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MEDIATION AND DOMESTIC VIOLENCE : WELL "SUITORED" OR PERPETUATING A CRIME?

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CONTENTS

ABSTRACT

As a form of alternative dispute resolution, mediation has been heralded as a forward looking, cost-effective, participatory, voluntary and informal process with a variety of uses and application to many areas of conflict. The object of this paper is to consider the appropriateness of mediation in a civil context between spouses whose relationships are characterised by domestic violence.

Despite its many virtues, in the context of spousal abuse mediation is presented as a wolf in sheep's clothing: as something that feeds on the informal nature of the process, offering false promises and serving to aggravate existing inequalities between disputants. The informal process and structural constraints of mediation serve to reinforce male patriarchal order due to the incomparable status and power between men and battered women. Through mediation, there can be no equality nor equity for the victim. By exposing women to coercive bargaining techniques, mediation perpetuates these existing inequalities, serving private interests at the expense of public interests.

In conclusion, this paper proposes that a more formal system such as that presented by a law enforcement model with an elaborate system of rules and mechanisms is better able to protect women and serve societal interests in the struggle against domestic violence.

The text of this paper (excluding contents page, footnotes, bibliography and annexures) comprises approximately 14,000 words.

I INTRODUCTION

Throughout the last two decades there has been wide ranging expansion in the interest and adoption of alternative dispute resolution[1] mechanisms as a means of resolving conflict. This has been influenced and, in part, led by increased dissatisfaction with the traditional legal system. The adversarial process is often ill-suited to provide effective and efficient resolution of disputes, the cost of litigation is typically high and lengthy delays due to court congestion and/or delaying tactics on the part of lawyers will often occur before an outcome is reached.

Touching on a diverse range of interpersonal and social conflict from family, neighbourhood and employment discord to larger scale environmental and international disputes, ADR offers the advantages of a more responsive, accessible and cost-effective way of managing conflict.

This paper focuses on one such method, and examines the development and expansion of mediation into new areas, specifically that of domestic violence. In arriving at the conclusion that domestic violence is not an appropriate domain for mediation to venture toward, the second part of this paper has a theoretical focus and identifies some of the earlier thinking on traditional forms of mediation and different approaches to mediation practice. Part III highlights the types of cases which may be considered suitable for mediation and Part IV examines the history and dynamics of domestic violence, where a plethora of issues are further enmeshed. In examining the perceived advantages of mediation, this paper will then consider, in Part V, the problematic areas that arise when considering the nature and limits of mediation in the context of domestic violence. This thesis concludes that while mediation may be a useful tool in terms of dispute resolution, issues rooted in conflict, such as those exampled by

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[1] Hereafter referred to as "ADR".

spousal abuse, are not so easily remedied by an informal process such as mediation.

II THEORETICAL PERSPECTIVE

It is useful to first identify early thinking and theoretical aspects that have helped shape current mediation discussion. Contrary to the belief of many proponents of ADR, mediation does not present a wholly new approach to conflict resolution. Rather, legal philosophers for centuries have mulled over the theoretical justification and practical forms of age-old mediation techniques.[2] Douglas Lind considers 17th Century thought and attempts to relate jurisprudential history to contemporary forms of mediation, concentrating in particular on German legal philosopher Johann Wolfgang Textor's 1680 work "*Synopsis of the Law of Nations*". Textor's work represents the first attempt to create a systematic analysis of mediation and the role of mediator and; while primarily focused on international disputes and peacekeeping, still provides a useful analysis when considering contemporary uses and the direction of mediation into new realms of dispute resolution.

A Textor's Fundamental Principles

Textor identified a number of fundamental principles inherent in the practice of mediating international peace. Falling into five primary categories, the basic attributes of mediation are identified as: the necessary conditions for a duly constituted mediation, the obligation to accept and the right to refuse an offer of mediation, the ministers of mediators, the

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2 Douglas Lind "On the Theory and Practice of Mediation: The Contribution of Seventeenth-Century Jurisprudence" (1992) 10 *Mediation Quarterly* 119, 120.

requirement of providing sound reasons for refusing a proposal offered by a mediator, and the historical practice of compulsory mediation.[3]

1 *Necessary conditions for a duly constituted mediation*

Four qualifying factors had to be satisfied before mediation could commence and form the basis of the traditional nature of mediation. The first two conditions relate to the qualifications of the mediator and the second two conditions are linked to the fundamental nature of the agreement.

Textor observed that in relation to the mediator's qualifications, a mediator was required first, to act with the requisite degree of **authority**. Essentially, this required a mediator to be of equivalent standing or rank with those whose dispute necessitated mediation. The second qualification consisted of the mediator's actions being directed toward the ends of achieving **justice** and required the mediator to remain free from bias toward or against any of the disputing parties. The second two conditions to be met before mediation could proceed relate to the basic nature of the agreement: namely **assent** on the part of the person acting as the mediator and secondly, **acceptance** by the parties to the dispute of the person fulfilling the role of mediator. These latter two prerequisites identify a core principle behind contemporary mediation: its voluntary nature.[4]

2 *Obligation to accept/right to refuse mediation*

According to Textor's thinking, the offer by a third party to act as mediator represented a sacred proposal which the disputing parties were obliged to accept. In the context of warring nations, to be seen to reject such an offer,

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3 Above n 2, 121.

4 Above n 2, 122.

disregarding the obvious benefits that mediated peace might have over continued hostilities, was deemed to be an act of extreme inhumanity.

Alongside the obligation to accept an offer of mediation exist a number of exceptions which constitute the right to refuse offers of mediation. The first exception allows a party to refuse an offer of mediation on the grounds of bias. For example, a warring party presented with an offer of mediation would be entitled to refuse if there were sufficient grounds for believing the opposing party and the suggested mediator shared a community of interest. Secondly, the obligation to accept did not extend to those situations where mediation was thought to be a futile exercise. Thirdly, the circumstances surrounding an offer of mediation could also serve to justify a refusal to participate: for example, where submitting one's cause to a particular mediator was viewed as beneath a party's dignity or where victory on the battlefield was proximate. Finally, a party had the right to refuse an offer of mediation if it appeared that mediation would involve undue expense.[5]

3 *Ministers of mediators*

Textor's third essential principle entails, as a condition of acceptance, rules about the appointment of "ministers" (usually diplomats or ambassadors) to exercise the functions of agreed-to mediators. The role of the ministers was to offer the warring factions proposals where the "mediator" was a country or organisation. There could be no devolution of the mediator's responsibilities in cases where the mediator was an actual person as opposed to another country or organisation.[6]

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5 Above n 2, 122-123.

6 Above n 2, 123.

4 *Sound reasons for refusing a mediator's proposals*

Despite the fundamental nature of mediation and; further, that a decision to either accept or reject a mediator's proposals is essentially voluntary, parties to the conflict had to be wary of the possibility that rejecting the suggestions of a fair and reasonable mediator could be met with public and international disdain. Textor considered it prudent for a cautious party to therefore publicly state the reasons for its decision to reject the proposals, whether related to the conduct of the mediator or to the substance of the settlement.[7]

5 *Compulsory mediation*

Unlike judicial positions where decisions of Judges carry the force of law against even those parties who do not voluntarily submit to the court's jurisdiction, the role of mediator is merely a friendly one. Textor observed, in theory, mediators could not assert their authority over unwilling participants nor make awards of a binding nature. Notwithstanding this, Textor identified historical examples where parties were compelled to agree to a settlement achieved through mediation. The element of compulsion arose through fear of a superior power or a greater evil which may be incurred in the face of resistance. Although not formally recognised as such, Textor found compulsory mediation to be an acceptable practice between interacting nations.[8]

While it is accepted that Textor's principles represent a limited source in terms of comparative mediation thought, Textor's work does, however, demonstrate the extraction of early dispute resolution and mediation principles and is useful to this extent.

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7 Above n 2, 124.

8 Above n 2, 124.

B Applying Textor's Principles to Contemporary Mediation Practice

Lind notes that although Textor was writing more than three centuries ago and within the context of international dispute resolution, his methodical treatment of mediation still has utility when applied to contemporary notions of mediation.[9] Textor's work identifies eight basic principles inherent in mediation practice: (1) Authority; (2) Unbias; (3) Agreement; (4) Obligation to Accept; (5) Right to Refuse; (6) Requirement for Sound Reasons; (7) Limitations on Agency; and (8) the Legitimacy of Compulsory Mediation.

While not an exhaustive list, Textor's eight principles address many aspects of mediation that are weil recognised in mediation processes today. For example, the parties must consent to a mediator thereby giving that person the requisite **authority** to mediate the dispute between them. A mediator is a neutral third party who facilitates negotiation between the parties and systematically assists to isolate issues in dispute and explore options for resolution. In not imposing solutions, coercing the parties into agreement or making substantive decisions for the disputants, the mediator's role can be said to be impartial or **unbiased**. Further, the **agreement** reached is that of the parties alone. The parties' individual needs are met because they control the resolution of the conflict; their participation in this process is an empowering one which arms them with the ability to manage conflict more adeptly in future. Perhaps one of the most fundamental values seen in both the historical and contemporary context is the voluntary nature of the mediation process where parties have the right to choose whether or not to participate and can **refuse** or **accept** settlement offers as they see fit in working together to reach an amicable solution.

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[9] Above n 2, 124.

In identifying these principles as relevant to contemporary mediation practice, it is possible to recognise them as fundamental characteristics expected to be found in any mediation setting. As ideals of mediation, however, these principles remain subject to some political and empirical criticism. Proponents of ADR make assumptions about the properties of mediation; essentially that mediation is a speedy, non-intimidating, flexible means of attaining justice on the premise that some disputes are handled more effectively outside of the adversarial system. In addition, the process is facilitated by a neutral, non-coercive third party who coordinates and propitiates the negotiation in order to encourage settlement where ultimate decision making authority is retained by the parties. Perhaps the most striking assumption that is made about mediation is the notion that informal dispute resolution mechanisms are more accessible than formal ones and, as such, this serves to promote access to justice because of its informality.

Laurence Boulle describes mediation to some extent as a practice in search of theory: in the sense that the foundations of mediation can be found in several disciplines, mediation has yet to develop its own explanatory theories.[10] In agreement with this proposition, we can see that Textor's work at least provides us with a coherent starting point for understanding mediation theory. As noted by Lind, our comprehension of the principles of unbias, authority and acceptance are therefore heightened as they are given historical content.[11]

Writing in the early 1970s, Lon Fuller suggests the function of a mediator is to assist the parties to free themselves from the burden of rules, to steer them toward a relationship of mutual trust, respect and understanding in order to enable the parties to meet shared contingencies and work out their own rules. By meeting alternately with the mediator out of the presence of the other, the parties are more likely to be open and make frank disclosure

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10 Laurence Boulle *Mediation: Principles, Process, Practice* (Butterworths, Sydney, 1996), v.

11 Above n 2, 125.

about their preferences and interests. Thus Fuller defines the central quality of mediation as a means to:[12]

> *...reorient the parties toward each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward one another.*

Fuller suggests an antithesis exists between standard procedures of law and mediation processes, specifically, the concept of rules is inherent in the notion of law.[13] It is through the enforcement and administration of these legal rules that a degree of incompatibility can be perceived between mediation and "the rule of law". For instance, in questioning how far mediation should enter, and in what respects, into the administration of law, Fuller suggests that once enacted then interpretation and enforcement of the law is a matter for the courts to decide. The courts have been instituted not to mediate disputes but to decide them, thus the standard method of dispute resolution is adjudication and not mediation.[14]

Twenty five years on, Fuller's proposition of an antithesis between mediation and the rule of law is perhaps a little naive and the situation not so "black and white". Mnookin and Kornhauser note that disputants tend to bargain in the shadow of the law.[15] Specifically, each party has certain claims on what they would get if the case went to court; this has the effect of equipping each party with certain bargaining chips and is an example of how the legal system unwittingly effects and impacts on the behaviour of members of society.

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12 L L Fuller "Mediation: its forms and functions" (1971) 44 *Southern California Law Review* 305, 325.

13 Above n 12, 328.

14 Above n 12, 328.

15 Robert H Mnookin and Lewis Kornhauser "Bargaining in the Shadow of the Law: The Case of Divorce" (1979) 88 *Yale Law Journal* 950, 968.

Mediation represents a form of assisted decision making and carries with it many uses. For example, mediation may be used to define problems and disputes so that once adequately defined they may be referred on to other methods of dispute resolution. Alternatively, mediation can be used as a means of managing conflict where an ongoing series of disputes of considerable intensity has occurred over extended time periods. In this respect, mediation serves to contain the conflict by establishing appropriate rules, processes and structures for communication and interaction. Indeed, Boulle argues that mediation provides opportunities for disputes to be dealt with through other methods in the long term.[16] Given that mediation has varying uses, it is useful to turn the discussion toward distinct approaches to mediation practice.

C *Different Approaches to Mediation Practice*

Bush and Folger identify four different approaches to mediation practice that have emerged in the last two decades, describing them as distinct "stories" relating to satisfaction, transformation, social justice and oppression.[17] According to Bush and Folger, the views of practitioners, theorists and academic writers on mediation can be categorised as coming within one of the following "stories".[18]

1 *The satisfaction story*

Bush and Folger describe this first story suggesting that mediation/ADR satisfies the genuine human needs of parties because of its flexible, informal and consensual nature. In that mediation can reduce the economic and emotional costs of dispute settlement, for example by freeing up valuable

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16 Above n 10, 13.

17 R A B Bush and J P Folger *The Promise of Mediation: Responding to Conflict through Empowerment & Recognition* (Jossey-Bass, San Francisco, 1994).

18 It is important to note that the proponents of each version may not identify their individual interpretations in terms of Bush and Folger's representation as "stories".

court fixtures, it also represents a more efficient use of private and public dispute resolution resources therefore creating greater overall satisfaction for individual consumers of the justice system. The satisfaction story claims to illustrate what has generally occurred in mediation practice so far. The ultimate goal of this story is to maximise satisfaction of the individual's needs (or to minimise their suffering) in order to provide the greatest satisfaction for all concerned.

2 *The transformation story*

This second view depicts mediation as transformative in nature; and, as such, has the capacity to transform the characters of individual disputants and society as a whole. Mediation is said to be transformative because it is educational. As parties learn ways to develop crises into opportunities, they also learn about themselves, others around them and gain the ability to formulate new ways of conceptualising problems. The transformation story allows people to define problems and goals in their own terms which, in turn, validates the problems and goals perceived by the parties. This view of mediation strengthens the capacity of people to handle adverse circumstances of all kinds both in terms of the present conflict and in future. Through this process the participants sustain an element of empowerment by gaining self-respect, self-confidence and self-reliance. Mediation is seen to engender acknowledgment and concern for other people as human beings which then transforms individuals into confident and more considerate beings. The mediation process evokes recognition between men and women, changing the parties involved and the character of male-female interaction. The goal of the transformation story is one of moral growth, of transforming the human character in order to elicit greater strength and compassion. This view of mediation fosters empowerment and recognition, building party confidence to create mutual understanding across differences.

3 *The social justice story*

Bush and Folger describe the social justice story as viewing ADR as an effective means of organising individuals around common interests in order to build stronger structures and community ties. Encouraging self-help, the parties are assisted to solve their own problems and to reduce their dependency on outside agencies. The aim of the social justice story is that through mediation equality is promoted between individuals, therefore reducing existing inequalities. By organising people around common interests, the resulting coalitions is said to ultimately further the goal of equality.

4 *The oppression story*

Unlike the three previous stories, this view of mediation recounts a tale of foreboding. Because mediation has no procedural or substantive rules, proponents of this story are wary of the fact that mediation may increase the power of stronger parties to take advantage of the weak. Contentious issues such as power imbalances are magnified and open the door to coercion and manipulation while the principle of mediator neutrality excuses the mediator from preventing this. Outcomes will often be unjust and disproportionately favourable to the more powerful party. Further, as mediation is a private and informal process the mediator has broad power to control the discussion effectively giving free reign to intrinsic biases of the mediator. On a more insidious note, mediation is said to neutralise the achievements of the civil rights and women's movements by removing safeguards and exposing women to coercive bargaining techniques which result in unjust property and child custody agreements. Mediation is essentially manipulative and exerts pressure in a covert manner; by working against the disadvantaged in this way, mediation risks making existing inequalities worse.

This descriptive account of mediation practice is especially pertinent to the scope of this paper. The oppression story raises issues and highlights difficulties women may encounter when they set forth to resolve a dispute via mediation. For abused women, the implications of Bush and Folger's oppression story are more severe. Due to the informal nature of mediation, private interests are often served at the expense of public interests. Such processes work to the detriment of women and other disadvantaged groups in society to the extent that it is these groups who are largely the ones that benefit most from public policies that underlie our formal legal processes.

D Conflict and Mediation

As the nature of conflict is essentially a universal one, Folberg and Taylor describe mediation as a process that can be used to resolve a variety of situations centred around a dispute.[19] Two categories of conflict exist: intrapersonal (conflict within an individual) and interpersonal (disputes that arise between individuals or groups). While mediation is primarily concerned with interpersonal disputes, it is important to recognise that issues may also trigger conflicts within the person and so it is necessary to recognise and distinguish between both categories of conflict.[20]

In having different goals from other forms of ADR, the advantage of mediation over other methods of conflict resolution is reflected in mediation's constructive outcomes. By promoting the resolution of conflict with mutual gain or what is known as a win-win outcome, mediation reflects an agreement that is more acceptable to the parties in that it is consensual in nature.

Folberg and Taylor also identify mediation as furthering governmental policies of minimum state intervention in interpersonal conflicts; the

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19 J Folberg and A Taylor *Mediation: A Comprehensive Guide to Resolving Conflicts without Litigation* (Jossey-Bass, San Francisco, 1984), 18.

20 Above n 19, 19.

reasoning behind this lies in economic arguments and the perceived value of personal autonomy that can be gained from solving one's own problems.[21] On this basis, the primary benefit of mediation is said to be self-determination. The parties are presumed to have the requisite responsibility, authority and capacity to determine what is best for themselves and their family without intervention from the state. Arguments in favour of self-determination and less reliance on the state are further justified by the inadequacy of the legal system to efficiently supervise complex interpersonal relationships between families. Because relationships often continue after a dispute is resolved and the fact that lawyers and Judges are involved, Folberg and Taylor suggest people are less likely to function independently, thus necessitating further professional involvement. On the other hand, consensual agreements that reflect the parties' preferences are more acceptable and durable than court orders, thus disputants are more likely to adhere to agreements made.[22]

1 *Perceived benefits of mediation*

Among the various ADR methods, mediation stands out as being particularly advantageous. Features inherent in mediation such as flexibility, informality, its voluntary and non-binding nature make this method of conflict resolution preferable not only to litigation but to other means of dispute resolution as well.[23]

In terms of its advantages over litigation, mediation does not limit its focus to assertions made by the parties to the dispute. While the objective lies in

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21 Above n 19, 35. As recent New Zealand Governments have adopted minimalist stances in relation to other areas of social policy (e.g. welfare provision), it is arguable a move toward increased use of mediation to resolve disputes as a means of looking after one's self and kin before turning to the state for assistance could soon be seen on the New Zealand political agenda. Such a political move may also be justified in terms of efficiency gains.

22 Above n 19, 36.

23 Kenneth R Feinberg "Mediation - A Preferred Method of Dispute Resolution" (1989) 16 *Pepperdine Law Review* S5.

determining who is right and wrong, litigation does not permit a full exploration of factors underlying the dispute. Mediation on the other hand looks beyond legal issues in an attempt to explore the relationship between the parties and find a solution to the problem between them. In addition, because the possible outcomes in mediation are not limited to pre-existing legal remedies, a wide range of win-win solutions are possible. The resolution is therefore specifically tailored for the parties and dispute at hand, representing a cooperative process through which the parties have fashioned a mutually acceptable agreement. Compared with the adversarial process, controlled by lawyers and Judges using legalistic terminology, participants in mediation are able to control the ultimate decision making process. Mediation, therefore, is said to be preferable to litigation as it offers parties the opportunity to participate actively and effectively in designing a solution that is not circumscribed by existing legal practices.

Features of mediation which offer advantages over other forms of ADR include the informality of process: the parties set their own rules and procedures; and are not constrained by legal rules of evidence. Because the process is not highly structured in terms of procedure, it is less formal than arbitration or mini-trials. Flexibility is a further feature rendering mediation amenable to a wide range of disputes. Mediation can be employed at any stage in the dispute, notwithstanding that litigation may be contemplated, as no laws govern its procedure, availability or use. Further, mediation is cost-effective requiring smaller time investments on all sides, a feature which serves to minimise costs arising from lost business revenue, employee working hours and smaller legal fees. Emotional costs are also largely averted in the mediation process: by encouraging co-operation and offering a more stable structure to the immediate relationship, mediation recognises the emotional needs and feelings of the parties more effectively than other methods of dispute resolution. Finally, as mediation is voluntary and non-binding, the parties retain complete control over the process from the outset and can choose to withdraw if the process does not meet their

expectations. In addition, pursuing other forms of dispute resolution is not precluded in the event an attempt at mediation fails. Feinberg suggests that, as a result, more disputants will be willing to try mediation as it represents a relatively risk free method of conflict resolution.[24]

In summary, proponents of ADR argue informal processes which address the cause of a dispute, emphasise community values and compromise are more appropriate than formal processes among disputants who must continue to deal with each other often after the current dispute ends. Contrary to this view is the wider critique of informalism propounded by authors such as Owen Fiss and Richard Delgado. Fiss outlines a genuine social need for an authoritative interpretation of law, describing settlement as the civil analogue of plea bargaining, as a capitulation to the conditions of mass society which should neither be encouraged nor praised.[25] Settlement (in favour of adjudication) aggravates inequalities between the parties and further accepts these inequalities as a legitimate and integral part of the process; as such mediation leaves justice undone. Supporting this view, Delgado argues when the formalities of traditional adjudication are abandoned in favour of more informal methods of dispute resolution, minority disputants may be placed at even greater disadvantage than that which they would usually suffer.[26]

Even though Delgado is primarily referring to racial and ethnic prejudice, the argument can be made that the same principles would apply (and perhaps even more so) to women who have suffered abuse at the hands of their partners. On this basis, (and as will be expanded on later in this paper) ADR ought to be reserved for disputes in which parties of comparable status and power confront each other: in terms of the example of battered women and mediation equity and equality, therefore, cannot exist at the same time.

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24 Above n 23, S8.

25 Owen M Fiss "Against Settlement" (1984) 93 *Yale Law Journal* 1073, 1075.

26 Delgado, Richard et al "Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution" [1985] *Wisconsin Law Review* 1359.

III SUITABILITY FOR MEDIATION

Having identified several issues above arising out of a discussion of mediation, it is appropriate at this point to reflect on types of cases that may be considered suitable for mediation; and to question whether, and indeed how far, mediation should develop and expand into different areas of conflict that might otherwise be dealt with in a traditional court setting.

A Dyadic Relationships

In his inquiry into the proper place and function of mediation in society's processes, Fuller asserts dyadic relationships are particularly suited, even dependent, on mediation and further describes mediation as the only measure capable of solving the internal problems of the dyad.[27] Fuller offers two tests to assist in the determination of the proper domain of mediation, namely when mediation **should not** be used and when mediation **can not** be used.[28]

In relation to the first test, Fuller asks whether the underlying relationship between the disputants is such that it would best be organised by impersonal act-oriented rules. If this is found to be the case, then mediation is generally considered inappropriate except where it can be employed to create or modify existing rules.[29] The second test is to determine whether the conflict is amenable to resolution through mediation processes.

Fuller ascertains that mediation is subject to intrinsic limitations and identifies two of these limitations as: first, mediation cannot be generally employed where there are more than two parties involved in the dispute on

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27 Above n 12, 313.

28 Above n 12, 330.

29 Fuller describes rules as prohibiting, requiring or attaching specific consequences to acts.

the basis that any number greater than this will tend to confuse and further complicate the issues at hand. It should be noted that this theory is not necessarily supported in the modern day practice of mediation. Secondly, Fuller advocates that mediation presupposes an intermeshing of interests of such an intensity that the parties will be amenable to working together in the mediation effort.

Having established an appropriate domain for mediation, Fuller concludes, on all accounts, that marital problems qualify for resolution through mediation. A dyadic relationship exists and; further, Fuller contends that the internal workings of a marriage constitutes material that is inappropriate for regulation.[30]

Fuller's work represents a useful example of early and principled consideration of the value of mediation in that it provides a broad relational definition of mediation practice. More recent discourse on the suitability and appropriateness of cases for mediation can be found in discussion by Boulle. A major issue that arises for modern dispute resolution is the question of finding the most appropriate method of dispute resolution for each dispute, taking into account the type of dispute and the individual needs of the disputants. Boulle states:[31]

> *Mediation will be appropriate where it is likely to result in a settlement and to achieve some of the other goals of mediation, and where its underlying principles are relevant to the circumstances.*

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30 For example, who puts the rubbish out, who gets the children ready for bed etc. Also rules of evidence can preclude a spouse from giving evidence against the other due to the sanctity of the marital relationship. The absence of legalistic concepts from marriage is due to the perceived destructive nature such rules would have on the spirit of mutual trust and confidence, essential characteristics for a successful marriage. In addition, Fuller indicates that shifting contingencies such as changing jobs, moving house and pregnancy would necessitate many exceptions to the rules, rendering such regulations largely impractical.

31 Above n 10, 77.

Judgments relating to the suitability of mediation, therefore, will require an assessment of the nature of the dispute, the characteristics of the disputing parties, as well as consideration of society's wider interests. Most mediation commentators would agree with Boulle's suggestion that mediation is less appropriate in cases where a power imbalance exists, there is a single issue to the dispute or there is unlikely to be an ongoing relationship between the parties. Boulle identifies that the experience of literature and mediation practice tends to suggest a number of relevant factors in relation to whether mediation is deemed appropriate or inappropriate in any particular case. For example, instances where moderate conflict exists is deemed to be suited to mediation whereas cases characterised by intense hostility may not be because mediation may be unable to provide the control, protection and influence that is necessary to generate constructive decision making.[32]

Where there is a likelihood of a continuing relationship, mediation is regarded as a suitable and more feasible method of dispute resolution in that it takes account of future interests. Similarly, the same can be said for disputes revolving around more than one issue as mediation is able to provide a basis for collaborative and integrative bargaining involving trade-offs, compromise and linkages between the issues.[33] Boulle describes mediation as unsuited, however, to cases involving a risk of personal danger for one or more of the parties, or where the dispute centres around issues of child abuse or family violence.[34]

B Family Disputes

Subsequent studies and writing confirm observations of Fuller et al that disputes between couples and/or families are appropriate types of cases to be resolved using mediation. Whiting examines the characteristics of cases

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32 Above n 10, 77.
33 Above n 10, 77.
34 Above n 10, 81.

most likely to be suited to mediation and determines that family disputes, due to the existence of an on-going relationship and the number of underlying issues involved, are likely to be successfully resolved using mediation.[35]

Whiting states that it is important to first have an understanding of the special nature of cases involving family conflict. Family disputes display unequal characteristics because they bring with them complex histories of past interactions that involve strong emotional issues and past failures which can complicate efforts to resolve them.[36] The on-going nature of family disputes and their tendency to involve multiple issues, however, are attributes which can be used by mediators in order to resolve the conflict.

1 *Characteristics of successful mediations*

On completion of a study in a mid-size city in the eastern United States, Whiting found that family disputes appeared to respond in different ways to mediation attempts than their non-family counterparts. In this study Whiting observed a dispute resolution centre involving some 296 cases from neighbourhood disputes to child custody, divorce and consumer disputes from a wide variety of referral sources. Of the 109 cases in the final sample Whiting found that 35% constituted family cases compared to 62% of cases which were coded as non-family disputes. The findings of Whiting's study reveal that family cases have a statistically significant higher success rate in mediation than non-family cases.

Whiting measures success against three categories: the ability to produce a written agreement, compliance with the final result and the parties' satisfaction with the outcome. Parties involved in family cases were found to have reached agreement and then followed through with the agreements

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35 Raymond A Whiting "Family Disputes, Nonfamily Disputes and Mediation Success" (1994) 11 *Mediation Quarterly* 247.

36 Above n 35, 248.

more frequently than their disputant counterparts in non-family cases. In addition, 74% of the family cases indicated win-win outcomes compared to 38% of non-family cases which reported similar outcomes.

(a) Single issue and multiple issues

Whiting identifies the number of issues to be determined as a characteristic of family disputes which might account for the observed differences in mediation success rates. Of the cases categorised as family disputes 92% involved multiple issues compared to 16% of the non-family disputes which entailed multiple issues. The complex nature of family cases may, in part, account for a higher success rate in mediation due to the number of family cases which fall into the multiple issue category.

Of the cases categorised as multiple issues, a mere 5% reported failure to comply compared with a 19% failure rate of cases characterised by single issues. Further, 70% of these same single issue cases were reported to have failed to produce a win-win outcome. The multiple issue cases which failed to produce a win-win outcome is represented by a significantly smaller figure of 24%.

When these elements are combined, it can be established that a considerable 87% of single issue cases failed to achieve successful mediated outcomes in comparison with a 35% failure rate for multiple issue cases. Whiting's findings indicate the value of using the number of issues to be decided as a tool for determining the likelihood of success in mediation. According to Whiting, one of the characteristics which makes family relationships well suited to mediation, therefore, is the tendency for familial relationships to be characterised by several issues rather than one overarching theme.[37]

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[37] Above n 35, 255.

(b) On-going relationship

Whiting's study reveals the existence of an on-going relationship as another statistically important determinant of mediation success. Of the 109 cases in the sample, 56% fell into the on-going relationship category compared to 44% of cases which were not expected to continue after resolution of the conflict.

In terms of failure to produce a written agreement, 13% of disputants with an on-going relationship were unable to reach agreement compared to a 39% failure rate of disputants that did not have an on-going relationship.

Where a written agreement was reached, categorisation into on-going or non-continuing relationships revealed no significant effect. Of the on-going relationships, 10% of cases reported failure to comply and 14% of non-continuing relationships reported a compliance failure. While it seems that the cases involving an on-going relationship perhaps demonstrate a higher tendency for compliance, there is, in effect, no practical difference between the two.

In terms of outcome, the non-continuing relationships were unable to produce a win-win situation in 71% of cases compared to a significantly smaller 35% failure rate of on-going relationships.

In evaluating the overall success of these three categories, Whiting concludes that 45% of on-going relationships display failure rates in mediation compared to an overwhelming 94% of non-continuing relationships which do not achieve success in mediation. The existence of an on-going relationship, therefore, may have a significant impact on the success rate of a mediated case.[38]

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[38] Above n 35, 256.

2 *Conclusions of Whiting's study*

While other variables exist which might affect the mediation success of disputant characteristics, Whiting did not find other qualities which could be considered to be statistically significant when determining the success rate of individual mediation cases.[39]

In summary, Whiting's study raises questions about the appropriate application of mediation to particular types of disputes and ultimately suggests that conflicts which involve non-continuing relationships and/or single issues may be more suited to other forms of dispute resolution than mediation. Essentially, for conflicts that encompass only one issue and where there is no on-going relationship between the parties, attempts at mediation revealed high failure rates. As a result, Whiting's findings have a broader importance than mere application to family disputes. His study suggests that the number of primary issues and the existence of an on-going relationship between parties may have a statistically significant effect on the likelihood that mediation can be used as a successful tool in conflict resolution.[40]

As a comparison with these findings, a study of Ontario's court-based mediation programme found discernible patterns in the types of cases that settle when assisted by mediation.[41] The study revealed that the presence of an on-going relationship or an extended history facilitates early settlement; similarly the same could be said if fact situations were straight forward. Interestingly, however, respondents (and their lawyers/advocates) reported their personal views of fewer parties and fewer issues assisted settlement. Of the 1,460 cases in the programme, roughly half of those which were

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39 Above n 35, 257. Variables which might affect mediation success include gender, age, financial status and education levels.

40 Above n 35, 258.

41 Macfarlane, Dr Julie "Court-Based Mediation of Civil Cases: An Evaluation of the Ontario Court (General Division) ADR Centre" (Faculty of Law, University of Windsor, Ontario, 1995).

disposed of had attended a mediation session; and, of these, a slim majority settled in full or part. Given the breakdown of the case types in the study (30% breach of contract or negligence cases, 17% wrongful dismissal and 53% characterised merely as "other") it is difficult to make any more conclusive statements about the appropriateness of mediation when considered in the context of spousal abuse.

The work of the above authors establishes a prima facie case that conflict between two people, a dyad, in the nature of a familial relationship, is likely to be successfully resolved using mediation as a dispute resolution process. Intimate relationships are likely to be characterised by multiple issues which will undoubtedly arise in attempting to resolve conflict between a disputing couple. In addition, the possibility of an on-going relationship is increased if there are children, joint property or business interests added into the equation. Ensuing questions relate to how far the mediation process should extend into intimate relationships and whether mediation ought to be pursued to the extent where issues of domestic violence arise. If one examines the history and dynamics of spousal abuse, a plethora of issues are uncovered. These issues serve to further complicate the discussion and raise questions regarding the suitability of mediation in this context as a means of resolving conflict between a couple notwithstanding the evidence that dyadic, on-going relationships that are characterised by multiple issues can be said to have found a home ground in mediation.

Before turning to discussion concerning the nature of spousal abuse, it is useful at this point to illustrate a number of initial conclusions that can be made about mediation and ADR in general. First, there are several assumptions which underlie current mediation practices, its many and differing uses and suitability to a wide variety of cases. Secondly, while outside the scope of formal rules of law, bargaining in a mediation setting often occurs in the shadow of the law. Thirdly, the informal nature of mediation raises difficulties for those who are most in need of the protection

which a public process can offer. While mediation may be preferable to litigation in some cases, these circumstances will depend on whether disputants are relatively equal in terms of their individual status and power. Finally, the literature predominantly reveals that cases involving ongoing relationships, particularly those of a familial nature where children are involved, are especially suited to mediation due to its future focus and ability to take account of future interests.

IV DOMESTIC VIOLENCE

Over the last thirty years there has been a fundamental shift in society's attitudes and thinking towards domestic violence.[42] This change of position has been shaped, and indeed driven by, the rise of the women's movement, police and judicial responses to domestic violence and more up-to-date legislation in the form of New Zealand's Domestic Violence Act 1995. Recent statistics reveal that while the vast majority of domestic violence remains largely unreported, an estimated 40,000 incidents are reported to police each year. In addition, women's refuges help in excess of 20,000 women and children annually. The problem of domestic violence is stated to affect 1:7 New Zealanders.[43]

Domestic violence permeates all socio-economic groups.[44] A person's age, culture, class, race or religion are not determining or identifying factors. It is important to clarify that while men are not always the perpetrators of domestic violence with women being the victims, this is the most common scenario. The remainder of this paper contemplates spousal abuse/domestic

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42 For the purposes of this paper the term "domestic violence" is used interchangeably with "spousal abuse".

43 Victims Task Force (1992), *Protection from Family Violence: A Study of Protection Orders Under the Domestic Protection Act 1982*, Wellington.

44 K O'Connell Corcoran and J C Melamed "From Coercion to Empowerment: Spousal Abuse and Mediation" (1990) 7 *Mediation Quarterly* 303.

violence as this scenario of wife abuse rather than between siblings, against children or other family members or beaten husbands.

There is a wide spectrum of domestic violence ranging from pushing to controlling battery. The Domestic Violence Act 1995 amends anomalies in the previous existing law and defines domestic violence as including physical, sexual and psychological abuse.[45] The new legislation is far reaching in that it has been expanded to include groups of people previously omitted by earlier legislation. Section 4 of the Domestic Violence Act 1995 now extends to people who can be categorised as in a "domestic relationship" with another.[46]

A History of Domestic Violence

Domestic violence has historically been viewed as a "family affair" and, as a result, society has always been reluctant to interfere. The credence given to notions such as "a man's home is his castle" and the male role as "head of the family" has reinforced the subordinate status of women in society; state intervention would be seen as depriving the patriarch of his authority within the family unit. In addition, women and children have traditionally been considered as chattels or the property of their male counterparts. The institution of marriage is perhaps one of the most illustrative examples of this: a bride's father (a male) walks her down the aisle where she is then "given away" to her husband-to-be (again male); this tradition still exists today and parallels the passing of property from one man to another. Similarly, if a man was caught having an affair with another man's wife,

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45 See section 3 of the Domestic Violence Act 1995. Psychological abuse is deemed to include a wide range of activities including, but not limited to, intimidation, harassment, damage to property and pets, threats, economic deprivation, isolation, criticism, name calling and mind games.

46 A "domestic relationship" includes one's partner (including same sex and de facto relationships), children, flatmates or anyone that can be regarded as having a close personal relationship with the complainant. However, landlord/tenant and employer/employee relationships are not considered to fall within this category.

then his sin was not that of being engaged in an adulterous relationship but, rather, was deemed as a trespass to property. Early law can be said to have condoned, and even promoted, domestic violence in society. A classic example is "the rule of thumb" provided in early common law whereby a husband was prohibited only from using a rod thicker than his thumb to beat his wife.

Society's change in attitude first began to emerge around World War II. Despite there being no real power for women per se, it was women who ran the industries and kept economies afloat throughout the world while men were at war. While only short-lived, this bestowed a sense of empowerment and ability, increasing self-esteem for women. The early 1970s witnessed the rise of the women's movement when activists discovered something that battered women had known for a long time: women were largely denied assistance and protection by the criminal justice system and that police non-arrest policies and their subsequent treatment of violence in the home as being "just a domestic" represented a failure to 1) protect the victim; and 2) act against the offender.

We are now experiencing heightened awareness about the problems of domestic violence. Violence in the home is no longer tolerated nor hushed up as a private family matter but rather is viewed as an ill of society. In recent years this has been reinforced through television and advertising campaigns that violence is "not just a domestic" and will not be treated by state agencies as such. Tougher responses by police and the courts have encouraged women to speak out about their plight, as has powerful social comment in movies such as *Once Were Warriors*. In essence, women are finally being allowed to assert themselves and speak out against years of silent emotional and physical suffering.

B Dynamics of Domestic Violence

The existence of violence in an intimate relationship poses many difficulties and contradictory messages for women. Violence in the relationship is used as a means of power and control and can be exercised in either a covert or overt manner. The velocity of a look, a simple movement or an ordinary word which may mean little to an outsider, can be an extremely coercive weapon against a victim of domestic violence. Indeed, victims of domestic violence become expert at interpreting the hidden signals and cues of their abusers.

Due to the intimacy of the relationship, women are vulnerable to repeated threats and episodes of violence often with few chances to seek help. The home is supposed to represent a sanctuary, a place where one can retreat and relax; and more importantly somewhere where one can feel safe. This presents a dilemma for victims of spousal abuse; very often the home is not a safe place to be which raises the difficulty that if women cannot feel safe in their own homes then it becomes a problematic question to ask where, if anywhere, an abused woman can feel safe.

Very often women in violent relationships do not want the relationship to end. Rather than seeking to sever family ties, many women would just like the violence to cease and continue in partnership with their spouse. When the relationship does end, however, further victimisation and coercion can and does often continue. Beatings do not stop merely because a divorce is granted, instead contact between parents to effect child visitation can constitute further opportunities for abuse.[47] Over time, the violence in an abusive relationship escalates in frequency and evolves into what can be described as a "cycle of violence".[48] An episode begins with tension which gradually increases in intensity before erupting into violence. An apology

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47 Above n 44.

48 Barbara Hart "Gentle jeopardy: the further endangerment of battered women and children in custody mediation" (1990) 7 *Mediation Quarterly* 317.

and remorse follows along with promises to never lose control again by the perpetrator. A short-lived honeymoon period ensues until once again the tension slowly begins to build and the cycle of violence is sustained.

1 *Why don't battered women leave?*

There is a multitude of reasons why battered women do not attempt to seek refuge and leave their abusive relationships. Fear, in conjunction with a sense of learned helplessness and society's attitudes that the status quo is simply a woman's lot to be endured underlie many of these reasons.

Women have concerns for their children: they may not wish to break up the family unit and deprive the children of a father figure; or they may feel "it's better he takes it out on me rather than the kids". Economic concerns are also likely to feature highly in a woman's thinking: as mother and perhaps not the primary breadwinner, battered women may not have easy access to financial resources or the possibility of finding a well paid job on which it is possible to singlehandedly raise a family. In addition, there is also a reluctance to involve other family members or friends which can limit the range of possibilities where refuge can be sought. A fear of reprisal may also prevent women from escaping abusive relationships, fear that next time the beating will be worse if she is seen to have defied her partner.

Finally, the way women have been socialised and the stereotypical view of a woman's role in society as caring, passive, nurturing, co-operative and non-confrontational also plays a major part in the exercise of control over women and prevents them from stepping outside acceptable male-defined boundaries. Women are not taught to protect or assert themselves, rather, women are taught to expect others, males, to do so on their behalf.[49] Feminist writer Kate Millet describes patriarchy as sustained by ideological

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[49] Lisa G Lerman "Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women" (1984) 7 *Harvard Women's Law Journal* 57.

and structural factors. Ideological support comes from a system of socialisation which conditions both men and women to accept male dominance as natural. It is these factors which underlie the feminist critique of informalism described earlier in this paper. Women are more likely to benefit from public policies which underpin society's formal legal processes. While women are socialised into adopting compliant, submissive and passive roles and accepting their essentially subordinate position, informal processes such as mediation and structural constraints serve to reinforce this order. Millet further identifies the family, the class system, economic and educational systems as the main structural bulwark of patriarchy.[50]

V MEDIATION AND DOMESTIC VIOLENCE

Discussion concerning domestic violence and mediation can be described as existing within two contexts. The first of these relates to spousal abuse and mediating actual abusive conduct; for the purposes of this paper, this first context is alluded to as the criminal context. The second context constitutes situations where mediation is used to facilitate separation or divorce and/or child custody and access proceedings where there has been a history of spousal abuse between the parties. This second context is referred to as mediated negotiation in a civil context.

A Mediating Abusive Conduct - The Criminal Context

While not forming a major part of this thesis, it is nevertheless important to make a few brief comments about the criminal context of domestic violence and mediation. For the purposes of this paper, it is assumed that mediation

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50 Norman Johnson "Domestic Violence: An Overview" in Paul Kingston and Bridget Penhale (eds) *Family Violence and the Caring Professions* (Macmillan Press Ltd, London, 1995), 101.

is not an appropriate response for dealing with spousal abuse in a criminal context. Indeed, it is difficult to understand domestic violence and mediation as ever being suitably married together in this context as there is no dispute or conflicting issues to be resolved. Rather, spousal abuse represents violent actions that have occurred and cannot be described as a misunderstanding or resolved by accepting the point of view of the other party. Domestic violence is a serious crime and should be treated as such. As described earlier in this paper battered women are particularly vulnerable to repeated violence and threats from their partners given the intimacy of the offender/victim relationship. As a result, spousal abuse requires special care and attention to be given to the safety and support of abused women.

Menard and Salius contend that the effect of mediation in this context serves to legitimise violence rather than acting as a punishment or deterrence:[51]

> *Offenders should not be given the opportunity to negotiate criminal charges directly with the victim of their abuse or threats. To do so compromises the message that must be communicated to offenders that the use of violence is unacceptable.*

To a certain extent, the perception that abusive conduct may be suited to mediation blurs issues of criminal accountability and suggests inaccuracies that these are types of issues that the parties can, and indeed should, work out for themselves. The effect, therefore, is that abusive conduct, through mediation, becomes legitimised, individualised and a privatised form of conflict. As such, abusive conduct is then outside the protection that a public process can offer. Richard Abel succinctly summarises the situation by identifying that formal legal institutions start with the presumption of inequality between parties and can therefore construct elaborate rules and

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[51] A E Menard and A J Salius "Judicial Response to Family Violence: The Importance of Message" (1990) 7 *Mediation Quarterly* 293, 298.

mechanisms in order to protect weaker parties. Informal systems, however, de-emphasise these concerns with the end result that informal forums serve to greatly disadvantage weaker parties.[52]

B History of Abuse : Mediated Negotiation on Other Issues - The Civil Context

The civil context of domestic violence and mediation forms the basis of analysis and thought throughout this paper. The use of mediation in civil disputes that are characterised by a history of abuse necessitates a cautious approach. Because mediation theory assumes a relative balance of power between the parties, assurances for the victim's safety and informed consent are required. Mediation of separation and/or custody proceedings will be inappropriate in instances where current or past abuse renders the victim unable to fully represent her interests and may be susceptible to further violence or threats. In addition, factors such as fear and learned helplessness make it unlikely that a victim will be able to face her abuser and successfully negotiate an agreement that meets her needs.

The topic of mediation in the presence of domestic violence is a controversial one. The literature is unanimous in its view that it is never appropriate to mediate violence.[53] A division exists, however, between those who suggest that mediation is empowering and can assist the victim to communicate safely with a partner about stopping the violence;[54] and those who are adamant that mediation cannot be promoted in good conscience. The long term impact of power and control, for example, is an aspect that is not recognised in mediation and a guarantee of physical safety alone is

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52 Abel, Richard L (ed) *The Politics of Informal Justice* (Academic Press, New York, 1982).

53 L Perry "Mediation and Wife Abuse: A Review of the Literature" (1994) 11 *Mediation Quarterly* 313.

54 Above n 51.

insufficient to erase the effects of psychological terrorism.[55] As such, discussion of spousal abuse and ADR is illustrative of one field in which the "theory" of mediation practice has been relatively naive.

The essential question to be answered is: whether abuse ought to be a negotiable issue in civil proceedings or should violent relationships be totally excluded from participating in mediation?

1 *Pros and cons of mediation and domestic violence*

The literature in this field reveals considerable discussion surrounding the arguments for and against the use of mediation when domestic violence has occurred. Positive aspects centre around self-determination, empowerment for women and more robust outcomes and essentially focus on the general virtues of mediation. The converse position is reflective on the dynamics of domestic violence, manifest power imbalances and the fact that the safety of women may be compromised once the mediation has concluded.

Some commentators are of the view that the very presence of domestic violence constitutes sufficient grounds for not using mediation in any circumstances; mediation is said to be unable to provide the legal safeguards essential to protecting women and children from post-separation violence.[56] Other authors report that mediation may be used where effective safeguards and rules are developed to ensure the victim's safety, asserting that mediation can be adapted to account for the dynamics of spousal abuse;[57]

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55 D Knowlton and T Muhlhauser "Mediation in the presence of domestic violence: is it the light at the end of the tunnel or is a train on the track?" (1994) 70 *North Dakota Law Review* 255.

56 Above n 48. See for example articles by Grillo, Lerman above n 49; and Muhlhauser's arguments against use of mediation in context of abuse, above n 55.

57 L Perry "Mediation and Wife Abuse: A Review of the Literature" (1994) 11 *Mediation Quarterly* 313.

or, in cases where abuse is deemed particularly insidious, procedures are implemented into the process to screen such cases out.[58]

(a) Positive aspects

Mediation can be a route to empowerment and responsibility for both parties to a dispute and can avoid perpetuating victimisation of the abused.[59] Through mediation the parties are able to examine their own interests, are assisted to develop skills and solutions to fit the present dispute and for resolving future problems that may arise in the relationship. Even though mediation typically takes place with both parties present, the flexibility of the mediation process means that victims of domestic violence are not forced to confront their abusers. Procedures which enhance safety and might reduce anxiety include "shuttle diplomacy",[60] support people or an advocate in attendance for the victim of spousal abuse. As noted earlier in this paper, there are many forms and uses of mediation. The processes which may be used as mediation, therefore, are likely to vary according to the circumstances of the individual case. In addition to law enforcement remedies such as protection orders, mediation offers the prospect of victim empowerment, rehabilitation of the offender once the problem of domestic violence is acknowledged and an opportunity to end the cycle of violence.

In the end result, the parties are likely to experience a better balance of power in mediation than in courtroom proceedings. The feelings and perceptions of the victim are recognised and therefore validated compared to an adversarial process where many disputants come out of court feeling their special interests have not been heard or appreciated.[61] There is also

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58 L Girdner "Mediation Triage: Screening for Spouse Abuse in Divorce Mediation" (1990) 7 *Mediation Quarterly* 365.

59 Above n 44.

60 A process where parties meet separately with the mediator who then moves between the two parties exchanging and relaying discussion and ideas without direct contact taking place. See discussion for screening mediation in A E Gerencser "Family Mediation: Screening for Domestic Abuse" (1995) 23 *Florida State University Law Review* 43 and above n 23.

61 Above n 56.

higher compliance and greater perceived fairness which emerges from mediated outcomes.[62] Equitable results can be achieved by the disputants shaping the dialogue, expressing their needs and interests, exploring options, evaluating consequences and generally through participating in a process to reach an outcome which fosters empowerment.

(b) Problematic aspects

The opposite side of the coin reveals more compelling arguments against the use of mediation where domestic violence has been found to exist. Specific arguments against the use of mediation of separation/divorce and/or custody proceedings characterised by a history of abuse largely relate to the intimate nature of the relationship. Mediation is said to legitimise violence rather than punish or deter. Women who have previously been unable to protect themselves from physical assault are expected to engage in a process of open discussion with their abusers on probably the most important thing in their life: the caretaking and welfare of children. Violence in a relationship is essentially used as a means of power and control; an informal process where the parties are regarded as "equals" is therefore inappropriate because the intimacy of the relationship will never again hold such equality.

Safety represents a further issue for concern: mediated agreements have no effective enforceability or non-compliance consequences. Even if safety could be assured, there remains a problem with the balance of power not being restored as mediation does not recognise the long term effects of the exercise of power and control thus rendering the victim unable to fully represent her interests and susceptible to further violence or threats.

As the goal of mediation is future oriented there may also be a tendency to overlook or minimise past conduct, thus not holding the abuser accountable for his abusive actions. Inherent in the mediation process is the requirement

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[62] Above n 23.

for the parties to be conciliatory and compromising. This is particularly dangerous where the victim is concerned as it implies that she is, in part, responsible for the abuse.

There is a further danger in mediators not appreciating the coercive nature and effects of domestic violence on women. While the parties may seem agreeable, it could be the case that the victim anticipates the abuser's needs and gives in to a particular demand in exchange for short term physical safety. If this occurs, the mediator then becomes an unwitting party to an agreement based on submission and coercion. In addition, women may be fearful of their partners and choose to forfeit legal rights for fear of property destruction, psychological abuse and violence. This element of fear reduces the ability of women to effectively negotiate for herself and children; these inequalities are then taken into the mediation process. As a result, solutions achieved in mediation between abusive couples may be unavoidably coercive. In this context, mediation is said to offer false promises of co-operation, honest communication, safety, improved communication and fairness.[63]

2 *Critique of core mediation values*

The next part of this paper highlights general concerns relating to core values of mediation viewed from the perspective of spousal abuse. Identifying three fundamental issues in mediation discussion: analysis and discussion of power and empowerment; neutrality and impartiality and the voluntary nature of mediation; the particular difficulties of these values will be examined in the sense they are further exacerbated when an informal process such as mediation is implemented alongside domestic violence.

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63 Above n 48.

(a) Power imbalance and empowerment

Joan Kelly presents a framework for assessing conditions which present the potential for unequal power structures in mediation:[64]

> *Power is not a characteristic of a person, exercised in a vacuum, but is instead an attribute of a relationship. Within the mediation context, power can be defined as the ability of a person in a relationship to influence or modify an outcome. Power is the measure of the degree to which one can get one's needs or goals satisfied*

Kelly observes different potential situations or sources of power that can lead to power imbalances and states that mediator interventions demonstrate an array of techniques which can be used to create and maintain a level playing field on which disputants can participate and negotiate effectively.[65] Each factor or condition creates the potential for power inequities in mediation and may operate in conjunction with other factors or separately.

Particularly relevant to the present discussion is the *history and dynamics of the disputant relationship*. Kelly identifies that the prior and current relationship between disputants presents potential for serious power imbalances in terms of bargaining power. As parties come to mediation, they bring with them an in-built decision making pattern of domination and deference. This reinforces the idea that any approach which is taken to the dialogue needs to focus on changing existing patterns of destructive interaction rather than to merely focus on reaching "agreement" or "resolution". This is where an understanding of Bush and Folger's four approaches to mediation is useful. Mediation, therefore, is not merely about resolving disputes but plays an important role in terms of transforming and educating disputants so they can communicate more effectively and constructively in future interactions. The risk for the deferent partner lies

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64 J Kelly "Power Imbalance in Divorce and Interpersonal Mediation: Assessment and Intervention" (1996) 13 *Mediation Quarterly* 85, 87.

65 Above n 64, 89.

with acceding to the demands of the dominant party which, in turn, may lead to inequitable outcomes. To avoid such unfavourable results, the mediator can concentrate on drawing out the needs and interests of the deferent party by actively encouraging evaluation of the ideas and proposals of the more dominant party.

The difficulty arising here is that because the power imbalance inherent in an abusive relationship is so pervasive and insidious, it is doubtful whether inequalities that are so absolute in nature can ever be sufficiently addressed. As mentioned earlier in this paper, spousal abuse is a particularly controlling and denigrating form of violence that is not easily detected or resolved. In terms of mediation, even if power imbalances are identified and attempts made to achieve balance between the parties, the fact remains that the relationship, due to its history, was never balanced in terms of power in the first instance and is never likely to be again. Attempting to address power inequities, therefore, would largely be a futile effort as the relationship is characterised by perhaps the largest power imbalance of all - that of domination and control.

A second relevant factor identified by Kelly relates to the parties' *character and personality traits*. A person with low self-esteem, for example, may be reluctant to ask questions for fear of speaking out of turn, appearing stupid or less powerful in the presence of the more dominant party. In this case, the mediator may seek to facilitate communication in a different manner in which personality traits are less prominent.

Again in the context of domestic violence, battered women are certainly likely to exhibit poor self-esteem and be hesitant to speak out against suggestions her abusive partner might make and even less likely to ask for what they want. Victims of spousal abuse are well versed in terms of what to expect if they are perceived to be acting in defiance of male domination.

On this basis, any agreement reached is likely to be made through silent or hidden coercion and may outwardly appear to be fair to the mediator.

Further conditions relate to the *knowledge base and cognitive capabilities* of the disputants. One party may not be as quick to grasp new material or becomes easily confused; differences in analytical thinking, therefore, may give one party an unfair advantage over the other. In addition, the base of knowledge people hold varies considerably in relation to different areas. While one person may have more knowledge than the other relating to a particular state of affairs, the situation may well be reversed for others. In terms of ensuring a level playing field in these circumstances, the mediator can check for understanding at each step in the process and enhance the knowledge of the less powerful party by having them carry out equal tasks rather than allowing the party who would usually deal with such matters continue to do so.[66]

It is contended that attempts to remedy imbalances in knowledge cannot be enforced outside of the mediation setting. While tasking individuals to seek out new information may appear worthwhile, efforts could easily be frustrated by an unwilling or unhelpful partner who resents interference into "their" domain. It is recognised that this form of "empowerment" is fraught with risk, but if successful, may go some way in attempting to disrupt old patterns of interaction. Cognitive capabilities may also be problematic, a person not wishing to look stupid might convey they do have an understanding of the concepts involved or even bluff their way through attempts by the mediator to engage in discussion.

Kelly further contends that to benefit from a position of power, a person must first be willing to assert that power over another.[67] This is simply not the case, however, when considering the dynamics of domestic violence.

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66 An example of this might be in terms of financial matters or dealing with the children's schooling.

67 Above n 64, 87.

The control and domination which characterises an abusive relationship and creates vast differences in power does not require an intention or willingness on the part of the abuser to make it exist. Instead, because violence has occurred in the past it remains as a constant reminder and serves as a warning which strengthens the male party and further disempowers the abused female. Power does not, therefore, need to be asserted by the abuser because it is inherent in the nature of the violent relationship.

An examination of mediation must focus on the impact of power, especially gender related power, as it relates to the mediation process. As women are typically not equal to their male partners in terms of bargaining power, experience and financial resources, power related interventions need to be implemented in order to maintain a balanced playing field for vulnerable parties. Despite attempts to control the process and balance power in order to enhance disputant participation by empowering the weaker party, the presence of domestic violence in conjunction with limited mediator resources represents an impracticable hurdle.

(b) Neutrality and impartiality

Mediation is described by Christopher Moore as a form of negotiation utilising a third party who is knowledgeable in effective negotiation procedures and can assist the conflicting parties to coordinate their activities and be more effective in their bargaining:[68]

> *Mediation is the intervention into a dispute or negotiation by an acceptable,* ***impartial, and neutral third party*** *who has no authoritative decision-making power to assist disputing parties in voluntarily reaching their own mutually acceptable settlement of issues in dispute.* (emphasis added)

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68 Christopher Moore "How Mediation Works" in Roy J Lewicki et al *Negotiation: Readings, Exercises, and Cases* (2ed) (Richard D Irwin Inc, Boston, 1993), 445.

The assumption behind an outsider's intervention is that a neutral and impartial third party can alter power and the social dynamics of the conflict relationship by influencing the beliefs or behaviour of individual parties. By providing knowledge or access to information or by using more effective negotiation processes, the role of the impartial and neutral mediator is facilitative and therefore helps the participants settle their differences by arriving at their own solution. In not having any decision making authority, the mediator's goal is to assist the parties examine their future, their interests and needs and to negotiate an exchange of promises that will be mutually satisfactory and meet standards of fairness acceptable to both sides.

Most mediation literature emphasises values such as mediator neutrality, impartiality and empowerment. An impartial mediator still retains much power and can influence the psychological, procedural and substantive elements of a settlement.[69] The concept of impartiality is based on the notion of a third party observer without a perspective on the dispute. Like all human beings, however, mediators have biases, values and points of view which they will unwittingly bring to the mediation setting. When domestic violence is introduced into the equation, issues surrounding the protection of life, security, and safety of the person take on increased importance.

It is questionable how a mediator can remain neutral in circumstances which require the implementation of safety procedures to protect one of the parties, as recognition that safety procedures are required could be argued as violating the principle of mediator neutrality. It is contended that a mediator cannot take a neutral or unbiased stance where issues of spousal abuse are concerned. While mediation requires the parties are treated fairly; equitable treatment, however, does not mean treating disputants equally.

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[69] Kevin Gibson "The Ethical Basis of Mediation: Why Mediators Need Philosophers" (1989) 7 *Mediation Quarterly* 41.

Fairness, in a mediation context requires parties be treated equitably where differences between them are taken into account. If disputants are treated the same and a power imbalance exists between them, as it inherently does in cases of domestic violence, then a neutral and impartial mediator is supporting an unfair process by allowing the more powerful party, the abuser, to take an unfair advantage. It would be considered unethical, therefore, for a mediator to allow the process to be guided by principles of neutrality and impartiality. The matter is further complicated if the mediator adopts procedures to promote the safety of the parties; by taking a position on the abuse, the mediator is no longer adopting a neutral or impartial stance.

(c) Voluntariness

One of the primary principles of mediation is that any settlement or agreement reached should be done so voluntarily.[70] A truly voluntary agreement cannot be achieved if one party is unable to fully comprehend the issues being discussed or is unable to engage in effective representation of their own interests with the other party to the conflict. When the value of voluntary mediation is viewed in the context of domestic violence, it is clear that many victims will be simply unable to represent their own interests accordingly in mediation. Before mediation is embarked upon there ought to be a professional responsibility on the mediator to determine that the capacity of the parties to reject or accept any settlement is not compromised.

A significant issue relating to the principle of voluntariness lies in the contentious practice of mandatory mediation. While beyond the scope of this paper in attempting to determine how far mediation should be taken, mandatory mediation is at least relevant in the context of domestic violence. The dynamic of voluntary mediation is fundamentally altered when mediation is imposed rather than sought or offered. Grillo describes

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70 James S Boskey "The Proper Role of the Mediator: Rational Assessment, Not Pressure" (1994) 10 *Negotiation Journal* 367, 370.

mandatory mediation as a mistake which can be traumatic in psychological terms and further place women in physical danger. As a result, Grillo suggests that because of these possibilities, the chance of a beneficial result arising from mediation (even a significant one) cannot justify the intrusion by the state that occurs when mediation is mandatory.[71]

Further difficulties stemming from mandatory mediation lie with the illusion that the parties are making their own decisions. While it is the process to which the parties must submit which is mandatory (as opposed to an outcome or decision which must be reached), in cases where mediation is imposed the disputants will not have chosen the place or had any input into the timing of the process according to their abilities to best handle the situation. As a result, the voluntary aspect of mediation is destroyed.

In summary, the fundamental values that are often heralded in mediation raise several problematic issues when viewed in conjunction with the dynamics of spousal abuse. While difficulties exist with these core principles and, to a large degree, can be controlled by a mediator using effective strategies to minimise the effects, the dynamics of domestic violence intensifies these problems and simultaneously introduces new ones. The extent of these difficulties as mentioned above is such that consideration needs to be given as to whether mediation ought be used at all as a means of resolving conflict between disputants who have a history of domestic violence.

3 *Adapting models of mediation to suit domestic violence*

As discussed earlier in this paper, mediation represents an attractive alternative in family disputes by empowering the parties to devise agreements that meet their specific needs. The emphasis in mediation

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71 Trina Grillo "The Mediation Alternative: Process Dangers for Women" (1991) 100 *The Yale Law Journal* 1545, 1609.

focuses on workable solutions rather than on who is right or wrong. Some authors contend that mediation can be adapted to account for the dynamics of spousal abuse.[72] Gerencser suggests that many family matters can be successfully mediated where abuse has not created a situation of unequal power between the parties provided that relationships characterised by chronic abuse are distinguished from cases of limited abuse where the parties can bargain on a more equal footing.[73] This, however, would require complex evaluation and selection of suitable cases. In determining between the two, screening must distinguish between relationships where the parties can mediate on equal terms despite prior episodes of abuse and relationships that experience a culture of battering where mediation on equal terms would be impossible.

Girdner has devised a Conflict Assessment Protocol (CAP) to determine whether mediation is a suitable means of resolving conflict between violent couples and focuses on two criteria: consideration of the parties' ability to negotiate effectively and the potential for future violence.[74] In screening for domestic violence and assessing the parties' suitability for mediation, Girdner's CAP involves separate meetings with each party, asking general questions about patterns of decision making in the relationship, conflict management and the ways in which anger is expressed. Specific questions relating to abusive behaviour, including physical and emotional abuse, issues of control and drug and alcohol abuse are put first to the female participant to avoid a situation where the male disputant could influence his partner's responses. Following the interview process, the parties' responses are assessed into three categories: those where the parties are likely to benefit from mediation conducted in the usual manner, those who are likely to benefit from mediation if specific ground rules, resources and skills are applied; and finally, those disputants who are likely to experience harm from participation in mediation.

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72 See articles by Perry at n 57 and Girdner at n 58.

73 Above n 60.

74 Above n 58.

In the first example, where the disputants are likely to benefit from mediation conducted in the usual manner, the mediator acts an as impartial third party and facilitates the parties to arrive at a mutual agreement. This includes procedures such as power balancing, establishing and monitoring ground rules (such as no interrupting or name calling, for example). Control is not a central feature of the relationships which fall into this first category and there is no distinct pattern of abusive behaviour. However, if one party was discovered to be fearful of the other, it would exclude them from this first category.

The second category where parties will benefit from mediation if specific ground rules, resources and skills are applied requires a mediator to be knowledgeable about the dynamics of domestic violence, its impact on the parties and any children of the relationship. A mediator must also demonstrate highly developed mediation skills especially in relation to their ability to balance power in addition to having a considerable network of community resources available. This category requires the abuser to acknowledge past abuse and also encourages victims to seek law enforcement remedies such as protection orders and police involvement.

The third group embraces those people likely to experience harm from participating in mediation. Disputants falling into this category are likely to be those where the parties are unable to negotiate or indicators exist which tend to suggest the abuser is capable of causing serious injury or killing his spouse. Also falling within this category are abusers who do not accept responsibility for their violence under category two above; disputants who have obtained or are making plans to get a weapon or if they have used a weapon against a partner in the past; those disputants who have previously been convicted of assault; those who are constantly jealous and violent or have fantasies about killing their partner and/or children or who may have attempted this and those who have previously threatened suicide.

In developing special safeguards and rules such as those described in Girdner's CAP above for the use of mediation in situations of domestic violence, provided monitoring and on-going contact is maintained with the parties, mediation may be able to be adapted to take account of the dynamics of spousal abuse in limited situations. In cases where mediation is deemed inappropriate, then alternatives to mediation should be offered to the parties.

C Suitability of Mediation and Domestic Violence

Feminist writers such as Lerman[75] view mediation, as a remedy for spousal abuse, as based on misconceptions about the nature of wife abuse and argue that mediation fails to protect women from subsequent violence and perpetuates continued victimisation.

Lerman identifies two models of domestic violence mediation: a conciliation model and a law enforcement model; and articulates a law enforcement critique of domestic violence mediation. Under a conciliation model, mediation is used on the basis that family life should be protected from the intrusiveness of the justice system and that problems existing within families are best resolved using informal methods that will assist the parties communicate more effectively with each other. The law enforcement approach to spousal abuse on the other hand uses the formal powers of the legal system to protect the victim and also operates to punish and deter the alleged offender from committing subsequent acts of violence.

In determining whether mediation and domestic violence are well suited for conflict resolution, it is pertinent to consider the goals and structural features of mediation.

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75 Above n 49.

1 *Critique of mediation goals*

First, the objectives of mediation can be summarised as seeking to reach a mutually satisfactory agreement, reconciling the parties in order to foster an on-going relationship and recognition of mutual responsibility for past problems. An impasse is created when these goals are considered alongside the aims of a law enforcement approach to spousal abuse. Specifically, the goals of mediation are diametrically opposed to the purposes of domestic violence legislation, namely that of affording safety and protection for the victim by ultimately seeking to stop the violence.

Lerman argues that advocates of mediation justify limited intervention into family disputes with arguments that have an unrealistic view of family life.[76] Fuller, for example, characterises conflict between a husband and wife as so personal or inconsequential as to be outside the scope of formal legal interventions:[77]

> *[T]he internal affairs of the marriage have generally been thought to be inappropriate material for regulation by a regime of formal act-oriented rules, whether imposed by law or by contract. There are, for example, no laws in the books prescribing which spouse is responsible for helping the children with their school work or allocating between husband and wife the right to invite their respective relatives to make weekend visits.*

As indicated in an earlier part of this paper, Fuller maintains that married life is too complex and variable to be formally regulated; the marriage partnership should not be governed by such rigidity as would be imposed by the formality of legal rules which *"...would be destructive of the spirit of mutual trust and confidence essential for the success of a marriage."*[78] Contrary to this notion is that mooted by Mnookin and Kornhauser who

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76 Above n 49, 78.
77 Above n 12, 330.
78 Above n 12, 331.

argue that negotiation in areas of family law occurs in a setting of formal regulation, i.e. that bargaining occurs in the shadow of the law which gives each disputant bargaining claims.[79]

While arguing that dyadic and familial relationships are eminently suited to the mediation process, Fuller's logic (which, prima facie, could be described as sound) reflects an antiquated view of the institution of marriage as a life-long and blissful union between two people. Fuller fails to take account of the many partnerships characterised by uncertainty, cruelty and abuse where confidence and trust in one's partner has long since deteriorated. It is submitted that act-oriented rules in these instances are imperative in the retaliation of society against spousal abuse. Formal legal requirements are necessary to encourage women to speak out, be heard and seek protection from assaults by their violent partners.

Many proponents of ADR and those who contend mediation can be manipulated to account for the dynamics of domestic violence fail to acknowledge that adversarial proceedings will often be the best method of affording protection to peoples rights. Unlike the softer option of mediation, which glosses over past actions, and encourages responsibility to be taken by all parties and ultimately legitimises violence; the legal system has the power to intervene on behalf of the weaker party, to punish and deter and does not perpetuate further abuse and can be described as more effective in stopping violence from reoccurring.

2 *Structural difficulties with mediation*

There are a number of structural defects within mediation that make it unsuitable for resolving conflict between couples with a history of domestic violence. First, absent an agreement which is turned into a court order by a Judge which may provide a degree of protection, there is no legally

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79 Above n 15.

enforceable agreement which stems from an informal mediated settlement. A resolution which has no legal "teeth" is likely, therefore, to exist only in terms of a masquerade. Contrary to evidence which suggests that mediation produces agreements more durable than those produced in adversarial settings, outcomes that emerge from mediated negotiation between an abuser and his victim are based on deception and clandestine coercion which could never be argued as a foundation for on-going relations and future stability.

Secondly, mediation alone does not (and indeed can not) adequately punish or deter behaviour described in current domestic violence legislation as serious and actions which will be responded to by the criminal justice system. The failure of mediation to adequately respond to this, conveys a message to abusers that violence within the family is acceptable to society and, in effect, has the further end of serving to legitimise and decriminalise the abuser's conduct. Finally, for the reasons mentioned above, as an informal process mediation cannot therefore be described as an effective remedy for the protection of victims of domestic violence without the additional consolidation of formal legal procedures specifically designed with safety and protection in mind.

On the basis of the above, mediation can be viewed as offering ineffective and weak legal solutions to victims of spousal abuse. In addition, the private and confidential nature of mediation constitutes further endangerment to women as it returns domestic violence to its position of two decades ago - within the family domain and hidden behind closed doors. Further, with mediation there are no procedural guarantees of accountability or consistency in the handling of cases by different mediators.

A law enforcement model of protecting victims of domestic violence is not an infallible one as the same social values which have historically prevented

effective intervention by society continue to exist in cases of spousal abuse. From a theoretical point of view, while a model of law enforcement is more likely to be a better response in attempting to combat spousal abuse, in practice, however, problems can arise at the implementation stage.

In cases where mediation does proceed, the mediator has a duty to remain neutral which poses problems in fulfilling the role of advocate. Abused women will often be unaware of their rights or poorly equipped to assert their wishes especially before their abusers, the presence of a third party, therefore, may be able to better articulate the victim's needs. Further, an advocate on behalf of the abuser may help to foster an atmosphere where communication is possible. Mediators will require training on the nature and causes of abuse and how their responses can either remedy or perpetuate the likelihood of future violence. Mediated outcomes between couples with a history of spousal abuse would require significant resources for monitoring compliance with agreements. In relation to today's economic climate, in people and dollar terms this is perhaps too costly and unrealistic to implement when other, more preferable, avenues such as adversarial proceedings exist and can be more easily enforced.

VI CONCLUSION

On the broader analysis even in an overburdened legal system, mediation is not a desirable remedy for resolving conflict between partners with a history of spousal abuse. Notwithstanding evidence gleaned from different theoretical perspectives relating to the merits and values of mediating dyadic and familial relationships, when factors relating to the history and dynamics of domestic violence are added into the equation it becomes apparent that mediation in both a criminal and civil context is clearly inappropriate. Problems inherent in domestic violence compound existing complexities within the informal process to make issues of empowerment

and neutrality unworkable. As a wolf in sheep's clothing, the goals of mediation, in addition to structural difficulties, are fundamentally inconsistent with a law enforcement model of stopping violence in the home, and serve to legitimise and even decriminalise spousal abuse.

The effect of mediation in this context will neutralise the achievements of the women's movement by removing safeguards and exposing abused women to coercive bargaining techniques. As an informal process, mediation in the presence of spousal abuse works against the disadvantaged and worsens existing inequalities in order to pursue private interests at the expense of public interests. As a result, a law enforcement approach is more valuable and more effective if the responsibility of domestic violence is placed where it belongs - on the shoulders of abusers in order to demonstrate that serious consequences flow from repeated episodes of abuse.

As a post-script, abuse should be seen as the primary issue, with custody issues and matters of property division viewed as secondary problems in the context of avoiding continued violence. Finally, there are no "minor" cases of abuse. Any form of domestic violence whether verbal or physical is insidious and coercive in nature and typically develops and escalates into violence of a more serious nature. Any argument, therefore, which suggests that an informal mediation process is unsuitable in cases of serious abuse, (but suited to lesser instances) is untenable.

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APPENDIX

"Property", in relation to a person, means property that—

(a) The person owns; or

(b) The person does not own but—

(i) Uses or enjoys; or

(ii) Is available for the person's use or enjoyment; or

(iii) Is in the person's care or custody; or

(iv) Is at the person's dwellinghouse:

"Protected person", in relation to a protection order, means—

(a) The person for whose protection the order is made:

(b) Any child of that person's family:

(c) Any person for whose benefit the order applies pursuant to a direction made under section 16 of this Act:

"Protection order" means an order made under section 14 of this Act; and includes a temporary order made under that section:

"Registered foreign protection order" means a foreign protection order that is registered in a Court pursuant to section 97 of this Act:

"Registrar" means the Registrar of a Court; and includes a Deputy Registrar of a Court:

"Representative",—

(a) In relation to a child, means a guardian *ad litem* or next friend appointed, pursuant to rules of Court, to take proceedings under this Act on behalf of that child:

(b) In relation to a person to whom section 11 of this Act applies, means a guardian *ad litem* appointed, pursuant to rules of Court, to take proceedings under this Act on behalf of that person:

(c) In relation to a person to whom section 12 of this Act applies, means a guardian *ad litem* appointed, pursuant to that section, to take proceedings under this Act on behalf of that person:

"Respondent" means the person against whom an application has been made for an order under this Act; and includes a person (other than an associated respondent) against whom an order is made under this Act:

"Secretary" means the chief executive of the Department for Courts:

"Special condition", in relation to a protection order, means any condition of the order imposed pursuant to section 27 of this Act:

"Specified person" means a person for whose benefit a protection order applies pursuant to a direction made under section 16 of this Act:

"Standard condition relating to weapons" means the standard condition contained in section 21 of this Act:

"Temporary order" means an order of limited duration that is made on an application without notice:

"Tenancy order" means an order made under section 57 of this Act; and includes a temporary order made under that section:

"Tenant", in relation to any dwellinghouse, includes any person—

(a) Whose tenancy of that dwellinghouse has expired or been determined; and

(b) Who is for the time being deemed, pursuant to any enactment or rule of law, to continue to be the tenant of the dwellinghouse;—

and "tenancy" has a corresponding meaning:

"Use domestic violence", in relation to any person, means to engage in behaviour that amounts to domestic violence against that person:

"Weapon" means any firearm, airgun, pistol, restricted weapon, ammunition, or explosive, as those terms are defined in the Arms Act 1983.

Cf. 1982, No. 120, s. 2

3. Meaning of "domestic violence"—(1) In this Act, "domestic violence", in relation to any person, means violence against that person by any other person with whom that person is, or has been, in a domestic relationship.

(2) In this section, "violence" means—

(a) Physical abuse:

(b) Sexual abuse:

(c) Psychological abuse, including, but not limited to,—

(i) Intimidation:

(ii) Harassment:

(iii) Damage to property:

(iv) Threats of physical abuse, sexual abuse, or psychological abuse:

(v) In relation to a child, abuse of the kind set out in subsection (3) of this section.

(3) Without limiting subsection (2) (c) of this section, a person psychologically abuses a child if that person—

(a) Causes or allows the child to see or hear the physical, sexual, or psychological abuse of a person with whom the child has a domestic relationship; or

(b) Puts the child, or allows the child to be put, at real risk of seeing or hearing that abuse occurring;—

but the person who suffers that abuse is not regarded, for the purposes of this subsection, as having caused or allowed the child to see or hear the abuse, or, as the case may be, as having put the child, or allowed the child to be put, at risk of seeing or hearing the abuse.

(4) Without limiting subsection (2) of this section,—

(a) A single act may amount to abuse for the purposes of that subsection:

(b) A number of acts that form part of a pattern of behaviour may amount to abuse for that purpose, even though some or all of those acts, when viewed in isolation, may appear to be minor or trivial.

(5) Behaviour may be psychological abuse for the purposes of subsection (2) (c) of this section which does not involve actual or threatened physical or sexual abuse.

4. Meaning of "domestic relationship"—(1) For the purposes of this Act, a person is in a domestic relationship with another person if the person—

(a) Is a partner of the other person; or

(b) Is a family member of the other person; or

(c) Ordinarily shares a household with the other person; or

(d) Has a close personal relationship with the other person.

(2) For the purposes of subsection (1) (c) of this section, a person is not regarded as sharing a household with another person by reason only of the fact that—

(a) The person has—

(i) A landlord-tenant relationship; or

(ii) An employer-employee relationship; or

(iii) An employee-employee relationship—

with that other person; and

(b) They occupy a common dwellinghouse (whether or not other people also occupy that dwellinghouse).

(3) For the purposes of subsection (1) (d) of this section, a person is not regarded as having a close personal relationship with another person by reason only of the fact that the person has—

(a) An employer-employee relationship; or

(b) An employee-employee relationship—

with that other person.

(4) Without limiting the matters to which a Court may have regard in determining, for the purposes of subsection (1) (d) of this section, whether a person has a close personal relationship with another person, the Court must have regard to—

(a) The nature and intensity of the relationship, and in particular—

(i) The amount of time the persons spend together:

(ii) The place or places where that time is ordinarily spent:

(iii) The manner in which that time is ordinarily spent;—

but it is not necessary for there to be a sexual relationship between the persons:

(b) The duration of the relationship.

5. Object—(1) The object of this Act is to reduce and prevent violence in domestic relationships by—

(a) Recognising that domestic violence, in all its forms, is unacceptable behaviour; and

(b) Ensuring that, where domestic violence occurs, there is effective legal protection for its victims.

(2) This Act aims to achieve its object by—

(a) Empowering the Court to make certain orders to protect victims of domestic violence:

(b) Ensuring that access to the Court is as speedy, inexpensive, and simple as is consistent with justice:

(c) Providing, for persons who are victims of domestic violence, appropriate programmes:

(d) Requiring respondents and associated respondents to attend programmes that have the primary objective of stopping or preventing domestic violence:

(e) Providing more effective sanctions and enforcement in the event that a protection order is breached.

(3) Any Court which, or any person who, exercises any power conferred by or under this Act must be guided in the exercise of that power by the object specified in subsection (1) of this section.

6. Act to bind the Crown—This Act binds the Crown.