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Entering the Debate on Spousal Abuse Divorce Mediation: Safely Managing Divorce Mediation When Domestic Violence is Discovered

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ENTERING THE DEBATE ON SPOUSAL ABUSE DIVORCE MEDIATION: SAFELY MANAGING DIVORCE MEDIATION WHEN DOMESTIC VIOLENCE IS DISCOVERED

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I. INTRODUCTION

Whether or not spousal abuse divorce matters should be mediated remains a hotly debated topic. Opponents argue that one should never mediate divorce matters when domestic violence is present. They state that the inherent power imbalance between the participants is insurmountable, and that informal mediation proceedings do less to ensure the safety of the abused party.¹ Proponents of mediation however, are reluctant to abandon mediation when spousal abuse is present, and argue that there is a role for mediation in spousal abuse divorce cases. For example, they state that many of the shortcomings of a drawn-out litigious process can be avoided by mediation.²

The difficulty with each of these views is that both presume that the mediator has detected the presence of domestic abuse prior to deciding to perform the mediation. However, this presumption cannot realistically be made because cases of spousal abuse divorce mediation are not always clear-cut. In fact, they are often more complicated. For example, the violence in the relationship may not be detected until midway through the mediation, leaving the mediator with the difficult choice of withdrawing or finding other means to continue with the mediation. Alternatively, the mediator may encounter a victim that reveals prior to mediation that there is domestic violence in the relationship, but feels that mediation is the best forum for her.

This paper utilizes hypothetical situations of two couples that fall into these complicated situations to illustrate how a mediator may proceed if he or she chooses to mediate a spousal abuse divorce case. The paper begins with a basic overview of mediation and domestic violence. It then identifies the opponent and proponent views with regard to whether spousal abuse divorce cases can be mediated. It next addresses the mediator's option to withdraw or continue the mediation. Should the mediator choose to withdraw from the mediation, the process ends. However, should the mediator choose to continue the mediation, he or she will need certain tools to ensure that the

¹ Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100(6) YALE L.J. 1545 (1991).

² Jessica Pearson, *Mediating When Domestic Violence Is a Factor: Policies and Practices in Court-Based Divorce Mediation Programs*, 14(4) MEDIATION QUARTERLY.321 (1997).

mediation will be effective. This paper concludes with suggestions of screening techniques and management techniques that may help the mediator directly and safely manage spousal abuse divorce cases.³

II. BRIEF OVERVIEW OF MEDIATION AND DOMESTIC VIOLENCE

A. Mediation

Mediation is a process in which disputing parties select a neutral third party to assist them in reaching a mutually satisfying agreement. The process is private, voluntary, informal and non-binding. The mediator has no power to impose a settlement. The function of the mediator is determined in part by the desires of the parties and in part by the attitude of the individual chosen to mediate. Some mediators propose settlement terms and attempt to persuade parties to make concessions. Other mediators work only with party-generated proposals and try to help parties realistically assess their options. At a minimum, most mediators will provide an environment in which the parties can communicate constructively with each other and assist the parties in overcoming obstacles to settlement.⁴ The mediator will help the parties analyze the issues in dispute, identify and express their needs, communicate their concerns, generate alternative solutions, and assist in the negotiation of a resolution.⁵

B. Domestic Violence

Domestic violence has been defined as "causing or attempting to cause bodily injury." However, this definition also includes additional forms of power and control, such as physical abuse,

³ It is important to note that throughout this paper, I will address the perpetrator as "he," and the victim as "she." This is because, of the spousal violence incidents reported in the National Crime Survey, women experienced over ten times as many incidents of violence than did men. *National Crime Survey*, as cited in the Erie County Domestic Violence Reference Guide, created by the State University at New York at Buffalo Domestic Violence Clinic Participants (1997).

⁴ Marguerite S. Millhauser, *ALTERNATIVE DISPUTE RESOLUTION: AN OVERVIEW OF BASIC PROCESSES* (1988).

⁵ D.B. Chandler, *Violence, Fear, and Communication: The Variable Impact of Domestic Violence on Mediation*, 7(4) *MEDIATION QUARTERLY* 331-346 generally (1990).

sexual abuse, economic abuse, emotional abuse, and psychological abuse. Therefore, it can be said that domestic violence is any act that causes the victim to do something that she does not want to do, prevents her from doing something she wants to do, or causes her to be intimidated and afraid.⁶

In domestic violence situations, there is a grave power imbalance. One person becomes the oppressor and the other the victim. This relationship may develop after several incidents of abuse, or after one isolated incident of abuse. With this said however, domestic violence is not usually an isolated incident, but rather a gradual development involving many incidents. Commonly, domestic abuse begins with the oppressor degrading the victim, causing her to believe that she is inferior. Once the victim's self esteem and self worth begins to diminish, the victim becomes isolated and more dependent upon the batterer. As the batterer gains control, more severe forms of abuse follow. The abuse operates in a cyclic fashion and becomes the central dynamic of the relationship.⁷

III. HYPOTHETICAL SITUATIONS

The following hypothetical situations, present cases of spousal abuse divorce mediation that tend to be more complicated. The first hypothetical presents a situation where violence in the relationship is not detected until midway through the mediation, leaving the mediator with the difficult choice of withdrawing or employing safety techniques and management techniques to continue with the mediation. The second hypothetical presents a situation where the mediator encounters a victim that admits from the onset that there is domestic violence in the relationship, but feels that mediation is the best forum for her to express her needs.⁸

⁶ *Erie County Domestic Violence Reference Guide*, created by the State University of New York at Buffalo Domestic Violence Clinic Participants (1997).

⁷ *Id.*

⁸ Throughout these hypothetical situations, I use different forms of domestic violence for the sole purpose of showing that all forms of domestic violence, whether it be physical, emotional, economic, psychological, or sexual abuse result in a power imbalance.

A. John & Jill

John and Jill arrive at your office and state that they would like a divorce and would like to mediate instead of litigate. John tells you that he and Jill want to retain control over the terms of the divorce. Jill acknowledges that she too wishes to mediate instead of litigate. You are a trained mediator, who has received additional training in domestic violence. You have each party fill out screening questionnaires. The questionnaires show no indication that domestic violence is a dynamic of this relationship. You proceed with the mediation. Half way through the mediation, you become concerned because Jill appears to be withdrawing. She gradually becomes more disengaged and you suspect that domestic violence may be involved. You decide to caucus with Jill and discover that John has been physically and emotionally abusive in the past. She indicates to you that she is afraid of how her husband will react should she disagree with him.

B. Sam & Sue

Sam and Sue arrive at your office and express that they would like a divorce and would like to mediate instead of litigate. Sam expresses to you that he and Sue have had a lucrative life together and have accumulated many financial assets, including a pension and stocks, which they would like to distribute themselves. You are a trained mediator who has completed special training in domestic violence. You have each party fill out a questionnaire. After receiving the questionnaires, you discover that Sue has indicated that her marriage to Sam has been emotionally and economically abusive. Sue has indicated on the questionnaire that Sam does not allow her to see his paycheck or any of the financial accounts. She also indicates that Sam makes her surrender her paycheck to him, stating that she is a frivolous spender. You then caucus with Sue who states that despite the abuse, mediation is the best forum for her to express her needs. She tells you that she would like to proceed with mediation.

IV. OPPONENTS TO DIVORCE MEDIATION WHEN SPOUSAL ABUSE EXISTS

It is often said that divorce mediation may not be the best tool for individuals who exhibit patterns of domestic violence in their relationship. Although not codified in any law in New York State, many opponents often state that it is their personal policy, as well as the policy of their particular community, not to mediate between couples who exhibit patterns of domestic violence. They argue that where one partner is the oppressor, and the other the victim, the goal of a mediated end is impossible. The reason for such thought is that the success of the process rests on the parties' willingness, despite their conflict, to reach a mutually acceptable agreement. In a victim-oppressor relationship, there is often uncertainty as to whether the victim's willingness to reach an agreement is genuine. They contend that without a genuine willingness to mediate on behalf of both parties, the process of mediation will break down and ultimately be rendered ineffective.⁹

Opponents to spousal abuse divorce mediation also argue that mediation puts battered women at great risk. They argue that it is best to err on the side of safety, and withdraw from the mediation upon discovering the presence of spousal abuse. In support of their argument, they commonly refer to statistics which indicate that the laws of at least twenty states restrict or prohibit mediation in cases of family violence.¹⁰

Women advocate groups also argue that mediation should not be used in cases where spousal abuse is present. They state that mediation is both inappropriate and damaging to the victim because of the lack of equality between the victim and the oppressor. They argue that it is the very nature of an abusive relationship that makes a fair, safe, or mutually acceptable settlement an

⁹ See generally, G.J. FRIEDMAN, A GUIDE TO DIVORCE MEDIATION 69-75 (Workman Publishing 1993).

¹⁰ Barbara Hart, *State Codes on Domestic Violence*, 37-38 (1990); Joan Zorza, *Protecting the Children in Custody: Disputes When One Parent Abuses the Other*, CLEARINGHOUSE REVIEW, Vol. 29, No. 12, Apr. 1996, 1113, 1121.

impossibility.¹¹ They argue that when domestic violence is present in a relationship, mediation only creates an “unfair, unproductive, and circular process,”¹² in which the abuser continues to manipulate the victim by forcing her to accept terms and conditions in fear of later repercussions.

Other opponents argue that divorce mediation is unnecessary because approximately ninety-percent of divorce cases settle. They argue that it is unnecessary to place the couple in a situation that renders the victim more susceptible to violence when the majority of the cases settle. They state that there are inherent risks in an intervention that allows a violent spouse to know the time and place that his partner will be present for mediation.¹³

Relating back to the hypothetical of John and Jill, opponents of spousal abuse divorce mediation would argue that once domestic violence was discovered, the mediation should stop. Opponents would argue that it is best to err on the side of safety, and allowing the mediation to go forward would only place Jill in a dangerous situation and increase her susceptibility to violence. They would also argue that Jill’s obvious apprehension to the process only negates the goal of mediation. In other words, if Jill is not a willing party to the mediation, any agreement reached would not genuinely reflect her needs.

As to Sam and Sue, opponents to spousal abuse divorce mediation would recommend that the mediator choose not to mediate. They would point out that a victim-oppressor pattern has been acknowledged, thereby rendering it impossible to reach a mediated end. Opponents would state that the very nature of a victim-oppressor relationship only excites the circular process in which the abuser continues to manipulate the victim.

¹¹ Grillo, *supra*, note 2; Barbara Hart, *Gentle Jeopardy: The Further Endangerment of Battered Women and Children in Custody Mediation*, 7(4) *MEDIATION QUATLERY* 317 (1990).

¹² Zorza, *supra*, note 12 at 1121.

¹³ Pearson, *supra*, note 3.

**V. PROPONENTS OF DIVORCE MEDIATION
WHEN SPOUSAL ABUSE EXISTS**

Mediation proponents are hesitant to dismiss the process outright and argue that there is a role for mediation in domestic abuse cases.¹⁴ They argue that mediation, as an alternative to litigation, is desirable in many respects. For example, proponents argue that the judicial system can escalate and prolong the conflict between the parties, ultimately increasing the level of danger for the victim.¹⁵

In litigation, the parties are often encouraged to adopt extreme positions in negotiations or portray the other party in the least favorable light in court documents.¹⁶ This can pose a grave danger for the victim, especially in New York, where she must prove fault grounds in order to obtain a divorce. For example, should the victim pursue a divorce on grounds of cruel and inhuman treatment, she may find herself in danger when the perpetrator receives a complaint alleging violence.

Proponents also argue that mediation is quicker and cheaper. A few studies comparing mediated custody and divorce settlements and those outcomes obtained through the adversarial process, have failed to find that the agreements were disadvantageous to women using mediation. In fact, these studies use selected findings that indicate that the cost was significantly less.¹⁷

Taking a stance against women advocates, proponents of divorce mediation are quick to point out that women in custody and divorce mediation have reported that mediation has enabled them to

¹⁴ See generally, Joshua D. Rosenberg, *In Defense of Mediation*, 33 ARIZONA L.Rev. 467,468 (1991), as cited in J. Pearson supra.

¹⁵ Janet R. Johnston & Linda E. G. Campbell, *IMPASSES OF DIVORCE: THE DYNAMICS AND RESOLUTION OF FAMILY CONFLICT*, (New York Free Press 1988), as cited in J. Pearson supra.

¹⁶ Pearson, supra, note 3, at 321.

¹⁷ R. Emery, S. Matthews, and M. Wyer, *Child Custody Mediation and Litigation: Further Evidence on the Differing Views of Mothers and Fathers*, 59 JOURNAL OF CONSULTING AND CLINICAL PSYCHOLOGY 415 (1991)- as cited in J.B. Kelly supra. p.86.

have a voice and express their views. They use reports which illustrate that women feel they have an equal influence over the terms of the agreement.¹⁸ Many proponents argue that mediation permits a more thorough airing of problems, and produces high levels of client satisfaction on custody and visitation issues.¹⁹

Proponents have further used studies to argue that there is a higher compliance and higher perceived fairness in mediated outcomes compared to litigated outcomes. They state that the parties themselves know best what they and their children need, so settlements are more comprehensive and realistic, resulting in less post-divorce conflict and relitigation.²⁰

Relating back to John and Jill, proponents would argue that there is a role for spousal abuse divorce mediation in this particular situation. They would argue that mediation would be safer for Jill. Proponents would state that with mediation, Jill will avoid the negative aspects of a complaint. For example, should Jill file a complaint alleging cruel and inhuman treatment, she may face severe repercussions outside of the mediation. John may become enraged at the allegations in the complaint and lash out at her. In mediation, Jill will be able to avoid the complaint and by extension, the allegations of domestic abuse.

With regard to Sue, proponents to spousal abuse divorce mediation would argue that mediation would be wise for Sue because she will have an opportunity to express her needs and express her views. She would be afforded a forum where she can have equal influence over the terms of the agreement. Proponents would argue that mediation would give Sue a greater sense of satisfaction than litigation in that she will be able to thoroughly air her problems, while having her safety closely monitored.

¹⁸ J. Kelly, *Power Imbalance in Divorce and Interpersonal Mediation: Assessment and Intervention*, 13(2) *MEDIATION QUARTERLY* 85 (1995).

¹⁹ Chandler, *supra*, note 6 at 331-346 generally.

²⁰ *Id.*

VI. SCREENING TECHNIQUES

When mediation is properly managed, it may minimize the danger that the victim is placed in. However, the mediator must have special skills and must employ techniques to manage the complex dynamic of spousal abuse. This section provides three suggested techniques to be used by a mediator in his or her quest to reveal potential abuse. Each subsection operates under the assumption that the mediator has engaged in domestic violence training, and that each party has retained separate counsel prior to mediation.

A. *Screening Using Questionnaires*

When couples first enter the mediation office for an initial interview, the mediator should have them complete a questionnaire. Within this questionnaire, there should be questions that ask if there is abuse in the relationship.²¹ In general, the questions should focus on three issues: presence of abuse, fear of abuse, and ability to communicate equally.²² The questionnaire should be completed separately by each party and not revealed to the other spouse.²³

One thing to remain aware of is that disclosures of domestic violence may vary according to how questions are worded in the questionnaires. Relatively few people acknowledge domestic violence, but when they are asked explicitly, many may report experiencing specific incidents of abuse. Questions on temporary restraining orders, for example, may also suggest that there has been domestic violence in the relationship.²⁴

²¹ Erickson and McKnight use the following basic question to determine whether domestic violence is a dynamic of the relationship: *Was abuse present in the marriage relationship?*
__ Yes __ No Type: __ Physical __ Emotional __ Chemical __ Other. S.K. Erickson, M.S. McKnight, *Mediating Spousal Abuse Divorces*, 7(4) *MEDIATION QUARTERLY* 381 (1990).

²² Chandler, *supra*, note 6, at 336.

²³ Erickson, *supra*, note 25, at 379.

²⁴ Pearson, *supra*, note 6 at 325.

Some mediators may prefer using telephone intake screening questionnaires. This is a good technique for mediators who have predetermined that they will not take divorce matters where domestic violence is involved. It saves both the time of the mediator, as well as the parties to the mediation, by eliminating the trip into the office for an initial interview.

Over the telephone, each woman who is involved in a potential divorce mediation should be asked several domestic-violence screening questions. It is important to be particularly precise and creative with the questions you ask over the telephone, because unlike in-person contact, the mediator is unable to read the individual's body language over the telephone. For example, the following questions give a general outline of the basic questions that should be asked:

1. Would you tell me if you have been physically abused by your spouse during your relationship?
2. If yes, when was the last incident?
3. Do you have any reason to fear physical abuse from your spouse at this time?
4. Do you have any kind of restraining order?
5. Do you feel that as a result of the abuse you are less able to communicate with your husband on an equal basis?²⁵

B. Screening Using Caucusing

Another method that is wise to employ to uncover spousal abuse is caucusing. Caucusing is the process by which the mediator meets with each spouse outside the presence of the other spouse. During this separate meeting, the mediator may describe an observation that he or she had while meeting together with the couple. For example, the mediator in John and Jill's scenario may ask Jill:

Jill, I have noticed that you have been withdrawn lately and have had difficulty speaking for yourself, or in saying clearly what your needs are. John seems to have control in this

²⁵ Chandler, *supra*, note 6 at 336.

mediation. Does he exhibit control in your marriage? Has he ever physically or emotionally abused you in the past?²⁶

It is through caucusing that the mediator can recognize the true dynamic of the relationship, and take measures to ensure that the victim is safe and that the mediation, should it continue, be effective.²⁷

C. Screening Using Non-Verbal Cues

Mediators should also rely on nonverbal cues and other body language for evidence of intimidation and gross power disparities.²⁸ For example, an indicator of abuse may be recognized when the abuser is angry and speaks mostly about the other spouse; saying little about himself and giving the impression that his spouse is the entire problem. Another indicator may be when the victim speaks in low and measured tones, taking great pains not to openly disagree with her spouse. When the couple fights over who should move out of the house, and the abuser says that if the victim wants to leave, she should be the one to move out of the house, may indicate that abuse is involved. For example, if any attempt to discuss the abuser moving out is met with great resistance and anger, the mediator should question the presence of domestic violence.²⁹

Another indicator is when the victim appears to have difficulty expressing her needs, and repeatedly masks comments about the past by saying that things have been difficult, but never openly indicates that there has been physical or emotional abuse. If the mediator observes controlling behavior on the part of the suspected abuser, he or she should probe deeper into domestic violence. For example, if the controlling spouse is the one who has managed the finances of himself and his wife refusing the wife any access to the financial accounts, or the wife indicates that she has

²⁶ Erickson, *supra*, note 25 at 381.

²⁷ *Id.* at 383.

²⁸ Pearson, *supra*, note 3 at 326.

²⁹ Erickson, *supra*, note 25, at 377-388 generally.

not hired an attorney because she does not have any money, the mediator should probe deeper into the possible presence of domestic violence. Lastly, a key indicator that domestic violence may be present is when the body language of the abused spouse indicates fear and tension, and she is unable to have direct eye contact with the abusive spouse.³⁰

It may be argued that these indicators are common in divorce mediation where spousal abuse is not a factor. However, when some or all of the factors are present, the mediator should inquire further about possible domestic violence. For instance, the mediator in Jill's hypothetical should have recognized that Jill was having trouble expressing her needs, and probed further into whether domestic violence was a dynamic of the relationship.

VII. MANAGEMENT TECHNIQUES

A. *To Withdraw or to Continue?*

The mediator has two choices upon discovering that spousal abuse exists amongst the parties.

First, the mediator can withdraw from the mediation. Should the mediator choose to withdraw, the mediation process will end. Second, the mediator can continue with the mediation. Should the mediator choose to continue the mediation, he or she will need to employ certain management techniques to ensure that the mediation will be effective.

Should a mediator choose to continue, it must be recognized that there are situations where mediation is always inappropriate. For example, mediation will not work if the abused spouse openly acknowledges that her consent is a result of pleasing her oppressor. Mediation can only work when both parties are equally willing to participate in the process. It is imperative that the mediator be aware of the situation where the victims' commitment to the process seems shaky, yet she persists on mediating.

³⁰ Id. at 377-388 generally.

The mediator should also be aware that mediation will never work when the oppressor discounts everything the victim says and does, and refuses to acknowledge her worth, even after the mediator has discussed how his behavior affects her. The mediator should recognize that mediation is inappropriate if the abuse is occurring at the time of the sessions, and the husband continually refuses to respect the safety boundaries. Mediation is not appropriate when the parties insist on carrying weapons, or are under the influence of chemical substances. Lastly, mediation is never appropriate when either party violates the rules that are set out at the beginning of the mediation, and refuses to acknowledge the violation as a problem.³¹

B. Examples of Management Techniques Using Hypothetical Situations

Once a mediator has determined that it is safe to continue with the mediation, he or she should employ certain techniques to ensure that the mediation is effective. Before beginning the discussion however, it is first necessary to note that both parties should be required to hire separate counsel prior to the commencement of mediation. The victim should be urged to hire an attorney who understands the mediation process as well as spousal abuse. This will have the effect of giving the mediator another professional who will assist him or her in managing the case, and assist the victim in obtaining a protection order should one be necessary. If appropriate, the mediator may also suggest that the victim have an advocate with her in the mediation session for support.³²

i. Hypothetical #1

As we saw with John and Jill, the mediator may encounter a situation where domestic violence in the form of emotional abuse is present. Here, the trained mediator may recognize that Jill is failing to assert her needs, showing a fear of conflict, or acceding to John's demands. In this mediation, the mediator should concentrate on drawing out Jill's interests and proposals. Once she

³¹ Id.

³² Id.

expresses her interests and proposals, the mediator should present the same to John. For example, he or she may say: "John, what are your thoughts about Jill's idea? How would that work for you? Do you have any suggestions or ideas?"³³

Should Jill fail to express her interests and proposals, the mediator should caucus separately with Jill to bring her ideas and proposals to the forefront. Should John make suggestions which so obviously prejudice Jill, the mediator should get him to convert his dominance into mutual problem solving. For example, the mediator should respond to John's unfair suggestion in the following manner: "Show us how your proposal would work for both you and Jill."³⁴

ii. Hypothetical #2

As we saw with Sam and Sue, the mediator may encounter a mediation where domestic violence in the form of economic abuse is present. For example, a trained mediator will recognize this form of domestic violence upon discovering that Sam has control over the couple's financial resources including money, bank accounts, stock, etc. Should this be the case, a definite power imbalance will be present, and mediation without employing management techniques will be ineffective.

With economic abuse, it can be anticipated that Sam and Sue will have different levels of knowledge when it comes to accounts, pensions, stocks, etc. Typically, the oppressive partner isolates the victim partner in a manner which renders her totally uneducated. Therefore, once the trained mediator detects economic abuse, he or she should provide education for both parties to ensure that an equitable decision is made. Depending upon the severity of the abuse, the mediator may choose to educate the parties by bringing in an expert to speak with both parties, or by referring each party to an individual expert or to a body of literature which will explain the area of dispute.³⁵

³³ J.B. Kelly, *Power Imbalance in Divorce and Interpersonal Mediation: Assessment and Intervention*, 13(2) MEDIATION QUARTERLY 90 (1995).

³⁴ *Id.* at 91.

³⁵ *Id.* at 93.

Regardless of which method the mediator chooses, Sue will need to be educated about Sam's pension and stock values before agreeing to a set distribution of the property.

VIII. CONCLUSION

Whether or not spousal abuse divorce mediation is wise will continue to be actively debated. Opponents will argue that it is best to err on the side of safety, while proponents will argue the many benefits of mediation as a whole. Accepting that this debate will continue, this paper has proposed measures to be taken by the mediator should he or she choose to mediate spousal abuse divorce cases. These measures include employing adequate screening techniques to do premediation inquiries for domestic violence, as well as management techniques that a mediator should use to preserve the safety of the victim and the sanctity of the mediation process as a whole.

Given the statistics of domestic violence, and the growing use of mediation, some spousal abuse divorce mediation may be inevitable. Given this inevitability, the mediator must use thorough screening techniques to ensure that domestic violence is revealed. Once domestic violence is revealed and the mediator chooses to proceed with the mediation, he or she must use management techniques to ensure that the mediation is effective and the victim safe.