**Teaching Family Mediation in Higher Education – What could an Academic Family Mediation Course look like – by Katherine Stylianou**

**Introduction**

Academic teaching of family mediation can present some challenges, not least of which is the multi-disciplinary nature of the subject, which creates a diverse theoretical base. The evolutionary development of the profession of family mediation has also led to historic tensions, which can influence teaching. These tensions can create challenges to decisions about the content and teaching methods of a family mediation course.

This chapter is an attempt to see what the indicative contents of a family mediation course could look like, and how this could be distinct from training. It can only be indicative, because the extent of possible material to be studied feels non-exhaustive given the wealth of disciplines that have relevance to the field of mediation in general, and then specifically to family mediation. For example: social anthropology, sociology, psychology, political sciences, international relations and peace studies all have relevance to the field of mediation[[1]](#endnote-1). However, the common academic departments for housing mediation modules in the UK, in the author’s experience, seem to be law, psychology and social work. The parent discipline within which a mediation course is taught can shape its emphasis, context and content. For example, in the field of law, the focal point can often be the courts. The emphasis can be on how family mediation performs a function for the state in diverting disputes from the legal process, saving the state the costs of formal justice that is expensively dispensed in courts. In psychology or social science departments the emphasis may be on conflict theory, psychological states of conflict and how mediation can be a way of managing these states, not necessarily with the goal of resolving a dispute. There may then be an emphasis on therapeutic models of family mediation that deal with management and resolution of conflict. This chapter will not seek to conclude as to what is the best “home” for a course in family mediation in higher education, but to suggest what any course could have as its contents. This would be irrespective of the discipline of the academic department.

For the purposes of this chapter, it is useful to distinguish early on between the terms conflict and dispute. A dispute refers to the voicing of a specific grievance that is met with opposition by the person who is regarded as at fault. [[2]](#endnote-2) Conflict has been defined as clashes arising from opposition [[3]](#endnote-3). There can be many sources of conflict. International relations and peace studies[[4]](#endnote-4) have interesting and extensive studies of the challenges and difficulties of resolving conflict. In a family context, the disputes that arise are often around arrangements for the children and the financial division of family assets as a result of separation of the adults. The sources of conflict leading to separation can be derived from different many possible sources. For example, infidelity or mental health issues. Disputes around children’s arrangements and finances may have arisen because the source of conflict has led to separation of parents. Family mediation, usually, deals with the disputes but not the underlying conflict.

There are, of course, other questions about design of a course that are related not just to discipline, but to the level of the course. Whether it is an undergraduate module within a programme of study in an academic discipline, or a postgraduate course dedicated to family mediation within an academic department, will shape the contents and depth to which topics are studied. These factors will also determine the learning outcomes of a family mediation course and in turn will affect the teaching, learning and assessment modes of those outcomes. The way a module or programme of study is shaped in terms of its content and focus can also be determined by a demand that the academic course is relevant to factors such as employability, corporate plans and university mission statements[[5]](#endnote-5).

**History and Current Relevance for a Higher Education Course in Family Mediation**

The historical background to family mediation and its development in the UK parallels the rationale and ensuing pressures faced by the emergence of divorce mediation in the US. This has its tensions, which in turn are reflected in the empirical and theoretical research. Some of the tensions stem from professional and disciplinary perceptions of the ‘ownership’ of the practice of family mediation. Although mediation has its roots in many different contexts and cultures, [[6]](#endnote-6) the family mediation context was developed from different professional practices within family justice in the UK. One example was Divorce Court Welfare Officers (they performed a similar role to that played currently by social workers in CAFCASS[[7]](#endnote-7)), overseen by the Probation Service. For many years the in-court work done by social workers in this field was labelled as family conciliation/mediation. However, the major difference was that the purpose of this work was and is still to provide recommendations to the judge to assist in their decision making. As in the US, professionals who were involved in the early shaping of family mediation were lawyers and family therapists, who wanted to spare families and children the pain of settling disputes arising from divorce and separation through protracted court battles. The effect of conflict on children and this rationale for lawyers and social workers in finding another way to resolve disputes is a good starting point for study on a family mediation course. Studies, funded by the Rowntree foundation, emphasised significant differences in children of families whose parents had experienced high conflict whilst making decisions about children and finances arising from divorce and separation.[[8]](#endnote-8) A large field of research has also been conducted in the US which looked at the impact of conflict on children[[9]](#endnote-9). Similarly, Michael’s work on “Children in the Middle” discusses the effect of conflict on children during the divorce process[[10]](#endnote-10). An early wave of empirical research in the 1980’s and 1990’s in the US and UK (more detail of this will be discussed later), showed that mediation did help parties going through separation and divorce to resolve disputes and reduce conflict. This made family mediation in the UK, particularly after the 1989 Children Act was passed (it specifies that no court order should be made unless necessary where children’s arrangements are concerned), very relevant.

Although the history has contributed to the enrichment of the development of the field of family mediation, it has also led to territorial assumptions of what constitutes professional competence, and, in turn, has led to competitive approaches to both training and regulation. However, two important breakthroughs have emerged over the last two decades. Firstly, an overarching regulatory body, the UK College of Family Mediators[[11]](#endnote-11) (UKCFM) was established in the late 1990’s (now the College of Mediators[[12]](#endnote-12) - COM) which brought together all the training organisations that represented the different professional backgrounds. The purpose and function of the UKCFM was to separate the functions of standard setting and regulation of family mediation from the provision and delivery of services and training, thereby avoiding a conflict of interest. However, the training organisations broke away to form the Family Mediation Council[[13]](#endnote-13). The fundamental difference between the FMC and COM is that the COM is the only body that does not have a conflict of the functions in both setting standards for practice as well as being a provider of services and training.

The breakthrough in 2015 was that, at the insistence of the Government, the FMC finally set up the Family Mediation Standards Board in order to establish the independent function of standard setting and regulation. This came about because of legal changes to the process of divorce, where family mediators became the gatekeepers for potential litigants seeking to access courts to resolve their disputes. [[14]](#endnote-14) All parties wishing to access the courts need to see a family mediator to hear about all options and to assess if the parties, the dispute and all the circumstances are suitable for mediation. In justifying the need for the existence of such an academic course, this is a good place to start with a rationale.

**Indicative Content**

1. **Theoretical Sources For A Family Mediation Course**

A core part of the course could involve a look at the different dispute resolution processes and some of the concerns about alternative forms of dispute resolution, lumped together by writers as ‘Informal Justice’. Negotiation and mediation theory are important sources for understanding family mediation, as is Conflict Resolution theory. These sources which can then lead on to an exploration of the nature of family mediation, its principles and specific features.

1. **Dispute Resolution Processes and Informal Justice Concerns**

Dispute resolution theory and negotiation theory, as mentioned earlier, comes from a range of disciplines. Given the likely legal consequences of relationship breakdown and possible consequential disputes relating to finances and children, the different processes used in dispute resolution, including courts and the legal process would need to be explored. Understanding the differences between the various processes, including the difference between negotiation, mediation and adjudication can be helpful in determining boundaries between them and in determining how third parties intervene – giving another layer of understanding to mediation generally. Gulliver,[[15]](#endnote-15) in discussing mediators, describes some crucial differences between negotiation and adjudication, the central point being with whom the decision-making power rests. Black and Baumgartner [[16]](#endnote-16)have used this work to expand on a typology of third part intervention, which is helpful in seeing what roles third parties play in the settlement of disputes. The body of work by Gulliver all helps to identify the process of mediation as being one which follows the negotiation process and has a function in restoring negotiations. The mediator is therefore differentiated from being a third party who has any decision-making authority.

Additionally, understanding how disputes are layered, as discussed by Felstiner, Abel and Sarat, also provides an insight into how disputes can be transformed by family justice professionals in order to enter the arena of civil litigation and therefore formal adjudication.[[17]](#endnote-17) They write that disputes have many layers starting with an injurious experience that firstly needs to be experienced as injurious and then voiced. If the voicing or grievance is not met with a satisfactory response, it becomes a claim, which if not satisfied becomes a dispute. What happens to a dispute then depends on whether it is taken to the legal arena. It is then transformed by lawyers into the language of a legal dispute which is positional – applicant and respondent, both arguing the rightness of their positions so that they can receive a decision and remedy from the judge. This is also the case in arbitration, and tribunals and should be the safeguards used in other processes whereby the third party has a decision-making role. Within any process where a third party has the authority to makes decisions, due process is necessary to enable that third party to make a rational and therefore objectively fair decision.

Fuller’s work[[18]](#endnote-18) examines the kinds of disputes that can be exacerbated and not resolved by adjudication. He discusses polycentric disputes that are multi layered (or like a cobweb of connectivity). An adjudicated decision will affect many people other than the parties themselves. For example, family disputes are polycentric in their nature as community, children, grandparents, new siblings, new partners are all affected by decisions of the court. Fuller argues that an adjudicated decision often leads to further conflict in these types of disputes.

Galanter [[19]](#endnote-19) explores the kinds of cases that survive the many exit points from the civil litigation process and reach formal adjudication (see Diagram 1), based on the work of Felstiner, Abel and Sarat mentioned earlier. This is useful in assisting students to understand where and when family mediation can be used to resolve disputes and when it can be more challenging where a dispute has become transformed and entrenched in the language of legal positions.

(INSERT DIAGRAM HERE)

K. Stylianou Summary of Marc Galanter’s work

Some of the work done by these sociologists, anthropologists and legal theorists can also be of important in identifying the dangers and limitations of informal justice in general and which helps to identify the rationale for the boundaries and principles inherently needed in mediation[[20]](#endnote-20). Some of the dangers discussed in Abel’s work called the Politics of Informal Justice[[21]](#endnote-21), identifies a number of important considerations that resonate with every family justice and civil justice reform. For example, Abel describes institutional self-interest and the perceived threats that professions experience at the emergence of Informal Justice. This can be seen from the history of regulation in the family mediation field, as discussed earlier and in other parts of this book. Abel discusses the unburdening of the courts onto informal justice is inherently dangerous as those processes may lack safeguards inherent in the process of formal justice and due process. This is the driver for having clear boundaries, training and regulation of mediation.

Simon Roberts also discusses some of the dangers identified by Abel. [[22]](#endnote-22) For example, he discusses that looking at mediation as a way of assisting the courts, as opposed to it being a minimal form of intervention with its own value can compromise the safeguards of the process. A minimal form of intervention is used, among other factors, because mediation seeks to clarify not transform a dispute. Using mediation and other forms of alternative dispute resolution to unburden the courts in order to rescue the shortcomings of the formal justice system, carries with it challenges that can lead to a more stressed and less effective, and therefore less safeguarded process.[[23]](#endnote-23) In family mediation this has led to a shortage of accredited family mediators and a number of tensions related to standards of competence and training. [[24]](#endnote-24) Understanding, through dispute resolution theory, the function of adjudication and the inevitable development of rules – due process - to support third party decision making, can assist in the understanding for the rationale of the principles, boundaries and limits of mediation. The aim of teaching this is to provide students with additional understanding and justification for the safeguards and principles of mediation in general and within a family mediation context[[25]](#endnote-25).

1. **Negotiation and Mediation Theory**

In Guliver’s work *Disputes and Negotiations: A Cross-Cultural Perspective*, [[26]](#endnote-26) he explores the stages that negotiations go through. Through his research of different cultures, he identifies some common stages. The mediation process follows these stages of negotiation.[[27]](#endnote-27) What characterises negotiations is the “absence or presence of an authoritative third party decision maker” and that the “locus of decision-making”[[28]](#endnote-28) can be found with the parties themselves. Palmer and Roberts [[29]](#endnote-29) have a very clear and interesting chapter on negotiation and mediation, featuring excerpts from Gulliver and other important contributors to the field. It is a good starting point for students to begin to explore negotiation theory and the breadth of decision-making processes.

Students also need to see that negotiations can break down and that mediation can assist in their restoration. There are different negotiation strategies to be explored: mainly positional or competitive bargaining, which focuses on positions, and the other, which is what mediation encourages, called principled/collaborative or problem-solving strategies[[30]](#endnote-30). The latter focus on the interests and needs of the parties. Negotiation strategies can help to explain some of the factors that cause negotiations to break down, particularly if a dispute has been transformed by the legal process, which as mentioned earlier, can only focus on the positions giving parties rights in law to enable a judge to decide for them. These are, of course, not the only way to explain blocks to negotiation, particularly in family mediation, but more of the factors that contribute to negotiation breakdown will be mentioned later in the chapter, which are important for students to understand.

In family mediation the positions may be about how much time the children spend with each parent and where. The positions may be numerical in nature, days counted by each party to feel equal to one or other. However, the needs of the parties may be dictated by other factors like work, children’s activities and the children’s needs that may necessitate a unique outcome. The pressure of time or the complexity of the arrangements necessary, impaired relationship, poor communication and different parenting styles all contribute to the difficulties in getting through negotiations. With family mediation, of course, the dynamic of the separation process and the underlying emotional conflict that causes parties to behave positionally contributes to the biggest blocks to negotiation. However, positional bargaining carries risks, which are mainly related to no outcome or a breakdown in future relationships (parenting relationships in the context of family disputes). It is important, therefore to also understand the psychological stages of separation and grief[[31]](#endnote-31).

1. **Conflict Theory and Conflict Management within Family Mediation**

Bush and Folger[[32]](#endnote-32), once again, have provided some interesting insights in to conflict management and how conflict theory is woven in to mediation. In their work, “The promise of Mediation”,[[33]](#endnote-33) they discuss three different models of mediation that are shared in the mediation field: problem solving, harmony, and transformative. Each model reflects its own assumptions shared beliefs of the world. Bush and Folger propose that mediators choose a framework based on their own view of the world – or ideology. Bush and Folger go on to focus on their own transformative model of managing conflict.

 Interesting work has also been done by Compassionate Focussed Therapists[[34]](#endnote-34) , discussing the different responses to stressful situations – a key response is flight, fight or fight responses to conflict. The interaction between this “threat” drive and the evolved human brain which is all about imagination creates a difficult combination to enable clear thinking. In his work, Gilbert has shown how compassion and empathy calm the mind and allow people to think differently. The work of compassionate focussed therapists has resonance with family mediators who are dealing with people highly stressed by the conflict that has led to separation and disputes about children and finances. Family mediators need to understand empathy, its value but also its pitfalls in the maintenance of perceived impartiality and balance. Discussions of skills of mediation at this point can be very useful, as can the difference between therapeutic interventions and a minimal form of intervention[[35]](#endnote-35) like mediation. This has also been examined by Noce[[36]](#endnote-36) who, likewise, sees the value of empathy in the management of conflict.

 From this perspective, family mediation can have a conflict management value in that it can give parties the space to express the emotional aspects of the conflict, but through the mediator they are able to do so with validity and empathy. Emotions in an adjudication are not relevant. They are not seen as evidence of anything. However, this is because decision making is based on principles necessitating an exploration of the past in order to decide whether a boundary has been breached. The use of evidence to prove this breach is what makes adjudication rational. In mediation the focus is on the future, as in any negotiation this is where the common ground and area of option possibilities can be found. Emotion and conflict are very useful in mediation as they disclose very important information for negotiation which, in turn, clarifies the needs of the parties.

Relating family mediation to conflict theory and conflict management can help students to evaluate and interpret the empirical and practice-based literature on family mediation, which will be discussed later in this chapter. The mediator’s use of acknowledgement of feelings gives the empathy that parties require to calm their minds and proceed with this decision making. Understanding this theoretically is helpful to then understanding the reason that certain skills are used at certain times.[[37]](#endnote-37) This can be woven into the rationale for the boundaries and principles of mediation. [[38]](#endnote-38) [[39]](#endnote-39)

Some key ideas have been put forward by writers like Duckworth[[40]](#endnote-40) about what often leads to conflict – pinch crunch moments. Understanding sources of impasse [[41]](#endnote-41) and stages of conflict. [[42]](#endnote-42) After exploring these aspects students can then begin to understand the function, form and limits of mediation in family disputes. Once this scene is set, then the rationale for mediation principles and its boundaries will make further sense.

1. **The Nature Of And Principles And Boundaries Of Family Mediation**

As discussed earlier by Gulliver,[[43]](#endnote-43) key to understanding mediation’s central principle is the fact that a mediator has no power to impose an outcome. This can then usefully show that many ADR professionals performing settlement roles are still adjudicatory, even though not formally making judgements in a formal court. They are still decision makers and therefore have more degree of authoritative intervention than mediators. For example, in the family context, the other ADR professionals are those who offer early neutral evaluation/mini trial/executive tribunals and Family Law arbitrators. These professionals are decision makers, albeit they may only be asked to decide on one point of contention. [[44]](#endnote-44)

The mediator as a non-decision making third party has a role that needs to be supported by principles of impartiality, voluntary participation of the parties and confidentiality and legal privilege of the process. These principles protect both the disputants’ rights to adjudication and the integrity of their negotiations. Parties making their own decisions necessitate a focus that shifts away from importance of the third party and what they do and is replaced with a disputant’s focus.[[45]](#endnote-45) The third party is there to enable communication between the parties so that information is exchanged between them. Only with the flow of communication and information can negotiation and solutions be found. This is the essence of the role of the mediator. Anything further Roberts [[46]](#endnote-46) argues blurs the boundary with adjudication/advice/evaluation.

In order to move disputing parties forward through a negotiation, the focus of a mediation is on what they need in the future. Mediators use their skills to work through the following stages of negotiation: engaging parties; identifying issues; exploring issues; creating options; developing options; securing agreement.

The empirical research, more of which will be discussed below, was summarised by Joan Kelly in her work in 1996, called ‘A Decade of Divorce Mediation Research’[[47]](#endnote-47). The research, Kelly surmises, bears out the effectiveness of the mediation process in disputes arising from separation and divorce. In general, it was the observation of these principles and boundaries that the research showed yielded the best outcomes, subjectively for the participants. Because adjudication in family disputes dictates a winner and a loser of a position, studies showed that disputants in the family context preferred to resolve their differences in a way that reduced the conflict rather than exacerbated it through the courts. It is important to note also that negotiations occurring once the parties have had their dispute transformed[[48]](#endnote-48) by lawyers into legal positions in family law, will be positional in nature. This is necessary so that a lawyer can represent their client’s interests in law and represent them before a judge to establish who is right or wrong.

The principles and boundaries can be taught with reference to the central purpose of mediation described by Gulliver, which is to put the decision-making power into the hands of the parties. There are role play exercises that can be set for students to experience being a third party who is only allowed to listen, ask open questions and summarise back what parties say (active listening). If students are taught with reference to this rationale, then the principles make sense and diversion from them can be seen to be unethical and unsafe. There are four main characteristics of mediation, and they will be briefly touched upon below[[49]](#endnote-49). The characteristics or principles stem, as said earlier, from the fact that mediation is a negotiated agreement with the assistance of a third party (mediator) who has no authority to make decisions for the parties. For this reason, a mediated outcome is not legally binding because it has not been made through formal judicial decision making of the court.

Firstly, mediation is confidential so that parties feel free to exchange information without fear of how the information will be used outside of the negotiations. Information exchange is essential for the progress of negotiations. It is in the public Interest that certain professional relationships are confidential in order to maintain the effectiveness of that relationship. Mediator/clients is one such relationship.

The negotiations in mediation are also said to be without prejudice. This refers to negotiations that are in the shadow of the law. This principle ensures that parties are not prejudiced by anything that they say in negotiation should they need to go to court to have their dispute resolved. This preserves disputants’ right to have their rights vindicated in a formal court. Students can go on to explore the exceptions to confidentiality and privilege – safeguarding, child protection, proceeds of crime and financial disclosure in divorce settlements.

Secondly, the voluntariness of mediation ensures that the negotiations are consensual and that parties are genuinely making their own decisions. There are some interesting and continuing debates around this issue in family mediation. This is well-rehearsed debate through the history of family mediation and students can find material to examine this from all perspectives – for example how can the state save money through mediation if it is only ever a voluntary process? On the other hand, how can compulsion be used in the negotiation process which relies on consensus for agreement? To what extent does compulsion to mediation breach rules of freedom of contract? Are there human rights issues in compulsory mediation, which relate to denial of the right to have rights vindicated in a forma court? Does compulsion defeat the purpose of mediated outcomes that rely on subjective approval of the outcome in order to be effective?

Thirdly, mediators do not need to take sides, because they are not decision makers. They are, therefore, impartial. Impartiality is about the mediator maintaining a balance or even-handedness between the parties[[50]](#endnote-50). It is a balance between remaining sufficiently distant from the dispute, in not having a stake in the outcome, and being sufficiently interested in what all parties have to say [[51]](#endnote-51). Impartiality is different from neutrality, which does not consider the human characteristics and psychology of mediators and does not allow for the need to balance power between parties to ensure equal participation[[52]](#endnote-52). Students can grapple with interesting questions within this area. For example, how can mediation skills assist a mediator to resist the urge to push parties to a solution? Or how can evaluative or directive mediation styles avoid a compromise of this principle of impartiality?

Finally, mediation is said to be flexible. This does not refer to flexible boundaries or principles but to the way and where mediation can take place. For example, should a mediator have separate meetings – as described in the Bromley model [[53]](#endnote-53) - before bringing parties together. Would the parties be better served by shuttling between them (never bringing them face to face)? It is interesting to explore what the benefits and pitfalls of using separate meetings or shuttle can be and whether or how this could affect impartiality or perceived non bias of mediators by the parties?

The challenge for any academic course is how to facilitate and assist students to navigate the wealth of literature that exists and to understand that there is a great deal that has been written and researched in the past. One of the values of having an academic course in family mediation is to enable students to see the history of the long and distinguished body of multi-disciplinary literature on mediation.

All six Family Mediation Council member organisations [[54]](#endnote-54) have ethics, standards of training and practice that adhere to the standards and codes of practice identified by the Family Mediation Standards Board[[55]](#endnote-55). These codes reflect the above principles and ethics of the profession. As resources, the six-member organisations and the Family Mediation Council websites are helpful for students to access.

 Lawyer negotiations are distinct from negotiation strategies encouraged by mediators. So distinct are they that a term collaborative law has been created in family disputes to allow lawyers to negotiate with each other in a less positional way. The process involves both parties and their collaborative lawyers using problem-solving approaches to negotiations, focussing on interests and needs of their respective clients. However, collaborative lawyers cannot then go on to represent the same clients in court should the negotiations fail, as they would have been privy to privileged information that must remain confidential and not be used against the other party in court.

At some stage, it is also important to explore the scope of family mediation. Students should explore a wide their idea about what constitutes family. The identification of myths about family and commonly held assumptions make for interesting discussion. This can then extend to ask questions about what constitutes a family dispute? How wide is this definition? Currently, only mediation in disputes arising from separation and divorce result in regulation of mediators – except for the College of Mediators, who recognise and set standards for all mediation contexts. There are many possible disputes arising within a family where mediation is useful. For example, disputes relating to inheritance and wills; disputes where a family member’s needs are changing, or where care options must be explored. These are often flash points for families where high emotions can lead to breakdown in communication and therefore negotiation. Deep rooted family dynamics will often come to the fore in these situations and negotiation can sometimes feel impossible[[56]](#endnote-56). (See end notes 2-5)

1. **Specific Features Associated with Family Disputes**
2. **Issues of Safety and Power Balancing in Family Mediation**

Any academic course would need to explore the limitations of family mediation. Whether mediation is suitable and safe for clients is now assessed before parties come for family mediation in a Mediation Information and Assessment Meeting (MIAM). The meeting acts as an opportunity to both gather and give information. The purpose of the information is for the party to decide if mediation is suitable and for the mediator to assess whether parties can participate equally and without negative repercussions outside the mediation – this is with particular regard to domestic abuse and child protection issues, which will be discussed a little more below. In family disputes, there are specific power imbalances that need to be spotted in the MIAM. The safeguards to mediation are the observance by the mediator of the principles and boundaries. If a mediator must to compromise these boundaries because of a power imbalance that prevents a party from participating equally, then mediation cannot be said to be safe for the parties or the mediator. The impact of factors such as domestic abuse will affect this.

1. **Sources of Power Imbalance in Family Disputes**

Any academic course in family mediation needs to address issues of power imbalance that are particular to the family context. One source of power imbalance can be where the dynamic of the relationships has been one that involves domestic abuse. This could be of such a nature that mediation would be physically unsafe or the process itself could become abusive. This is something that mediators must learn to screen and discern through open questions. It is important to understand that it is the impact that any domestic abuse has on an individual that would determine whether mediation is suitable, and this must come from the party themselves first and then be an assessment that a mediator must make. Once again there is a rich vein of academic research and debate on this area. It is an important consideration in understanding the limitations of mediation and the consensual nature of negotiations.[[57]](#endnote-57)

Another source of power imbalance that would need to be covered by an academic course would be where one party is still in the early stages of separation – the grief loss cycle [[58]](#endnote-58). At this early stage, one party may still be in shock after finding out that the other wants to end the relationship. This is a vulnerable position to be in as this party will find it difficult to deal with some of the overwhelming feelings of loss and grief and will likely be unable to think of the long term. In such situations, mediation may have to be paced slowly or it may not be the right time for mediation to take place. An important part of negotiating collaboratively is to identify sources of power. If this is too great in favour of one party, a decision is needed about whether mediation is appropriate. There has been a development in relation to the way that parties are screened for domestic abuse in family mediation.

Like domestic abuse, child safety is non-negotiable. Explaining and discussing with students as to why mediation is not a process that can be used to resolve domestic abuse or deal with safeguarding of children (non-negotiable as it is plainly wrong to abuse adults and children, therefore not something that can be bargained). This leads to interesting moral and ethical debates for students to explore involving interventions that are appropriate. Once again, discussing limitations of mediation in the context of family disputes can be interesting for students to explore. There can be discussion of how and whether mediation can be used in public Law cases – what are the safeguards and challenges in this area?

A third source of power imbalance that can be discussed could be the one relating to knowledge about the finances. Negotiations rely on the exchange of information in order to create the options for possible settlement. In disputes arising from divorce and separation where finances need to be sorted out, the most important part of any mediation is to ensure that disclosure takes place in mediation. This would be the same in any forum including a decision-making forum. The imbalances of power arise from who has knowledge of the finances and whether all is being disclosed. Many questions arise here around the appropriateness of mediation, moral and ethical dilemmas for mediators and understanding of legal principles and whether this empowers mediators to act differently or whether this binds them to empowering parties to inform themselves. This also allows for interesting discussions about the difference between information giving and advice. What should mediators be doing ethically and within the rationale of this process? One aspect of this can be to also discuss the legal consequences of non-disclosure and why privilege and confidentiality cannot apply to financial settlements in divorce (principles of freedom of contract).

1. **Consulting Children**

Within the family mediation field, it is also important to consider how the thoughts of children are obtained in keeping with modern childhood and UN Convention for Children[[59]](#endnote-59). Here, important distinctions can be made between methods of accessing children’s views about the future arrangements in mediation. Family mediators should always be focussing the discussions on the needs of the children and encouraging discussions whereby the parents themselves access their children’s views. However, this can sometimes be fraught with difficulties, so mediators can directly consult with children as part of the process. This is now well regulated by the Family Mediation Council and Member organisations who all have codes of practice about consulting with children, and this involves special training of mediators in order to be able to conduct this meeting separately with children.

For the purposes of an academic course, once again there is a rich body of literature to draw upon. In 2015[[60]](#endnote-60), the Ministry of Justice published a report making recommendations about giving children an opportunity to have a voice in dispute resolution processes resulting from their parents’ divorce or separation. Within this context, there were many debates and responses to the paper that students can access and reflect upon.

1. **Research Findings On Family Mediation**

In the first wave of research in the 1990’s in the US and UK, most studies were consumer and outcomes based. The research, summarised by Joan Kelly[[61]](#endnote-61), and a number of other academics and researchers, taken together showed a number of common themes: that mediation clients appreciated being heard[[62]](#endnote-62), their agreements brought relief, the agreements tended to last, clients preferred facilitative models of mediation where they did not feel coerced into an arrangement, and children benefitted from the reduction of conflict and the opportunity to be consulted[[63]](#endnote-63). Mediation clients in the Newcastle University research conducted by Walker et al, contributed to the following conclusions [[64]](#endnote-64): mediation was most effective where it was voluntary; secondly, mediation in independent services that are not linked to the legal process were more effective, best to be seen as an alternative way of resolving disputes; and finally that mediation was most effective where it was client led and client focussed with the absence of imposed authority. This links in to other research (51 studies in total) reviewed by Benjamin and Irvine [[65]](#endnote-65), found that although styles vary in family mediation, the research points to the most effective for clients being a flexible approach responsive to clients interaction as it arises and which encouraged productive exchanges and discouraged destructive conflict. They also concluded that mediation was more helpful than litigation in assisting couples to reduce conflict. Similarly, a study done by Walton, Oliver and Griffin[[66]](#endnote-66) showed that family mediation in a small sample resulted in a reduction of stress for both parents and children. Beck and Sales’ research warned of the dangers of mandatory mediation and parties being rushed through processes without time to air concerns and identify spousal abuse.[[67]](#endnote-67)

The difficulty that Noce, Bush, Folger[[68]](#endnote-68) and Kelly[[69]](#endnote-69) identify with focussing only on theory free skills and techniques is that mediators may not be able to explain themselves about why an intervention works and when. They call this “blind faith in the how”.

The pinning down of a theoretical framework for mediation in general has historically been challenging. Noce, Bush and Folger[[70]](#endnote-70) give three reasons for this: mythology, imported theories and “skills and techniques that are presumed to be theory free”. Noce, Bush and Folger argue that mediators interact with their clients, and make choices about the interventions they make, based on their own theoretical frameworks about the social world and social activities.[[71]](#endnote-71) Exploration of the early empirical findings from the research undertaken in US upon the emergence of divorce/family mediation would be useful. Included in the discussion could be the imported theories discussed by Noce, Bush and Folger[[72]](#endnote-72), namely negotiation and conflict theory. These imported theories do help to explain the process and principles/boundaries, but do not explain the mythology of what, when and why mediators do what they do. This is often referred to the “black box”. Some mediators in the 1980’s and later have attempted to explore these intuitive responses[[73]](#endnote-73). A study conducted by Robert Emery[[74]](#endnote-74) discussed the intuitive interventions of mediators where one or both parties were displaying anger. He found that mediator interventions differed depending both on the level of and whether both or one party was displaying anger. The difficulties with studies exploring the intuitive interventions of mediators is that it is difficult to hypothesise and have control samples.

Bush and Folger do, however, discuss useful ideas in their work about models of mediation determining the what and why, and that this is more influenced by the style of the individual mediator. [[75]](#endnote-75)The consensus is, however, that more research is needed in order to develop more theory and to further test out some of the interventions mediators intuitively use to manage the process.

**Conclusion**

 For the purposes of this chapter, it is proposed that the ideal programme of study would be a one-year full time or two- year part-time Masters degree course in family mediation. There could be exit points for an award of a certificate after four modules and diploma level after six modules, with a thesis and dissertation for those choosing a Masters degree qualification. This, of course, would also depend on the institution’s credit system for each Masters level module of study. All programmes of study could have practical skills components, which can be woven into the course. For example, by way of understanding the process of negotiation and thereby the stages of mediation, students can do a role-played negotiation and reflect on the stages they went through in order to get to agreement. This can enhance the students’ understanding of the process and boundaries of mediation in general. Students could, optionally, take these skills further if they wish to pursue a qualification in mediation generically and then specifically in family mediation. There could therefore be a core element to the course and some optional elements.

 Having said this, however, the above indicative contents can be condensed into a module dedicated to family mediation that can be adapted to an undergraduate or postgraduate degree programme in many specialisms. For example: family law, dispute resolution, or conflict studies. Writing a module for family mediation that examines the above and many other opportunities for

A final point to be reiterated is that there is a rich, varied and interesting academic course to be had in the field of family mediation. It can be both theoretical and practical, overlapping with skills training through the introduction of students to the skills involved in mediation and which can be very useful in the management of conflict in general. It would have as its centre a rationale for the principles, boundaries and ethics of the mediation process and its relationship with other third-party processes.

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5. The author’s own experience of teaching mediation courses has been primarily within a law department; as a guest lecturer on a postgraduate diploma and MSc teaching ADR theory in a Psychology department; and as a lecturer on an LL.M course in Dispute Resolution teaching a short family mediation module. The courses I am responsible for at the institution in which I am permanently based are Alternative Dispute Resolution and Mediation Skills. Both these are optional modules on a law degree (LL.B.) and law masters (LL.M). The ADR module involves the teaching of Family mediation as an example of one of several contexts for mediation. Mediation is taught as an alternative to formal adjudication and as an alternative process to most other dispute resolution processes, which mostly have adjudicatory characteristics (See later diagram of third party roles in disputes). The mediation module has been developed to be an integrated mediation theory and generic mediation skills course. The emphasis on skills awareness and (if students choose to further train) acquisition, has been as a result of the focus on employability within Higher Education in general, but particularly within our department’s and institution’s mission statement and corporate planning. [↑](#endnote-ref-5)
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25. Another useful piece of literature that helps to clarify the different roles played by third parties in any dispute is that of Black and Baumgartner’s work on a typology of third party roles. See note xvi. They differentiate between support roles and settlement roles played by third parties in disputes. Support roles are classified in order of the degree of their partisan involvement – i.e. how much support is given; the settlement roles are characterised by the degree of the third party’s level of authority to intervene. [↑](#endnote-ref-25)
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40. For example: Duckworth, V. (2012) *Understanding Behaviour* McGraw-Hill Education [↑](#endnote-ref-40)
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55. www.familymedaitioncoucil.org.uk [↑](#endnote-ref-55)
56. There are many other topics within family mediation that are interesting for students to explore. There is a wealth of writing amongst practitioners, researchers and academics in the general field of mediation and in the family mediation specialism. For example: the relationship between culture and mediation and the field of cross-cultural mediation and how this is relevant to family mediation, both in the narrow and wider sense. This appreciation of different cultural notions of identity, self and community can be studied and discussed here, having been researched and written about in some depth. (See notes ).

Another example of an area for research is how and when to consult children during the parents’ mediation process. Questions here can be explored about the function of consulting children. Also, differentiation needs to be made between direct and indirect consultation and the extent to which both can be useful in family mediation. Discussions can be had about how this can be kept safe and what the boundaries need to be present for the professionals involved. Again, ethical considerations can be explored by students engaging in this area of research. Some recent debates have taken place on the recent Ministry of Justice Report on “The Voice of the Child”. (See note), which heavily relied on the work of Australian researcher Julie Macintosh. See note ). (The researchers themselves explained how their research and their practice was unique and should not be taken out of the context of the project they were engaged in). Another area of debate is whether the report adequately consulted with children. To inform the recommendations were children who had been through adversarial processes. There was no voice of children who had been directly consulted in mediation in the focus groups. How does this affect those recommendations?

Professional Backgrounds and the Impacts on mediation is another interesting exploration for students. For example, with what assumptions do different professionals come to a dispute and conflict? Are there different professional approaches to family mediation and the occupational assumptions that training and academic study needs to confront. Challenging these professional assumptions are important in the study of family mediation as it further assists students to understand the boundaries between the different professionals involved in family justice and relationship breakdown – See note .

Some member organisations like the College of Mediators allows students to join at a reduced fee and thereby get access to their newsletters and journal “Mediation Theory and Practice”. (See note ) The journal is a useful learning resource for libraries as it has regular pieces about practice, academic theoretical debate not just about family mediation but all contexts. It therefore helps to orientate students into the mediation field, which is not determined by professional background, but by mediation discussion distinctly and specifically. [↑](#endnote-ref-56)
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72. Ibid [↑](#endnote-ref-72)
73. For example, mediators like John Haynes (see note) wrote and videoed case studies. He would unpick what and why interventions were made and how they helped move clients through the process. [↑](#endnote-ref-73)
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75. Ibid. [↑](#endnote-ref-75)