

# **USING ADR TO RESOLVE DIFFICULT ISSUES IN FAMILY LAW**

## **SUMMARY**

Research shows that most people who use mediation to resolve separation and divorce-related issues are more satisfied with the process and the outcome than most people who use lawyers to negotiate or litigate.

This paper will discuss some of the research and opinions about why mediation is usually, but not always, in the best interests of the parties and their families. In particular, it surveys some of the research on abuse, power, violence and the presence of personality disorders, in an effort to provide mediators with some tools for successful mediation where these difficult issues are present.

## **MEDIATION RESEARCH AND CLIENT SATISFACTION**

There have been many studies of voluntary and mandatory family mediation in Canada and the United States. The results consistently show that people who mediate are more satisfied with the process and the outcome than those who go to court. Some findings:

1. Participants in a custody mediation survey in Colorado and Delaware reported more satisfaction with the process than those in litigation. They felt it helped them focus better on the needs of their children, was less damaging to their relationship with their former spouse, and provided a

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better opportunity to express their point of view. The study also found a higher level of compliance with mediated agreements.<sup>1</sup>

2. Another U.S. study found that men were generally more satisfied with the outcome of mediation than men using litigation; they felt their rights were better protected, that concern was shown for them and that they were better able to resolve problems with their former spouse. They also felt that the process had a positive effect on their children, which they felt resulted in a better relationship between the children and their mothers.<sup>2</sup>
3. A 1992 U. S. study found that men and women alike found the mediation process to be fairer; they felt less pressure to agree to things they didn't want, and that their rights were better protected. The parties reached settlement sooner in mediation than those in litigation.<sup>3</sup>
4. The same study found that women in mediation perceived less intimidation from their spouses and felt they had more control over the process, and over their decisions, than the women in the litigation sample.
5. A 1989 custody mediation study found that men and women were equally satisfied with the process, happier with the custody agreement, and felt that the process better addressed the child's needs. Follow up studies in 1991 showed that the positive effects of mediation can be lasting; the parties felt less tension than the parties who litigated for a full year after the divorce.<sup>4</sup>

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<sup>1</sup> Pearson and Thoennes, p. 19-23, in *Mediation Research*, Kressel and Pruitt eds., (1989) Jossey-Bass; and *Mandatory Custody Mediation: The Debate Over its Usefulness Continues*, Gaschen, (1995) 10 Ohio St. J. on Disp.Resol, 569.

<sup>2</sup> Gaschen, *ibid.*, p. 484; and footnote 106-110.

<sup>3</sup> Gaschen, *ibid.*, p. 485 and footnote 116-119 on mediation studies in Florida, Nevada, New Mexico and North Carolina.

<sup>4</sup> Gaschen, *ibid.*, p. 486, and footnote 125 citing the work of Joan Kelly, and footnotes 129-131.

6. California studies on mandatory custody mediation show that the majority of participants view the experience positively, reach agreement more quickly and comply with the agreement more often.<sup>5</sup>
7. Client satisfaction with mediation varies inversely with judicial or lawyer control or involvement. Mediation clients in non-court-based (ie/ private) mediation with low judicial/lawyer control or involvement reported higher levels of satisfaction.<sup>6</sup>

These findings support what researchers have long been saying about the benefits to families of avoiding an adversarial environment and reducing conflict.

8. Research shows that the greater exposure parents have to litigation, the more likely they are to make decisions that do not reflect the best interests of their children. Adversarial procedures such as filing affidavits and going to court polarize the parents, diminishing their parenting capacity, and compromising their ability to co-parent. Highly conflicted parent relationships result in resistance to mediation, questionable negotiation strategies, unrealistic custody and access demands and repeated litigation. All of this reduces the ability of the parents to cooperate in the best interests of their children.<sup>7</sup>
9. The first year post-separation is a critical time that establishes a foundation for the parenting relationship. Educational interventions early in the separation can be useful in supporting parents to make wise decisions about their children. Early mediation is one way of achieving this goal, as demonstrated by research showing that parties in mediation

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<sup>5</sup> Gaschen, *ibid.*, p. 486-487, and footnotes 132, 134, and 135-138.

<sup>6</sup> Ellis and Stuckless, *Mediating and Negotiating Marital Conflicts*, (1996) Sage Publications, p. 104.

<sup>7</sup> Freeman, *Parenting After Divorce: Using Research to Inform Decision-Making About Children*, (1998) 15 Can. J. Fam. Law, parag. 50 and footnote 76.

feel less tension during this period than parties negotiating with counsel or in litigation.<sup>8</sup>

## **MEDIATION AND VIOLENCE**

10. According to a 1994 Canadian study, voluntary mediation makes a greater contribution towards preventing post-separation violence against women than does lawyer negotiations. Women involved in lawyer-negotiations with their former partners experienced more repeat violence in the first 12 months after separation than the women participating in mediation. The preparation of affidavits was considered to be a significant factor in increased violence against women who were negotiating with lawyers.<sup>9</sup>
  
11. In another study, women who had been battered and women who had not been battered reported, in equal proportions, being equally or better able than their partners to stand up for themselves and state their position. Although more men than women used physical violence and psychological abuse against their partners in this study, the study found no connection between these “power imbalances” and the outcome of the mediation.<sup>10</sup>
  
12. The importance of mediator skill and training is well illustrated by the results of a 1999 study in Nova Scotia. The Transition House Association of Nova Scotia studied the experiences of female victims of partner violence who had participated in court-mandated custody mediation. The study concluded that the mediation process in which these women participated served only to re-victimize them. “Far from providing a less adversarial forum in which woman had a better chance of making their

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<sup>8</sup> Freeman, *ibid.* parag. 60, and Gaschen, *ibid.*, footnote 53.

<sup>9</sup> Ellis and Stuckless, *supra*, p. 62.

<sup>10</sup> *Ibid.*, p. 79.

voices heard, this research indicates that mediation with an abuser instead becomes re-victimization”<sup>11</sup>.

13. However, this study should be read with caution. The mediators in this study were apparently neither skilled nor trained to handle the kinds of cases they were mediating. Judging from the way they responded to the presence of violence and intimidation in mediation, it is fair to conclude that they had little, if any, awareness of the complex nature of family violence, power and control in the negotiation process. They appeared to have no protocols, sensitivity or instincts about these issues. There appeared to be no pre-mediation “screening” for the presence or a history of violence, emotional abuse, mental illness, substance abuse, etc. The mediators used coercive pressure to achieve settlements, and continued the mediation process, without any modification, when ongoing abuse, violence or intimidation was brought to their attention. Given the skills of the mediators, it is not surprising that only two of 24 cases reached settlement and that the majority of women participants reported that they found the experience intimidating, unfair and a waste of time.<sup>12</sup>
14. A review of the general literature on violence and aggression reveals three major conceptions of violence: conflict-instigated, control-instigated and anger-instigated violence.<sup>13</sup>
15. A comprehensive 1994 review of research into types of male batterers resulted in a model featuring three types: generally violent/anti-social (violent towards family and non-family members), family only (violent only towards family members) and dysphoric/borderline (more likely to be depressed and difficult to get along with). Each category of batterer engaged in different severities and types of violence, with the family-only

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<sup>11</sup> *Transition House of Nova Scotia (THANS) Report*, 2000, summary.

<sup>12</sup> *ibid.*

<sup>13</sup> Ellis and Stuckless, *supra*, p. 34

batterer generally engaging in the least severe violence and the generally violent batterer using the most severe violence.<sup>14</sup>

16. “Males with criminal records for committing violent crimes against non-family members are greatly over-represented among males who batter their female partners. The “generally-violent” start off being violent towards non-family members and gradually widen their circle of victims to include their intimate female partners. ”Partner batterers” tend to start off being violent towards their female partners and tend to continue being violent towards them for longer or shorter periods of time without expanding their circle of victims.... “<sup>15</sup>

17. Ellis and Stuckless concluded from their survey of the research that:

- (a) female partners who were married to generally aggressive males, especially a small subset of them classified as sociopathic batterers, are most likely to be seriously injured by them following marital separation or divorce.
- (b) Husbands are far more likely to kill wives than wives are to kill husbands.
- (c) Compared with female partners, a significantly higher proportion of male partners engage in control-instigated violence.
- (d) Approximately equal proportions of male and female partners engage in conflict-instigated violence.<sup>16</sup>

18. A slightly different perspective is provided by Toronto researcher Rhonda Freeman. She writes that there are three kinds of family violence:

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<sup>14</sup> *ibid*, p. 38.

<sup>14</sup> *ibid*, p. 34

<sup>15</sup> Ellis et al., *Domestic Violence Evaluation Manual, (DOVE)* LaMarsh Centre on Violence and Conflict Resolution, York University, 2001.

<sup>16</sup> *Ibid*, p. 45-46.

intrapsychic (within the person), interactional (relational) and external (situational). In the first kind, violence is used to relieve stress and tension. In the second, it is a method of obtaining or maintaining interpersonal control. In the third, it is a means of addressing perceived external danger.<sup>17</sup>

19. Another approach that can be practically very useful for mediators is to conceive of violence between partners as either of a “complimentary” nature or a “symmetrical” nature. The former can be classified as a “predator-prey” relationship; couples who are engaged in severe, repetitive, one-sided violence, showing extremely rigid dominant-submissive complementarity. A “symmetrical” relationship is more like a struggle, with each person using what resources he or she has to maintain his or her place in the relationship. It may be imbalanced, with one person inflicting more harm on the other, but it is not marked by the rigid dominant-submissive hallmark of a complementary relationship of violence.<sup>18</sup>

20. Research findings indicate that past violence is one of the most reliable predictors of future violence. Other types of past behaviour, such as alcohol abuse, that were associated with past violence are also risk markers for future violence/abuse. Generally, behaviour in the recent past is more reliable as a predictor of future abuse/violence than behaviour that occurred a long time ago. According to the LaMarsh Centre on Violence and Conflict Resolution’s Domestic Violence Evaluation (DOVE), the key risk markers for predicting future violence are:

1. Past history of violence towards female partners.
2. Past history of violence towards children.

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<sup>17</sup> Freeman, *supra*, parag. 41, note 73.

<sup>18</sup> This theory of family violence, among others, guides the therapists and researchers at the Mental Research Institute (MRI) in Palo Alto California, according to Dr. Wendel A. Ray, its director.

3. Past history of violence towards other family members.
4. Past history of violence towards non-family members.
5. Past history of stalking female partners.
6. Past history of being afraid of partner.
7. Past history of criminal and/or civil law contacts.
8. Past history of mental health problems.
9. Past history of skills deficits.
10. Past history of conflict.
11. Past history of alcohol use/abuse.
12. Past history of being possessive, jealous, emotionally dependent.
13. Past history of anger.
14. Past history of power need.<sup>19</sup>

## **MEDIATION AND PERSONALITY DISORDERS**

It is helpful for family mediators, who are inevitably going to be dealing with difficult issues, to understand something about personality disorders and how they might affect parties in mediation. Schedule “A” sets out some generic beliefs, perceptions and thoughts of persons with various personality disorders.<sup>20</sup> Such clients may lack basic skills necessary for successful mediation, such as problem-solving ability, anger management, stress management, and assertiveness (as opposed to aggressiveness). Recognizing the absence of these skills may help the mediator work more effectively with both clients in mediation.

Some may not have reached the age-appropriate stages of cognitive development, making it impossible for them to understand abstract thought. As mediators, we may tend to assume that clients have a capacity for conceptual thought. Mediator techniques include

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<sup>19</sup> DOVE Manual, *supra*, pages 6-9. The DOVE screening tool is currently being tested at the Ontario Court of Justice, 311 Jarvis Street in Toronto, to evaluate its reliability in predicting future violence.

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both behavioural and cognitive techniques similar to traditional therapist techniques listed in Schedule “B”.<sup>21</sup> Like therapists, mediators may benefit from being able to recognize when a client lacks the skills or cognitive development to benefit from the more abstract techniques, and focus on more concrete, “behavioural” mediation techniques.

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