crafting.\textsuperscript{27}

An additional component of process pluralism is that different processes produce different outcomes. While Menkel-Meadow does not advocate for the elimination of litigation, she believes that outcomes produced by participatory processes such as mediation are qualitatively better than those produced by third party decision makers.\textsuperscript{28} Menkel-Meadow suggests that consensus-based outcomes are more likely to focus on the future as well as the past. Furthermore, collaborative processes such as mediation are based on underlying interests and needs, rather than arguments or positions.\textsuperscript{29} Furthermore, during a collaborative process, issues are expanded rather than narrowed which increases the likelihood of good agreements.\textsuperscript{30} The notion that a selected ADR process will affect the outcome of the problem or dispute is a basic principle of process pluralism. To choose litigation is to limit the field of possible outcomes to distributive arrangements, \textit{i.e.} binary or zero or negative sum solutions, or unprincipled

\textsuperscript{25} Ibid., at 458.
\textsuperscript{26} Ibid.
\textsuperscript{27} Ibid.
\textsuperscript{28} Ibid., at 458-59.
\textsuperscript{29} Ibid.
\textsuperscript{30} Ibid.
compromises.\textsuperscript{31} To choose an ADR process may allow more creativity, join gain, and wealth creating possibilities to emerge.\textsuperscript{32}

Finally, as an integral component of process pluralism, matching different techniques with different goals can help “would-be” participants to assess which process is most appropriate for accomplishing an outcome that is best suited to the problem at hand.\textsuperscript{33} Menkel-Meadow argues that the context in which conflict arises determines the appropriate form and technique of dispute resolution.\textsuperscript{34} Every area of dispute or conflict contains systemic, or macro-level issues, as well as behavioural, or micro-level issues to consider.\textsuperscript{35} However, applying different kinds of dispute and conflict resolution processes to different contexts is not without complexity as it involves different expectations of roles for third parties, disputing parties and their lawyers, and duties owed to those affected by the dispute, as well as presenting concerns about the legitimacy about the process used.\textsuperscript{36} If dispute resolution professionals and legal representatives do not agree amongst themselves about the appropriate use and content of CPM, other stakeholders cannot possibly understand the consequences of choosing this process.\textsuperscript{37} At the very least, as Menkel-Meadow contends, the differences between litigation and ADR processes should be clarified so that prospective participants are aware of their options.\textsuperscript{38}

Menkel-Meadow further asserts that if the common theoretical vision is not realized in practice, for example, that CPM is a viable process, it is because people theorize and work in different environments and practice is often carried out under less

\textsuperscript{31} Ibid., at xiv.  
\textsuperscript{32} Ibid.  
\textsuperscript{33} Ibid., at 459.  
\textsuperscript{34} Ibid., at xxvii.  
\textsuperscript{35} Ibid.  
\textsuperscript{36} Ibid., at xxvii.  
\textsuperscript{37} Ibid., at 319.  
\textsuperscript{38} Ibid.
than optimal conditions than theoretically conceived.\(^{39}\) An additional hurdle for ADR is the historical dominance of adversarialism. The application of ADR processes requires stakeholders to adopt conceptions that are very different from those associated with adversary culture. ADR, with all its promise, in fact threatens the accepted forms of government and legal authority and legitimacy.\(^{40}\) Adversarial tendencies are not conducive to the idea that disputes and conflicts are human constructs.\(^{41}\) As Menkel-Meadow suggests, the acceptance of ADR depends upon the willingness of stakeholders to understand the causes, dynamics and trajectories of conflict.\(^{42}\) This will require looking beyond the deeply seeded adversarial values that dominate the existing system.

Menkel-Meadow views developments in the parallel fields of legal dispute resolution and the more multidisciplinary conflict resolution provide us with a special opportunity to test whether particular concepts, approaches and processes can be generalized or have only contextual validity.\(^{43}\) While certain aspects of mediation can be generalized, \(i.e.\) self-determination, participation, relationship preservation, the unique demands of the child protection system have created a specialized form of mediation. Given the highly regulated nature of child protection, CPM has developed an institutionalized character. Child protection law and policy is designed to ensure the protection of children and facilitate due process for families. The CPM process is bound by child protection law and policy. Furthermore, the ambit of negotiable topics is narrowed by the bottom lines of a CPA. Moreover, the mediator has an ethical duty to ensure the process and outcome of CPM reflect the best interests of a child. These

\(^{39}\) Ibid., at 168.

\(^{40}\) Ibid., at 332.

\(^{41}\) Ibid., at xii.

\(^{42}\) Ibid.

\(^{43}\) Ibid., at xi.
unique considerations support Menkel-Meadow’s suggestion that ADR processes must be considered contextually. A contextual examination of CPM leads to a particular approach of structuring conflict resolution that will improve outcomes for children and their families.

In Ontario, courts are generally receptive to process pluralism as an aspect of the recent “case management philosophy, emphasizing multiple-option dispute resolution”.

There is a growing acceptance that litigation is not a suitable forum to plan a child’s future. As ADR processes such as CPM slowly receive acknowledgment, disputants can look forward to a menu of “hearing and listening” venues and decision-making forums. These options will account for the kinds of issues implicated and the number of parties actively involved.

Where conflict is multifaceted and a better solution can be derived from the parties themselves, an ADR process can be chosen instead of litigation.

The ability to choose a process that is compatible with a desired outcome is an extremely valuable asset where the conclusion has such a tremendous affect on children. Ultimately, the goal of all procedural institutions is to ensure that the child protection process progresses as quickly as possible. Children should not be drawn into the child protection system any longer than is necessary. The complexity and urgency of child protection matters call for flexibility in conflict resolution in order to efficiently address the needs of a child and the circumstances of the respective family. While the resolution of some disputes may require the assistance of an authoritative decision-maker, other types of conflict may be better addressed though a collaborative problem solving effort.

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To suggest that the availability of ADR processes such as CPM will automatically lead to widespread and frequent usage, however, is naïve. The presumption that parties will choose CPM over litigation at the dispositional stage infers that the “would-be” participants understand the process and are capable of recognizing when it is a favourable option. That parties are not choosing to mediate indicates that there may be disconnect between theory and practice. This vital link to which the expansion of CPM is dependent is often overlooked. This oversight is largely attributed to the fact that the appropriate use of CPM is presently unsettled.

Menkel-Meadow suggests that legal professionals have an important role to play in transitioning ADR from theory into practice. First, lawyers must analyze conflicts and disputes in their full contextual complexity before an appropriate resolution process can be chosen. Once goals and desired outcomes are established between the lawyer and client, they can be achieved with a broader repertoire of processes and behaviours, whether goal are defined as maximizing individual gain (litigation) or seeking “Pareto-optimal” or just solutions (ADR). The broader repertoire of behaviours on behalf of stakeholders, especially lawyers, will need to include communication skills, “creative problem-solving”, questioning, as well as persuading, listening, synthesizing, and analyzing. In the context of process pluralism, legal problem-solving is not only centered on adversarial argument or persuasion about what is ‘right’ for the client, it also involves understanding a range of possible goals for clients and those with whom they

47 Menkel-Meadow, supra note 5 at xxi.
48 A Pareto-optimal outcome is one that discovers the best possible outcome for parties along an axis of preferences, in which each party is made as well off as possible without further harm to the other party; see Menkel-Meadow 2003, ibid.
49 Menkel-Meadow describes creative problem solving as the pursuit of joint gain and agreements that are wise, efficient and improve – rather than destroy – relationships by looking for different kinds of solutions to legal, social, political, and economic problems; see Menkel-Meadow 2003, ibid.
50 Menkel-Meadow, supra note 5 at xxi.
interact, and seeking both substantive outcomes and appropriate processes to satisfy the
needs and interests of clients and those engaged in activity with the client. If the ethical
reference point is solving the problem or doing justice rather than winning or zeal, the
opposing disputant must be viewed as more as a joint venturer rather than an adversary.

III. CHILD PROTECTION IN ONTARIO

A. History of Child Protection in Ontario

It was not until the middle of the twentieth century that provincially regulated CPAs were operational throughout Canada. Prior to this time, while child welfare agencies existed in some jurisdictions, they were rarely involved in removing children from care of parents who expressed an interest in caring for them or challenged the agency intervention in the courts. However, in the early 1960s a greater awareness of child abuse emerged which prompted a need for child protection workers to investigate parenting practices. At this time, child welfare legislation began to reflect concerns with protection of due process and parental rights.

In the 1970s and 1980s, Canadians became increasingly concerned about legal rights and family preservation. Significantly, the constitutional entrenchment of the

51 Ibid.
52 Ibid., at 369.
54 Ibid.
55 Ibid., at 4.
56 Ibid.
57 Ibid., at 5.
Canadian Charter of Rights and Freedoms\textsuperscript{58} in 1982 reinforced the value of individual rights-protection in Canada. This led the Ontario child protection system to move toward a family autonomy model in 1984.\textsuperscript{59} This family autonomy model favoured the autonomy and integrity of the family and the least disruptive alternative for CPA intervention.\textsuperscript{60} Furthermore, in 1984 the criterion for CPA intervention was narrowed; vague grounds for intervention, like “parental unfitness,” were eliminated, and the basis for state intervention was restricted to situations where there was a clear risk of serious harm to the child.\textsuperscript{61} Child protection agencies in Ontario further developed an expectation that in child abuse and neglect cases that were assessed as low risk the child would remain with the family. This created more emphasis on service provision for children and families. In 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.

In the 1990s, child protection services were drastically reduced as a result of government budget cuts. This reduction in services usurped the family preservationist expectation that preventative and support services in the community would be available to assist high-risk parents and children.\textsuperscript{62} This resulted in CPAs in Ontario changing their focus to individual responsibility and accountability, and less on societal support

\textsuperscript{59} Bala, supra note 53 at 5.
\textsuperscript{60} Ibid.
\textsuperscript{61} Ibid.
\textsuperscript{62} Ibid., at 6.
and responsibility. While family preservation remained important, CPAs became more prepared to intervene in the lives of children and remove them from parental care.

In the last twenty years Ontario has witnessed a more or less stabilized version of child protection, fluctuating slightly with amendments to child protection legislation. In 2000, the Ontario Legislature emphasized the duty of a CPA to promote the protection, best interests, and well-being of children to enhance the protection of children at risk of neglect and abuse which was cited as the paramount purpose of child protection legislation. As well, neglect and emotional harm were included as grounds for agency intervention. Moreover, a mandatory limitation period was introduced which regulated the amount of time a child could spend in the care of a CPA before the court makes a decision regarding permanency for the child. In 2006, placing children with extended family members instead of the care of a CPA was given greater priority, i.e. kinship care.

To date, the child protection system in Ontario has embraced a rights-based legal regime, relying on the policy, enforcement, and adjudication pillars of the legal system to ensure the protection of individual rights. Indigent parents involved in a child protection proceeding have been afforded the constitutional right to state-funded legal representation. Contested child protection matters have become a complex, lengthy, and costly crusade.

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63 Ibid.
64 Ibid.
66 Ibid.
67 Ibid.
69 New Brunswick (Minister of Health and Community Services) v. G.(J.), [1999] 3 S.C.R. 46 [G.(J.)].
70 Ibid., at 7.
In general, the paramount objective of child protection in Ontario is to promote the best interests, protection and well being of children.\textsuperscript{71} Achieving permanency is essential to the healthy development of a child and is implicit within this statutory objective. Preferably, a child should be raised in the familiar environment of his/her family. Furthermore, care giving responsibility rests primarily with the child’s parents. It is generally presumed that it is in the child’s best interests to remain with his/her natural parents or to be returned to them as soon as it becomes appropriate. However, the likelihood that a child has been neglected or abused will, at least temporarily, supersede the child’s interest in remaining with his/her family.\textsuperscript{72} When a parent disagrees with the intervention of a CPA the litigation process is initiated.

B. Litigation and Contested Child Protection Cases

The appropriate balance between state intervention and respect for familial integrity is an ongoing struggle in the field of child protection. In Ontario, CPAs are governed by the \textit{Child and Family Services Act} [CFSA].\textsuperscript{73} The CFSA provides criteria for intervention and time-sensitive procedural guidelines.\textsuperscript{74} The CFSA also includes the following features: declaration of the principle of the “best interests of the child”, respect for family autonomy and support, recognition of the importance of continuity of care, consideration of the views of children, and respect for cultural heritage.\textsuperscript{75} The CFSA

\textsuperscript{71} CFSA, \textit{supra} note 11, s. 1.
\textsuperscript{72} Bala, \textit{supra} note 53 at 7-9.
\textsuperscript{73} CFSA, \textit{supra} note 11.
\textsuperscript{74} Bala \textit{et al.}, \textit{supra} note 68 at 12.
\textsuperscript{75} \textit{Ibid.}, at 16-17.
guides CPAs, judges, lawyers, and engaged families through the child protection process. In addition, CPAs are self-regulated through constituency-based policy and protocol.

In Ontario, a child protection proceeding is bifurcated. First, when parents are contesting state intervention, a fact-finding process is undertaken by the court to determine whether a child has been, or is at risk of, abuse or neglect. Upon hearing evidence from all parties, the court will determine whether a CPA has met its evidentiary burden to support a judicial finding that a child is in need of protection. A positive judicial finding on this issue implies that the CPA intervention has been legally validated. This endorsement of child protection concerns thereby prompts the commencement of the dispositional stage of a child protection matter. During this second stage of a child protection proceeding, the court must assess whether or not a court order is required to protect a child. The court will hear evidence from all parties on this matter and make predictive determinations regarding a plan of care that will suit the best interests of a child.

There are mandatory court appearances in circumstances where a CPA brings an application to the court seeking leave to intervene to protect a child against the will of his/her parents, and also where the state has removed a child involuntarily from his/her parent’s care as a result of protection concerns.76 A court order is necessary to authorize involuntary state-intervention within five days of a child being apprehended or to permit contested intervention prompted by a CPA’s court application.77 Numerous court appearances often take place before the issue of whether or not a child is in need of protection can be determined. A child protection hearing is often adjourned to a later

76 CFSA, supra note 11, ss. 40-44.
77 Ibid., s. 47.
date to permit parties to retain legal counsel, gather evidence, and prepare court materials. If the court is concerned about the safety of a child during the time leading up to the resolution of the case, a judge may grant an interim order. An interim order consists of temporary measures deemed necessary to protect the child. This may include a placement under the auspices of a CPA or a placement in an alternate and approved location under the supervision of a CPA or other designate. An interim order of this nature that is made without consent and without the court having heard all of the relevant evidence is labelled “without prejudice” to the respondents with respect to future child protection proceedings.

During the first stage of a child protection trial, the CPA must prove on a “balance of probabilities” that the child is at risk of, or, is “in need of protection” as a result of abuse or neglect at the hands of the child’s caregiver. If this burden of proof is not met, the child will be returned to the care and custody of his/her parents. If the CPA is successful in demonstrating that the child is in need of protection, the court will make an order to that effect. The finding order is then followed by the dispositional stage. During the dispositional stage, the court hears submissions from all parties. Before making a dispositional order, the court must be satisfied that an order is necessary to ensure the child is protected from harm. Dispositional orders may correspond to custody, access, placement, and services for the child in addition to imposing obligations upon parents to address care giving deficits. Furthermore, it is possible that the first stage of a child protection proceeding is bypassed because the parents acknowledge the allegations made

78 Ibid., s. 51.
79 Ibid.
81 Statutory criteria for determining whether a child is in need of protection are found under s. 37(2) of the CFSA, supra note 11.
82 CFSA, supra note 11, s. 57.
by a CPA and agree to consent to a judicial finding that their child is in need of state protection. The latter circumstance would involve a direct entry into the dispositional stage of a child protection proceeding.

At the dispositional stage, upon hearing evidence, the orders available to the court are listed in the CFSA from the least to the most intrusive toward a family. Specifically, a court may order the following: that the child be returned to his/her parents; that the child be returned to his/her parents subject to the supervision of a CPA; that the child enter the care of an extended family or community member subject to the supervision of a CPA; that sole custody be granted to an applicant; that the child become a Society ward, i.e. placed in the care and custody of a CPA; or, that the child become a Crown ward which effectively transfers care and custody rights from the child’s parents to the province of Ontario on a permanent basis - most often in view of adoption planning. If the court orders that a child is to be removed from the care of his/her parents a provision for parental access is discretionary and will only be made if it corresponds with the best interests of the child. When the statutory limitation period for a child’s temporary arrangements has elapsed and/or it is unlikely that the parents will be capable of resuming a care-giving role, the CPA must make a reasonable attempt to develop a permanent and stable plan of care for the child. Depending on the age of the child, the judiciary may permit parents no more than two years to address the CPA’s concerns before a permanent order is made, i.e. an order for Crown wardship or custody. However, where parents are successful at diminishing the concerns of a CPA, voluntarily

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83 Ibid., ss. 57, 57.1.
84 Ibid., s. 70(1).
85 Ibid., s. 70.
or by court order, the CPA will terminate its involvement or reduce its involvement incrementally to ensure the child’s safety and well-being.

While litigation has continued to dominate the field of child protection, it is becoming more apparent that the results of formal adjudication disservice children. As a result, interest in ADR processes such as CPM continues to grow. This enthusiasm has spawned an abundance of literature supporting the use of mediation in the child protection context. Subsequently, the Ontario Legislature has advanced a position favouring the use of CPM.

C. Legislative Support for Alternative Dispute Resolution

Support from the Ontario Legislature for alternative dispute processes is apparent from the 2006 amendments made to the CFSA.86 Bill 210 amended the CFSA to provide for the use of alternative dispute resolution processes both before and during child protection proceedings. Bill 210 indicates an interest in the development of alternative dispute resolution processes within Ontario’s child protection system.

Bill 210 has facilitated the application of ADR during a child protection proceeding. These amendments provide that a judge may adjourn a child protection proceeding, on the consent of all parties, at any time to permit parties to participate in a “prescribed” alternative dispute resolution process.87 Ontario Regulation 496/06 sets out the mandatory characteristics of “prescribed methods of alternative dispute resolution” implemented under the CFSA. These regulations indicate that a method of dispute

87 CFSA, supra note 11, ss. 20.2(1), 51.1.
resolution is considered “prescribed” if it is not arbitration, if it is conducted by an impartial facilitator, and if the process is consensual so that parties are free to abandon the process at any time.88 Rules respecting confidentiality, access to records and information, and a transitional provision are also included in this regulation.89

While promoting the best interests, protection and well-being of children may be the paramount purpose of the CFSA90, secondary goals of this statute are also consistent with alternative dispute resolution process such as CPM. For example, s. 1(2) of the CFSA recognizes the following two principles that are greatly facilitated by CPM: 1) while parents may need help in caring for their children, that help must be offered with cognizance of the autonomy and integrity of the family unit and, where possible, be provided on the basis of mutual consent, and 2) that the least disruptive course of action on behalf of the state that is available and is appropriate in a particular case to help a child should be considered. CPM effectively endorses and facilitates the secondary goals of the CFSA through the principles of participation and self-determination.

The 2006 amendments made to the CFSA also impose an obligation upon CPAs to consider a prescribed method of alternative dispute resolution if a child is, or may be, in need of protection. This statutory duty presupposes the availability of prescribed alternative dispute resolution mechanisms. Arguably, CPAs, as state-funded bureaucracies, are good candidates to make alternative dispute resolution information available to parents and, inferentially, a CPA cannot refuse participation in a prescribed alternative dispute resolution process without good reason. Some CPAs have interpreted this statutory provision as an indirect obligation to expend resources to ensure some form

88 O. Reg. 496/06, s. 1.  
89 O. Reg. 496/06, ss. 1, 2.  
90 CFSA, supra note 11, s. 1(1).
of prescribed alternative dispute resolution forum is available to child protection disputants.

A roster listing all qualified child protection mediators by jurisdiction has recently been established in Ontario. The criteria to become a member of this roster includes the completion a university degree or the possession of a minimum number of years of comparable work experience. Also required is family mediator certification by the Ontario Association of Family Mediation (OAFM). The OAFM is a not-for-profit association that promotes family mediation as a dispute resolution process for separating couples and for families in conflict.⁹¹ Mediators listed on the CPM roster are further required to complete theoretical training specific to child protection issues in addition to a minimum number of clinical hours. Presently, OAFM is working toward the provision of qualified child protection mediators throughout the province.⁹² However, despite the rigorous training criteria required for roster membership, CPM, and mediation in general, remains an unregulated professions in Ontario.

IV. CHILD PROTECTION MEDIATION

A. Defining Child Protection Mediation

Mediation is a dispute resolution process that has developed to fill the void created by the inadequacies of traditional adjudication. The mediation process is thus difficult to define. Mediation is based on multiple sources of insights and disciplines and has been adapted to many different contexts. Mediation, as a sub-group of alternative

⁹¹ See Ontario Association for Family Mediation, online: http://www.oafm.on.ca/.
⁹² See Ontario Association for Family Mediation, online: http://www.oafm-cpmed.ca/.
dispute resolution, has “used, borrowed, and elaborated on ideas from anthropology, sociology, international relations, social and cognitive psychology, game theory and economics, and political theory.” Mediation is widespread in its application and it has many possible configurations. However, the core elements of mediation include facilitated negotiation by an impartial third party (the mediator) who does not possess decision-making power. The mediator assists parties in a collaborative problem-solving effort aimed at reaching a mutually acceptable agreement. In Lon Fuller’s seminal work, “Mediation – Its Forms and Functions”, he described the central quality of mediation as:

…its capacity to reorient the parties toward each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward one another.

Fuller’s reference infers that mediation is collaborative, not adversarial, and it leaves open the possibility of transforming preconceived notions about the other side of the dispute. The mediator makes this possible by assisting participants to identify and discuss the source of the conflict or the underlying interests at stake without blame or labels.

Mediation is a flexible process and can be adjusted to different contexts and transformed to accommodate different party needs and case characteristics. Since child protection matters encompass unique circumstances and considerations, the field requires

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93 Menkel-Meadow 2003, supra note 5 at 5.
95 Lon L. Fuller, “Mediation—Its Forms and Functions” (1970) 44 S. Cal. L. Rev. 305 [Fuller].
a distinct version of mediation. The Ontario Association of Children’s Aid Societies, a membership organization that represents all CPAs in Ontario, defines CPM:

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.97

CPM assumes a more legalistic model as opposed to other forms of mediation.98 Process and outcome in CPM are bound by the legal norms and the ethical boundaries of the mediator, both of which are driven by the child protection obligations of the state. Typically, the mediator steers the discussion toward addressing conflict in a manner that focuses on the best interests of the child while attempting to address the collateral interests of the disputants.

Although mediation is difficult to characterize, when applied to a specific context such as child protection, it can be categorized to some extent. Child protection mediation is considered to be facilitative. A facilitative process is designed to assist parties with human communication and negotiation techniques.99 A facilitative mediator does not have decision-making power. Child protection mediation may also be thought of as an evaluative process. A child protection mediator, with an ethical duty to ensure an outcome that is in the best interests of a child, often evaluates the claims and arguments of each party and how they measure up to the standards reflected in child protection norms. Evaluation occurs even though the solution remains technically in the hands of the parties. Through facilitation and evaluation, mediators can reduce inefficiency by

98 Menkel-Meadow 2003, supra note 5 at 179.
99 Menkel-Meadow 2003, supra note 5 at xxvi.
facilitating negotiation through the discovery of information and learning about parties’ underlying needs.100

Key procedural aspects of CPM are that it provides for more party participation and control over proceedings, a greater possibility of resolving more than the particular dispute at hand, and reconciliation or better communication between disputing parties.101 CPM allows parties to redefine problems through more open and participatory conversations and dialogues, exploring underlying interests and conflicts, and it deals comprehensively with underlying issues.102 Unlike the backward focus of most court decisions, with the best interests of the child paramount, CPM has the power to create relationships, rules, agreements and plans for the future.103 Through greater participation, parties can expand, rather than narrow, issues in order to create more issues for trade.104 CPM can be used to produce more Pareto-optimal solutions.105 During CPM, bipolar results are avoided and the underlying interests of the parties may be explored and hopefully met.106 While being inclusive of needs and interests, CPM is also attentive to rights and responsibilities. This results from caucusing, private meetings between the mediator and a party during mediation, and less self-interested questioning by skilled third-party mediators.107

Significantly, CPM is never an option where there is an immediate safety concern for a child or any other participant. A trained mediator will identify and exclude cases from CPM where a child or other participant is subjected to an immediate risk of harm,
i.e. where there is the potential that an individual may suffer harm a result of domestic violence or sexual abuse. Furthermore, it must be assured that there is no ongoing or current domestic violence or other abuse that may affect the ability of any party to participate effectively during CPM. However, that physical, emotional, or sexual abuse has occurred does not always preclude parties from participating in CPM. Arguably, as long as the process can be safe and fair and vulnerable participants can be protected, CPM may be used. In cases involving abuse, the decision to mediate ought to be made upon a thorough exploration of the circumstances of each case.108

CPM is typically limited to immediate family and legal and social work professionals.109 The core participants essential to the CPM process include parent(s), the social worker employed by the CPA, and the mediator. Members of extended family and community may also participate. A mediator and possibly a co-mediator will facilitate the negotiation during CPM.

Occasionally, CPM may include the child deemed to be at risk. When a child is capable of articulating an opinion, his/her views should be considered during CPM. Provided there are no safety concerns, it may be permissible for a child who is sufficiently mature to participate in CPM. However, regardless of the child’s level of maturity, the danger of unnecessary anguish as a result of witnessing and participating in this type of dispute may weigh in favour of the child’s exclusion from the process.110 Ideally, the child’s appointed counsel will participate in the CPM process, with or without the child, and advocate on the child’s behalf.

108 Ibid., at 7.
109 Olson, supra note 3 at 10.
Involvement of legal counsel during the CPM process, aside from the child’s lawyer where appropriate, is discretionary. CPM can provide disputants with an opportunity to be heard, rather than a settlement arranged exclusively by their lawyers. While the presence of legal counsel is an important safeguard, excluding lawyers from CPM may create an informal and supportive atmosphere enabling disputants to be more comfortable engaging in frank discussion. A guileless and detailed expression of the issues at hand will correspondingly assist in the creation of a more intricate solution that to address a child’s needs. In any case, it is preferable that disputants have an opportunity to obtain independent legal advice prior to participating in CPM and before signing an agreement.

The goal of CPM is to resolve conflict and address problems related to developing a case plan to reunify the family. If reunification is not possible, the goal of CPM becomes finding the most suitable permanent placement for the child within the time period established by law. Topics discussed during CPM could include, but are not limited to: living arrangements, parenting practice, parental visitation, permanency planning, treatment plans, relinquishment, kinship care arrangements (having the child enter the care of an extended family member), and adoption. During the course of CPM, parties may discuss problems arising during the implementation of the child’s plan of care and court order, and may agree to modify the plan of care or to allow the court to modify the order.

111 Menkel-Meadow 2003, supra note 5 at 295.
112 Ibid., at 4.
113 Ibid.
115 Hehr, supra note 110 at 4.
Confidentiality is an essential aspect of CPM. It reassures CPM participants that discussion during CPM cannot be disclosed to anyone outside the process and cannot be used during future court proceedings. Strict confidentiality provides comfort to participants who must discuss highly personal and sensitive topics such as abuse, addiction, mental health, and unemployment. There are, however, important limitations of confidentiality during CPM. Confidential information may be disclosed where information surfacing during CPM leads any person involved to believe that a child may be in need of protection or that any person’s life or physical safety appears to be in immediate danger. Information discussed during mediation may also be disclosed on consent of the participants and as it pertains to an agreement reached following the mediation.\textsuperscript{116}

Any agreement reached during CPM must ultimately receive judicial endorsement. After a judicial finding that a child is in need of protection, in appropriate cases, the parties may adjourn the matter to attempt CPM. Since the parties are already before the court, the court has an obligation to ensure that the case concludes in a manner that is in the best interests of the child. Judicial review of mediated settlements is thus mandatory. Therefore, litigation will be pending while dispositional conflict is mediated. Parties will participate in CPM with the knowledge that they must return to court to have their agreement endorsed. Consequently, this may have the effect of diminishing the element of self-determination during CPM. However, as with any joint resolution, it seems unlikely the court would set aside the terms of a mediated agreement without a valid concern for a child’s safety and well-being.

V. A COGENT ROLE FOR CHILD PROTECTION MEDIATION

A. Procedural Perspectives

At any stage of a child protection proceeding, the CFSA permits parties to utilize a prescribed form of ADR, such as CPM. Section 51.1 of the CFSA provides that alternative dispute resolution processes can be employed to “resolve any dispute between them [“them” refers to the parties to the proceeding] with respect to any matter that is relevant to the proceeding.”117 Therefore, there are no legislative restrictions on the type of dispute that may be resolved during CPM.

However, it is generally accepted amongst practitioners that the issue of whether or not a child is in need of protection and the facts in relation to the existence or non-existence of child abuse or neglect should not be mediated.118 If protection concerns are contested, a court order will be necessary to either validate or dismiss the allegations of a child protection agency. The main reason cited for precluding the legitimacy of child protection allegations from mediation is the risk that a child will be harmed by unwarranted concessions by either the parents or the CPA. When parents contest the

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117 CFSA, supra note 11, s. 51.1.
protection concerns of the CPA, it is preferable that the court, with its procedural safeguards intact, be the official evaluator of the agency’s claims according to legal standards.

To insist that the existence of protection concerns is non-negotiable assigns CPM to dispositional issues. Narrowing the ambit of mediation topics in such a fashion does not leave anything substantial to negotiate during the first stage of a child protection proceeding. During the first stage of a protection proceeding, all conflict is based upon disputed protection allegations. This impracticality is likely the reason supporting the Ontario Legislature’s choice to leave this issue open-ended. While the benefits of CPM were academically supported when Bill 210 was debated, at that time there was limited research available concerning the procedural implications of CPM. At this juncture, legislators probably considered it premature to restrict the use of CPM without empirical support.

The structure of a child protection proceeding in Ontario creates certain consequences for the implementation of CPM if practitioners and academics persist that the validity of a CPA’s claim cannot be mediated. As explained, infra, a child protection proceeding in Ontario is bifurcated. The second stage of a child protection proceeding, the dispositional stage, does not occur until the first stage of the proceeding is concluded by a judicial finding that a child is in need of protection. The first stage of a child protection proceeding is consumed by contested child protection allegations. The components of disputed child protection allegations impact the likelihood of a judicial finding that a child is in need of protection. Whether or not a child is found to be in need of protection by the court either validates or dismisses a CPA’s intervention. Therefore, conflict arising during the first stage of a child protection proceeding cannot be
considered in a vacuum; it invariably reflects a family party’s challenge to the alleged child protection concerns and the basis for state intervention. Precluding the mediation of the legitimacy of child protection allegations renders CPM unproductive until a judicial finding is made that a child is in need of protection.

Some scholars insist that CPM is suitable to entertain conflict concerning issues that are ancillary to contested child protection allegations.\textsuperscript{119} This assertion is supported by the claim that the confidential discussion that CPM generates is not harmful and may lead to a positive result. However, because it is virtually impossible to isolate disputed protection concerns from conflict manifested prior to a judicial finding on contested child protection issues, in addition to the ethical issues associated with mediating this type of conflict, this proposition is refuted.

\textbf{B. Substantive Perspectives}

Not only is CPM impractical during the first stage of a child protection proceeding, it is also inappropriate for substantive reasons. Reserving CPM to resolve dispositional conflict is the best way to ensure that children are safeguarded from the dangerous and inevitable compromise during negotiation that is centred upon the fault and risk associated with the abuse and/or neglect of children. Given the lack of procedural safeguards associated with CPM, it will also help to assure that children and their families are not affected by the bureaucratic pressures that may result in rash decision making and possibly the exploitation of vulnerable families. Furthermore, without a mandated court process to ensure accountability, due to the stress of child

\textsuperscript{119} Edwards 2009, \textit{supra} note 118 at 5.
protection work as a result of the high stakes involved and a generally overworked system, CPA workers may be less inclined to base their decisions on tangible evidence.

As Menkel-Meadow highlights, it must not be forgotten that dispute resolution, in all of its forms, is not neutral. Process such as CPM are designed and implemented by parties, court administrators, or governments with substantive agendas. Therefore, Menkel Meadow suggests that the purpose for which a process of dispute resolution is being invoked must always be interrogated. To remove the danger that CPM, as an externally imposed dispute resolution process, will colonize or control child protection disputants, great attention must be paid to the possibility these participants may be coerced. Without the protection of the “rule of law” and the formality of the courtroom, vulnerable parties may be taken advantage of by the more contextually powerful within the informal settings of CPM.

A significant implication resulting from the use of CPM prior to resolving contested child protection allegations is that it presents a suspicious element of state coercion. When parents contest these allegations, their energy is initially devoted to defensive tactics and parties significantly polarize. In contested cases, i.e. situations where parents intend to dispute the child protection allegations in court, without a judicial finding on this issue, parties would be left with little or nothing to discuss during CPM.

The British Columbia Ministry of Attorney General’s policy on mediation provides that the issue of whether or not a child is in need of protection cannot be mediated, however, mediation can occur prior to the judicial determination of this issue. The British Columbia policy further provides that during CPM the child, the child’s parent, and any

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120 Menkel-Meadow 2003, supra note 5 at 14.
121 Ibid.
122 Ibid.
123 AGBC, supra note 118.
other participant are not required to agree with the reasons for the CPA’s belief that the child needs protection.\textsuperscript{124} In addition, the Ministry policy indicates that admissions regarding the circumstances of the child or the child’s family need not be made during the process.\textsuperscript{125} Finally, the Ministry policy in British Columbia provides that the child or the child’s family need not accept blame or acknowledge faults for any acts, omissions or other conduct as part of the CPM process.\textsuperscript{126} It is asserted that this policy is meaningless because without actually acknowledging the existence of protection concerns, the source of validation for a CPA’s intervention, parents will not be in a position to make the compromises necessary for CPM to be productive. Without coercion, the parties will be at stalemate. Since all conflict prior to a judicial finding that a child is in need of protection is derived from contested child protection allegations, CPM at this stage is futile without parties agreeing to some level of fault. Therefore, to advocate that contesting parties are permitted to participate in CPM prior to a judicial finding that a child is in need of state protection raises serious questions about the level of coercion required to convince parents that participation is in their best interests.

To further illustrate some of the problems that may arise when child protection conflict is mediated prior to resolving contested child protection allegations, \textit{i.e.} prior to a finding that a child is in need of protection, the London Child Protection Mediation Project [LCPMP]\textsuperscript{127} provides some assistance. The LCPMP was a pilot project initiated

\begin{itemize}
  \item \textsuperscript{124} \textit{Ibid.}
  \item \textsuperscript{125} \textit{Ibid.}
  \item \textsuperscript{126} \textit{Ibid.}
  \item \textsuperscript{127} The London Child Protection Project was initiated in 2003 and the official report was released in 2005. Twenty cases were selected for mediation. The project administrators specifically choose cases where the London CPA was seeking a supervision order. Key characteristics of the cases – satisfaction of the parties, time from first appearance to final order, and costs – were compared to twenty contested cases processed, also involving supervision order requests by the CPA, prior to the advent of mediation. However, due to problems related to the structure of the study which affect validity and reliability, the empirical findings of the LCPMP are not heavily relied upon in this paper; see A. Cunningham & J. Van Leeuwen, \textit{Finding a}
in 2003 which was designed to test the viability of CPM in Ontario. The LCPMP report indicated that most people who used mediation were less likely to seek legal advice, and problematically, not all parties were aware of the implications of a judicial finding that a child is in need of state protection.\textsuperscript{128} Unrepresented parties who signed mediated agreements were typically not aware that their signature involved acquiescence to a finding that the child is in need of protection.\textsuperscript{129} Furthermore, it was observed that family parties and the child protection workers were out of sync on the issue of whether or not a child is in need of protection.\textsuperscript{130} On the one hand, the CPA workers assumed that the child was in need of protection and the mediation would focus on the finer points of the wording, conditions, and length of a dispositional order.\textsuperscript{131} In contrast, while some families believed they were participating in CPM to question the need for CPA involvement.\textsuperscript{132} Restricting CPM to the dispositional stage is one approach that would resolve these issues by ensuring due process, \textit{i.e.} that family parties are afforded a right to present their case fairly and be heard by an impartial decision maker.

The failure of the Ontario Legislature to acknowledge the limitations of mediating protection issues during the initial phase of a child protection proceeding has created ambiguity at the ground level. A literal interpretation of s. 51.1 of the CFSA suggests that all matters are appropriately discussed during CPM. However, ethical considerations ought to prevent a negotiation process that is centred on refuting the safety risks posed to a child. As well, the principle of procedural fairness suggests that CPM is inappropriate.


\textsuperscript{128} \textit{Ibid.}, at 39.
\textsuperscript{129} \textit{Ibid.}
\textsuperscript{130} \textit{Ibid.}
\textsuperscript{131} \textit{Ibid.}
\textsuperscript{132} \textit{Ibid.}
for a contesting parent prior to the resolution of contested child protection allegations. The legal representative of a contesting parent is unlikely to recommend a process that requires some concession of fault. As already indicated, the proposed solution to this dilemma is to restrict CPM to resolve dispositional issues as an alternative to litigation. This will serve to address the uncertainty and concerns related to the utility of CPM within the child protection system.

It is also noteworthy that the application of CPM to resolve conflict after protection concerns are resolved is equally applicable to a non-bifurcated proceeding. A bifurcated proceeding neatly severs the presentation of evidence in court. Presumably, bifurcation was adopted to avoid the consideration of dispositional evidence while determining whether or not a CPA has established that a child is in need of protection. However, even in merged or non-bifurcated proceeding, a dispositional court order endorsing the contested intervention of a CPA is always contingent upon a finding that a child is need of protection. Just as a matter can be adjourned during a bifurcated hearing to allow parties to attempt CPM, a non-bifurcated hearing can be adjourned in the same fashion. In the case of both a bifurcated and non-bifurcated hearing where parties choose to attempt CPM after protection concerns are judicially endorsed, any mediated agreement will be contingent upon the final oversight of the court.

Reserving CPM to address solely dispositional conflict makes practical sense given Ontario’s bifurcated procedural framework. However, opposition to this assertion arises because the scope of CPM is narrowed. The streamlined conflict resolution scheme proposed in this paper reduces quantifiable benefits. Rather, the role of CPM asserted here places an emphasis on increasing the quality of results for children and their families. This dispute resolution regime does not significantly reduce legal costs.
Academics and practitioners working toward the development of CPM programs are hard pressed to find adequate funding. To suggest that CPM may not be the panacea to an overworked court system, or that CPM will not significantly reduce legal costs, is not an attractive aspect to potential funding providers. Those advocating for increased usage of CPM under the proposed paradigm must achieve “buy-in” by emphasizing the potential the mediation has to create enriched results. However, even if funding providers found the qualitative benefits of CPM intriguing, these aspects are intangible, dynamic, unpredictable, and withhold numerous extraneous variables which has created obstacles for empirical work. In this respect, the act of convincing, or creating “buy-in”, is a great challenge for CPM advocates. One thing that is certain, however, is that CPM is capable of providing more enriched outcomes for children in comparison to litigation.

Having clarified the role of CPM using the process pluralism framework, the following sections will concentrate on more refined considerations under the proposed conflict resolution schema. To support this proposed application of CPM, both stages of a child protection proceeding will be examined in isolation. The advantages and disadvantages of using mediation and litigation during both stages will be highlighted. Litigation and CPM, presented as choices at the dispositional stage, have developed their own process norms which are justified by different conceptions of their respective goals. While there are special considerations associated with child protection matters, it will be shown that the generic elements of child protection conflict are predictive of their suitability to a conflict resolution forum.

133 Menkel-Meadow 2002, supra note 45 at 3.
VI. STAGE ONE: RESOLVING CONTESTED CHILD PROTECTION ALLEGATIONS

A. Litigation

While not without its disadvantages, litigation is the best available process to address the issue whether or not a child is in need of state protection, and hence, to resolve conflict related to the existence or non-existence of child abuse or neglect. The allegations of a CPA inform the legal basis of the state’s authority to intervene. CPAs are entrusted with the discretion to take extremely intrusive measures that affect private citizens in order to protect children. Because of the gravity of CPA intervention and its serious repercussions, coupled with the possibility of human error, in contested cases, it is essential that CPAs be held accountable by the court under rigorous legal standards.

Litigation is inevitable when irreconcilable opinions regarding the best interests of a child hinder the collaboration ability of parties involved in a child protection dispute. A child protection worker may claim to have behaved in accordance with applicable statutes and policy, however, parents may wish to formally challenge how these rules have been interpreted and acted upon. At this juncture, a fact-based determination by an authoritative third party is necessary to resolve the dispute. Litigation is the most legitimate means available to redeem parental entitlement and autonomy.

To have their rights enforced, parents turn to the court to obtain a formal declaration that the allegations made against them by a CPA are false or exaggerated. Traditional adjudication, therefore, provides a procedural check against the concentration of government power and operates as a systemic deterrent to bureaucratic excess by
guarding against groundless state intervention.  

The court system protects due process by ensuring that principles of natural justice are realized. As Nicholas Bala comments, “it is only in the advent of due process that parents and children have been afforded a forum to challenge decisions that profoundly affect their lives.”

Similarly, the Supreme Court of Canada made the following assertion:

For a hearing to be fair, the parent must have an opportunity to present his or her case effectively. Effective parental participation at the hearing is essential for determining the best interests of the child in circumstances where the parent seeks to maintain custody of the child.

The Court additionally held that procedural fairness is fundamental in child protection matters since “[f]ew state actions can have a more profound effect on the lives of both parent and the child.” Concluding that indigent parents in child protection proceedings are entitled to state-funded counsel for serious and complex cases (arguably all cases), the Court further pronounced that “the parent must be able to participate meaningfully at the hearing, which goes beyond mere ability to understand the case and communicate.”

Thus, litigation guarantees due process and judicial oversight of CPAs.

Conflict regarding whether or not a child is being harmed, or is at risk of being harmed, requires resolution by a neutral, yet authoritative, third party. During the litigation process, evidence pertaining to child protection concerns is evaluated against statutory criteria listed in the CFSA. A formal evaluation and fact-finding process pertaining to contested allegations of a CPA is particularly appropriate in contested child protection matters because the consequences of a child protection worker’s authority of are significant. As Amy Sinden articulates, the law permits a CPA to interfere with the

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135 Ibid.
136 G.(J.), supra note 69, para. 78.
137 Ibid., para. 76.
138 Ibid., para. 83.
lives of private citizens by hauling them into court against their will, accusing them of acts that trigger severe social reprobation, and threatening them with a deprivation of liberty that often strikes at the very core of their identity and threatens to remove from them the most profound source of purpose, fulfillment, and happiness from their lives.\textsuperscript{139} Accuracy in decision-making is vital because an error favouring less intrusive intervention could result in a child suffering serious injury in his/her home; on the other hand, a decision at the opposite end of the spectrum may result in a child being wrenched unnecessarily from a loving family.\textsuperscript{140} Litigation will help to ensure, to the greatest extent possible, that the decision is arrived at is based on accurate information. Making a determination based on the application of the facts to a legal test is a task that rightly remains with a judge. Presumably, a judge obtains this stature because he/she is an expert in analyzing evidence, synthesizing law and facts, and resolving legal issues in a fair and comprehensive manner.

The public is best served if disputed protection issues are litigated. The debate regarding the correct balance between state intervention and child protection is deserving of an established body of legal precedent. Litigation enables the deliberation of “moral ideals about justice, rights, and social cohesion that a public should want to uphold, and which, in any event, the state is obligated to enforce.”\textsuperscript{141} The shifting approaches in child protection law ought to have a corresponding body of jurisprudence so that members of society have reasonable notice of the potential legal consequences of their actions. In


\textsuperscript{141} Amy J. Cohen, “Revisiting Against Settlement: Some Reflection on Dispute Resolution and Public Values” (2009) 78 Fordham L. Rev. 1143 (WL) at 1 [Cohen].
addition, clarity in the law will enable legal professionals to have a more accurate of what types of behaviour justify involuntary intervention by a CPA.

Despite the ability of litigation to tackle the issue of whether a child is in need of protection, the process has certain disadvantages in the child protection context. Court proceedings are often viewed as increasing trauma to a child in limbo.\textsuperscript{142} The delay associated with court proceedings has significant consequences for a child who is subject to a child protection matter. Being removed from one’s home and being placed in a foster or kin placement during litigation is a traumatizing experience for a child. Moreover, living in an indeterminate situation during litigation is emotionally and psychologically damaging as children possess a different sense of time and are often left feeling insecure about their lives.\textsuperscript{143} A child in litigation limbo is unfortunately deprived of permanency and stability.\textsuperscript{144} Furthermore, in contested cases, parents are often reluctant to address the protection concerns of a CPA until a formal court ruling is made.

Adjudicating child protection matters often exacerbates conflict and polarizes parties.\textsuperscript{145} The adversarial rift that is created between child protection workers and parents makes post-litigation cooperation a challenge. This is especially true where a court has ruled that the return of a child to his/her home is conditional upon positive actions and/or abstentions on behalf of the parents. In most cases, if a parent has a desire to regain access and/or custody an intrusive level of cooperation with a CPA is required. Furthermore, cooperation with a CPA in order to satisfy a court order is often viewed as stigmatizing and undermines a parent’s confidence.

\textsuperscript{142} Olson, \textit{supra} note 3 at 3.  
\textsuperscript{143} \textit{Ibid.}  
\textsuperscript{145} McHale \textit{et al.}, \textit{supra} note 118 at 1.
The financial consequences associated with child protection litigation are significant. The court process, with its associated cost and delay, draws from already depleted child protection resources. The 2009-2010 Ontario Budget significantly reduced funding to CPAs.\textsuperscript{146} Presently, government funding does not cover the costs of the demand for child protection services.\textsuperscript{147} The legal cost incurred on a CPA for a contested court proceeding has been estimated to be between $1,500 and $8,000.\textsuperscript{148} Unfortunately, legal costs may detract from funding allocated to service provision.

Despite these pitfalls, the absence of an alternative conflict resolution process that can provide the same level due process and accurate fact-finding regarding historical events implies that preservation of the litigation process is necessary.

\section*{B. Child Protection Mediation}

There are many reasons to suggest that CPM is an unsuitable process to address disputed protection allegations. Generally speaking, the structural components of the CPM are inadequate to deal with this type of conflict because the parties are in extremely adverse positions and are not in a position to compromise or negotiate.

Either the child is or is not, at risk of being harmed; has or has not been harmed; and does or does not require state protection. In other words, the principle of self-determination, a crucial component of CPM, is inapplicable and negotiation of the

\begin{footnotesize}
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existence of protection concerns is unnecessary and improvident. The structure of CPM does not support the type of discourse required to deal with disputed protection concerns. CPM is an informal process based on consensus, collaboration, and self-determination – characteristics which are hardly amenable to a contested legal question. CPM is not an ideal venue to engage in a dispute regarding the facts pertaining to existence or non-existence of protection concerns. The lack of evidentiary standards and procedural safeguards creates too much adverse risk for children in this context.

Discussing protection concerns during CPM poses risks that may specifically affect a child. Due to the informal nature of the process, the safety and well-being of a child deemed to be at risk could potentially be marginalized. An agreement reached during CPM may be within the parameters of the law but could nonetheless expose a child to harm. Participants have not sworn an oath to be truthful. There exist no formal rules limiting the manner by which information is presented. Therefore, the process itself may be more prone to manipulation from participants. The gravity of a CPA’s concern may potentially be diminished based on false explanations by parents. On the other hand, if the CPA concerns are overstated a child may also suffer as more time may be spent away from his/her natural parents.

The process of disputing child protection concerns and therefore contesting the assertion that a child is in need of state protection is volatile. Parents will typically be emotionally charged and adamant that the protection concerns have been overstated. Since CPM is based on consensus and collaboration it not an effective venue to enable parents to dispute the allegations of a CPA.

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Not only is CPM procedurally inadequate for the resolution of disputes regarding the validity of child protection concerns, prior to their judicial endorsement, there is also a risk that state coercion will be imposed upon vulnerable families. During ADR processes, rights talk may be devalued and suppressed and framing problems in an adversarial context may be viewed as unmotherly and harmful to the child.\(^{150}\) Furthermore, if the issue of whether or not a child is in need of protection is non-negotiable and disputed, prior to a judicial finding, there will be nothing substantial to mediate. Participation in CPM infers some level of negotiation and compromise. At this juncture, in order to participate, parents would be required to assume a certain level of fault in order for the process to be meaningful. As a result, CPM would deny disputants a neutral and impartial process if protection concerns remain in dispute.\(^{151}\) While parties are always free to abandon the CPM process and resume litigation at any time, parents may nonetheless be discouraged from asserting the rights and procedural protection to which they are legally entitled.\(^{152}\)

VII. STAGE TWO: RESOLVING DISPOSITIONAL CONFLICT

A. Litigation

Litigation is appropriate to address contested child protection allegations; however, it is not an ideal process to resolve dispositional conflict. The dispositional stage is focused on the prospective best interests of a child. The best possible plan for a

\(^{150}\) Ibid.

\(^{151}\) Jarrett, supra note 44 at 11.

\(^{152}\) Ibid.
child can only occur if the “experts”\textsuperscript{153} are participating in the planning process and all parties are invited to provide input regarding the issues at stake. Litigation, however, takes a narrow approach by focusing on legal disputes.\textsuperscript{154} When negotiation occurs between parties and co-counsel, lawyers often fail to explore the full panoply of their client’s various legal, social, psychological, emotional, moral, political, and religious needs and interests.\textsuperscript{155} Human problems become stylized and simplified because they must take a particular legal form for the stating of a claim.\textsuperscript{156} Furthermore, strategic legal thinking impairs the ability to reveal information in fear that it may be exploited by the other disputant.\textsuperscript{157} The insufficiency of legal remedies in solving a client’s underlying problems and addressing underlying needs is what makes the process inadequate to address dispositional conflict or problems.\textsuperscript{158}

During the litigation process, the court often loses sight of the human aspects of familial dysfunction associated with child abuse or neglect. The court does not provide a forum that sufficiently addresses the complex issues arising from the interplay of family dynamics.\textsuperscript{159} The court’s concern with legal standards combined with the pressure resulting from a backlogged system makes it ill-suited to entertain a family systems approach. There is no simple legal solution to the complex set of human problems that surface during child a protection proceeding.\textsuperscript{160} A family systems approach is crucial to resolve issues surrounding a child’s plan of care because it focuses on family structure

\begin{footnotes}
\item[153] The reference to “experts” includes parents, extended family members, and social and medical professionals.
\item[154] Menkel-Meadow 2003, supra note 5 at xix.
\item[155] Ibid., at xxii-xxiii.
\item[156] Ibid., at 231.
\item[157] Ibid., at 321.
\item[158] Ibid., at xix.
\item[159] Hehr, supra note 112 at 3.
\item[160] Bala, supra note 53 at 1.
\end{footnotes}
functioning as a way of understanding behaviour.\textsuperscript{161} According to Susan Brooks, a family systems approach is defined by the “bonds of intimacy as well as by blood ties.”\textsuperscript{162} A family system surrounding a child could include neighbours, close family friends, “fictive kin,” foster parents, individuals who have a special interest in establishing bonds of intimacy with the child, and/or those with whom the child has existing bonds.\textsuperscript{163} Brooks maintains that, without a family systems approach, the court system does not pay sufficient attention to family attachments, family self-reliance, and family empowerment.\textsuperscript{164} Correspondingly, this poses a risk that an inaccurate picture of the child’s best interests will be painted which may negatively impact a child as a result of an ill-informed dispositional order.

A judge is an expert at assessing evidence as it correlates to a legal burden of proof. While the CFSA provides mandatory considerations for the judiciary when considering the best interests of a child, these factors are open to subjective interpretation. The judge’s interpretation is based on his/her inherent values and life experience, both of which may be foreign to a child and his/her family. Furthermore, the formal, time-limited, and adversarial context in which a judge presides is not conducive to speculating and making predictions pertaining to the best interests of a child. This argument is supported by Bala:

indeed, the judge often has relatively little information about the proposed placement for the child, or about the nature, goals, or duration of the services that are to be provided to the child or the family. The judge’s role in child protection cases is confined to selecting from a statutory menu of dispositional choices that determine the level of intervention that the situation appears to demand in the best interests of the child.\textsuperscript{165}

\begin{itemize}
\item \textsuperscript{162} Susan L. Brooks, “Representing Children in Families” (2006) 6 Nev. L.J. 724 (WL) at 1-2 [Brooks 2006].
\item \textsuperscript{163} \textit{Ibid.}
\item \textsuperscript{164} Brooks 1999, \textit{supra} note 161 at 6.
\item \textsuperscript{165} \textit{Ibid.}, at 8.
\end{itemize}
Abuse and neglect cases are in essence about interpersonal relationships and the law is a crude instrument for dealing with such issues.\textsuperscript{166} The fact that the non-legal inquiry, \textit{i.e.} determining a plan of care that is in the best interests of a child, is left for a judge’s determination raises questions regarding forum capacity in this context.

In general, empathizing with the impugned parent requires an open mind and sensitivity to culture and socio-economic status. This is a difficult task for a judge or lawyer who surrounds him/herself by legal and middle/upper class norms. Parents are often from a dramatically different socio-economic group than the judge, the lawyers, and the social workers in the case; they have different values and a very distinct life experience.\textsuperscript{167} The differences between a judge and a parent in education, standard of living, value systems, family history, and ethnic background can be enormous.\textsuperscript{168} If a judge does not appreciate socio-economic issues or cultural factors, there is a risk that mainstream values will be imposed upon families without justification.

\textbf{B. Child Protection Mediation}

CPM differs from conventional litigation in ways that make it more conducive to addressing dispositional conflict. Appreciably, all capable stakeholders or interested parties are identified and welcome to participate in CPM.\textsuperscript{169} Direct input from individuals most intimately involved in the child’s life is made available to all participants as they


\textsuperscript{168} \textit{Ibid.}

\textsuperscript{169} Menkel-Meadow 2003, \textit{supra} note 5 at 6.
work toward permanency planning for the child. During CPM, participants engage in joint problem-solving in accordance with agreed upon ground rules which enable structured, but open, discourse throughout the process. These rules of engagement further promote civil, cooperative, and efficient conflict resolution. Adversarial tendencies that inhibit collaboration are diminished during CPM. Parties engage in creative brainstorming, as opposed to argumentative debate or structured witness examination.

A dispute that arises during the dispositional stage of a child protection matter is not capable of a binary solution, and therefore, compromises or negotiated resolutions are in fact more just because of their distributed precision. In other words, while the court process may serve as a default option for disputants, justice may be better served by tailored departures from the general rule as long as the negotiated solutions are not otherwise unlawful. For the individuals involved, including a child deemed to be at risk, justice is likely to be more ‘just’ through CPM than court-ruled justice.

Dispositional issues are typically multi-faceted or value is embedded or connected in a web of other issues or parties. Therefore, trades, tailor-made solutions or contingent agreements, linking past to future in dynamic and changeable solutions, are often preferable to the rigid, past-focused adjudication of ‘rights and responsibilities derived from legal principles.’ When commands from government sponsored

170 Ibid.
171 Ibid.
172 Ibid.
173 Ibid.
174 Ibid.
175 Ibid., at xxiv.
176 Ibid., at xxiv.
institutions are not required, decision reached by the parties themselves will have greater legitimacy and longevity.177

CPM provides a forum that empowers family members and child protection workers through direct participation. CPM fosters cooperation and understanding, in contrast to litigation, which tends to create hostility and mistrust.178 CPM encourages parents and extended family members to accept responsibility for their actions. Direct and cooperative involvement in the creation of a child’s plan of care can have the effect of heightening parental confidence in the child protection process.179 Parties who negotiate their own settlements during CPM have control over the outcome of the process which is more satisfying than a court imposed order.180

Although a CPA is alleging abuse or neglect, or risk thereof, the child protection system is not designed to serve a retributive or penal purpose. Rather, state intervention arises to alter the status quo in favour of protecting a child. While the grounds of intervention require a fact-based evaluation of historic events, the goal of CPA involvement is prospective in nature, i.e. to promote the best interests, safety, and well being of children. For parents, however, the a child protection hearing is reminiscent of the experience of a person accused of committing a criminal offence. CPM, a consensus based-process, moves parties beyond deliberation of fault and blame steering toward collaboration and problem solving. In contrast to litigation, CPM thus provides a forum for child protection disputants to expand the issues which will serve to increase the likelihood of reaching a favourable agreement.

177 Ibid., at xxv.
179 Firestone, supra note 140 at 3.
180 Jordan, supra note 178 at 4.
CPM offers a more informal setting than litigation. CPM can further attend to emotional reactions which validate the underlying concerns of the participants. This may resolve tension and assist in preserving relationships. CPM addresses issues such as relationships and communication styles which are often ignored during the litigation process.\(^{181}\) CPM can substantially mitigate impediments to empowerment and self-determination such as poor communication and a need to express emotions.\(^{182}\) During mediation, all parties have an opportunity to speak and be heard. A mediator will assist parties to clarify ambiguity that arises during the presentation of a participant’s position. During CPM, the circumstances and underlying concerns of both the child’s family and the CPA can be acknowledged and reconciled. Parties “communicate with one another, tell their stories, identify issues and concerns, develop ideas, and eventually craft agreements with the support of the professionals”\(^{183}\) during CPM. Hence, disputants are provided a venue to address the emotionally laden, complex, and prospective nature of child protection conflict. The opportunity to unravel the underlying problems related to child abuse and neglect is unparalleled. CPM is a flexible and fluid process limited only by ethical boundaries of the mediator and child protection legislation, policy, and protocol.

The role of the mediator is also significant. A mediator can use his/her role to mitigate conflict by making offers and counteroffers more acceptable by presenting them as his/her own.\(^{184}\) This may be helpful in preserving the relationship between a child protection worker and a parent. Furthermore, the mediator can reframe proposals, inject his/her own ideas as appropriate, and take blame if necessary in order to facilitate

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\(^{181}\) Firestone, \textit{supra} note 140 at 4.
\(^{182}\) Sander and Rozdeiczer, \textit{supra} note 96 at 21.
\(^{183}\) Olson, \textit{supra} note 3 at 10.
\(^{184}\) Sander and Rozdeiczer, \textit{supra} note 96 at 20.
negotiation and/or settlement.\textsuperscript{185} Moreover, a mediator can direct the solution away from the past and toward a future-oriented resolution which is central to ensuring the safety and well being of a child. The mediator can accomplish all these tasks within the confines of child protection law and the mediator’s ethical responsibilities.

A discussion of CPM, however, would be incomplete without considering its potential drawbacks. When utilized at the dispositional stage, CPM does not avoid the litigation process. Therefore, its ability to reduce systemic pressure is limited. A judge must hear a contested matter and therefore parties nevertheless require legal counsel. Furthermore, legal counsel will also need to be available during the CPM process. The cost-saving effect of CPM is thus minimal. Furthermore, CPM will not significantly reduce the problem of court backlog. While mediation may enable a party to express his/her feelings and tell his/her side of the story, sorting out positions and underlying concerns of parties during CPM may also unnecessarily complicate and lengthen the process of developing a plan of care for the child. Furthermore, in this type of high conflict dispute, getting parties to agree on a plan of care in which they, themselves have generated is a challenge and requires a highly skilled mediator.

The notion that a mediator in CPM is neutral or impartial is illusory. Since the child’s interests are, both ethically and legally paramount, mediators must prioritize the best interests of the child over that of the interests of any other parties. While this may serve the interests of children, it does not always provide a neutral or impartial process. In fact, preserving mediator neutrality during CPM creates the risk that the best interests of the child will be neglected.\textsuperscript{186} A mediator favouring impartiality may place a child at

\textsuperscript{185} Ibid.
\textsuperscript{186} Jarett, \textit{supra} note 44 at 11.
risk if the discussion is not actively facilitated toward the child’s needs which could lead to an unfavourable result. The rhetoric surrounding the mediator’s traditional role as a neutral or impartial third party is misleading. In the name of procedural fairness, a mediator may be forced to step beyond impartiality in order to assist vulnerable parties to achieve meaningfully participation. Hence, the mediator has the difficult task of ensuring the best interests of the child are paramount while also ensuring that all participants have an equal voice during the process. Making participants aware of this barrier to neutrality may deter them from participating in CPM. Moreover, not specifically advising parties of the limitations of a mediator’s impartial role may create setbacks, especially where the mediator’s perception of the best interests of the child is in conflict with that of a participant.

Power imbalances may linger or perpetuate undetected and may be exacerbated by CPM. CPM may further subject parties to safety concerns or force them to relive the negative aspects associated this power imbalance. This is especially true in cases where a family member has been sexually, physically, or verbally abused. The power dynamics of abuse may reappear or further materialize during CPM. A power imbalance may affect the degree of participation of the parties involved in CPM. An imbalance of power between disputants can inhibit a party's ability adequately exercise self-determination during mediation. When a file is being considered for CPM by administrators, it must be screened for factors associated with power imbalance. Even during the CPM process, mediators must be on guard for signals that may indicate that a party is intimidated or unreasonably compliant the mediator has an ethical obligation to ensure that the outcome of CPM is fair. The mediator must not only be alert to power imbalances between a CPA

187 Firestone, supra note 140 at 4.
and the impugned care givers, but must also be alive to safety concerns that may arise as a result of power dynamics within a family system as a result of domestic violence or sexual abuse.

Feminists argue that mediation in domestic relations fails to counteract inherent power imbalances between the parties, particularly, in cases involving battered women.\textsuperscript{188} Regarding the de-formalization of child protection proceedings, Sinden raises the following feminist concerns regarding power imbalance:

Rather than liberating a wrongfully suppressed women's voice or promoting “process values” of participation and a sense of fairness, de-formalization relegates those proceedings and their participants to a female ghetto that disempowers mothers by generating inaccurate fact finding and false agreements and subjecting mothers to unwarranted state intrusion into the intimate details of their private lives.\textsuperscript{189}

Informal proceedings such as CPM may produce results that reflect the disparity of power between the parties. Sinden further asserts that during informal proceedings “decisions are based on the extent to which each side is willing to compromise rather than a neutral evaluation of evidence and arguments.”\textsuperscript{190} Furthermore, while parties may undertake to participate in good faith and fully disclose all relevant issues, there are no enforceable rules limiting the evidence and arguments that can be presented by each disputant during CPM.\textsuperscript{191} A mediator does not have decision-making authority, nor can the mediator ensure due process through due process and the principles of natural justice. Moreover, those participating in CPM may not have access to a lawyer throughout the process and thus rights entitlement and exploitative outcomes may be overlooked. In essence, informal processes such as CPM may serve to restrict access to individual rights.

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\textsuperscript{188} See Lisa Lerman, “Mediation in Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women” (1984) 7 Harv. Women's L.J. 57 (W.L.) [Lerman].

\textsuperscript{189} Sinden, \textit{supra} note 139 at 17.

\textsuperscript{190} \textit{Ibid.}, at 21.

\textsuperscript{191} \textit{Ibid.}, at 21.
protection just at a time when these less powerful groups have achieved access to due process. ¹⁹²

Some might argue that the prescribed degree of voluntariness essential for mediation is lacking in the child protection context. When faced with the prospect that a child may be removed from the home permanently, parents often worry that unless they comply with the requests of the CPA, they will lose custody and access. ¹⁹³ As Boulle and Kelly suggest, “voluntarism is the foremost tenet of good mediation.” ¹⁹⁴

Consequently, this may have an impact on the level of participation during the process as well as compliance with the conditions of a CPM agreement. Parents may rush into settlements, not fully understanding their obligations, in order to show they are willing to take any and all measures to regain control of a child. Therefore, since parents involved in child protection matters often suffer from chronic problems such as substance abuse, cognitive disorders, and poverty, it is essential that CPM agreements be realistic and not set parents up to fail. In the best interests of the child, both the mediator and the lawyers of the parties should undertake to ensure this does not occur. Unintentional or uncontrollable non-compliance as a result of an unrealistic CPM agreement will unjustly curtail a parent’s chance of regaining access and/or custody of his/her child.

Presumably, parents will agree to a CPA’s recommendation in order to regain custody and access - even if parents are aware that the terms of the agreement are unrealistic. This has the potential to create future compliance-related issues. Given that CPM is a relatively recent phenomenon, the extent to which CPM agreements will be enforced by child protection workers is not entirely clear. To further compound this

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¹⁹² Menkel-Meadow 2003, supra note 5 at 235.
¹⁹³ Sinden, supra note 139 at 4.
problem, resource shortages in CPAs may impede compliance monitoring. As well, active recourse for parental breach of agreed upon CPM conditions is within the child protection worker’s discretion. Minor slips on the part of parents are particularly problematic for child protection workers. A minor breach of a mediated condition, while still a breach, can create additional hurdles for disadvantaged parents if brought to the court’s attention. Rightly or wrongly, the court’s reaction to a breach of a mediated condition may be swift and without empathy. Child protection workers face the arduous decision of whether or not formal consequences should be imposed upon parents for breaches that do not significantly affect the safety and well-being of a child. Given this level of discretion, it is unlikely that mediated agreements will be enforced consistently. This may create the perception of bias or unfairness on the part of a child protection worker.

While a significant amount of empirical work has been completed that demonstrates the effectiveness of mediation in terms of reducing delay in proceedings, preserving resources, and generating participant satisfaction, there are no longitudinal studies to support these claims.\textsuperscript{195} The ability of CPM to allow parties to settle is a hollow attribute if conditions agreed upon are not followed through. More studies are needed to determine how well, and in what circumstances, families are able to comply with the agreements reached during CPM. The problems associated with measuring compliance create difficulty in measuring successfulness of the process. Success means something different to nearly everyone and each case is unique.\textsuperscript{196} While short-term success might be measured in terms of participant satisfaction, the ability of participants

\textsuperscript{195} Menkel-Meadow 2003, \textit{supra} note 5 at 235.
\textsuperscript{196} Jarett, \textit{supra} note 44 at 8.
to tailor solutions that promote the best interest of the child, and time and costs savings, the question of long term success is more complicated. While it is important to monitor compliance with CPM agreements and how children cope in the aftermath of the process, the many variables at play prevent perfect isolation of the effects of CPM.

When compared to litigation, the outcomes of CPM are much more favourable to children. Much can be done to mitigate the problems associated with CPM. Proper case screening, \textit{i.e.} assessing the appropriateness of files for CPM based on a list of established criteria, will greatly reduce the chance that CPM will trigger safety risks or add a superfluous layer to the child protection process. Furthermore, trained and experienced mediators will be aware of risk indicators and will react accordingly. A mediator may refuse to mediate or cease a mediation in progress if a party is threatened or cannot adequately participate. As an additional safeguard, child protection lawyers can guide their clients through the CPM process, if it is selected.

\textbf{VIII. LAWYERS AND THE EXPANSION OF CHILD PROTECTION MEDIATION}

In accordance the process pluralism framework, the role of a child protection lawyer is to bridge the gap between ADR theory and practice. Support for this assertion and guidance as to how this role is played out is described in this section.

A legal representative of a child protection client has an obligation to become well-versed in process and substance beyond the realm of traditional litigation. There is a growing recognition that parties stand to gain by resolving disputes using alternatives to litigation. Support from the Ontario Legislature solidifies the assertion that ADR forums are a slow growing reality in the child protection context. Stakeholders operating within
the system will inevitably need to accept the legitimacy of ADR processes. Lawyers have a professional obligation to be competent in the law and to adjust their practice to suit contemporary legal development. Moreover, a lawyer has a duty to act in the best interests of his/her client which will often include the utilization of ADR principles and processes. A child protection lawyer has a professional, statutory, and ethical responsibility to ensure that the best interests of a child have been achieved. While remaining as a default process, litigation is not an ideal venue for children and their families to respond to child protection concerns and plan for a child’s future. Therefore, lawyers have a legal, professional and moral obligation to identify and utilize more amenable ADR processes whenever possible.

The assertion that CPM should be reserved to address dispositional conflict greatly assists a child protection lawyer advising his/her client about conflict resolution options. A lawyer acting in the best interests of his/her client has an obligation to ensure the exchange of all salient information pertaining to legal decisions, including procedural options. This professional duty extends to the provision of advice with respect to the lawyer’s evaluation of the respective merits and pitfalls of available dispute resolution processes. Restricting CPM to dispositional conflict gives the process a more cogent role and lessens the risk it may pose to a child protection client. Moreover, easier transition between different conflict resolution processes such as litigation is facilitated.

Menkel-Meadow suggests that, for lawyers, an appreciation of process pluralism and the value of alternative processes is as important as the substantive legal ideas upon which the system is based.197 A divergence from conventional legal thought to accommodate new values and new ways of thinking about conflict management will be

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197 Menkel-Meadow 2002, supra note 45 at 8.
required. While argument, trials, and legal research is an inevitable part of the child protection lawyer’s skill set given the necessity of litigation during the first stage of a contested child protection hearing, lawyers will nonetheless be required conceptualize their role beyond adversarial ideations during the dispositional stage.\(^\text{198}\) An understanding of the sociology and psychology of group behaviour can assist a child protection lawyer to initiate a process amenable to the dispute that attends to the interests of the child and one that meets the needs of his/her client.\(^\text{199}\) Particularly, to fully appreciate the potential of collaborative dispute resolution mechanisms such as CPM, lawyers must move beyond a rights and obligations perspective and toward a family systems perspective.\(^\text{200}\) A family systems approach permits stakeholders to identify, and hopefully address, the source of family problems which have detrimentally affected a child. Providing legal advice pertaining to the suitability of CPM requires a complex and subjective assessment of how a family system has affected, and may continue to affect the abuse and/or neglect of a child. The manner by which the family system could be impacted by formal or informal processes is also an important consideration. To better assist families, a child protection lawyer contemplating an ADR processes must behave as a “representative of creative ideas”\(^\text{201}\) and not merely a “hired gun”.

CPM is a consensus-based process. If parties have the assistance of legal counsel, the decision of whether or not to mediate can be made on an informed basis. While parties may receive information regarding CPM from many sources, the advice they obtain from their legal representative will be viewed as trustworthy. Client trust in lawyers is made possible by professional legal ethics. It is thus crucial that parties,

\(^{198}\) McHale et al., supra note 119 at 5.
\(^{199}\) Ibid.
\(^{200}\) Kirsthardt, supra note 166 at 15.
\(^{201}\) Ibid.
especially parents, receive sufficient guidance from their lawyer when in the process of choosing an appropriate conflict resolution process. Jacqueline M. Nolan-Haley underscores the importance of informed consent as it relates to mediation, stating:

Informed consent prepares the way for a party to participate voluntarily and intelligently in the mediation process and to accept its outcome. It serves as a check on the mediator's power, a way of making sure that the mediator has not used her position of authority to cajole or bamboozle parties into consent. In short, informed consent matters because the potential for coercion, incapacity, and ignorance can impede the consensual underpinnings of the mediation process.202

CPM process should be explained to a prospective participant far enough in advance so that he/she has sufficient time to evaluate the advantages and disadvantages of the process. Lawyers, in conjunction with mediators, have an obligation to properly identify safety concerns, capacity to mediate, and other concerns relating to participation and plan accordingly.203

To effectively participate in CPM, lawyers must draw on the knowledge, skills, and attitudes that fall outside standard legal training.204 For lawyers and judges trained to argue, criticize, and persuade, rather than to listen, synthesize, and empathize, some changes in behaviour will be required.205 Beyond the language of rights, lawyers must learn the “helping” language evident in social work theory which stresses holism, interactionism, interdependence, and relationships.206

To the extent that CPM will trigger legal consequences, lawyers are experts at spotting legal issues and are capable of providing for their appropriate coordination within less formal processes.207 Lawyers, armed with legal training, are particularly well-...

204 Janet Weinstein, “Coming of Age: The Importance of Interdisciplinary Education in Law Practice” (1999) 74 Wash. L. Rev. 319 (WL) at 21 [Weinstein].
205 Menkel-Meadow 2003, supra note 5 at 260.
206 Kisthardt, supra note 166 at 13.
207 Ibid., at 491.
suited to marry the legal formalities and requirements of child protection norms to more flexible, fair, and participatory processes.\textsuperscript{208}

CPM has the potential to become a process that “may be able to incorporate the best of the skills that lawyers (assisting clients in negotiation) and social workers (communication, collaboration and identifying shared interest) bring to the table.”\textsuperscript{209} In practice, the challenge is to reconcile the differences that arise between lawyers and social workers as a result of the distinction between legal and social work perspectives. By making an effort to understand ADR and by embracing process pluralism in pursuit of the most equitable result, a child protection lawyer can facilitate the use of CPM when it is appropriate. While doing so, it is possible that the interests of the child and the lawyer’s professional obligation to his/her client can simultaneously be satisfied. However, this proposition rests on the assumption that the parents involved are indeed focused on the child’s best interests.

\textbf{IX. CONCLUSION}

The resistance toward CPM in Ontario can be explained by the uncertainty surrounding its role and value. Concern regarding the potential risk of harm posed to children and the lack of due process has created roadblocks for the development of CPM. Despite the benefits associated with CPM, surrounding ambiguity has raised doubt pertaining to its practical effectiveness. Stakeholders operating within the child protection

\textsuperscript{208} Menkel-Meadow 2003, \textit{supra} note 5 at 125.
\textsuperscript{209} Kisthardt, \textit{supra} note 166 at 17.
system have therefore been hesitant to embrace CPM given the high stakes conflict involved.

The application of process pluralism to evaluate the role and suitability of CPM within the child protection system has led to three important conclusions. First, it is asserted that CPM should be restricted to dispositional conflict. At the dispositional stage, the risk posed to children and parents as a result of the lack of procedural safeguards during CPM is significantly reduced. At this juncture, a CPA’s concerns have been endorsed by the court and have withstood due process. Unless the court’s decision on this issue is appealed, if a parent wishes to have continued involvement in his/her child’s life, the protection concerns must be prospectively embraced. Secondly, it is suggested that by restricting CPM to dispositional conflict, the role of CPM within a contested child protection matter acquires much needed clarification. With this new found brevity, child protection lawyers will be in a better position to evaluate when CPM is suitable and make corresponding recommendations to their clients. The advantages and disadvantages of both litigation and CPM are more easily assessed because the procedural and substantive consequences of both processes are readily apparent. Finally, it is concluded that child protection lawyers have a significant role to play in assisting their clients in selecting the appropriate conflict resolution forum at the dispositional stage. Lawyers can empower disputants to make an informed and voluntarily choice to mediate or litigate dispositional conflict. Overall, with a more specific role for CPM and the corresponding child and client centred benefits associated with the process, it is predicted that a higher instance of lawyers recommending CPM to their clients will result. It is further suspected that increased stakeholder exposure to CPM will gradually erode systemic resistance.
Process pluralism aptly describes the future direction of Ontario’s child protection system. This perspective is essential to effectively respond to child maltreatment. Child protection stakeholders should always be searching for new and better ways to assist children in need. How the child protection system can support, engage, and empower families in ways that address the safety concerns of professionals must not be pigeon-holed or remain constant simply because stakeholders operating within the system are resistant to change.\footnote{Olson, supra note 3 at 12.} For now, litigation in conjunction with CPM can permit parties to collaborate, exercise self-determination, generate ideas, and hence, produce high quality solutions for children while respecting the principles of due process and natural justice.