Mandatory Dispute Resolution in Child Protection:
A Survey of Jurisdictions

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Executive Summary

This report reviews and critically examines a range of mandatory dispute resolution (DR) programs in child protection cases. The focus is on mandatory dependency mediation and family group conferencing (FGC) in child protection and includes jurisdictions in both U.S. and international contexts. Both the research literature and interviews with key administrative and legal personnel indicated that mediation and family group conferencing are the primary DR strategies used in child protection. For this reason, the report focuses on dependency mediation and family group conferencing.

Based on interviews with key people in the child welfare field in the U.S. and abroad, and information obtained from the research literature, program evaluations, statutes, policies, and web sites, this report presents separate analyses of the implications of mandating mediation and family group conferencing in child protection. Discussions of each of these analyses are provided. Limitations of the report are also discussed.

With regard to the U.S. picture, it appears that all states have been affected by, and have responded in varying degrees to, the federal Adoption and Safe Families Act (ASFA) of 1997. States have been compelled by the ASFA to revisit their child welfare practices, and the federal government now monitors how each state is progressing toward meeting specific outcomes according to specific measures in child protection. These measures include the length of time a child spends in foster care; number of placements; number of kinship adoptions; re-occurrence of abuse, etc., and each state must record and make public their data on these and other measures. Although the ASFA does not speak directly to dependency
mediation or FGC, many U.S. states have developed such DR interventions as ways of meeting the federal requirements.

No national or state legislation (either American or other international) was located for either dependency mediation or FGC that required parties to actually attend. Legislation exists that requires FGCs to be coordinated and for all parties involved to be informed and invited, but families are not required by law to be present (e.g., New Zealand). Legislation also exists authorizing the development and funding of dependency mediation programs (e.g., Florida and California), but the issue of whether or not to mandate attendance at the mediation is decided at the local jurisdiction level.

Referrals to dependency mediation across the U.S. appear to be almost entirely left to judges, which means the case has come before the court. Mediation is then mandated by court order, but the extent of mandate is determined either by the judge on a case by case basis, or according to court rules where they have been developed. For example, some parties may or may not be required by the judge to attend, or sanctions may or may not be imposed for non-attendance, etc. FGCs, in contrast, are not usually court ordered. In New Zealand, for example, the FGC Coordinator is invested with the authority to coordinate and convene a FGC as he or she sees fit according to the legislation. In Oregon, however, a case worker can refer a case to a family decision-making meeting, but the worker is not invested with legislative powers. These distinctions demonstrate the way variations in mandating legislation become played out in practice.

Three jurisdictions were chosen to present as case studies in the area of dependency mediation. Both California and Florida are examples of jurisdictions with enabling legislation that refers specifically to dependency mediation. The
third jurisdiction reviewed, Colorado, mandates mediation from the judicial bench or by policy.

Case studies presented for FGC include New Zealand, which is the world leader in FGC in child welfare, and Oregon. FGC began in New Zealand in response to political resistance to traditional, bureaucracy-centred child welfare practice. The philosophy of FGC includes respect for the child’s cultural and kinship ties, and New Zealand’s innovative legislation of 1989 specifically empowers families to develop care and protection plans independently and apart from the professionals involved. This legislation can also be considered enabling, as authorized FGC Coordinators are compelled to convene a FGC, but families are not mandated to attend. In Oregon, where the legislation mandates the consideration of a family decision-making meeting (which might include family group conferences, family unity meetings, or family mediation), child protection practice is driven by policy (engineered by private donor funding) that mandates the practice of Family Unity Meetings (a family decision making meeting more similar to mediation than Family Group Conferencing).

The report discusses the challenge with FGC in providing the infrastructure needed to sustain a family-centred type of practice; as with dependency mediation programs throughout the U.S., funding is a critical obstacle, as well as buy-in from professionals and the judiciary. FGC faces a unique challenge, however, in avoiding what has been referred to as “ideological drift”, where the practice that in essence represents a shift in the child welfare paradigm, gradually reverts to the previous profession-centred paradigm. The FGC model in Oregon has been criticized for becoming somewhat of a hybrid approach, which focuses on incorporating family views into the professionals’ decision-making process, rather than empowering families to develop their own plans for the child. Similar concerns of “ideological drift” were noted in the current
practice of child protection in New Zealand. There appears to be a consensus that both a legislative mandate and bottom-up support and incentive for front-line workers to administer FGC in child welfare is required to counter these obstacles and sustain the original intent of the programming.

The report ends with reference to a model for thinking about the level of mandate in child welfare DR strategies. The author of the model, as well as most of our key informants, advocate that DR strategies such as dependency mediation or FGC need a legislative mandate to be successful.

The limitations of the report are based on the lack of research and literature on the topic. Questions are listed that arise from the report, which could be used to guide further study.
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1.0 Introduction

1.1 Scope of the project

This report reviews and critically examines a range of mandatory dispute resolution (DR) programs in child protection cases. The operative term here is mandatory. The focus is on mandatory mediation and family group conferencing in child protection and includes jurisdictions in both U.S. and international contexts.

The original intention was to consider mandatory dispute resolution programs that occur prior to court, including negotiation, mini-trial, early neutral evaluation, judicial case conferencing, summary jury trial, and arbitration. However, both the research literature and interviews with key administrative and legal personnel indicated that mediation and family group conferencing are the primary DR strategies used in child protection. For this reason, then, this report focuses on mediation and family group conferencing.

Points of discussion about mandatory DR processes in child protection are based on information from the research literature and interviews with administrative and legal experts. Specifically, literature searches were conducted using Legal Trac, Psych Abstracts, and the Internet. Key search words and phrases included:

- Mediation
- Family group conferencing
- Family group decision-making
- Mandating
- Alternative dispute resolution
- Child protection, and
- Dependency mediation
No significant research was found that specifically focused on the issue of mandating DR in child protection.

In addition to a literature review, key administrative, legal, and policy experts as well as persons experienced in either mediation or family group conferencing were interviewed. These persons range over a number of specific jurisdictions identified in the terms of reference of this contract (including the U.S., New Zealand, Australia, and England). A framework of issues and questions asked are found in Appendix A. The key informants’ names, jurisdiction, and contacts are found in Appendix B. These interviews served many purposes: a) they solicited an up-to-date understanding of the DR processes in child protection for that jurisdiction; b) identified relevant and up-to-date legislation and policies; c) turned up grey literature and local evaluations; d) led to an understanding of the challenges and successes related to mandating DR processes; and, e) pointed the way to further referrals and contacts in other jurisdictions.

Based on these key informant interviews and information obtained from the research literature, program evaluations, statutes, policies, and web sites, this report presents separate analyses of the implications of mandating mediation and family group conferencing in child protection. Discussions of each of these analyses are provided. Limitations of the report are also discussed.

1.2 Definition of mandate

Legislation can be mandatory, enabling, a combination of both, or silent on DR requirements. Our review found two different types of mandating legislation. In one type, parties are mandated to attend the DR intervention, and there may be
legal consequences for not attending.\textsuperscript{1} In the other type, it is mandated that a particular intervention be offered, and that people have the right to attend if they so choose.\textsuperscript{2} Enabling legislation is generally supportive of a DR process and may or may not specify the specific DR activity, but importantly indicates that the activity “may be used” or is “encouraged” as opposed to “required.” Legislation that is both enabling and mandatory does not compel parties to attend, but does compel the existence, maintenance, and/or funding of DR programs. Court rules guide how mandatory and enabling legislation are carried out. A legislation that is silent on a DR process makes no mention of the process in the legislation.

DR programming in child protection may be mandated in one or more of three ways: legislation, procedure (policy), or good practice.\textsuperscript{3} Each of these approaches to mandating carry with them benefits and challenges in terms of program practice and implementation. Issues related to each of these approaches to mandating will be discussed throughout this report.

1.3 Background to Dependency Mediation and Family Group Conferencing in the U.S.

As mentioned above, based on the terms of reference of the contract, much of the review of programs is based on US jurisdictions. It is worth noting, therefore, the legislative context from which these programs are situated. In terms of some U.S. background, it appears that all states have been affected by, and have responded in varying degrees to, the federal Adoption and Safe Families Act (ASFA) of 1997. According to a recent Family Court Review publication, states were compelled by

\textsuperscript{1} Found in the area of dependency mediation practice.
\textsuperscript{2} Found in the area of family group conferencing.
\textsuperscript{3} This is a framework used by Mike Doolan (2004) and discussed later in this report. See Doolan, M. (2004). The family group conference: A mainstream approach in child welfare decision-making. Accessed from www.americanhumane.com
the ASFA to revisit their child welfare practices. The authors say that states have varied existing law or enacted new laws to meet the requirements of the ASFA. The federal government now monitors how each state is progressing toward meeting specific outcomes according to specific measures. These measures include the length of time a child spends in foster care; number of placements; number of kinship adoptions; re-abuse, etc., and each state must record and make public their data on these and other measures.

The authors go on to describe the growth of dependency mediation and family group conferencing in the U.S. as follows:

*Family Group Conferencing and dependency mediation have matured as plausible, realistic methods for merging the needs and interest of children and families and the protection concerns of public welfare agencies, the courts and the community. Formalized programs for Family Group Conferencing and dependency mediation are used by public child welfare agencies and the courts at various stages in the life of a case to encourage early case resolution and to promote full participation of the family members involved. Each has its unique components and characteristics. Variations of each have emerged as public child welfare agencies and courts strive to design processes that are consistent with public policy and practice. The processes can and do coexist in many jurisdictions.*

Although the ASFA does not speak directly to dependency mediation or family group conferencing, many U.S. states have developed those DR interventions as ways of meeting the federal requirements.

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5 See note 1, p. 217.
2.0 Three U. S. Jurisdictions Utilizing Dependency Mediation

Our review of the dependency mediation literature identified articles pertaining to the following U.S. states: California, Georgia, Florida, New Jersey, Alabama, Rhode Island, North Carolina, Wisconsin, Colorado, Ohio, Arkansas, and Oregon. Most of the 38 articles reviewed described dependency mediation programs in place in those states, but many did not refer to legislation. No articles were located that specifically discussed mandating dependency mediation, via legislation or otherwise, and our interviews with key people in the field confirmed that such literature does not yet exist. Much of the literature we did locate, however, gave numerous clues and insights into the level of mandate in various jurisdictions (e.g., legislation, policy, or practice), and with the assistance of our informants, we also located the specific pieces of dependency mediation legislation for jurisdictions that have enacted it.

We also conducted seven interviews with key people working in the area of dependency mediation throughout the U.S., and were able through them to locate relevant pieces of legislation and to have discussions about how and to what extent dependency mediation was mandated in their jurisdiction.

Three jurisdictions were chosen to present as case studies, based on points we thought were salient: first, we had enough information through the literature, interviews, and copies of pertinent legislation to speak to each; second, two of the three jurisdictions (California and Florida) have legislation that refers specifically to dependency mediation, while the third is silent in that regard; and on a final and related point, there are differences and contrasts among the three chosen jurisdictions that we thought would shed light on the issue of whether and how to mandate dependency mediation.
2.1 California

California is the reputed leader among the U.S. states in juvenile dependency mediation. The first juvenile dependency mediation program in the country was started in Los Angeles in 1983, and various State Legislature Bills passed since then have enabled the expansion to 22 similar programs in 22 of 58 counties. The first programs were funded by use of a birth certificate surcharge, but since 1998 program funding has been allocated through the Judicial Council Administrative Office of the Courts as part of trial court budgets. Growth of programs was also encouraged through a 1997 amendment to the California Welfare and Institution Code, which states:

Each juvenile court is encouraged to develop a dependency mediation program to provide a problem solving forum for all interested persons to develop a plan in the best interests of the child, emphasizing family preservation and strengthening.

In 1994 the California Juvenile Dependency Court Mediation Association (JDCMA) was founded. The JDCMA:

[c]oordinates statewide efforts to develop, support, and influence public policies that promote effective and accessible juvenile dependency mediation programs statewide.

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7 As above, p. 2
8 As above, p. 3
The association developed minimum uniform standards of practice for court-connected juvenile dependency mediation, which were adopted by the Judicial Council as Rule 1405.5.

Rule 1405.5 spells out detailed requirements for court-connected dependency mediation. According to this statute:

‘Dependency mediation’ is a confidential process conducted by specially trained, neutral third-party mediators who have no decision-making power. Dependency mediation provides a non-adversarial setting in which a mediator assists the parties in reaching a fully informed and mutually acceptable resolution that focuses on the child’s safety and best interest and the safety of all family members. Dependency mediation is concerned with any and all issues related to child protection.

The Rule addresses the responsibilities of local courts that have a dependency mediation program with regard to mediator training and standards of conduct, access to services, and issues of domestic violence. It also specifies that:

The dependency mediation process must be conducted in accordance with pertinent state laws, applicable rules of court, and local protocols. All local protocols must include the following:

(1) The process by which cases are sent to mediation, include:
   a. Who may request mediation;
   b. Who decides which cases are to be sent to mediation;

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10 As above, p. 1
c. Whether mediation is voluntary or mandatory;
d. How mediation appointments are scheduled; and
e. The consequences, if any, to a party who fails to participate in the mediation process.\textsuperscript{11}

Accordingly, each judicial district then decides whether or not to mandate dependency mediation, as in (c) above. The following description based on the referral process in Santa Clara County gives an example of how one judicial district interprets the state Rule.\textsuperscript{12}

In Santa Clara County, judicial officers (judges) act as gatekeepers to the process and either order cases to mediation based on their own judgement or at the request of a case participant.\textsuperscript{13} The referral may occur at any point during the history of the case, and any issue may be sent to mediation. Protocols are clear, however, that “it is never permissible to negotiate about whether or not child abuse, neglect, or domestic violence are acceptable behaviors,” although “(e)xploring the best ways of responding to these problems… is very appropriate subject matter for mediation.”\textsuperscript{14} According to Megan Orlando, Director of California Juvenile Dependency Mediation Services, mediators may also use discretion about whether both parties should attend mediation in cases involving domestic violence, or whether parties have the capacity to participate.\textsuperscript{15}

\textsuperscript{11} As above, p. 3.
\textsuperscript{13} The same level of mandate is found in Los Angeles County, according to a personal communication with Megan Orlando, Director of Juvenile Dependency Mediation Services.
\textsuperscript{14} See note 9, p. 51
\textsuperscript{15} Personal communication, Megan Orlando, Director, California Juvenile Dependency Court Mediation Association. June 2004.
Referral to mediation usually occurs during a court appearance, and once ordered, the parties, social worker, and attorneys are required to attend. Other participants may be invited, including domestic violence advocates, relatives, family friends, foster or adoptive parents, therapists, and so on. An appointment time is selected, participants are notified, and family members are provided a brochure by the court describing the mediation process. The judicial officer then reviews and immediately forwards selected documents to the dependency mediator(s).

According to a 2003 statewide evaluation of 19 out of 21 dependency mediation programs then in operation, judicial officers, attorneys, and social workers are allowed to request mediation, while most jurisdictions also give that right to parents. The court is empowered in 15 counties to order mediation over the objection of a party or a party’s attorney. Most programs allow anyone related to the case to attend the mediation.

In terms of point of referral for mediation, the study found that:

All jurisdictions refer cases at the 6-month and 12-month review hearings.
Eighteen of the 19 programs mediate cases at jurisdiction, disposition, the 18-month review, and the point of dismissal/exit orders.

Some programs also indicated that the mandating of individuals to attend mediation by court order was dependent on the particulars of the case and the issues being mediated.

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16 See note 10
17 As above, p. 6
The evaluation also reported high rates of agreement across all dependency mediation programs on case issues, high rates of placement with relatives, fewer contested review hearings, and a high rate of parent satisfaction with the court process. The report also refers to an earlier study of one jurisdiction in Colorado that showed a 13% reduction in juvenile dependency-related court costs.

Among the California districts evaluated in the report, 13 programs cited the lack of funding as a major challenge, while four of those 13 also reported a lack of referrals due to lack of support from key players such as judicial officers, attorneys, and Child Protective Services. These challenges were seen as critical to the future growth and success of the programs.

On a concluding note, our review indicates that California’s state legislation is enabling, and gives the various local jurisdictions authority to decide whether or not to mandate attendance. In our interview with Ms. Orlando, she indicated that she thought it was important that dependency mediation has a basis in legal codes.
2.2 Florida

Alternative dispute resolution has been in use in the state of Florida since 1975.\textsuperscript{18} A wide variety of court-connected mediation and arbitration programs currently operate throughout all 20 judicial circuits. In 1987, legislation authorized the creation of citizen dispute settlement centres and judicial referral of cases to family mediation programs. From that point, judges have had the authority to refer any civil matter to mediation or arbitration, unless it is subject to Supreme Court exceptions.

There are currently at least 23 dependency mediation programs in the state. Florida has enabling legislation that allows judges to require parties in child dependency cases to mediate:

\textit{In circuits in which a dependency or in need of services mediation program has been established, judges may refer to mediation all or any portion of a matter relating to dependency or to a child in need of services or a family in need of services.}\textsuperscript{19}

Judges in those judicial circuits that have dependency mediation programs may refer cases at any point in the process. Florida’s Supreme Court spells out rules of practice and procedure according to which mediation must be conducted, including rules of disclosure, mediator qualifications, fees, and so on.\textsuperscript{20}

\textsuperscript{18} Florida Dispute Resolution Center. \textit{Alternative dispute resolution}. Accessed 06/06/2004.
\textsuperscript{19} Chapter 44, Florida Statutes, section 44.102 (2)(c).
\textsuperscript{20} See note 1.
Although civil cases in Florida can also be referred to summary jury trial, non-binding and voluntary binding arbitration, in practice dependency cases are referred to mediation only.\textsuperscript{21}

With regard to the degree of mandate involved, the state’s legislation is silent on requiring the presence of parties; the only reference is to counsel, as follows:

\textit{The parties primarily conduct negotiations in dependency or in need of services mediation. Counsel for each party may attend the mediation conference and privately communicate with their clients. However, presence of counsel is not required and, in the discretion of the mediator and with the agreement of the parties, mediation may proceed in the absence of counsel unless otherwise ordered by the court.}\textsuperscript{22}

However, the following is an example of the exercise of the extent of mandate from the \textit{Rules of Court of Florida’s Fifth Judicial Circuit}:

\textit{The appearance of counsel who will try the case, and their clients (a management representative if a corporate party) with full authority to enter into a full and complete compromise and settlement is mandatory…}

\textit{The Court has the power to impose sanctions on all parties who do not attend the conference. The participants shall be prepared to spend as much time as is necessary to settle the case, or until an impasse is declared by the mediator.}\textsuperscript{23}

\textsuperscript{21} Personal communication, Sharon Press, Director, Administrative Office of the States Court, Dispute Resolution Centre, Tallahasee, Florida, June 2004.

\textsuperscript{22} Chapter 44, Florida Statutes, section 44.1011 (2)(e).

With regard to procedure, the *Rules from Florida’s Fifth Judicial Circuit* also stipulate that:

> All discussions, representation and statements made at the mediation conference shall be privileged as settlement negotiations, and nothing related to the conference shall be admitted as testimony at trial or subject to discovery procedures.24

In this jurisdiction, the attorney for the plaintiff is responsible for scheduling and coordinating the mediation; the *Rules* state that mediation conferences are not to be cancelled without immediate reschedule, except by court order.

Dependency mediators must be certified according to Florida’s *Rules for Juvenile Procedure*.25 According to the state legislation, a roster of mediators who have been certified by the Supreme Court is to be maintained by the chief judge of each judicial circuit. Dependency mediators must have completed a stipulated number of training hours with a certified program; have a master’s or doctoral degree in social work, mental health, behavioural sciences or social sciences, or be state licensed to practice medicine or law; have four years of experience working with family/dependence issues; and have observed and conducted a stipulated number of mediations.26 Mediators may be drawn from the private sector, work under contract with the court, and/or be associated with a mediation services program.

With regard to state funding for mediation and arbitration programs, the legislation authorizes each county to levy service charges on specified court

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24 As above
proceedings, and a percentage is forwarded to the state mediation and arbitration trust fund.

Unfortunately, no outcome evaluation could be located for dependency mediation in Florida, although anecdotal evidence suggests “considerable savings” associated with dependency mediation at this time.27

In summary, according to Sharon Press, Director of the Administrative Office of the States Court Dispute Resolution Centre in Florida, there is variability among Florida judges regarding which types of dependency cases will be referred to mediation, partly based on judges’ commitment to the use of mediation in general. Ms. Press recommended leaving legislation open enough to allow individual judges to mandate on a case by case basis, rather than imposing artificial, top-down standards on the referral process.28

2.3 Colorado

The practice of mediating child protection cases in Colorado began in 1985 at the Centre for Dispute Resolution in Denver.29 Trained mediators worked with parents and caseworkers to resolve differences involving child abuse or neglect, and to produce contracts involving treatment plans and agreements about family interaction. The Denver Child Protection Mediation Project was also founded in the mid-1980’s to facilitate interactions between clients and social services. It appears that the growth of dependency mediation programs in Colorado has been a response to the federal Adoption and Safe Families Act, in which courts are

26 As above
obligated to expedite the processing of dependency cases.\textsuperscript{30} No state law was identified dealing specifically with dependency mediation, although the \textit{Colorado Dispute Resolution Act} has been in effect since the early 1980’s.\textsuperscript{31} Although the Office of Colorado Dispute Resolution Services has provided dependency mediation services throughout Colorado, and legislation was enacted authorizing dependency mediation programs, funding for such services has been limited.

A 2000 evaluation in Colorado’s Fourth Judicial District reported that most cases that go to dependency mediation are court-ordered by the judge, although other parties may request mediation as well. Also in that district, all cases involving a request for trial time are automatically ordered into mediation. According to the report:

\begin{quote}
Judges and hearing officers in the Fourth Judicial District opted to send all cases requesting trial to mediation in order to realize the full efficacies of the process and encourage the child welfare community to become acquainted with mediation.\textsuperscript{32}
\end{quote}

An important point here is that there are jurisdictions, including Colorado, that utilize dependency mediation extensively in the absence of any legislated mandate to do so. Interviews with key informants in Rhode Island\textsuperscript{33} and

\begin{footnotes}
\item[31] Colorado Judicial Branch. \textit{Colorado Office of Dispute Resolution Services.}
\item[33] Personal communication, David Tassoni, Chief Prosecutor, Rhode Island Family Court, July 2004.
\end{footnotes}
Connecticut\textsuperscript{34} revealed that dependency mediation is widely used because of the high referral rate from the bench (almost 100\% of dependency cases are sent to mediation in Rhode Island). Further, in Connecticut, policy dictates that a sequence of DR interventions, including dependency mediation, be used at strategic points in the care and protection case.\textsuperscript{35} Further study would be required to understand the differences in outcome between those jurisdictions that mandate dependency mediation by legislation, and those that mandate by policy.

2.4 Discussion

A central conclusion drawn from our review of the U.S. literature and interviews with key people in the field is that there is no federal or state level, mandated requirement for parties involved in a dependency case to attend mediation. Changes to the federal \textit{Adoption and Safe Families Act} in 1997, which compelled courts to expedite the placement of children in need, appear to have provided an impetus for various states to develop and fund dependency mediation programs. Some of these initiatives are written into state legislation (for example, Florida and California). However, state legislation appears to be enabling rather than compelling, and the issues of whether and how to mandate mediation is left to the various local jurisdictions (that is, to judges in various jurisdictions) to decide. As seen with Florida, the \textit{Rules of the Fifth Judicial Circuit} push the issue of mandate by not only compelling attorneys and their clients to attend, but also compelling them to \textit{stay} with mediation until an agreement has been reached or the mediator declares an impasse.

\textsuperscript{34} Personal communication, Marilou Giovanucci, Manager of Court Operations, Superior Court, Connecticut Judicial Branch, July, 2004.

\textsuperscript{35} As above, Note 34.
In California, the Judicial Council of California adopted standards of practice for dependency mediation under a statewide Rule (1405.5), which compels local jurisdictions to develop protocols regarding whether or not dependency mediation is mandatory. This again leaves the decision of whether parties are compelled to attend in the hands of judges.

Interestingly, our interviews with Ms. Orlando in California and Ms. Press in Florida, both key figures with regard to dependency mediation in their respective states, produced two different opinions about mandating mediation in state legislation. Ms. Press was of the opinion that judges in local jurisdictions should have the authority to decide whether or not to compel parties to attend dependency mediation. She thought that state legislation would impose “artificial standards” that would interfere with good decision-making based on context at the local level.36

In contrast, Ms. Orlando in California was of the opinion that California’s state laws are not strong enough on the issue, and that the requirement to attend dependency mediation should be entrenched at the state level. Ms. Orlando believes there is too much variability between local jurisdictions, and would like to see dependency mediation brought into line with family law legislation in which cases must be sent to mediate.

Lastly, the picture in Colorado seems to be of a more “bottom up” approach to the provision of dependency mediation services. In Colorado and other states where the legislation is silent, dependency mediation is often widely used due to policy and/or referrals from judges who support it as an alternative to adversarial court proceedings.
3.0 Use of Family Group Conferencing in Child Protection

Our review of the literature and interviews with key informants indicate that Family Group Conferencing (FGC) is being used in numerous U.S. jurisdictions, including Oregon, Arizona, Texas, and Washington, as well as internationally in New Zealand, Australia, the Netherlands, and the U.K. For this report, we chose to look more closely at New Zealand and Oregon. These two jurisdictions have legislation that speaks to family group conferencing, and the literature indicated that other jurisdictions have modelled themselves after these.

3.1 New Zealand

New Zealand is the undisputed world leader in the use of Family Group Conferencing (FGC) in child welfare. The Children, Young Persons and their Families Act of 1989 arose out of what has been termed the “political and cultural revolution” amongst Maori people during the 1970’s and 80’s in New Zealand. An influential report in 1979 called “Daybreak – Puao te Ata Tu” brought to light serious concerns about the treatment of children by New Zealand’s child welfare system. Among concerns listed were the following:

- The centrality of the child in previous child welfare legislation was not in keeping with Maori understandings of family
- The welfare of the child could not be considered separate from the well being of the family, and the child could not be considered as belonging solely to the parents and not extended family.

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36 Personal communication, Sharon Press, July 2004
Large numbers of Maori children were ‘lost’ to extended family under the child welfare system

Placement of Maori children in the care of non-Maori families or in institutions raised concern about the cultural needs of the children.\textsuperscript{38}

The result of the report was the introduction of the \textit{Children, Young Persons and their Families Act}, which places emphasis on FGC as the central process for decision making in child welfare cases relating to care and protection of children. From November of 1989 on, “all children who were considered to be in need of care and/or protection were required legally to be referred for an FGC.”\textsuperscript{39}

The following quotes highlight the spirit of the \textit{Act}:

\begin{quote}
\textit{The Children, Young Persons and their Families Act 1989… emphasizes the importance of family and cultural identity in handling matters relating to the care of children. Our Act significantly proclaims the ideal that child welfare is primarily a private rather than a State concern.}
\end{quote}

\begin{quote}
\textit{The Act proposes a comprehensive set of services to support… family groups in all cultures in New Zealand to care for their own:}
\begin{itemize}
\item Services are to give recognition to the social, economic and cultural values of all groups; and
\item Have ‘particular regard to the values, culture and beliefs of Maori people’.\textsuperscript{40}
\end{itemize}
\end{quote}

And,

\begin{flushright}
\textsuperscript{38} As above, p. 1
\textsuperscript{39} Connolly, M. (under review). Up front and personal: Confronting dynamics in the family group conference. \textit{Family Process}.
\textsuperscript{40} As above, p. 2
\end{flushright}
There can be no doubt that the 1989 Act represents one of the most far-reaching reforms in child law for decades. No longer is the welfare of the child to be the central consideration but only one along with other factors which emphasise the unity and authority of the family. Instead of the state, including the courts, taking a dominant role in protecting children and making decisions affecting them, the initial and substantial role is to be given to the family itself (which)… is not to be narrowly defined.

The processes laid down in the Act swing the participants away from judicial resolution, away from social worker and professional strategies and towards the concept of the family group conference. This approach applies no matter what the child’s ethnic background – European as much as Maori or Pacific Island (Polynesian).41

Under the Act, a family group conference is defined as:

A meeting, convened by either a Care and Protection Coordinator (under s. 20) or a Youth Justice Coordinator (under ss. 270 and 281). These Coordinators are defined (ss. 423 and 425 respectively) as persons appointed by the Director-General of the Department of Social Welfare who ‘by reason of [their]… personality, training, and experience [are] suitably qualified to exercise or perform the functions, duties, and powers conferred or imposed.. by or under this Act.42

The Act also stipulates who is entitled to attend the FGC (anyone involved with the case or with the child in a very broadly defined sense), that the Coordinator

must provide relevant information and advice to the parties involved, and that
the Coordinator is obligated to ascertain the views of those unable to attend and
to make every effort to notify those who are entitled to attend. The Act goes on to
state that “a family group conference may regulate its procedure in such a manner as it
thinks fit”\textsuperscript{43}, and that the FGC “may make decisions and recommendations and
formulate plans.”\textsuperscript{44}

The role of the Coordinator as enshrined in legislation is key to the difference
between the FGC and other types of intervention strategies. For example, ‘family
meetings’, more similar in participation and process to mediation than to FGCs,
may be called early in the child protection case as a problem solving
mechanism\textsuperscript{45}, but because they are not called by an appropriate Coordinator they
do not carry the same statutory status and power.\textsuperscript{46}

Care and Protection Coordinators may receive reports from police, social
workers, or child welfare organizations that a child is in need of care and
protection. Such reports may be based on information provided by the public.
“Reasonable belief” is required for such reports, or must be based on the
Coordinator’s own belief that action is required. The Coordinator can then
convene a “mandatory” FGC, which means the Coordinator has a duty to call the
conference, but does not mean the family members are required to attend.

The \textit{Children, Young Persons and Their Families Act (1989)} is very clear in its
mandate for Coordinators to convene FGC’s. Sections 18, 20 and 21 of the \textit{Act}
specify that Coordinators are obligated to convene a FGC by fixing the date,
time, and place for the conference, to consult with family, ‘whanau’ (extended

\begin{footnotes}
\item[43] As above, s. 26.
\item[44] As above, s. 29.
\item[45] Personal communication, Marie Connolly, July 2004.
\end{footnotes}
family), or the family group, and to “give effect to the child’s or young person’s family, whanau, or family group in relation to those matters.”

The legislation mandates that administrative services be provided to the FGC, that the Director General is to “give effect to decisions, recommendations, and plans of family group conference,” and that “[p]olice are to comply with decisions, recommendations, and plans of family group conference.”

In sum, without actually mandating that families attend the FGC, the legislation provides a strong mandate for creating the context for the FGC to occur. This is in keeping with the philosophy of the Act, which emphasizes the ability and right of families to bear the burden of creating care plans for children in need.

A recent 2004 conference presentation by Sharon Pakura, Chief Social Worker of Child Youth and Family Services made the following observations about FGC in New Zealand:

- (T)he integration of family decision-making into the protection, care and youth justice processes has occurred and is producing significant, meaningful results.
- The Crown has recognized that there is more than one worldview…Maori are not one people but rather each expresses their identity in their kinship and tribal origins;
- Fewer children live outside the care of their extended family networks;
- Arrangements for protection and care have mostly been better;

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47 Children, Young Persons and Their Families Act, 1989, s. 21 (b)(iii).
48 As above, s. 27.
49 As above, s. 34.
50 As above, s.35.
• Family resolutions are practical, cost-effective and respect Maori and Pacific Peoples’ cultural norms;
• Provided family representation is wide enough, family decision-making is usually better than decisions by social workers alone. The fear that ‘dysfunctional’ families would use the law in dangerous and abusive ways have proved to be a myth;
• Courts and Police now support the process, which now forms a vital part in any judicial involvement in protection, care or youth justice matters.51

In her presentation, Ms. Pakura also spoke to the challenges New Zealand continues to face with regard to implementing FGC in child protection. The most significant challenge appears to be securing and protecting funding, not only for implementing the plans that emerge from FGCs, but also for families wanting to attend, many of whom are low income. As Ms. Pakura states:

All of our practice experience tells us that better plans emerge from family group conferences when family members attend in significant numbers… levels of attendance will be dependant on the availability of resources to assist families to travel and be away from work, sometimes for days on end. Our failure to recognise this and to ensure that funds for convening future conferences were protected and grew over time, has had a significant negative impact on the process.52

Another challenge has been to uphold the legislative intent to shift away from placing children with strangers, while working within a policy framework that was not designed for kinship care. It seems there has been a slide back toward the traditional bureaucracy-centred (as opposed to family-centred) approach,

about which Ms. Pakura states “The corruption of family empowerment philosophy into something that is organisationally and professionally more comfortable can happen almost without anyone being aware of it.”

This is akin to Marie Connolly’s notion of ‘ideological drift’. In our interview with Dr. Connolly, she talked about two sides of the issue of mandating the FGC in New Zealand. On one hand, there has been an observed tendency since FGC was mandated under legislation for it to “drift” away from the original ideology of family empowerment to become gradually more legalized and bureaucratized over the years. For example, some FGC Coordinators have difficulty allowing families time by themselves without interruption to work on their plan for the child, while others make a concerted effort to respect the spirit of the legislation in that regard. The location of FGCs has also shifted over the years—where originally FGCs were conducted in family’s homes or familiar and local settings, they are now more often conducted in government offices so social workers and FGCs can do other things like paper work while the family is deliberating by themselves.

Dr. Connolly also commented on the tendency for the FGC to become entrenched in a legal and professional paradigm, which is counter to its original intent. Because it is part of a legal process, the FGC tends to be saved until later in the child protection case process due to the required level of professional involvement, rather than being used creatively and flexibly. And lastly, Dr. Connolly stressed that FGC Coordinators need to be supported in working to

54 Dr. Connolly is the Director of Te Awatea Violence Research Centre, Department of Social Work at the University of Canterbury in Christchurch, New Zealand, and has followed the use of FGC under the Children, Young Persons and Their Families Act as a social worker and researcher for many years.
55 Personal communication, June, 2004.
uphold the philosophy of the legislation, through funding, ongoing training, and permission to be flexible. Otherwise, the FGC may gradually become yet another professional intervention strategy.

In spite of her observations and concerns about the impact that legislative mandating of FGC may have on the practice of child protection, Dr. Connolly nevertheless advocates mandating FGC in legislation. Without the requirement for social workers to participate FGC becomes underused as a strategy, as appears to happen in countries where it is not mandated in legislation.\[^{57}\] It is clear there is a paradox here, in that by mandating a strategy that was intended to shift power \textit{away} from professionals, the strategy is in danger of becoming, by virtue of the mandate, reified and professionalized. However, by not mandating, the supportive infrastructure is absent and the strategy is underused.

3.2 Oregon

Oregon has enabling legislation pertaining to “\textit{family decision-making meetings},” which can include FGCs. The legislation, enacted in 1997, states in section 417.368 that,

\begin{quote}
\textit{The State Office for Services to Children and Families shall consider the use of a family decision-making meeting in each case in which a child is placed in substitute care for more than 30 days.}\[^{58}\]
\end{quote}


\[^{57}\text{This may be the case in Sweden and the UK. See Connolly, M. (under review). Up front and personal: Confronting dynamics in the family group conference. \textit{Family Process}. This point was also made by Paul Nixon, Children Services Manager, Hampshire Social Services, England, July 2004.}\]

\[^{58}\text{The pertinent legislation is known as ORS (Oregon Revised Statutes) 417.365-417.375.}\]
Thus, the consideration of the use of the family decision-making meeting is mandated, although it is not required that a meeting be held, and neither are parties compelled to attend. Under the legislation, the family decision-making meeting is defined as follows:

As used in ORS 417.365-417.375, ‘family decision-making meeting’ means a family focused intervention facilitated by professional staff that is designed to build and strengthen the natural caregiving system for the child. Family decision-making meetings may include family group conferences, family unity meetings, family mediation or other professionally recognized interventions that include extended family and rely upon the family to make decisions about planning for its children.

As with New Zealand’s legislation, the statute also requires notification of family members (again broadly defined), and incorporation of the plan developed by a family meeting into the plan developed by the State Office for Services to Children and Families.

Family decision-making meetings grew out of the Family Unity Meetings (FUM) used in Oregon since 1990. The FUM was a model used to incorporate collaboration into the plan for the care and safety of children, and is currently used with all types of cases. A 1999 evaluation of family decision-making meetings in Oregon describes the difference between FGCs and the Oregon model as follows:

Family Group Conferences (FGCs) and Family Unity Meetings are similar in many respects. However, during FGCs, service providers are employed primarily to provide information to family members, who are then left alone for as long as it takes for the family group to decide on a plan for the care of the children… The
The format of Family Unity Meetings as implemented in Oregon, differs from that of FGCs in at least two important respects: service providers are present throughout the meeting, (in other words, the family group is not left alone to deliberate in private); and the FUMs are typically limited to two hours.\(^{59}\)

The authors also say that the FUM or family decision-making meeting model is “more conservative” than the FGC model used by New Zealand.

Anna Rockhill, research analyst with the Child Welfare Partnership Institute, Portland State University,\(^{60}\) who has studied the Oregon model extensively, described further the conservative nature of the Oregon legislation. Ms. Rockhill indicated that the Oregon model has come under criticism for not fully endorsing the FGC philosophy, primarily in terms of not giving enough decision-making power to families. Rather, the family decision-making meeting focuses on making good decisions efficiently, rather than empowering families to make decisions about the care of the child. Ms. Rockhill also said the funding for family decision-making in Oregon is targeted toward FUM meetings and not FGCs, and that the use of FGCs is declining in the state.

Thus, in Oregon, where the legislation mandates the consideration of a family decision-making meeting (which might include FGCs, Family Unity Meetings, or family mediation), child protection practice is primarily driven by policy (engineered by private donor funding) that mandates the practice of Family Unity Meetings (a family decision making meeting more similar to mediation than Family Group Conferencing).

Our review of the literature and interviews with key people in the child protection field indicate that New Zealand’s legislation of the use of FGCs is the most progressive and far reaching. Although no legislation, including New Zealand’s, actually mandates parties to attend a FGC, New Zealand’s goes farthest in mandating that the conditions exist for the FGC to occur and for the plans developed from it to be implemented.

The New Zealand legislation, with its emphasis on culture, kinship and family empowerment, is unique in that it articulates a revolutionary approach not only to the development of care and protection plans, but to child welfare as a whole. As such, there are tensions involving the power dynamic between the state and families that are still being worked through in New Zealand. The Oregon legislation, in contrast, is an example of legislation that promotes some aspects of FGC, while remaining within the traditional philosophical approach to child welfare. Rather than addressing issues of culture and power, the Oregon model attempts to incorporate the family’s views in the interest of efficient decision-making.

A final point about mandating family group conferencing pertains to how case workers’ practice is affected by particular nuances of mandated legislation. It is worth examining when and how FGC is introduced into the care and protection process. In South Australia, for example, a Family Care Meeting (FCM) (a meeting similar in participation and process to a FGC) is required by statute as soon as a social worker deems a child to be at risk.\textsuperscript{61} This approach uses the FCM not only as a way of avoiding court, but as an early intervention for the family. What happens in practice, however, is that social workers often rush the FCM,

\textsuperscript{60} Personal communication, July, 2004.
\textsuperscript{61} Personal communication, Donnie Martin, Senior Coordinator, Care and Protection Unit
or, in some instances, skip it altogether in the interest of making an application to the courts for a care order, which under the legislation cannot occur until an FCM has taken place.

As a result, according to our informant, there is a trend for FCMs in South Australia to become hurried in the interest of obtaining the authority of the courts, even though there is a requirement in legislation to convene them. This results in insincere efforts to involve the family. The point here is that case workers seem to seek out the authority of the courts to support their practise, often at the expense of conducting a thorough FCM. In the opinion of our Australian informant, legislation should include legal consequences of not doing a FCM to ensure compliance with the legislation.62

While the mandating of FCMs seems to influence the practise of the case workers in the South Australian system to hurry or bypass the FCM, this contrasts with how the legislative mandate affects FGC practice in New Zealand. Our key informant in New Zealand indicated that she believed the number of FGCs have dramatically declined in the 15 years since mandated legislation was introduced.63 In New Zealand, since the plan that emerges from the FGC is registered with the court and thus given legal weight, it is often used as a last resort intervention, and more expedient interventions are used before resorting to a FGC. Thus, FGCs are held later (if at all) in the care and protection process in the interests of avoiding the finality and high tariff of the legal process. This is in contrast with the South Australia practice where the FCM is as much an attempt at prevention for the family as it is a tool for producing a concrete care and protection plan. What seems to drive the practice in these two jurisdictions is not so much that FGC is mandated or not, but rather whether the FGC is registered


62 As above.
with the courts to give it a legal status. In New Zealand the workers seem to avoid the FGC because of the legalization, while in South Australia workers have been known to pay lip service to FCMs in the interest of reaching for legal authority.

4.0 Conclusions

Our review of the literature and our interviews revealed both similarities and differences between the implementation of dependency mediation and FGC. Mediation was originally developed as an alternative to the adversarial nature of court proceedings. This is similar to FGC in that the intention was to shift away from the professionalization of the development of care and protection plans for children. But while a place has been (more or less) successfully found for mediation to occur alongside the court system, the infrastructure required for FGC presents more of a challenge. The philosophy of FGC involves a shift in power away from social workers, other professionals, and the courts, and empowerment of families to make decisions regarding the care and protection of children. As a few authors have pointed out, FGC is not just an alternative DR strategy, but is a paradigm shift in the way child welfare is done, and as such challenges not only the skills of the protection workers involved but the delivery infrastructure as well.

Our review found two very different types of mandating legislation. In jurisdictions with mandating legislation where dependency mediation is used,\textsuperscript{64} parties are mandated to attend the mediation, and there may be legal consequences for not attending.\textsuperscript{65} In jurisdictions with mandating legislation

\textsuperscript{63} Personal communication, Marie Connolly, July 2004.  
\textsuperscript{64} For example, Florida’s Fifth Judicial Circuit Court  
\textsuperscript{65} Found in the area of dependency mediation practice.
where FGC is used, it is mandated that the FGC is offered, and people therefore have the right to attend if they so choose.

Our assessment is that when FGC is not mandated legislatively, it can become co-opted by traditional, bureaucracy-centred frameworks. This has also been a challenge where it is mandated legislatively (New Zealand), but at least there is active awareness of the issue. As one author states in the only article located that addressed issues of mandate (briefly but) explicitly,

*Social workers will not mainstream family group conference practice until there is an explicit mandate for them to do so. Where there is no legislative provision for a decision-making mechanism the methodology vacuum is filled by structures designed by bureaucrats. Child Protection Committees and Adoption and Fostering Panels are the prime decision-making models currently operating in England and Wales, for example, and these are professional decision-making constructs. Attempts have been made to include families in these processes, but the levels of participation are not encouraging.*

Although we cannot comment conclusively, it appears that the infrastructure required to support FGC may be more involved than the infrastructure required to support dependency mediation. The literature identified problems such as lack of funding for FGC programs, lack of ongoing training for social workers and FGC Coordinators in the philosophy of FGC, and the “ideological drift” that can occur when a new and innovative practice such as FGC becomes absorbed by traditional, entrenched child welfare practices. As such, our key informant in New Zealand (as well as those from other jurisdictions including South

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66 For example, New Zealand.
67 Found in the area of family group conferencing.
Australia, New South Wales, England, Oregon, Arizona, and Texas) believes FGC needs a legislative mandate to strengthen and support its use.

There are similar challenges for dependency mediation. Most outcome evaluations we reviewed cited the lack of funding as a major barrier to utilization of dependency mediation, regardless of whether enabling legislation existed (e.g., California) or not (e.g., Colorado).

There is an additional challenge that appears to be unique to FGC. Because FGC is not ordered by the courts but is instigated by social workers or Coordinators (who are often former social workers), there appears to be resistance to its implementation. Where FGC is not mandated by legislation, social workers who are not sympathetic to the intervention, for whatever reason, can simply not refer the family for a FGC, or can rush the process and not allow it due consideration. 69 This same dynamic does not appear to exist to the same extent in dependency mediation. There appears to be a consensus that both a legislative mandate and bottom-up support and incentive for front-line workers to administer FGC in child welfare is required to counter these obstacles and sustain the original intent and principles of programming.

No national or state legislation was located for either dependency mediation or FGC that required parties to actually attend. Legislation exists that requires FGCs to be coordinated and for all parties involved to be informed and invited, but families are not required by law to be present (e.g., New Zealand). Legislation also exists authorizing the development and funding of dependency mediation programs (e.g., Florida and California), but the issue of whether or not to mandate attendance at the mediation is decided at the local jurisdiction level.

Referrals to dependency mediation across the U.S. appear to be almost entirely left to judges, which means the case has come before the court. Mediation is then mandated by court order, but the extent of mandate is determined either by the judge on a case by case basis, or according to court rules where they have been developed. For example, some parties may or may not be required by the judge to attend, or sanctions may or may not be imposed for non-attendance, etc.

FGCs, in contrast, are not usually court ordered. In New Zealand, for example, the FGC Coordinator is invested with the authority to coordinate and convene a FGC as he or she sees fit under the guidelines of the legislation. In Oregon, however, a case worker can refer a case to a family decision-making meeting, but the worker is not invested with legislative powers.

Our review surfaced questions regarding the legislative mandate of DR, which would require further research to answer. For example, although we did locate and discuss a local jurisdiction (Fifth Circuit Court, Florida) that mandates attendance at dependency mediation, at this time we cannot comment on the difference that mandating makes to child protection outcomes. Does a legislative mandate make a difference in terms of the number of cases mediated or referred to FGC? Does it make a difference in terms of social worker compliance or resistance to using DR interventions? Does it affect parties’ willingness to resist or comply with the process and agreements? Does mandating (legislation or policy) contribute to sustainability of the particular DR practice over time? None of the evaluations located compared different jurisdictions with regard to the level of mandate involved nor did they provide any analysis of the implications of mandating DR in child protection.
In this sense, the report is limited. Due to the lack of literature on the topic of mandating DR interventions in child protection cases, research would be required for a full exploration of the difference level of mandate makes to outcomes in dependency mediation and FGC in child protection. The level of mandate in various jurisdictions would have to be compared, then a comparison of outcomes conducted. Very little research exists at this time evaluating FGC outcomes, and while there is extensive evaluation research on dependency mediation, no cross-jurisdiction comparisons were found except within the state of California.70

By way of conclusion, one article was located that addressed the issue of legislative mandate in child protection. The author is referring specifically to FGC, but his words reflect very well one side of the discussion regarding mandating DR in child protection in general:

There are three approaches to this issue of mandate:

1. Legislation – the principles of empowerment practice are enshrined in law, and there is procedural law to ensure these principles guide practice. The law conveys rights and obligations, powers and entitlements. Any action is subject to judicial review. The law, and not the professionals, sets the rules.

2. Procedure – the principles of empowerment are contained in guidance, and there is procedural requirement to act in certain ways. There are review mechanisms and failure to follow the procedure or apply the principles can be challenged.

3. Good Practice – the principles of empowerment practice are introduced to staff who are encouraged to work within a refocused practice paradigm. Professionals set the rules by and large, and control the gateway to this different practice approach. There is no appeal against a failure to apply the principles in day-to-day practice.

The good practice approach faces significant barriers. It takes years to make small inroads. It relies on enthusiasts maintaining their drive in the face of seemingly insurmountable odds. Of the three approaches to mandate, it is the most susceptible to reverses in support and right to resources when anything goes wrong… This suggests the legislative mandate as the favoured option and the one that is most likely to have the most pervasive and enduring effect.\textsuperscript{71}

The other side of the discussion was expressed by those interviewees who argued that mandating DR in child protection simply creates resistance among professionals. The issue is complex, involving variables such as philosophical and political orientations to child welfare, funding requirements, and support from key players such as the judiciary. More research would be helpful to clarify the issues involved.

\footnote{\textsuperscript{71} See note 67, pp. 6-7.}
Appendix A

Interview Questions

- What is the nature of the DR service provided: mediation, case conferencing, etc.? Who is involved, and what actually occurs? Are there limits to the scope of issues that may be addressed?
- Is the service mandatory? Is so, how?
- What event triggers the mandatory attendance at the service?
- Given that the service is mandatory, what are the provisions for exemptions? Are certain types of cases excluded from the service, and dealt with directly by court? How are cases assessed to determine whether they meet the criteria for the service?
- Who provides the service, e.g., employees of the court, employees of government agencies, private service providers under contract (to whom), etc.?
- How is the service funded? Are fees used?
- Where is the service located (court or community based)?
- Are there any special provisions for providing service to clients with access difficulties, i.e., in languages other than English, in remote or rural locations, etc.
- Have there been any evaluations of the service, and if so, what are the key findings? Is the program cost-effective?
### Appendix B

**Interview Names and Contact Information**

**Mediation**

<table>
<thead>
<tr>
<th>Name</th>
<th>Jurisdiction</th>
<th>Contact</th>
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<tr>
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**Family Group Conferencing**

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