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Yes, No, and Maybe: Informed Decision Making About Divorce Mediation in the Presence of Domestic Violence

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Yes, No, and Maybe: Informed Decision Making About Divorce Mediation in the Presence of Domestic Violence

Abstract
Divorce mediation in the context of domestic violence is one of the most controversial issues in family law today. Some believe that mediation is never appropriate when domestic violence has taken place, and others believe that it is always appropriate and should be mandatory. These views can be reconciled by taking a third approach, that mediation is sometimes appropriate but that this decision must be made on a case-by-case basis in consultation with the abuse survivor. The central premise of this article is that victims of domestic violence should have the opportunity to make an informed choice about which divorce process - mediated or adversarial - will best meet the needs of their families. Because families are different and because both adversarial and mediated proceedings vary in quality and accessibility, decisions about what process to use must be made on an individual basis in light of the real, not theoretical, options available to the family. The article uses social science research to (1) establish that families experience different types of violence and consequently differ from each other in ways that are significant for choosing a divorce process; (2) provide objective information on how mediation and the adversarial process compare in terms of overall effectiveness, satisfaction rates, and compliance with agreements or orders; and (3) evaluate the extent to which commentators' fears about mediation and domestic violence have been substantiated. The article analyzes this information and suggests factors, both individual and systemic, to be considered in choosing a divorce process. Finally, the article discusses specific practice safeguards and makes recommendations for future change.

Keywords
domestic violence, domestic abuse, family violence, mediation, types of domestic violence, adversarial system, adversarial divorce, informed choice

Disciplines
Family Law

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YES, NO, AND MAYBE: INFORMED DECISION MAKING ABOUT DIVORCE MEDIATION IN THE PRESENCE OF DOMESTIC VIOLENCE

NANCY VER STEEGH*

TABLE OF CONTENTS

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HeinOnline -- 9 Wm. & Mary J. Women & L. 145 2002-2003

HeinOnline -- 9 Wm. & Mary J. Women & L. 146 2002-2003

I. INTRODUCTION

All happy families are like one another; each unhappy family is unhappy in its own way.[1]

Divorce mediation in the context of domestic violence is one of the most controversial issues in family law today. Some believe that mediation is *never* appropriate when domestic violence has taken place, and others believe that it is *always* appropriate and should be mandatory.[2] These views can be reconciled by taking a third approach, that mediation is *sometimes* appropriate but that this decision must be made on a case-by-case basis in consultation with the abuse survivor.

The central premise of this article is that victims of domestic violence should have the opportunity to make an informed choice about which divorce process – mediated or adversarial – will best meet the needs of their families. Because families are different and because both adversarial and mediated proceedings vary in quality and accessibility, decisions about what process to use must be made on an individual basis in light of the real, not theoretical, options available to the family. The article uses social science research to (1) establish that families experience different types of violence and consequently differ from each other in ways that are significant for choosing a divorce process; (2) provide objective information on how mediation and the adversarial process compare in terms of overall effectiveness, satisfaction rates, and compliance with agreements or orders; and (3) evaluate the extent to which commentators' fears about mediation and domestic violence have been substantiated. The article analyzes this information and suggests factors, both individual and systemic, to be considered in choosing a divorce process. Finally, the article discusses specific practice safeguards and makes recommendations for future change.

Part II of this article outlines prevalent theories about the dynamics of violent relationships and discusses the implications of these theories with respect to choosing a divorce process. Part III focuses on the overarching goal of successful divorce as defined by social scientists. Part IV analyzes common concerns about the

1. LEO TOLSTOY, ANNA KARENINA 17 (1961).

2. *Compare* Carrie-Anne Tondo, et al., *Mediation Trends*, 39 FAM. CT. REV. 431 (2001) (arguing that mediation is never appropriate), *with* Penelope E. Bryan, *Reclaiming Professionalism: The Lawyer's Role in Divorce Mediation*, 28 FAM. L. Q. 177, 203-05 (1994) (arguing that mediation is always appropriate) [hereinafter *Reclaiming Professionalism*].

HeinOnline -- 9 Wm. & Mary J. Women & L. 147 2002-2003

impact of the adversary process on families involved in divorce proceedings. Part V is an overview of the mediation process, and Part VI examines concerns about its use when domestic violence has taken place during the marriage. Part VII suggests safeguards that can be put into place if mediation is undertaken, and Part VII concludes with recommendations for reforming the decision making process so that victims of domestic abuse are able to make intelligent, informed choices about the use of mediation in the divorce process.

II. THE DYNAMICS OF VIOLENT RELATIONSHIPS

A. *History*

Although awareness of domestic violence has increased over the last fifty years, the problem is hardly a new one. Domestic violence has been documented as far back as Ancient Rome[3] and continues to the present day. Prior to the 1870s, physical "chastisement" of a wife was seen as a husband's legal prerogative in the exercise of his property rights.[4] Though this behavior is now illegal, our society remains ambivalent about intervening in family matters.[5]

B. *Statistics*

Domestic violence occurs frequently and persistently in our society. Nearly one-third of women will be physically assaulted by an intimate partner sometime during adulthood.[6] Ongoing violence takes place in at least 25% of American homes.[7]

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3. Kathleen O'Connell Corcoran & James C. Melamed, *From Coercion to Empowerment: Spousal Abuse and Mediation*, 7 MEDIATION Q. 303, 304 (1990); Michelle J. Nolder, *The Domestic Violence Dilemma: Private Action in Ancient Rome and America*, 81 B.U. L. REV. 1119, 1120 (2001).

4. *See* Mary E. Asmus et al., *Prosecuting Domestic Abuse Cases in Duluth: Developing Effective Prosecution Strategies from Understanding the Dynamics of Abusive Relationships*, 15 HAMLINE L. REV. 115, 116 (1991); Corcoran & Melamed, *supra* note 3, at 304.

5. Lynne R. Kurtz, *Protecting New York's Children: An Argument for the Creation of a Rebuttable Presumption Against Awarding a Spouse Abuser Custody of a Child*, 60 ALB. L. REV. 1345, 1360 (1997).

6. ABA Network, ABA Commission on Domestic Violence, *Statistics* (citing BUREAU OF JUSTICE STATISTICS SELECTED FINDINGS: VIOLENCE BETWEEN INTIMATES 2 (1994)), *available at* http://www.abanet.org/domviol/stats.html.

7. LENORE E. WALKER, THE BATTERED WOMAN 20 (1979); Asmus et al., *supra* note 4, at 120-21.

HeinOnline -- 9 Wm. & Mary J. Women & L. 148 2002-2003

Ninety to ninety-five percent of domestic abuse victims are women[8] and women are ten times more likely to be abused by an intimate partner than are men.[9] Women of all races are victimized equally,[10] although women who are young, ages 19-29,[11] and poor[12] are more likely to be abused.[13] Consistent with the finding that younger women experience more violence, researchers have estimated that one-third of girls younger than twenty have been or will be subjected to dating violence before reaching adulthood.[14]

Abuse is likely to start or escalate during pregnancy.[15] Fifty percent of abusive men batter their partners during pregnancy and this results in a fourfold increase in the likelihood of low birth weights for the children of these women.[16] In light of this prenatal child abuse, it is not surprising that men who abuse their wives also abuse their children. About half of the children growing up in violent homes are also physically abused by the batterer.[17]

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8. NEIL S. JACOBSON & JOHN M. GOTTMAN, WHEN MEN BATTER WOMEN: NEW INSIGHTS INTO ENDING ABUSIVE RELATIONSHIPS 34 (1998); ABA Network, *supra* note 6 (citing AMERICAN PSYCHOLOGICAL ASSOCIATION, VIOLENCE AND THE FAMILY: REPORT OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION PRESIDENTIAL TASK FORCE ON VIOLENCE AND THE FAMILY, 10 (1996)); Sheila Murphy, *Guardians Ad Litem: The Guardian Angels of Our Children in Domestic Violence Court*, 30 LOY. U. CHI. L.J. 281, 289 (1999). Because of these statistics, this article will refer to the victim as being a woman.

9. ABA Network, *supra* note 6 (citing BUREAU OF JUSTICE STATISTICS SELECTED FINDINGS: VIOLENCE BETWEEN INTIMATES 2 (1994)); ABA Commission on Domestic Violence, *Multidisciplinary Responses to Domestic Violence*, *available at* http://www.abanet.org/domviol/mrdv/facts.html.

10. ABA Network, *supra* note 6 (citing BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: VIOLENCE AGAINST WOMEN: ESTIMATES FROM THE REDESIGNED SURVEY 3 (1995)); WALKER, *supra* note 7, at 21.

11. ABA Network, *supra* note 6 (citing BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: VIOLENCE AGAINST WOMEN: ESTIMATES FROM THE REDESIGNED SURVEY 4 (1995)).

12. *Id.* (citing JODY RAPHAEL & RICHARD M. TOLMAN, TRAPPED BY POVERTY, TRAPPED BY ABUSE: NEW EVIDENCE DOCUMENTING THE RELATIONSHIP BETWEEN DOMESTIC VIOLENCE AND WELFARE 21 (1997), *available at* http://www.ssw.umich.edu/trapped/pubs.html).

13. Richard J. Gelles, *Domestic Violence Factoids*, Minnesota Center Against Violence and Abuse, *available at* http://www.mincava.umn.edu/papers/factoid.htm.

14. Kathryn E. Suarez, *Teenage Dating Violence: The Need for Expanded Awareness and Legislation*, 82 CAL. L. REV. 423, 426 (1994) (citing Sheila J. Kuehl, *Legal Remedies for Teen Dating Violence*, *in* DATING VIOLENCE: YOUNG WOMEN IN DANGER 209 (Barrie Levy ed., 1991)).

15. LENORE E. WALKER, TERRIFYING LOVE: WHY BATTERED WOMEN KILL AND HOW SOCIETY RESPONDS 136 (1989); Naomi R. Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VAND. L. REV. 1041, 1047 (1991).

16. HOWARD DAVIDSON, THE IMPACT OF DOMESTIC VIOLENCE ON CHILDREN, A REPORT TO THE PRESIDENT OF THE AMERICAN BAR ASSOCIATION 1 (1994).

17. JEFFREY L. EDLESON, THE OVERLAP BETWEEN CHILD MALTREATMENT AND WOMAN ABUSE 2 (1999), *available at* http://www.vaw.umn.edu/finaldocuments/Vawnet/overlap.pdf; N. Zoe Hilton, *Introduction*, *in* LEGAL RESPONSES TO WIFE ASSAULT: CURRENT TRENDS AND EVALUATION, 15 (N. Zoe Hilton ed., 1993) (citing *Ten Facts About Violence Against Women: Hearing on Women and Violence Before the Senate Comm. on the Judiciary*, 101st Cong. 78

HeinOnline -- 9 Wm. & Mary J. Women & L. 149 2002-2003

The remaining children, who are not themselves physically hurt, suffer the traumatic effects of witnessing their mother's assault.[18] These children are more likely to run away, use drugs and alcohol, and attempt suicide.[19] Boys who grow up in violent homes are twice as likely to become batterers themselves.[20] Children are more likely to be concurrently abused in cases where the spousal abuse has been especially severe.[21] In extreme cases, the batterer may abduct the child[22] or murder the mother and/or the child.[23]

Unfortunately, even if the woman decides to leave the batterer, this does not mean that the abuse will end. In fact, separation may trigger abuse even if abuse has not previously occurred in the relationship.[24] When there has been a pattern of abuse, the woman is in particular danger because the violence is likely to escalate upon separation.[25]

(1990)); Marjory D. Fields, *The Impact of Spouse Abuse on Children and Its Relevance in Custody and Visitation Decisions in New York State*, 3 CORNELL J.L. & PUB. POL'Y 224 (1994) (citing Evan Stark & Anne H. Flitcraft, *Women and Children at Risk: A Feminist Perspective on Child Abuse*, 18 INT'L J. HEALTH SERVS. 97, 106 (1988)); Susan Schechter & Jeffrey L. Edleson, *In the Best Interests of Women and Children: A Call for Collaboration Between Child Welfare and Domestic Violence Constituencies*, 386 ISSUES OF THE MINN. LEGAL SERVICES COALITION 1, 2 (1999) *available at* http://www.mincava.umn.edu/papers/wingsp.htm.

18. JEFFREY L. EDLESON, PROBLEMS ASSOCIATED WITH CHILDREN'S WITNESSING OF DOMESTIC VIOLENCE 12-13 (1999), *available at* http://www.vaw.umn.edu/finaldocuments/Vawnet/witness.pdf; Amy Haddix, *Unseen Victims: Acknowledging the Effects of Domestic Violence on Children Through Statutory Termination of Parental Rights*, 84 CAL. L. REV. 757, 760 (1996).

19. MARIA ROY, CHILDREN IN THE CROSSFIRE: VIOLENCE IN THE HOME – HOW DOES IT AFFECT OUR CHILDREN? 103-04 (1988).

20. Hilton, *supra* note 17, at 11; Andrew Schepard, *The Evolving Judicial Role in Child Custody Disputes: From Fault Finder to Conflict Manager to Differential Case Management*, 22 U. ARK. LITTLE ROCK L. REV. 395, 417 (2000) [hereinafter *The Evolving Judicial Role*] (citing JANET R. JOHNSON & VIVIAN ROSEBY, IN THE NAME OF THE CHILD: A DEVELOPMENTAL APPROACH TO UNDERSTANDING AND HELPING CHILDREN OF CONFLICTED AND VIOLENT DIVORCE 5 (1997)).

21. Joan B. Kelly & Lynn L. Gigy, *Divorce Mediation: Characteristics of Clients and Outcomes, in* MEDIATION RESEARCH 65 (Kenneth Kressel et al. eds., 1989); Schechter & Edleson, *supra* note 17, at 23, 41.

22. ELIZABETH M. ELLIS, DIVORCE WARS: INTERVENTIONS WITH FAMILIES IN CONFLICT 257 (2000).

23. ABA Network, *supra* note 6 (citing FLORIDA GOVERNOR'S TASK FORCE ON DOMESTIC AND SEXUAL VIOLENCE, FLORIDA MORTALITY REVIEW PROJECT 45 (1997)).

24. LINDA GIRDNER, ABA CENTER ON CHILDREN AND THE LAW, DOMESTIC ABUSE AND CUSTODY MEDIATION TRAINING FOR JUDGES AND ADMINISTRATORS: INSTRUCTOR'S GUIDE, 12 (1999).

25. *Id.*; Gelles, *supra* note 13 (citing Margo Wilson & Martin Daly, *Spousal Homicide Risk and Estrangement*, 8 VIOLENCE AND VICTIMS 3, 3-16).

HeinOnline -- 9 Wm. & Mary J. Women & L. 150 2002-2003

C. *Definition*

The term "domestic violence" connotes different behaviors to different people. Some social scientists define it as a pattern of coercive behavior used to control an intimate partner.[26]

> Domestic violence is a pattern of coercive behavior that changes the dynamics of an intimate relationship within which it occurs. Once the pattern of coercive control is established, both parties understand differently the meaning of specific actions and words. Domestic violence is not simply a list of discrete behaviors, but is a pattern of behavior exhibited by the batterer that includes words, actions, and gestures, which, taken together, establish power and control over an intimate partner.[27]

This definition emphasizes the idea that the abuse defines the fundamental dynamics of the relationship, creating an ongoing coercive context for behavior that might not otherwise be seen as threatening. It includes psychological abuse, financial abuse, physical attack, and sexual assault. It is consistent with and describes the "culture of battering."

Legal definitions of abuse differ from social science definitions in that the law focuses on specific incidents of physical abuse. For example, the Model Code on Domestic and Family Violence defines domestic violence as follows:

> Domestic or family violence means the occurrence of one or more of the following acts by a family or household member, but does not include acts of self defense:
> (a) Attempting to cause or causing physical harm to another family or household member;
> (b) Placing a family or household member in fear of physical harm; or
> (c) Causing a family or household member to engage involuntarily in sexual activity by force, threat of force, or duress.[28]

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26. *See* Mary Ann Dutton, *Expert Witness Testimony*, *in* THE IMPACT OF DOMESTIC VIOLENCE ON YOUR LEGAL PRACTICE, ABA COMMISSION ON DOMESTIC VIOLENCE § 8-81, § 8-8 (Deborah M. Goelman et al. eds., 1996).

27. *Id.*

28. MODEL CODE ON DOMESTIC AND FAMILY VIOLENCE § 102 (1994).

HeinOnline -- 9 Wm. & Mary J. Women & L. 151 2002-2003

This definition includes acts such as pushing, slapping, choking, punching, use of weapons, and rape.[29] These actions may or may not be part of a larger pattern of coercion and control.

Definitions of domestic violence are difficult to apply because domestic violence encompasses a continuum of behavior that might start with ridicule and ultimately end in homicide.[30] As will be explored later, the term "domestic violence" is too often wielded as a blunt instrument when more precision is warranted. Each domestic violence survivor falls in a different place on the continuum of abuse, and the unique experience of each victim must be considered in context when choosing legal and nonlegal remedies.

D. Types of Violence

Domestic violence advocates and mediators have historically disagreed about the propriety of mediating divorces involving domestic violence. Women's advocates have often opposed its use while mediators have favored using it in this context. These divergent points of view have emerged, in part, because each professional group has a different perspective concerning the causes and characteristics of domestic abuse.[31] As the following analysis suggests, both groups may be observing valid but different phenomena. Family violence is simply more varied and complex than was originally contemplated.

1. Walker's "Cycle of Violence" Theory

Early ground-breaking work on the dynamics of family violence was popularized by Lenore Walker in the late 1970s. She theorized that violent couples become enmeshed in an insidious, repetitive cycle of violence and control. She labeled the initial phase of the cycle the "tension-building" phase.[32] During this phase, stressors such as finances, work, children, illness, and relationship problems accumulate as the tension within the batterer builds.[33] Eventually, the tension escalates to a point where an acute, violent incident

29. *See* Dutton, *supra* note 26, at § 8-8; Benjamin Mackoff et al., *Mediation, and Family Law*, *in* ALTERNATIVE DISPUTE RESOLUTION, § 13-1, (Anne V. Swanson, et al., 2001).

30. Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 30 (1991).

31. Clare Dalton, *When Paradigms Collide: Protecting Battered Parents and Their Children in the Family Court System*, 37 FAM. & CONCILIATION CTS. REV. 273, 275 (1999); *The Evolving Judicial Role*, *supra* note 20, at 419.

32. WALKER, *supra* note 7, at 56.

33. *Id.* at 56-59.

HeinOnline -- 9 Wm. & Mary J. Women & L. 152 2002-2003

occurs.[34] Immediately following the violence, the couple enters the honeymoon phase during which the abuser expresses extreme contrition and remorse and seeks to win the victim's forgiveness.[35] Unless the cycle is broken, it will be repeated with each journey through the phases proceeding more quickly and resulting in more severe injury.[36] This repeated violence allows the abuser to assert increasing control over the victim's life.[37]

A woman caught in the cycle of violence develops low self esteem, becomes socially isolated, believes that she has caused the violence, and may suffer from Post Traumatic Stress Disorder (PTSD) with accompanying flashbacks, anxiety, and depression.[38] She is likely to stay with the abuser because she is fearful, economically dependent, and may have a continuing emotional attachment to him.[39]

Under Walker's theory, men who batter exhibit pathological jealousy, blame the victim for the violence, and are also capable of being charming manipulators.[40] These contrasting characteristics make these abusers seem unpredictable.

Although Walker's theory has been widely accepted, it has also been subject to criticism for being too limited, especially with respect to her passive characterization of the victim as suffering from "learned helplessness."[41] In contrast, some commentators have noted that many battered women actively seek help and openly rebel against the abuser.[42] "In actuality, battered women are a diverse group: some are economically independent, others economically dependent, most are angry, most fight back verbally, many fight back physically, and many are jealous of batterers who use the infidelity to inflict (psychological) injury on their

34. *Id.* at 59 (describing the second phase of the cycle).

35. *Id.* at 65.

36. *Id.* at 69.

37. *Id.* at 59.

38. JACOBSON & GOTTMAN, *supra* note 8, at 50; WALKER, *supra* note 7, at 31; Jennifer P. Maxwell, *Mandatory Mediation of Custody in the Face of Domestic Violence: Suggestions for Courts and Mediators*, 37 FAM. & CONCILIATION CTS. REV. 335, 341 (1999).

39. RICHARD J. GELLES, FAMILY VIOLENCE 96 (1987); JACOBSON & GOTTMAN, *supra* note 8, at 49.

40. WALKER, *supra* note 7, at 26, 36 (1979).

41. Mary Ann Dutton, *Critique of the "Battered Woman Syndrome" Model*, *available at* http://www.vaw.umn.edu/finaldocuments/Vawnet/bws.htm (explaining a victim's inability to protect herself following repeated failed efforts to do so).

42. Karla Fischer et al., *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 SMU L. REV. 2117, 2136 (1993).

HeinOnline -- 9 Wm. & Mary J. Women & L. 153 2002-2003

partners."[43] Consequently, other researchers have expanded upon Walker's work.

2. Johnston and Campbell

Janet Johnston and Linda Campbell recognize the cycle of violence relationship described by Lenore Walker. However, they found violent families that do not fit Walker's profile.[44] They theorize that there are five distinct profiles of domestic violence and that each type requires a different response.

Their first profile, "ongoing and episodic male battering," is consistent with Lenore Walker's theory. The males in this profile are easily frustrated, exhibit poor impulse control, and are jealous and domineering.[45] When violence occurs, it is usually severe and the danger from the batterer increases at separation.[46] Some of the victims suffer from "battered wife syndrome," but others leave the relationship as soon as the abuse becomes evident.[47]

The second profile, "female-initiated violence," entails violent outbursts by women who throw things, scratch, and kick.[48] The husband, although intimidated, usually remains more composed and the violence does not escalate.[49]

The third profile, "male-controlling interactive violence," begins with a disagreement that eventually turns into a physical struggle. The male usually prevails by overpowering the woman but he does so without using excessive force.[50] These relationships are not characterized as fearful and violence usually ends upon separation.[51]

The fourth profile, "separation-engendered and post divorce trauma," involves violence that erupts at separation but is not

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43. Mary Becker, *The Passions of Battered Women: Cognitive Links Between Passion, Empathy, and Power*, 8 WM. & MARY J. WOMEN & L. 1, 72 (2001).

44. Janet R. Johnston & Linda E. G. Campbell, *Parent-Child Relationships in Domestic Violence Families Disputing Custody*, 31 FAM. & CONCILIATION CTS. REV. 282, 282-83 (1993).

45. *Id.* at 286.

46. *Id.* at 286-87.

47. JANET JOHNSTON & VIVIENNE ROSEBY, IN THE NAME OF THE CHILD: A DEVELOPMENTAL APPROACH TO UNDERSTANDING AND HELPING CHILDREN OF CONFLICTED AND VIOLENT DIVORCE 30 (1997).

48. Johnston & Campbell, *supra* note 44, at 291; JOHNSTON & ROSEBY, *supra* note 47, at 33.

49. Johnston & Campbell, *supra* note 44, at 291.

50. JOHNSTON & ROSEBY, *supra* note 47, at 35. Johnston & Campbell, *supra* note 44, at 292.

51. JOHNSTON & ROSEBY, *supra* note 47, at 36; Johnston & Campbell, *supra* note 44, at 292.

HeinOnline -- 9 Wm. & Mary J. Women & L. 154 2002-2003

present through the marriage.[52] The partner who feels abandoned is likely to initiate the violence.[53]

The fifth profile, "psychotic and paranoid reactions," involves active psychosis on the part of the violent spouse.[54] Individuals in this profile are likely to cling to conspiracy theories and to be delusional.[55] These abusers are quite dangerous.

In a related work, Johnston and Roseby propose that "the propensity for domestic violence derives from multiple sources and follows different patterns in different families, rather than being a syndrome with a single underlying cause."[56] They recommend that mediation be avoided with abusers in the first (ongoing and episodic male battering) and last (psychotic and paranoid reactions) categories but would consider adapted mediation with couples in the second, third, and fourth groups.[57]

3. Hanks

Susan E. Hanks has developed a typology of family violence that is similar to the Johnston formulation. She hypothesizes four distinct types of abuse.[58]

Type I involves "violence as an acute affective storm within a primary relationship manifesting a failure to master a family developmental stage and/or cope with an overwhelming life crisis."[59] This violence may have occurred more than once but it is not a pattern within the relationship. In fact, the couple may be surprised by the event and seek help.[60] Hanks' Type I characterization is more general than Johnston's fourth profile, separation and post divorce violence.[61]

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52. JOHNSTON & ROSEBY, *supra* note 47, at 35; Johnston & Campbell, *supra* note 44, at 293.

53. JOHNSTON & ROSEBY, *supra* note 47, at 38; Johnston & Campbell, *supra* note 44, at 294.

54. JOHNSTON & ROSEBY, *supra* note 47, at 40; Johnston & Campbell, *supra* note 44, at 294-95.

55. JOHNSTON & ROSEBY, *supra* note 47, at 40; Johnston & Campbell, *supra* note 44, at 295.

56. JOHNSTON & ROSEBY, *supra* note 47, at 42.

57. *Id.* at 42-43.

58. Susan E. Hanks, *Translating Theory into Practice*, *in* INTIMATE VIOLENCE: INTERDISCIPLINARY PERSPECTIVES 163-72 (Emilio Viano ed., 1992).

59. *Id.* at 163-64.

60. *Id.* at 163.

61. Janet Johnston, *Response to Clare Dalton's "When Paradigms Collide: Protecting Battered Parents and Their Children in the Family Court System,"* 37 FAM. & CONCILIATION CTS. REV. 422, 426 (1999).

HeinOnline -- 9 Wm. & Mary J. Women & L. 155 2002-2003

Type II involves "repetitive violent rages in the primary relationship manifesting the man's intolerable internal affective states."[62] This violence starts early in the relationship and occurs in regular patterns with increasing intensity. The woman may exhibit the behaviors ascribed to the battered woman's syndrome.[63] This type is similar to Johnston's first profile, ongoing or episodic male battering, and Walker's cycle of violence.[64]

Type III involves a "habitual violent interpersonal style in multiple relationships used for intimidation and control."[65] The abuser uses the violence to achieve a goal or to control the victim. The violence is ongoing and dangerous with likely involvement of the criminal system.[66] This type is more severe than Johnston's third profile, male controlling interactive abuse.[67]

Type IV involves "repetitive acute violent behavior in multiple relationships secondary to severe mental disorder and/or drug or alcohol addiction."[68] This type of violence is associated with serious mental illness and/or chemical addiction.[69] The violence is not necessarily directed at family members although they are often the victims.[70] Type IV violence is similar to Johnston's psychotic and paranoid reactions profile.[71]

4. Ellis and Stuckless

Ellis and Stuckless hypothesize three conceptions of spousal violence. The first type, "conflict instigated violence," is used by spouses "as a tactic of conflict resolution."[72] This violence is equally likely to originate from the woman as the man.[73] The second type, "control instigated abuse," is motivated by the abuser's desire to control the victim and may involve inflicting pain beyond that necessary to "resolve" the conflict.[74] The male is significantly more

62. Hanks, *supra* note 58, at 165.
63. *Id.* at 165-66.
64. Johnston, *supra* note 61, at 426.
65. Hanks, *supra* note 58, at 170.
66. *Id.*
67. Johnston, *supra* note 61, at 426.
68. Hanks, *supra* note 58, at 172.
69. *Id.*
70. *Id.*
71. JOHNSTON, *supra* note 61, at 426-27.
72. DESMOND ELLIS & NOREEN STUCKLESS, MEDIATING AND NEGOTIATING MARITAL CONFLICTS 34 (1996).
73. *Id.* at 46.
74. *Id.* at 2.

HeinOnline -- 9 Wm. & Mary J. Women & L. 156 2002-2003

likely to instigate this type of abuse[75] and this is the type of abuse associated with the "culture of battering."[76] The third type, "anger-instigated violence," flows from an overwhelming emotional state that results in a violent outburst.[77] Making the situation more complex, Ellis and Stuckless believe that all three types of abuse can exist simultaneously in a given situation.[78]

5. Jacobson and Gottman

Jacobson and Gottman focused their research on men who abuse. They suggest that there are two basic types of batterers, which they have characterized as "cobras" and "pit bulls". [79]

Cobras commit more severe violence and are more likely to use weapons.[80] Seventy-eight percent come from violent homes[81] as do 20% of their wives.[82] Forty-four percent are violent outside the family as well as within it.[83] They tend to exhibit more mental illness[84] and their wives tend to be fearful and depressed rather than angry.[85] Cobra couples are less likely to divorce or separate.[86] Cobras are similar to Hank's Type III abusers,[87] although somewhat less severe than Johnston and Campbell's male controlling interactive abuse.[88] Cobras, who are estimated to be 20% of abusers, actually experience a decrease in heart rate as their aggression escalates. This distinguishes them from their counterparts, the pit bulls, whose heart rates increase as they become more violent.[89]

Pit bulls are prone to emotional outbursts[90] and are less calculated than cobras in their use of violence.[91] They are seldom

75. *Id.* at 16.
76. Fischer et al., *supra* note 42, at 2117-18.
77. ELLIS & STUCKLESS, *supra* note 72, at 34; Geri S. Fuhrmann et al., *Parent Education's Second Generation: Integrating Violence Sensitivity*, 37 FAM. & CONCILIATION CTS. REV. 24, 26 (1999).
78. ELLIS & STUCKLESS, *supra* note 72, at 34.
79. JACOBSON & GOTTMAN, *supra* note 8, at 28.
80. *Id.* at 93.
81. *Id.* at 94.
82. *Id.* at 97.
83. *Id.* at 96.
84. *Id.*
85. *Id.* at 95.
86. *Id.*
87. *See* HANKS, *supra* note 58, at 170.
88. Johnston, *supra* note 61, at 427.
89. JACOBSON & GOTTMAN, *supra* note 8, at 28-30.
90. *Id.* at 121.
91. *Id.*

HeinOnline -- 9 Wm. & Mary J. Women & L. 157 2002-2003

violent outside the marriage.[92] However, pit bulls are more demanding of their wives and seek more control over their wives' behavior.[93] Interestingly, the wives of pit bulls exhibit more anger and less fear than the wives of cobras.[94] Pit bull wives exhibit behavior similar to wives exposed to Hank's Type II abuse[95] and Johnston and Campbell's ongoing male battering.[96] In contrast to Lenore Walker's learned helplessness theory, Jacobsen and Gottman found these abused women to be resourceful,[97] angry, and outraged.[98] Jacobsen and Gottman express more hope for the rehabilitation of pit bulls than for cobras.[99]

Jacobson and Gottman suggest that chances of eliminating abuse are increased when the abuser (1) takes responsibility for the violence, (2) has an internal code of ethics that prohibits violence, (3) has not been successful at controlling the victim, (4) exhibits low levels of emotional abuse and domineering behavior, (5) experiences marital satisfaction, (6) does not abuse drugs or alcohol, and (7) has been held accountable for the violence.[100]

6. Miles

Joanna Miles views domestic violence in two ways. First domestic violence is an individual "micro-level" problem that should be dealt with on an individual or family level.[101] Second, it is a "macro-level" problem stemming from the subordination of women in a male-dominated society.[102] Perhaps the reality is that both micro-level and macro-level factors are involved.

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92. *Id.*; *see also* Lenore M. J. Simon, *A Therapeutic Jurisprudence Approach to the Legal Processing of Domestic Violence Cases*, 1 PSYCHOL. PUB. POL'Y & L. 43, 49 (1995).

93. JACOBSON & GOTTMAN, *supra* note 8, at 118.

94. *Id.* at 119.

95. *See* HANKS, *supra* note 58, at 165.

96. Johnston, *supra* note 61, at 427.

97. JACOBSON & GOTTMAN, *supra* note 8, at 33.

98. *Id.* at 64.

99. *Id.* at 275.

100. *Id.* at 195-99.

101. Joanna Miles, *Domestic Violence*, *in* FAMILY LAW 81 (Jonathan Herring ed., 2001). *See also* Renata Vaselle-Augenstein & Annette Ehrilich, *Male Batterers: Evidence for Psychopathology*, *in* INTIMATE VIOLENCE: INTERDISCIPLINARY PERSPECTIVES 139 (Emilio C. Viano ed., 1992) (arguing that batterers evidence psychopathology).

102. Miles, *supra* note 101, at 83. *See* Cahn, *supra* note 15, at 1054.

HeinOnline -- 9 Wm. & Mary J. Women & L. 158 2002-2003

E. Implications of the Research

The above theories present a more sophisticated understanding of domestic violence than was previously available. Taken as a whole, this research demonstrates that families experience different types of violence and that within each type of violence, the abuse may vary in frequency and intensity. This understanding makes it possible to more fully and thoughtfully assess the dynamics of individual violent relationships.

Because families experiencing domestic violence are very different from each other, "one size fits all" solutions are inadequate. No one divorce process will be "right" for all violent divorcing couples. However, the relationship patterns identified in the research can be helpful in deciding whether a mediated or adversarial divorce process is more appropriate for a particular family.

> To evaluate the potential benefits versus the harms of mediation, we must first clarify our understanding of "domestic violence" and "battered women." Most mediation proponents agree that there are some cases where mediation is simply inappropriate, a fact that many opponents of mediation seem oftentimes to ignore. Those who argue emphatically against mediation tend to assume that the couple is involved in a pervasive "culture of battering," whereby the woman has been so brutalized and demoralized by her abusive partner that she is rendered a passive shadow of her former self, unable to bargain in any meaningful way. However, this ignores the reality of a "continuum" of family violence, ranging from pervasive abuse to occasional violence. It is the contention of many that "[m]ediation can be an appropriate and effective problem-solving technique with at least a percentage of those persons whose lives have been touched at some point by violence."[103]

III. THE GOAL: SUCCESSFUL DIVORCE

Domestic relations cases constitute the fastest growing segment of civil cases heard in the state courts.[104] In fact, domestic relations cases have increased by 70% since 1984 and many of these

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103. Rene L. Rimelspach, *Mediating Family Disputes in a World with Domestic Violence: How to Devise a Safe and Effective Court-Connected Mediation Program*, 17 OHIO ST. J. ON DISP. RESOL. 95, 100-01 (2001).

104. *The Evolving Judicial Role*, *supra* note 20, at 399.

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cases involve children.[105] Forty percent of children will participate in the divorce of their parents[106] and half of all children will live with one parent prior to reaching adulthood.[107]

When a relationship breaks down, the goal should be to achieve a "successful" divorce. This is a divorce where "the adults are able to work through their anger, disappointment, and loss in a timely manner and terminate their spousal relationship with each other (legally and emotionally), while at the same time retaining or rebuilding their parental alliance with and commitment to their children."[108]

Unfortunately, research suggests that there are a large number of unsuccessful divorces. About one-fourth to one-third of couples experience continued conflict and hostility even after the divorce is final.[109] Researchers estimate that 10% of divorcing couples demonstrate "unremitting animosity" as their children grow up.[110] This is of special concern because of mounting evidence connecting the level of parental conflict with poor post- divorce adjustment of children.[111]

The path to a successful divorce is different for each couple and is especially difficult when domestic violence has occurred. For example, in such cases, the goal of forming a "parental alliance" may be unrealistic and even dangerous. Nevertheless, the couple will have some level of involvement concerning the children, and this contact needs to be carefully structured. What divorce process will be the safest and the most helpful to these families? Although this is an individual decision, social science research concerning the experiences of divorcing couples, as discussed in the next sections, can be enlightening.

IV. CONCERNS ABOUT THE ADVERSARIAL DIVORCE PROCESS

In recent years, a variety of parents and professionals have questioned whether it is appropriate to use the adversary system to

105. *Id.* at 399 (citing Brian J. Ostrom & Neil B. Kauder, EXAMINING THE WORK OF STATE COURTS, 1995: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT 39 (1996)).

106. Stephen J. Bahr, *Social Science Research on Family Dissolution: What It Shows and How It Might Be of Interest to Family Law Reformers*, 4 J.L. & FAM. STUD. 5 (2002).

107. MARY R. CATHCART & ROBERT E. ROBLES, PARENTING OUR CHILDREN: IN THE BEST INTEREST OF THE NATION 11 (1996).

108. JOHNSTON & ROSEBY, *supra* note 47, at 3.

109. *Id.* at 4.

110. *Id.*

111. ELLIS, *supra* note 22, at 184-85; Linda Elrod, *Reforming the System to Protect Children in High Conflict Custody Cases*, 28 WM. MITCHELL L. REV. 495, 497 (2001);.

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resolve family issues. While many of these concerns have merit, they must be considered in context. Divorcing couples are a diverse group[112] and the adversary system is actually a combination of different processes,[113] including uncontested cases, negotiated settlements, and cases that go to trial.[114] For example, an estimated 50% of custody cases are uncontested[115] and the parents involved in the dissolution report negligible conflict.[116] Most of the remaining custody cases are settled, with less than 2% ultimately resolved by the judge.[117] However, about half of the contested cases involve substantial or intense conflict over custody.[118] Thus, cases are actually resolved through a variety of processes under the umbrella of the adversary system.

A. The Theory of the Adversary Approach

The adversary process is based on the idea "that two or more professional adversaries representing the parties to the dispute will draw forth all relevant information to the contest in the process of putting forward their clients' best positions, thereby allowing the decision-maker to determine the 'truth' and to make the best decision."[119]

An apparent weakness of the adversary system is that it assumes that the parties bring equal skill and power, in the form of an attorney and economic support, to bear upon the case.[120] However, the parties often are not evenly matched in this regard, and there is no mechanism in place to compensate for the mismatch.[121] This is particularly true in cases involving domestic violence because some batterers use the court system as a forum to

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112. *See* Andrew Schepard, *War and PEACE: A Preliminary Report and a Model Statute on an Interdisciplinary Educational Program for Divorcing and Separating Parents*, 27 U. MICH. J.L. REFORM 131, 150 (1993) [hereinafter *War and PEACE*].

113. Carol J. King, *Burdening Access to Justice: The Cost of Divorce Mediation on the Cheap*, 73 ST. JOHN'S L. REV. 275, 431 (1999).

114. ELLIS, *supra* note 22, at 116-17; King, *supra* note 113, at 113.

115. ELEANOR E. MACCOBY & ROBERT J. MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY 137 (1997).

116. *Id.* at 141.

117. *Id.* at 137.

118. *Id.* at 141; King, *supra* note 113, at 431.

119. Janet Weinstein, *And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System*, 52 U. MIAMI L. REV. 79, 82 (1997).

120. Carrie Menkel-Meadow, *The Trouble With the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5, 22 (1996).

121. Ann Milne & Jay Folberg, *The Theory and Practice of Divorce Mediation: An Overview*, *in* DIVORCE MEDIATION: THEORY AND PRACTICE 17 (Jay Folberg & Ann Milne eds., 1998).

HeinOnline -- 9 Wm. & Mary J. Women & L. 161 2002-2003

harass and intimidate the abuse survivor by engaging in traumatic and expensive ongoing litigation.[122]

The adversary system is premised on the notion that the judge is able to ascertain what is best for the family, determine who is right and wrong,[123] and arrive at the "correct" solution.[124] Critics argue that the adversary model discounts the importance of the emotional and psychological concerns of the parties and places judges in an impossible role for which most have not been adequately trained.[125] A Maryland study found that some family judges "display either a lack of interest, a lack of temperament, or a lack of understanding with respect to these cases."[126] In reality, judges are asked to resolve family conflicts that neither the parties nor any other professionals have been able to settle.[127]

Although most divorce cases are eventually settled, the adversary process has come under scrutiny because, not knowing which cases will be settled, all cases are prepared and processed as if they were proceeding to trial.[128] Consequently, at the outset of the divorce, spouses separately consider their options within the context of a win/lose framework and helping professionals too quickly become advocates rather than problem solvers.[129] As a result, the couple's pressing needs and common interests are ignored while their differences are emphasized.[130] The process becomes unnecessarily confrontational[131] and sometimes less than helpful to an already stressed family. Thus, the adversary system may be inappropriate for some families who have experienced

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122. Katherine M. Reihling, *Protecting Victims of Domestic Violence and Their Children After Divorce: The American Law Institute Model*, 37 FAM. & CONCILIATION CTS. REV. 393, 394 (1999).

123. JOHNSTON & ROSEBY, *supra* note 47, at 11.

124. Weinstein, *supra* note 119, at 112.

125. Christy L. Hendricks, Note, *The Trend Toward Mandatory Mediation in Custody and Visitation Disputes of Minor Children: An Overview*, 32 U. LOUISVILLE J. FAM. L. 491, 495 (1993). *See* Weinstein, *supra* note 119, at 105.

126. Jessica Pearson, *Court Services: Meeting the Needs of Twenty-First Century Families*, 33 FAM. L.Q. 617, 628 (1999) [hereinafter *Court Services*].

127. JOHNSTON & ROSEBY, *supra* note 47, at 223.

128. OREGON TASK FORCE ON FAMILY LAW, CREATING A NEW FAMILY CONFLICT RESOLUTION SYSTEM: FINAL REPORT TO GOV. JOHN A. KITZHABER AND THE OREGON LEGISLATIVE ASSEMBLY 4 (1997) [hereinafter OREGON TASK FORCE]; *The Evolving Judicial Role*, *supra* note 20, at 410.

129. Weinstein, *supra* note 119, at 100.

130. King, *supra* note 113, at 377.

131. Bill Ezzell, Note, *Inside the Minds of America's Family Law Courts: The Psychology of Mediation Versus Litigation in Domestic Disputes*, 25 LAW & PSYCHOL. REV. 119, 124 (2001).

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domestic violence because the process has the potential to exacerbate already dangerous conflict.[132]

B. Dissatisfaction With the Adversarial Process

Divorcing couples express overwhelming dissatisfaction with the adversarial approach to divorce. A prominent study found that 50% to 70% of litigants thought that the legal system was "impersonal, intimidating, and intrusive."[133] In another study, 71% of parents reported that the court process escalated the level of conflict and distrust "to a further extreme."[134] Divorcing couples were also disappointed because the process was too lengthy, too costly, too inefficient, and not sufficiently tailored to their needs.[135] These are not attributes of a system that would be helpful to families already torn by violence.

C. Dissatisfaction With Attorneys

In addition to being dissatisfied with the legal system, many divorcing couples are also unhappy with their attorneys. The dissatisfaction correlates with the higher numbers of ethical complaints that are filed against family attorneys than those practicing in other fields.[136] In a recent survey, divorcing parents described their attorneys as lacking genuine interest in their cases and not paying sufficient attention to the matter.[137] These parents felt excluded from decisions and found attorney communication lacking: "nobody hears you and nobody talks to you."[138] In their defense, attorneys claim that divorce clients often have unrealistic expectations and enter the system at a time of great emotional turmoil.[139]

Historically, the family law attorney is trained as an advocate to act "from a purely partisan perspective, to strategically maneuver the presentation of evidence and evoke statutes and case law in

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132. Rimelspach, *supra* note 103, at 102.

133. CATHCART & ROBLES, *supra* note 107, at 39.

134. Marsha Kline Pruett & Tamara D. Jackson, *The Lawyer's Role During the Divorce Process: Perceptions of Parents, Their Young Children, and Their Attorneys*, 33 FAM. L.Q. 283, 298 (1999).

135. *Id.* at 299.

136. *The Evolving Judicial Role*, *supra* note 20, at 410.

137. Pruett & Jackson, *supra* note 134, at 296.

138. *Id.* at 297.

139. *War and PEACE*, *supra* note 112, at 135 n.8.

HeinOnline -- 9 Wm. & Mary J. Women & L. 163 2002-2003

order to win the client's case."[140] Commentators have suggested that family clients are not well served by unchecked zealous advocacy[141] and have urged attorneys to reexamine this traditional role.[142] The role of counselor may be more appropriate than that of advocate.[143] Participants at the Wingspread Conference suggest that attorneys have an affirmative responsibility to promote conflict resolution.[144]

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140. Janet R. Johnston, *Building Multidisciplinary Professional Partnerships with the Court on Behalf of High-Conflict Divorcing Families and their Children: Who Needs What Kind of Help?*, 22 U. ARK. LITTLE ROCK L. REV. 453, 459 (2000).

141. Kathryn E. Maxwell, *Preventive Lawyering Strategies to Mitigate the Detrimental Effects of Client's Divorces on Their Children*, 67 REV. JUR. U.P.R. 137, 152 (1998).

142. Pauline H. Telser, *Collaborative Law: A New Paradigm for Divorce Lawyers*, 5 PSYCHOL. PUB. POL'Y & L. 967, 983-84 (1999).

143. Maxwell, *supra* note 141, at 152-53.

144. *See The Wingspread Report and Action Plan, High Conflict Custody Cases: Reforming the System for Children*, 39 FAM. CT. REV. 146, 150 (2001) [hereinafter *Wingspread*]:

> THE LAWYER'S RESPONSIBILITY TO PROMOTE CONFLICT RESOLUTION
>
> a. Lawyers should diligently exercise their counseling function in assisting their clients to avoid inappropriate conflict in dealing with custody-related issues, including the ways in which the parties and counsel pursue litigation. Lawyers should discuss with client parents the negative consequences of custody conflicts and disputes on their children and should advise parents about the availability of resources to reduce conflict.
> b. Lawyers should discuss alternatives to litigation, such as mediation, with the clients.
> c. As a general rule, lawyers should encourage their clients to cooperate with forensic custody and mental health evaluations.
> d. Lawyers have a duty to realistically evaluate their client's case and not raise false expectations.
> e. Lawyers should encourage early court interventions to identify issues in high-conflict cases and should refer clients to available resources and processes to help them resolve their conflicts outside the courtroom.
> f. Lawyers should assist one another and the court in expeditiously determining the best interests of the child by cooperating in defining and limiting the issues, procedures, and evidence necessary to determine the best interests of the child.
> g. Lawyers should maintain a civil demeanor and encourage their clients to follow their example.
> h. Lawyers and parties should not use the media, child protective services, or other means to create or exacerbate conflict and should be sensitive to the child's need for privacy.
> i. Lawyers should be trained in child development, child abuse and neglect, domestic violence, family dynamics, and alternative conflict resolution and be knowledgeable about cross-disciplinary issues affecting their high-conflict custody cases, such as competencies of other professionals and available community resources.
>
> Lawyers should develop and participate in special continuing legal education programs for high-conflict custody cases and encourage law schools to incorporate inter-disciplinary training in mental health and dispute resolution into the family law curriculum to improve lawyers' ability to reduce conflict in custody cases.

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Although some commentators believe that attorney professionalism has declined,[145] some divorce clients favorably report that their attorneys "interpreted" the proceeding for them, helped them keep perspective, and provided needed emotional support.[146] Certainly, lawyers do serve to protect the interests of their clients and may effectively provide a voice for the disempowered, particularly for the abuse survivor.[147] However, choosing and affording the right attorney, one who screens for and understands the dynamics of abuse, is crucial for the battered woman.[148]

D. Pro Se Litigants

Although divorce clients express unhappiness with their attorneys, being unrepresented is also problematic, especially if the other spouse has retained an attorney. To a large extent, lawyers control the public's access to the court system and the quality of justice that litigants receive.[149]

The number of pro se litigants in family cases has increased dramatically in recent years. A 1990 American Bar Association study of representation in divorce cases in Maricopa County, Arizona found that neither party was represented in 52% of the cases and at least one party was unrepresented in 88% of the cases.[150] In contrast, a 1980 study found that one party lacked representation in only 24% of the cases.[151] Other studies indicate similar proportions of unrepresented parties. For example, a California study found at least one spouse appearing pro se in 67% of domestic relations cases and 40% of child custody cases.[152] A national study concluded that 72% of domestic relations cases involved at least one unrepresented party[153] and an Oregon study

145. Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337, 1344-45 (1997).

146. *See* Connie J.A. Beck & Bruce D. Sales, *A Critical Reappraisal of Divorce Mediation Research and Policy*, 6 PSYCHOL. PUB. POL'Y & L. 989, 1014 (2000); Pruett & Jackson, *supra* note 134, at 294-95.

147. Leigh Goodmark, *Alternative Dispute Resolution and the Potential for Gender Bias*, JUDGES' J., Spring 2000, at 21, 26.

148. Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 814 (1993).

149. KAREN WINNER, DIVORCED FROM JUSTICE: THE ABUSE OF WOMEN AND CHILDREN BY DIVORCE LAWYERS AND JUDGES xviii (1996).

150. Steven K. Berenson, *A Family Law Residency Program?: A Modest Proposal in Response to the Burdens Created by Self-Represented Litigants in Family Court*, 33 RUTGERS L.J. 105, 109 (2001).

151. *Id.*

152. Beck & Sales, *supra* note 146, at 993.

153. *Id.*

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found that in 80% of Oregon family cases at least one side was unrepresented.[154] Therefore, there is little question that divorce proceedings where both sides are represented by counsel are no longer the norm; rather, they are surprisingly rare.[155]

What are the consequences when a litigant is unrepresented? A 1993 survey found that pro se litigants involved in uncontested cases were generally satisfied (88%) with their decrees.[156] However, when issues were contested, the satisfaction rate decreased to 33%.[157] Not surprisingly, pro se parties who litigated against represented parties were less likely to say that they would represent themselves again; 36% said they would do so, while 70% of pro se litigants who faced an unrepresented party said they would do so again.[158]

Unrepresented parties in a divorce shoulder the burden of navigating the legal system unsupported.[159] The National Center for State Courts research found that pro se family litigants experienced the following problems: (1) 41% had difficulty locating where and how to file; (2) 37% had trouble understanding court procedures; (3) 31% had difficulty understanding forms, 28% had difficulty completing forms, and 26% had difficulty obtaining forms; (4) 19% were concerned about speaking in court; (5) 14% had difficulty obtaining evidence to support the case; and (6) 14% had trouble scheduling the case.[160] Abuse survivors must add safety concerns to this list of issues.

Studies indicate that most people are unrepresented because they cannot afford to hire an attorney.[161] Women, including battered women, are less likely to be represented than men.[162] Particularly in domestic violence cases, the victim is at a severe disadvantage if the abuser is represented and she is not, because

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154. OREGON TASK FORCE, *supra* note 128, at 5.

155. Jane C. Murphy, *Access to Legal Remedies: The Crisis in Family Law*, 8 BYU J. PUB. L. 123, 131 (1993).

156. Beck & Sales, *supra* note 146, at 1039.

157. *Id.*

158. *Id.* at 1040.

159. *Id.* at 1019.

160. Carol Flango et al., HOW ARE COURTS COORDINATING FAMILY CASES?, National Center for State Courts 46, *at* http://www.ncsconline.org/WC/Publications/Res_SCtFam_CtCoordFamCasesPub.pdf.

161. Flango et al., *supra* note 160, at 44; *Report of the Maine Commission on Gender Justice and the Courts*, 49 M. L. REV. 135, 148 (1997) [hereinafter *Maine Commission*].

162. Penelope E. Bryan, *Reasking the Woman Question at Divorce*, 75 CHI.-KENT L. REV. 713, 714-17 (2000) [hereinafter *Reasking*]; Carol Flango et al., *supra* note 160, at 44; *Maine Commission*, *supra* note 161, at 148-49.

HeinOnline -- 9 Wm. & Mary J. Women & L. 166 2002-2003

she is then without a spokesperson and advocate.[163] The represented party may also have more access to financial and other case related information.[164]

Studies indicate that the presence of lawyers has an impact on the outcome of the case as well. After controlling for gender, Maccoby and Mnookin found that represented parents were more likely to be awarded physical custody than unrepresented parents.[165] In cases where neither party was represented, Maccoby and Mnookin found that joint legal custody was awarded to half of the families.[166] However, when both parties were represented, couples received joint legal custody 92% of the time.[167]

Being unrepresented in an adversarial proceeding is more than just a disadvantage for the abuse survivor – it can be dangerous. Given the skyrocketing number of pro se litigants, the battered woman is increasingly likely to be representing herself.

E. Children

Even though the vast majority of custody cases do not go to trial, commentators believe that the "adversarial mentality" invades the attitudes of the litigating parents.[168] For example, issues may be framed in terms of the parents' rights rather than the child's needs[169] and the contestants may see each other as opponents in a win/lose struggle rather than as parents making plans for the future.[170] As hostility increases, the parties' ability to parent may be adversely affected.[171]

Much has been written about the impact of adversarial divorce on children[172] and evidence continues to mount connecting the intensity of parental conflict with poor post-divorce adjustment.[173] Even though the marital relationship ends, couples with children

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163. Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441, 519-20 (1992) [hereinafter *Killing Us Softly*]; Goodmark, *supra* note 147, at 26.

164. Beck & Sales, *supra* note 146, at 1019.

165. MACCOBY & MNOOKIN, *supra* note 115, at 110.

166. *Id.* at 108.

167. *Id.*

168. Elrod, *supra* note 111, at 498-99; *War and PEACE*, *supra* note 112, at 145-46.

169. Elrod, *supra* note 111, at 499; Weinstein, *supra* note 119, at 88.

170. Weinstein, *supra* note 119, at 132-33.

171. Elrod, *supra* note 111, at 501.

172. *See* MAVIS E. HETHERINGTON & JOHN KELLY, FOR BETTER OR FOR WORSE: DIVORCE RECONSIDERED 157-58 (2002); Bahr, *supra* note 106, at 9-11; Ronald L. Solove, *Judges on Judging: Confessions of a Judicial Activist*, 54 OHIO ST. L.J. 797, 800 (1993).

173. ELLIS, *supra* note 22, at 184; Elrod, *supra* note 111, at 496-97.

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will continue to deal with each other as parents, even when there has been domestic abuse.[174] Garrity and Baris found that a quarter of parents ease into a co-parenting relationship, half of parents disengage for a period of time and then become more cooperative, and the last quarter remain at odds for the duration.[175]

In the adversarial model, custody decisions are based on statutory standards such as the best interests of the child. However, the vague "best interests" legal standard gives little guidance to judges who are expected to label one parent as better than the other.[176] Although appearing to stress the child's needs, the "indeterminacy" of the standard requires judges to make value judgments and makes predicting outcomes problematic.[177] As a result, some commentators believe that mothers are held to a higher standard than are fathers.[178] Although some studies show that mothers are the primary custodial parents in two-thirds of custody cases,[179] fathers increasingly are awarded custody to the point that some researchers have reported that men are awarded custody at least half of the time that they pursue it.[180]

There has also been a significant increase in the number of joint legal custody decrees, which now approach 80%.[181] Furthermore, joint physical custody is being increasingly used as a resolution for high conflict and abusive families.[182] This outcome is of concern because in such families joint physical custody may work to "cement rather than resolve" parental conflict.[183] In abusive families, this unresolved conflict between the parents may escalate into violence.

What about custody contests involving clear cases of domestic violence? Some commentators feel that domestic violence survivors are disadvantaged under the adversarial system because of the lack

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174. CARLA B. GARRITY & MITCHELL A. BARIS, CAUGHT IN THE MIDDLE 27 (1994).

175. *Id.* at 27-28.

176. Peter Carnevale et al., *Contingent Mediator Behavior and Its Effectiveness*, *in* MEDIATION RESEARCH 263 (Kenneth Kressel et al. ed., 1989).

177. AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS 97 (2002).

178. *Reasking*, *supra* note 162, at 725-26.

179. MACCOBY & MNOOKIN, *supra* note 115, at 108; Mary Becker, *Maternal Feelings: Myth, Taboo, and Child Custody*, 1 S. CAL. REV. L. & WOMEN'S STUD. 133, 211 (1992); Kathy T. Graham, *Child Custody in the New Millennium: ALI's Proposed Model Contrasted with Oregon's Law*, 35 WILLAMETTE L. REV. 523, 542 (1999).

180. *Reasking*, *supra* note 162, at 723.

181. MACCOBY & MNOOKIN, *supra* note 115, at 108; *Reasking*, *supra* note 162, at 723.

182. MACCOBY & MNOOKIN, *supra* note 115, at 159.

183. Elrod, *supra* note 111, at 509 (citing H. Patrick Stern et. al., *Battered-Child Syndrome: Is It a Paradigm for a Child of Embattled Divorce?*, 22 U. ARK. LITTLE ROCK L. REV. 335, 379 (2000)).

HeinOnline -- 9 Wm. & Mary J. Women & L. 168 2002-2003

of awareness about domestic violence, the failure to link battering and parenting under the law, and the proliferation of "friendly parent" provisions.[184] Despite new research regarding the effect of domestic violence on children, discussed in Part II, the existence of domestic violence is not always seen as relevant to custody decisions.[185] Studies show that abusive fathers are sometimes awarded custody.[186] For this reason, a few states have followed the lead of the Model Code of Family Violence and have passed statutes creating a rebuttable presumption against the abuser's obtaining custody of children.[187]

Even when the abuse survivor is awarded sole custody, visitation will be an issue.[188] Courts often fail to pay sufficient attention to safety issues surrounding visitation[189] and this creates an ongoing opportunity for the abuser to continue to manipulate the family.[190]

F. Economic Issues

Economic issues pervade the adversarial divorce process. Research indicates that even women and children who are not solely dependent on the other spouse for support suffer a decline in income after separation.[191] In an effort to "unhook" the couple's finances and make a clean break, courts sometimes fail to provide adequately and specifically for future needs.[192] Maccoby and Mnookin report that only 30% of mothers received a spousal support award and that child support awards were inadequate to prevent a precipitous decline in income for mothers and children.[193] In contrast, the financial situation of divorced fathers improved

184. Leigh Goodmark, *From Property to Personhood: What the Legal System Should Do for Children in Family Violence Cases*, 102 W. VA. L. REV. 237, 262 (1999) [hereinafter *From Property to Personhood*]; *Reasking*, *supra* note 162, at 727-28.

185. DAVIDSON, *supra* note 16, at 13; Pamela M. Macktaz, *Domestic Violence: A View From the Bench*, 6 MD. J. CONTEMP. LEGAL ISSUES 37, 44 (1994-95); Murphy, *supra* note 8, at 288.

186. Becker, *supra* note 179, at 183 (three of nineteen fathers accused of spousal abuse were denied sole or joint physical custody); Mahoney, *supra* note 30, at 45 (59% of fathers awarded custody had physically abused wives); Joan Zorza, *Protecting the Children in Custody: Disputes When One Parent Abuses the Other*, 29 CLEARINGHOUSE REV. 1113, 1119 (1996) (larger proportion of battering fathers win custody than nonbattering fathers).

187. MODEL CODE ON DOMESTIC AND FAMILY VIOLENCE § 401 (1994).

188. *From Property to Personhood*, *supra* note 184, at 271.

189. GARRITY & BARIS, *supra* note 174, at 20.

190. *From Property to Personhood*, *supra* note 184, at 271.

191. *Reasking*, *supra* note 162, at 713-14.

192. *Id.* at 719-20.

193. MACCOBY & MNOOKIN, *supra* note 115, at 249.

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following divorce.[194] This inequity is attributed to low child support guidelines[195] and nonpayment of support orders[196] rather than the mother bargaining away support in order to secure custody.[197] As noted previously, a woman's lack of equivalent economic resources compromises her ability to fully participate in the adversarial process by hiring an attorney, paying for experts, and pursuing temporary financial and other relief.[198]

G. Conclusion

The adversarial process has a long history of resolving marital disputes. In cases of domestic abuse, however, it may not always be appropriate. In some situations, the traditional adversarial system may protect the interests of abuse survivors, especially if they have access to strong representation and sufficient resources to finance prolonged litigation. However, many serious cases fall through the cracks in a system that is unsuited to protecting them. Is mediation a better alternative?

V. OVERVIEW OF DIVORCE MEDIATION PROCESS

Mediation has recently come into vogue in the United States as an alternative method of resolving disputes.[199] However, it has a long history, sharing much with processes dating back to ancient China, the New Testament, and Navajo Peacemaking.[200]

A. Definition

What is mediation? The Model Standards of Practice for Family and Divorce Mediation define it as:

> A process in which a mediator, an impartial third party, facilitates the resolution of family disputes by promoting the participants' voluntary agreement. The family mediator assists

194. *Id.* at 264.

195. *Reasking*, *supra* note 162, at 721.

196. MACCOBY & MNOOKIN, *supra* note 115, at 263.

197. *Id.* at 156.

198. WINNER, *supra* note 149, at 13; Penelope Eileen Bryan, *Women's Freedom to Contract at Divorce: A Mask of Contextual Coercion*, 47 BUFF. L. REV. 1153, 1175 (1999) [hereinafter *Freedom to Contract*].

199. Beck & Sales, *supra* note 146, at 991.

200. Donna Coker, *Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking*, 47 UCLA L. REV. 1, 13 (1999); Milne & Folberg, *supra* note 121, at 3-4.

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> communication, encourages understanding and focuses the participants on their individual and common interests. The family mediator works with the participants to explore options, make decisions and reach their own agreements.[201]

While the Model Standards suggest that family mediation does not supplant legal advice or therapy, it can help families communicate and determine their own outcomes. It can also promote the interests of children while reducing the financial and emotional toll of divorce.[202]

Although there is agreement about the general theory of divorce mediation, in practice mediation programs are very different from each other[203] with respect to the scope of issues considered, the number of sessions offered, the qualifications of the mediator, and the involvement of lawyers. For example, lawyer participation in mediation varies from eleven to 75% depending on location.[204] Thus, when people refer to mediation, it is important to clarify who is mediating and the nature of the setting and the process.[205]

Research shows that the success of mediation is linked to the quality of the program and factors such as the time spent mediating, client treatment, and the degree of inconvenience clients experience.[206] Mediation is more likely to result in settlement and behavioral change when the couple spends more time with an experienced mediator who focuses on enhancing communication.[207] Court mandated public mediation is very cost efficient but may be less successful because it often is shorter in duration and focuses on fewer issues.[208]

Although mediators work differently, the process of mediation usually includes the following steps:

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201. Andrew Schepard, *An Introduction to the Model Standards of Practice for Family and Divorce Mediation*, 35 FAM. L. Q. 1, 3 (2001) [hereinafter *Introduction to the Model Standards*]. The Model Standards were adopted by the ABA House of Delegates on February 19, 2001.

202. *Id.*

203. Beck & Sales, *supra* note 146, at 995.

204. Jessica Pearson & Nancy Thoennes, *Divorce Mediation: Reflections on a Decade of Research*, *in* MEDIATION RESEARCH, 16 (Kenneth Kressel et al. eds., (1989)).

205. STEPHEN K. ERICKSON & MARILYN S. MCKNIGHT, THE PRACTITIONER'S GUIDE TO MEDIATION 17-18 (2001); Jay Folberg, *Mediation of Child Custody Disputes*, 19 COLUM. J.L. & SOC. PROBS. 413, 414 (1985).

206. Beck & Sales, *supra* note 146, at 1032.

207. Joan B. Kelly, *A Decade of Divorce Mediation Research*, 34 FAM. & CONCILIATION CTS. REV. 373, 380 (1996).

208. Pearson & Thoennes, *supra* note 204, at 433.

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1. Identify the issue.
2. Create an understanding of the issues. (This is accomplished through education and information provided by both the mediator, the clients, and sometimes by neutral experts.)
3. For each property issue, place an actual value on the item, and discuss the value of each item.
4. Consider options for decision making about each issue.
5. Analyze the consequences of the options for each spouse and for their children.
6. Discuss their standard of fairness about each issue.
7. Make a decision based on their standard of fairness.
8. Draft and review each agreement.
9. Submit their agreements for review, drafting, and implementation by their attorneys.[209]

B. The Role of the Mediator

The role of the mediator is to function as a neutral facilitator who refrains from expressing a point of view on the dispute but instead helps the parties make their own decisions.[210] This is in contrast to the judge in an adversarial proceeding who renders final decisions for the family.[211] Rather than controlling the outcome, the mediator structures the process by managing the flow of the discussion and attending to power imbalances.[212]

Indeed, research shows that participants are more likely to reach agreement when the mediator actively structures the sessions, focuses the parties on problem-solving, keeps "flexible control," intervenes in conflict, "shapes" communication, and keeps the parties focused on underlying interests.[213]

Even though the mediator controls the process, mediation empowers the parties to make their own substantive decisions and

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209. ERICKSON & MCKNIGHT, *supra* note 205, at 63. *See also* KENNETH KRESSEL & DEAN G. PRUITT, MEDIATION RESEARCH 413 (1989); Sarah Childs Grobe, *Structured Mediation and Its Variants: What Makes It Unique*, *in* DIVORCE MEDIATION 227 (Folberg & Milne, eds., 1988).

210. Trina Grillo, *Respecting the Struggle: Following the Parties' Lead*, 13 MEDIATION Q. 279, 279 (1996).

211. In some models of mediation, the mediator is allowed or required to make recommendations to the court. However, this practice is not consistent with the definition of mediation used in this article. *See* Folberg, *supra* note 205, at 446; Maggie Vincent, *Mandatory Mediation of Custody Disputes: Criticism, Legislation, and Support*, 20 VT. L. REV. 255, 289 (1995).

212. ERICKSON & MCKNIGHT, *supra* note 205, at 60; JOHNSTON & ROSEBY, *supra* note 47, at 230.

213. Kelly, *supra* note 207, at 382.

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tailor their agreements to fit their unique situations.[214] Because of this individual orientation, mediated agreements tend to be more detailed and specific.[215] For example, a carefully structured parenting plan reduces conflict by detailing transfer arrangements, listing rules about contact, and regulating communication.[216] Interim agreements are frequently made to stabilize the situation without resort to formal hearings and in order to allow the couple to "test drive" potentially permanent arrangements.[217] Throughout this process, the mediator models problem-solving approaches and teaches basic conflict resolution skills.[218] As the parties arrive at small agreements, they become more hopeful and more confident about tackling the tougher issues.[219]

C. Interest-Based Process

The mediator keeps the focus on the underlying needs and interests of the parties and their children, thus avoiding a win/lose rights-based orientation in which parties become locked into a fixed position.[220] The discussion centers on brainstorming ways to fulfill expressed needs rather than compromising in a zero sum game.[221] Most couples have some common interests, especially around the welfare of children, and the mediator attempts to build on these.[222] The children's needs are a specific focus of discussion and the mediator repeatedly draws the couple's attention to the children's point of view.[223]

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214. NANCY H. ROGERS & CRAIG A. MCEWEN, MEDIATION: LAW, POLICY, PRACTICE 22 (1989); Joanne Fuller & Rose Mary Lyons, *Mediation Guidelines*, 33 WILLAMETTE L. REV. 905, 910 (1997).

215. Ezzell, *supra* note 131, at 128.

216. Elrod, *supra* note 111, at 529-30.

217. Fuller & Lyons, *supra* note 214, at 906.

218. *Wingspread*, *supra* note 144, at 147; Ezzell, *supra* note 131, at 127.

219. ANTHONY J. SALIUS & SALLY DIXON MARUZO, *Mediation of Child-Custody and Visitation Disputes in a Court Setting*, *in* DIVORCE MEDIATION 189 (Folberg & Milne eds., 1988); Ezzell, *supra* note 131, at 127.

220. ERICKSON & MCKNIGHT, *supra* note 205, at 46.

221. *Id.* at 49; MACCOBY & MNOOKIN, *supra* note 115, at 52.

222. MACCOBY & MNOOKIN, *supra* note 115, at 53.

223. GROBE, *supra* note 209, at 188-89; Elrod, *supra* note 111, at 529; Ezzell, *supra* note 131, at 129; Alison E. Gerencser, *Family Mediation: Screening for Domestic Abuse*, 23 FLA. ST. U. L. REV. 43, 50-51 (1995).

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D. Standard of Fairness

Because mediation helps couples build agreements unique to them, they are able to use their own standards of fairness[224] subject to the advice of their attorneys and subsequent approval by the court.[225] They have the freedom to address emotional issues in a constructive setting,[226] set their own time frame,[227] and control costs.[228]

E. Time

Research indicates that mediated divorce cases generally proceed more quickly than those that are not mediated.[229] Some researchers have found that a mediated divorce is completed in half the time it would normally take the case to make its way through the court system.[230] However, as noted previously, the amount of time saved depends upon the process used, with private mediation taking longer than public mediation.[231] While successful mediation saves time, unsuccessfully mediated cases actually take longer to complete than those continuously within the adversarial system.[232]

F. Cost

Most studies have also found that mediation is less expensive than the traditional court process.[233] In one study, mediating couples saved 134% in fees when compared to those using the two

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224. ERICKSON & MCKNIGHT, *supra* note 205, at 50; Folberg, *supra* note 205, at 419.

225. *But see Reclaiming Professionalism*, *supra* note 2 (asserting that judicial oversight does not prevent unfair agreements).

226. ROGERS & MCEWEN, *supra* note 214, at 21; Gerencser, *supra* note 223, at 50; Milne & Folberg, *supra* note 121, at 3.

227. Stephen K. Erickson, *The Legal Dimension of Divorce Mediation*, *in* DIVORCE MEDIATION 122 (Folberg & Milne eds., 1988); Ezzell, *supra* note 131, at 128; Fuller & Lyons, *supra* note 214, at 906.

228. Erickson, *supra* note 227, at 123; Fuller & Lyons, *supra* note 214, at 910; Mackoff et al., *supra* note 29, at 1317; Kate McCabe, *A Forum for Women's Voices: Mediation Through a Feminist Jurisprudential Lens*, 21 N. ILL. U. L. REV. 459, 461 (2001).

229. KRESSEL & PRUITT, *supra* note 209, at 398; Folberg, *supra* note 205, at 431; King, *supra* note 113, at 429. *But see* NAT'L CENTER FOR STATE COURTS, MULTI-STATE ASSESSMENT OF DIVORCE MEDIATION AND TRADITIONAL COURT PROCESSING 71 (1992) [hereinafter MULTI-STATE ASSESSMENT] (describing the time savings as nominal).

230. Kelly, *supra* note 207, at 376; *The Evolving Judicial Role*, *supra* note 20, at 411.

231. Pearson & Thoennes, *supra* note 204, at 432 (2.4 hours difference).

232. Jessica Pearson & Nancy Thoennes, *The Benefits Outweigh the Costs*, 4 FAM. ADVOC. 26, 29 (1982).

233. KRESSEL & PRUITT, *supra* note 209, at 398; Kelly, *supra* note 207, at 376; King, *supra* note 113, at 439. *But see* MULTI-STATE ASSESSMENT *supra* note 229, at 71.

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attorney adversarial process.[234] In another study, couples saved 42% in attorney fees. Couples also save money by using single neutral experts, as needed, rather than hiring "battling" experts.[235] The amount saved depends on the mediation process used, with more savings being accrued if the case is diverted from the courts early in the process.[236] Mandatory mediation is particularly cost efficient.[237]

G. Settlement Rates

Mediation settlement rates vary by program but range from forty to 80% with the average rate of settlement being about 60%.[238] Some research has shown that high conflict levels do not correlate with lower settlement rates in mediation.[239] However, other researchers have found that mediation is more problematic when the conflict is intense, the power differential is significant, the parties are not highly motivated to settle, the parties disagree in principle, and they are negotiating over "scarce resources."[240]

H. Satisfaction Levels

Studies indicate that satisfaction levels with mediation range from 60% to 93%.[241] Both men and women are equally satisfied with mediation, with 78% of men and 72% of women reporting that they are somewhat to very satisfied.[242] Satisfaction rates vary depending upon whether the parties reach agreement. Those who settle are more satisfied than those who do not settle.[243] Interest-

234. Joan B. Kelly, *Is Mediation Less Expensive?*, 8 MEDIATION Q. 15, 15 (1990).

235. *See* ERICKSON & MCKNIGHT, *supra* note 205, at 100.

236. *See* Beck & Sales, *supra* note 146, at 1041.

237. MULTI-STATE ASSESSMENT *supra* note 229 at 71.

238. ELLIS & STUCKLESS, *supra* note 72, at 103. *See also* KRESSEL & PRUITT, *supra* note 209, at 397 (60%); Jeanne A. Clement & Andrew I. Schwebel, *A Research Agenda for Divorce Mediation: The Creation of Second Order Knowledge to Inform Legal Policy*, 9 OHIO ST. J. ON DISP. RESOL. 95, 99 (1993) (45% to 75%); Folberg, *supra* note 205, at 422 (58%); *Introduction to the Model Standards*, *supra* note 201, at 3 (50% to 60%); Kelly & Gigy, *supra* note 21, at 18.

239. Kelly, *supra* note 207, at 380.

240. *See* KRESSEL & PRUITT, *supra* note 209, at 405. *See also* Milne & Folberg, *supra* note 121, at 16.

241. ELLIS, *supra* note 22 at 74; Folberg, *supra* note 205, at 424. *See also* KRESSEL & PRUITT, *supra* note 209, at 395 (75%); Clement & Schwebel, *supra* note 238, at 98 (80% to 100%).

242. Kelly & Gigy, *supra* note 21, at 278.

243. ELLIS, *supra* note 22 at 74.

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ingly, even among those who do not reach agreement, 81% would nevertheless recommend the process to a friend.[244]

Mediating couples report liking the focus on the children, the chance to air grievances, the opportunity to discuss real issues, the ability to keep the discussion on track.[245] Those expressing dissatisfaction with mediation describe the process as tense, unpleasant, confusing, and rushed.[246]

Research shows that both men and women are more satisfied with mediation than with the adversarial process.[247] Seventy-seven percent of mediating couples are pleased with the mediation process, but only 40% of litigating couples are satisfied with the court procedure.[248] In fact, 50% to 70% of those litigating express active dissatisfaction with the legal system.[249] Reasons for this dissatisfaction include the reluctance to deal with private matters in public, the impersonality of the process, and the association of court appearances with criminal prosecution.[250] Eighty-five percent of mediating couples see the process as fair compared to 20% to 30% of those using the court system.[251] Mediation is seen as involving less pressure, protecting people's rights better, giving couples more control over decisions, and being less coercive.[252] Dissatisfaction rates increase as couples become more involved with lawyers and the court system.[253]

I. Compliance and Relitigation

Mediators have long believed that compliance with mediated agreements is higher because the parties have thoroughly explored alternatives and voluntarily chosen to take the agreed upon path.[254] Indeed, research shows that mediating couples are more likely to

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244. *Id.*

245. Pearson & Thoennes, *supra* note 204, at 19, 438.

246. *Id.* at 439.

247. ELLIS & STUCKLESS, *supra* note 72, at 102 (detailing positive results of mediation); Kelly & Gigy, *supra* note 21, at 280.

248. Pearson & Thoennes, *supra* note 204, at 437.

249. *Id.* at 437-38.

250. *Id.*

251. Clement & Schwebel, *supra* note 238, at 99; Folberg, *supra* note 205, at 424.

252. MULTI-STATE ASSESSMENT, *supra* note 229, at 72.

253. ELLIS & STUCKLESS, *supra* note 72, at 104.

254. Beck & Sales, *supra* note 146, at 281; McCabe, *supra* note 228, at 460-61. *See* MARY R. CATHCART & ROBERT E. ROBLES, U.S. COMM'N ON CHILD & FAM. WELFARE, PARENTING OUR CHILDREN: IN THE BEST INTEREST OF THE NATION 21 (1996).

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comply with the agreements they have made.[255] This is especially true for custody and child support agreements.[256] Couples participating in multiple mediation sessions over a two to three month period have higher compliance rates than those participating in a single mediation session.[257]

Some studies also show that relitigation rates are lower for mediating couples.[258] Other researchers have found that mediating couples are less likely to return to court for the first two years after the divorce but that relitigation rates even out by the five-year point.[259] Although these results are somewhat inconclusive, there is no indication that mediation increases relitigation rates.[260]

J. Who Chooses to Mediate?

Not everyone chooses to mediate and researchers have compared the characteristics of couples who mediate with those of couples using the adversary process. People choosing to mediate are generally better educated and have higher incomes than those who do not mediate.[261] Those choosing to use the court system are apt to have been separated longer and are more likely to have been abused.[262] There is little difference between the two groups with respect to the ongoing level of conflict evidenced prior to entering mediation. [263] Thus, high conflict couples are as likely to mediate as lower conflict couples. Research shows that couples choose mediation for practical reasons, usually financial, and because they want to keep their relationship as friendly as possible.[264] A substantial number (80%) of those choosing mediation do so to avoid contact with attorneys and court proceedings as well as to reduce costs.[265]

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255. ELLIS & STUCKLESS, *supra* note 72, at 116; Pearson & Thoennes, *supra* note 204, at 21.

256. ELLIS & STUCKLESS, *supra* note 72, at 116; Clement & Schwebel, *supra* note 238, at 100.

257. ELLIS & STUCKLESS, *supra* note 72, at 116.

258. ELLIS, *supra* note 22, at 75; Clement & Schwebel, *supra* note 238, at 100 (1993) (stating that mediation reduces post-settlement relitigation up to 30%); Folberg, *supra* note 205, at 425.

259. ELLIS & STUCKLESS, *supra* note 72, at 115-16; King, *supra* note 113, at 435.

260. Pearson & Thoennes, *supra* note 204, at 21-22.

261. ELLIS, *supra* note 22 at 73.

262. *See* ELLIS & STUCKLESS, *supra* note 72, at 27 (concluding that people who choose lawyers also are often poorer and less educated).

263. Kelly & Gigy, *supra* note 21, at 267.

264. *Id.* at 271.

265. KRESSEL & PRUITT, *supra* note 209, at 410.

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K. Children and Custody

The focus on the needs of the children is a hallmark of the mediation process as described in Standard VIII of the Model Standards of Practice for Family and Divorce Mediation:

> A family mediator shall assist participants in determining how to promote the best interests of children.
>
> A. The mediator should encourage the participants to explore the range of options available for separation or post divorce parenting arrangements and their respective costs and benefits. Referral to a specialist in child development may be appropriate for these purposes. The topics for discussion may include, among others:
>
> 1. information about community resources and programs that can help the participants and their children cope with the consequences of family reorganization and family violence;
> 2. problems that continuing conflict creates for children's development and what steps might be taken to ameliorate the effects of conflict on the children;
> 3. development of a parenting plan that covers the children's physical residence and decision-making responsibilities for the children, with appropriate levels of detail as agreed to by the participants;
> 4. the possible need to revise parenting plans as the developmental needs of the children evolve over time; and
> 5. encouragement to the participants to develop appropriate dispute resolution mechanisms to facilitate future revisions of the parenting plan.[266]

Thus, mediated agreements usually include longer and more detailed parenting agreements.

Several studies show that mediating couples are more likely to agree to joint custody,[267] while mothers are more likely to be awarded sole custody in the courts.[268] Other researchers believe that there is no significant difference in custody outcomes.[269]

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266. MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION, Standard VIII.

267. KRESSEL & PRUITT, *supra* note 209, at 397; Clement & Schwebel, *supra* note 238, at 101 (50% to 60% joint).

268. ELLIS & STUCKLESS, *supra* note 72, at 138; Clement & Schwebel, *supra* note 238, at 104.

269. MULTI-STATE ASSESSMENT, *supra* note 229, at 38-39; Vincent, *supra* note 211, at 275-76.

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Aside from the outcome, the divorce process used by the parents has less effect on the adjustment of children than does their ongoing conflict level and the passage of time.[270] Mediation may reduce parental conflict levels for the first couple of years,[271] but this does not appear to be a long term effect.[272] Although the mediation process is too brief to reverse entrenched behavior patterns, parental cooperation is positively associated with the amount of time spent in mediation.[273] Parents whose cooperation level was increased through participation in mediation found that they communicated more effectively, understood each other's point of view better, and reduced their anger levels.[274] Although 15% to 20% of mediating couples reported that their relationship worsened in mediation, nearly half of the litigating couples believed that that adversarial process had harmed their relationship.[275] The mediation process, therefore, is seen as less potentially damaging to parental cooperation than are court proceedings.[276]

L. Economic Issues

Although there is some evidence that couples who mediate perceive their property settlements to be fairer than those who litigate[277] and some believe that women and children are economically advantaged in mediation,[278] research shows that the choice of divorce process is not a highly significant economic factor.[279] Rather, the couple's financial status prior to the divorce and whether either has remarried is more predictive of financial status after divorce.[280] Because males are generally better off financially, they tend to remain so after divorce in mediation as well as under the adversarial model.[281]

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270. ELLIS & STUCKLESS, *supra* note 72, at 137-38.

271. *Id.*; ROGERS & MCEWEN, *supra* note 214, at 110; Clement & Schwebel, *supra* note 238, at 100-01.

272. ELLIS & STUCKLESS, *supra* note 72, at 138; Kelly, *supra* note 207, at 379.

273. Kelly, *supra* note 207, at 379.

274. Clement & Schwebel, *supra* note 238, at 100-01.

275. *Id.*

276. *See* Jessica Pearson & Nancy Thoennes, *Divorce Mediation: An Overview of Research Results*, 19 COLUM. J.L. & SOC. PROBS. 451, 471-72 (1985).

277. Kelly, *supra* note 207, at 379.

278. SARAH R. COLE et al., MEDIATION: LAW, POLICY & PRACTICE § 12.2 (2d ed. 1994). *See* ELLIS & STUCKLESS, *supra* note 72, at 88 (citing a study in which mothers who participated in mediation were awarded, more often, the child support they wanted than those who received a negotiated settlement).

279. ELLIS & STUCKLESS, *supra* note 72, at 138.

280. *Id.* at 123, 138.

281. *See id.* at 123.

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M. Gender

Because the adversary system sometimes has failed to protect the interests of women and battered women in particular,[282] some believe that mediation embodies a style of conflict resolution that is more compatible with women's world view and "ethic of care."[283] Others have expressed grave concern about the use of mediation in divorce cases generally and most especially in cases where there is a history of domestic violence. These concerns are explored in the next section.

VI. DIVORCE MEDIATION WHEN DOMESTIC VIOLENCE IS AN ISSUE

Although mediation provides a desirable alternative for many families, there are serious concerns about its use in cases of domestic violence. Some of these concerns arise from the mediation process itself and others stem from the varying quality of the conducted mediation.[284]

A. Reasons Why Mediation Might Never Be Appropriate

1. Is Mediation Too Private?

Privacy and confidentiality are critical aspects of the mediation process. Both are necessary to encourage full disclosure and candid problem solving.[285] Some women's advocates, however, are troubled by the private nature of mediation. After years of working to have domestic violence dealt with as a crime, they see mediation as potentially returning the issue "back into the shadows."[286] Because

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282. *See* Vincent, *supra* note 211, at 282.

283. *See* McCabe, *supra* note 228, at 471-72 (discussing CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT 24-63 (1993)); Vincent, *supra* note 211, at 257-58 (citing Nancy G. Maxwell, *The Feminist Dilemma in Mediation*, *in* INTERNATIONAL REVIEW OF COMPARATIVE PUBLIC POLICY, 4 FAMILY LAW AND GENDER BIAS: COMPARATIVE PERSPECTIVES 67-68 (Nicholas Mercuro & Barbara Stark, eds., 1992)).

284. Stephen K. Erickson & Marilyn S. McKnight, *Mediating Spousal Abuse Divorces*, 7 MEDIATION Q. 377, 379 (1990) (emphasizing that mediators must have "special skills . . . tailored to the complex dynamic of spousal abuse." The role of the mediator is to help set "new rules" to eliminate spousal abuse.).

285. Mary Pat Treuthart, *In Harm's Way? Family Mediation and the Role of the Attorney Advocate*, 23 GOLDEN GATE U. L. REV. 717, 730 (1993).

286. Goodmark, *supra* note 147, at 24; Sarah Krieger, *The Dangers of Mediation in Domestic Violence Cases*, 8 CARDOZO WOMEN'S L.J. 235, 240-41 (2002). *See also* WINNER, *supra* note 149, at 182-84 (discussing the imbalance of power in divorce mediation).

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criminal prosecution sends a public message to the abuser that his behavior is unacceptable, advocates fear that the abusers in mediation will not be held accountable for the abuse.[287] Similarly, they fear that if these cases are removed from the courts, new favorable legal precedents will not be established.[288]

Two factors mitigate these concerns. First, divorce mediation need not supplant the use of the criminal system.[289] If an abuse survivor chooses to do so, she can file criminal charges, pursue a protective order, and mediate the divorce. Use of the criminal courts is not an exclusive remedy. Second, a growing body of evidence suggests that applying criminal sanctions may not deter further abuse. Rather, in some cases, criminal charges have been correlated with an increased likelihood of a recurrence of abuse.[290] Consequently, each victim must make an individual assessment of whether the abuser will be deterred from further violence by criminal prosecution. Either way, she could proceed with mediation.

Proponents of mediation argue that the privacy of the process and the neutrality of the mediator increase the likelihood that the abuser will admit the abuse and accept help.[291]

> The adversarial approach to spousal abuse often actually encourages the husband to deny his past abusive behavior because his defense attorney will assist him in denying the offense . . . . In mediation, the mediator and the couple can immediately deal with the abuse because the neutral role of the mediator takes away the need for the mediator to be a judge determining what happened in the past and allows the mediator to focus on steps to remove any possibility of future allegations or occurrences of abuse.[292]

Some batterers may respond more constructively if they perceive that they are being listened to, treated fairly, and given clear

287. Kerry Loomis, Comment, *Domestic Violence and Mediation: A Tragic Combination for Victims in California Family Court*, 35 CAL. W. L. REV. 355, 367 (1999).

288. Goodmark, *supra* note 147, at 24; Laurie Woods, *Mediation: A Backlash to Women's Progress on Family Law Issues*, 19 CLEARINGHOUSE REV. 431, 431 (1985).

289. *See* Ann W. Yellott, *Mediation and Domestic Violence: A Call for Collaboration*, 8 MEDIATION Q. 39, 39-42 (1990).

290. *See* Janell D. Schmidt & Lawrence W. Sherman, *Does Arrest Deter Domestic Violence?*, *in* DO ARRESTS AND RESTRAINING ORDERS WORK? 49 (Eve S. Buzawa & Carl G. Buzawa eds., 1996).

291. Luisa Bigornia, *Alternatives to Traditional Criminal Prosecution of Spousal Abuse*, 11 J. CONTEMP. LEGAL ISSUES 57, 60-61 (2000); Rimelspach, *supra* note 103, at 102; Yellott, *supra* note 289, at 43.

292. Erickson & McKnight, *supra* note 284, at 385.

HeinOnline -- 9 Wm. & Mary J. Women & L. 181 2002-2003

expectations for future behavior.[293] This does not mean that abuse should ever be tolerated or negotiated.[294]

Although more research is needed in this area, there is some evidence that mediation prevents future violence.[295] Researchers Ellis and Stuckless report that voluntary multi-session mediation is more effective in preventing future violence than either coerced mediation or lawyer negotiations.[296] Interestingly, they found that the preparation of affidavits with "hurtful" content may have undermined lawyers' efforts to end the abuse.[297]

Some mediators specifically recommend that a protective order be pursued simultaneously with mediation and that the mediation sessions be used to reinforce the boundaries set in the order.[298]

Until more is known about which abusers are likely to offend again and under what circumstances, the abuse survivor ought to have an expanded, not more limited, array of options including both civil and criminal sanctions.

2. *Are Power Imbalances Insurmountable?*

The potential difference in power between the victim and the abuser is a major concern when mediation is being considered or conducted.[299]

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293. MARILYN MCKNIGHT, MEDIATING IN THE SHADOW OF DOMESTIC VIOLENCE 50 (1997); Holly A. Magana & Nancy Taylor, *Child Custody Mediation and Spouse Abuse: A Descriptive Study of Protocol*, 31 FAM. & CONCILIATION CTS. REV. 50, 54 (1993). *But see Reclaiming Professionalism*, *supra* note 2, at 205 (asserting that in cases of domestic abuse, "mediation is a power choice").

294. Mary A. Duryee, *Guidelines for Family Court Services Intervention When There Are Allegations of Domestic Violence*, 33 FAM. & CONCILIATION CTS. REV. 79, 82 (1995).

295. Kelly, *supra* note 207, at 381; Linda Perry, *Mediation and Wife Abuse: A Review of the Literature*, 11 MEDIATION Q. 313, 322 (1994); Rimelspach, *supra* note 103, at 103. *See* ELLIS & STUCKLESS, *supra* note 72, at 61; Kelly Rowe, Comment, *The Limits of the Neighborhood Justice Center: Why Domestic Violence Cases Should Not Be Mediated*, 34 EMORY L.J. 855, 883-84 (1985) (citing a study in which 70% of those contacted reported no further problems).

296. ELLIS & STUCKLESS, *supra* note 72, at 61-62.

297. *Id.* at 62; Jessica Pearson, *Mediating When Domestic Violence Is a Factor: Policies and Practices in Court-Based Divorce Mediation Programs*, 14 MEDIATION Q. 319, 329 (1997) (noting that the court system is often counterproductive because couples have to deal with each other after "trashing" each other in pleadings).

298. Erickson & McKnight, *supra* note 284, at 386.

299. Telser, *supra* note 142, at 973.

HeinOnline -- 9 Wm. & Mary J. Women & L. 182 2002-2003

a. The Issue of Power Imbalance in Nonviolent Relationships

Power involves the potential for one party to impose his or her will upon the other party.[300] Power can shift and change and is not an all or nothing attribute.[301] It can spring from different capacities such as one's belief system, personality, self-esteem, gender, selfishness, force, income/assets, knowledge, status, age, and education.[302] In divorce, power generally corresponds with who originated the divorce, who has the more favorable legal case, who feels more guilty, and who has the stronger lawyer or support system.[303] Power need not be entirely competitive in nature; rather, in a cooperative relationship, each party benefits from enhancing each other's power.[304]

Power imbalances occur to some extent in all divorce mediation, even when violence is not a factor.[305] Despite the fears of commentators, research shows that women do not necessarily wield less power in the mediation process.[306]

Women often find mediation to be empowering. They report that participation in mediation enhances their ability to stand up for themselves, assume responsibility for themselves,[307] solve problems,[308] and express their views.[309] Most women studied prefer mediation[310] and their satisfaction levels are not associated with power related marital issues such as abuse, who won arguments, or difficulty being heard.[311]

Of course, some women do report being pressured into agreements by their husbands, being uncomfortable with expressing

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300. Scott H. Hughes, *Elizabeth's Story: Exploring Power Imbalances in Divorce Mediation*, 8 GEO. J. LEGAL ETHICS 553, 574 (1995) (citing MAX WEBER, LAW IN ECONOMY AND SOCIETY 323 (1954)).

301. Diane Neumann, *How Mediation Can Effectively Address the Male-Female Power Imbalance in Divorce*, 9 MEDIATION Q. 227, 229 (1992).

302. *Id.* at 229.

303. *Id.* at 236-37.

304. STEPHEN K. ERICKSON & MARILYN S. MCKNIGHT, POWER IMBALANCE IN MEDIATION: SHOWSTOPPER OR OPPORTUNITY 5 (1998) [hereinafter POWER IMBALANCE].

305. *Id.* at 2. *See* ELLIS & STUCKLESS, *supra* note 72, at 5-6.

306. *See* MULTI-STATE ASSESSMENT, *supra* note 229, at 30; Kelly, *supra* note 207, at 378. *See also* McCabe, *supra* note 228, at 480 ("[M]ediation offers women an opportunity to step out of their socialized image and speak for themselves.").

307. Beck & Sales, *supra* note 146, at 1037; Kelly, *supra* note 207, at 378.

308. Vincent, *supra* note 211, at 278. *See* Roselle Wissler, *Study Suggests Domestic Violence Does Not Affect Settlement*, DISP. RESOL. MAG., Fall 1999, at 29.

309. King, *supra* note 113, at 444; Wissler, *supra* note 308, at 29.

310. MULTI-STATE ASSESSMENT, *supra* note 229, at 30; Pearson & Thoennes, *supra* note 204, at 440-41.

311. Beck & Sales, *supra* note 146, at 1037.

HeinOnline -- 9 Wm. & Mary J. Women & L. 183 2002-2003

their feelings, and feeling tense, angry, confused, and overwhelmed during the mediation process.[312] Research has shown that these women tend to terminate the mediation rather than submit to agreements they deem unfair.[313]

Feeling pressure to settle has been more strongly associated with poor communication throughout the marriage than the presence of domestic violence.[314] However, even though abuse is "an unreliable indicator" of power imbalance,[315] there may still be an association and this is cause for concern.[316]

b. The Problem of Power Imbalance in Cases of Domestic Violence

In cases where domestic violence has taken place, there has already been a severe abuse of power and the consequent power imbalance can make mediation impossible.[317] Barbara Hart argues that cooperation between spouses when domestic abuse had occurred is "an oxymoron."[318] Others agree that especially where there has been a culture of battering coupled with severe abuse, the power imbalance is too great to be overcome in mediation.[319] Victims may fear retaliatory violence if they disagree with the abuser,[320] thus making negotiation impossible.[321] This is described by Leigh Goodmark:

> Memories of the batterer's power, and the way he used that power, trigger fear of the abuser. As one abused women noted, "When he had power over me, he didn't have to exert himself.

312. Joan B. Kelly et al., *Mediated and Adversarial Divorce: Initial Findings from a Longitudinal Study*, *in* DIVORCE MEDIATION: THEORY AND PRACTICE 469 (Jay Folberg & Ann Milne eds., 1988); Kelly & Gigy, *supra* note 21, at 279; Pearson & Thoennes, *supra* note 204, at 440-41.

313. David B. Chandler, *Violence, Fear, and Communication: The Variable Impact of Domestic Violence on Mediation*, 7 MEDIATION Q. 331, 343-44 (1990).

314. Beck & Sales, *supra* note 146, at 1037; Pearson & Thoennes, *supra* note 204, at 440; Vincent, *supra* note 211, at 277.

315. Pearson, *supra* note 297, at 324.

316. Vincent, *supra* note 211, at 278-79.

317. *Reclaiming Professionalism*, *supra* note 2, at 203; James Martin Truss, *The Subjection of Women . . . Still: Unfulfilled Promise of Protection for Women Victims of Domestic Violence*, 26 ST. MARY'S L.J. 1149, 1186 (1995).

318. Barbara J. Hart, *Gentle Jeopardy: The Further Endangerment of Battered Women and Children in Custody Mediation*, 7 MEDIATION Q. 317, 320 (1990).

319. *Reclaiming Professionalism*, *supra* note 2, at 203-04.

320. Barbara Hart, *Battered Women and the Criminal Justice System*, *in* DO ARRESTS AND RESTRAINING ORDERS WORK?, 98-99 (Eve S. Buzawa & Carl G. Buzawa eds., 1996).

321. Holly Joyce, Comment, *Mediation and Domestic Violence: Legislative Responses*, 14 J. AM. ACAD. MATRIMONIAL L. 447, 453 (1997).

HeinOnline -- 9 Wm. & Mary J. Women & L. 184 2002-2003

> The more powerful I become [in getting away from him], the more irrational he becomes. I wonder, would he hurt me physically?" These memories may render the victim inarticulate or angry, making it difficult for her to express her position during mediation. The victim may feel pressure to settle or to compromise, continuing to believe that the abuse . . . will stop if she simply decreases her demands.[322]

Research does bear out some of these concerns. A 1995 study found that abused women perceive themselves as having less power than women who have not been abused; they were more likely to think that the abuser could "out-talk" them, had "gotten back at them" previously, and said they were afraid to "openly disagree" for fear of retaliation.[323] Interestingly, the authors also made some contrary discoveries as well.

> However, there were no significant differences for abused and nonabused women on four personal empowerment items: (a) giving in just to stop dealing with the abuser, (b) feeling guilty for asking for the custody and visitation that they wanted, (c) perceived ability to speak up for themselves about custody and visitation wishes, and (d) getting what they wanted in disagreements.[324]

Other studies report that abuse survivors are able to negotiate effectively[325] and are not at a disadvantage in mediation because of power imbalances.[326] These favorable findings may be related to the mediator screening for abuse and carefully monitoring relative power levels.[327]

Despite the contrary indications found in the research, power imbalance is an important consideration in deciding whether mediation is appropriate. The extent of the problem varies with the individual couple.[328] As discussed previously, women who are dealing with ongoing and episodic male battering or psychotic and paranoid reactions as defined by Johnston and Campbell, may have

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322. Goodmark, *supra* note 147, at 22.

323. GIRDNER, *supra* note 24, at 13; Lisa Newmark et al., *Domestic Violence and Empowerment in Custody and Visitation Cases*, 33 FAM. & CONCILIATION CTS. REV. 30, 57 (1995).

324. Newmark et al., *supra* note 323, at 57. *See generally* MULTI-STATE ASSESSMENT, *supra* note 229.

325. Wissler, *supra* note 308, at 29.

326. Pearson, *supra* note 297, at 327.

327. ELLIS & STUCKLESS, *supra* note 72, at 80.

328. Joyce, *supra* note 321, at 457.

HeinOnline -- 9 Wm. & Mary J. Women & L. 185 2002-2003

more difficulty mediating.[329] Similarly, women suffering from "battered women's syndrome" or PTSD may have difficulty standing up for themselves. However, some abuse survivors are able to state their own needs and problem solve effectively.[330]

At the other extreme, some have argued that men are disadvantaged in mediation because of women's greater power with respect to children, their relationship-oriented negotiation style, and sometimes their ability to "tell a better story."[331]

Each couple differs with respect to power imbalance and relative power levels may change throughout the relationship. The power imbalance inherent in domestic violence will render some abuse survivors unable to mediate. However, this assumption cannot be made for all couples who have had violent incidents. Capacity to mediate can only be assessed on an individual level. However, if the couple and the mediator proceed with the mediation, the mediator needs to remain especially alert for power imbalances and be prepared to deal with them. In addition to viewing each couple as unique when deciding whether the mediation process is appropriate, it is important to ask, as Folberg and Milne do, "Compared to what?"[332]

c. Dealing with Power Imbalances

In some cases, the power imbalance is too severe for mediation to take place. However, in less extreme cases, skilled mediators are equipped to deal with moderate power differentials.[333] One way that mediators deal with power imbalance is through their own exercise of power.[334] The mediator controls the process by:

1. Creating the ground rules.
2. Choosing the topic.
3. Deciding who may speak.
4. Controlling the length of time each person may speak.

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329. JOHNSTON & ROSEBY, *supra* note 47, at 42.

330. McCabe, *supra* note 228, at 476-77.

331. MACOBY & MNOOKIN, *supra* note 115, at 95-96; Randy Frances Kandel, *Power Plays: A Sociolinguistic Study of Inequality in Child Custody Mediation and a Hearsay Analog Solution*, 36 ARIZ. L. REV. 879, 896 (1994); Lenard Marlow, *Samson and Delilah in Divorce Mediation*, 38 FAM. & CONCILIATION CTS. REV. 224, 224 (2000); McCabe, *supra* note 228, at 477; Vincent, *supra* note 211, at 278.

332. MARY ANN MASON, THE CUSTODY WARS: WHY CHILDREN ARE LOSING THE LEGAL BATTLE, AND WHAT WE CAN DO ABOUT IT 154 (1999); Grobe, *supra* note 209, at 17.

333. Rimelspach, *supra* note 103, at 101 (arguing that a skilled mediator can overcome difficulties that arise from power imbalances).

334. Grobe, *supra* note 209, at 198.

HeinOnline -- 9 Wm. & Mary J. Women & L. 186 2002-2003

5. Allowing and timing the person's response.
6. Determining which spouse may present a proposal to the other.
7. Presenting an interpretation of what the spouse said.
8. Ending the discussion.
9. Writing down the agreement.[335]

The mediator gradually transfers power from himself or herself to the divorcing couple as they become able to use it appropriately.[336] If the mediator retains too much power the couple will not "own" the agreement, but if the mediator relinquishes power prematurely, sessions are unproductive and, in the case of domestic violence, potentially dangerous.[337] Because knowledge is a form of power, special care is taken to share information and verify facts.[338] Power can also be balanced in a neutral fashion by asking probing questions[339] and validating the concerns of the less powerful party.[340] Separate caucuses give the mediator a chance to obtain direct feedback on power and safety issues.[341]

Mediators watch for specific behaviors that indicate power imbalances. These include but are not limited to tone of voice, glaring, insults, passivity, threats, outbursts, and refusal to speak.[342] In addition to behavioral cues, mediators watch for lopsided agreements. "Even if we concede that a mediator will not be able to see how the husband is maneuvering his wife to where he wants to get her, it is simply impossible for the mediator not to see where her husband has brought her."[343]

Additional safeguards in such situations include independent legal advice and, to some extent, judicial review.[344] If necessary, the mediator can end the mediation "on behalf" of the less empowered person.[345]

Some have argued that mediators cannot deal with power imbalance without jeopardizing their neutrality and impartiality.[346]

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335. Neumann, *supra* note 301, at 232.
336. Grobe, *supra* note 209, at 198.
337. *Id.* at 199.
338. Albie M. Davis & Richard A. Salem, *Dealing with Power Imbalances in the Mediation of Interpersonal Disputes*, 6 MEDIATION Q. 17, 20 (1984).
339. Folberg, *supra* note 205, at 439.
340. Joshua D. Rosenberg, *In Defense of Mediation*, 33 ARIZ. L. REV. 467, 497-98 (1991).
341. Hughes, *supra* note 300, at 580; Loomis, *supra* note 287, at 365.
342. POWER IMBALANCE, *supra* note 304, at 8-9.
343. Marlow, *supra* note 331, at 233 n.15.
344. Milne & Folberg, *supra* note 121, at 20.
345. Pearson, *supra* note 297, at 327.
346. Beck & Sales, *supra* note 146, at 1001-02; *Killing Us Softly*, *supra* note 163, at 504;

HeinOnline -- 9 Wm. & Mary J. Women & L. 187 2002-2003

Mediators do remain neutral with respect to the outcome of the mediation[347] but they are not "value-free" with respect to the process and the safety of the participants.[348] For example, as a part of the process of balancing power, mediators ask probing questions and suggest that legal counsel be sought to ensure that the parties are equally informed and fully understand the implications of agreements being considered.[349] The alternative to ignoring power imbalances would essentially amount to siding with the more powerful party. Obviously, the experience of the mediator is key.

3. Do Mediators Know What They Are Doing?

As the foregoing discussion suggests, mediation is a complex undertaking. The skill, training, and experience of the mediator are significant variables in the quality of any mediation process.[350] However, abuse survivors should be especially careful when selecting a mediator because of the danger inherent in their situation.

Because mediation is a relatively new field and much of it operates privately and informally, regulation and quality control have been controversial.[351] Questions abound with respect to licensure and minimum competency.[352] The situation is complicated by the fact that mediation is a multidisciplinary practice. For example, a 1983 study found that while 80% of mediators held graduate degrees, private sector mediators were likely to be social workers (42%); therapists, psychologists, psychiatrists (36%); and attorneys (15%).[353] The challenge comes in finding a way to promote professional diversity and innovation while maintaining quality control.[354] One possible solution involves requiring perfor-

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Loomis, *supra* note 287, at 362-63. *See* MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION, Standard IV; UNIFORM MEDIATION ACT § 9(g). Under both the Model Standards of Practice for Family and Divorce Mediation and the Uniform Mediation Act, the mediator has a clear duty to be impartial and to disclose any conflict of interest.

347. *Introduction to the Model Standards*, *supra* note 201, at 20.

348. *Id.*; Vincent, *supra* note 211, at 286-87. *See* Allan Edward Barsky, *Issues in the Termination of Mediation Due to Abuse*, 13 MEDIATION Q. 19, 26 (1995).

349. Barsky, *supra* note 348, at 96-97.

350. Treuthart, *supra* note 285, at 728, 755 (suggesting a mediator can never be skilled enough to counter a batterer's control).

351. Beck & Sales, *supra* note 146, at 1009.

352. Milne & Folberg, *supra* note 121, at 21.

353. *Id.* at 3, 11. *See also* ROGERS & MCEWEN, *supra* note 214, at 204.

354. ROGERS & MCEWEN, *supra* note 214, at 184 (noting that quality control is particularly important in cases where mediation is mandatory or the parties are unrepresented); Stephanie A. Henning, *A Framework for Developing Mediator Certification Programs*, 4 HARV. NEGOT. L. REV. 189, 228-29 (1999).

HeinOnline -- 9 Wm. & Mary J. Women & L. 188 2002-2003

mance and skills testing rather than limiting mediation practice to a particular professional discipline.[355]

The Model Standards of Practice for Family and Divorce Mediation suggest that mediators should:

1. have knowledge of family law;
2. have knowledge of and training in the impact of family conflict on parents, children, and other participants, including knowledge of child development, domestic abuse, and child abuse and neglect;
3. have education and training specific to the process of mediation; and
4. be able to recognize the impact of culture and diversity.[356]

Mediators are expected to provide information to clients about their training, education, and expertise.[357] Mediators are cautioned not to undertake domestic abuse cases without "appropriate and adequate" training.[358] However, this language is very general and fails to specify anything about the desired training. Similarly, the American Law Institute requires that mediators be qualified to identify abuse.[359]

Despite the lack of agreement about the qualifications and regulation of mediators, the research shows that participants generally find mediators to be impartial, sensitive, and skilled.[360] Reviews of transcripts of mediation sessions show that 80% of mediator statements are neutral or positive in tone.[361] However, in a mandatory mediation setting study, 15% of men and women did report that the mediator imposed his or her own viewpoint upon the parties.[362]

Abuse survivors need to exercise special care in selecting a mediator because in some states, no training or credentials are required for mediators.[363] In fact, only 70% of mediation programs surveyed report that mediators regularly attend domestic violence

355. Henning, *supra* note 354, at 228.

356. MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION STANDARD, Standard X (2001).

357. *Id.* at Standard II(B).

358. *Id.* at Standard X(B).

359. Reihling, *supra* note 122, at 401. *See also* Margaret Shaw et al., *National Standards for Court-Connected Mediation Programs*, 31 FAM. & CONCILIATION CTS. REV. 156, 184 (1993).

360. Kelly, *supra* note 207, at 378.

361. Pearson & Thoennes, *supra* note 204, at 16.

362. Kelly, *supra* note 207, at 378.

363. Beck & Sales, *supra* note 146, at 1011; Telser, *supra* note 142, at 974; Tondo et al., *supra* note 2, app. at 445 (2001) (listing state by state comparison).

HeinOnline -- 9 Wm. & Mary J. Women & L. 189 2002-2003

training programs.[364] Families who have experienced domestic violence should only consider mediating with someone who has specialized domestic violence training and experience.[365] Mediators should only undertake such cases if they are trained to understand the dynamics of domestic violence and have been taught special techniques for working with abusive families such as power balancing, screening, special safeguards, safety planning, and community referrals.[366] This training should be followed up with experiential requirements including the co-mediation of cases and a lengthy period of case supervision.[367]

B. Deciding Whether to Mediate

If power imbalances are manageable and a qualified mediator is available, mediation may be worth exploring. Research indicates that the settlement rates in domestic abuse divorce cases are comparable to other mediated divorces.[368] These settlement rates range from 51% to 76%.[369] Violent and nonviolent couples express equal levels of satisfaction with the mediation process, the agreements made, and the level of compliance with agreements.[370] In one study, 80% of complainants and respondents reported satisfaction with the process. Other studies have found that women experience higher levels of satisfaction and that couples perceive that their dealings with each other are improved.[371] This is probably because mediated agreements tend to be more detailed with respect to structuring future contact.[372]

1. Is It a Choice? Mandating Mediation

A central tenet of mediation theory is that mediation should be a voluntary choice.[373] Consequently, many mediators find the

364. Pearson, *supra* note 297, at 332; Nancy Thoennes et al., *Mediation and Domestic Violence Current Policies and Practices*, 33 FAM. & CONCILIATION CTS. REV. 6, 10 (1995).

365. ELLIS, *supra* note 22 at 332; Carnevale et al. *supra*, note 176, at 229; Fischer et al., *supra* note 42, at 2143; Treuthart, *supra* note 285, at 755.

366. Alexandria Zylstra, *Mediation and Domestic Violence: A Practical Screening Method for Mediators and Mediation Program Administrators*, 2001 J. DISP. RESOL. 253, 270 (2001). *See* Yellott, *supra* note 289, at 47 (listing suggested topics for training).

367. Zylstra, *supra* note 366, at 270.

368. Chandler, *supra* note 313, at 341.

369. Magana & Taylor, *supra* note 293, at 60; Perry, *supra* note 295, at 321, 323.

370. Fischer et al., *supra* note 42, at 2152.

371. Wissler, *supra* note 308, at 29.

372. Chandler, *supra* note 313, at 344.

373. Milne & Folberg, *supra* note 121, at 19.

HeinOnline -- 9 Wm. & Mary J. Women & L. 190 2002-2003

notion of mandatory mediation to be "a contradiction in terms"[374] because mediation is about self-determination, not coercion.[375]

Both the Model Code and the Model Family Standards contemplate voluntary participation in mediation.[376] Section 407 of the Model Code provides that mediation in the context of domestic violence should only take place if requested by the victim.[377] The Model Family Mediation Standards embrace the concept of "informed consent"[378] and call for informational sessions to discuss the process of mediation, the need for independent legal advice, confidentiality, and related issues.[379] Ideally, the mediator should meet separately with each party to screen for abuse and discuss safety options.

Advocates object to mandatory mediation fearing that victims will feel pressured into participating, even if they can opt out; individual mediators will vary regarding the stringency of screening and extent of safety measures; and the process will be too oriented toward cooperation, good faith bargaining, and compromise.[380] So far, these fears have not been born out by the research. Those required to attend mediation express equal or higher levels of satisfaction (70% to 90%)[381] than their voluntary counterparts.[382] When asked, 85% to 91% respond affirmatively to the idea of requiring all divorcing couples to participate in mediation.[383]

There is some evidence that court mandated mediation, while shorter and more cost efficient, is not as effective as private mediation.[384] On the other hand, research shows that mandatory programs provide more domestic violence training for mediators and require more thorough screening than private programs.[385]

Those who favor mandatory mediation note that more people use mediation when it is required[386] and this means that more

374. Robert Geffner & Mildred Daley Pagelow, *Mediation and Child Custody Issues in Abusive Relationships*, 8 BEHAV. SCI. & L. 151, 155 (1990); Joyce, *supra* note 321, at 452.

375. Rimelspach, *supra* note 103, at 102; Vincent, *supra* note 211, at 263.

376. MODEL CODE ON DOMESTIC AND FAMILY VIOLENCE § 407 (1994); MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION STANDARD, Standard III(C) (2001).

377. MODEL CODE ON DOMESTIC AND FAMILY VIOLENCE § 36 (1994).

378. MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION, Standard III (2001).

379. *Introduction to the Model Standards*, *supra* note 201, at 12. *See* MCKNIGHT, *supra* note 293, at 18 (discussing initial interview topics).

380. Pearson, *supra* note 297, at 228.

381. CATHCART & ROBLES, *supra* note 107, at 38.

382. ELLIS & STUCKLESS, *supra* note 72, at 103-04; King, *supra* note 113, at 392-93, 439-40.

383. Pearson & Thoennes, *supra* note 204, at 432.

384. ELLIS, *supra* note 22, at 78.

385. Pearson, *supra* note 297, at 325.

386. Vincent, *supra* note 211, at 283.

HeinOnline -- 9 Wm. & Mary J. Women & L. 191 2002-2003

couples are making their own decisions for the future.[387] This is seen as particularly desirable with respect to child custody arrangements.[388] However, in the context of domestic violence, mandatory mediation may actually be dangerous.

In practice, states have increasingly recognized the danger and the inappropriateness of requiring abuse survivors to mediate. Those states with mandatory programs generally provide exceptions for domestic violence cases.[389] Although California requires the mediator to meet individually with each party at separate times,[390] states such as Tennessee,[391] Hawaii,[392] and Alabama[393] are "victim choice" states in that they have adopted an approach similar to Section 407 of the Model Code which states:

> Section 407. Duty of mediator to screen for domestic violence during mediation referred or ordered by court.
>
> 1. A mediator who receives a referral or order from a court to conduct mediation shall screen for the occurrence of domestic or family violence between the parties.
> 2. A mediator shall not engage in mediation when it appears to the mediator or when either party asserts that domestic or family violence has occurred unless:
>   (a) Mediation is requested by the victim of the alleged domestic or family violence;
>   (b) Mediation is provided in a specialized manner that protects the safety of the victim by a certified mediator who is trained in domestic and family violence; and
>   (c) The victim is permitted to have in attendance at mediation a supporting person of his or her choice, including but not limited to an attorney or advocate.[394]

This approach allows victims the opportunity to mediate if they want to do so but does not force them into face-to-face negotiations with the abuser.[395]

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387. *Id.* at 284.

388. Mary Tall Shattuck, *Mandatory Mediation*, *in* DIVORCE MEDIATION: THEORY AND PRACTICE 191 (Jay Folberg & Ann Milne eds., 1998).

389. Tondo et al., *supra* note 2, app. at 445.

390. *Id.* at 435.

391. *Id.* at 443. *See* TENN. CODE ANN. § 36-4-131 (2001).

392. Tondo et al., *supra* note 2, at 436. *See* HAW. REV. STAT. § 580-41.5 (2001).

393. Tondo et al., *supra* note 2, at 434. *See* ALA. CODE § 6-6-20 (2002).

394. MODEL CODE ON DOMESTIC AND FAMILY VIOLENCE § 407 (1994).

395. Of course, mediation cannot go forward without the agreement of the batterer.

HeinOnline -- 9 Wm. & Mary J. Women & L. 192 2002-2003

When given the choice whether to mediate, only about 15% of domestic abuse victims opt out of mediation. However, because all abusive families are different, each abuse survivor should carefully consider whether or not mediation is safe and appropriate for her. The more information she has concerning the benefits and dangers of mediation, the more informed her choice will be.[396] She must consider all of her available options in light of her personal history of abuse and dealings with the abuser.[397] She may need time to think about the situation, and the opportunity to discuss her decision with an advocate or attorney.[398]

Even though the parties may choose to mediate, that choice is made subject to the professional judgment of the mediator. The following list of preconditions for mediation, written by Linda Girdner at the ABA Center on Children and the Law, provides an overview of the considerations. Mediators and abuse survivors should consider whether:

- Each party can make a decision to enter mediation freely and without coercion.
- Each party enters mediation with informed consent. Informed means that the parties had the opportunity to learn about mediation, its pros and cons, and alternatives to it.
- Each party can provide full disclosure without being afraid or endangered.
- Each party is aware that he or she can withdraw at anytime and feels they can do so without retribution.
- Each party is able to recognize that the other party has rights and needs separate from his or her own.
- Each party recognizes that all mediated outcomes must be agreed upon voluntarily by both parties.
- Neither party is cognitively or emotionally impaired (e.g., severe depression) in any way that affects capacity to mediate.
- Neither party lacks capacity due to drug or alcohol abuse.[399]

Clearly, not all families dealing with abuse will have the capacity to mediate and they should not be required to do so.

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396. GIRDNER, *supra* note 24, at 25.
397. *Id.*
398. *Id.* at 26.
399. *Id.* at 18-19.

HeinOnline -- 9 Wm. & Mary J. Women & L. 193 2002-2003

2. Screening for Abuse

Fifty percent of couples now entering mediation programs have experienced domestic violence.[400] Consequently, the Model Code, the Model Standards, and the American Law Institute[401] require that mediators screen for the presence of domestic violence.[402]

While there is general agreement that screening should take place, there is little consensus as to exactly how this should be accomplished.[403] Because the presence of domestic violence can be difficult to discern and victims often downplay or deny the abuse,[404] experts suggest using more than one method of screening.[405] For example, mediators might initially use a written questionnaire and then meet separately with each spouse. Various instruments such as the Conflict Assessment Scale,[406] the Conflict Tactics Scale,[407] the Conflict Assessment Protocol,[408] the Tolman Screening Model,[409] and others[410] have been devised. However, screening is more of an art than a science and the judgment of the screener is an important factor.[411] Consequently, some commentators believe that accurate results are improbable.[412] In fact, research discloses that only about 5% of cases are excluded from mediation because of domestic violence.[413]

This problem is confounded by the finding that as few as 80% of mediation programs are formally screening for abuse and that only half of these programs use private interviews in addition to written questionnaires and observation.[414] Although increasing numbers of mediators are using specialized processes such as

400. King, *supra* note 113, at 443; Pearson, *supra* note 297, at 320.

401. Reihling, *supra* note 122, at 399.

402. MODEL CODE ON DOMESTIC AND FAMILY VIOLENCE § 407 (1994); MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION, Standard X (2001).

403. *Introduction to the Model Standards*, *supra* note 201, at 21.

404. Krieger, *supra* note 286, at 254; Zylstra, *supra* note 366, at 268.

405. GIRDNER, *supra* note 24, at 15.

406. GARRITY & BARIS, *supra* note 174, at 42.

407. Nancy R. Rhodes, *The Assessment of Spousal Abuse: An Alternative to the Conflict Tactics Scale*, *in* INTIMATE VIOLENCE: INTERDISCIPLINARY PERSPECTIVES 28 (Emilio C. Viano ed., 1992).

408. Fischer et al., *supra* note 42, at 2156; Zylstra, *supra* note 366, at 272.

409. GIRDNER, *supra* note 24, at 5.

410. *Id.* at 17-26; MCKNIGHT, *supra* note 293, at 14-15; Rimelspach, *supra* note 103, at 112; Treuthart, *supra* note 285, at 724-26.

411. Reihling, *supra* note 122, at 393 n.139.

412. *Id.* at 403. *See* Fischer et al., *supra* note 42, at 337.

413. Pearson, *supra* note 297, at 324.

414. *Id.* at 325; Thoennes et al., *supra* note 364, at 11-12.

HeinOnline -- 9 Wm. & Mary J. Women & L. 194 2002-2003

separate caucuses and co-mediators,[415] there is much room for improvement. Thirty percent of mediators may not be trained regarding domestic violence and 20% may not be screening for it.[416]

Nevertheless, attorneys and judges believe that mediators who are trained to identify abuse and intimidation are in a key position to do so. They can provide "an institutionalized review of the cases" whereas outside of mediation, "these matters are less likely to be either reported by the victims or detected by the attorneys."[417]

3. Mediation Triage

As noted previously, mediation should never proceed against the wishes of the abuse survivor.[418] However, even when the victim wants to mediate, there are some conditions under which many mediators will not agree to mediate. For this reason, the Model Standards specifically state that some domestic violence situations "are not suitable for mediation because of safety, control, or intimidation issues."[419]

Experts agree that some categories of domestic violence cases should never be mediated. Erickson and McKnight find mediation inappropriate when (1) the abuser discounts the victim and refuses to acknowledge how his behavior affects her, (2) abuse is ongoing between mediation sessions, (3) either client is carrying a weapon or attempts to mediate while drinking or using drugs, or (4) either party continues to violate the mediation ground rules.[420]

Linda Girdner writes that cases should be excluded from mediation when abuse and/or control are central to the relationship to such an extent that the parties are unable to differentiate their interests, the abuser does not accept responsibility for his behavior, and the victim fears retribution.[421] These conditions render the couple unable to negotiate. In addition, Girdner cautions against mediation when weapons are involved and/or the abuser has fantasies of killing the victim and children or committing suicide.[422]

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415. Pearson, *supra* note 297, at 322, 324-25.

416. *Id.* at 332.

417. MULTI-STATE ASSESSMENT, *supra* note 229, at 31-32.

418. GIRDNER, *supra* note 24, at 20.

419. MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION, Standard XC; *Introduction to the Model Standards*, *supra* note 201, at 20-21.

420. Erickson & McKnight, *supra* note 284, at 387.

421. GIRDNER, *supra* note 24, at 21-22.

422. Linda K. Girdner, *Mediation Triage: Screening for Spouse Abuse in Divorce Mediation*, 7 MEDIATION Q. 365, 374 (1990).

HeinOnline -- 9 Wm. & Mary J. Women & L. 195 2002-2003

These exclusions are similar to those recommended by Johnston and Campbell. In a similar vein, Elizabeth Ellis suggests that mediation may go forward if the violence has been brief, was instigated by the wife, and/or began only after the separation.[423]

Because abuse can differ widely in "form, duration, and severity," the existence of violence creates a red flag for the mediator signaling a need for a closer look at the victim's ability to negotiate and the level of the abuser's denial and control.[424]

If there has been abuse but the identified prohibitions are absent, mediation might proceed, but only under stringent conditions. These include use of a specially trained mediator, a specialized process, and agreed upon safety protocols.[425]

4. Context and Making Informed Decisions

The abuse survivor is more familiar with her situation than anyone. Consequently, all process decision-making should start and end with her. She will have the best information on the following topics and should consider the following questions.

- The Abuse. As discussed previously, there is a continuum of abuse and the experience of each victim is unique. What is the history with respect to the severity, frequency, and amount of abuse? How recently has the abuse occurred? Is there a pattern? Is there a culture of battering with systematic domination and control by the batterer?[426]
- Immediate Safety Issues. The abuse survivor cannot make any decisions until she is safe. Has the couple separated? Is the abuse ongoing? If so, referrals should be made to community resources and the victim should consider pursuing a protective order and/or pressing criminal charges.
- Status of the Abuse Survivor. Is she ready and able to make decisions? What does she want to happen? Is she interested in counseling? Does she need medical treatment for PTSD?
- Likely Behavior of the Abuser. The abuse survivor is usually very knowledgeable about how the abuser is likely to respond to a protective order, criminal charges, and/or

423. ELLIS, *supra* note 22 at 77.
424. Pearson, *supra* note 297, at 324.
425. GIRDNER, *supra* note 24, at 20-21; Erickson & McKnight, *supra* note 284, at 387.
426. Gerencser, *supra* note 223, at 59.

HeinOnline -- 9 Wm. & Mary J. Women & L. 196 2002-2003

mediation. The point of this discussion is not to put his needs before hers, but to anticipate and avoid future abuse.

- Need for Future Contact. If the couple has children, especially young ones, there will be some form of future contact that must be carefully structured.
- Resources. What resources does the victim have? Can she afford to be represented by an attorney? Is she connected to an advocate or other support system? Are there other time and cost issues?

All of these factors can point in different directions and this makes decision-making difficult. For example, if the abuse survivor is seriously traumatized, has no children, and can afford an attorney, she may elect to proceed through the court system. On the other hand, if the abuse has been less severe and only took place around the time of the separation, if she has small children, and if she cannot afford an attorney, exploring mediation might make sense. Most abuse survivors will fall between these two scenarios and their decisions will be more complex.

Beyond individual considerations, divorce process decisions must be made within a larger context. Ideally the abuse survivor should have access to information about the quality and approach of the court system as well as the particular mediation process. Whatever process is chosen, state law will inform the ultimate outcome. The abuse survivor should be aware of whether the law provides a rebuttable presumption against custody awards to batterers or whether custody decisions are made in accordance with the "best interests" standard. The survivor might also want to consider whether joint custody is the norm.

If the abuse survivor enters the adversarial system, she should know whether the judge is likely to be informed about domestic violence issues. If she enters mediation, she might consider whether she will have access to a mediator or co-mediators who are experienced and specially trained to mediate domestic violence cases. The survivor should also learn whether the mediation will cover all topics and involve multiple sessions.

The quality of the process may be of more significance than the process itself. Poorly conducted mediation could be more dangerous than when unrepresented parties appearing before a well-trained and sensitive judge. In reality, there is not always a clear choice between mediation and the adversarial process. For example, a well-structured, cooperative two-attorney negotiation is more like

HeinOnline -- 9 Wm. & Mary J. Women & L. 197 2002-2003

mediation than a contested trial. Consequently, each abuse survivor must individually evaluate her actual options.

VII. SAFEGUARDS FOR MEDIATING IN THE CONTEXT OF DOMESTIC VIOLENCE

If the couple and mediator agree to proceed with mediation, the Model Standards provide that safety precautions be taken. These include the following:

> D. If domestic abuse appears to be present the mediator shall consider taking measures to insure the safety of participants and the mediator including, among others;
>
> 1. establishing appropriate security arrangements.
> 2. holding separate sessions with the participants even without the agreement of all participants;
> 3. allowing a friend, representative, advocate, counsel, or attorney to attend the mediation sessions;
> 4. encouraging the participants to be represented by an attorney, counsel or an advocate throughout the mediation process;
> 5. referring the participants to appropriate community resources; and
> 6. suspending or terminating the mediation sessions, with appropriate steps to protect the safety of the participants.
>
> E. The mediator should facilitate the participants' formulation of parenting plans that protect the physical safety and psychological well-being of themselves and their children.[427]

A. Procedures and Ground Rules

As noted previously, the time of separation is potentially one of the most dangerous for the abuse survivor.[428] Research shows that 73% to 96% of mediation programs use special techniques and procedures when mediating cases involving domestic violence.[429] For example, physical safety can be enhanced by providing separate

427. MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION STANDARD, Standard XD (2001).

428. Rimelspach, *supra* note 103, at 98.

429. Pearson, *supra* note 297, at 326; Thoennes et al., *supra* note 364, at 19-20.

HeinOnline -- 9 Wm. & Mary J. Women & L. 198 2002-2003

waiting rooms, staggering arrival and departure, and providing an escort to and from the car.[430]

Conditions for the mediation should be in writing and reviewed during each session.[431] For example, all abuse should be prohibited and both parties must agree that stopping the abuse is not a negotiable issue.[432] Likewise, drug and alcohol use should be prohibited.[433] The basic ground rules for conduct in mediation should be clarified. These include respectful and appropriate use of language and gestures, not interrupting, and not touching the other person.[434] Conduct outside the mediation sessions should be spelled out including whether any contact outside of the sessions will be permitted and if so, setting clear boundaries regarding telephone, e-mail, and face-to-face contact.[435]

With respect to mediation procedure, the use of male and female co-mediators is advised whenever possible.[436] Separate initial screening and caucusing allow the mediator to monitor whether agreements are being made voluntarily.[437] When domestic violence has occurred, mediators downplay the importance of reaching an agreement and are prepared to terminate the mediation if necessary.[438] Mediators also report that they are more active and directive in these sessions and that they encourage more detailed and specific agreements.[439]

If the couple has children, clear and detailed rules must be established to prevent child abuse and determine whether visitation will be supervised.[440] In most cases, the parents will continue to have contact concerning the children and this must be planned in detail in order to avoid future conflict and potential abuse.[441] Given the trend toward joint custody in mediated and adversarial proceedings and the link between domestic violence and child abuse,[442] special care must be taken to keep the parents focused on the safety needs of the children.[443] If not carefully structured,

430. Fuller & Lyons, *supra* note 214, at 926; Zylstra, *supra* note 366, at 277.
431. JACOBSON & GOTTMAN, *supra* note 8, at 229.
432. Goodmark, *supra* note 147, at 26; Fuller & Lyons, *supra* note 214, at 923.
433. Erickson & McKnight, *supra* note 284, at 384.
434. MCKNIGHT, *supra* note 293, at 22; GIRDNER, *supra* note 24, at 40.
435. Corcoran & Melamed, *supra* note 3, at 313.
436. GIRDNER, *supra* note 24, at 38.
437. Rimelspach, *supra* note 103, at 108.
438. Pearson, *supra* note 297, at 326.
439. *Id.* at 326-27.
440. Erickson & McKnight, *supra* note 284, at 383.
441. *Id.* at 377; Elrod, *supra* note 111, at 528.
442. MASON, *supra* note 332, at 237; Treuthart, *supra* note 285, at 734.
443. Fuller & Lyons, *supra* note 214, at 916; Magana & Taylor, *supra* note 293, at 54.

HeinOnline -- 9 Wm. & Mary J. Women & L. 199 2002-2003

studies have shown that visitation in situations of high conflict can be detrimental rather than helpful to children.[444] Rather than working toward co-parenting when abuse has occurred, "parallel" parenting governed by a specific structured parenting plan may be more appropriate.[445]

B. Reporting

Although mediation sessions are confidential, an exception must be made for threatening behavior. Under the Model Standards, mediators are allowed to disclose threats of suicide or threats of violence against another person.[446] Similarly, the Uniform Mediation Act allows disclosure of threats to "inflict bodily injury or commit a crime of violence."[447] Mediators are advised to put these and related child abuse reporting exceptions in writing before any mediation begins.[448]

C. Presence of Attorneys

Attorney representation should be encouraged in cases where domestic violence is an issue. Research in Maine has shown that the presence of attorneys moderates power imbalances and decreases the likelihood of unfairness.[449] The attorney can act as a support person and as a spokesperson for the victim.[450] In the absence of an attorney, an advocate or friend can provide additional support.[451]

D. Monitoring for Signs and Abuse and Terminating Mediation

Because screening is not always accurate and abuse is common, mediators should assume that domestic violence may be present in any mediation. Consequently, the mediator has an ongoing

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444. Jessica Pearson & Nancy Thoennes, *Supervised Visitation: The Families and Their Experiences*, 38 FAM. & CONCILIATION CTS. REV. 123, 124 (2000).

445. Johnston, *supra* note 140, at 469.

446. MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION, Standard VIIC (2001).

447. UNIFORM MEDIATION ACT § 6(a)(3).

448. *Introduction to the Model Standards*, *supra* note 201, at 23.

449. Craig McEwen, Nancy H. Rogers & Richard J. Maiman, *Bring in the* Lawyers: *Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317, 1376 (1995).

450. *Id. See* Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1597 (1991).

451. MODEL CODE ON DOMESTIC AND FAMILY VIOLENCE § 407(2)(C) (1994).

HeinOnline -- 9 Wm. & Mary J. Women & L. 200 2002-2003

obligation to screen for abuse and to evaluate the suitability of continuing with the mediation.[452] Conduct to watch for includes fearful body language, one party dominating the discussion, difficulty expressing needs, put-downs, and so forth.[453] Even though mediation has begun, either party or the mediator should have the freedom to terminate it at any time.[454]

The Model Standards provide for seven different situations when the mediator is called upon to terminate the mediation.

> Standard XI
> A family mediator shall suspend or terminate the mediation process when the mediator reasonably believes that a participant is unable to effectively participate or for other compelling reasons.
> A. Circumstances under which a mediator should consider suspending or terminating the mediation, may include, among others:
> 1. the safety of a participant or well-being of a child is threatened;
> 2. a participant has or is threatening to abduct a child;
> 3. a participant is unable to participate due to the influence of drugs, alcohol, or physical or mental condition;
> 4. the participants are about to enter into an agreement that the mediator reasonably believes to be unconscionable;
> 5. a participant is using the mediation to further illegal conduct;
> 6. a participant is using the mediation process to gain an unfair advantage; and
> 7. if the mediator believes that the mediator's impartiality has been compromised in accordance with Standard IV.
> B. If the mediator does suspend or terminate the mediation, the mediator should take all reasonable steps to minimize prejudice or inconvenience to the participants which may result.[455]

Because terminating the mediation may put the domestic violence victim at additional risk, care must be taken to prepare the parties. Typically, this is done in a separate caucus where options can be discussed and appropriate community referrals made.[456]

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452. Zylstra, *supra* note 366, at 275.
453. *Id.* at 275-76.
454. Fuller & Lyons, *supra* note 214, at 925.
455. MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION, Standard XI (2001). *See also* Davis & Salem, *supra* note 338, at 24; Zylstra, *supra* note 366, at 279.
456. GIRDNER, *supra* note 24, at 32.

HeinOnline -- 9 Wm. & Mary J. Women & L. 201 2002-2003

When meeting with the abuser, no insinuation should be made that the termination is the fault of the victim.[457]

For whatever reason the mediation is terminated, including attempted reconciliation of the parties, the victim should have a safety plan.[458] If the woman decides to return to the abusive relationship, it may be possible to make a plan for counseling and an agreement about the future conduct of the parties.[459]

E. Criminal Charges and Orders for Protection

Even if mediation is continuing, the victim should be encouraged to explore obtaining an order for protection and filing criminal charges. These strategies can provide additional protection for the victim while the divorce is mediated and finalized. Referrals should also be made to community resources.[460]

VIII. RECOMMENDATIONS

A. Safety

Before any decisions can be made regarding the choice of divorce process, the victim and children need to be safe. This is particularly true in situations where the abuse is ongoing, severe, and frequent. When violence has occurred, the victim should be assisted in developing a safety plan and she should seriously consider obtaining an order for protection and possibly pursuing criminal charges.

B. Victim Choice and the Model Code

When domestic violence has occurred, divorce mediation should only take place if requested by the victim. To this end, all states should adopt statutes similar to Section 407 of the Model Code which provides that when domestic violence has taken place, mediation may proceed if requested by the victim and conducted by a trained mediator using a specialized procedure.[461] The victim should be allowed to have a support person, including an attorney or advocate, present during the mediation sessions.

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457. Barsky, *supra* note 348, at 20.
458. JACOBSON & GOTTMAN, *supra* note 8, at 248.
459. Yellott, *supra* note 289, at 43.
460. GIRDNER, *supra* note 24, at 44; Fischer et al., *supra* note 42, at 2154.
461. MODEL CODE ON DOMESTIC AND FAMILY VIOLENCE §§ 407, 408 (1994)

HeinOnline -- 9 Wm. & Mary J. Women & L. 202 2002-2003

C. *Informed Decision Making*

The ultimate decision about whether to mediate must rest with the abuse victim. In order to make an informed decision, the victim will need to examine her personal situation and compare the specific options *actually* available to her. These considerations and options will vary from case to case. However, the factors in Fig. 1 may be useful in making an informed decision.

D. *State Law*

State family law provides the foundation for both mediated and adversarial divorce. Abuse survivors should be offered the opportunity to seek protective orders and file criminal charges. States should clarify their existing statutes with respect to the connection between battering and child abuse by adopting protective provisions such as the rebuttable presumption against the batterer being awarded custody and related provisions contained in the Model Code.[462] Whatever process is chosen, the children must be protected.

E. *Adversarial System Reforms*

Reforms are needed in the way that the adversarial system handles domestic violence cases. For example, when domestic violence is an issue in a divorce action, both parties should be represented by attorneys to "level the playing field," to make sure that relevant information is brought forth, and to provide support for the victim. In addition, attorneys should, within the bounds of professional responsibility, moderate their traditional role as zealous advocates in favor of a more collaborative approach. Judges who make decisions for families should have in-depth, ongoing training concerning domestic violence, child psychology, and family dynamics.

F. *Mediation Reforms*

Mediation should be undertaken using safeguards designed to protect victims of domestic violence. It should be a voluntary, not mandatory, option for abuse survivors. Mediators should be trained

462. *Id.* at § 403.

HeinOnline -- 9 Wm. & Mary J. Women & L. 203 2002-2003

to screen for and otherwise recognize abuse. In addition, specialized training and certification should be required for those undertaking cases involving domestic violence. This process may include performance and skills testing as well as a period of case supervision. A specialized procedure including ground rules, safety planning, separate caucuses, and the presence of attorneys and support people should be tailored to the needs of each couple. Mediation should not be limited in duration and should cover all of the issues needing resolution.

IX. CONCLUSION

Should abuse victims mediate their divorces? In some cases, the answer is "no." In others, the answer is "maybe" but only on a voluntary basis with a highly skilled mediator using a specialized procedure. Even then, the decision regarding mediation must be made with regard for the victim's particular situation and the options realistically available. As Jessica Pearson observes, the time has come to replace bright-line solutions with more customized procedures:

> At the end of the twentieth century, there is growing recognition that families with legal problems are extremely different and need a variety of dispute resolution forums. This is true for families with and without domestic violence. It is impossible to proscribe the legal court intervention that would best serve all battered women given the different profiles of domestic violence offenders, victims, and episodes of abuse. Disputes between and among family members involve complicated relationships; courts are learning that they must "customize" their responses.[463]

Thus, mediation should be offered as one option among many.[464] Abuse survivors must be informed of choices, educated about the advantages and disadvantages of each, and counseled with respect to what might work for them. They and their families deserve no less.

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463. *Court Services*, *supra* note 126, at 631.

464. Elrod, *supra* note 111, at 517; *Court Services*, *supra* note 126, at 617 n.53.

HeinOnline -- 9 Wm. & Mary J. Women & L. 204 2002-2003

Fig. 1. Summary of Contextual Factors to be Considered in Choosing a Divorce Process

Factors	Indicators Consistent With Choice of Adversarial System	Indicators Consistent With Choice of Mediation
Type of Violence Experienced	-Walker's cycle of violence.* -Johnston and Campbell's ongoing and episodic male battering or psychotic and paranoid reactions.* -Ellis and Stuckless' control instigated violence.*	-Johnson and Campbell's female-initiated violence or male-controlling interactive violence or separation-engendered and post divorce trauma.* -Ellis and Stuckless' conflict instigated violence.*
Frequency and Severity of Abuse	-Ongoing and severe abuse.	-Abuse not presently occurring.
Victim Status	-Victim suffers from PTSD or depression -Victim intimidated and fears retribution.	-Victim able and willing to state her needs, problem solve, and make own decisions.
Likely Abuser Response	-Abuser likely to comply with court orders.	-Abuser likely to comply with voluntary agreements.
Quality of the Process	-Judges specially trained and experienced in handling domestic violence cases. -Timely access to the courts.	-Specially trained and experienced mediator who implements and enforces safeguards. -No limit on number of sessions. -Includes mediation of all issues (custody, parenting time, property, support).
Legal Representation	-Victim represented by an attorney. -Attorney experienced with domestic violence cases.	-Victim representation important and very helpful but not as critical as in adversary system.
Presence of Children	-Couple has no children or other need for ongoing contacts.	-Couple has children (especially if young) and will have ongoing contact that must be carefully structured to ensure safety.
State Law	-State law provides for a rebuttable presumption against award of custody to batterer. -State law includes a	-Mediation process helped by presumptions against award of custody to batterer and against

HeinOnline -- 9 Wm. & Mary J. Women & L. 205 2002-2003

	presumption against joint custody if domestic abuse has taken place.	joint custody but mediation process not entirely dependent upon it.
Financial Resources	-Victim able to afford extended litigation and hiring of experts.	-Victim has limited financial resources.
Decision Making Approach	-Victim is comfortable with or favors possibility of a judge making decisions for the future.	-Victim prefers to make her own decisions for the future within the mediation context.

***See Section II.D.**

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