1997

Examining the problem of power in divorce mediation: A naturalistic inquiry

Shelley Lynne Hermer
Wilfrid Laurier University

INFORMATION TO USERS

This manuscript has been reproduced from the microfilm master. UMI films the text directly from the original or copy submitted. Thus, some thesis and dissertation copies are in typewriter face, while others may be from any type of computer printer.

The quality of this reproduction is dependent upon the quality of the copy submitted. Broken or indistinct print, colored or poor quality illustrations and photographs, print bleedthrough, substandard margins, and improper alignment can adversely affect reproduction.

In the unlikely event that the author did not send UMI a complete manuscript and there are missing pages, these will be noted. Also, if unauthorized copyright material had to be removed, a note will indicate the deletion.

Oversize materials (e.g., maps, drawings, charts) are reproduced by sectioning the original, beginning at the upper left-hand corner and continuing from left to right in equal sections with small overlaps. Each original is also photographed in one exposure and is included in reduced form at the back of the book.

Photographs included in the original manuscript have been reproduced xerographically in this copy. Higher quality 6" x 9" black and white photographic prints are available for any photographs or illustrations appearing in this copy for an additional charge. Contact UMI directly to order.

UMI

A Bell & Howell Information Company
300 North Zeeb Road, Ann Arbor MI 48106-1346 USA
313/761-4700 800/521-0600

EXAMINING THE PROBLEM OF POWER IN DIVORCE MEDIATION

A Naturalistic Inquiry

By

Shelley L. Hermer

Honours Bachelor of Arts, McMaster University, 1991

THESIS

Submitted to the Faculty of Social Work
in partial fulfilment of the requirements
for the Master of Social Work degree
Wilfrid Laurier University
1997

[St] Coivin...proposed that all who did not find themselves happy and contented in the married state should be indulged with the opportunity of parting, and making a second choice. For that purpose he initiated an annual solemnity, at which all the unhappy couples in his parish were to assemble at his church; and, at midnight , all present were sufficiently blindfolded, and ordered to surround the church three times at full speed with a view of *mixing the lots in the urn.* The moment the ceremony was over, without allowing an instant to recover from the confusion, the word *cabag* (seize quickly) was pronounced; upon which every man laid hold of the first female he met with, whether young or old, handsome or ugly, good or bad, she was his wife till the next anniversary return of the solemnity...

(Menefee, 1981; p. 21)

ABSTRACT

How problematic is power imbalance in divorce mediation? Research in the last fifteen years has drawn attention to this issue, resulting in criticisms levelled at mediation from women's groups, lawyers and others. Using six in-depth interviews with Ontario divorce mediators, this study examined power imbalance and its management. Three main themes emerged from the findings related to power: (1) the 'emotional readiness' of the couple, (2) the effects of the legal system, in particular, the relationships with lawyers, and, (3) physical intimidation and financial intimidation. Techniques employed by the mediators were similar across the interviews. These findings led to a redefinition of the problem of power in divorce mediation. Specifically, this perspective suggests that the problem with power in mediation may lie in its management by mediators, legal professionals, and government. Implications for practitioners, mediation organizations, and public policy are discussed in light of professional responsibility in divorce mediation.

ACKNOWLEDGEMENTS

The process of completing this work has resulted in the development of new perspectives. I wish to thank those who have been instrumental.

First, I wish to thank the participants in the study for their time, candidacy and professionalism that allowed for such an enriched information base.

I wish to acknowledge my co-advisors Professor Luke Fusco and Dr. Eli Teram. Professor Fusco's encouragement and wisdom throughout the past two years has been vital in nurturing an interest and an idea in divorce mediation, to the development and completion of this research. Dr. Teram's support and expertise have provided me with the opportunity to consider and explore the benefits of qualitative research, and my thinking in many areas has been enriched as a result.

I acknowledge Dr. Cheryl Regehr's research which inspired the purpose of this study, and I thank her for her insights, constructive evaluation and work on the thesis committee. Also, thanks to Cathy Brothers for her thoughtful and valuable comments, questions, and suggestions.

Finally, thank you, Kevin, Braden, and Jared for your patience and optimism during a time of such great change; your influence continues to be invaluable.

TABLE OF CONTENTS

PART ONE: INTRODUCTION, LITERATURE REVIEW, AND METHODOLOGY

PART ONE

Introduction, Literature Review and Methodology

CHAPTER ONE

1. INTRODUCTION and HISTORY

1.1 Introduction

Despite some common misconceptions, divorce, even wide spread divorce, is not a new concept, dating at least back to Roman times (Day and Hook, 1987). In Britain, before marriages were officially sanctioned by legal and religious ceremonies, divorce was accepted through a number of informal practices.

Some of these informal practices carried into the dark ages. My favourite of these stories occurred in Scotland during the 1700's (Menefee, 1981). Once a year, at midnight, all the dissatisfied couples would gather together in the church. Each person was blindfolded, and, given the signal, all would run about the church at full speed, until the clergyman gave the second signal. All persons stopped, removed their blindfolds, and each man would take the first woman he saw. This 'marriage' would last at least until the following year's 'divorce' service.

The idea of grown adults blindfolding themselves and running amok inside a church may well seem barbaric, simplistic, and even amusing. However, I contend that perhaps not much has changed in the rituals of divorce. Today men and women are expected to survive an unknown, chaotic period of time during which their fate lies in the hands of a set of decision-makers who ultimately decide how long the event continues, and the amount of injury incurred as a result. Choices are restricted by circumstance and

fate. No one knows the duration of the new 'deal', or if it will be better or worse than the previous one. Furthermore, it has been argued that women have had less 'control' in the formal divorce processes than men.

The impetus for this study has grown from an interest in the current management of divorce. The advent of family mediation as an alternative to the much-criticised legal system has provided an additional choice for families, although this choice also has been questioned on different grounds. Supporters of mediation claim that it is a less expensive and more humane way to end unhappy and/or damaging relationships (Brown, 1982). Critics of mediation complain about poor professional standards, and a lack of attention to gender-based power imbalance (Irving and Benjamin, 1995). Thus, through in-depth interviews with six Ontario mediators, the concept of power imbalance and its management provided insight into the bases of these criticisms, with implications for service delivery, policy, and future research.

In order to sufficiently examine modern-day divorce mediation, it is necessary to first place the practice in context. Divorce and its management have long histories shaped by cultural and political beliefs; mediation as a forum for handling divorce in 1990's must be placed in an historical context. Put by Phillips (1991):

> [I]t is clear that nineteenth-century social critics, whether they were utopian socialists, Marxists, liberals, or reactionaries, integrated marriage, divorce, and the family...into their social analyses...attitudes toward marriage and divorce must be understood within the broader social and political doctrines, many of which recognized the family as pivotal in promoting either social change or social

stability. (p. 171)

1.2 From Community to the Church to the Civil Courts

A review of the history of divorce reveals that divorce and divorce ceremonies have been a part of the life of the family throughout recorded history. In ancient times, clan and group type cultures brought men into their families to marry their daughters, and thus, if things were not agreeable and divorce resulted, the woman could retain her dowry and place of residence. In ancient Rome, women and marriage were reportedly used to stabilize alliances and attain political power; less obvious, but similar rationale can be found, even today. During this period, divorce and remarriage were 'prevalent,' and for a time both women and men had gained the ability to exit a relationship at will (Day and Hook, 1987).

In clans, tribes, and nomadic groups, males dominated the divorce practice, evidenced in early Hebrew cultures. Men merely 'wished their wives to be gone' and the marriage was over. However, a wife was expected to go to great lengths to prove the 'sins' of her husband, and could be killed if she failed to do so (Day and Hook, 1987).

In China, from 1122 B.C. to 481 B.C., males exercised total authority in the household; even widows could not remarry. However, men could divorce their wives for reasons ranging from 'barrenness' to 'too much talking' (Day and Hook, 1987).

Throughout the rise of Christianity, divorce remained a solely male privilege. By the 12th Century, however, marriage and divorce could only be sanctioned by the church, which made obtaining a divorce very difficult. A man could divorce if his wife

committed adultery or prostitution, but a woman could only divorce if her husband was in jail, or had been away from the home for four years (Day and Hook, 1987).

Strict guidelines regarding permission to divorce in England remained through the 15th century. By the 16th century, divorce began to be challenged, especially during the reign of King Henry VIII, who successfully obtained a series of 'annulments' (Phillips, 1991). At this time, women were considered the complete property of their husbands. Notably, in Germany during this time, polygamy was encouraged, and women were allowed to divorce freely. Divorce rates rose to as high as ten percent of the married population during this time (Phillips, 1991).

As early as the 1700's interest began in promoting marriage and divorce as legal rather than religious matters. When Scotland split from the Roman church, it assumed this right, and couples in England could, at great expense, travel to Scotland to obtain a divorce (Day and Hook, 1987). However, it was not until 1857, in England, that divorce was transferred from the church to the civil courts. At this time, a man could more freely divorce again if his wife committed adultery, but wives still had to prove adultery and another 'sin', such as cruelty or desertion (Day and Hook, 1987; Latey, 1970; Phillips, 1991).

Until the industrial revolution, then, divorce remained a union of property, resources, and a forum for bearing children. It was not until Victorian times that the notion of 'love' entered the marriage and divorce arena, and divorce became a rising social issue throughout the 1800's.

At the turn of this century, a marked increase in divorces occurred, curtailed by

the Great Depression (Day and Hook, 1987). The proponents of the women's movement were reportedly split over the issue of divorce. One side believed that a more free divorce improved women's choice to leave an oppressive marriage; the other saw the equalization of divorce laws as potentially increasing the equality of women in their oppressive marriages (Phillips, 1991).

However, World War II may well be seen as the beginning of the turning point in divorce, with a marked short-term rise until the 1950's (Phillips, 1991). Women could develop an economic base, and the challenge of authority and resurgence of the women's liberation movement in the 1960's (Carden, 1984) finally resulted in 'no-fault' divorce, which became part of Canada's Divorce Act in 1968. This made it possible for couples to divorce without placing one party at fault (Devlin and Ryan, 1986).

Thus, divorce rates have fluctuated across culture and time, affected by religion, politics and economics. However, since the 1960's, divorce rates have demonstrated a dramatic increase world-wide (Phillips, 1991). Parallelling this rise is the strength of the women's movement, increasing numbers of women in the work force, and the more liberal divorce laws (Phillips, 1991). Historians and post-modern theorists may well predict that this unprecedented rate of divorce will subside (Goode, 1993; Phillips, 1991). However, the cause for concern of the effects of the current divorce trends must be addressed. One of the greatest effects has been with respect to children; we turn next to a brief description of the history of child custody.

1.3 History of Child Custody Determinants

Given the level of sexism involved in decisions and control over divorce, it is not surprising that child custody preferences followed the same route. According to Gardner's review (1992), fathers were given custody of their children from the times of the Roman Empire. In fact, until the 14th century, fathers had the rights to sell, or kill, their children. By the 17th and 18th centuries, when divorce became a legal issue, the notion of 'rights and responsibilities' associated with custody became law. In 1839, the state of England adopted the right to obtain custody of children under the age of seven if the single father was considered not interested or capable. Eighteenth-century France, however, promoted the belief that mothers should retain custody of their daughters and sons until the age of seven, at which point fathers obtained custody of the male children (Phillips, 1991).

In the mid-19th century, men gained custody based on their wives having committed adultery, or failing another of the wedding vows. The same privilege was not extended to women. By the turn of the century, the increasing strength of the women's movement (Phillips, 1991) saw slight shifts in the theory of custody determinants. The 'better parent' was the one who was considered to be best able to provide for the child. However, this shift did not translate into any change in the custody decisions, as 'best able to provide' was based on financial status, and women still had little economic means (Gardner, 1992). Then, in 1925, England passed an act that began the 'tender years presumption', which became the doctrine in North America. Along with a general interest in the area of child development, this doctrine assumed that young children were

best cared for in the sole custody of their mothers who could provide 'proper' emotional nurturing (Gardner, 1992).

This presumption lasted until the 1970's, when the exploding divorce rate and redefinition of male and female roles forced a new perspective. During this time, the concept of the 'best interests of the child' was considered to rule custody decisions. In most cases to present, mothers still retain sole custody of their children although the rise of joint custody in the past twenty years has altered this landscape (Irving and Benjamin, 1995).

1.4 Court Involvement in Divorce

Modern-day media has promoted the high drama and negative aspects of the divorce process in the courts, both in real and fictitious cases (e.g., 'The Divorce from Hell', Dennis, 1996; and films such as Kramer vs. Kramer and The War of the Roses). While such highly publicized and protracted divorce cases mould the public view of the legal system, researchers and mental health workers have attacked the system (Brown, 1992), claiming that divorce simply does not belong in the adversarial arena.

Their rationale for such statements can be found in the historical roots of the courts in the divorce process. The North American legal system is derived from the old British system. In the medieval period, this system evolved through 'trials' whereby opponents would fight (even to the death), or be forced to survive tortuous acts. The successor, it was rationalized, was then in the right. Soon, however, adversaries procured 'champions' to fight their battles (Gardner, 1992).

By the time the courts had jurisdiction over divorce in Britain and North America in the late-eighteenth and nineteenth centuries, divorce decisions were based on 'fault', (Day and Hook, 1987; Phillips, 1991) and custody decisions were based on the presiding cultural notions of the time. For the majority of this time, the legal system was extremely biased against women (Mahoney, 1996). However, 'no fault' divorce and the shift in women's equality rights muddled the legal decisions regarding child custody, child and spousal support. Divorcing couples hired (and continue to hire) their 'champions', and the battles begin. At the end of the battle, the best 'champion' wins, and the other loses, as dictated by more-or-less arbitrary judges. Children both 'lost' access to one of their parents, and often become financially impoverished.

While the intention of the no-fault divorce laws were to promote more equality between men and women, a number of inconsistencies remain. For example, this push for equality resulted in an 'equal division' of property between men and women, while ignoring the lower pre- and post- divorce earning capacities of most women. In addition, while the decision was made to abolish 'fault' in unhappy or oppressive marriages, decisions for custody still seem to be based on fault. Perhaps it is these incongruities, coupled with the destruction of family relationships, that has led to the search for alternate strategies for managing disputes.

1.5 Mediation and Divorce

To begin with, mediation as a means to resolve conflict is an age-old concept which "has probably been practised since there were three people on earth"

(Folberg, 1983, p. 4). Formal recordings of mediation date back to ancient times. In China, following the teachings of Confucius, mediation was the principle way of resolving disputes, and remains in effect today in China as the primary means to settle conflict (Brown, 1982; Folberg, 1983). Mediation has also been traced historically in other communist and clan-system countries, including Japan, Africa, Russia, and Cuba (Brown, 1982; Folberg, 1983). Religious leaders and family members have also performed as 'third parties' in family disputes for centuries (Folberg, 1983).

In North America, the first 'conciliation court' was developed in Los Angeles in 1939, with the purpose to reconcile couples and prevent divorce (Irving and Benjamin, 1987). As reviewed by Devlin and Ryan (1986) the notion of using conciliation techniques to resolve divorce disputes has moved slowly. Relying heavily on the experience of the conciliation courts in California, the first Canadian conciliation court was established in Edmonton, Alberta, in 1972.

In 1973, the Family Court in Hamilton, Ontario developed a conciliation department, staffed by a case worker. In 1977, the Unified Court became permanent in Hamilton. Other Ontario jurisdictions attempted various experimental models of conciliation services, but few survived due to tentative funding by the Ministry of Community and Social Services, and/or the Ministry of the Attorney General. Despite a promise of wide-spread conciliation services in Ontario, public sector development seemed to have ceased in the 1980's, with a resurgence of interest during the present decade (Devlin and Ryan, 1986).

Similar trends are found in other provinces. With the exception of New

Brunswick and Prince Edward Island, public mediation services were found only in the larger urban centres. Interestingly, Winnipeg holds the only mandatory court mediation service in Canada for divorces. However, mediation for civil matters, excluding divorce, is about to be introduced in Ontario ("Government demanding mandatory mediation", 1997).

1.6 Divorce Mediation Practice

Divorce mediation has been modelled after conflict-resolution strategies in labour-management negotiations of the 1960's (Folberg, 1983). However, Deutsch's research broadened this view in several important ways for divorce mediation, by examining the effects of various aspects such as process, prior relationship, the nature of the conflict, and characteristics of the parties (Deutsch, 1973).

Thus, divorce mediation began to take on an identity, and continues to be modified by various political, social, and economic changes in North America. As noted above, initial conciliation alternatives were staffed by public servants, often performing other court duties such as probation (Devlin and Ryan, 1986). However, in the late 1970's, definite 'divorce mediation' models were developed. Among the first of these was Coogler's model (Brown, 1983), dealing largely with custody and access disputes. At this time, divorce mediation reflected the legal view that parties could decide their custody arrangement for themselves. At this time, Coogler discussed the "intra psychic mediation" within the individual, as a prerequisite for "interpersonal mediation" with the other "adult" parent (Coogler, 1979). This coincided with some of the prevailing

'transactional' psychotherapy thinking of the time (e.g., Berne, 1977).

Coogler's model included one mediator, and one attorney to be shared between the parties. However, with the exception of the model employed in Montreal, Coogler's model was not followed in Canada (Devlin and Ryan, 1986). Canadian models expected each party to obtain his and her own lawyer. With the failing of province-wide public mediation services, the private sector began offering mediation for child custody issues. These mediators were primarily mental health workers. Interestingly, once the legal profession began to take an interest in divorce mediation as a profession, divorce mediation became comprehensive. Thus, both lawyers and mental health professionals began to mediate all issues, including custody, visitation, division of property, and financial support (Devlin and Ryan, 1986).

In 1982, the first provincial mediation association was organized in Ontario, Canada. By 1985, the divorce act included the following , under Bill C-47, Section 9 (2): that it was the "duty of every barrister, solicitor, lawyer or advocate who undertakes to act on behalf of a spouse in a divorce proceeding...to inform him of the mediation facilities known to him" (in Devlin and Ryan, 1986). Given this amendment, it appeared as though mediation was to be officially recognized as an alternative to the legal adversary positions.

As mediation became more popular, largely through the private sector, professionals began to recognize that part of the process was to deal with the intense emotional feelings surrounding marital dissolution. Despite a prevailing view that mediation was 'not therapy' (Folberg, 1983), the recognition of the emotional process led

to the development of 'therapeutic' components of mediation, whereby part of the skill involved was to help couples through some of the emotional processes in order to separate the feelings from the tasks at hand. In the mid-1980's, Irving and Benjamin's (Irving and Benjamin, 1987) model of Therapeutic Family Mediation exemplified this. This model included an assessment phase, a possible pre-mediation 'counselling' phase, and finally, the negotiation phase. Kruk (1993) proposed a unique 'therapeutic/interventionist' model, which focused on shared parenting, and included a follow-up phase during the implementation of shared parenting.

Throughout this development, however, critics of mediation began to have a significant impact. Generally, these groups were either lawyers, who took legal action against mediators for "unauthorized practice of the law" (Rogers and McEwen, 1989), or, feminist organizations questioning the premise that mediation is a better alternative to the courts (Irving and Benjamin, 1987).

Although discussed in more detail in a later chapter, women's groups were concerned about several philosophical and practical issues about mediation, centring around 'power imbalance'. These included: a failure of neutrality, a bias to shared parenting, failure of empowerment, a lack of sensitivity to family violence, mandatory mediation, and a lack of accountability (Irving and Benjamin, 1995). In response to these criticisms, Irving and Benjamin shifted their Therapeutic Family Mediation Model to include a 'feminist-informed' perspective, whereby they addressed neutrality, empowerment and family violence on philosophical and practical levels. Others, for example Folger and Bush (1996), discussed a 'transformative model' of mediation, based

on the belief that divorce mediation is about a transformation in a relationship, which involved the key dimensions of 'empowerment' and 'recognition'.

It seems as though the future course of mediation legislation and practice will continue to reflect an attempted balance between critiques, economics, and opposing views within practice domains. On CBC's Radio show 'Ideas', (Wolch, 1997) guest Genevieve Chornenki, proclaimed that the public is demanding more involvement in their public and private affairs, and thus, mediation is here to stay.

1.7 Summary

The management of divorce seems to have revolved around cyclic social, cultural and political changes since ancient times. Attention to divorce in the latter half of this century is driven by a high divorce rate in North America, changing gender roles, and the consequent economic, social, and psychological effects on children.

Historically, it has been demonstrated that individuals have assumed, lost, and re-gained their rights to choice with respect to marriage and divorce. Power in this choice has been traditionally restricted to arbitrary decision-makers, largely favouring men. Divorce mediation has been formally developed as a means to allow more individual choice in the personal outcomes of divorce. However, the problems of power imbalance within this 'new' process are challenging mediation as a viable and valuable alternative.

Therefore, this research can be considered a response to the changing face of divorce management, specifically, the response to some key criticisms of power imbalance in divorce mediation. Beginning with a preliminary literature review on the

outcome of mediation, specific questions about power imbalance and the competence of mediators to manage it are developed. Next, the qualitative methodology designed to explore these questions is presented. In Part Two, the findings provide interesting implications for a discussion with respect to redefining power imbalance, with associated suggestions for practice, policy, and additional research.

Given the historical and social context of the current divorce trends and formal responses, we must evaluate mediation as a better, if not ideal, alternative to the courts. In this evaluation, we must also consider whether mediation is merely the new culturally relevant power-broker, the mediator a modern-day 'priest of arbitration' transported from 18th Century Scotland.

CHAPTER TWO

2. PRELIMINARY LITERATURE REVIEW

2.1 Introduction

The reality of divorce in the twentieth century has effected lasting changes in the social landscape of North America and other developed countries. In Canada, an estimated 33% of children born to 'ever-married' women (as opposed to children born to 'never-married' women) will experience family disruption before they reach sixteen years of age (Irving & Benjamin, 1995). These changes continue to affect everyone from judges to grandparents, as society is forced to grapple and contend with the 'best interests' of millions of children.

The short and long-term negative effects of divorce are becoming well-known as longitudinal studies emerge from the research (e.g., Wallerstein and Blakeslee, 1989; Wallerstein and Kelly, 1980). Complicated by the effects of poverty inherent in many single parent households (Munroe-Blum, Boyle, and Offord, 1989), some research indicates that children of divorce fair significantly less well academically and socially than children of intact families (Hoyt, Cowen, Pedro-Carroll, Alpert-Gillis, 1990; Johnston, Kline and Tschann, 1989). However, many protective factors have also emerged. Among them, the relationship between the natural parents has a powerful effect on short and long-term post-divorce adjustment (Wallerstein and Blakeslee, 1989).

Acrimony between divorcing parents is understandably high. Coupled with issues

around child custody, animosity is often exacerbated with negative effects for children when couples choose litigation (Kitzmann and Emery, 1994). This has been recognized in various jurisdictions across North America, and efforts to employ divorce mediation have been put into place. In California, since 1981, custody mediation is the first legal (and mandatory) step in custody disputes, required before litigation can proceed (Depner, Cannata and Ricci, 1995).

Devlin and Ryan (1986) provide a history of mediation in Canada. As discussed in Chapter One, compared to the United States, family mediation has been slow. The first Conciliation Court in Canada was established in 1972, and most of the growth has occurred in the private sector. In Ontario, family mediation can only be court-ordered if both parties consent. The new civil mediation laws ("Government developing mandatory mediation", 1997) in Ontario may well open debate with respect to mandatory family mediation.

Much has been postulated, written, and disputed in the literature on divorce and child custody issues. Divorce mediation, with its own relatively recent yet prolific research base, has been lauded as a positive step with fewer negative ramifications for children overall (Dillon and Emery, 1996). However, mediation has its critics, largely composed of women's groups legitimately concerned with supposing an equal relationship where there may be serious and damaging power imbalances (Regehr, 1994).

Our present economic situation, and knowledge about family mediation, may guide the way in Ontario and other provinces to legislate mediation as a less expensive and less damaging approach to settling child custody conflicts. This possibility will

doubtless escalate debates regarding the use of mediation. Following from this, certain issues must be understood: (1) mediation outcome research, (2) the emotional cost of the court process versus mediation to children of divorce, and (3) the issues for women in mediation.

2.2 Mediation Outcome Research

Before examining researchers' attempts to uncover factors that may influence the outcome of mediation, it is important to clarify some key concepts that emerge in the literature.

2.2.1. "Successful" Mediation

The 'success' of mediation holds different meanings, and it is thus important to distinguish them here. Generally, 'success' means that through the process of mediation, a couple is able to resolve custody (and other divorce-related) issues. However, mediation is also considered successful when some and/or part of the issues in dispute are resolved through mediation. Further, success can be viewed in terms of client satisfaction ratings of the mediation process, independent of the resolution outcome. Finally, each of these definitions of 'success' can be disqualified by concerns of inappropriate employment of mediation, as in cases involving physical abuse, or when couples did not develop sufficient relationship skills during the process required to effectively carry out the agreement reached in mediation.

Although all issues are critical to mediation, for the purposes of this chapter,

'success' will refer to the ability of the couple to reach an agreement during the mediation process, and 'failure' will refer to couples' inability to solve these disputes through mediation.

2.2.2 Court-Ordered versus Voluntary Mediation

One can expect differences in the outcome of court-ordered mediation compared to the outcome of private mediation. There may be differences in the demographic characteristics of the clients and mediator qualifications. Voluntary clients may have higher expectations of the mediation outcome. Further, court-ordered mediators may sometimes make recommendations to the court if custody issues are not resolved, and this is likely to impact on the quality of participation by the parents. These factors are important to keep in mind when examining the literature findings.

2.2.3 Characteristics of Clients Related to Mediation Success

One type of study common in revealing possible client characteristics is post hoc studies of demographic data. For example, Depner, Cannata, and Ricci (1995) examined characteristics of clients referred for court-ordered mediation in California. Findings revealed that most participants who reached an agreement held less education, were in lower paying jobs, and over 1/3 belonged to an ethnic minority. In addition, families were found to be relatively low in conflict. Johnson's (1984) survey found that parents most likely to settle tended to have fewer children and were previously married, as opposed to living common-law, or apart.

Many researchers concern themselves with content predictors. For example, Kressel (1989), using a case study method, found that major obstacles to reaching agreement included (i) interpersonally dysfunctional parent(s), (ii) parent(s) negotiating in bad faith, and (iii) unresolved marital attachment issues. Another example is Mathis and Yingling (1991), who provided parents with a brief questionnaire to determine spousal consensus regarding the cause of the divorce. They found that consensus was not a predictor for successful mediation.

Camplair and Stolberg (1990) examined some differences between families who chose mediation versus litigation, and suggested that successful mediation may be related to the content of the dispute (i.e., noneconomic issues) and the parents' willingness to compromise. Such relationship characteristics were also considered by others. Campbell and Johnston (1984) found that couples with poor mediation outcome were high in conflict, ambivalent about the separation, and emotionally distressed. Bautz and Hill (1989) linked positive mediation to a relatively cordial post-divorce relationship between parents. Stranglio (1986) found that the parents' willingness to share the children, the view of the other parent and personal rigidity to be predictive of mediation outcome. Such findings led to the development of 'mediation readiness' scales and questionnaires (e.g., Fuhr, 1989).

2.2.4 Characteristics of Mediators Related to Mediation Success

Mediation is a process that helps couples resolve disputes. It may also develop and improve problem-solving strategies. As seen above, researchers have suggested

many client characteristics that may be more amenable to mediation. However, other researchers have taken another route, and examined differences within the process of mediation, (e.g., techniques and actions of the mediator) that may affect the outcome.

For example, Kelly (1989) conducted a longitudinal study, and using questionnaires she found that parents were much more satisfied with mediation if they felt that the professionals had an understanding of the children's needs and issues. She also found content variables in that mediated couples were significantly more satisfied with financial arrangements.

Kressel's (1989) case study also looked at mediator characteristics in terms of process. He found that the mediator's interrogatory style, the ability to deal effectively with an interpersonally dysfunctional parent, and a relaxed attitude toward achieving 'settlement' were in fact very helpful in achieving an agreement.

Manusov, Cody, Donahue and Zappa (1994) taped and coded mediation sessions. They found that successful mediation was related to whether or not mediators intervened after reproaches by disputants towards each other, if the reproacher was allowed to use direct rebukes, and if discussion of behaviour was avoided.

Some studies have linked the consumers' impressions of the mediator to successful mediation. Thoennes and Pearson (1985) found several factors related to successful mediation outcome. Among them, perception of the mediator's behaviour proved to be a helpful predictor, specifically the mediator's ability to promote communication between spouses and to provide them with interpersonal insights. Burrell, Narus, Bogdanoff and Allen's (1994) results on 'stressors' of mandatory

mediation indicated that the higher parents rated their concern for their children (which was related to higher self-esteem), and the higher their expectations were of the mediation process, the more successful they rated their mediation outcome.

As demonstrated above, the majority of research results conducted to reveal characteristics of clients that may predict successful mediation provide information about distinguishable content and demographic features. Further findings related to mediator characteristics have also been important. Together, such information has been helpful in terms of developing and altering the models of mediation (e.g., adding a therapeutic component) and making decisions about referrals. The results are encouraging as we search out less expensive and less acrimonious solutions to divorce.

2.3 Emotional Costs To Children

Sadly, the impact of divorce is believed to have long-standing negative consequences for many children, including poor social and academic development. Many theories have been postulated to account for this--the trauma of the divorce, the effects of losing one primary parent, the subjection to multiple step-parent figures, and the effects of being shuttled between two homes.

However, as longitudinal evidence comes to light, it appears that post-divorce adjustment depends largely on the quality of the relationship between the divorced parents. According to Kelly (1993), many children who have problems with adjustment are functioning within the normal limits following the divorce, with on-going marital conflict accounting for continued maladjustment. Wallerstein and Blakeslee (1989)

revealed similar results in a ten year follow-up study with children of divorced parents. Bonney (1993) identified parental conflict to be the major factor in children's post-divorce adjustment. Hamilton (1993) found that the single most important factor in latency-aged children's academic success was liberal access to both parents. Johnston, Kline and Tschann (1989) found that children in joint custody arrangements whose parents were still involved in post-divorced conflict, were more emotionally troubled and behaviourally disturbed than a normative sample. Camara and Resnick (1989) examined parental conflict in terms of resolution styles. They found that conflict per se was not predictive of children's socio-emotional behaviour, but the degree of cooperation on parenting issues was predictive.

Thus from recent literature, it seems that although children suffer and demonstrate the disruptive and painful losses incurred by divorce, their long-term adjustment may depend in large part on prolonged conflict between their parents. The legal system has been largely criticized for promoting long-lasting conflict (Brown, 1982; Gardner, 1992). Conversely, the suggestion has been that mediation may serve to not only de-escalate parental conflict, but to improve the relationship between the parents in the long-term, with beneficial results for the children. In support of this, Stull and Kaplan (1987) found that children ten to seventeen years of age whose parents used mediation were less likely to develop delinquent behaviours than those whose parents participated in a contested divorce.

Other results, however, are less clear. Emery, Matthews and Kitzmann (1994) interviewed families who mediated versus litigated their divorces. They found that one

year after the settlements, 1) fathers who mediated were more satisfied than those who litigated, while mothers were not, and 2) fathers who mediated were more compliant with child support orders than those who litigated. Further, within two years, two-thirds of the sample had returned to the courts, with no significant difference in return rate between the mediation and litigation groups. Ellis (1994) found that compared to female litigation clients, female mediation clients were more satisfied with the issues of custody, child support, access and property division. This was true despite the fact that mediation was less effective than litigation in obtaining the custody arrangements desired by women.

What seems to be evident is that children's long-term positive post-divorce adjustment is inversely related to the level of on-going conflict between the parents. What remains unclear, however, is the actual effect of mediation versus litigation on the potential on-going conflict between parents. Clearly more research is required in this area.

2.4 Women and Mediation

An historical examination of divorce (Day and Hook, 1987) reveals that women have been long-standing losers in the process, losing to the economic and social power of their husbands. In this review, divorce was documented back to ancient times, following cycles of social, religious, and legal influences. Only when 'no fault' divorce became legislated in 1968, did women have equal legal rights in divorce matters (Devlin and Ryan, 1986). Nonetheless, the concerns regarding sexist and biased court systems continue to be documented; in fact, women continue to be more disadvantaged financially

despite efforts to promote equality (Mahoney, 1996).

Despite the criticism of the legal system, however, in the early 1980's, women's advocates began to fight against the use of mediation, especially mandatory mediation such as in the state of California. The main thrust of the concerns centre around cases involving domestic violence. In Perry's (1994) review of this literature, she discussed past studies that used mediation in domestic violence cases, and found positive results, but there has been little follow-up data concerning continued abuse and satisfaction with the mediated agreements.

Perry (1994) reviewed the main issues brought against mediation. They included the concern that mediation decriminalizes wife abuse by ignoring its effects within the process of mediation and subsequent parenting plans, thus permitting abusers to avoid accepting responsibility for abuse. Another major concern included the complexity of the dynamics of wife abuse that affect a woman's ability to negotiate, such as learned helplessness, and sex-role expectations of women to be peace-makers. Other concerns involved the lack of protection from further abuse during and after mediation. A final concern echoed by many others is the lack of training and sensitivity to domestic violence on the part of mediators and agencies offering mediation. One of Perry's major recommendations was that more than one kind of exploratory forum for wife abuse must be utilized, i.e., phone contact, initial questionnaires, individual meeting, joint meetings, etc.

These concerns continue to be supported by additional findings. Newmark, Harrell, and Salem (1995) interviewed women and men who were currently participating

in mediation sessions. They found that 88% of women reported some type of abuse (defined by threats, intimidation, or physical harm), with 72% of men indicating the same. Almost one half (45%) of the abused women felt that physical harm during the next six months was possible. Both abused women and abused men perceived their partners to have had more decision-making power in their relationships. Finally, abuse was related to a sense of personal empowerment for women, but not for men. Women felt more empowered working with the court system than men did. These results led to recommendations for mediation such as the need to screen for abuse, the opportunity for a safe, private place to express needs prior to joint sessions, and the allowance of a support person in mediation for the abused party.

Another criticism that the mediation process is not 'fair' to women, has led to additional research. Menzel (1991) provides a critique of the literature in terms of the external and internal factors by which the fairness of mediation is judged, and the trends in the research. He found that overall, mediated agreements (i.e., considered 'fair') provided for more compliance and long-term agreement stability than court-ordered agreements. Regarding efficiency of agreements, he found that although mediation can bring a more rapid end to a dispute, it could compromise attention given to certain issues, particularly financial issues. Another external factor was access to justice, which he found compromised in mediation as passive mediators may allow the most powerful party to attain more in terms of custody and the division of assets. Concerning internal factors of fairness, Menzel found that mediation was more successful in providing a children-based focus to the process, although he found that the literature did not

substantiate a difference in adjustment of children whose parents litigated versus mediated. However, mediation was credited with improving parental relationships and healing some of the wounds of divorce. Finally, regarding satisfaction with the agreement, Menzel found that it is critical for the disputants to know the alternatives to mediation (i.e., that they could win or lose a great deal more in court).

Dingwall and Greatbatch (1991) taped mediation interviews with the purposes of 1) considering the fairness of face-to-face interaction in mediation, and 2) examining the claims of mediation to take children's interests into account. The authors found that mediators held a great deal of authority and influence. They also noted that the process only seemed to be child-focused when negotiation was beginning to fail, as opposed such a child focus to be an explicit and implicit tenant of mediation (i.e., parents made to feel guilty about not thinking about their children if they are refusing to compromise a point in the negotiations).

Pearson (1991) devised questionnaires for men and women who received mediation services in an attempt to examine the equity of mediated divorce agreements. Based on the results, she concluded that mediation did not exacerbate the financial woes of women and children as compared to court processes.

Neuman (1992) discusses the ability of mediation to address the male-female power imbalance in divorce. She reviewed the view that women could not bargain on equal ground given societal power imbalances, and challenged this with the alternate idea that the crisis of divorce creates the peak climate for change within this imbalance.

Professional response to this debate has been strong in North America. As the

voice against mediation has grown stronger, attempts to bridge the domains of mediation and women's groups have begun. In 1992, a forum was held in California, which included the goals to agree on the issues at hand and to develop common guidelines for intervention in domestic violence cases (Duryee, 1995). While procedural and pre-mediation interventions were devised, the main practical interventions included the provision of safety while the person was in court offices, the management of dangerous clients, dealing with empowerment issues for one or both parties, a referral process for victim and perpetrators, attention to past and possible future exposure of children to violence (e.g., new boyfriends, etc.), and the essentiality of follow-up services.

In Canada, a major forum over two years, in the spring of 1992 and the spring of 1993 (Landau, 1995), brought together all major family mediation organizations in North America, as well as abuse committees, women's programs, etc. Again, recommendations were broad, dealing with training for family mediators, pre-mediation screening, safety, and alternatives to mediation. These recommendations have been adopted by the Ontario Association for Family Mediation into their Standards of Practice (Landau, 1995).

Others in the field have responded individually to the concerns of women. Irving and Benjamin's model of "Therapeutic Family Mediation" (1987), was revised to "Feminist-Informed Therapeutic Family Mediation" (1995) which uses techniques to empower women in the process of mediation. The concept of empowerment is evidenced in other mediation models (e.g., Folger and Bush, 1996). Regehr, (1994), however, contends that empowering techniques used in mediation create a temporal illusion that women have an equal voice; out of the mediation process nothing may be changed and

the agreement may represent an extended platform for men to maintain power.

Therefore, the issues of women in mediation are both specific and broad. The criticism of mediating domestic dispute cases has been clearly articulated, and has generated response on national levels. The more philosophical issue of women and other power issues in mediation is less obvious, but it remains problematic for those who proclaim the virtues of mediation as an equitable, if not better, alternative to the courts.

2.5 Summary

Disentangling the issues in divorce is indeed a complex task. Research into the intricacies of human relationships, especially with respect to the multiple dyads and triads in families, requires in-depth investigation and openness to multiple eventualities. Mediation, as an option for couples, is not always successful, and various reasons have been postulated and examined for the difference between success and failure. The research seems divided and inconclusive regarding whether mediation allows for a better long-term outcome than the legal system. One approach, which has focused around power imbalance, has drawn a great deal of attention. Therefore, with the above review providing a backdrop for this study, it seems logical to attend to power differences in mediation. The following chapter outlines the methodology employed to examine this concept.

CHAPTER THREE

3. METHODOLOGY

3.1 Introduction

As outlined in the preliminary literature review, the issues under investigation are complex, lending themselves to an ethnographic research model where the focus is on "how we understand people and their predicaments and find meaning in their thoughts, language, behaviours, and life circumstances" (Goldstein, 1994, p. 42). Using a naturalistic approach respects the multiple realities inherent in a topic based on intricate relationship issues (Lincoln and Guba, 1985).

The general purpose of this research is two-fold. The first is to develop an understanding of power imbalance in family mediation. The second purpose, rising from the critique of mediation, is to examine the use of various balancing techniques employed by family mediators in the complex mediator-client relationship. Aspects of the research design were considered in accordance with concepts articulated in Marshall and Rossman (1989), Rubin and Rubin (1995), and Lincoln and Guba (1985).

3.2 Research Strategies

Initially, the proposal for this research suggested a case study method, where data on one or two specific cases from each participant would be analysed. However, strict adherence to the case study method was difficult for two reasons. The first reason was

that overall, participants tended to discuss their interpretations of power imbalance and support them with various aspects of different cases. Secondly, when one or two cases were pre-selected by participants, they were the 'failed' mediation cases, and this resulted in a shortage of data. In order for me to understand the participants' experiences with and management of power in mediation, I began to conduct in-depth questioning requiring participants to draw from a range of examples. Despite this change in strategy, all areas of questioning in the interview guide were still addressed with the participants.

The purpose of the study is both exploratory and explanatory in nature. The study seeks to explore and identify various aspects of mediation and power differences. However, the study also seeks to explain process variables, and how these perceptions interact with the power differences between ex-spouses. Therefore, given the nature of the study, it seems important that the data reflect a broad range of unique mediation experiences of the participants. Thus, the in-depth interviewing model speaks to these aspects.

Expense variables were also considered in choosing the geographical boundaries for the study. While a wide population from which to draw experienced mediators was important, consideration was also give to my personal monetary expense of contacting the participants and travelling to interviews. Therefore, the boundaries were constrained to South and Central Ontario, which satisfied both concerns.

3.3 Sample and Site Selection

3.3.1 Sample

In order to explore the mediation process related to complex issues around power imbalances, this study proposed to interview six experienced family mediators in Ontario. Key informants in various cities in South and Central Ontario were contacted (Appendix A). A list of eight mediators was produced, and six participants were selected based on the breadth and depth of mediation and related experience as indicated by the referral information. All but one of the first six selected mediators agreed to the interview. Therefore, the next mediator on the list was selected. A total of six interviews was conducted, and all interviews were utilized in the findings.

After the participants were chosen, an introductory letter explaining the purpose and extent of the involvement in the research was sent to each participant (Appendix B). These were followed-up by a telephone call, (Appendix C) in order to determine the participant's interest in being involved in the research. An Interview Guideline (Appendix D) and written confirmation of the interview date were then sent to the participant. One participant had not received the introductory letter prior to the interview.

The six (three male and three female) mediators selected for the research included one practising lawyer and mediator, one former lawyer and social worker mediator, two mediators with custody assessment and social work background, and two mediators with other mental health background. All participants practice mediation in the private sector.

Advantages of this sample selection included convenience, low expense and time efficiency. Disadvantages included the potential of personal biases in the opinions of the

referees in recommending skilled mediators.

3.3.2 Site

An arrangement was made with each mediator to meet at a time and place of convenience to the participant. Five of six interviewees were interviewed in professional offices; one interview occurred at the participant's residence. The sites were chosen for convenience to the participants, with attention to the details of privacy and professionalism.

3.4 Data Collection Techniques

3.4.1 Pre-Interview

Once again, given the intricacy of the relationships involved in the research questions, qualitative in-depth interviewing was the primary research technique. However, due to the fact that an awareness about the issues to be discussed had already been developed, the interviews followed an open-ended interview guide (Appendix D), based on the preliminary literature review (Chapter Two). The questions in the guide were designed with two purposes in mind: 1) to help the participant anticipate and prepare for the interview process, and 2) to facilitate an open-ended discussion that was nonetheless structured by knowledge of the mediation process (e.g., assumptions, stages), and contemporary issues (e.g., aspects of the feminist critique). However, the open nature of the interview guide also allowed the flexibility to obtain information pertaining to the complexities and unforseen aspects of certain issues.

The interviews were scheduled for one and a half to two hour time periods. Interviews generally lasted from one hour and fifteen minutes to one hour and forty-five minutes. All participants agreed that further personal or telephone interviews could be arranged by me or by the participant.

3.4.2 Interview

Main interview questions as outlined in the interview guide were reviewed in most cases by participants prior to the interview. Throughout the interviews, pencil and paper notes were made so that further probing could be done without interrupting the participant. This model of interviewing with the use of a guiding set of questions, was chosen consistent with Rubin & Rubin's (1995) suggestion to do so, "if [the researcher knows], perhaps from previous interviews, observation or background reading, that certain main questions must be asked in order to cover the entire subject" (p. 159). This type of interviewing, defined in Rubin and Rubin (1995) as 'topical interviewing', noted that the researcher more actively guides the questioning than he/she would in cultural interviewing.

Marshall and Rossman (1989), describe the ethnographic interview as one "whereby the interview is similar to a friendly conversation, but the interviewer asks most of the questions, uses repetition to clarify the responses, and encourages the subjects to expand on their responses" (p. 92).

In the few hours following each interview, main concepts were recorded by hand in a reflective process. This allowed for the inclusion of questions around the concepts

gained in any previous interview. This design issue is articulated in Rubin and Rubin (1995), and would suggest that later interviewees "can provide insight on more specific themes that emerge from the [previous] interviews" (p. 70).

3.5 Data Management

The management of the data began when the information letters were sent to the potential mediators. Separate paper and computer files (two back-ups on computer diskettes) were organized, and once participants were confirmed, they were identified in the files by an assigned letter, A-F.

The interviews were audio-recorded (tapes labelled A-F) and transcribed into the computer with hard copies produced and placed in paper files, and two back-ups on the computer. All files were kept in a locked drawer or in a locked briefcase. Once the study is complete, the audio-tapes and paper files will be destroyed.

3.6 Procedure for data analysis

Six interviews were conducted and all six were used in the data analysis. The coding of the data was done in three stages. Initially, only two main categories were coded on the hard copies of the interviews, as suggested in Rubin and Rubin (1995), "First you set up a few main coding categories, suggested by the original reading of the interviews and the intended purposes of the report" (p 239).

Once coded, computer software (Word Perfect 6.1 for Windows, 1994) was used to move the data into new computer files, and new hard copies were produced under the

skeleton themes. These files were then examined, and then the original interviews were additionally coded for each new concept, and new files were again produced and examined, with a re-coding of the original transcripts. This process produced over one dozen themes. Further analysis uncovered additional relationships between the categories, and thus categories were collapsed into three main themes.

3.7 Researcher Bias

The importance of recognizing and identifying biases held by a researcher has been addressed by many. Such an awareness decreases the likelihood that one will impose his/her own opinions on the interviewee (Rubin and Rubin, 1995).

I carried biases which changed throughout the course of the interviews, and which were declared during each of the interviews. The sources of these biases stemmed from personal experience as well as from the review of the literature. The former centred around a personal observation, whereby my husband was involved in an unsuccessful mediation and subsequent litigation over child custody, the court system seemed unfair, and the children became pawns. Therefore, I held a bias against the court system, as well as a bias related to the outcome of divorce for children.

In addition, a bias was developed following a review of the literature and a personal sensitization to various prejudices and discrimination against women inherent in our society. Finally, current training in social work practice led to an additional bias in favour of mediation, whereby empowerment and choice are central to the process.

Not surprisingly, these biases crept into the interviews. However, as the

interviewing progressed, with on-going self-evaluation, attempts were made to make questioning more objective and concept-driven.

3.8 Role Management

My role as a researcher required careful planning. Issues to be considered included my assimilation into the mediator's environment, the perception of me by the participants, as well my interviewing style and techniques.

Given that the mediators were familiar with consultation and discussion around mediation issues, this level of professional interaction was expected, and required some caution in terms of posing too many restrictions around the conversation. This allowed me to become a participant, declaring any personal biases and perceptions, yet probing for in-depth information regarding the topic or concept being discussed.

3.9 Reciprocity

I provided an open opportunity for the participants to add any information via telephone or letter after the interview was completed. Also, each participant was informed that he/she would received a copy of the overall results and interpretations (Appendix H). In appreciation of their time, all participants received keepsake (a coffee mug/tea cup) at the conclusion of the interview.

3.10 Ethical Behaviour

A consent document for participation (Appendix E) was provided and explained

at the beginning of the interview (one was mailed at a later date, but had been read and agreed upon by the participant). Confidentiality issues regarding the situations discussed by the participant were examined with the interviewee. To protect the identity of the clients discussed, each participant carefully avoided any identifying information, i.e., city of residence, place of employment, names, etc.

The only identifying information of the participants and their clients is that interviews for this study were conducted in South and Central Ontario. All audio-tapes, computer files, and paper files with identifying information will be destroyed following the completion of the study.

3.11 Credibility

A criticism of qualitative research is its lack of validity and reliability measures. Rubin and Rubin (1995) contend that "[m]ost indicators of validity and reliability do not fit qualitative research. Trying to apply these indicators to qualitative work distracts more that it qualifies" (pg 85). This is partially due to the difference in orientation between positivistic and naturalistic research. Positivists control for change and differences in the world, while naturalists assume a changing social world, resulting in altering the design to accommodate these changes (Marshall and Rossman, 1989).

Nonetheless, it is crucial that qualitative research has what Lincoln and Guba (1985) describe as 'truth value', whereby the research is credible to readers and critics. Rubin and Rubin (1995), have outlined three areas that qualitative researchers must pay attention to in order to establish credibility, 1) transparency, 2) consistency and

coherence, and 3) communicability.

With respect to the notion of transparency, it is important for the reader to see the basic processes of data collection. In this study, the data from the taped interviews was transcribed. The process of data coding, conducted initially by hand and then with a word processor, is available in a set of paper copies. Moreover, a skeleton log of my notes was kept, outlining possible themes, areas to question, and self-evaluation notes.

Next, consideration was given to consistency and coherence of the themes. Data was checked for inconsistencies both within and between interviews during the data analysis process, and this design allowed me to contact the participants following the interview. Consistencies, inconsistencies and negative instances are noted in the findings, and hypotheses are offered when the data fail to explain any contradictions. This design also lends itself to obtaining a possible range of participants' responses, allowing for thematic consistency across a variety of mediators.

Finally, as the interviews progressed, the main themes were presented in a variety of ways. In each case, participants spoke from first-hand experience, which adds to the validity of the study (Miles and Huberman, 1994; Rubin and Rubin, 1995). In addition, a telephone interview (Appendix F) was conducted with each participant following the data analysis, with the purposes of (1) discussing the major themes, and (2) allowing the respondents to add information. These follow-up interviews lasted between fifteen and forty minutes, and additional information is documented in the findings.

3.12 Limitations

While the design of this study speaks to the building of knowledge around mediation and power issues, some clear limitations exist. A more comprehensive examination may have included the interviewing of mediation participants with respect to their experience of power imbalance in mediation. Secondly, the participants in the study did not reflect a broad ethnic range, although some did speak of immigrant populations and recognition of cultural differences with respect to gender and power. However, the perspective on such issues may have been limited by the cultural homogeneity of the sample. Furthermore, participants acknowledged the middle-class socio-economic range of clients usually seen in private practice, and thus the findings reflect their experiences with this sub-sample of the population.

3.13 Summary

The methodology design for this project was driven by the complexity of the topic of power imbalance and family mediation. Research strategies carefully considered the professional sample chosen, and the type of interviewing model. My biases with respect to children and against the court system were declared and included in the interviewing process. Data management was clearly outlined, and data analysis strategies were provided. Attention was given to the credibility of the study, and limitations of this particular design were also noted.

Therefore, the strategies discussed provided for the opportunity to examine the complexities of the topic being explored. The findings, detailed in Part Two, allow for an

on-going discourse on the subject of power imbalance in divorce mediation, and provide a focus for future theoretical considerations.

PART TWO

Findings, Discussion

and

Conclusion

CHAPTER FOUR

4. PREFACE TO FINDINGS

4.1 Introduction

Each professional interviewed for this study acknowledged power imbalance as a major issue in mediation. However, the identification of power, and of power imbalance was somewhat varied with differential emphasis on particular aspects. While many commonalities were drawn among these aspects, each participant's argument began from a different perspective.

Some made reference to a broad view of imbalance, such as one who said, "we're speaking of the unequal ability to control, or to control the other person, or control the outcome." The same individual also believed, "that the whole mediation process is designed to equal power...supposedly levelling the landscape in that sense, the whole thing is grounded in making them equals."

Another explained power in terms of a continuous dynamic that controlled the process: "[P]ower can be equal too, it can be stalemate, the power can go back and forth like a ping pong ball ...it's all over the place, [you] need to look at it in a very complex and complicated way."

Yet another put forth some gender differences upfront, "so that the feminists are representing one voice about the power and then there's the male counter-part[s], who are also criticizing mediation, and that fathers are disempowered, so I think we have some

pretty vocal groups at the moment."

Each of the participants discussed the particulars of the imbalances they perceived and dealt with to varying degrees. Surprisingly to me, gender differences were not identified as the main underpinnings of the imbalance. However, domestic abuse and financial issues were discussed across the interviews.

The most common and complex theme was the issue of the emotional readiness of the client couple. The next most significant issue was the effects of the legal system on the mediation process. A third major theme centered around intimidation, related to domestic abuse or to financial power.

4.2 Discussion of Mediator Ethics and Values

Prior to introducing the aspects of the findings for the three main themes, a discussion around the personal and professional ethics of the participants is required. In social work, the recognition and identification of one's values is critical to the quality of social work practice, to "develop an appreciation of the significant role your values play in your daily roles with clients" (Hepworth and Larson, 1993, p. 52).

The issue of ethics and values in family mediation has received a fair amount of attention in the literature, perhaps due to mediation as a relatively recent and developing profession. We know that personal and professional values have reciprocal effects on one another. In fact, in her discussion of ethics and family mediation, Grebe (1992) states that for, "consistency, clarity and usefulness, our codes need to reflect the values of our profession" (p. 164). Grebe outlines the tenants of any professional ethics as (1)

beneficence (doing good), (2) non-maleficence (doing no harm), (3) professional care (based on a combination of beneficence and non-maleficence, (4) justice (equality), and (5) autonomy (respect that human beings are rational, problem-solving individuals). Cooks and Hale (1994) review the basic aspects in many standards of practice for mediation: (1) self-determination, (2) informed consent, (3) impartiality, and (4) neutrality. Problems arising from these standards in relation to mediation can be discussed in terms of some of the responses provided by the participants in this study.

While not a focus in any of the interviews conducted, each respondent did make minimal mention of some of their values, philosophy, and/or biases. The most consistent theme between interviews was the notion that mediators act in the 'best interests' of the children. Among the comments were:

"I'd advocate on the part of the children"; "we have to advocate...on behalf of the child, primarily, so that really is or should be our value base"; "that's how I learned to do the work, to think about what's in the best interests of the child, and to then have the parents do that"; "for the best of the kids", and, finally, "so I'm very clear that my bias is for the kids' best interests, and aside from that, I don't really have trouble with people deciding what their life has to be like."

This view represents some of the contraindications of ethics and values. For instance, mediators hold their own biases about "best interests", stemming from the ethic of non-maleficence. However, if mediators espouse autonomy and self-determination, then should mediators be allowed to intervene if their training suggests that a particular parenting plan is harmful? Roberts (1992) addresses this particular problem as

'dangerous' in her criticism of the induction of family systems theory in mediation.

The concepts of autonomy, neutrality, and impartiality were expressed specifically by the participants. For example, "I haven't found any attitudinal belief problems--I think I can support people in whatever they want to do--even if they change their minds."

Another individual stated, "I don't want to be on the hook for their future and I'm here to assist them...but I'm not going to be destroyed if it doesn't work out." Also, one said, "I don't really care what people decide on as long as I feel it takes into consideration what I feel they need to look at, there's the odd time when what one party says doesn't make much sense--I have to be careful not to make like I'm directly supporting the other party."

Two respondents put forth the concept that mediators aren't impartial. For instance, "I don't think that we're particularly impartial as mediators. I think that we have to, in terms of the clients, I mean they have to perceive us as being impartial, but ultimately, I don't think that we are." Another interviewee stated, "it's impossible to do the work without having biases."

One mediator discussed a specific philosophical approach: "because the way I advertise is kind of a holistic approach, and I always thought of myself...not as a hawk...that's always been part of my philosophy, and there's a whole culture around the way that you think so it was very very validating to have a philosophy to back up this."

Interestingly, some mediators made reference to their counselling background: "having a counselling background and going into mediation has special advantages."

Another example was, "I don't think that I could be a mediator without my therapy skills and that would be my bias."

This range of statements regarding values and biases is discussed in the literature. Many are concerned with the contradictions between self-determination and professional care (Cooks and Hale 1994; Dworkin, Jacob and Scott, 1990; Grebe, Irvin, and Lang, 1989; Marlow, 1994). Other issues, as we see in the findings, centre around the notion of therapy within the context of mediation, or vice versa (Dworkin, Jacob, and Scott, 1990), as well as the change in the ethical and value base for lawyers who become family mediators (Roberts, 1992).

4.3 Emotional Readiness

While not all participants identified this as the "main" power imbalance from their perspective, it was the most common aspect, and in each case surfaced without any initial prompting by me. Analysing the complexity of this issue resulted in the identification of the common themes across the mediation process. The view of an initial 'imbalance' regarding the couples decision to divorce is followed by a theoretical review of the stages of divorce. The identification of the emotions associated with the early stages of divorces follows, as presented in the interviews and in other research. The effects of these emotions on the mediation process were significant, and methods for assessing and managing them are examined. Finally, the entrenchment in the emotional stages of some couples is discussed, with reference to potential etiology and implications for mediation.

4.4 Legal Aspects

A second prominent theme in the interviews was that of the legal system and mediation. Most participants outlined the conflict between the basis of the legal system in cases of divorce, with the ultimate necessity of lawyers in the divorce process. This section outlines some basic perceptions of the problematic nature of the legal system and the antagonistic nature of the relationship between lawyer-mediators and counsellor-mediators. The interviews revealed particular themes that account for this animosity, including professional competition and differences in perspectives and basic skills. Each of these aspects is supported by the literature. Suggestions made in the interviews and in other research regarding improving this important relationship is included.

4.5 Intimidation

Given the initial impetus for this research, all participants were asked about overt intimidation in the mediation process. Although the attention to this theme varied between interviews, many discussions of cases centred around intimidation as a chief problem. Perhaps this occurred due to the memory salience of such cases. Nonetheless, most participants were fairly clear in their cautions around mediating cases with a previous history of domestic violence, although experience with and subjective assessment of such cases varied. In addition, discussions of intimidation with respect to financial positions were examined through the interviews and literature.

4.6 Summary

The analysis of the interviews resulted initially in the development of many categories related to power and to mediation. After careful consideration, additional relationships were drawn and these categories were collapsed into three main themes.

The extent to which the participants contributed to these themes should be considered as reflective of their various experiences. For example, while 'emotional readiness' was not considered to be the most severe or difficult power imbalance, this analysis revealed that it may well be inherent to the mediation process; therefore a great deal of data was provided. Similarly, although all participants acknowledged the seriousness of domestic violence, it appeared as though most had not had the experience, through choice or otherwise, of mediating cases involving domestic violence, and therefore the interviews did not result in this as a focus.

All participants were candid and expressed their views from a range of personal experience with cases, formal training in mediation, and basic values. Each participant was presented with the summary of the themes and allowed the opportunity to comment. The results of the follow-up appointments are included in each chapter.

CHAPTER FIVE

5. MEDIATION READINESS

5.1 Introduction

Consistent across all six interviews was the strong notion of couples' emotional 'readiness' for the mediation process. Given the intense and vacillating emotions inherent in the divorce process, the participants felt that this had a pronounced effect on the power differential in the mediation, often rendering it 'non-mediable'. The intricacy of this issue has far-reaching effects for mediation. This section attempts to disentangle the common elements experienced by the participants. These themes are largely supported by the literature, as are the responses for managing its complex nature.

5.2 A Staggered Start

Participants commonly referred to disequilibrium between the couples at the point of entering mediation; one partner was typically more able to accept the divorce: "just as you experience in many or most relationships you sense an unevenness in the commitment in the relationships, and the same is true in divorcing experiences--one is just a lot more ready than the other."

Similarly, another responded,

> [P]eople don't simultaneously decide to break up, people operate at different levels and at different speeds, someone becomes disillusioned with the

relationship...and then all of a sudden something happens, and then this person makes a decision, and they make an announcement...and at that point, the other person is usually taken by shock.

This leads into the theme of 'leaving versus being left', and the effect on the mediation process. With respect to the person leaving, it was often seen that this person held the power, at least in the initial stages. As expressed by one interviewee, "if they decided to leave then they usually want to wrap things up so they can get on with their lives, so they're in a terrifically strong and powerful position, emotionally and psychologically. I think that factor is really important for a certain time period."

However, the person who left the relationship had also been seen as in a poorer position in mediation due to the guilt involved. "...[if one] had an affair, you're leaving, so you'd better give her everything...I saw one woman, and she wouldn't fight for anything." Another participant said, "the person who wants to get it settled but is still dealing with the guilt...it may be colouring some of his ideas."

Nonetheless, a great deal of the focus was on the readiness with respect to mediation of the person 'being left', which was often associated with the early part of the divorce process. For example, "I've certainly had a couple of cases where it was rather apparent that one of them just wasn't ready--just couldn't accept that there was going to be a divorce."

5.3 Stages of Divorce

Comments such as these would be classified in the literature as typical of the early stages of the divorce process. In an attempt to understand the divorce process, researchers have categorized the divorce process into 'stages', much like the stages of bereavement. Somary and Emery (1991) use the analogy that for the person that is 'leaving' the process is much like the bereaving the death of a loved one following a chronic illness; for the person being left, the process is akin to bereaving a sudden death. Bowlby's (1973, 1979) stages of grief include: (1) numbness, occasionally interrupted by outbursts of extreme distress, (2) phase of yearning and searching for the lost figure, (3) disorganization and despair, and (4) reorganization. There has also been recognition that there may be cycling between the stages, also noted by one participant: "Well...you never go through the stages in order, they're all over the place and some of the feelings are simultaneous."

However, notable differences between bereavement grief and divorce grief have been identified. Bowlby (1979) suggested that divorce grieving can take longer due to the possibility of a reunion. Clulow (1990) also remarked on the difference in time, citing that adults and children are in a death-related bereavement process for one to two years, where recovery from a divorce may take from two to five years. Pledge (1992) describes the difference as the simultaneous occurrence of many changes in ones area of life, for example, spouse role, parenting role, financial issues, lifestyle issues and goals.

Clulow (1990) also reports the different role of the social network, whereby in death, family and friends rally around the bereaved for a period of time, ending rituals are

conducted, and emotional support is present, for a time. In divorce, however, social networks diminish, and relationships with in-laws and friends may be severed. Clulow (1990) remarks that this may be especially true for men, which had also been mentioned by one participant:

> They're disasters...most males aren't the stereotypical males you get who work in a mental health centre, having lots of friends and sharing views and ideas, and stuff like that--they probably don't do as well...women are smarter about how they set up their lives.

In addition, part of the difficulty with divorce is the self-determination involved. Clulow (1990) describes the difference between death and divorce along personal lines. That is, divorce may be much harder to accept than a sudden death due to the fact that one person chose to leave, and then a different relationship must continue.

Weingarten (1986) outlines Bohannon's perspective of 'six divorces': the emotional divorce, the legal divorce (court involvement), economic divorce (reassignment of property), co-parental divorce (changing relationships of each parent to his/her children), community divorce (changing patterns of social support from friends and in-laws), and psychic divorce (the task of psychologically separating from one's spouse).

5.4 Emotions in the Early Stages

Despite some difference in how one may concretize the stages of divorce, the

emotions in the early stages seem to be clear. Barsky (1993) characterizes the 'shock' phase as physiological, with dizziness, nausea, numbness, with the emotions following in the 'reality' phase: intense longing and distress, disorganization, desolation, agitation and emptiness. Power (1985) also noted the wide range of response in the early stages, including anger, denial, depression and ambivalence. Mitchell-Flynn and Hutchinson (1993) conducted a longitudinal study of the problems of divorced men. At one and six months following the divorce, loneliness was a prevalent problem.

In the short term, Clulow (1990), claims that divorce "can be extremely harrowing, even life-threatening. Out of anger or fear partners are capable of committing a kind of psychological murder" (p. 19). He notes that death wishes are often common. In the interviews, one participant quoted a well-known mediator as suggesting,

> [He] used to talk about it as people are psychotic when they're separating, and he's right in a way, you're not rationally thinking, I mean, you're really, in at least in the early stages...you're really distraught, your whole life is upside-down and topsy-turvy and you have to make really important decisions.

Power (1985) suggests that one spouse remains emotionally attached, and that this attachment is characterized by a pre-occupation with the past, frequent thoughts of the spouse, and loneliness. Guilt has also been observed as very poignant during the initial phases of divorce (Power, 1985). Walters-Chapman, Price, and Serovich (1995) divide guilt during a divorce as either 'specific' (related to particular events, such as an affair, desire to leave, etc.), or 'global', associated with a sense of shame over a failed marriage

and effects on the children. Thus, spouses who initiate the divorce may feel guilty with respect to the pain of the children and spouse, failure to maintain a home and family, and 'abandonment fantasies'. This guilt is reinforced by the negative stigma in society regarding divorced families.

It seems as though even within this 'normal' experience of emotions in the divorce process, other factors can account for some variance in adapting to divorce. A study by Wijnberg and Holmes (1992) found that women in the most traditional roles had more stress, especially during the actual separation phase, than did women with more career-directed roles. Power (1985) also notes that traditional sex-roles play an important part, whereby adults who have held traditional roles may have the most difficult time moving through the emotional stages. Garvin, Kalter and Hansell (1993) found that low post-divorce income levels were strongly related to poor divorce adjustment for women.

Pledge (1992) explained that individual cognitive appraisal can greatly affect one's response, for example, how one is able to attribute the divorce positively versus negatively. She also found that women were most stressed at the initial separation, while men were most stressed at the finalization of the divorce.

Finally, Kolevzon and Gottlieb (1984) found that levels of 'depression' and 'hostility' generally declined following the first year of divorce, and definitely by the second. In addition, certain factors were related to this decline of these depression and hostility levels. Specifically, these levels were more likely to be reduced if women: retained custody, did not initiate the divorce, were involved in marital therapy before the

divorce, and lived closer to their ex-spouses.

5.5 Effects of Emotions on Mediation

The consequences for this 'lack of readiness' due to emotions was articulated from different viewpoints in the interviews. One perspective was the vulnerability of such an individual, termed by one participant as "tremendously vulnerable...that's where your real power imbalance is, because they're usually at the stage where they're going to agree to anything."

Through further questioning, this vulnerability theme seemed to be related to the hope of the party of a reconciliation, "that they hang in to see if something will work out, maybe with the hope that whatever else is competing for the relationship will dissolve," and later, "maybe for those people mediation is just an opportunity for those people to be together again, and they just hope for something else to happen."

Another participant described the issues as:

> [T]here's this sense that I'll be really nice and maybe I'll get the person back...like I know what I'll do, we'll buy a new house, I'll buy her a new car, I'll go into therapy, we'll have a baby, we'll get a dog, so you make all these concessions...they've got a secret agenda, and the secret agenda is that during that process they'll win the person back.

Another had a client who was unaware that the relationship was over:

> In fact, sometimes a very hopeful party has been led to be hopeful by maybe a

very guilty partner, and they don't really know until they hear during the mediation session that reconciliation is not going to happen; they may hear that for the first time.

The ramifications of mediating such cases were described by one mediator, who recounted a case where the client became extremely aggressive towards him, "because his agenda wasn't being met...I was negotiating the end of their marriage, and he didn't want that so what happened is he was becoming more nasty."

However, just as the person not ready was at increased risk for making too many concessions, they also posed a problem with respect to blocking the process. One described a woman who refused to agree on the final points in mediation. "She didn't want the divorce--I remember that too--he had taken off with another woman or something--she felt pretty hard done by, she felt--I'm sure she wanted to get in her lashes."

Yet another recounted, "I don't think he was overly agreeing to everything, he put up a massive fight in every area...because every concession would mean that he'd get closer to the agreement."

One participant summarized the range of possibilities,

[I]f one person is still really hurting, then they aren't able to negotiate and work things out in a way that's going to be fair, because they're either going to be very angry and vengeful, or putting up a lot of blocks, or they could also be very hurt, and will pull back a lot and try to win the other party over, or they'll want to just

get it over with and they'll throw the baby out with the bathwater, so you really have to sense where they are in the emotional stage of separating and if they really are ready to work at something together.

In another instance, one client in a failed mediation who was verbally aggressive towards his wife had been described as, "angry, angry about having to come up here, angry about having to go to court, and probably angry in terms of the way that things ended up in terms of their relationship, but I can't say that definitely." One participant described a situation, "I was able to challenge him that it was part of the relationship that he wasn't able to let go, because that can be another reason for putting up blocks, not letting go."

Nonetheless, while there was an agreement that the timing of the divorce process could affect mediation, it was stated that this vulnerability, anger and attempts at reconciliation were a natural part of the divorce process. "Now what happens later on is when the person who's being left really understands that they're being left, and there's no chance of reconciliation, then there may be that terrific amount of anger." Later, "you have to go through a certain amount of anger and resentment and depression."

Anger is often seen as the main emotion through which other feelings of rejection, disappointment, frustration, and anxiety are channelled (Somary and Emery, 1991). In Clulow's (1990) comparison of bereavement and divorce, he explains that in bereavement, sorrow is the uppermost emotion, with some anger at others; in divorce, anger is the uppermost emotion, and that sorrow can be more difficult to locate.

Somary and Emery (1991) discuss the difficulty during mediation of separating the 'irrational' anger (related to the divorce process), from the 'rational' anger, (related to the specifics of the divorce settlement). Thus, they suggest, while the 'irrational' anger helps people cope with the divorce, it can impede the decision-making processes as indicated in the above interview statements. The anger is described as functional for the client, whereby an attachment can be maintained: anger is an acceptable emotion in the circumstance, the underlying feeling of continued caring is not acceptable. Thus the two partners, at different stages of acceptance, are misunderstood by one another as either 'not caring', or, 'not accepting'.

Power (1985) describes the emotional process affecting mediation because mediation requires the parties to be able to separate the issues of the tasks at hand from the issues of the relationships, and often the 'emotionally attached' spouse can't diminish the effect of the ex-spouse from his/her cognitive and affective processes.

Thus, the emotional states of the parties are seen to have significant effects on the process of mediation, whereby each party is considered able to make appropriate choices for their future, and individuals are rarely seen to be at the same point in the stages (Clulow, 1990; Pledge, 1992; Power, 1985). The respondents in this study stated this observation as a matter of fact, for example, "You will occasionally meet a couple that's at the same [emotional] spot, but rarely, and even then issues still come up."

Participants described ex-spouses as still married 'emotionally', such as, "it may take them 2,3,4, or 5 years to get to the point where they can mediate, so people can still get divorces and still be married--emotionally--they can still have as much contact."

Therefore, my question arose in the interview regarding how couples were ever able to mediate successfully, given the difference in emotional stages. Responses, fairly consistent in the interviews and in the literature, are detailed in the next section.

5.6 Assessing Emotional Disparity

The respondents, whether through a formal prescreening or within the first few sessions, assessed whether or not the couple was at a 'mediable stage', emotionally. This assessment resulted in one of two outcomes: (1) the couple was judged to be 'non-mediable', and rejected, or, (2) the couple was assessed to be mediable, within a range of 'readiness'. For example, one mediator indicated that "if they can't make that decision [whether the mediation is open or closed] then they probably won't make any other decisions...[I] don't go any further."

Suggested another, "I might be wrong, but I suspect that intelligence and education and just worldly knowledge might have a lot to do with [the difficulty] too...some people come in with horrible stereotypes about divorce."

Similar ideas were stated again by another respondent, "I think there's a certain level of understanding that needs to be running before people can come in and negotiate their own deal...they'd have to be pretty functional in the rest of the world." Later:

> [T]hose people [who] come in and they choose mediation because it's consistent with their values, and then its easy for me...the key factor is...what their perspective of the other person is, that the people who come in with a very very defensive, victim-orientation, are the ones where it will be really tough.

In Irving and Benjamin's (1995) model of Therapeutic Family Mediation, emotional 'readiness' was categorized within one of seven aspects of the assessment phase, termed, 'post-divorce spousal functioning'. This aspect included the examination of many concerns. Among them, the attachment to the ex-spouse and the extent to which each spouse has accepted the end of the relationship was strongly considered.

5.6.1 Mediators Rejecting Mediation

Although it seemed somewhat less common for the participants to outright reject mediation based on emotional readiness, it did happen. For example, one stated, "I've certainly had a couple of cases where it was rather immediately apparent that one of them just wasn't ready...they cried a lot...I've had a couple...I've terminated, or seems to me that I picked up a year later or something."

Another believed that if the couple wasn't willing to split the cost, this was associated with their emotional state, and he may not be willing to accept them as clients:

> [I]f they weren't ready to split the cost, then it might indicate that the person who didn't want to contribute felt hard done by...I think it's an important symbol in the situation...if one of the parties wasn't willing to contribute then I'd question their motivation for being in the mediation process.

A case was discussed whereby the participant had mis-assessed the couples' readiness, and declared them 'non-mediable' in hindsight. "It was a case where I made a

strategic error in that they weren't mediable...he was at that initial vulnerable stage where he agreed to go along with it, and I missed that, so I agreed to do the mediation."

5.6.2 Mediators Accepting Mediation

With the acknowledgement that couples generally enter mediation in an unbalanced state, they were definitely often considered mediable, and therefore the mediator was in the position of balancing them. The first aspect of the mediator's role was to form an assessment of the couple's or individual's position in the process. For example, "A reasonable person is just kind of stuck temporarily at that initial mourning stage." Said another, " I want to test out where they are in the mourning process, if they're way at the beginning, you can sense, there's always some anger and rage, and you need to go through that to get healthy again."

Another respondent said,

> [M]ediation works when people are somewhat stable, reasonable, somewhat mature enough...I would be really interested in...how they view the process after I explained it to them, whether they were able to make concessions...I would say...I need to decide whether I have the skills to make it work for you.

Similarly, one interviewee explained, "mediation is really for people [who] have a fair amount of ego strength, who have a willingness to sit and negotiate, [and] an ability to sit and negotiate."

Respondents also discussed an assessment as valuable in terms of predicting the

difficulty of the mediation. For instance, "I go through the screening, and I'm looking for the clues for how difficult the case is going to be and where certain buttons are going to be." One mediator suggested that the most difficult clients "don't have the mental imagination to be creative enough...I go in with the premise that if I can help them come to an agreement about anything, I feel it's successful."

Clearly, there is a sense that couples enter mediation at different emotional stages, and that this affects the power in mediation. Nonetheless, a formal or informal assessment occurs to determine this, and they are often considered mediable. This is also accepted in the literature. For example, although Lyon, Silverman, Howe, Bishop and Armstrong (1985) described the second 'litigation/restructuring' phase of divorce as difficult emotionally, they concluded that this phase was most amenable to the mediation process.

5.7 Balancing Techniques

Many balancing techniques were articulated by the respondents, and considered successful. As all discussed cases that had not worked out, they also discussed techniques that they may try if faced with the same or a similar situation. The statements revealed that the interviewees employed various techniques relative to the amount of conflict between the couple and within the sessions. On the whole, the techniques across the subjects were very similar.

In most cases, there was an assumption that power is a dynamic process that can shift between partners. When asked what could be done to equalize power in sessions,

one respondent replied, "My point here might surprise you, but my one word answer is 'mediate'. I think that the whole mediation process is designed to equal power--that's really what it's all about...the whole thing is grounded in making them equals."

5.7.1 Hearing and Being Heard

Many instances arose of mediators simply talking with both parties present as a balancing tool. For example:

> I think it's a lot of repetition, and you kind of go over what the alternatives are and think about what will happen if they don't agree...the first time its presented to you, it's totally unacceptable and then you think about it and think about it...and eventually at some point what was the unthinkable becomes the acceptable.

Another pointed out, "Another way of balancing is to draw commonality out, where they will be expressing things where they felt that they are totally at odds with one another, and pulling out of it a common interest." Afterwards, she continued, "I guess clarification is a power balancing [technique] because it brings down the barbs, and understanding what the other person is really looking for, because if assumptions are made then they could go off in all directions."

A sensitivity to language was also noted:

> I'm very sensitive to language...you need to use the kind of language that's going

to be conducive to getting them to work together, so I downplay negative terms, I downplay things that denote the differences, and I play up the terms that are positive and common.

Another respondent utilized a specific model based on this notion of common interests:

> So after doing the 'interest space', we started generating some options, so we had maybe seven or eight different options...I don't assume or ask them [about the interest in the children] because it's already been said and it's on paper, that's one of the interests.

Another technique that mediators mentioned was allowing both parties to talk, with the mediator controlling the process. One respondent stated, "The communication skills are a really important part of the balance...so that to get each of them to talk about the ideas that they have, and to make sure that the other person is listening, and then to explore other common areas...so that no one feels forgotten or ignored."

This idea of controlling the mediation seemed to be an important part of the process; in fact, often the mediation would stop in order to ensure that people's feelings were understood. For example, "you've got to give them time for ventilation, with respect to depression and anger--you go back, you take your time, you work with people and let them do what they need to do." Another stated, "One of the most powerful power-balancing skills is to allow them both to talk and to listen to each other."

One interviewee discussed a comfort level with conflict:

> [I]t's nice for a mediator to have a fair tolerance for that kind of thing and I think I do but ... it's not necessarily a bad thing to let a little anger and rage fly, but then if they can get beyond that then it can certainly be helpful and certainly they each know how important certain issues are.

The literature also confirms the importance of acknowledging the emotions of each of the parties. Payne and Overend (1990) cite the helpful techniques as reframing, 'controlled venting', and re-focusing on the children. Barsky (1993), suggests the permission for the direct expression of powerful and painful feelings in the mediation sessions. Similarly, Somary and Emery (1991) recommend helping individuals recognize and acknowledge their grief.

Mediators responded to higher- level, or prolonged conflict by employing a different set of tactics. Some talked about using the 'referee' approach:

> [Y]ou get them to talk through you, where you reiterate and reframe things until you can sense that the level is calm enough that they can start talking to each other, I'm often described as a referee and I think that's how people see you is as a referee to kind of keep a cap on things so that they don't get out of hand.

Described another, " I just laugh thinking about how active it is, the mediator or assessor poised on the edge of their chair, [saying] 'you just sit down'. You have to be really active sometimes."

5.7.2 Instruction/Education

Educating couples about the divorce process and its effects on family was also common. One participant took more of a general instructing approach, such as, "during session you can instruct them 'it is not helpful to do such and such', or 'do you know that every time you say that the other person does this or that'."

Others commonly attempted to provide some specific education to the parents. For example, one stated, "I try to generate or talk a little bit about the research and to understand what we know about children in terms of dealing with parents and separation, and what kids need." Another used a concrete example, "this mother was telling the son about the dad's affair, and I told her, you know, the research says that this kid should feel free to love his dad."

One participant said, "I'm constantly giving educational stuff...I find I'm doing a lot of parenting education...I think that knowledge is another balancing too, if they have equal knowledge and equal understanding, that'll balance them in their eyes with each other." Another also considered the education part of the process: "to explain how damaging the process is instead of having them continually fighting, kids need stability..."

Imparting specific information about the divorce process in particular was also noted in the literature. Barsky (1993) suggests that one can reinforce the need of new role functions, discuss the new stages and tasks in the life cycle, and to help them understand that their intense feelings are a normal part of the resolution. Legitimizing the anger, and

helping partners clarify and redefine the new boundaries of their relationship was also noted (Somary and Emery, 1991).

5.7.3 Support Individuals

Another technique utilized by mediators was to bring in parties for support into the sessions. "One thing I did, the woman suggested this herself, was to bring in a friend, which was fine...in fact..she wanted the husband to bring the woman that he was now living with and sharing the children with him."

As suggested by another in response to the involvement of third parties,

> ...sometimes, like a shelter worker or a support person, people will often want to bring in new partners and I won't bring in a new partner without working with the biological parents, first, and I won't bring in new partners if the other party is uncomfortable with it...new partners are an important piece of it.

5.7.4 Caucusing

Caucusing was considered a very important and effective balancing technique when mediators had great difficulty moving one of the two parties through the process. Generally, the purpose of caucusing was to address some maladaptive issue or behaviour with one party, while 'making up' an issue to discuss with the other party. One respondent referred to caucusing "as sometimes safer", in terms of not having the neutrality of the mediator affected.

One mediator recounted a case that had failed, saying,

I think that if I were going to do it again, I think that I'd probably do some caucusing with those two, I might have gotten him alone, and that would have been a better approach to take...I'd talk to him in terms of what he was demanding, and perhaps in terms of needing to focus on the child rather that his own needs, and with her..probably in terms of whether that is what she really wanted.

Explained another respondent:

I will caucus with each of them if I feel it will be helpful, if I feel it's necessary...I do a straight non-stop talk to get them to stop yelling, if I need to do that, I just start talking to them and at them and just keep going in a monotone, until they stop. It usually works.

Somary and Emery (1991) suggests caucusing as an important tool, giving the mediator an opportunity to search for the underlying emotion, i.e., if they are angry to help them search for the sadness, if they are depressed to help them locate the anger. One respondent recounted such a process:

[W]e sail along marvellously and then Dad puts up a block, and I caucused today before starting to address that, because that was constant. And what came out was his fear of losing the child, but he wasn't at any point able to articulate that. So we did a lot of talking, and when we re-convened, he was able to articulate a lot of the stuff that was bothering him...you may need to do one on one

sometimes...either immediately or after you've seen them. I don't know if that's a balancing technique as much as if it's a 'moving them forward' technique. I guess it's balancing a process and getting them to catch up with each other.

5.7.5 Pre-Mediation

Therefore, occasionally stopping the mediation process to consider the emotional issues at hand seems to be a common and expected part of the mediation process. In addition, however, mediators have considered a separate phase in order to prepare individuals for mediation. This idea had different viewpoints from the participants in this study. While one participant spoke explicitly of utilizing pre-mediation as part of the process, others had felt that this should be done by another individual:

> I can certainly envision that a person , a reasonable person, is just kind of stuck temporarily at that initial mourning stage, but at the moment [mediation] is just a little premature, and maybe they need to talk to somebody...I don't think it should be me, because you'd develop too much of an alliance with that other person.

Another respondent reported:

> I think that as a premediation stage, it might have been good for one or both of them to have some counselling of some kind...even some adjustment counselling...there were some pretty raw emotions here, and it might have been helpful just in terms of getting them ready to mediate.

The concept of pre-mediation counselling has been in the literature for well over a decade. Power (1985) describes the goals of pre-mediation as to (1) mute the emotional tone and promote acceptance of the divorce, and, (2), to enhance post-separation adjustment. This model involves the discussion of pre-mediation with both partners, although one partner may receive individual counselling prior to the mediation. The advantages of this model were articulated including increased confidence in the mediator and aiding post-divorce adjustment. However, a potential disadvantage cited is similar to that indicated above. That is, there is the potential that the 'other' spouse may feel that the mediator is aligning with the non-initiator.

Irving and Benjamin (1995) explain that premediation is "intended to produce a change in patterns of relating between former partners consistent with the requirements of negotiation" (p. 157). Their research on couples entering mediation suggested that approximately 50 percent were assessed as functioning at the level of "having the potential to develop the attributes required by the negotiation process, with premediation a requisite to the realization of that potential" (p. 173).

In speaking of custody assessments, a participant said,

> I think the same is true of mediation, if people are basically healthy and wanting to work toward the best interests of their children, then I think you really can help people move through that process, and help them separate out their marital issues from their parental issues, I think you can really help them focus on what's in the best interests of their children as opposed in the left-over business of the marriage.

5.8 Inability to Progress

While many couples seemed to be temporarily 'stuck' in the mourning process, others were considered to be entrenched. The latter couples were considered very difficult, if not impossible, to mediate. Irving and Benjamin (1995) cite that approximately 20% of couples fell into this group, characterized by such attributes as intense stress, obsessive pre-occupation, extreme rigidity, and intense anger. Such characteristics were also noted by the respondents. For example:

> I think it has to do with their psychological health, pure and simple...when the fight goes on long term, like most people get over, I mean most people have difficulty in the first year, with some persistence in the second, but usually with some intervention they'll settle down and usually things go relatively smoothly, the couples that stay in intractable disputes are usually pretty disturbed on some level, narcissistic kinds of disturbances, they feel entitled, and everything's a slight, and they just can't move on...

When questioned about partners who prolong the divorce fight, this participant responded, "it has to do with possession, it has to do with narcissistic entitlement, and that the battle that went on in the marriage is still going on," and later, "not wanting to feel like you're being taken advantage of, but it also has to do with unfinished business about separating."

One participant regularly labelled the on-going fight for her clients:

> I try to [tell them] that as long as people are reacting to each other and retaliating, then I try to tell them that really in a lot of ways, they're still emotionally married...I had one couple that said as long as we keep on fighting, we're still married--once the fighting stops the marriage is over, and that's tough.

Johnston and Campbell (1988) interpret such entrenchment as couples with 'separation-individuation' conflicts, related to serious disturbances in past relationships, specifically with primary caretakers, who were "ungratifying, unsupportive, and frequently abandoning" (p. 110). Thus, separation from his or her spouse is a reactivation of the trauma, and the feelings of panic and abandonment surface.

A very experienced mediator explained the extreme result of entrenchment as 'parental alienation syndrome':

> The parent who's alienating, is the one who's stuck the one who hasn't been able to get through the process of separation and divorce, and in that stuck stage, their needs are so great, they can't differentiate between themselves and the child, so they're not able to move beyond their own needs, and do their own healing...but there's no way you can mediate that.

Richard Gardner (1992) coined the term 'parental alienation syndrome' to describe the phenomenon of one parent 'brainwashing' or 'programming' the child against the other parent. Gardner divides this into three types. In the 'severe' cases, the alienating parents are considered fanatic, often having a diagnosed psychiatric illness,

obsessed with a paranoid antagonism towards their ex-spouses. These parents do not respond to logic, reason or confrontations with reality. In the 'moderate' cases, there exits a "campaign of denigration" (p. 152) against the ex-spouse, and professional efforts may be successful in enabling the children to resume a normal relationship with their non-custodial parent. In the 'mild' cases, custodial parents may use 'programming' tactics with their children to strengthen their position, characterized by anger and a desire for vengeance.

There was some agreement, also, that the legal process, as one suggested, "inflamed things" in such entrenched cases. Put by another,

> [I]f you've got somebody with a personality disorder, then you've really got a problem, because if you've got somebody with say a narcissistic personality disorder who generally wanders through life blaming everyone else for what's happening to them, then the legal system fits in perfectly.

5.9 Follow-up Discussions

All participants confirmed their experience with the finding that emotional readiness posed a significant issue of power in mediation. One interviewee in particular maintained that couples need to be in a 'mediative stance' in order to get on with the business of mediation. Another summarized that some people just aren't ready, if the emotions are "too raw, too close."

5.10 Summary

The ramifications for the emotional stage of the divorce process relative to mediation were significant. Mediators recognized that couples should not mediate if they are still in the mourning stage of the divorce process, as either partner may make too many concessions, or block the process. There was also the belief that some couples need help separating the emotional carry-over from the marriage in order to move on and truly separate. Techniques utilized by mediators in this process were similar across the interviews. In addition, there was also acknowledgment that personality difficulties provide substantial, if not insurmountable barriers to the mediation process.

CHAPTER SIX

6. LEGAL ASPECTS OF POWER IMBALANCE

6.1 Introduction

The legal system in North America and Canada, based on the British model of law, seeks out 'justice and truth' through an adversarial process (Gardner, 1992). This system has been criticized on many levels with respect to the matters of divorce. King and Trowell (1992) summarize one of the criticisms: "[v]ictories tend to be empty and meaningless in so far as they relate to future parent-child relationships...moreover, the relentless struggle to establish 'the truth' in the courtroom is likely to have exacerbated the antagonism between the parents" (pp. 64-65).

In the last century, divorce has evolved from a legal division of chattels and support responsibilities, to an extensive social issue. Therefore, the shift into the social system of managing divorce should not be surprising. The difficulties in this transitional stage has perhaps been most obvious in the unsteady relationships between the professionals in each arena: mental health/social work mediators, and lawyers.

The extent and breadth of information provided in the interviews on the effects of lawyers in mediation, leads to the investigation of the concepts identified. These concepts were seen by the mediators to have significant ramifications in terms of balancing power between clients, thus undermining, arresting, or otherwise negatively affecting the process.

The main themes discovered from the examination of the data included a sense of the problematic nature of the legal system in divorce. With respect to the lawyers, other themes emerged such as professional competition between family litigators and counsellor-mediators. In addition, a difference of perspective (i.e., adversarial versus cooperative) and understanding of the difference in skills were also cited as problematic. Techniques and suggestions were also examined and are provided. A review of the literature echoed these themes, and also provided some bases for their origins.

6.2 The Legal System

The process of divorce in the legal system was addressed by the respondents, in terms of being unbalanced. One respondent stated that clients "give up" to the larger systemic imbalance of the court process. The ex-lawyer social worker described it this way:

> Once the process gets started, it's not a healthy well-balanced system, its an adversarial system that originates in England, from trial by combat, whereby if you killed the other person, you were right...you can't come out...without being mauled...it's sad more than anything...what the legal process does is gets people going in the direction that it's 99 percent the other person's fault.

Another interviewee stated:

> I really don't have much faith in the judicial system...it's just a very weird way to try to decide on the fate of your child or children, to go to court and represent your

case before somebody you believe is an impartial Solomon, and the judges also have the biases..the whole system is set up in a way that it often makes it very difficult for the women...not used to negotiating, to putting their case forward, they're not used to arguing...so to have to go to court and fight it out and to think that's a system that's more equitable...I don't think so, I've seen some very very unfair things happen in court...to men and to women.

6.3 Professional Competition

In terms of barriers to the mediation process, the discussion of lawyers figured prominently across the interviews. One area of discussion was the competition between non-lawyers and lawyers practising mediation. Put by one participant, "there are a lot of lawyers who would like to take it over, and indeed make it a legal enterprise...some lawyers are very scared of protecting [their turf], and that's justified, to an extent."

Another interviewee corroborated this idea: "[T]here's a lot of places in Ontario where there's [not a lot of support from lawyers], there's still a lot of animosity in the legal profession, understandably." Although each mediator interviewed required their clients to retain a lawyer for at least the financial aspect (five of the six required it for any aspect of an agreement), the rivalry between the two professions had been considered a significant issue.

Attention to this issue in the literature has been significant. Haynes (1989) has outlined the rapid shift within the practice of law to accommodate alternate dispute resolution. For instance, he notes that between 1978-1988, American bar associations

shifted between complaints of mediation as unlawful practice of law to incorporating mediation as a major focus of interest and training. During this time, issues of 'turf' surfaced.

According to Haynes (1989), these issues were also complicated by differences in opinion within the legal profession. He explains inconsistency within different attorney groups: (1) an academic group advocating for alternate dispute resolution training, (2) non-matrimonial lawyers, who advocate for divorce mediation, believing that matrimonial law taints the image of the profession, and, (3) lawyers who sense an additional encroachment on their practice, given the success of real estate brokers and accountants in taking over other once-legal duties.

Further examination of the complaints of the latter group revealed legitimate rationale for these concerns. Charges of unauthorized practice of the law have been laid in areas of the United States where non-lawyer mediators were believed to impart legal advice, or, to draft legal agreements. However, Rogers and McEwen (1989) noted that non-lawyer mediators have generally been successful in these cases. In Ontario, there is one current case against mediator Maureen Boldt in North Bay. Although Ms. Boldt had successfully won a suit against her for unlawful practice of law, new charges have just been re-laid, and mediation associations are watching closely (Kusan, 1997).

With no enforceable boundaries on the practice of mediation, the perception by lawyers is that mediators have practised, unsupervised, in complicated areas of law, such as income tax, support, and property division issues. However, the interviews generally supported the belief that lawyers should be involved for these purposes, and in other

power-related instances. For example, one response was, "if the power imbalance was that strong between the two of them, then that's the situation where he or she, usually she, is going to need a really tough lawyer." Regarding a case with a strong financial imbalance, one interviewee stated, "my response to that as in a lot of other circumstances, and I suppose the response of just about any other mediator, just to strongly encourage the wife to get some legal and financial help." Another one said, "[the lawyers] are there for...protection and to make sure that the ex isn't doing anything really awful."

One individual encouraged the use of lawyers in this way: "tell them that they need to talk to their lawyers to get a sense of the kind of information or kind of issues that they could bring to mediation for discussion", and later, "I will say to them this is very unfair, that unless you have a real reason for closing this, your lawyer is not going to accept it."

Therefore, despite the sense of the participants, and in the literature, that lawyers reacted to competition with non-lawyer mediators, the interviewees were clear about the necessity of the lawyers. When asked about whether the parties should have lawyers, the response was, "I require it, actually...it's written into our association's code of ethics, you really must have independent legal advice." In fact, only one mediator did not require (but did recommend) lawyers unless the financial aspect of the agreement was being mediated.

6.4 Differences in Perspective

The most common theme with respect to lawyers was a perceived lack of

understanding by the legal profession of the mediation process. In the recounted cases presented, this had been a major issue. For example, one individual felt that the process had been sabotaged from the beginning:

> [I]t was almost like the lawyers were saying that, looking back, let's give this a try and see what happens, and then we'll kind of take it the next step...I think this is kind of a problem for mediation, that it can be kind of used as a dumping ground for cases, by lawyers, and I don't say that to be negative on the legal profession, but I think that it's perhaps seen as the first stage, so lets try it, and if it doesn't go anywhere then here's the route we go next...I don't know if that's communicated to the clients or not.

Another argued,

> I think you have to have lawyers who basically take the stand that, 'oh, I see that you have this agreement, and maybe you've given in this area more than you had to, but maybe there's a good reason for doing that, and I understand that's what you want'...so unless the lawyer's on board from the outset, you need to have a lawyer that's honest with you.

This slight shift to the importance of the lawyers understanding to their willingness to cooperate was mentioned by another:

> I guess the other piece of it in terms of the power stuff is getting the lawyers on

side with you...one of the first things you need to do is to assess the lawyers, and so you need to know whether or not they're going to work with you...and if they're not, then you're into a whole different situation.

Yet another pointed out that successful mediation occurred when "you get an agreement and the lawyers don't sabotage it...that's part of your imbalance, too, the character of the lawyers."

Therefore, some mediators' experience with lawyers indicate that a lack of understanding is problematic. Others defined this same problem as less of a misunderstanding, and more of a positional issue, and discussions about the training of mediators ensued. For example, "certainly lots to be offered by a non-adversarial, or less adversarial approach...some lawyers can do that if they step out of the adversary--but that's where they are, and that's their training, and that's what attracted them to law in the first place, because they're good advocates." Another describes it as follows "their training is different, it's aggressive."

The social worker with a degree in law explained it as follows:

[Y]ou don't hire a lawyer, you hire an assassin, and then this person comes along and makes up an affidavit about all the nasties that he's doing, and blows it all out of proportion, and at that point it's game over because people are just reacting to the process and the truth has nothing to do with it.

In addition, the interviews suggested that this lack of understanding of the

mediation process led to some inappropriate and problematic referrals. For instance, regarding a failed mediation case, one respondent shared, "I thought that there was a lot of pressure to get this case into mediation of some nature." Later, "there was another case...referred by the lawyers...and there was a real history of violence...that was a case where the lawyers basically wanted to avoid trial." Another recounted, "I had one referred to me, the lawyer said it's physical abuse, and the women never showed up for the appointment...I said, look, it's usually not appropriate."

The theme of the lawyers' personality characteristics was also discussed. In a discussion about lawyers' alignment with their clients, one interviewee professed: "and lawyers will tell you about their own battles, I had so and so and this is what I got, and so again it generalizes, if I got 50-50 split of my kid, and often lawyers don't have the psychological awareness to understand that there's a difference between this guy and their situation."

Yet another said, " part of your power imbalance is the character of the lawyers involved...probably fifty percent of the lawyers don't understand the psychological favouritism toward mediation because they're fighters--they like to fight--lawyers like to do battle." Continuing later, "what's the point in going through this process and then having somebody's lawyer who might be a very forceful personality, talk the husband or wife into not going along and then undoing all the work you've done?"

One participant believed that the attitude of the lawyers was one of the key power imbalances : "the attitude of the lawyers actually is the one I felt probably had the greatest influence."

These differences in perspective and in consequent attitudinal views were also noted in the research. An example of this is provided by a lawyer in support of mediation, who emphasized that lawyers needed to accept that clients may be willing to accept less financially than the lawyer thinks could be obtained, in order to settle the position in a non-adversarial way (Leick, 1989). In the same article, Leick also suggests that mediators need to appreciate the lawyer's role and responsibility, under professional oath, in advocating for and protecting a client.

Similarly, Melemed (1989) recognizes this difference suggesting that "[w]e [lawyers] should not attempt to fit [mediation] into our traditional adversarial assumptions and process" (p. 21). He explained that the adversarial system is based on 'negative-avoidance' decisions, i.e., that people settle when the cost, delay, risk and trauma become too great.

Medley and Schellenberg (1994), surveyed 226 lawyers in Indiana, and found that approximately one-half of the lawyers were supportive of mediation, although there was less support for divorce mediation than for civil mediation. This support concluded with five major advantages of mediation, as rated by lawyers: mediation reduces time, encourages clients to become more responsible, promotes lasting agreements, and helps attorneys better understand the strengths and weaknesses of their cases.

The interviews alluded to the difference in training and mind-set between non-lawyer mediators and lawyers, as the rationale for this difference. Evidence provided by lawyers in the literature corroborated this difference. Leick, 1989, affirms the position of lawyers as 'extremely aggressive". An ex-lawyer, summarized his role as a lawyer with a

number of descriptive verbs, including to: criticize, find fault, blame, discourage communication, focus on the past, and minimize the client's responsibility for the problem (Micka, 1989).

6.5 Differences in Skills

The skills of the lawyers were also mentioned, that they were great advocates, and that some situations were better dealt with in court. The lawyer-mediator maintained that "the only thing [lawyers] really do differently than non-lawyer mediators is to draft a full legal separation agreement and then the parties take that to their own lawyers."

Another pointed out the difference between lawyer mediators and non-lawyer mediators: "[Y]ou have lawyers trained to be mediators, which is beneficial because they have a handle on the legal piece...whereas the mental health people are great on the people skills, but then don't have any handle on the legal knowledge". This participant described her beliefs that neither lawyers nor mental health mediators should attempt practice without recognizing and then addressing their respective skill deficits.

Medley and Schellenburg (1995) found that lawyers were significantly concerned with the 'competence' of the mediator to handle legally-sensitive issues. Melemed (1989) outlines lawyers concerns, which included assurance regarding (1) full-disclosure or damaging over-disclosure, and, (2) the resolution of all pertinent and relevant concerns some of which are complex financial issues.

Certainly, the antagonistic relationship between family lawyers and non-lawyer mediators seem to be characterized by a lack of trust. The etiology of the negativity is

complex, and plausibly the combination of a number of different factors, including concerns about encroachment, and differences in training, orientation, and philosophical beliefs about 'best interests'.

Lawyers are criticized for their lack of sensitivity and skill in managing individuals and families in divorce situations. Non-lawyer mediators are criticized for negligence in terms of the important legal considerations in separation agreements. Moreover, the misunderstanding between lawyers and mediators can be viewed as mutual, with further positional entrenchment as a result of continued misinterpretation of the separate roles and functions. Filion (1986), explains the difficulties as: resistance and distrust, absence of incentive for lawyers to refer to mediation, loss of clientele and revenue, and, absence of clear roles for both legal and social service professions.

However, an extensive study by McEwen, Mather, and Maiman (1994) demonstrates a very positive view of mediation by lawyers. Interviews were conducted with 163 lawyers in a state with mandatory mediation. The successful adaptation of lawyers to mediation seemed to centre around the fact that mediation was mandatory, and included financial and custody issues. This 'mandatory' nature promoted the acceptance and value of both professional roles, with no evidence that mediation diminished the role of lawyers in divorce cases. Further, lawyers found mediation to be advantageous in terms of preparing information if a trial ensued, and for influencing clients in positive ways towards a settlement. The idea of lawyers using mediation in order to be further prepared in the case of court was also noted as an incentive to lawyers by Mastrofski (1991), who also pointed this out as problematic in terms of confidentiality in mediation.

While at least one major study has found the lawyer-mediator relationship to be positive, albeit from the lawyers' perspective only, the issues in this study of competition, appropriate lawyer involvement, and respect for the difference in skills were well documented in the literature. The following section outlines suggestions for improving these antagonistic relationships.

6.6 Bridging the Differences

Attempts and suggestions to bridge these gaps in understanding, knowledge and training were identified. The suggestion of involving the lawyers from the outset was common:

> So from my end I could have done more work in terms of talking with the lawyers and helping them...help the client to get a little closer to the mind set of [mediation]...I'd like to talk to the lawyer about maybe doing some more discussion with his client about the needs of the child, and to talk to him/her in terms of, we're not going for a win, we're going for a win-win [situation].

Still other participants discussed the idea of bringing lawyers into the mediation with them, and the lawyer-mediator suggested bringing in a counsellor-mediator to co-mediate abuse cases. Therefore, the willingness to address the knowledge deficits and indeed to defer to other professional opinion was evident across all mediators in the study.

In addition, most participants mentioned that involvement with the lawyers, either

by telephone or by having them present in the sessions, could be extremely useful. Said one, "I think it's a good idea, sure, if you can get lawyers to do that, usually they're pretty busy." Similarly, one suggested, "I think it's quite acceptable to let them bring somebody for support, or an expert on something, some people have people bring their lawyers, I've never done that...but I think it could be useful."

Another lamented that he did not use the lawyers more: "I'd talk to the lawyer about maybe doing some more discussion with this client about the needs of the children."

Given the above information, the interviewees claimed definite opinions about potential negative effects of lawyers on the mediation process, and two solution-oriented themes emerged. First, participants acknowledged the necessary role of the lawyers in the process. Second, methods to achieve this end were suggested.

The importance of improving the partnership between the two professions has been expressed in the literature. Leick, (1989) proposed several ideas to improve the relationships between lawyers and mediators. In terms of the mediators' role, she suggests that the attorney requires a number of things regarding finances, if the mediation includes the financial aspect. For instance, lawyers should receive copies of all documents obtained through the mediation process so that the attorney can confirm the income, asset and debt information. This includes income tax returns, *current* consecutive pay stubs, and retirement plan descriptions and statements. She also recommends that the mediators and attorneys use similar financial forms to expedite the transfer process.

Regarding understanding, she urged mediators to respect attorneys' legal position to protect the client. Leick (1989) also cited a history of successful mediations whereby the clients sought legal advise at the beginning of mediation, as opposed to only at the end when all tentative decisions had been made without informed legal counsel. She also encouraged mediators to remains current with respect to basic principles of family law, and to ensure clients' consultation with a lawyer on complicated issues such as support and maintenance.

Perhaps due to the fact that family attorneys are required to make broad perception and practice changes in accepting mediation, a great deal has been written for lawyers about mediation. Leick (1989) also provides a number of suggestions for lawyers in terms of the relationship with mediators. She advises that the attorneys gain an understanding of the mediation process as a different style of negotiated settlement, and to be conscious of this when reviewing mediation agreements that result in, for instance, a lesser financial settlement than he/she could obtain through the courts. In addition, she suggested that lawyers need to recognize that the process moves much faster in mediation, and that the momentum is an important, and healthy part of the process. Therefore, attorneys should be prepared to evaluate mediated agreements quickly so as not to undermine the process by slowing the momentum. Finally, she urged attorneys to maintain the process in mediation even if they disagree with a certain direction or part of the agreement. She suggests that the attorney's role could then become a direct part of the mediation process.

Melemed (1989), encourages similar practices. He suggested that lawyers assist

clients in a decision to mediate, and then to act as an 'on-line' resource of legal information and advice. In advising the lawyer-turned-mediator, Melemed acknowledged a fundamental shift in the role, that is, attorney-mediators must be understood to be strictly facilitative. Similarly, Mosten (1995) proposed "low key participation and tactful guidance" (p 223). Mosten also insisted on a shift in the lawyer-mediator's view of the 'client'. He maintains that clients are best served if the family system is recognized as the client, as opposed to the interests of one parent who may not be able to see long-term benefits of a less adversarial approach.

6.7 Follow-Up Discussions

Of the six initial interviews, only one did not make significant mention of lawyers as part of the power equation affecting mediation. Interviews with the other participants corroborated the information that the lawyers and the legal process had an effect on the power imbalance. One respondent framed the problem as reflective of public education with respect to mediation; there is not enough knowledge and/or awareness about divorce mediation. When I addressed this theme with the lawyer-mediator, the response indicated that the legal profession has started to change and become more accepting of mediation. However, it seemed as though this was evidenced by lawyers becoming trained in mediation, as opposed to lawyers referring to non-lawyer mediators. This contradicted another participant's response which was that the division was getting broader and more difficult to bridge. Three respondents mentioned that there was a spectrum with respect to the difference, as they also spoke of lawyers who were very positive about the

mediation process, and who made consistent referrals.

6.8 Summary

The legal system and the lawyers has been noted to affect the power differential in mediation. These effects have been conceptualized on a number of different levels. For instance, the legal system as a forum for resolving divorce disputes was seen as potentially threatening to the parties, reflecting a larger systemic imbalance. In addition, the relationship difficulties between non-lawyer mediators and lawyers were manifested in inappropriate referrals and failed mediation. Mediators in this study and the literature recognized the issue as one that needs to be addressed for the benefit of the mediation profession.

CHAPTER SEVEN

7. INTIMIDATION

7.1 Introduction

As discussed in Chapter 2, there has been a growing concern for women in the mediation process. One concern is that the inherent power imbalance between men and women render them unable to mediate. While some exceptions were provided in the interviews, (e.g., threatening to withhold access to children, or threatening to go to court to obtain more child and/or spousal support), in general, the respondents found that intimidation occurred mainly by men towards women, (e.g., loud voices, aggressive personalities, and threats regarding financial situations). As stated by one interviewee, "put aside all the court stuff, and put two people in front of you, it's not been my experience that women try to have the power."

Part of the perception is that women are less able to put forth and maintain their positions, and thus are better able to do so through a lawyer. However, one participant stressed this perspective as problematic in the court process as well: "[women] are not used to negotiating, to putting their case forward, they're not use to arguing...they lose their voice often." Herrnstein (1996), also challenged the perception that women are better with legal representation, indicating that women need alternative measures to the court process. Regarding mediation, she suggests: "women's legal rights can be enforced in a way that does not devalue their individual needs, perspectives, and mutual

interdependence with others" (pp. 239-240). Mahoney (1996) also outlines the historical bias in the courts against women.

With this in mind, this section incorporates the perceptions and experiences of mediators with respect to intimidation concerning domestic abuse (including emotional intimidation), and financial areas. Additional research from the literature supporting various aspects of the argument is also presented.

7.2 Domestic Abuse

Geffner and Pagelow (1990) point to the importance of understanding the increased danger that surrounds the dissolution process of a marriage. For couples with abusive and non-abusive histories, this is considered the most dangerous time.

Most participants in this study acknowledged an awareness, apprehension and/or caution around cases suggestive of violence, and all believed that an assessment of the level of violence was necessary and would determine whether or not mediation should continue. Interestingly, those mediators who seemed to be most comfortable in their ability to make accurate assessments of the situations, had the most experience with mediation. In addition, an increase in formal mediation training seemed to account for mediators' use of definite screening protocols.

With respect to a general acknowledgement of abuse issues, this varied between participants. One participant spoke of a 'wariness' about whether mediation should be done with victims of family violence. When questioned directly about screening, he said,

> [N]o I've been suspicious, but it's never come out as an issue. They were earlier

cases for me...I might have handled them a little differently, I guess, with more direct inquiries, you know. No I really haven't had to deal with that, I don't think. I mean I suppose it's possible that I should have and failed to.

This response is directly related to the criticism against mediation--that mediators are either not screening directly, or the screening is not sensitive enough. Girdner (1990) stresses that mediators have a responsibility to actively seek to identify whether spousal abuse exists.

One other subject referred to the difficulty in screening abuse at the outset:

[S]uppose for example that there was a male who was quite violent, or abusive, and the women through counselling or whatever decides that she doesn't need to put up with [it]...so there's a window of time in there when she has the power. But when he figures out what's going on, he may get very very angry, and he may be quite threatening to her, so there's's a time when he has the power, so that the power imbalance may be very complex, it may be something that shifts back and forth.

However, most subjects articulated the importance of an assessment of the domestic violence, similar to assessing other power differences, prior to ruling out mediation. When asked about mediation in the face of a history of abuse, one respondent replied,

[W]ell, I don't think that rules out mediation, I mean, if I assessed that one of the

parties was absolutely terrified, who would agree to anything then I wouldn't agree to the mediation, because its your job to protect people as well...so I would want to know the impact, how strong is this person, are they still terrified.

Another interviewee responded to a similar question in this way:

I'm apprehensive about violence, and I guess the question in my mind would be I'd like to hear a bit more about the violence in terms of what actually happened, were there charges--and maybe the victim's present circumstances, whether he or she, but mostly she I guess, has support now, and whether she's at any kind of a risk, and whether you know, if contact with the perpetrator would put her in any kind of danger, that kind of stuff...again it's back to the question of power, and how, because I think that violence is power at the extreme and is a tool that people use to have control so I think that's the fundamental question, whether or not the power dynamic is out of whack.

Yet another mediator stated,

If I had a case, then I'd probably take it initially, but not keep it without being satisfied that there's significant changes in the dynamics...so my own view is that I don't mediate domestic violence and I screen for it...my own personal view is that if someone even throws a book across a room then they're crossing some line, that other people would never cross, so there's some concerns, but that's not quite the same as the battered woman; unless there's been some change in the

dynamics, you can't come in and fix that with mediation.

We see that overall, mediators assessed for domestic violence, and made a decision regarding their capability of mediating such a case. One mediator in particular had clear and relatively objective boundaries, with similarities to the screening and opinions about mediating abuse as those cited above:

> In the realm of domestic abuse, you're looking at all kinds of different things, Girdner's article talks about the three different levels of abuse...[I] work with the middle level, but it's marginal for mediation, and you have to be skilled enough and you have to be able to put parameters in place to work with, but what I'm really looking for is to see if there's the ability to express oneself, and to raise concerns...the ability to contribute, on par.

The article referred to above describes a 'triage' assessment protocol, written by Linda Girdner (1990). Girdner classifies three levels of abuse, identified through in-depth individual interviewing. The first, or most mild level, includes couples where both partners may have engaged in some emotionally hurtful behaviour, or where there may have been one or two non-injurious physical incidents. In this case, an assessment would be conducted to ascertain whether or not the spouse subjected to the physical incident(s) changed his/her behaviour (i.e., became submissive) in response, and whether or not there was any fear. Girdner classifies a couple in this level as likely to benefit from the mediation process without any special ground rules aside from those typically found in

mediation.

The second level requires specific ground rules, resources and skills. Both partners must acknowledge the abuser's responsibility for the abuse, and both must agree to the special ground rules necessary for mediation. These ground rules include a safety plan for the abused person, the use of individual sessions, and a support person for the abused person in any joint sessions.

The third level of abuse, considered non-mediable, includes those couples where there have been indicators that the abuser is/has been capable of serious harm, including any past assault record, use of a weapon, and/or threats to commit suicide. If the abuser is easily frustrated by not getting everything he wants, or if he fails to comply with a set safety plan, mediation should be terminated. At minimum the mediator has a responsibility to develop a safety plan and to connect the abused person with other resources.

The literature further identifies the 'voluntary nature' of mediation as an important factor in cases where there has been domestic violence (Geffner and Pagelow, 1990). Hart, (1990) claims that "cooperation by a batterer with his wife/partner is an oxymoron" (p. 320). She maintains that mandatory mediation must exclude custody disputes where there is a history of domestic violence. Ellis and Stuckless (1992) found that in cases of abuse, post-separation abuse occurred six months following the mediation only among those who participated in mandatory legal aid mediation.

Erickson and McKnight (1990) focus their argument in favour of mediation in abuse cases on two facts regarding abusers: that the courts have been reluctant to (1)

impose long jail sentences, and, (2) prevent access to their children. They also point out that in court, men are much less likely to accept responsibility for their abuse, due to their defensive position within the litigation system. However, Erickson and McKnight maintained that mediating cases with a history of abuse holds several cautions and criteria for rejecting or terminating mediation. Their recommendations also included terminating if the husband discounts everything the wife says in the sessions, or, if the abuser has any drug/alcohol addiction problems.

Chandler's (1990) study found that the small proportion of abuse cases mediated successfully (with an agreement) were also characterized by the use of third party experts, and an agreed-upon structuring of visitation, future controls on the conduct of the abusers, and future controls on the communication between the ex-spouses. Ellis's (1994) study on a public (but not mandatory) mediation service found that mediation makes greater contributions towards decreasing post-mediation abuse (physical and emotional) than did lawyer negotiations.

Overall, the information from the interviews and the literature suggests that the issue of mediating cases with domestic abuse has received significant consideration. The consistent tasks in the process include: weighing the physical risk to the abused party, weighing the benefits of the mediation process versus the litigation process in events when parties must continue contact with one another, and, the continued utilization and evaluation of sensitive screening protocol with consequent directives.

7.3 Financial Intimidation

Much attention is paid to the financial plight of single-mother families following divorce. In 1994, 60.5% of all Canadian children under eighteen years of age living in single-mother homes, lived below the poverty line. In Ontario, this figure was 56.9% (National Council of Welfare, 1996). Thus, the risk of children growing up in poverty when their parents are divorced is alarming, and the fear of this to women is valid.

This issue was addressed by the participants in the interviews as a significant aspect of power imbalance. For one respondent, it represented the chief imbalance:

> [W]ell, I think that one of the biggest issues and it comes out around power and control and that's the issue about finances, that's the one that--where there's is a situation where the father is, usually its the father, has been the primary breadwinner, where he's making a lot of money, where the wife is really kept in the dark about their financial situation, partly because she doesn't want to know, and partly because he doesn't tell her...so he's making $100,000.00 and year, and then what do you do in that kind of a situation, so that's one where he's got control over the finances, and he's going to decide...what's fair.

The same respondent relayed a number of cases, such as :"I can think of another case...he was punitive, and withholding things, and they had decided on an arrangement where they split the cost fifty-fifty, well he's making $200,000 a year and she's making $25,000."

In other cases, intimidation of this nature was more overt. For example, one participant recalled a case where the male was "very very aggressive, very very intimidating" who received "several thousand dollars more than he was probably entitled to because she was willing to compromise on that."

Moreover, specific threats were considered common. Put by one mediator, "I bet that's happened in more than half the mediations I've done...the husband will at some point say, 'I'm going to quit my job and make you suffer'.

These comments represent the concerns that women can be intimidated by their poor financial positions, affecting their ability to compromise from an equal position. The literature is inconclusive in this area. For example, Ellis (1994) found that women who had mediated the financial aspect of their agreements were more successful in attaining their desired amount, than were women who used lawyers to resolve the financial issues.

Pearson (1991) found similar results, conducting over 300 telephone interviews. Child support was found to be higher when women used mediation versus lawyers, and female mediation clients were more likely to rate their financial arrangements favourably. In addition, property division was more likely to be rated favourably by both men and women if resolved through mediation.

Pearson (1991) also notes that divorced women who do not remarry do much worse financially after divorce, and do much worse than their ex-husbands, despite the method of agreement on financial issues. She states, "no matter where agreements are produced, women exhibit prolonged financial dislocations following divorce" (p. 195).

Thus, she concludes that women's financial woes are not exacerbated by mediation; in fact women are more satisfied with their financial agreements if mediated. However, the long-term financial outcome for single divorced women remains poor.

In Canada, Child Support Guidelines changed on May 1, 1997, with the amounts awarded to reflect the amount of the payer's income and the number of children. In addition, men no longer receive tax deductions for their child support contributions, women no longer pay tax on child support received, and new enforcement regulations have been put into place. Therefore, while the awards are considered to be higher, it seems that there is less incentive for fathers to pay the full amount without the tax deduction (Katz, 1997).

Very recently, Arditti (1997) discussed her research on divorced women and economic risk. She found that 15.6% of fathers reported post-divorce incomes of less than $ 15,000 (in U.S. dollars), while 42.1% of the female sample had incomes below this amount. Further, she noted that once incomes were adjusted for child support, the disparity between mothers' and fathers' income lessened, but the difference still left women financially inadequate. She discusses the societal contributions to this problem, including: 1) the lack of recognition of societal financial inequities for women, 2) the focus on child support as a remedy, 3) the lack of recognition for child care costs for custodial parents (mostly women), 4) the lack of recognition that divorcing parents may not be able to adequately insure their children's well-being, and 5) the lack of support for fathers to be involved with their children.

7.4 Managing Intimidation

As discussed above in the section on domestic abuse, all mediators referred to this when asked about rejecting mediation. For example, "I'm also trying to look for abuse and you know for the question of risk--those kinds of things." Also, "if there's issues of violence, where there's clearly has been boundary violations, those are pretty clear off the top", and "if there's a strong indication of physical violence, I had one referred...you know, it's usually not appropriate."

Nonetheless, most participants recounted cases with significant intimidation issues, most of which failed and were considered in hindsight to be non-mediable. However, mediators did discuss tactics that worked, or that they would try if one party appeared to be intimidating. The most common tactic discussed was caucusing with each client individually, which sometimes led to threatening to end the mediation.

In terms of inappropriate behaviour on the part of one of the clients, an interviewee supposed,

> I would stop the session and take them out of the room and say that maybe we need to have a time for you and I to talk individually, and this is a process, and do you need to have some time to calm down, or are you so angry that we need to stop the process altogether.

Another considered it a last resort: "if the message is too strong then you can talk to them individually and make your points that way...as a last resort, you can threaten

them with terminating mediation--that's a high-risk technique, but it's very powerful."

With respect to ending mediation pre-maturely, all respondents felt that they had developed a comfort level in taking responsibility for ending the mediation process if the power difference was too great. Some had mentioned that their comfort level with this had developed over time. Girdner (1990) suggests caucusing with clients of abusive relationships, with termination resulting if the individual is unable to comply with the ground rules of mediation. Also, Theonnes, Salem and Pearson's (1995) study found that the most common techniques used in domestic violence cases, as reported by 149 mediators, were additional screening and caucusing.

As also indicated in Chapter 6, full financial disclosure by both parties has been considered a concern with respect to power (Irving and Benjamin, 1987; Pearson, 1991). The use of third party experts, also recommended by Girdner (1990) and Pearson (1991), had been mentioned in one of the interviews who sent them to "somebody who did financial mediation and was very clear with this person that there was a power imbalance".

7.5 Follow-up Discussions

In the follow-up, I asked the participants to provide an opinion regarding the scarcity of attention overall in the interviews to the issues of gender. The responses varied greatly. One individual stated that perhaps related to the other issues discussed, gender imbalances were not considered important in comparison. Yet another respondent declared that there is general denial in the field that gender is a factor. In addition,

however, respondents noted that the issues may often include gender as part of an intricate imbalance, but may not necessarily be the basis for the imbalance.

7.6 Summary

The interviews suggest that gender-based imbalances tend to cluster around the issues of abuse or finances. Participants ranged in terms of their screening and subsequent management of cases involving domestic violence, although all recognized that domestic abuse required differential treatment, and that some cases were not applicable for mediation. Financial aspects, which received comparatively marginal attention in the interviews, were seen as affecting mediation in so far as women acquiescing on other issues due to concerns about their financial issues. In the follow-up interviews, most participants commonly stated that gender was often played out as part of other imbalances, as opposed to a main underlying imbalance.

CHAPTER EIGHT

8. DISCUSSION

8.1 Introduction

The extent of the content in the interviews provided a substantive information base, framed by the richness of the detail and the expanse of clinical experiences. Each interview, characterized by both candidacy and professionalism, included 'successful' and 'failed' mediation cases, with logical reference to values, theory and hindsight.

The main supporting features of this enriched information base were the differences between the participants. For instance, some had significantly more mediation experience than others. One had a legal and social work background, one had a legal background, two participants had substantial experience with family court assessments in addition to social work and mediation, and two had psychology-related counselling backgrounds. Areas of practice varied from large urban centres to small and medium-sized cities. Nonetheless, the similarities in the interpretations, considerations and dilemmas with respect to power imbalances were striking. Moreover, the differences noted between the interviews contributed to the analysis in other important ways.

The purpose of this section is to place the findings of this study within the context of the problems relative to power imbalance. In order to achieve this, the findings of the six participants will be considered within the framework of the issues put forth at the outset of this study. However, the findings also contribute to additional issues to be

considered, perhaps suggesting a redefinition of the problems of power in mediation. The findings, corroborated in large part by the literature, only reflect the experiences of the six mediators in the study. Although not conclusive, these findings may guide the consideration of implications for the practice of mediation, as well the possible directions of additional research.

8.2 Power Issues as Initially Defined

The initial purpose of this study was to gain an 'understanding of power imbalance' in mediation, and to 'examine power-balancing techniques' employed by mediators. The rationale for these queries, as guided by the preliminary literature review (Chapter 2), stemmed from an inter-locking structure of three conjectural constructs.

First was the belief that the adaptation of children and adults to divorce is a major social concern, if not preoccupation, in North America. Related to this, some children and adults adapt better to divorce, for a variety of hypothesized reasons. Second, the interest of mediation as a means to resolve divorce disputes, has gained attention for its presumed benefits to divorced families. Finally, contraindications of the mediation process in divorce were revealed. Of particular interest were the presumptions about the mediation process as contradicting the well-documented reality of power imbalance between men and women in everyday life.

Through the interviews, an understanding was gained of the power imbalance from the point of view of the professionals. With respect to the power difference between men and women in mediation, this was acknowledged by the participants. However, it

was not considered the underpinnings of any and every power imbalance. In fact, this gender-related imbalance, whereby the intimidation of women by their former husbands, was restricted to two main areas: intimidation based on past physical, sexual or emotional abuse, and/or, intimidation based on the prospect of financial poverty.

These findings indicate that the mediators considered past domestic violence to seriously contraindicate the mediation process, having received this message from various training and research on the topic. Furthermore, there was a sense of 'competence' with respect to dealing with such matters, and the participants seemed to be conservative in the subjective estimation of their skills in handling domestic abuse cases, recognizing the specialized training required to achieve and employ these skills.

Thus, mediation critics should acknowledge that the message about domestic violence and mediation is reaching professionals. However, what appears to be inconsistent is the use of a screening protocol, as well as the specific, objective bases for considering a particular course of action, as suggested in the Girdner (1990) article. Thus, although these findings indicate the appropriate cautiousness about domestic violence, the concerns about inaccurately assessing cases, thus placing women at risk, may be valid.

The second aspect of intimidation, that of financial power, was also addressed. Follow-up studies have shown that women are more satisfied by the financial arrangements reached through mediation than those reached in the legal system. The literature also suggested that divorced women are at risk of financial jeopardy, despite the method of settlement, and that mediation does no more to harm women than does the

legal system.

However, when examining the statements in the interviews, the caution was that women may be influenced through some minimal concessions in child custody and visitation or spousal support, and are consequently less likely to represent their cases in other areas, such as division of property, and child custody issues. The financial threat to divorced women and their children remains a long-lasting and far-reaching reality. With a few exceptions, attention to its repercussions within the interviews was somewhat vague.

Somewhat surprisingly to me, the bulk of the discussions in the interviews centred around aspects of power that were not divided along the lines of gender. In analysing these themes, it became apparent that the issue of power in mediation required a broader definition that includes internal and external factors related to the couples seeking mediation in divorce resolution.

8.3 Power Issues Redefined

Perhaps the most valuable implications of the findings in this study are that they help to conceptualize the issues of power in complicated ways that require both broad and specific definitions. Power imbalance in the interviews was discussed as imposed by both internal and external processes. The internal processes that affected the power in mediation was the inevitability of the emotional divorce process. The external processes revealed was of the influence of the legal system on the divorce process.

In as much as the belief of 'equality' is requisite to mediation, so is the concept

of imbalance in the initial stages of divorce, commonly concurrent with the initial stages of mediation. The findings revealed that while this imbalance is identifiable throughout the mediation, it is extremely complex. For example, power can be held by either the person who left the marriage (and therefore in less immediate distress), or by the person being left (eliciting guilt from the ex-spouse). It can be related to the unfinished business about the marriage. Moreover, it can vacillate between spouses.

The difficulty for mediators in managing this imbalance is to accurately assess whether or not the extreme display of emotion is part of the 'normal' separation process, and thus, mediable, or whether it is rooted in a more serious psychological dysfunction, and therefore non-mediable. The interviews suggested that the mediator's knowledge about and experience with counselling and/or mediating divorced couples improved the accuracy of assessing this issue. Thus, the issue of emotional readiness as it affects power in mediation, is not the problem. The issue is, however, the assessment and management of the emotional consequences of divorce, and the understanding of its roots and dynamics.

The external legal process was also considered to have serious effects on the mediation process. The most common theme was the influence of the lawyers on the mediation process. This may have been especially salient in this study, as the acceptance and awareness of family mediation in Ontario has been relatively slow compared to our American counterparts. The findings revealed that the effects of the animosity between the legal and mediation professions affected mediation through inappropriate referrals, an adherence by lawyers to the adversarial system, and the dissolution of the separation

agreements after mediation had been completed, or almost completed. Further, mediators acknowledged the necessity of lawyers in the process, complicating the issue further.

An examination of other research confirmed the antagonistic nature of this relationship, but provided many insights into the bases for these problems. Given this, it seems that the problem is not that of the legal system in divorce, or that of mediation in the legal system. Interestingly, the problem parallels divorcing couples; there is conflict over the 'custody' of a particular item (divorcing couples), and misunderstandings in perspectives and interests.

The definition of the issues of power imbalance can be reconsidered. The surface issues would imply that the problems of mediation are in the power imbalances, (1) the inequality of women and men, (2) the emotional stages of the spouses, and (3), the effects of the lawyers. However, the findings of this study can be interpreted through the view that the problems of mediation are not power imbalances, per se. In fact, it can be argued that power imbalance is inherent in any conflict, guided by past experience, social norms and individual differences.

Thus, I propose a reconsideration of power as a problem of divorce mediation in so far as it affects the abilities of mediators to manage it; as professionals, our involvement affects the life course of thousands of individuals and their children. Therefore, a redefinition of the problem of power in mediation in a manner that reflects this responsibility, seems appropriate. Such a redefinition may include:

(1) The varying ability and training of mediators to assess and maintain an

appropriate, and dynamic, therapeutic distance between couples in conflict, whether this conflict is rooted in abuse, gender issues, or emotional readiness.

(2) The varying ability and training of mediators to assess and mediate appropriate financial decisions, and the recognition of the engendered post-divorce problems for women and children

(3) The lack of motivation of the legal and mediation professions to establish workable agreements based on common interests, acknowledgement of interdependence within certain parameters, and a delineation of roles and responsibilities to their clients and to each other.

8.4 Implications for Practice: Micro-Level

At the micro level, it is imperative that mediators have an understanding of the dynamics in domestic abuse, and are able to assess and acknowledge their limitations with respect to assessing and mediating the power differential between couples. The potential ramifications for neglecting these issues are tremendous. In the case of domestic abuse, an incorrect assessment, or none at all, puts women and their children in jeopardy. Some cases, as suggested by the interviews and research, are mediable. Here knowledge and competence regarding appropriate 'distancing' techniques is critical. While some couples require a minimal 'safety plan', others may benefit most by individual caucusing, or perhaps televideo sessions.

With respect to emotional readiness, I suggest that family mediators need to have a solid grasp of the stages of marital dissolution and divorce. The consequences here include the risk of mediating a couple whereby one partner is unable to represent his or her own needs, and cannot be moved into a position to do so. The second consequence is rejecting a couple for mediation by mis-judging a normal expression of strong emotion as inappropriate. The third is to mediate an entrenched couple, having the mediation fail and return to court, consequently increasing the expense and time for the couple in reaching an agreement, and prolonging the uncertainty in arrangements for the children.

Next, it seems that mediators need to be responsible for their knowledge of legal financial issues arising in divorce situations, including an awareness and sensitivity to women and children post-divorce. Despite the legal difference between child support and access, it seems that mediators also need to understand the connection between fathers' access to their children, and compliance with child support. A willingness to refer couples for financial mediation should also exist. Ramifications of mediating inadequate or inappropriate financial awards contribute to future animosity between the couple, child poverty, and poor relationships between children and their non-custodial parents.

Regarding the relationship between mediators and lawyers, it appears necessary for individuals in both professions need to take responsibility for resolving this conflict. The current case of mediator Maureen Bolt in North Bay (discussed in Chapter 6) only serves in the continued polarization of the professions. Again, mediators in both disciplines are employed to serve the best interests of families and children during a traumatic period. Lack of attention to this relationship, I would argue, is professionally

irresponsible.

The above implications for practice at the micro level are essentially a function of a change at the macro level of practice. Given the slow growth of family mediation in Ontario and Canada, many of the issues brought to light here were observed by earlier researchers of family mediation in the United States. As an advantage, then, we can predict somewhat the course and implications for family mediation in Ontario, and develop sound policies and practices to address our current issues and potential difficulties.

8.5 Policy Implications: Macro Level

8.5.1 Professional Standards and Accreditation

The findings in this research indicate a need for standardizing practice and supporting and recognizing accredited mediators. While all participants had related training at the graduate level in counselling or legal disciplines, there remained an inconsistency with respect to a clear protocol for screening and handling cases with domestic violence. For instance, if abuse did surface, and the case was rejected, only one participant discussed the strategy of ensuring a 'safety plan', linking to other resources, etcetera. This inconsistency seemed to be related to a lack of information and/or training.

Family Mediation Canada has recently drafted new Practice and Certification Standards which are to be implemented by provincial mediation organizations (Neilson, 1997). These standards speak to many of the issues outlined in the practice implications above. For instance, all certified mediators must receive basic conflict resolution

training, followed by 70-100 hours of training in family relations and financial family mediation. Training in all three areas allows for certification of comprehensive mediation including custody and access, property division and support. Otherwise, mediators are only certified and endorsed in their area of training, i.e., in custody and access or in financial aspects.

Such standardization procedures address many of the above concerns, promoting a balance of theoretical and skill acquisition. Thus, non-counsellor mediators may attain the necessary therapeutic-sensitive skills, and counsellor mediators may attain the required financial knowledge. This speaks to the respective professional concerns of mediators and lawyers.

The difficulties with the standards may lie in their implementation. The protocol is based on a practicum model, which may thwart certification in smaller urban centres, where mediators already struggle with credibility and community awareness. In addition, the certification on its own does not prevent anyone from practising mediation without the necessary training. In fact, one could argue, given the time and expense necessary to attain certification, more mediators will be practising without adequate training and accountability standards. This would increase the distrust and suspicion of mediation among professionals and the public. Thus, the issue becomes one of public policy.

8.5.2 Public Policy

In addition to standardizing practice, it seems necessary for accredited mediation

to be sanctioned by the government as a valuable and less expensive option for divorcing couples. Recognition by the government of trained, accredited mediators and voluntary mediation programs would help protect the public from irresponsible practice.

An example of a potential shift in policy has been noted by Devlin and Ryan over ten years ago (1986). Here, they outline recommendations of Family Mediation Canada for an amendment to the 1985 Divorce Act, to include the mandatory attendance of a couple at a joint mediation information session, provided by a court-appointed mediator. This would require the provision of accredited mediators in all provincial court jurisdictions, promoting awareness of judges, lawyers and the public of mediation as a viable alternative for many.

A second policy issue concerns what could be termed the 'unlawful practice of mediation', which would prevent individuals from practising without the appropriate certification standards. This could be implemented through government legislated mandatory insurance policies for mediators, which would stipulate required accreditation and licensing. This would necessarily facilitate discussion forums between law societies and mediation associations, addressing the relationship issues between their respective members.

The recent change in Ontario legislation to mandate mediation for civil matters, excluding divorce, may well be advantageous to the promotion of divorce mediation from the provincial government. Current suggestions for policy reforms and their analyses should be strongly considered as an immediate and critical priority for family mediation services in Ontario and across Canada.

8.6 Further Research

As mentioned above, divorce mediation has yet to gain significant momentum in Canada; the wide spread use of mediation has yet to begin. We have the fortune of learning from various jurisdictions in the United States with respect to the problems in the field, including training issues, standardization issues and problems of mandatory mediation. This study focused on the issue of power imbalance in mediation from the professionals' perspective, and provided useful information; the in-depth examination of the imbalances led to the identification of the strengths and of limitations in this field.

The need for research into policy reform has been indicated above. Additional qualitative research into the relationships between lawyer- and counsellor- mediators must be considered in order to direct positive changes in this area. Further, the need for longitudinal examinations of children and families who experienced divorce mediation is required for continued identification of strengths and limitations in the field. Finally, continued attention to new research into domestic violence and child poverty must be incorporated into developing training and certification standards.

8.7 Summary

This research has provided insight to power imbalances in mediation from the perspective of the professional mediator. What seems to be clear is that, indeed, there are inherent power differences between divorcing couples. However, the experience of the participants interviewed suggest that this difference is not necessarily divided along gender lines. The issues that did place women at a disadvantage, by virtue of their

gender, were taken seriously by professionals when domestic abuse was considered. This analysis pointed to the broader systemic power imbalances with respect to the legal system. Further, this analysis led to the discussion around the necessity of standardized and accredited practice status, in addition to recommended changes in social policy. The on-going evaluation of mediation and its respective merits and problems is crucial in the interests of men, women and children whose lives have been and will be touched by divorce.

CHAPTER NINE

9. CONCLUSION

One need only review the literature in order to grasp the social effects of divorce on children. The potential long-term consequences of issues such as mental well-being, academic and social success, juvenile delinquency, poverty and health figure prominently in the themes of divorce research. Consequently, mental health professionals and educators have had to examine divorce and its effects on children and families, and provide various appropriate supports.

The growth of divorce has also held significant ramifications for women and men. Issues of domestic violence, risk to women, the feminization of poverty and child care have made divorce a women's issue. Non-custodial fathers must reconcile the loss of daily contact with their children, in addition to developing new parenting skills. Divorce, then, has become a family issue.

Together, these individual concerns have pushed divorce, perhaps irrevocably, into the social arena, making divorce ostensibly a social issue instead of a legal possession. This transfer has led to the development of alternate avenues in the management of divorce, and currently divorce mediation is considered a main alternative.

As reviewed in this study, divorce mediation has not received unanimous acceptance. Major critics, and perhaps the most vocal, have included women's advocacy

groups concerned with power imbalance in mediation, especially with respect to domestic violence cases. This criticism catalysed the focus for this research, i.e., the presence of power in divorce mediation, and its management by mediators.

The findings in the study were clustered along three dimensions. First, with respect to power in divorce mediation, it appears that power imbalance is inherent in the process of mediation. Examination of the interview data revealed that couples typically enter mediation in a state of emotional disequilibrium. This disequilibrium can be assessed along a spectrum of imbalance, rendering it mediable with specific intervention, non-mediable for a certain time period, or non-mediable due to personal dysfunction.

The second category involved the imbalances resulting from the involvement of the legal system. The legal system was seen to cause an overall imbalance with respect to divorce. However, more commonly, the participants discussed the involvement of the lawyers as potentially posing significant imbalances in mediation. These imbalances, resulting in inappropriate referrals, and/or an undermining of the mediation process, were explained by a lack of understanding of the mediation process, and a difference in training and belief systems. The literature supported the animosity between the professions, and provided helpful direction to address this issue.

Finally, the third category involved discussions around engendered power balances, specifically with respect to domestic abuse and financial issues. The findings revealed that there is a lack of consistent protocol with respect to handling abuse cases, which seemed to be related to experience and training. Less attention was given to the power issues related to finances.

The findings in this study, combined with the research led to the overarching themes described above. Subsequently, these themes suggested a different perspective on power imbalance in mediation as outlined in the Discussion (Chapter 8). Essentially, I proposed that power imbalance with respect to the consumers is not problematic for mediation; that power imbalance is created or exacerbated by its management through professionals. This new 'definition' pointed to several implications for professional practice, standardization, and policy.

Mediation and legal organizations may have an interest in the research with respect to the necessity to focus on the motivation of mediators to invest in the recently designed standardization and certification procedures in Canada. Mediation organizations in particular may be encouraged to develop and promote public policy amendments, considering the very recent implementation of the new child support guidelines. In addition, the attention by the provincial government in Ontario on the mandatory mediation of other civil matters and the reductions to legal aid are additional incentives to drive the promotion of policy changes.

Several legal and social service areas may also be responsive to this research. For instance, women's and single parent's organizations will have some stake in the results of this research. Legitimate concerns have been tabled regarding the potential of mediation to contribute to the oppression of women. Also, complaints have arisen from men who feel that they have been disengaged from their children as a result of the 'tender years' doctrine, and its continued biases, that has led to most custody decisions going to mothers during the last fifty years. Again, the clarification of the potential of mediation

to protect each parent's rights, will help adults make informed decisions about the extent to which they comply with, or independently elect, mediation over litigation.

Finally, judges, counsellor-mediators, lawyer-mediators and lawyers may also take an interest in the findings presented here. Without a more clear understanding of the purpose and place of mediation in family court, these disciplines may continue to operate as adversaries. Similar to judges, these professionals will need to accept the limitations of modern mediation services. Hopefully, this will lead to the further development of sensitive mediation assessment tools, and/or the adaptation of modern mediation to ensure the full protection of all parties.

We can return for a moment to seventeenth-century Scotland. For spouses preparing to end their marriage, divorce likely remains as dark, frightening, and chaotic today as it did then. Mediators, to some degree, can be seen as comparable to the priests who supervised and controlled the chaos in the church. New developments in mediation must be implemented with the interests of families at the forefront, as opposed to the existing trend of protecting professional interest as the chief priority. However, with continued research and advocacy, divorce mediation may well emerge as the leading method for resolving divorce disputes in this chapter of social history.

Appendices

Appendix A: Telephone Guideline to Community Agencies

Hello. My name is Shelley Hermer and I am an MSW student at Wilfrid Laurier University. Currently, I am preparing to collect data for my thesis. Specifically, I am wondering if you could recommend local mediators who deal with child custody issues between separated parents.

pause

if "yes"

Great. Is _____ in private practice or part of an agency? Why would you recommend _____to couples with child custody issues? May I let this person know that you referred them to the study?

Thank you very much for your time.

if "no"

Would you be aware of any other agencies that would refer cases to mediators?

if "yes" or "no"

Thank you very much for your time.

Appendix B: Introductory Letter

Shelley Hermer
822 Rock Road
Warsaw, Ontario
K0L 3A0

January 10, 1997

Dear :

In fulfilment of my Masters of Social Work at Wilfrid Laurier University, I am writing a thesis on family mediation. The purpose of this research is to learn more about techniques and procedures used by mediators to deal with power imbalances between partners seeking mediation. You were recommended to me by _____ as someone who may be helpful by virtue of your experience.

This study is a multi-case study design. If you are available, you will be one of six family mediators in southern Ontario who would participate a 1 1/2 -2 hour interview qualitative interview at a time and place of your convenience. Participation is completely voluntary and your relationship with Wilfrid Laurier University will not be affected if you choose not to participate. You also reserve the right not to answer any specific question that may arise. Should you wish to participate, an interview guideline will be forwarded to you prior to the interview.

Complete confidentiality is guaranteed. The interview will be audiotaped in order to transcribe the data for analysis. Direct quotations that do not identify you may be used. The tapes will be locked in a file cabinet at my residence, or locked in a briefcase in my possession. The tapes will be destroyed at the conclusion of the study, by June 1997. Also, you will be provided with a follow-up opportunity by telephone should you wish to add information to the data, after the date of the interview.

I will be conducting follow-up telephone calls during the week of _____. Should you wish to discuss this with me in the meantime, please feel free to call me at (705) 652-3701. I look forward to speaking with you soon.

Sincerely,

Shelley Hermer
MSW Student

Appendix C: Follow-Up Telephone Call

Hello. My name is Shelley Hermer. On ____, 1996, I sent you a letter regarding my research on family mediation as part of my Masters in Social Work. Did you receive the letter?

if "yes"

Great. As indicated in the letter, I am following up to determine whether or not you may be interested. I will be conducting the interviews this summer, and they require approximately 1-2 hours of time at your convenience. Is this a possibility for you?

(yes)

Wonderful. I will send you an outline of the interview today, which you may find helpful in selecting cases or reviewing situations prior to our meeting. Do you have any questions?

(Set up meeting time, obtain directions, and ensure participant has contact numbers for me) Thank you very much; I'll look forward to meeting you then.

if "no"

Okay. I am conducting qualitative research involving six mediators from southern Ontario. You were recommended to me by _____, as someone who would be helpful, based on your experience as a family mediator, and complete confidentiality is guaranteed. I would like to come and interview you at your convenience. The projected length of time is between 1-2 hours. Is this a possibility for you?

(yes)

Great. If I could confirm your address, I will send you another copy of the first letter, in addition to an outline of the interview, which should help you may find helpful in selecting cases and/or reviewing situations. Do you have any questions?

(Set up meeting time, obtain directions, and ensure participant has contact numbers for me) Thank you very much; I'll look forward to meeting you then.

(no)

Thank you very much for your consideration. If circumstances change, please feel free to call me.

(no)

Is there any way to make this more convenient for you?

(no)

Thank you very much for your consideration. If circumstances change, please feel free to call me.

Appendix D: Interview Guideline

INTERVIEW GUIDELINES FOR MEDIATORS

NOTE:

The first purpose of this guideline is to assist you in selecting a case or cases to discuss during our interview. Essentially, I am interested in mediation cases where you observed a significant power difference in the relationship. You need not have facilitated an agreement in the case, but worked long enough with the case to develop a relationship with the couple. (The power imbalance can be based on status, money, past history, and/or personality characteristics).

The second purpose of the guideline is to provide an open-ended structure for our interview, although it is not conclusive.

You may choose to discuss more than one example with me, depending on your experience.

---

1. Can you give me some background information on a mediation case where you perceived there to be a difference in power (whereby one participant had more power over the other--evident in history and/or in sessions).

2. How do you feel the power difference affected the mediation process?

3. Tell me about your feelings toward the two parties in this particular case. How did you manage your feelings throughout the mediation process?

4. Do you think you did anything differently than you would in cases where there is a minimal power imbalance?

5. How did the power imbalance relate to the outcome of the process? In retrospect, would you have done anything differently?

6. How did your personal beliefs and values affect the process in this case?

7. What personal and professional learning can you describe relative to this case?

I hope this is helpful. If you have any questions, please contact me at (705) 652-3701.

Appendix E: Consent Form

RESEARCH PARTICIPATION CONSENT

1. I consent to the participation in the research study "The Examination and Exploration of Power Differences in Family Mediation", conducted by Shelley Hermer, an MSW thesis student at Wilfrid Laurier University in Waterloo, Ontario. The purpose of this study is to better understand how power difference is handled in family mediation.

2. I understand that the sessions will be audio taped for the purposes of collecting the data. I understand that the tapes will be destroyed at the conclusion of the study, and all identifying information will be destroyed also.

3. I understand that my participation is strictly voluntary. I am able to withdraw, or have my data withdrawn from the study at any time. My decision to participate in the study will not affect my relationship with Wilfrid Laurier University.

4. My decision to participate in this study will not be available to the source that referred me to the study.

5. I understand that I may add information to the interview, and that the researcher has provided me with contact information.

6. I am aware that I will receive a copy by mail of the completed overall results and interpretations of the study by June 1997.

7. I understand that the researcher will be using the results for her thesis requirements, and that direct quotations may be used. She has explained all precautions to protect confidentiality of the data and my identity.

_____ _____

Signature of Participant Date

_____ _____

Shelley Hermer; MSW Student Date
R.R.2 Warsaw, Ontario (705) 652-3701

Luke Fusco and Eli Teram, Co-Advisors, Faculty of Social Work, (519) 884-1970.

Appendix F: Telephone Guideline for Follow-up

Hello. It's Shelley Hermer speaking. As you recall, I had interviewed you in (month) about power imbalance in mediation for my MSW thesis.

(yes)

As this is a qualitative study, part of my credibility check involves presenting you with the themes that I found, and allow you an opportunity to comment on them. I would like to arrange a telephone interview with you which should last 15-30 minutes. Is this possible for you?

(yes) Great. (Set up date and time for interview). Thank you; I'll look forward to talking with you then.

Appendix G: Follow-Up Interview Guideline

Hello. This should take between 15-30 minutes. Obviously I'm not tape-recording this, but I will be taking notes in order to add any new information to my data.

(okay)

As you know, the purpose of this study was to explore power imbalance in mediation. I have categorized the findings in three groups. I'll tell you each of these three themes, and then allow you to make any comments, if you agree, disagree, or have anything to add.

(okay)

The most common finding across interviews was that of an 'emotional readiness' for mediation. Any comments?

The second most commonly discussed theme was the issue of how the legal system affected the balance in mediation; most notably with respect to the lawyers. The imbalances seemed to stem from 'turf wars' or a perceived lack of understanding by the lawyers. Any comments?

Finally, issues of intimidation surfaced generally along gender lines with respect to either physical intimidation/aggressiveness, or, financial intimidation. Any comments on why the gender issues received so much less attention in the interviews than the other areas?

Thank you so much again for your time. I will be sending you a copy of the findings at the end of June.

Appendix H: Feedback to Participants

Shelley Hermer
822 Rock Road
Warsaw, Ontario
K0L 3A0

(Date)

Dear (participant's name):

As discussed, I have prepared this summary of the results of my thesis results on power imbalance in divorce mediation. You were one of six mediators in South and Central Ontario who were interviewed, and whose data was utilized in this research. As indicated in the consent form, all audio tapes of the interviews, in addition to any identifying information has now been destroyed.

During our follow-up conversations, I had indicated that your responses with respect to your identification and management of power imbalance in mediation were similar to the other mediators in this study. The summary provided here outlines the three main findings of the research, in addition to a reconsideration of the problem of power in mediation.

Summary of Findings

Main Finding A: 'Emotional Readiness'

In as much as the belief of 'equality' is requisite to mediation, so is the concept of imbalance in the initial stages of divorce, commonly concurrent with the initial stages of mediation. The findings revealed that while this imbalance is identifiable throughout the mediation, it is extremely complex. For example, power can be held by either the person who left the marriage (and therefore in less immediate distress), or by the person being left (eliciting guilt from the ex-spouse). It can be related to the unfinished business about the marriage. Moreover, it can vacillate between spouses.

The difficulty for mediators in managing this imbalance is to accurately assess whether or not the extreme display of emotion is part of the 'normal' separation process, and thus, mediable, or whether it is rooted in a more serious psychological dysfunction, and therefore non-mediable. The interviews suggested that the mediator's knowledge about and experience with counselling and/or mediating divorced couples improved the accuracy of assessing this issue. Thus, the issue of emotional readiness as it affects power in mediation, is not the problem. The issue is, however, the assessment and management of the emotional consequences of divorce, and the understanding of its roots

and dynamics.

Main Finding B: Legal Aspects

The external legal process was also considered to have serious effects on the mediation process. The most common theme was the influence of the lawyers on the mediation process. This may have been especially salient in this study, as the acceptance and awareness of family mediation in Ontario has been relatively slow compared to our American counterparts. The findings revealed that the effects of the animosity between the legal and mediation professions affected mediation through inappropriate referrals, an adherence by lawyers to the adversarial system, and the dissolution of the separation agreements after mediation had been completed, or almost completed. Further, mediators acknowledged the necessity of lawyers in the process, complicating the issue further.

An examination of other research confirmed the antagonistic nature of this relationship, but provided many insights into the bases for these problems. Given this, it seems that the problem is not that of the legal system in divorce, or that of mediation in the legal system. Interestingly, the problem parallels divorcing couples; there is conflict over the 'custody' of a particular item (divorcing couples), and misunderstandings in perspectives and interests.

Main Finding C: Intimidation

Through the interviews, an understanding was gained of the power imbalance from the point of view of the professionals. With respect to the power difference between men and women in mediation, this was acknowledged by the participants. However, it was not considered the underpinnings of any and every power imbalance. In fact, this gender-related imbalance, whereby the intimidation of women by their former husbands, was restricted to two main areas: intimidation based on past physical, sexual or emotional abuse, and/or, intimidation based on the prospect of financial poverty.

These findings indicate that the mediators considered past domestic violence to seriously contraindicate the mediation process, having received this message from various training and research on the topic. Furthermore, there was a sense of 'competence' with respect to dealing with such matters, and the participants seemed to be conservative in the subjective estimation of their skills in handling domestic abuse cases, recognizing the specialized training required to achieve and employ these skills.

Thus, mediation critics should acknowledge that the message about domestic violence and mediation is reaching professionals. However, what appears to be inconsistent is the use of a screening protocol, as well as the specific, objective bases for considering a particular course of action. Thus, although these findings indicate the appropriate cautiousness about domestic violence, the concerns about inaccurately assessing cases, thus placing women at risk, may be valid.

The second aspect of intimidation, that of financial power, was also addressed. Follow-up studies have shown that women are more satisfied by the financial

arrangements reached through mediation than those reached in the legal system. The literature also suggested that divorced women are at risk of financial jeopardy, despite the method of settlement, and that mediation does no more to harm women than does the legal system.

However, when examining the statements in the interviews, the caution was that women may be influenced through some minimal concessions in child custody and visitation or spousal support, and are consequently less likely to represent their cases in other areas, such as division of property, and child custody issues. The financial threat to divorced women and their children remains a long-lasting and far-reaching reality. With a few exceptions, attention to its repercussions within the interviews was somewhat vague.

Redefinition of the Problem of Power

Somewhat surprisingly to me, the bulk of the discussions in the interviews centred around aspects of power that were not divided along the lines of gender. In analysing these themes, it became apparent that the issue of power in mediation required a broader definition that includes internal and external factors related to the couples seeking mediation in divorce resolution. Perhaps the most valuable implications of the findings in this study are that they help to conceptualize the issues of power in complicated ways that require both broad and specific definitions. Power imbalance in the interviews was discussed as imposed by both internal and external processes. The internal processes that affected the power in mediation was the inevitability of the emotional divorce process. The external processes revealed was of the influence of the legal system on the divorce process.

The definition of the issues of power imbalance can be reconsidered. The surface issues would imply that the problems of mediation are in the power imbalances, (1) the emotional stages of the spouses, and (2), the effects of the lawyers, and (3) the inequality between women and men. However, the findings of this study can be interpreted through the view that the problems of mediation are not power imbalances, per se. In fact, it can be argued that power imbalance is inherent in any conflict, guided by past experience, social norms and individual differences.

Thus, I proposed a reconsideration of power as a problem of divorce mediation in so far as it affects the abilities of mediators to manage it; as professionals, our involvement affects the life course of thousands of individuals and their children. Therefore, a redefinition of the problem of power in mediation in a manner that reflects this responsibility, seems appropriate. Such a redefinition may include:

(1) The varying ability and training of mediators to assess and mediate appropriate financial decisions, and the recognition of the engendered post-divorce problems for women and children

(2) The lack of motivation of the legal and mediation professions to establish workable agreements based on common interests, acknowledgement of interdependence within certain parameters, and a delineation of roles and responsibilities to their clients and to each other.

(3) The varying ability and training of mediators to assess and maintain an appropriate, and dynamic, therapeutic distance between couples in conflict, whether this conflict is rooted in abuse, gender issues, or emotional readiness.

Thank you, once again, for your invaluable contribution to this research. I was impressed by the candidacy, professionalism, and depth of experience demonstrated by all six participants. If you would like to examine the findings in more detail, and I will make arrangements to provide you with the sections/chapters of interest to you. You can reach me at the above address, or at (705) 652-3701. My e-mail address is kroot@ptbo.igs.net.

Sincerely,

Shelley Hermer
MSW

Reference List

Arditti, J. (1997). Women, divorce, and economic risk. Family and Conciliation Courts Review, 35,1, 79-89.

Barsky, M. (1993). When grief underlies the conflict. Mediation Quarterly, 11,1, 39-53.

Bautz, B., Hill, R. (1989). Divorce mediation in New Hampshire: A voluntary concept. Mediation Quarterly,7,1, 33-40.

Berne E. (1977). Beyond Games and Scripts. New York: Grove Press.

Bonney, L. (1993). Planning for postdivorce family relationships: Factors to consider in drafting a transition plan. Family and Conciliation Courts Review, 31,3, 367-372.

Bowlby, J. (1973). Attachment and loss, II. New York: Basic Books.

Bowlby, J. (1979). The making and breaking of affectional bonds. London: Tavistok.

Brown, D. (1982). Divorce and family mediation: history, review, future directions. Conciliation Courts Review, 20,2, 1-44.

Burrell, N., Narus, L, Bogdanoff, K., & Allen, M. (1994). Evaluating parental stressors of divorcing couples referred to mediation and effect on mediation outcomes. Mediation Quarterly, 11,4, 339-352.

Camara, K., Resnick, G. (1989). Styles of conflict and cooperation between divorced parents: effects on child behaviour adjustment. American Journal of Orthopsychiatry, 59,4, 560-567.

Campbell, L., Johnston, J. (1984). Impasse-directed mediation with high conflict families in custody disputes. Behavioural Sciences and the Law, 4,2, 217-241.

Camplair, C., Stolberg, A. (1990). Benefits of court sponsored divorce mediation: a study of outcomes and influences on success. Mediation Quarterly, 7,3, 199-213.

Carden, M.L., (1984). The women's movement and the family: A socio-historical analysis of constraints and social change. Mediation and Family Review,7,3-4, 7-18.

Chandler, D. (1990). Violence, fear, and communication: the variable impact of mediation. Mediation Quarterly, 7,4, 331-346.

Clulow, C. (1990). Divorce as bereavement: similarities and differences. Family and Conciliation Courts Review,28,1, 19-22.

Coogler, O.J., Weber, R., McKenry, P. (1979). Divorce mediation: a means of facilitating divorce and adjustment. The Family Coordinator, 28, 255-259.

Cooks, L., Hale, C. (1994). The construction of ethics in mediation. Mediation Quarterly, 12,1, 55-76.

Day, R., Hook, D., (1987). A short history of divorce: Jumping the broom--and back again. Journal of Divorce, 10, 3/4, 57-73.

Dennis, W. (1996). The divorce from hell. Toronto Life, Feb., 44-58.

Depner, C., Cannata, K., Ricci, I., (1995). Report 4: Mediated agreements on child custody and visitation: 1991 California Family Court Services Snapshot Study. Family and Conciliation Courts Review, 33,1, 87-109.

Deutsch, M. (1973). The resolution of conflict. Constructive and destructive processes. New Haven: Yale University Press.

Devlin, A., Ryan, J. (1986). Family mediation in Canada: Past, present and future developments. Mediation Quarterly, 11, 3 93-108.

Dillon, P., Emery, R. (1996). Divorce mediation and resolution of child custody disputes: Long-term effects. American Journal of Orthopsychiatry, 66,1, 131-140.

Dingwall, R., Greatbatch, D. (1991). Behind closed doors: A preliminary report on mediator/client interaction in England. Family and Conciliation Courts Review, 29,3, 291-303.

Duryee, M. (1995). Guidelines for family court services intervention when there are allegations of domestic violence. Family and Conciliation Courts Review, 33,1, 79-86.

Dworkin, J., Jacob, L., Scott, E. (1990). The boundaries between mediation and therapy: Ethical dilemmas. Mediation Quarterly, 9,2, 107-119.

Ellis, D. (1994). Family mediation pilot project. A report prepared for the Attorney General of Ontario.

Ellis, D., Stuckless, N. (1992). Preseparation abuse, marital conflict, mediation, and post-separation abuse. Mediation Quarterly,9,3, 205-225.

Erickson, S., McKnight, M. (1990). Mediating spousal abuse divorces. Mediation Quarterly,7,4, 377-388.

Filion, L., (1986). The Montreal family mediation service: from the competitive to the complementary--the changing roles of the legal and mental health professional in a new territory.

Folberg, J. (1983). A mediation overview: History and dimensions of practice. Mediation Quarterly, 1, 3-13.

Folger, H., Bush, R. (1996) Transformative mediation and third party intervention: ten hallmarks of a transformative approach to practice. Mediation Quarterly, 13,4, 263-278.

Fuhr, J. (1989). Mediation Readiness. Family and Conciliation Courts Review, 31,2, 172-179.

Gardner, R. (1992). The parental alienation syndrome. New Jersey: Creative Therapeutics.

Garvin, V., Kalter, N., Hansell, J. (1993). Divorced women: individual differences in stressors, mediating factors, and adjustment outcome. American Journal of Orthopsychiatry,63,2, 232-240.

Geffner, R., Pagelow, M. (1990). Mediation and child custody issues in abusive relationships. Behavioural Sciences and the Law, 8, 151-159.

Girdner, L. (1990). Mediation triage: Screening for spouse abuse in divorce mediation. Mediation Quarterly, 7,4, 365-376.

Goldstein, H. (1994). Ethnography, critical inquiry and social work practice. In E. Sherman and W.J. Reid (Eds.), Qualitative research in social work. New York: Columbia University Press.

Goode, W. (1993). World changes in divorce patterns. New Haven: Yale University Press.

"Government developing mandatory mediation details". (1997, March-April). Ontario Lawyer's Gazette, 17-18.

Grebe, S. (1992). Ethics and the professional family mediator. Mediation Quarterly, 10,2, 155-165.

Grebe, S., Irvin, K., Lang, M. (1989). A model for ethical decision-making in mediation. Mediation Quarterly,7,2, 133-145.

Hart, B. (1990). Gentle jeopardy: the further endangerment of battered women and children in custody mediation. Mediation Quarterly,7,4, 317-330.

Hamilton, W.F. (1993). The effects of a maritally disrupted environment in latency stage-child: In respect to the formal education process. Journal of Divorce and Remarriage, 20,3-4, 65-74

Haynes, J., (1992). Mediation and therapy: An alternate view. Mediation Quarterly, 10, 1, 21-34.

Hepworth, D., Larson, J.A. (1993). Direct Social Work Practice. Theory and Skills (4th ed.). Pacific Grove, CA: Brooks/Cole Publishing Company.

Herrnstein, B.H. (1996). Women and mediation: a chance to speak and to be heard. Mediation Quarterly, 13,3, 229-241.

Hoyt, L., Cowen, E., Pedro-Carroll, J., Alpert-Gillis L. (1990). Anxiety and depression in young children of divorce. Journal of Clinical Child Psychology, 19,1, 26-32.

Irving, H., Benjamin, M. (1987). Family Mediation. Theory and Practice of Dispute Resolution. Toronto: Carswell.

Irving, H., Benjamin, M. (1995). Family Mediation: Contemporary Issues. California: Sage Publications Inc.

Johnson, K., (1984). Factors predicting outcome of divorce mediation. Conciliation Courts Review, 22,2, 31-38.

Johnston, J., Campbell, L. (1988). Impasses of divorce. The dynamics and resolution of family conflict. New York: The Free Press.

Johnston, J., Kline, M., Tschann, J. (1989). Ongoing post-divorce conflict: effects on children of joint custody and frequent access, American Journal of Orthopsychiatry, 59,4, 576-592.

Katz, F. (1997 January). New federal child support guidelines. Resolve. Family Mediation Canada,10,2, 7.

Kelly, J. (1989). Mediated and adversarial divorce: respondents' perceptions of their processes and outcomes. Mediation Quarterly, Sum,24, 71-88.

Kelly, J. (1993). Current research on children's postdivorce adjustment: No simple answers. Family and Conciliation Courts Review, 31,1, 29-49.

King, M., Trowell, J. (1992). Children's Welfare and the Law. London: Sage Publications.

Kitzmann, K., Emery, R. (1994). Child and family coping one year after mediated and litigated child custody disputes. Journal of Family Psychology, 8,2, 150-159.

Kolevzon, M., Gottleib, (1984). The impact of divorce: a multivariate study. Journal of Divorce, 7,2, 89-98.

Kressel, K. (1989). Research in contested custody mediation: An illustration of the case study method. Mediation Quarterly, Sum,24, 55-70.

Kruk, E. (1993). Promoting co-operative parenting after separation: a therapeutic/interventionist model of family mediation. Journal of Family Therapy, 15,3, 235-261.

Kusan, S. (1997). President's message. Solutions. Ontario Association for Family Mediation,13,1, 1-2.

Landau, B. (1995). The Toronto forum on women abuse. The process and the outcome. Family and Conciliation Courts Review, 33,1, 63-78.

Latey, W. (1970). The tide of divorce. London, England: Longman Group Ltd.

Leick, C. (1989). Guidelines for mediator/attorney cooperation. Mediation Quarterly, 23, Spring, 37-52.

Lincoln, Y., Guba, E. (1985). Naturalistic Inquiry. Newbury Park, CA: Sage Publications Ltd.

Lyon, E., Silverman, M., Howe, G., Bishop, G., Armstrong, B. (1985). Stages of divorce: implications for service delivery. Social Casework, 66,5, 259-267.

Mahoney, K. (1996). Gender issues in family law: revelling the playing field for women. Family and conciliation courts review, 34,2, 198-218.

Mansunov, V., Cody, M., Donahue, W., Zappa, J. (1994). Accounts in child custody mediation sessions. Journal of Applied Communication Research, 22,1, 1-15.

Marlow, L. (1994). A divorce mediators's responsibility. The American Journal of Family Therapy,22,3, 208-221.

Marshall,C., Rossman, G., (1989). Designing Qualitative Research, California: Sage Publications.

Mastrofski, J., (1991). Re-examination of the bar: incentives to support custody mediation. Mediation Quarterly, 9,1, 21-31.

Mathis, R., Yingling, L., (1991). Spousal consensus on the divorce decision and mediation outcome. Family and Conciliation Courts Review, 29,1, 56-62.

McEwen, C., Mather, L., Maiman, R. (1994). Lawyers, mediation, and the management of divorce practice. Law and Society Review, 28,1, 149-187.

Medley, M., Schellenberg, J. (1994) Attitudes of attorneys toward mediation. Mediation Quarterly, 12,2, 185-198.

Melamed, James (1989). Attorneys and mediation: from threat to opportunity. Mediation Quarterly,23, 13-22.

Menefee, S. (1981). Wives for sale. An ethnographic study of British Popular Divorce. New York: St. Martin's Press.

Menzel, K. (1991). Judging the fairness of mediation : A critical framework. Mediation Quarterly, 9,1, 3-20.

Micka, C. (1989). From litigator to mediator. Mediation Quarterly, 23, Spring, 55-89.

Miles, M., Huberman, A. (1994). An expanded sourcebook. Qualitative data analysis (2nd ed.). Thousand Oaks, CA: Sage Publications.

Mitchell-Flynn, C., Hutchinson, R. (1993). A longitudinal study of the problems and concerns of urban divorced men. Journal of Divorce and Remarriage,19,1/2, 161-182.

Mosten, F. (1995). Emerging roles of the family lawyer. A challenge for the courts. Family and Conciliation Courts Review, 33,2 213-239.

Munroe-Blum, H., Boyle, M., Offord, D. (1989). Single-parent families: child psychiatric disorder and school performance. Annual Progress in Child Psychiatry and Child Development, 179-191.

National Council of Welfare (1996). Poverty profile 1994. Ottawa Minister of Supply and Services Canada.

Neilson, L. (1997, January). FMC's new practice and certification standards. Resolve, Family Mediation Canada, 10,1, 1-3.

Neuman, D. (1992). How mediation can effectively address the male-female power imbalance in divorce. Mediation Quarterly,9,3, 227-240.

Newmark, L., Harrell, A., Salem, P. (1995). Domestic violence and empowerment in custody and visitation cases. Family and Conciliation Courts Review. 33,1, 30-62.

Payne, J., Overend, E. (1990). Divorce mediation: process and strategies: an overview. Family and conciliation courts review, 28, 1, 27-34.

Pearson, J. (1991). The equity of mediated divorce agreements. Mediation Quarterly,9,2, 179-197.

Perry, L. (1994). Mediation and wife abuse: A review of the literature. Mediation Quarterly, 11(4): 313-327.

Phillips, R. (1991). Untying the knot. A short history of divorce. Cambridge: Cambridge University Press.

Pledge, D. (1992). Marital separation/divorce: a review of individual responses to a major life stressor. Journal of Divorce and Remarriage, 17,3/4, 151-179.

Power, R. (1985). Emotional attachment and ambivalence: an indicator for pre-mediation counselling. Conciliation Courts Review, 23,2, 79-90.

Regehr, C. (1994). The use of empowerment in child custody mediation: A feminist critique. Mediation Quarterly, 11,4, 361-371.

Roberts, M. (1992). Systems or selves? Some ethical issues in family mediation. Mediation Quarterly, 10,1, 3-19.

Rogers, N., McEwen, C. (1989). Mediation and the unauthorized practice of the law. Mediation Quarterly, 23, Spring, 23-29.

Rubin, H., Rubin, I. (1995). Qualitative interviewing. The art of hearing data. Thousand Oaks, CA: Sage Publications.

Somary, K., Emery, R. (1991). Emotional anger and grief in divorce mediation. Mediation Quarterly, 8,3, 185-197.

Stranglio, Donald (1986). Characteristics of parents affecting outcome of court-ordered child custody mediation. California: University Microfilms International.

Stull, D., Kaplan, N. (1987). The positive impact of divorce mediation on children's behaviour. Mediation Quarterly, 18, 53-59.

Theonnes, N., Salem, P., Pearson, J. (1995). Mediation and domestic violence: current policies and practices. Family and Conciliation Courts Review, 33,1, 6-29.

Wallerstein, J., Blakeslee, S. (1989) Second Chances: Men, Women, and Children a Decade after Divorce New York: Ticknor and Fields.

Wallerstein, J., Kelly, J. (1980). Surviving the break-up. New York: Basic Books.

Walters-Chapman, S., Price, S., Serovich, J. (1995). The effects of guilt on divorce adjustment. Journal of Divorce and Remarriage, 22,3/4, 163-177.

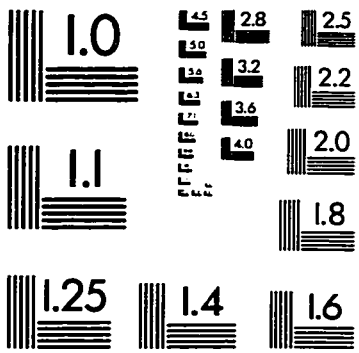
Weingarten, H. (1986). Strategic planning for divorce mediation. Social Work, May-June, 194-200.

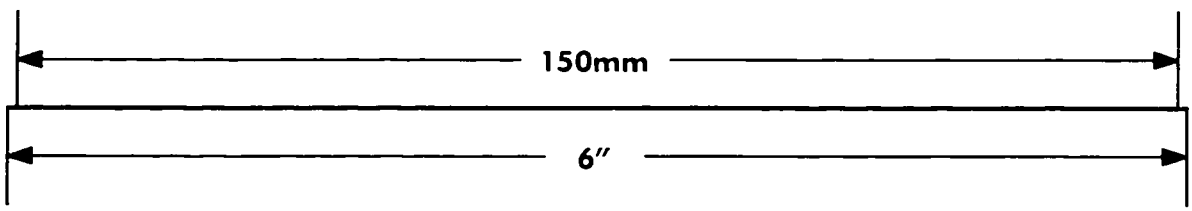
Wijnberg, M., Holmes, T. (1992). Adaptation to divorce: the impact of role orientation on family life-cycle perspectives. Families in Society, March, 159-167.

Wolch, S. (Producer). (May 8, 1997). Mediation, Part Two. Ideas. Toronto: Canadian Broadcasting Corporation Radio.

Word Perfect Version 6.1 for Windows (1994). USA: Novell Inc.

TEST TARGET (QA-3)





APPLIED IMAGE, Inc
1653 East Main Street
Rochester, NY 14609 USA
Phone: 716/482-0300
Fax: 716/288-5989