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# **Elizabeth's Story: Exploring Power Imbalances in Divorce Mediation**

SCOTT H. HUGHES\*

The first call came late on a Sunday evening in early January 1992 from Marian, Elizabeth's neighbor.<sup>1</sup> Marian recounted the saga of the holiday that Elizabeth Maguire had just been through. While visiting Elizabeth's relatives in Newark, New Jersey, more than 1,500 miles from home, Paul, Elizabeth's husband, had left abruptly, driving back home to Wichita, Kansas, taking their oldest daughter, Katy, age six, with him. He had abandoned Elizabeth and their youngest daughter, Megan, age three, in Newark. Before leaving, he wrote a check to Elizabeth for \$500 but, immediately upon arriving home, stopped payment. He then refused to send her money or airplane tickets unless she vowed to "change her ways." Elizabeth was forced to stay with her parents, because neither she nor her parents had the funds necessary for Elizabeth and Megan to return home. And, if they did return, to what would they come? Elizabeth had no place to live, no financial resources, nor any support network upon which to call.

Over the next week, Marian spent several hours in my office talking about Elizabeth's situation and asking how I could help. Marian, who lived in the apartment immediately below Paul and Elizabeth, was a confidant to Elizabeth and a grandmother figure for the two girls. She described at length Elizabeth's monastic lifestyle, which was controlled by a seemingly angry and autocratic husband. Marian discussed Paul's numerous and frequent outbursts, some that lasted up to an hour.

After several lengthy conversations with Marian, she instructed me to call Elizabeth directly and gave me her parents' phone number in Newark. Over the next eight weeks, with Elizabeth still at her parents' home, I spent many hours on the phone explaining the legal process over and over and helping her understand the options available and the protection that the law might provide.

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1. The names and locations have been changed and some other facts generalized to protect client confidentiality.

Elizabeth was reluctant to go into details over the phone about either emotional or physical abuse and only mentioned one incident several years prior. Proof of the abusive nature of the relationship, however, arrived in early February when Elizabeth sent a copy of a letter Paul had written to Elizabeth's parents in October 1990. In the six page, single-spaced letter, Paul attempted to justify his physical violence toward Elizabeth.

Paul started the letter by insulting Elizabeth's siblings, stating that they have "virtually no maturity. They are arrogant, but they have no honor . . . . [T]hey are only commonly polite and extremely inconsiderate [and] have no social skills . . . ." Paul then turned his attention to Elizabeth: "During the thirteen years of marriage . . . Elizabeth has managed to offend virtually every friend we have. They consistently forgive her because they look upon her as being naive and, being a foreigner, interesting." Elizabeth was born and lived in Portugal until after she and Paul were married, when she moved to the United States. Paul attempted to justify his violence by describing Elizabeth's conduct:

I have, time and again, with varying degrees of success and volume, tried to bend her outlook and rhetoric. Over the years, it has become clear to me that she does not readily respond to diplomatic criticism. Screaming and intimidation have been frequently more successful. At times, when there is no alternative but to do things in a certain, specific way, I have resorted to violence to get the job done. Situations deteriorate from:

Maybe we should re-assess this.

to

I don't think this is a good idea.

to

This is a bad idea.

to

If you do this, it will alienate us.

to

I'm not going to let you do this.

to

If you do this, I will destroy the kitchen.

to

If you do this, I will break your arm.

(Threat only)

to

If you do this, I will break both legs  
and your neck. (At which time, I am no  
longer threatening — I am 100% sincere.)

And, she frequently does not learn from such situations . . . . While it is not something that I want to move to, destruction of property and threat to both life and limb have been successful . . . . [V]irtually never have Elizabeth and I been a husband and wife team. Unfortunately, I started out as her father and teacher and have digressed to the roles of financial supporter and nag. I look at her most of the time as a problematic daughter and mother of my children, through immaculate conception.

After more criticism of Elizabeth's family, he turned back to Elizabeth:

Along these lines, I fear that I may have broken Beth's spirit. I hope not. I hope that what damage has been done can be healed. In any case, I have only done what was necessary to accomplish the goals of food, housing, security and retirement. And, she has certainly taken her toll on me.

\* \* \*

[B]ecause my patience has run completely out[,] I no longer use the diplomacy and tact which I have always been so proud of. Instead, regretfully, I now turn rapidly to vulgarities . . . . [C]ontinuation of the same old situation does not lend itself to an improved outlook. Rude, blunt, and crude comments have only *one* attribute over diplomacy: [t]hey leave not the smallest question as to one's viewpoint.

He then added the following postscript: "I have always thought it ironic that the word in Portuguese for girl, *garota*, is so similar to the word in English, *garrote*, for strangle."

Elizabeth was still with her parents on Valentine's Day, when Paul sent two heart shaped boxes of chocolates to Elizabeth and her family. The larger box was marked for Elizabeth and Megan and was still wrapped in the transparent, red foil. The smaller box, marked for Elizabeth's parents and family, had no wrapper and came open easily. The two cards which accompanied the candy carefully directed who was to get each box.

Further inspection of the chocolates in the smaller box revealed that each piece had been cleanly punctured with something about the diameter of a pencil lead. Elizabeth called the Newark Police who, after much delay, decided not to test the chocolates because no one had been harmed. The authorities back in Wichita were interested, but the state crime lab was not. Criminal case closed. Since we had no idea what might have been placed in the chocolates, and since private testing was prohibitively expensive, the idea had to be shelved. During one of his depositions, Paul admitted to tampering with the candies but denied that they were poisoned. He insisted that he did it only as a joke.

Shortly after Valentine's Day, Elizabeth received a lengthy letter from Paul. Again he criticized Elizabeth and her family and demanded that Elizabeth start communicating with him and developing a "plan" for returning home to him or for filing for a divorce: "For most of our marriage,

you were a taker and I was a giver. You are still a taker. The only real change has been in me. I no longer am willing to give without some guarantee of reciprocation."

The letter to her parents, the chocolates, and this final letter were all typical of Paul's anger and his need for absolute control. Elizabeth spent most of her time walking around on eggshells trying to keep Paul from losing his temper. She was a co-dependent caretaker who enabled Paul's conduct for many years hoping upon hope that she could change him for the better.

Paul and Elizabeth were married in Elizabeth's native Portugal in the fall of 1977. She was twenty-one, and he was twenty-six. Elizabeth, one of six children, came to the United States for the first time after her wedding. Paul's parents were active in community and statewide politics. Paul carried a well-known name and was respected in the business community.

After more than fourteen years in this country, Elizabeth still speaks with a pronounced accent and, though outwardly very bright, at times has difficulty with vocabulary and expression of abstract concepts. Even though eligible for citizenship, she has never been naturalized. Elizabeth has lived an essentially cloistered lifestyle and, besides her friendship with Marian, who is thirty years her senior, has lived entirely within Paul's sphere of influence. The more I spoke with Elizabeth, the clearer it became to me that she had been stuck in a vicious cycle in her marriage, dancing in ever tightening circles of abuse and isolation as the years passed.

Paul's sphere of influence extended to Elizabeth's finances as well. Although I conservatively estimated the net marital estate at \$750,000, the family had lived well below their means in a small, two bedroom apartment in a six-plex that they owned in a lower-middle class neighborhood. Their primary source of income came from the ownership and management of a seasonal restaurant that was open from mid-March to mid-November. Paul "paid" Elizabeth a salary while the business was open. Each fall, when the business closed for the winter, he pushed her into filing for unemployment insurance to provide another source of income. Beyond this, they lived on credit cards until the business reopened in the spring. None of the credit cards were held in Elizabeth's name. Unfortunately, Elizabeth had not filed for unemployment in the fall of 1991. She had neither a source of income nor any checking accounts with any appreciable balances when Paul stranded her in Newark.

Elizabeth filed for divorce in March 1992 while she was still with her relatives. We were able to obtain a protective order but not a favorable support order. At the hearing, the court ordered Paul to vacate the family apartment, allowing him to take up residence in the other six-plex they owned, and to make all of the periodic payments, including utilities, insurance, and Elizabeth's car payment. Paul also was ordered to pay

Elizabeth a meager monthly allowance of \$500. This amount was far below what the marital estate could afford and, more importantly, what Elizabeth needed in order to have some degree of autonomy. After this hearing, Paul offered to provide the funds to allow Elizabeth and Megan to fly home from Elizabeth's parents.

Elizabeth and Megan arrived home in early April 1992. Shortly after the homecoming, Paul had one of his shouting episodes in the hallway and on the lawn outside of Elizabeth's apartment. In response to his outburst, Elizabeth signed an application for a no-contact protective order, which the court signed. Within two weeks, however, Elizabeth began to ignore the order and started having fairly frequent contact with Paul during the summer of 1992. This rendered the order virtually unenforceable. The contacts between Paul and Elizabeth were neither romantic nor for purposes of reconciliation, but for talking about, and sometimes fighting about, the pending divorce. Although Elizabeth became more and more convinced that a divorce was inevitable, I continued to be concerned about her emotional strength and advised her not to see Paul except for purposes of arranging visitation.

After filing for divorce, we concentrated on the custody battle. Throughout the spring and early summer, custody remained the same as when Paul deserted Elizabeth; Katy lived with Paul and Megan with Elizabeth. Both had extensive visitation. Although I advocated an immediate change, Elizabeth was not willing to upset the current balance and would not allow me to file a motion for temporary custody. However, we obtained a court order for psychological examinations with an emphasis on evaluating each spouse's parental abilities. Paul's attorney agreed to use Dr. Arthur Levine, a local psychologist. Dr. Levine met separately with each spouse on several occasions. He then met with Elizabeth and the children, followed by a meeting with Paul and the children. These examinations gave further insight into the psychological dynamics of the marriage. Dr. Levine found that Elizabeth evidenced:

[a] moderately severe emotional disturbance [with] signs of very intense passive-dependent tendencies and an extreme personality impoverishment . . . . She strongly to severely dampens her own tendency to respond to outer arousing stimuli . . . . Overall Mrs. Maguire seems to be concerned, perplexed, and apprehensive about her own normality particularly in regard to her interpersonal sex role. She seems strongly frightened of harm from an aggressive person in her life (obviously her husband . . .).

While Elizabeth's emotional disturbance was moderately severe, Paul's imbalance was:

moderately to intensely severe in the form of a character disorder. A character disorder is an underlying emotionally disturbed condition with

intense feeling of anxiety and depression that the person experiences as being caused by other people rather than their own internal struggles . . . . [T]here is a deep and pervasive ingrained depression that generates a rigid obsessive caution and an inner sense of apprehension when he does not get his way in interpersonal relationships. The personality disorder defenses that he utilizes are a combination of narcissistic and cyclothymic traits. The narcissistic traits are connected to extremely strong feelings of egocentricity. When strongly stressed he is extremely likely to behave in very self-focused ways that do not take into account the other person's needs and feelings whom he is dealing with. The personality disorder defenses that are involved are partially cyclothymic defenses which involve an excessive sensitivity and irritability emotionally that leads to an emotional ability in that the person responds very quickly and deeply in a very demanding way when their inner needs are touched off. Furthermore, there are intense signs of inadequate emotional controls and serious psychological disturbance because Mr. Maguire is unable to pay sufficient attention to the actual events in the outer environment. Rather, his deep inner needs are blocking a clear perception of outer events. These inner needs consist of a combination of deeply frustrated needs for emotional affection and an over dependence on the affection of others to maintain his self-esteem . . . . At best, he is going to communicate with others only on his own terms.

Dr. Levine concluded that Paul's "inner deep despair" was not related solely to his marital difficulties, but that "[t]here [were] multiple signs of the ingrained nature of Mr. Maguire's needing to have his own way to avoid such feelings of deep inner despair."

Although Dr. Levine found that Paul was capable of bonding with the children, he stated:

There are numerous signs — his own inadequate emotional controls, the deeply frustrated affection needs, and the over dependence on the affection of others, his excessive sensitivity and irritability emotionally that leads to a querulously demanding style, his extreme egocentricity, and his evasiveness in dealing with people directly and appropriately — all [of which] indicate that under times of extreme emotional stress he is extremely likely to not be able to put the children's needs first on a regular basis . . . .

The letters forwarded to this examiner indicate that Mr. Maguire tends to use power tactics to try to get what he wants when frustrated. He has clearly done this with his wife . . . . When strongly stressed it is extremely likely that if his children challenge him he would also use such power tactics against them.

Dr. Levine also voiced strong concerns about Elizabeth's abilities to ad-

equately parent the children, but found that Paul's

deep need to have a close relationship with a woman that is focused mostly exclusively on meeting his own needs and his tendencies to get at least verbally if not violently coercive when frustrated indicate that he is extremely likely to not be a good candidate to stay an appropriate parent to either girl should they begin challenging him (which would be an age appropriate development in their life course).

Dr. Levine concluded his report by recommending that Elizabeth be made the custodial parent. Despite having the benefit of Dr. Levine's evaluations and recommendation, Elizabeth abdicated. She agreed, against my recommendation, to the existing split custody arrangement shortly after Dr. Levine issued his report.

Although the custody issue had been resolved by late October, the financial discovery would not be complete until after the first of the next year. By January 1993, very little progress was made toward settling issues of property division, alimony, or child support. Early on, Paul had proposed that he "give" one rental property to Elizabeth free of debt while he retain the remaining assets. Key to Paul's position was his belief that the assets in the marital estate were derived from gifts and inheritances from his family which had been parlayed through the sweat of his brow.

Under state law, property received from family by gift or inheritance is to be set aside to the recipient unless it is clear that the gift was intended for both spouses or unless to do so would be inequitable to the other party or the children. He asserted that gifts and inheritances from his grandfather and mother had been used for down payments on assets or as collateral for loans to purchase many of the properties and that, therefore, those properties should be set aside to him. This included most of the valuable assets. Our discovery showed that the vast majority of the gifts and inheritances had been intermingled with the marital estate and had lost their separate and protected status. Further, these assets constituted only a small portion of the estate. Based upon research, I concluded that Paul's assertions generally would not hold up in court.

Elizabeth initially considered the offer to be an attractive solution. It would give her the six-plex where she lived. She would not have to move, and the rental income from the other apartments looked substantial. The value of the apartment building, however, amounted to only fifteen percent of the estate, which included two six-plexes, several rental homes, a valuable ground lease, a small business, and development rights for a fast-food franchise. I advised her that this was substantially less than she could expect to recover in court. She would have income from only five other apartments. After deducting maintenance expenses, property, and income taxes, she



would have very little with which to work. After Elizabeth compared the income from the six-plex with her proposed budget, she finally agreed that Paul's proposal was not a viable solution.

As the decision on custody receded, Elizabeth's desire to obtain a fair resolution of the financial issues seemed to increase. Elizabeth met an accountant at church who had extensive experience working with clients going through a divorce. From our discovery, the accountant developed values for each asset and ran cash flows based upon various combinations of assets. These projections were then compared with budgets Elizabeth and the accountant prepared. We then tried to devise settlement strategies that would hopefully appeal to Paul, meet Elizabeth's needs, and divide the estate roughly in half. Elizabeth's confidence in the accountant grew, and she became more and more willing to rely on his opinions about the economic impact of any decisions. The three of us developed into a strong team.

Throughout the rest of 1992 and into early 1993, Paul did not budge from the initial offer of the one six-plex, even though we presented several different options as discovery progressed. It appeared that a trial on these issues was inevitable. On the eve of trial, Paul's counsel suggested a final pre-trial conference with the judge. This was a thinly veiled attempt at a settlement conference in which, I assumed, counsel thought that the trial judge would "suggest" a settlement closely aligned with the arguments she had been making on behalf of her client. In this way, the matter could be resolved quickly without the need for a trial. Feeling that our position was quite defensible, I had no problem with this meeting.

When we met with the judge in chambers, Paul's counsel started with a lengthy and detailed description of the assets, most of which was undisputed. She then tried to establish the separate nature of most of the assets, based upon claims about their gifted and inherited nature. I then went through the trail of documents to show that all of the assets were part of the marital estate or that a substantial portion of their value should be included in the estate which was to be divided equitably between the parties. Much to counsel's chagrin, the judge suggested a property split which treated Elizabeth much more generously than anything offered by Paul or previously proposed by us. The conference concluded quickly and, over the next hour and a half, we shuttled back and forth between our clients attempting to settle the matter. Although Paul talked in circles and some cracks began to appear in his position, the matter could not be settled.

After the conference with the judge, Paul's counsel suggested mediation. Elizabeth, wanting to avoid trial, agreed. A continuance was granted, and mediation was scheduled. Present at the mediation, along with the mediator, the parties, and their attorneys, was a paralegal for Paul, one of my paralegals, and our accountant. I carefully arranged the seating so that

Elizabeth did not sit near or directly across from Paul. Although the room was relatively small, I wanted her to avoid excessive eye contact with Paul. The mediator allowed the parties to speak through counsel, although each was encouraged to take part. The session took all day.

Although the increments of change were small, the parties, with the guidance of the mediator, started moving toward each other. As the process continued, I became more and more concerned about Elizabeth's concessions and worried that she was much more intent on disposing of the dispute than resolving it. I felt that a trial would provide a great deal of up-side potential with little down-side risk, which I explained to Elizabeth at length in private sessions.<sup>2</sup> My concerns were echoed by Elizabeth's accountant.

I also became concerned about the conduct of the mediator. Although the mediator was aware of the approximate range that the judge would use if the matter went to trial, he did little more than monitor the discussions and shuttle back and forth between the parties with various proposals. Late in the session, when he stood up to leave our caucus, Elizabeth put her hand on the mediator's arm and said, "Paul is being very unreasonable, isn't he?" The mediator agreed and left the room. Unfortunately, the mediator took no other steps. Between caucuses with the mediator, we kept trying to devise methods to move Paul toward the middle. We also kept trying to bolster Elizabeth.

After a series of private caucuses, a vague format of a settlement began to materialize. Unfortunately, the accountant and I both felt that we were far away from a fair settlement. However, Elizabeth did not want to break off the mediation. When the parties reconvened to review a partial, tentative agreement, Paul appeared morose. During this conference, Elizabeth leaned across the table and said to Paul, "I want you to feel the settlement is fair."

Although the mediation session ended without a concrete settlement, a few points were settled and the basic framework for settlement of the remaining issues was constructed. Paul's counsel offered to reduce the agreement to writing and to fill in the remaining blanks with proposed language. Several more drafts exchanged hands and, a few weeks later, Elizabeth agreed to the terms of the proposed decree.

The final agreement gave Elizabeth one of the six-plexes (debt free) and a forty percent interest as a tenant-in-common in the single largest asset, a ground lease. The bank reamortized the debt a few months later to match the income from the ground lease. Her income for about ten years was limited to the net return from the six-plex in which she resided. She gave up all other interests, including the franchise rights, seasonal business, lake

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2. In December of 1992, after the trial date had been set and the scope of the remaining work came into focus, Elizabeth and I agreed to a set fee for my services whether the case settled or went to trial. Taking the matter to trial was clearly against my own personal economic interests.

cabin, and all of the rental properties. The agreement represented only a marginal improvement over Paul's position prior to mediation and was, in my opinion, far less than what she would have received from the trial court. The settlement was less than the return in the worst-case scenario for going to trial.

### INTRODUCTION

This is Elizabeth's story. It has had and will continue to have a profound effect on my thinking and attitudes about divorce mediation. Many spouses enter the divorce process with severe deficits in their abilities to deal with the emotional, economic, intellectual, and logistical issues which arise. Whether it is as a result of abuse,<sup>3</sup> inexperience, ignorance, socialization, or the grieving process, many can not assimilate information or deal with

#### 3. The National Center on Women and Family Law has defined abuse as:

an act or acts by one [spouse] that serve to intimidate or control the other. The behavior may range from criminal acts causing or threatening physical harm, to non-criminal acts that destroy her ability to act independently. The conduct may include:

- any acts causing physical pain or harm . . .
- verbal threats to injure or kill . . .
- verbal criticism of the victim that impairs her self-esteem and makes her emotionally dependent on the abuser for approval, affection or companionship
- his unwanted presence at her home, workplace, or school, or his monitoring of her activities at these or other places (in person or by telephone)
- trespass or destruction to property in which she has an interest, even if he is an owner . . .
- exercising control over property in which she has an interest . . .
- physical confinement . . .
- the use of any of the above threats or actions, or other actions, to control the victims conduct, such as: whether she works outside her home, and on what terms, whether or where she attends school, and on what terms, how she uses her money or property, who she sees and under what circumstances she sees them
- attempts to commit any of the above acts
- any of the above acts committed against persons close to the victim, including her children.

NATIONAL CENTER ON WOMEN AND FAMILY LAW, *WOMAN BATTERING: THE FACTS 1-2* (1989). I believe that the phrase "acts that *destroy* her ability to act independently" in the second sentence of the definition is unnecessarily narrow because it requires the acts to eliminate her ability to act independently. A more appropriate definition would encompass "non-criminal acts that *impair* her ability to act independently." Obviously, this definition includes much more than physical abuse and can broadly be interpreted to include any behavior in which women are intimidated or controlled by men. DONILEEN R. LOSEKE, *THE BATTERED WOMAN AND SHELTERS: THE SOCIAL CONSTRUCTION OF WIFE ABUSE* 16 (1992). Most commentators, however, construct wife abuse to primarily include physical abuse. *Id.* Even when emotional abuse is included, it frequently is limited to abuse that is "severe" or even "life threatening." *Id.* at 18.

Further, the definition from the National Center on Women and Family Law is very broad in another sense because a single act would constitute abuse. However, Loseke reports that "the label, 'wife abuse,' is not really a label for an event, per se, since it is defined explicitly as a *pattern* of physical abuse, or as a continuing *series* of abusive and degrading acts." *Id.* Abuse is also

emotional issues quickly enough to adequately protect their interests. In this context, adjudication can be a very destructive force, substituting a different form of chaos for that which has just been escaped in the marriage. Although most divorces do not go to a contested hearing,<sup>4</sup> both the procedural<sup>5</sup> and the substantive dynamics of adjudication present substantial roadblocks to the development of a separate existence outside the context of a marital relationship. Mediation often is offered as an alternative to traditional adjudication that provides a "gentler" forum for the resolution of disputes.<sup>6</sup> In the context of divorce, however, there are various reasons why mediation is not advisable, especially where there exists an inequality of bargaining power between parties.

Many cases are mediated where a power imbalance adversely impacts the mediation and results in an agreement which reflects the underlying imbalance between the parties.<sup>7</sup> Although many states mitigate power imbalances through statutes that advise against or prohibit mediation if there has been abuse or a history of abuse,<sup>8</sup> many abusive relationships fail to fit the

characterized as a series of events of increasing severity and frequency. LEWIS OKUN, *WOMEN ABUSE: FACTS REPLACING MYTHS* 77 (1986).

For purposes of this Article, abuse may be an act or a series of acts which tend to impair a former spouse's ability to act independently or adequately protect her interests during negotiations or mediation. It is not continuous with power imbalance, but forms one type of power imbalance.

Because the vast majority of the victims of abuse are women, this Article uses feminine pronouns to refer to abused spouses. Women are the victims in 95% of domestic violence. Patsy A. Klaus et al., *The Victim*, in *REPORT TO THE NATION ON CRIME AND JUSTICE: THE DATA* 17, 21 (U.S. Dep't of Justice ed., 1983). See also ANGELA BROWNE, *WHEN BATTERED WOMEN KILL* 7 (1987) (citing one study finding that 91% of victims of domestic violence are women). Finally, women's injuries are nearly three times as severe as men's. Demie Kurz, *Physical Assaults by Husbands: A Major Social Problem*, in *CURRENT CONTROVERSIES ON FAMILY VIOLENCE* 88, 90 (Richard J. Gelles & Donileen R. Loseke eds., 1993). But see Katherine Dunn, *Truth Abuse*, *THE NEW REPUBLIC*, Aug. 1, 1994, at 16-17 (arguing that misinformation about domestic violence hides female violence against men). See also *infra* notes 70-86 and accompanying text (defining and discussing power).

4. With no overall statistics, we are dependent upon estimates of the number of divorces that are contested in court — probably less than ten percent. See MORTON M. HUNT, *THE WORLD OF THE FORMERLY MARRIED* 227 (1966) (estimating that practical aspects of divorce are worked out privately before going to court in approximately 90% of cases); Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations of the Limits of Legal Change*, 9 *LAW & SOC'Y REV.* 95, 108 (1974) (stating that over 90% of divorces are uncontested).

5. Even with the advent of significant reforms, such as no-fault divorce, there have "been few accompanying changes in the procedural law of divorce." Jay Folberg, *Mediation of Child Custody Disputes*, 19 *COLUM. J.L. & SOC. PROBS.* 413, 413 (1985). All of the usual accouterments of adjudication still co-exist, along with hearings over temporary support, custody, and visitation, with occasional contempt proceedings surrounding violation of no-contact or support orders.

6. Owen M. Fiss, *Against Settlement*, 93 *YALE L.J.* 1073, 1073 (1984).

7. See *infra* notes 87-94 and accompanying text (defining power and discussing the effect of power imbalance in mediation).

8. The protection afforded ranges from requiring only a claim of abuse to requiring a finding of a significant history of abuse. See, e.g., *COLO. REV. STAT. ANN.* § 13-22-311 (West Supp. 1994) (requiring only claim of physical or psychological abuse to avoid mediation); *DEL. CODE ANN.* tit. 13, § 711A (Supp. 1994) (prohibiting mediation if court finds one spouse has "committed an act of

prototypical image of an abusive relationship and will, unfortunately, escape any scrutiny. Other jurisdictions lack any safety net whatsoever.<sup>9</sup> Except for vague, occasional warnings about an inability to bargain in good faith,<sup>10</sup> prospective harm to one participant,<sup>11</sup> manipulative or intimidating bargaining techniques,<sup>12</sup> or power imbalances,<sup>13</sup> no specific, quantifiable warnings against divorce mediation exist on premises other than abuse.

Elizabeth's case was just such a case in which the marital power imbalance controlled the outcome of mediation. Whether Paul initially wanted a divorce or not was unclear. His desire was irrelevant because the abandonment of Elizabeth allowed her the time and refuge to construct a nascent support network before returning home. Had Paul sent airplane tickets within a few days or the first week or two, she may well have fallen back into the relationship and the abusive patterns it entailed.

Although the dispute was mediated nearly fourteen months after their

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domestic violence against the other" or if civil protection order is in force); FLA. STAT. ANN. § 44.102(2)(b) (West Supp. 1995) (prohibiting mediation if court finds "significant history of domestic abuse which would compromise the mediation process"); MINN. STAT. ANN. § 518.619(2) (West Supp. 1995) (prohibiting mediation if court finds probable cause to believe that physical or sexual abuse has occurred, but only if spouse will not be present with counsel); MONT. CODE ANN. § 40-4-301(2) (1993) (prohibiting mediation if court suspects physical, sexual, or emotional abuse); NEV. REV. STAT. ANN. § 3.500.2(b) (Michie Supp. 1993) (allowing court to exclude case from mediation upon "showing of a history of . . . domestic violence"); N.D. CENT. CODE ANN. § 14-09.1-02 (Michie 1991) (prohibiting mediation of custody, support, or visitation issues if it "involves or may involve physical or sexual abuse"); WIS. STAT. ANN. § 767.11(10)(e)(2) (West 1993) (requiring mediator to terminate mediation if there is evidence of interspousal battery as defined by statute). California has considered abuse as a factor, but in mandating mediation of custody and visitation, it requires only that the mediator shall meet with the parties separately and at separate times. CAL. FAM. CODE § 3181(a) (West 1994).

9. See, e.g., ALASKA STAT. ANN. § 25.24.060 (Michie Supp. 1994) (allowing court to order mediation when it would result in "a more satisfactory result between the parties"); IDAHO R. CIV. P. 16(j) (granting court discretion to order mediation if it is "not otherwise inappropriate"); IND. RULES FOR ALTERNATIVE DISPUTE RESOLUTION (1993); N.M. STAT. ANN. §§ 40-12-1 to -6 (Michie 1994); TEX. CIV. PRAC. & REM. CODE ANN. § 154.022(c) (West Supp. 1995) (requiring court finding of reasonable basis for objection to mediation before referral is prohibited); UTAH CODE ANN. §§ 30-3-20 to -31 (1989 & Supp. 1994) (establishing pilot program in section 30-3-21(4)(b) for mandatory mediation of custody and visitation issues in divorce that allows court simultaneously to direct parties to mediation while also making necessary interim protective orders).

10. See, e.g., KAN. SUP. CT. RULES Rule 901 app. at (I)(E) (West 1993) (requiring mediator to discontinue mediation if "one of the parties is not able or willing to participate in good faith").

11. See, e.g., IOWA RULES GOVERNING STANDARDS OF PRACTICE FOR LAWYER MEDIATORS IN FAMILY DISPUTES Rule 5(A) (1987) (stating duty to suspend mediation in situations causing harm) [hereinafter IOWA RULES]; KAN. SUP. CT. RULES Rule 901 app. at (II)(F)(4) (West 1993) (requiring that mediator terminate mediation if "continuation of the mediation process would harm a participant").

12. See, e.g., IOWA RULES, Rule 5(B); KAN. SUP. CT. RULES Rule 901 app. at (VI)(C) (West 1993) (requiring mediator to "attempt to diffuse any manipulative or intimidating negotiation techniques").

13. See, e.g., CAL. FAM. CODE § 3162(b)(3) (West 1994) (requiring negotiations to be conducted to "equalize power relationships between the parties").

separation, I believe that the dynamics of the relationship resulted in a severe power imbalance that, to a very large extent, controlled the outcome of the mediation. Any physical abuse had occurred many years prior to the divorce. This abuse and related emotional and economic abuse, however, rendered Elizabeth incapable of adequately dealing with Paul in a mediation setting.

The thesis of this Article is twofold. First, no reliable rules or guidelines exist to help determine if one spouse is unable to adequately protect her own interests during mediation. Second, no reliable rules or guidelines exist to help mediators determine whether or not, during mediation, a spouse can continue to adequately represent her interests.<sup>14</sup> In other words, no decent rules exist to tell us when not to mediate or when mediation should be terminated.

Mediability should be determined through an ongoing analysis of the relative levels of power between the parties, and, contrary to the approach of many rules or guidelines, cannot easily be determined by looking at any single factor, such as abuse.<sup>15</sup> Prior to mediation, steps should be taken to appropriately test and screen cases for debilitating power imbalances. When an imbalance of power during mediation threatens the ability of one spouse to make a voluntary and knowledgeable decision, mediation should be ruled out or, if in process, should be modified or terminated.

The first part of this Article contains a brief introduction to divorce mediation. It includes an outline of the various goals and attributes of the process along with a general comparison to adjudication. Part II discusses problems that appear in divorce mediation. Part III deals with definitions of power and power imbalance. Part IV addresses problems created in mediation by power imbalances. Part V discusses the duties for dealing with power imbalances. Part VI describes a system for addressing power imbalances that occur in mediation and discusses when and how a mediator should terminate a mediation when the power imbalance becomes intractable.

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14. The terminology about a spouse being able to "adequately represent her interests" is meant to relate to the definition of abuse, which includes "acts that impair her ability to act independently." See NATIONAL CENTER ON WOMEN AND FAMILY LAW, *supra* note 3, at 1-2 (defining abuse).

15. Reliance should not be placed upon abuse as the touchstone for the determination of the "mediability" of a divorce dispute. As admirable as prohibitions against mediation of abusive relationships may be, they generally do not work. See *infra* notes 47-49 and accompanying text. It is difficult to determine whether or not a relationship is or has been abusive. Abuse is a hidden crime and does not openly present itself. The finding of abuse tells us little about why such cases should not be mediated. Beyond abusive relationships, there are many cases that involve severe power imbalances which should not be mediated. Finally, and most disturbingly, so little is known about the mediation process that it is almost impossible, beyond the most general categorizations, to have a meaningful discussion about which cases should or should not be mediated. See *infra* notes 50-55 and accompanying text (discussing problems and concerns with mediation).

## I. INTRODUCTION TO MEDIATION

Mediation has been defined as "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."<sup>16</sup> It is more loosely defined as a "process that encompasses counseling-like interventions as well as more focused, problem-solving approaches."<sup>17</sup> Mediation first came into vogue as an alternative to traditional adjudication in the late 1970s.<sup>18</sup> Many states adopted statutes<sup>19</sup> or court rules<sup>20</sup> concerning family mediation. Others also issued rules<sup>21</sup> or passed legislation<sup>22</sup> encouraging or requiring attorneys to advise clients about mediation and other forms of alternative dispute resolution.<sup>23</sup>

The parties enter the mediation process seeking the mediator's assistance

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16. CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* 14 (1986).

17. Jessica Pearson et al., *A Portrait of Divorce Mediation Services in the Public and Private Sector*, 21 CONCILIATION CTS. REV. 1, 24 (1983).

18. KIMBERLEE K. KOVACH, *MEDIATION: PRINCIPLES AND PRACTICE* 20 (1994).

19. See, e.g., COLO. REV. STAT. ANN. §§ 13-22-301 to -313 (West 1990 & Supp. 1994); N.M. STAT. ANN. §§ 40-12-1 to -6 (Michie 1994). See also *supra* notes 8-13 and accompanying text (discussing state statutory responses to power imbalances in mediation).

20. See, e.g., IOWA RULES, *supra* note 11; KAN. SUP. CT. RULES Rule 901 (West 1993).

21. See, e.g., COLO. RULES OF PROFESSIONAL CONDUCT Rule 2.1 (West 1993) (stating only that an attorney "should" advise the client about various methods of alternative dispute resolution); GA. CODE ANN. app. tit. 9 (Michie 1981 & Supp. 1994); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-5 (1969) (providing for duty to advise client of methods of alternative dispute resolution).

22. See, e.g., ARK. CODE ANN. § 16-7-104 (Michie 1994) (providing that attorneys are "encouraged" to advise their clients about methods of alternative dispute resolution and to "assist" them in choosing most appropriate procedure). Cf. OR. REV. STAT. § 36.185 (Supp. I 1993) (implying duty to advise clients about alternative dispute resolution by requiring that parties in civil actions be provided with written information describing mediation and available mediation opportunities).

23. There do not appear to be any court decisions that specifically state that an attorney has a duty to advise the client about various alternative dispute resolution options, nor are there any decisions which have found liability arising from a failure to so advise. However, in *Garris v. Severson, Merson, Berke & Melchior*, 252 Cal. Rptr. 204 (Cal. Ct. App. 1988) (depublished Feb. 2, 1989), the court of appeals, in addressing a legal malpractice action for failure to settle a matter within policy limits, stated that the fact that "the client is initially opposed to settlement does not excuse the duty to advise and counsel the client about settlement if such advice and counsel is otherwise appropriate." *Id.* at 207.

In order for an aggrieved client to succeed in an action for lawyer malpractice, the client has huge hurdles to overcome with the issues of cause-in-fact and damages. For cause-in-fact, the client must show that: (1) given the opportunity, the client would have chosen a different form of dispute resolution, (2) the other side would have agreed to pursue the different method proposed, and (3) by pursuing the different method, the matter would have settled on more beneficial terms for the client. Robert F. Cochran, Jr., *Legal Representation and the Next Steps Toward Client Control: Attorney Malpractice for the Failure to Allow the Client to Control Negotiation and Pursue Alternatives to Litigation*, 47 WASH. & LEE L. REV. 819, 871-76 (1990). Under the damages claim, the client must show the extent to which the client would have been benefitted by such an alternative course. *Id.* at 876.

in reaching a consensual agreement on disputed issues, after considering all available options and alternatives.<sup>24</sup> The assumption behind the mediator's intervention "is that a third party will be able to alter the power and social dynamics of the conflict relationship" presented so that an agreement may be reached.<sup>25</sup> Because the parties accept the mediator — that is, they are willing to allow this third party to assist them and are willing to seriously consider suggested options — the mediator can alter these dynamics and accomplish numerous tasks associated with the mediation process.<sup>26</sup> First, the mediator assists the parties in identifying issues of mutual concern by asking neutral, open-ended questions and clarifying or summarizing each party's response.<sup>27</sup> Second, the mediator helps the parties examine their own interests and needs while simultaneously working to reconcile those competing interests.<sup>28</sup> Third, the mediator tries to implement an effective negotiation process that will steer the beliefs and behaviors of the individual parties toward resolution of the contested issues.<sup>29</sup> Fourth, the mediator provides the parties with the information they need in order to arrive at a fair settlement.<sup>30</sup>

In addition to accomplishing these tasks, the mediator can successfully play other roles in the process as well.<sup>31</sup> For example, the mediator is often cast as the opener of communication channels who initiates or facilitates communication between the parties, or as the legitimizer who helps each party recognize the other's right to be involved in the process.<sup>32</sup> The mediator also enables the parties to explore the contested issues from a variety of viewpoints, expands the resources available to the parties, and takes the initiative to keep the negotiations moving forward.<sup>33</sup> Furthermore, the mediator functions as the agent of reality who challenges the parties' extreme positions or unrealistic goals. The mediator also sometimes acts as the scapegoat, taking responsibility or blame for an unpopular decision that the parties nevertheless are willing to accept.<sup>34</sup>

Under the model of mediation adopted in this country, the mediator does

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24. JAY FOLBERG & ALISON TAYLOR, *MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION* 7 (1984).

25. MOORE, *supra* note 16, at 14.

26. *Id.* at 14-15.

27. *Id.* at 18; Joseph B. Stulberg, *The Theory and Practice of Mediation: A Reply to Professor Susskind*, 6 VT. L. REV. 85, 90 (1981); Patricia L. Winks, *Divorce Mediation: A Nonadversary Procedure for the No-Fault Divorce*, 19 J. FAM. L. 615, 636 (1980-81).

28. MOORE, *supra* note 16, at 17.

29. *Id.* at 14.

30. Winks, *supra* note 27, at 634.

31. See MOORE, *supra* note 16, at 18 (listing various roles of mediator); Stulberg, *supra* note 27, at 91-94 (describing various functions of mediator).

32. MOORE, *supra* note 16, at 18.

33. *Id.*

34. *Id.*



not play the role of decision-maker, and this is one of mediation's greatest advantages.<sup>35</sup> Individuals have "a fundamental psychological need to control events that affect them, and . . . loss of such control creates psychological distress."<sup>36</sup> Therefore, when parties in mediation retain the power to make their own decisions, they create solutions that are more imaginative and leave them better off than if they had submitted to a court-imposed solution.<sup>37</sup> Furthermore, a mutually agreed upon solution counteracts feelings of regret and guilt when one party has not resolved his or her ambivalent feelings about the divorce. Indeed, such feelings may create in that person a sense of responsibility for the decision to divorce as well as for the future as a whole.<sup>38</sup>

Another major advantage of divorce mediation over adjudication is the extent to which mediators work to reduce conflict between the parties. In traditional divorce litigation, the attorneys are virtually expected to reinforce conflicts and create obstacles to settlement.<sup>39</sup> Mediators, on the other hand, use facilitative tools, such as having each party clarify their goals and objectives, to keep negotiations moving forward.<sup>40</sup> Mediators also use reality testing and other tools to prepare divorcing spouses to accept a realistic division of the marital assets so that a settlement can be reached as smoothly as possible.<sup>41</sup> Most importantly, mediators focus on individual people and thereby create a framework that is uniquely suited to the dynamics of each particular couple.<sup>42</sup>

Mediation offers the additional advantage of avoiding many problems inherent in traditional adversarial litigation. First, because the parties themselves control the outcome of the process, they avoid the risks and uncertainties of seeking a court-imposed solution.<sup>43</sup> Second, mediation avoids the buildup of litigation costs.<sup>44</sup> Third, while adjudication assumes

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35. *Id.* at 17 (stating that "parties in dispute . . . often seek the services of a mediator because they can retain ultimate decision-making power"). See also Winks, *supra* note 27, at 634 (stating mediator's role is as "counselor and advisor, but not decisionmaker").

36. James S. Coleman, *Loss of Power*, 38 AM. SOC. REV. 1, 8 (1973).

37. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case for Divorce*, 88 YALE L.J. 950, 969 (1979).

38. Winks, *supra* note 27, at 651.

39. *Id.* at 621-23, 646-47.

40. *Id.* at 638.

41. *Id.* at 639.

42. Winks, *supra* note 27, at 639. The mediator is at liberty to hold individual caucuses if the spouses feel they can discuss issues more freely in separate interviews, or to hold joint meetings if there is a need to avoid the "paranoia" of one spouse who thinks he/she may be missing out on something. *Id.* at 638-39.

43. Mnookin & Kornhauser, *supra* note 37, at 974.

44. *Id.*; Winks, *supra* note 27, at 648-50.

that judges and attorneys know better than the parties what they want or ought to want, the modern model of mediation assumes that the divorcing parties themselves know best, and are capable of coming to an agreement despite the negative feelings associated with the divorce.<sup>45</sup> Finally, mediation allows the participants to reach an agreement without the hostility of adversary litigation; the mutually agreed solutions cause less destruction of family relationships than adversarial court-constructed remedies do.<sup>46</sup>

Unlike the formal, rule-bound procedures of adjudication, mediation presents informal, open-ended procedures that are amenable to frequent changes by the parties and the personal style of the mediator. Decisions based upon the rules of law in adjudication are replaced in mediation by a system where the law, or the individual rights of the parties, are often totally immaterial. Unlike the rational system of adjudication, which denigrates the emotional aspects of disputes, mediation provides a forum where the full ambit of emotions may come into play.

Although mediation theoretically provides a non-coercive environment for the exploration of options and the construction of joint solutions for the parties, there are several things that mediation is not. Mediation is not marriage counseling or therapy. It does not provide solutions to any of the personal difficulties being experienced by the parties. It is not an encounter. It is not a forum for the making of any decisions other than those made jointly by the parties.

## II. CRACKS IN THE WALL OF MEDIATION

### A. A MISPLACED FOCUS ON ABUSE

Are there any cases which should not be mediated? Almost universally, cases in which there has been abuse or a history of abuse are not to be submitted to mediation. Statutes frequently post warnings about or prohibitions against mediating abuse cases,<sup>47</sup> and numerous commentators have

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45. See Winks, *supra* note 27, at 650-51 (describing effectiveness of mediation in custody issues).

46. DONALD T. SAPOSNEK, *MEDIATING CHILD CUSTODY DISPUTES* 19 (1983). But see Sally E. Merry, *The Social Organization of Mediation in Nonindustrial Societies: Implications for Informal Community Justice in America*, in 2 *THE POLITICS OF INFORMAL JUSTICE* 17, 35-36 (Richard Abel ed., 1982) (arguing that mediation "may be more appropriate for concrete disputes that can be settled by a simple exchange of property than for complex, emotion-laden interpersonal hostilities arising out of tangled webs of insult and rivalry, abuse and counterabuse, love and hatred").

47. See *supra* note 8 (listing and contrasting state statutes intended to protect abuse victims in mediation).

echoed these admonitions.<sup>48</sup> Although abuse may be a relevant factor, reliance on abuse as the litmus test for mediability is misguided.

First, abuse, in and of itself, is not a viable screening device. Abuse cases are not easily recognized. The victim may not be willing to share the sordid details of the abuse with her own counsel, let alone others. In Elizabeth's case, I was only able to discern one instance of physical abuse, and she was reticent even to discuss that episode. The victim may not be aware that the abuse is a disqualifying factor under the rules or statutes, or may, at the time of the mediation, believe that the abuse will not adversely affect the outcome.<sup>49</sup>

Even supposing that the abuse can be unearthed from the victim, what amount of abuse is sufficient to disqualify the matter from mediation? The rules concerning abuse fail to provide sufficient guidance for screening cases. Is any abuse sufficient? Does one act of abuse in the distant past forever disqualify the case? In many cases, there may be only one act of physical violence. Beyond the single episode, the perpetrator can maintain control using threats alone. If one act is not sufficient, how much abuse is enough? Beyond questions of quantity exist questions of substance. What constitutes abuse? Is emotional abuse sufficient or do the rules only pertain to physical abuse?

Second, assuming that the statutes and rules concerning abuse could be constructed into a reliable standard, abuse does not present the only reason to avoid mediation. Either spouse may suffer from drug abuse, alcoholism, or other addiction. If addiction does not impair one spouse's abilities, the

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48. See, e.g., SAPOSNEK, *supra* note 46, at 254 ("It is not possible to facilitate constructive mediation in the face of real evidence of threats of physical, emotional, or sexual violence."); FOLBERG & TAYLOR, *supra* note 24, at 185 (stating that in cases of physical abuse, mediators should suspend mediation and refer parties to outside helpers). *But cf.* Emily M. Brown, *Divorce Mediation in a Mental Health Setting*, in *DIVORCE MEDIATION: THEORY AND PRACTICE* 127, 133 (Jay Folberg & Ann Milne eds., 1988) (stating that "[t]herapist-mediators who understand the dynamics of abuse are uniquely qualified to mediate such cases.").

49. See generally LENORE E. WALKER, *THE BATTERED WOMAN SYNDROME* 95-97 (1984). Walker has identified three stages of abuse: (1) the tension building phase in which "minor battering incidents" take place; (2) the acute battering incident; and (3) loving contrition. *Id.* at 95. In the first phase, "there is a gradual escalation of tension displayed by discrete acts causing increased friction such as name-calling, other mean intentional behaviors, and/or physical abuse." *Id.* The batterer is not acting in a "maximally explosive form," and the woman "tries not to respond to his hostile actions and uses general anger reduction techniques." *Id.* These techniques often succeed for a little while, reinforcing her unrealistic belief that she can control the situation. *Id.* This is followed by the second phase, the acute battering incident, and then the third phase, the "loving contrition" phase in which the abuser "may apologize profusely, try to assist his victim, show kindness and remorse, and shower her with gifts and/or promises." *Id.* at 95-96. Unfortunately, both the batterer and woman may believe at this point that the batterer will never allow himself to be violent again, and, after a short time, the cycle starts again. *Id.* at 96. During either the loving contrition phase or the beginning portions of the tension building phase, the victim of abuse may believe that the history of abuse may not affect the outcome of the mediation.

other spouse, as the enabler, may suffer from severe co-dependency or some other dysfunction. One spouse may be seriously depressed or subject to other mental disabilities, such as borderline personality disorders. One may be socialized to accept the unspoken role of victim. Finally, one may fear conflict so greatly that she accepts the agreement in order to end the conflict at all costs. This list is by no means exhaustive but illustrates the myriad ways in which one spouse may be seriously disadvantaged in mediation, much to the ignorance of the mediators who may, under the statutes and rules, not be trained or poised to ferret out these difficulties. Furthermore, these standards provide no guidance about what steps should be taken if any of these underlying problems are encountered during mediation.

### B. OTHER PROBLEMS WITH MEDIATION

In a larger realm, however, mediation presents some real concerns. We really know little about how mediators approach mediation.<sup>50</sup> Mediators come from a wide range of professional backgrounds.<sup>51</sup> Lawyer-mediators usually are untrained in the social and behavioral sciences and, beyond rendering legal opinions, their conduct is based upon personal experience only.<sup>52</sup> Most mediators are unable to describe what they do to help couples in divorce mediation.<sup>53</sup> A 1981 study found that the most important aspect of a successful mediator was the amorphous description "personality traits," with objectivity and credibility second, and experience and knowledge coming in third.<sup>54</sup> "[T]he degree to which practitioners are aware of differing techniques, and the extent to which they rely on their own intuition and personal theory in guiding choice of strategies, is largely unknown."<sup>55</sup>

In an attempt to catalogue the various approaches to divorce mediation, Ann Milne has identified five general styles of mediation: therapeutic, muscle, closet arbitrator, scribe, and labor.<sup>56</sup> Therapeutic mediators spend

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50. Pearson et al., *supra* note 17, at 24 (stating that "[m]ediation remains a loosely defined process").

51. Jeffrey Fuhr, *Standardization of Divorce Mediation*, 25 CONCILIATION CTS. REV. 65, 66 (1987).

52. See Julien D. Payne, *Future Prospects for Family Conflict Resolution in Canada*, 24 CONCILIATION CTS. REV. 51, 53 (1986) (discussing lack of social science training and attitudes based on personal experience).

53. Pearson et al., *supra* note 17, at 20. Pearson writes:

One mediator said: "I do not have (a particular approach). I was a business major, so I am not familiar with the different schools of thought. I just take each case as it comes and try to respond to it." Another mediator who had taken courses on Parent Effectiveness Training, General Counseling and Conflict Management, said: "It is too mixed to say I am working from any one perspective . . . I will use whatever works . . ."

*Id.*

54. *Id.* at 22.

55. Fuhr, *supra* note 51, at 65.

56. W. Patrick Phear, *Family Mediation: A Choice of Options*, 39 ARB. J. 22, 27-28 (1984) (citing

a great deal of time trying to help the parties understand why they are in the position in which they found themselves and spend little time helping the parties devise settlement options.<sup>57</sup> Muscle mediators expend little effort trying to understand the concerns of the parties, resulting in agreements that are designed by the mediators and not the parties themselves.<sup>58</sup> Closet arbitrators, like muscle mediators, make little effort to understand the underlying issues, and feel most comfortable making firm recommendations as to how to resolve the dispute, often based upon the mediator's opinion as to how the court would resolve the matter.<sup>59</sup> Scribes are facilitators only and make little attempt to redress power imbalances or even to engage in reality-checking. In situations of severe power imbalance, any agreement reached serves only one of the parties and is not a joint agreement.<sup>60</sup> Labor model mediators are viewed as the most constructive. They are found to have

helped the parties to identify the issues and underlying issues that were involved in the dispute, develop[ed] and examine[d] the various options that were available to them, and [drawn] up an agreement that they understood and with which they were satisfied. These mediators achieved this through initially assuming control, then actively assisting in the process, clarifying issues, transmitting information between the parties, checking the feasibility and reality of positions, and suggesting possible alternatives. When necessary they raised hypothetical solutions for the parties' consideration.<sup>61</sup>

Although therapeutic mediators focus on the positions of the parties, they do not directly redress the impact that power imbalances may have on the ability of the weaker party to adequately represent him or herself. The scribes, one step worse than therapeutic mediators, do little or nothing to take charge of mediation and cannot, therefore, even begin to deal with power imbalances. At the bottom of the stack are the muscle mediators and the closet arbitrators, each pursuing their own agenda. They end up substituting their own agreements for that of the parties. In this situation, the mediation probably will break down because the stronger party will not countenance the mediator's agenda being substituted for his own. Even if the mediation doesn't break down, the weaker party is still left to fend for herself.

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Ann Milne, Address at Association of Family Conciliation Courts Conference: "Divorce Mediation — Theory and Practice" (December 1981)).

57. *Id.* at 27-28.

58. *Id.* at 28.

59. *Id.*

60. *Id.*

61. *Id.*

Of the five mediator styles, only one — the labor model mediator — deals with power imbalances through control of the process and the use of power balancing tools to insure a careful consideration of the issues. Although it is the best model, it still suffers inherent disabilities when dealing with the emotional and comprehension problems stated above.

Among mediation strategies, there is no consensus on how the issues of the divorce should be ordered during the mediation sessions. Some mediators stick to a specific order while others start with issues having the greatest potential for resolution.<sup>62</sup> Various ways to organize the agenda include “easy to hard, most urgent to least urgent, most important to least important, least important to most important, [or] topical checklist.”<sup>63</sup> Because matters of custody, property rights, and support are interdependent,<sup>64</sup> breaking down issues may cause a fracturing of power with a resulting increase of the power imbalance. If one issue is resolved during mediation, any power that one party may have on that issue may not translate over to other issues even if the parties clearly understand that all issues remain open and on the table until a complete agreement has been reached. However conditional the resolution may be, the weaker spouse may find it extremely difficult to raise it later as a bargaining ploy. Whether based upon a random selection, an easier to harder standard, or any type of process, the question remains whether an ordering of issues will bias one gender or the other.<sup>65</sup> In Elizabeth's case, she lost her power to use her superior position on the custody issue because she capitulated on the issue long before mediation began.

In many cases of divorce mediation, the mediator may in fact turn the agreement of the parties into the decision of the mediator.<sup>66</sup> In the United Kingdom, research showed that the mediator in divorce mediation was constructing a concept of joint responsibility which was crucial to problem definition<sup>67</sup> and that parental solutions were “rarely seen as acceptable” to the mediator.<sup>68</sup> Mediation practices that aim at joint responsibility for

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62. Pearson et al., *supra* note 17, at 20.

63. MARK BENNETT & MICHELE HERMANN, *MEDIATION TRAINING MATERIALS* 48-49 (1993).

64. Payne, *supra* note 52, at 54.

65. See generally WILLIAM A. DONOHUE, *COMMUNICATION, MARITAL DISPUTE, AND DIVORCE MEDIATION* 45 (1991) (describing phases of mediation and effects on flow of power); BENNETT & HERMANN, *supra* note 63, at 48-50 (describing various ways in which issues are ordered).

66. See Christine Piper, *Divorce Conciliation in the U.K.: How Responsible are Parents?*, 16 INT'L J. SOC. L. 477, 478-79 (1988) (arguing that, “to a very large extent,” mediator ideology affects outcome of custody issue in divorce mediation).

67. *Id.* at 480.

68. *Id.* at 486. Few parental concerns were endorsed (occurring in only half of the cases and then only once or twice per case). *Id.* Parents' concerns that were frequently discounted included: (1) access should be good in itself, (2) access should not put too much strain on the new family, (3) access should not be carried out against the children's wishes, and (4) allocation of fault and assessment of past behavior should be deemed relevant. Mediators usually assumed: (1) access is an

parenting devalue past caretaking. Moreover, focus solely on current practical problems of parenting tend to disadvantage women<sup>69</sup> and, as a result, adversely affect the outcome of mediation for women.<sup>70</sup>

### III. POWER AND POWER IMBALANCES

It is, I believe, possible to address some of these issues by looking at the relative levels of power that each spouse exercised throughout the marriage and may, or does, exercise during the mediation. The examination must seek out power imbalances that will improperly influence the outcome of the mediation, and if found, determine what ramifications this will have for the mediators.

#### A. WHAT IS POWER?

First, what is power as it relates to divorce and mediation? Power represents "the possibility of imposing one's will upon the behavior of other persons."<sup>71</sup> Power is held and exercised in relation to others.<sup>72</sup> "Power is a property of the social relation; it is not an attribute of the actor."<sup>73</sup> Although much of our analysis of power can be generalized to broader areas, this discussion will be limited to divorce and divorce mediation. Power held by one spouse in relation to the other represents the ability to control resources, or the access to resources, that the other wants or needs.<sup>74</sup> However, power is not monolithic; it can be divided into five areas:<sup>75</sup>

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overriding good, regardless of its drawbacks or its quality, (2) parents can plan and cooperate, and (3) parents possess sufficient trust and the necessary skills to implement the proposed solution. *Id.*

69. *Id.* at 484. "[T]he use of strongly normative statements about responsible parents as ones who give top priority to joint decision making can in practice lead to a denial of access to legal rights in the resolution of disputes . . . ." *Id.* at 491.

70. *Id.* at 485.

71. MAX WEBER, *LAW IN ECONOMY AND SOCIETY* 323 (1954).

72. MORTON DUETSCH, *THE RESOLUTION OF CONFLICT: CONSTRUCTIVE AND DESTRUCTIVE PROCESSES* 84-85 (1973); John M. Haynes, *Power Balancing*, in *DIVORCE MEDIATION*, *supra* note 48, at 277 [hereinafter Haynes, *Power Balancing*].

73. Richard M. Emerson, *Power-Dependence Relations*, 27 AM. SOC. REV. 31, 32 (1962) (asserting that "[T]o say that 'X has power' is vacant, unless we specify 'over whom.'").

74. Haynes, *Power Balancing*, *supra* note 72, at 277.

75. French and Raven identified five areas of power (which they called sources of "social influence"): informational, referent (the desire of the party to maintain identification with another individual or group), legitimate (traditional, institutional, or cultural concepts of rights), expert, and coercive and reward. John R.P. French, Jr. & Bertram Raven, *The Basis of Social Power*, in *STUDIES IN SOCIAL POWER* 150, 155-56 (Dorwin Cartwright ed., 1959). *See also* Bertram Raven & Arie W. Kruglanski, *Conflict and Power*, in *THE STRUCTURE OF CONFLICT* 69, 73-77 (Paul Swingle ed., 1970) (describing five areas of power in detail); Haynes, *Power Balancing*, *supra* note 72, at 281-84

economic,<sup>76</sup> intellectual,<sup>77</sup> physical,<sup>78</sup> emotional,<sup>79</sup> and procedural.<sup>80</sup> Economic power represents the ability to control the income and the assets of the divorcing couple.<sup>81</sup> Intellectual power has two distinct aspects: control over information, both legal and factual, and the expertise to understand and manipulate the information. Physical power represents the ability to control the real and personal property of the marriage. It also includes the ability to provide for the housing and care of the children. Physical power also entails control over the other spouse exercised through physical abuse.

On a personal level, emotional power represents the ability to recognize injury to oneself, to disengage from the relationship, and to meet emotional needs elsewhere. On a relationship level, emotional power means the ability to control the other through threats or intimidation. The nature of a threat can extend from a threat to withdraw approval of the other or the other's conduct all the way to a threat of physical violence. These are inextricably intertwined, but distinct, ideas. To the extent that one spouse can end the emotional attachment and get his or her needs met elsewhere, the emotional hooks used by the other spouse will tend to decline in value.<sup>82</sup>

Finally, procedural power represents the ability to control the course and the duration of the dispute and any dispute resolving mechanism.<sup>83</sup> For purposes of divorce mediation, this means the course and timing of discovery, evaluations, custody investigations, and adjudication. The ability to exercise this power is closely tied to economic, physical, and intellectual power.

Power is not constant. It rarely resides primarily or exclusively with one party or the other, but flows back and forth between the parties.<sup>84</sup> Neither party has the sole claim on power. At times, the power of either party may

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(explaining theory of French and Raven). I do not use these categories, however, because they are not sufficiently expansive and descriptive for the current discussion.

76. JOHN M. HAYNES, *DIVORCE MEDIATION: A PRACTICAL GUIDE FOR THERAPISTS AND COUNSELORS* 49 (1981) [hereinafter HAYNES, *DIVORCE MEDIATION*].

77. Although Haynes separates the "objects" of "interpersonal relationships" into physical and emotional spheres, Haynes, *Power Balancing*, *supra* note 72, at 277, I have chosen separately to label economic and intellectual power and to create the category of procedural power because of its strategic importance to the divorce and mediation process and any resulting agreement.

78. *Id.*

79. *Id.*

80. *Id.* at 291-93.

81. Obviously, this condition can be exacerbated by court orders that temporarily institutionalize the power of the purse in one spouse or the other.

82. Of course, threats of violence still can retard or totally eliminate the ability of a spouse to deal with the emotional difficulties of separation and divorce.

83. Cf. HAYNES, *DIVORCE MEDIATION*, *supra* note 76, at 52 (describing power arising from ability to resist settlement).

84. William L.F. Felstiner & Austin W. Sarat, *Enactments of Power: Negotiating Reality and Responsibility in Lawyer-Client Interactions*, 77 CORNELL L. REV. 1447, 1454 (1992).



be quiescent, whether intentionally or not, with neither party gaining any advantage.<sup>85</sup>

These categories of power are not atomistic, but interwoven. The distinctions between them are blurred. The same act may exercise or surrender power in more than one category. During a divorce the use of emotional power by one spouse can have a dramatic effect on the ability of the other spouse to understand information which has been made available. The use of physical and economic power can have a deleterious impact on emotional power. Also, the economic power exercised by one spouse during the divorce proceeding can stifle the ability of the other spouse to obtain help in disengaging emotionally and physically from the other.

Since power cannot be exercised in a vacuum and is dependent on an existence of the relationship, a party's own perception of his or her power relates to (but does not control) all five categories.<sup>86</sup> In divorce mediation, one key to the exercise of power is the perception of the existence and extent of one's own power. If a wife has emotional or intellectual roadblocks to the divorce process, she may not perceive that she has any power to influence the negotiations. In one sense, perception can be seen as a negative influence — perception cannot create power where none exists, but a failure to perceive the power available can decrease or eliminate any possible exercise of that power.<sup>87</sup>

With the court's sanction, the cards appeared heavily stacked in favor of

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85. *But cf.* Haynes, *Power Balancing*, *supra* note 72, at 279 (stating that "In order for power to be exercised, the person owning the power must be aware of it and use it consciously.").

86. *Id.* Haynes states: "If one spouse has observable power (i.e., control of money), and the power balance appears to be heavily weighted in favor of that spouse, it is worth looking to see what compensation the other spouse enjoys to make it worthwhile to accede to this loss of power." *Id.* This naive assumption that loss of power is voluntary may rest on the inopportune use of the word "enjoys" in the quotation. Power lost to the other spouse does not have to be voluntary and, in many cases, does not even rise to the level of consciousness. This can be illustrated by the plaintive cry of an abused spouse: "If only I could (*fill in the blank: keep a better house, keep the kids from yelling, be better in bed, lose weight, etc.*), my husband would (*fill in the blank: not drink as much, stop beating me, return to AA meetings, etc.*).". While still in the relationship, victims of abuse fail to recognize that they lack control over their abusers behavior. WALKER, *supra* note 49, at 79.

In their landmark work on negotiation, Fisher and Ury referred to a person's perception of their own BATNA (Best Alternative To a Negotiated Agreement), as well as their perception of the other's BATNA, as crucial to exercising power in negotiations. ROGER FISHER & WILLIAM URY, *GETTING TO YES* 100 (2d ed. 1991). The aim is to increase your and the other party's perception of your own BATNA while decreasing the other party's perception of their own BATNA. *Id.* at 102-06. If one party is successful at driving down the other's perception of their own BATNA, the other party will think that he or she has less reason to walk away and will stay at the table longer and continue to negotiate. *Id.*

87. See Stulberg, *supra* note 27, at 93-94 (explaining that unrealistically exaggerated perception of power only serves to hinder agreement). *But cf.* Matthew I. Levine, *Power Imbalances in Alternative Dispute Resolution*, in *MEDIATION: CONTEXTS AND CHALLENGES* 68, 72 (Joseph E. Palenski & Harold M. Launer eds., 1986) (arguing that perception of power may be less influential in divorce mediation than in other arenas of negotiation).

Paul. He had the power of the purse. Although he made all the support payments regularly, the paltry amount of the support still placed Elizabeth at the end of a very tenuous rope. He also had the physical control. Although he did not enter her apartment without permission, he had the master key to all of the apartments, and he continued to maintain the six-plex and grounds. He was, therefore, frequently nearby. Without her seasonal job, which would have placed her beside Paul on a daily basis, Elizabeth's world shrank even further, thereby increasing Paul's relative power.

At this point, Paul had the overwhelming advantage of intellectual power. Elizabeth managed the seasonal business on a day-to-day basis but had been away from it since the fall of 1991. She took no part in the management of the rental properties, the purchase of major assets or the long range planning. Although she had some knowledge of their other assets, her information was rather sketchy and, at times, inaccurate. She could do little beyond identifying certain assets and providing very basic information. She neither had knowledge of the dynamics of any of the assets nor could she begin to comprehend the overall structure of the marital estate. Because of the intellectual power imbalance, Paul also had, to a certain extent, procedural control of the divorce proceeding. Discovery was a lengthy and torturous affair.

Paul also had emotional power. Some indicators, on Elizabeth's behalf, were favorable. A court order provided a minimum amount of protection, and it appeared as if the physical abuse had stopped. Elizabeth started attending a different church. Along with her counselor's help, she began to expand her small circle of friends and supporters. However, this must be weighed against the fact that she did not stop seeing Paul. He often visited the six-plex for other reasons, such as minor maintenance, and used these as excuses to talk to Elizabeth and explain at length his position and that he was being very reasonable in the offer he had made. Elizabeth explained to me that they would not talk about reconciliation. Unfortunately, there was still a strong emotional need on her part to see Paul. It was through these meetings that Paul exercised emotional power over Elizabeth. I believe that these discussions had a major impact on the final resolution of the divorce.

#### B. THE EFFECT OF POWER IMBALANCE IN MEDIATION

Power in the marital relationship is never absolutely balanced. As stated above, power is constantly in a state of flux as the parties interact and attempt to meet their perceived needs. In a divorce, the power will be unbalanced in various ways. The pertinent issue is the degree to which it is unbalanced and any resulting adverse impact it has on the bargaining and the outcome of the divorce. Not all severe power imbalances, however,

prejudice the weaker party. For instance, a husband may have all of the intellectual and emotional power, but his primary wish may be that his wife and children receive the lion's share of the marital estate and substantial child and spousal support. In such a case, the power imbalance, to borrow a term from physics, remains merely potential. Whether out of kindness, generosity, or the long term needs of the children, one spouse chooses not to exercise the power imbalance. These cases do not present a problem. Concerns, however, arise when severe power imbalances become kinetic.

Power imbalances produce skewed agreements "because, with few exceptions, a mediated settlement reflects the pre-existing inequalities between disputants."<sup>88</sup> As a result, failure to deal with power imbalances disadvantages the less powerful party.<sup>89</sup> On the other hand, the more equal the relative power, the more likely parties will cooperate in arriving at more equitable agreements.<sup>90</sup> The axiom that unequal power results in inequitable agreements has as its progenitors negotiation and historical forms of mediation. From the theory of negotiation, relative equality of power and resources between parties will result in approximately equal division of resources, whereas parties with greater power will demand and ultimately receive a larger share of resources.<sup>91</sup>

The replication of pre-existing inequalities by mediation is not just a modern phenomenon but dates back centuries to the roots of mediation at the time of Confucius in China,<sup>92</sup> to the "moots" of tribal Africa, and to the Jewish Beth Din.<sup>93</sup> "Mediation is believed to have developed as an ancient tribal or village dispute resolution mechanism well suited to resolving conflicts, particularly interpersonal ones, in which the need for restored

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88. Gary L. Welton, *Parties in Conflict: Their Characteristics and Perceptions*, in *COMMUNITY MEDIATION: A HANDBOOK FOR PRACTITIONERS AND RESEARCHERS* 105, 107 (Karen G. Duffy et al. eds., 1991). See also Levine, *supra* note 87, at 68-74 (discussing how mediated agreements reflect pre-existing power imbalances); Fiss, *supra* note 6, at 1076 (explaining how disparities in resources between parties can influence settlement).

89. Welton, *Power Balancing*, *supra* note 88, at 106.

90. Haynes, *supra* note 72, at 280 (citing empirical studies).

91. JEFFREY Z. RUBIN & BERT R. BROWN, *THE SOCIAL PSYCHOLOGY OF BARGAINING AND NEGOTIATION* 79 (1975).

92. This period was 551-479 B.C. James A. Wall, Jr. & Michael Blum, *Community Mediation in the People's Republic of China*, 35 J. CONFLICT RESOL. 3, 4 (1991). Compared to mediation in the United States, mediation in China is much more intrusive and less voluntary. The mediator usually knows the parties (this knowledge is considered an asset) and gets involved in the problem early. *Id.* at 9. There is considerable peer pressure to participate, and lack of neutrality is not considered a problem. *Id.* The goal of mediation is to resolve the problem while keeping the anger down. *Id.* The mediator is authoritative and will render opinions as to how the parties should behave and will encourage proposed outcomes. *Id.* Unlike the Western model, the mediator will take personal responsibility to see that dispute is resolved (save face), the pressure for which is much greater than just a professional track record. *Id.* at 9-11.

93. Gary Paquin, *Protecting the Interests of Children in Divorce Mediation*, 26 J. FAM. L. 279, 303-04 (1987-88).

harmony superseded the need to establish right and wrong or guilt and innocence."<sup>94</sup> Studies of the Nuer societies of Ethiopia and the Sudan have shown that "[m]ediated settlements between unequals are unequal. With few exceptions, a mediated settlement reflects the status inequalities between disputants."<sup>95</sup>

Because problems with power imbalances are especially acute in divorce,<sup>96</sup> which makes fair negotiation impossible,<sup>97</sup> it may be asking too much of divorce mediation to deal with power imbalances.<sup>98</sup> "There are severe inequalities built into many divorce negotiations due to longstanding economic and social inequality between the sexes."<sup>99</sup> This is further complicated by the fact that many mediators fail to act when confronted with difficult questions of power imbalances.<sup>100</sup>

#### IV. POWER IMBALANCES AND THE PROBLEM WITH MEDIATION

Mediation addresses some power imbalances but, as presently constituted, fails to adequately address others. Mediation, by its very nature, tends to reduce the level of certain power imbalances by facilitating the exchange of information and ideas, as well as reducing the level of tension.<sup>101</sup> This can further be enhanced by procedural guidelines that equalize the footing of the parties before and during mediation. During orientation, which is conducted by many family mediators separately before mediation begins, the mediator informs the parties about the process and discusses the nature of conflict and how parties can face and deal with conflict.<sup>102</sup> The mediator, by controlling the discussion, can prevent the powerful party from defining the problem (a powerful tool that would otherwise perpetuate many power imbalances),<sup>103</sup> prevent interruptions,<sup>104</sup> and equalize the amount of time that each party speaks.<sup>105</sup>

94. Phear, *supra* note 56, at 23.

95. Merry, *supra* note 46, at 32.

96. Welton, *supra* note 88, at 107.

97. See *id.* (stating that "there are some cases in which power imbalances are so great as to make fair negotiation impossible").

98. See Levine, *supra* note 87, at 72 (stating view of Professor Heather Wishik).

99. *Id.*

100. See Pearson et. al., *supra* note 17, at 21, 23 (stating that less than one-fifth of mediators terminate mediation when encountering agreements that are harmful to children or generally unconscionable).

101. Haynes, *Power Balancing*, *supra* note 72, at 284.

102. FOLBERG & TAYLOR, *supra* note 24, at 38-43; MOORE, *supra* note 16, at 53-54; SAPOSNEK, *supra* note 46, at 56-60; DONOHUE, *supra* note 65, at 45.

103. JOHN M. HAYNES & GRETCHEN L. HAYNES, *MEDIATING DIVORCE* 17 (1989) [hereinafter HAYNES & HAYNES].

104. MOORE, *supra* note 16, at 145; DONOHUE, *supra* note 65, at 45.

105. DONOHUE, *supra* note 65, at 45; John Forester & David Stitzel, *Beyond Neutrality: The Possibilities of Activist Mediation in Public Sector Conflicts*, 5 *NEGOTIATION J.* 251, 260 (1989).

The mediator can do something as simple as changing the seating arrangements, thereby diminishing the ability of one party to have eye contact directly with the other. Further, the parties can be directed toward the mediator and not toward each other.<sup>106</sup> Or, the parties can be directed to a blackboard, flip chart,<sup>107</sup> or other written organization of information.<sup>108</sup> This method helps reinforce the mediator's control of the process,<sup>109</sup> shows the parties' progress, and helps "deflect very hurtful or verbally aggressive comments because they would not be eligible to be written down."<sup>110</sup> By recognizing different modes of learning styles and recording information and options, the mediator can aid a party's comprehension. The mediator also can explore the parties' understanding of feasibility, fairness, and equity.<sup>111</sup> The caucus is another tool in the mediator's arsenal for leveling power imbalances.<sup>112</sup> The caucus, by allowing the mediator to meet with one party apart from the other, often allows the mediator to improve the party's attitudes and perceptions toward the other, generate information and alternatives that the party is unwilling to talk about in open session, and regulate the expression of destructive comments.<sup>113</sup>

Most of the tools I have discussed so far are fairly noncontroversial. From here, we move into methods which may threaten the neutrality of the mediator. The mediator may suggest an obvious alternative or a specific resolution.<sup>114</sup> Although giving opinions about options, legal and factual, encourages cooperation and is practiced by many mediators, it has been criticized as violating the mediator's duty of neutrality.<sup>115</sup> However, others have argued that "[t]o be neutral in the face of inequalities of power promises not indifference to outcome, but acquiescence to the perpetuation of power imbalances, to the perpetuation of a status quo of power inequalities."<sup>116</sup>

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106. JOAN BLADES, *FAMILY MEDIATION: COOPERATIVE DIVORCE SETTLEMENT* 40 (1985).

107. *Id.* at 42; HAYNES & HAYNES, *supra* note 103, at 142-43.

108. DONOHUE, *supra* note 65, at 44.

109. HAYNES & HAYNES, *supra* note 103, at 142-43.

110. DONOHUE, *supra* note 65, at 44.

111. BLADES, *supra* note 106, at 47.

112. *Id.* at 47-48.

113. Christopher Moore, *The Caucus: Private Meetings That Promote Settlement*, 16 *MEDIATION Q.* 87, 88-89 (1987). Although I feel that caucuses can have a positive impact on power imbalances, some models of divorce mediation prohibit private caucuses. For a discussion of the pros and cons of allowing caucuses, see Donohue, *supra* note 65, at 46-47.

114. Pearson et al., *supra* note 17, at 16. See also Lawrence E. Susskind, *Mediating Public Disputes: A Response to the Skeptics*, 1 *NEGOTIATION J.* 117, 118 (1985) (describing how mediator, viewed as a neutral source, can float "trial balloons" to give credibility to ideas originating from weaker party).

115. Note, *The Sultans of Swap: Defining the Duties and Liabilities of American Mediators*, 99 *HARV. L. REV.* 1876, 1889 (1986).

116. Forester & Stitzel, *supra* note 105, at 254. See also Paquin, *supra* note 93, at 310 (stating that

Many of these tools have an immediate and substantial effect on any intellectual power imbalance arising from lack of information. These tools insure equal access to all pertinent information. If discovery has not been completed, the mediator can urge full disclosure or provide parties with homework assignments to generate the necessary information between mediation sessions. By providing a neutral environment, mediation temporarily lessens economic and physical power imbalances and, to a lesser extent, the procedural power imbalances.

Although the mediation session also can reduce the emotional power imbalance, this may be temporary and situational. A spouse may avoid feeling threatened or intimidated, but mediation tools cannot deal with deep-seated emotional disturbances that may influence the ability of a spouse to adequately protect her interests. This problem is compounded when considered in light of any intellectual power imbalance. Mediation may provide equal access to information as stated above, but it will not automatically generate comprehension. Further, emotional difficulties may impede or block a spouse's ability to grasp and manipulate information to her advantage.

While mediation may help balance power in many circumstances, wrongfully assuming that it magically transforms the parties on all occasions severely prejudices the spouse who suffers from the emotional blocks created by an abusive or dysfunctional marriage or by the divorce process. The failure of these tools to address all power imbalances severely prejudices the weaker party suffering from intransigent power imbalances.

## V. POWER IMBALANCES AND DUTY

### A. WHY SHOULD WE INTERVENE?

Now that we have defined power, explored power imbalances, and determined that mediation perpetuates power imbalances, have we made a case for dealing with power imbalances? After all, the parties volunteered for mediation. If they reach an agreement, so be it; that was the purpose for going to mediation. The "mediator should foster and protect the proportional relative power relationship between the parties in decisions regarding entry, strategy and tactics and the shaping of the agreement."<sup>117</sup> Where one party requires a disparate level of assistance, such aid should be given with consent, based "on their mutual interest in reaching a viable agreement."<sup>118</sup>

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"Other mediators have dismissed the neutrality prohibition as impossible, recognizing the need for the mediator to manipulate the power balance between the parties.")

117. Gerald W. Cormick, Paper Presented to the Society of Professionals in Dispute Resolution at the Fifth Annual Meeting, at 12-13 (1977).

118. *Id.*

The mediator's duty "does not extend to the evils in the resulting contract."<sup>119</sup>

The individualist position is that the parties themselves are the best and only legitimate judges of their own interests, subject to a limited number of exceptions, such as incapacity. People should be allowed to behave foolishly, do themselves harm, and otherwise refuse to accept any other person's view of what is best for them.<sup>120</sup>

Although it may be appropriate in most situations to allow people to "behave foolishly," the situation presented by divorce mediation is decidedly different than most. In divorce mediation, the resolution of issues does not coincide with the resolution of the "emotional divorce."<sup>121</sup> A spouse's ability to represent her interests in mediation may be seriously diminished because of the emotional difficulties arising from the divorce process.

Unlike other forms of mediation, divorce mediation represents the deconstruction of the most complex and emotionally laden relationship our culture has to offer. In the mediation of most personal injury cases,<sup>122</sup> the parties do not begin with any relationship and will not end with one. The relationship exists within the time span of the mediation or between the agents of the parties such as the adjusters and the attorneys. In contract mediation, the parties are frequently trying to rebuild a broken relationship, with obvious benefits if successful. Only in divorce mediation are the parties intent on destroying a relationship.<sup>123</sup> This situation can only have a deleterious effect on the parties' cooperation, the very thing upon which mediation must rely for the process to work.

Cooperation is the key to mediation.<sup>124</sup> Unfortunately, mediation cannot

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119. Note, *supra* note 115, at 1886 n.41. See also Duncan Kennedy, *Distributive and Paternalistic Motives in Contract and Tort Law, With Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 615 (1982) (asserting that "The rhetoric of unequal bargaining power is distributionist in that it asserts the desirability of intervention in favor of the weaker party in situations where there is nothing like common law fraud, duress or incapacity.").

120. Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1737 (1976).

121. Payne, *supra* note 52, at 54.

122. Much mediation in the personal injury field requires the mediator to shuttle back and forth between the parties, hammering the plaintiff down and pushing the insurance adjuster up, hoping to get them to meet somewhere in the middle. Many "true" mediators refuse to call this mediation, but refer to it as settlement facilitation.

123. Even if the couple has children, one spouse may not perceive the continuing communication between the parties about child care and visitation as a relationship, especially in relation to the one out of which he was getting.

124. O.J. COOGLER, *STRUCTURED MEDIATION IN DIVORCE SETTLEMENT: A HANDBOOK FOR MARITAL MEDIATORS* 81 (1978).

enforce cooperation, nor does it, in many senses, even challenge the parties to be cooperative.<sup>125</sup> In general terms, parties exhibit one of three bargaining styles: competitive, conditionally cooperative, and unconditionally cooperative.<sup>126</sup> The nature of a competitive bargainer is apparent from the term. The conditionally cooperative bargainer is willing to cooperate so long as the other side cooperates, and will send out signals about his or her willingness to cooperate and wait for reciprocation. The conditionally cooperative bargainer will punish competitive behavior with further competition and will then wait for cooperation.<sup>127</sup> The unconditionally cooperative bargainer will cooperate at every turn, even if this results in her own destruction. She will collapse in the face of a competitive bargainer. Her interests, however, are not threatened by a pairing with a conditionally cooperative bargainer. Her cooperative behavior will be met with cooperation from the other side.

When the two spouses come to mediation, the three types of bargaining behavior provide six possible iterations. Further, three possible combinations exist with regard to the relative power balance of the parties: (1) roughly equal, (2) potential power imbalance only, and (3) kinetic (active)

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125. Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1392.

126. Cf. COOGLER, *supra* note 124, at 81. Coogler defines three types of bargaining behavior:

1. *Cooperative* — The person has a positive interest in the welfare of others as well as in his own welfare.
2. *Individualistic* — The person has an interest in doing as well as he can for himself and is unconcerned about the welfare of others.
3. *Competitive* — The person has an interest in doing better than others, as well as doing as well as he can for himself.

*Id.*

127. In his pioneering work on negotiation theory, Robert Axelrod conducted extensive computer analyses of a well-known negotiating game, called the Prisoner's Dilemma. In this game, two parties are stuck on the horns of a dilemma. If the parties each cooperate, they create value, but each has the potential to do better if they claim value (compete) while the other cooperates. Conversely, if both claim value, they both do poorly. Axelrod solicited computer programs from specialists to compete in repeated plays of the game. The programs that did the best had several common characteristics. First, they did not start out being competitive or value claiming. Second, they could be provoked into competitive behavior if the other side was competitive. Third, when provoked, they did not degenerate into a long, recriminating pattern of competitive behavior, but gave the opponent the opportunity to resume cooperative behavior. Fourth, they kept their intentions clear, thus they were able to elicit cooperation quickly from the other side. The winning submission, which was named TIT-FOR-TAT, cooperates on its first move and thereafter does what the other party did on his previous move. Robert Axelrod, *Effective Choice in the Prisoner's Dilemma*, 24 J. CONFLICT RESOL. 3, 18-21 (1980); Robert Axelrod, *More Effective Choice in the Prisoner's Dilemma*, 24 J. CONFLICT RESOL. 379, 389-93 (1980). Lax and Sebenius labeled such strategies "conditionally open." DAVID A. LAX & JAMES K. SEBENIUS, *THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN* 159 (1986). This is very close to my term of "conditionally cooperative."



power imbalance. When the six combinations of bargaining behavior are placed on a table with the power combinations, they appear thusly:

Across: P/I: Down: Combinations of bargainers:	A. Roughly equal P/I	B. Potential P/I only	C. Kinetic (active) P/I
1. Cond/Cond	Best	O.K.	O.K.
2. Uncond/Cond	Good	O.K.	O.K.
3. Cond/Competitive	Good	*	O.K.
4. Uncond/Comp	*	*	problem is here
5. Comp/Comp	O.K., but difficult for mediation	*	*
6. Uncond/uncond	Settle before mediation	Settle before mediation	*

\*By definition, this combination cannot exist.

Obviously, the situation with roughly equal power represents the ideal situation for mediation. Even the situation with a potential power imbalance presents good fodder for mediation. The problem arises when the mediator is presented with a severe and active power imbalance in combination with competitive and unconditionally cooperative bargainers. I believe that Elizabeth and Paul fit this last situation.

## B. EXISTING GUIDELINES

With this backdrop, have any cogent and coherent statutes, court rules, or ethical standards emerged to guide mediators in dealing with power imbalances in divorce mediation? Although the voices are many, they infrequently deal with the issue of power imbalance and, when they do, treat it only vaguely, thus providing little or no guidance. Throughout the country, mediation has been authorized in areas such as labor,<sup>128</sup> business,<sup>129</sup> and criminal law,<sup>130</sup> in addition to family law.<sup>131</sup> In addition to statutes and rules

128. See, e.g., COLO. REV. STAT. ANN. § 8-3-113 (West 1994) (concerning labor disputes); ME. REV. STAT. ANN. tit. 26, § 1285 (West 1988 & Supp. 1994) (concerning workers compensation).

129. See, e.g., COLO. REV. STAT. ANN. § 38-12-216 (West 1990) (concerning landlord-tenant disputes); WASH. REV. CODE ANN. § 7.70.100 (West Supp. 1995) (requiring mediation of health benefit claims).

130. See, e.g., CONN. GEN. STAT. ANN. § 54-56 (West 1994) (creating program for mediation, to which courts may refer criminal prosecutions).

131. See, e.g., CAL. FAM. CODE §§ 3160-3164, 3170-3174, 3175-3186 (West 1994) (setting out procedural framework for mediation in family law); IOWA CODE ANN. § 598 (West 1986) (discussing

authorizing mediation, ethical standards have been promulgated by the American Bar Association (ABA),<sup>132</sup> the Society of Professionals in Dispute Resolution (SPIDR),<sup>133</sup> the Association of Family and Conciliation Courts,<sup>134</sup> and the Academy of Family Mediators.<sup>135</sup> More recently, a committee composed of representatives of the ABA, SPIDR, and the American Arbitration Association released a set of standards for all types of mediation.<sup>136</sup>

The first questions that should be asked when examining these statutes, rules, and guidelines is whether they create a duty on the part of the mediator to deal with power imbalances. Only the California Family Code addresses this issue directly. It provides that the mediator conduct negotiations "in such a way as to equalize power relationships between the parties."<sup>137</sup> One other rule and two standards require "balanced" dialogue but provide little context or meaning. In Iowa, attorneys acting as family mediators have a duty to assure a "balanced dialogue and must attempt to diffuse any manipulative or intimidating negotiation techniques utilized by either of the participants."<sup>138</sup> This language is echoed by the standards from the ABA<sup>139</sup> and the Conciliation Courts.<sup>140</sup>

It is not clear if these requirements for balanced dialogue are merely procedural requirements or if they lead to some substantive standard. If the duty is procedural, the mediator can fulfill the duty by providing roughly

rules governing standards of practice for lawyer mediators in family disputes); KAN. SUP. CT. RULES Rule 901 (West 1993) (setting forth rules for mediation).

132. DIVORCE AND FAMILY MEDIATION STANDARDS OF PRACTICE (Am. Bar Ass'n 1984) [hereinafter ABA STANDARDS].

133. ETHICAL STANDARDS OF PROFESSIONAL RESPONSIBILITY (Society of Professionals in Dispute Resolution 1986) [hereinafter SPIDR STANDARDS].

134. MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION (Ass'n of Family and Conciliation Cts. 1984) [hereinafter CONCILIATION COURTS STANDARDS].

135. STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION (Academy of Family Mediators 1984). Language adopted is identical to the *Conciliation Courts Standards*. See CONCILIATION COURTS STANDARDS *supra* note 134.

136. JOINT COMMITTEE ON STANDARDS OF CONDUCT, STANDARDS OF CONDUCT (Am. Arbitration Ass'n et al. 1994) [hereinafter JOINT COMMITTEE STANDARDS].

137. CAL. FAM. CODE § 3162 (West 1994).

138. IOWA RULES, *supra* note 11, Rule 5(B).

139. ABA STANDARDS, *supra* note 132, Standard V(C) (stating that "The mediator has a duty to assure a balanced dialogue and must attempt to diffuse any manipulative or intimidating negotiation techniques utilized by either of the participants.").

140. CONCILIATION COURTS STANDARDS, *supra* note 134, Rule VIII(A) ("The mediator has a duty to assure balanced negotiations and should not permit manipulative or intimidating negotiation techniques."). Robert Baruch Bush, in his *Proposed Standards of Practice for Mediators*, states that "[a] mediator is obligated to make reasonable efforts . . . to ensure a balanced dialogue and prevent manipulation or intimidation by either party." Robert A. Baruch Bush, *The Dilemmas of Mediation Practice: A Study of Ethical Dilemmas and Policy Implications*, 1994 J. DISP. RESOL. 1 app. at 55 (Standard VII(B)). A discussion of Mr. Bush's standards is included herein because of the comprehensive nature of the standards, as well as the stature of the author in this field.

equal time for each participant to speak, by preventing interruptions, and so forth. Any substantive effect that the fulfillment of this procedural duty has on the mediated agreement would be purely coincidental.<sup>141</sup> The Iowa Rules and the ABA Standards, however, are prefaced with the mediator's duty to suspend or terminate the mediation whenever continuation of the process would harm one or more of the participants.<sup>142</sup> Of course, harm could result if the process were to go awry, but limiting this prefatory language to a procedural protection would impose an unnecessarily narrow definition on the phrase "continuation of the process." In that phrase, "process" is equivalent to "mediation," thereby containing both a procedural and a substantive dimension. This reading results in a substantive standard for the balancing of the power between the parties.

This first group of standards and rules provide the only language relating directly to the issue of power imbalances. The California Family Code<sup>143</sup> provides a seemingly uniform duty that spreads across the entire continuum of power imbalances even though the means for implementing the duty are not delineated.<sup>144</sup> Several criticisms can be leveled at the California provision: it provides no guidance on how much balancing is required, on what is necessary should balancing not be possible, and on what should be done if the parties are headed toward an unfair agreement resulting from a severe power imbalance. More specifically, it calls upon mediators to work toward a general balance of power between the parties no matter what the relative balance of power. A power balancing effort is all that is necessary no matter what the results. All parties are benefitted equally, even those in the greatest predicament who need much more help than others. All weaker parties are benefitted to the extent that the power balancing is successful but are prejudiced to the extent that the power balancing is unsuccessful. It does not require termination if the parties are headed toward an unfair agreement. For all of this criticism, it is the best provision relating to the problem of power imbalances in divorce mediation. Unfortunately, it is just not as complete as it could be.

On the other hand, the Iowa Rules, the ABA, and the Conciliation Court Standards, although requiring termination for unconscionable agreements, imply that only minimum effort which will move the parties away from an unfair agreement is necessary and, when that has been accomplished, the duty has been fulfilled. Under these rules, two sets of weaker parties are severely prejudiced: those that are only minimally capable of protecting

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141. The standard of the Conciliation Courts that contains the "balanced negotiations" language is subtitled "Procedural." CONCILIATION COURTS STANDARDS, *supra* note 134, Rule VIII(A).

142. IOWA RULES, *supra* note 11, Rule 5(A); ABA STANDARDS, *supra* note 132, Standard V(A).

143. CAL. FAM. CODE § 3162 (West 1994).

144. See *supra* note 137 and accompanying text (discussing duty of mediator to deal with power imbalances under the California Family Code).

themselves and those that are incapable of protecting themselves, but through the efforts of the mediator, are rendered minimally capable. The first set, for which no duty exists, ends up with an agreement that, although not unfair, is very nearly so. For the second set, the mediator leads them away from an unfair agreement and then abandons them. To these poor souls, an eye-awakening termination may be the brighter prospect.

Although no specific language concerning power imbalances exists beyond the California statute,<sup>145</sup> the indirect references in the Iowa Rules,<sup>146</sup> and the ABA and Conciliation Courts Standards,<sup>147</sup> the existence of a duty to deal with power imbalances can be extrapolated from both general and specific provisions found in other statutes, rules, and standards. This is so even though the strength of mediation is based upon the self-determination of the participants<sup>148</sup> and the fact that the mediator should not coerce either party,<sup>149</sup> make a substantive decision for any participant,<sup>150</sup> or "direct the

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145. *Id.*

146. *See supra* note 138 and accompanying text (discussing duty to assure balanced dialogue under Iowa Rules).

147. *See supra* notes 139-40 and accompanying text (comparing duty under Iowa Rules to standards of ABA and Conciliation Courts).

148. *See, e.g.,* FLA. RULES FOR CERTIFIED AND COURT APPOINTED MEDIATORS Rule 10.060(a) (1992) [hereinafter FLORIDA RULES] (stating that "A mediator shall assist the parties in reaching an informed and voluntary settlement. Decisions are to be made voluntarily by the parties themselves."); IND. RULES FOR ALTERNATIVE DISPUTE RESOLUTION Rule 1.3(A) (1993) (stating that "Decision making authority rests with the parties, not the mediator."); CONCILIATION COURTS STANDARDS, *supra* note 134, Rule VI(A) (stating that "The primary responsibility for the resolution of a dispute rests with the participants. The mediator's obligation is to assist the disputants in reaching an informed and voluntary settlement . . ."); JOINT COMMITTEE STANDARDS, *supra* note 136, Rule I (stating that "Self-determination is the fundamental principle of mediation."); Bush, *supra* note 140, app. at 53 (Standard V) (stating that "A mediator shall respect and encourage self-determination by the parties in their decision whether, and on what terms, to resolve their dispute, and shall refrain from being directive and judgmental regarding the issues in dispute and options for settlement.").

149. *See, e.g.,* MINN. STAT. ANN. § 518.619(1) (West Supp. 1995) (stating that "The mediator . . . shall have no coercive authority."); MONT. CODE ANN. § 40-4-302(2) (1993) ("The mediator may not use coercive measures to effect the settlement."); TEX. CIV. PRAC. & REM. CODE ANN. § 154.053(a) (West Supp. 1995) (stating that a mediator "may not compel or coerce the parties to enter into a settlement agreement"); FLORIDA RULES, *supra* note 148, Rule 10.060(b) (stating that "A mediator shall not coerce or unfairly influence a party into a settlement agreement. . ."); CONCILIATION COURTS STANDARDS, *supra* note 134, Rule VI(A) (stating that "At no time shall a mediator coerce a participant into agreement. . .").

150. *See, e.g.,* FLORIDA RULES, *supra* note 148, Rule 10.060(b) (stating that "A mediator . . . shall not make substantive decisions for any party to the mediation process."); CONCILIATION COURTS STANDARDS, *supra* note 134, Rule VI(A) ("At no time shall a mediator . . . make a substantive decision for any participant."); Bush, *supra* note 139, app. at 53 (Standard V) (stating that "A Mediator is obligated to leave to the parties full responsibility for deciding whether, and on what terms, to resolve their dispute. He/She may and should assist them in making informed and thoughtful decisions; but he/she shall never substitute his/her judgment for that of the parties, as regards an aspect of the mediation . . . [A]t no time shall a mediator make a decision for the

decision of the mediation participants based upon the mediator's interpretation of the law as applied to the facts of the situation."<sup>151</sup>

With regard to general provisions, the standards promulgated by the Joint Committee and SPIDR recognize an obligation that extends beyond self-determination and the pure self-interests of the participants. The Preface written by the Joint Committee states that the "Standards of Conduct for mediators are intended [among other things] to promote public confidence in mediation as a process for resolving disputes."<sup>152</sup> While SPIDR, in a section entitled "The Settlement and Its Consequences," stated that the mediator "must be satisfied that agreements in which he or she has participated will not impugn the integrity of the process."<sup>153</sup> Both of these provisions create an obligation to the community or society as a whole. The SPIDR provision looks to the end result of the mediation, the agreement, as the *sine qua non* from which integrity will be derived.

If the keystone to this new portal to dispute resolution was the process alone, there would be no reason to examine the substance of the agreement or to be concerned with the public confidence. The process alone could be examined, and from it integrity and public confidence could be derived. If the parties reached an agreement, so be it. The sum and substance of it would not be of concern to the public if the process remained intact. However, by looking at mediation as a whole and at the process in particular through the lens of the agreement, the mediator is forced to examine the quality of the agreement in order to judge mediation and the process of mediation. The language contained in the Joint Committee and the SPIDR Standards require it. If the agreement is to be examined, then some attention must be paid to power imbalances between the parties.

We now turn our attention from general, prefatory language to specific provisions contained in the statutes, rules, and standards. The specific language focuses on three areas: (1) capacity of the parties to mediate; (2) impact of the mediation on the parties; and (3) the nature of any agreement resulting from the mediation. The first two, by aiming at the parties, only indirectly create a duty to focus on the substantive agreement reached, while the third creates such a duty directly.

Concerning the capacity of the parties, the mediator is often called upon

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parties, or directly express his/her opinion about or advise for or against any proposal under consideration.").

151. ABA STANDARDS, *supra* note 132, Standard IV(C). *See also* FLORIDA RULES, *supra* note 148, Rule 10.090(d) (stating that "[U]nder no circumstances may a mediator offer a personal or professional opinion as to how the court in which the case has been filed will resolve the dispute.").

152. JOINT COMMITTEE STANDARDS, *supra* note 136, at Preface.

153. SPIDR STANDARDS, *supra* note 133, at 6 (Responsibilities to the Parties). *Cf.* FLORIDA RULES, *supra* note 148, Rule 10.020(a) (stating that "Persons serving as mediators are responsible to the parties, the public, and the courts to conduct themselves in a manner which will merit that confidence.").

to assess the status of the participants and to terminate the mediation if the parties lack the ability to participate in the mediation in a meaningful manner,<sup>154</sup> or in good faith,<sup>155</sup> or if one party is simply not "capable in participating in informed negotiations."<sup>156</sup> Also, the mediator shall terminate the proceeding for certain types of incapacities, such as intoxication, or when a participant is irrational or exhibits impaired judgment.<sup>157</sup>

Baruch Bush, in his *Proposed Standards of Practice for Mediators*, examines the capacity of the parties in order to make a determination concerning mediability of the dispute:

Where a party appears to be acting under complete coercion or fear, or without capacity to comprehend the process and issues and make decisions, the mediator is obligated to explore this question and, unless the party in question objects, discontinue the mediation. If that party insists on continuing, the mediator may do so, but should continue to raise the question and check for willingness to proceed.<sup>158</sup>

This provision presents two problems. First, by requiring "complete coercion or fear" before a response is sanctioned,<sup>159</sup> it presents an unreasonably high, but still unnecessarily vague standard for measuring capacity. What is the definition of that phrase? How is a mediator to implement this provision? Second, this provision allows the party to trump the determination of the mediator by objecting, thereby preventing the mediator from discontinu-

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154. See, e.g., FLORIDA RULES, *supra* note 148, Rules 10.050(b) & 10.110(b)(2) (requiring termination of mediation if one of the parties is "unwilling or unable to participate in the mediation process in a meaningful manner"); IND. RULES FOR ALTERNATIVE DISPUTE RESOLUTION Rule 2.7(D) (1993); IOWA RULES, *supra* note 11, Rule 5(A); OKLA. CODE OF PROFESSIONAL CONDUCT FOR MEDIATORS B(1)(e)(2) (1993) (requiring termination of mediation "when it appears that a party is unable or unwilling to make an effort to meaningfully participate in the mediation process"); ABA STANDARDS, *supra* note 132, Standard V(A); CONCILIATION COURTS STANDARDS, *supra* note 134, Rule IX(B)(2).

155. ABA STANDARDS, *supra* note 132, Standard I(E).

156. CONCILIATION COURTS STANDARDS, *supra* note 134, Rule VIII(B).

157. OKLA. CODE OF PROF. CONDUCT FOR MEDIATORS B(1)(e)(4) (1993). See also FLORIDA RULES, *supra* note 148, Rule 10.090(c) (using general disability of "psychological or physical" reasons); JOINT COMMITTEE STANDARDS, *supra* note 136, Rule VI (stating that "A mediator shall withdraw from the mediation . . . if a party is unable to participate due to drugs, alcohol, or other physical or mental incapacity."). Cf. ABA STANDARDS, *supra* note 132, Standard I(1) (requiring mediator to bring "to the participants' attention that emotions play a part in the decision-making process" and to ask "that each understands the connection between one's own emotions and the bargaining process," while providing absolutely no guidance as to the sum or substance of this connection).

158. Bush, *supra* note 140, app. at 53 (Standard IV(D)).

159. *But cf. id.* app. at 53 (Standard IV(C)). Bush requires the mediator to explore matters with a party if he or she "appears to be acting under pressure of any kind, or without fully comprehending the process." *Id.* This requirement, however, is nothing more than a restatement of a requirement that the parties understand the process and options available for settlement.

ing the mediation. That is followed by the contradictory provision that, if the party "insists on continuing, the mediator *may* do so."<sup>160</sup>

All of the provisions that measure the capacity of the parties to mediate result from an altruistic vision of mediation similar to the prohibition against mediating abuse cases. The intent is to protect parties who are unable to fend for themselves. Unfortunately, they create a measure that is extremely hard to define and implement. Beyond "complete coercion," asking the mediator to determine "meaningful" or "good faith" participation requires nothing less than speculation for a mediator who has just met or has extremely limited exposure to the parties. This is especially true for attorney-mediators who are singularly unqualified to make a determination of this kind.

With regard to the impact of the mediation upon the parties, under the ABA Standards and provisions from Indiana, Iowa, and Oklahoma, the mediator shall terminate the mediation if he or she believes that it will result in "harm" to a participant.<sup>161</sup> Under the Wisconsin statutes governing family mediation, the mediator may terminate if there is "evidence which indicates one of the parties' health or safety will be endangered if mediation is not terminated."<sup>162</sup>

Like the determination of capacity, the measuring of harm to a party suffers from similar criticisms of vagueness and speculation. Who should be the one to determine fairness? Should the mediation agreement be fair to the mediator or need it be fair only to the parties themselves? The principle of self-determination has already been stated in the guidelines.<sup>163</sup> If the parties to the mediation were the only judges of the fairness of the agreement, this would be nothing more than a redundant statement of self-determination. If procedural fairness was the responsibility of the mediator, and substantive fairness was the responsibility of the parties, there would be no reason to identify the need for self-determination. Fairness, especially when listed co-equally with self-determination,<sup>164</sup> must represent substantive fairness as determined by the mediator.

The third and final category of specific language relates to the agreement

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160. *Id.* app. at 53 (Standard IV(D)) (emphasis added).

161. See, e.g., OKLA. CODE OF PROFESSIONAL CONDUCT FOR MEDIATORS Rule B(1)(e)(1) (1993) (requiring suspension or termination "when it appears that continuation would harm or prejudice any party"); IND. RULES FOR ALTERNATIVE DISPUTE RESOLUTION Rule 2.7(D) (1993); IOWA RULES Rule 5(A); ABA STANDARDS, *supra* note 132, Standard V(A) (stating that "The mediator shall not, however, participate in a process that the mediator believes will result in harm to a participant.").

162. WIS. STAT. ANN. § 767.11(10)(e)(4) (West 1993).

163. See *supra* note 148 and accompanying text (citing authorities for proposition that the strength of mediation is based upon the self-determination of the participants).

164. See *supra* note 156 and accompanying text (discussing obligation of mediator to terminate mediation if one party is incapable of participating in informed decisions). See also CONCILIATION COURTS STANDARDS, *supra* note 134, at Preamble.

and not to the parties themselves. The ABA, Conciliation Courts, and the Academy of Family Mediator Standards all contain identical language: "If the mediator believes that . . . a reasonable agreement is unlikely, the mediator may suspend or terminate mediation and should encourage the parties to seek appropriate help."<sup>165</sup> Only two states have adopted any statutes or rules of this nature.<sup>166</sup>

The SPIDR Standards combine an examination of the agreement with a determination of the impact on the parties: "If the neutral is concerned about the possible consequences of a proposed agreement, and the needs of the parties dictate, the neutral must inform the parties of that concern. In adhering to this standard, the neutral may find it advisable . . . to withdraw from the case."<sup>167</sup> Although the "needs of the parties" would clearly refer to some examination of the capacities of the parties or the impact of an agreement, this phrase, unfortunately, has been left undefined.

Finally, Florida has created a grab-bag of items to monitor, including capacity and impact concerns along with contract terms: "The mediator shall not knowingly assist the parties in reaching an agreement which for reasons such as fraud, duress, overreaching, the absence of bargaining ability, or unconscionability would be unenforceable."<sup>168</sup>

Unfortunately, most statutes and rules are so general that the mediator receives no guidance as to his or her proper role concerning power imbalances. As an example, Delaware defines a mediator as one who shall "assist[] and facilitate[] two or more parties to a controversy in reaching a mutually acceptable resolution of the controversy."<sup>169</sup> In Maine, a workers compensation mediator "is not bound by the rules of evidence or procedure, but shall make inquiry in the manner best calculated to ascertain the substantial rights of the parties and carry out the [spirit of the act]."<sup>170</sup> These statutes not only fail to consider any potential power imbalances, but they place few other constraints (other than confidentiality) upon the mediator. Further, in Delaware, the only language about termination states that the mediator may terminate if there is no agreement.<sup>171</sup> Does this imply

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165. ABA STANDARDS, *supra* note 132, Standard V(A); CONCILIATION COURTS STANDARDS, *supra* note 134, Rule IX(B)(2).

166. IND. RULES FOR ALTERNATIVE DISPUTE RESOLUTION Rule 2.7(D) (1993) (stating that "The mediator shall terminate mediation whenever . . . the ability or willingness of any party to participate meaningfully in mediation is so lacking that a reasonable agreement is unlikely."); IOWA RULES Rule 5(A).

167. SPIDR STANDARDS, *supra* note 133, at 6 ("Responsibilities to the Parties").

168. FLORIDA RULES Rule 10.110(a)(3).

169. DEL. SUP. CT. CIV. R. Rule 16.2(a). *See also* FLA. STAT. ANN. § 39.01(35) (West Supp. 1995) (stating that "The role of mediator includes, but is not limited to, assisting the parties in identifying issues, fostering joint problem solving, and exploring settlement alternatives.").

170. ME. REV. STAT. ANN. tit. 39-A, § 313 (West Supp. 1994).

171. DEL. SUP. CT. CIV. R. Rule 16.2(h).



that the mediator may not terminate if there is movement toward an agreement, no matter what its nature? This is unclear. Under the Minnesota Civil Mediation Act, an agreement is not binding unless it contains a statement that "the mediator has no duty to protect their [the parties'] interests or provide them with information about their legal rights [and] signing a mediated settlement agreement may adversely affect their legal rights . . . ." <sup>172</sup>

In answer to the question posed at the beginning of this section, no cogent or coherent standards have emerged to guide mediators in dealing with power imbalances. The California Family Code comes the closest by clearly creating a duty to deal with power imbalances but suffers from many other infirmities. As a beginning, the duty created by the California provision should be combined with the language from the standards of the ABA, Conciliation Courts, and the Academy of Family Mediators, which calls upon mediators to take some action if the parties are not headed toward a reasonable agreement. <sup>173</sup> This combination would create a uniform duty to balance power across the continuum and also require termination should the parties, despite the power balancing efforts of the mediator, be headed toward an unfair agreement. The task then remains to explore the frontier of fairness and chart its borders.

## VI. FULFILLING THE DUTY

Several conclusions can be drawn from the foregoing discussion. First, mediation is most effective in situations in which ongoing relationships need to be preserved. <sup>174</sup> Second, without some drastic changes to mediation, "[e]ven where settlement is possible, it will likely preserve the relative balance of power between the parties." <sup>175</sup> Third, mediation may be inappropriate between parties of unequal bargaining power. <sup>176</sup> Fourth, mediation is most appropriate in divorce cases with only a moderate level of conflict between parties possessing reasonable negotiating skills. <sup>177</sup> Finally, the problem of power imbalances may be especially acute in divorce, <sup>178</sup> thereby calling for its exclusion from mediation <sup>179</sup> in certain circumstances.

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172. MINN. STAT. ANN. § 572.35(1) (West 1988).

173. See *supra* note 165-66 and accompanying text (discussing the adoption by Iowa and Indiana of ABA standard encouraging mediator to suspend or terminate mediation and encourage parties to seek help if a reasonable agreement is unlikely).

174. Levine, *supra* note 87, at 68.

175. *Id.*

176. *Id.* at 69.

177. Douglas H. Sprinkle & Cheryl L. Storm, *Divorce Therapy Outcome Research: A Substantive and Methodological Review*, 9 J. MARITAL & FAM. THERAPY 239, 252 (1983).

178. Welton, *supra* note 88, at 105, 107.

179. *Id.*

The first conclusion is the most damning. While mediation works best to preserve relationships, the arena of divorce mediation is constructed around the dismantling of the marital relationship.<sup>180</sup> The parties must divide assets originally obtained with no thought of degree of ownership. They must establish separate homes after spending the length of the marriage joined in one. They must deal with a variety of other issues in a manner diametrically opposed to the previous orientation. This is all overlaid with the emotional difficulties entailed in any divorce.

Divorce mediation represents the single area of mediation in which power imbalances are the most prevalent. Spouses are often dysfunctional, and the greater the dysfunctionality, the greater the potential for severe power imbalances. In this arena, we are dealing with quintessential power imbalances. Without more, mediation will likely preserve the relative imbalances of power.<sup>181</sup>

When spouses divorce, they are disentangling themselves from the single, most predominant relationship our society has to offer. For each party, the relationship has been the biggest presence in his or her life. At the same time they are breaking up their relationship, divorcing spouses must deal with societally imprinted images that sanction marriage and subtly condemn divorce. The purposes of other forms of mediation are to repair existing ties of an ongoing relationship or to increase the number of ties that will lead to a stable and lasting agreement. Divorce mediation drastically reduces or, in the case of childless couples or where ongoing support will not be an issue, eliminates existing ties altogether. This can only have a destabilizing effect. It tends to reduce mediation to relying on altruism of the powerful party, the results of which can hardly be depended upon. Competitive bargainers will have no compunction not to take advantage of the situation. This points strongly towards a conclusion that divorce mediation is inappropriate in many instances.

Did Elizabeth make a reasoned, moral decision to favor the relationship over the economic realities? It is clear to me that Elizabeth reverted to old patterns of caretaking and that the settlement, on a much more subtle level, became a replay of the excruciating power imbalances that infected the

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180. Granted, the parties will often have an ongoing relationship concerning issues of child care and support, but this represents only one small aspect of the entire realm of the divorce process. In fact, the emotional difficulties experienced by one or both of the parties may restrict or destroy the parties' ability to concentrate on ongoing aspects of the relationship, further diminishing this leveling tendency.

181. Welton, *supra* note 88, at 108. Welton states that one suggested solution "is to ask the mediator and the mediation process to empower the weaker party so as to create a situation more closely approximating equality." *Id.* The problem with this suggestion is that asking "mediation itself to equalize an unequal relationship is asking too much of the process. It may not be possible for mediators, who play an impartial role, to actively support a weaker side without damaging the mediation process as a whole." *Id.*

entire marriage. It is also clear that the same dynamics played the major role in the settlement of the custody matter. Elizabeth's bargaining style was unconditional cooperation, while Paul's was highly competitive. Paul felt that giving one dollar to Elizabeth was more than fair. For Elizabeth, the cessation of the conflict was more important than a fair resolution.<sup>182</sup>

Although commentators have addressed the issue, the standards developed by them, like the statutes, provide little or no guidance when faced with these issues. One recommends against mediation when the power is "substantially unbalanced" and participation is "a good deal less than voluntary,"<sup>183</sup> others when the parties bargaining power is "sufficiently unequal"<sup>184</sup> or when "the imbalance is too great."<sup>185</sup> None of these give the slightest hint as to when mediation should be avoided.

John Haynes, however, provides us with the kernel from which any standard should grow. He asserts "that the agreement measures up to a standard of fairness that all [including the mediator] agree on."<sup>186</sup> The measure of fairness must be that of the mediator as well as the parties themselves. Leonard Riskin takes the standard one step further: the mediator is to help the parties avoid an agreement that a court would refuse to enforce because of, among other factors, the absence of bargaining ability or substantive unconscionability.<sup>187</sup>

This standard of fairness can be implemented before mediation by screening each party<sup>188</sup> for his or her type of bargaining behavior. If one spouse is competitive and the other unconditionally cooperative, further inquiry would be necessary. Is there a power imbalance that is likely to assert itself? Has there been a history of abuse or does one spouse suffer from any of the other dysfunctions discussed? If so, mediation might be inadvisable.

All divorce mediations should be co-mediated with mixed gender teams consisting of an attorney paired with a health provider, either a counselor, psychologist, or therapist. During mediation the team should impose a two-part test. The attorney will determine, under the laws of the state, if any proposed agreement is unfair, where the meaning of unfairness is based upon an approximation of a judicial determination. In other words, does the

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182. See COOGLER, *supra* note 124, at 79 (stating that cessation of conflict occurs when one party is overwhelmed by another party's power).

183. Forester & Stitzel, *supra* note 105, at 256.

184. Levine, *supra* note 87, at 69.

185. Haynes, *Power Balancing*, *supra* note 72, at 280-81.

186. HAYNES & HAYNES, *supra* note 103, at 15.

187. Leonard L. Riskin, *Toward New Standards for the Neutral Lawyer in Mediation*, 26 ARIZ. L. REV. 329, 354 (1984).

188. See generally Ngho Tiong Tan, *Implications of the Divorce Mediation Assessment Instrument For Mediation Practice*, 29 FAM. & CONCILIATION CTS. REV. 26, 29 (1991) (discussing use of personality assessment to determine readiness for divorce mediation).

agreement fall outside a range of what the parties could reasonably expect from family court? The health provider would then decide whether the spouse on the weaker side is making a decision that is both knowledgeable and voluntary, or whether she is suffering from some disability which impairs her ability to act independently. In this way, each mediator can appropriately apply his or her expertise to the process to best ensure fairness for both spouses.

If a proposed agreement is unfair, but the weaker spouse is making a knowing and voluntary decision that is not subject to a disability, the mediators should allow the mediation to proceed. If a proposed agreement is fair, but the weaker spouse is not making a reasoned decision, a presumption should arise that the weaker spouse could obtain a better result under improved conditions. The mediators should then urge her to seek outside counseling. If counseling is unsuccessful, the mediators should consider terminating the mediation after advising the parties generally about the problem.

If both tests are positive, the mediators should advise the parties about their findings. If, after such a discussion, an agreement can be reached that satisfies both tests, mediation will have been successful. If not, the mediation should be terminated.

If Elizabeth's case had been subject to these standards, the mediators would have stopped the process before conclusion. The settlement agreement was unfair, based on an approximation of a judicial outcome, and I believe that Elizabeth suffered from a disability that impaired her ability to act independently. Ceasing mediation may not have prevented the resulting settlement, but a statement from the mediators that the agreement was unfair may have changed the outcome. Perhaps Elizabeth would have been shocked into claiming more of what was rightfully her own. Perhaps the matter might have settled as it did. Such a settlement, however, would not have borne the imprimatur of the mediation process.

## CONCLUSION

Had I to do it over again, would I have changed anything? Perhaps, but I am not sure that it would have changed the outcome. Under the laws of many states, attorneys have an ethical duty to advise clients about alternative dispute resolution. Although I would have advised Elizabeth about mediation, I would not have recommended it. On the other hand, all of the signals for a mediated settlement were favorable. She had been living independently for almost a year. She was in counseling, had joined a new church, and her support structure was strong. She wanted the divorce and was looking forward to moving on with her life, which included plans for returning to school to pursue a nursing degree. Finally, she understood the

financial aspects of the divorce and, with the help of her accountant, knew what was necessary to meet her needs.

Yet, slowly, imperceptibly, all of these favorable indicators began to melt away during mediation as the ugly presence of the power imbalance between Paul and Elizabeth, seemingly dormant, began to reappear from deep within the relationship. Even with the help of her attorney and accountant, Elizabeth could not overcome Paul's power. The push to settle, the persuasive presence of the mediator, and the non-confrontational atmosphere conspired to render Elizabeth impotent against Paul. As the mediation progressed, Paul was more and more competitive and Elizabeth was increasingly cooperative, unconditionally so. It is from Elizabeth's case that serious doubts about the viability of mediation as it is now constituted have arisen. The images from Elizabeth's mediation are still clear and sharp and drive the conclusions reached in this Article.