

**POWER & DOMESTIC VIOLENCE: A  
MEDIATOR'S CHALLENGE**

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Domestic violence is an unfortunate but existing reality for many families. In fact, it has been reported that around half of separating and divorcing couples have been physically abused by their spouse at least once during the time that they resided together.<sup>1</sup> For lawyers, mediators, arbitrators, and other personnel dealing with separating or divorcing couples, domestic abuse is not an uncommon issue to face and manage. Consequently, it is important for professionals dealing with clients who have been exposed to domestic violence to properly determine how to tailor their approaches and strategies accordingly.

Over the last several decades, mediation has emerged as a popular alternative dispute resolution (ADR) process and has been defined as “the use of an impartial third Party to assist the parties to resolve a dispute.”<sup>2</sup> It has also been described as a “facilitated negotiation” where the parties autonomously resolve their disputes and structure their own settlements.<sup>3</sup> The divorce mediation process has been heralded by many as being a process that empowers negotiating parties by allowing them to talk about their problems, focus on their needs, limit further damage to relationships, and develop satisfying agreements.<sup>4</sup> Others have argued that far from being a source of empowerment, the process can exploit vulnerable spouses.<sup>5</sup> Particularly in cases involving domestic violence, there has been much debate about whether or not mediation is an appropriate system of dispute resolution. Some academics argue that in cases of domestic violence, mediation is not the best process because abused spouses will not be able to rationally

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<sup>1</sup> Desmond Ellis, “Divorce and the Family Court: What Can Be Done About Domestic Violence?” (2008) 46 Fam. Ct. Rev. 531 at 531.

<sup>2</sup> ADR Institute of Canada, Inc., *Model Code of Conduct for Mediators*, online: ADR Institute of Canada <<http://www.adrcanada.ca>>.

<sup>3</sup> Leonard L. Riskin, “Decisionmaking in Mediation: The New Old Grid and the New New Grid System” (2003-2004) 79 Notre Dame L. Rev. 1 at 18.

<sup>4</sup> Lisa Newmark, Adele Harrell & Peter Salem, “Domestic Violence and Empowerment in Custody and Visitation Cases” (2005) 33 Fam. Ct. Rev. 30 at 32.

<sup>5</sup> Nancy Illman Meyers, “Alternative Dispute Resolution Symposium: Power (Im)balance and the Failure of Impartiality in Attorney-Mediated Divorce” (1996) 27 U. Tol. L. Rev. 853 at 860.

negotiate due to psychological and emotional scars.<sup>6</sup> On the other hand, other academics argue that mediation has the potential to make victims feel empowered by giving them more opportunity to be heard.<sup>7</sup>

The heart of this debate truly concerns power imbalances. Power is a central feature in any form of negotiation as parties are consistently trying to determine how much of it they have, how they can increase it, and how they can use it to their advantage to obtain the best possible outcome. In familial disputes such as divorce and particularly in situations involving domestic violence, power between the parties is often unequal. Mediators have the challenge of trying to identify the power imbalances and to effectively balance them so that parties can fairly negotiate a settlement. What this paper seeks to do is examine the concept of power, analyze the sources of power that divorcing couples bring to the bargaining table when there is a history of domestic violence, and comment on what kinds of approaches and tactics mediators can use to effectively balance power in this type of situation. This paper will focus solely on divorcing couples who do not have children, since the presence of children creates a different dynamic that can be examined in a separate analysis.

### **What is Power?**

Before the sources of power are examined, the concept of ‘power’ must first be defined and described. Power is commonly defined as a relational concept involving tangible and intangible resources that concerns a person’s ability to exert influence over another.<sup>8</sup> Because power is a relational concept, it does not arise in isolation; rather, it is the relationship between the parties at the bargaining table - not solely the attributes of one party - that is significant.<sup>9</sup>

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<sup>6</sup> William J. Howe and Hugh McIsaac, “Response” (2008) 46 Fam. Ct. Rev. 592 at 592.

<sup>7</sup> Joan B. Kelly and Michael P. Johnson, “Differentiation Among Types of Intimate Partner Violence: Research Update and Implications for Interventions” (2008) 46 Fam. Ct. Rev. 476 at 492.

<sup>8</sup> Meyers, *supra* note 5 at 864.

<sup>9</sup> Michael Coyle, “Power and Negotiation” in Colleen M. Hancyz, Frederick H. Zemans & Trevor C.W. Farrow, eds., *The Theory and Practice of Representative Negotiation* (Emond Montgomery, 2008) 159 at 164.

Depending on the circumstances, power dynamics between the same two individuals may shift.<sup>10</sup> For example, an abusive husband may possess power over his wife by having superior negotiations skills; however, this same power source would not exist if the wife were to hire a lawyer to negotiate on her behalf. Moreover, a party's perception of power is an important determinant of power dynamics. In fact, perceptions often have a greater effect on power dynamics than the underlying reality of the situation.<sup>11</sup> A party might perceive the other party as having a particular strength. Although the strength may not exist in reality, this perception still creates power for the party perceived to have that strength. Evidently, there are many factors involved in determining how much power a particular person possesses. Lastly, power is not static in that it is continuously changing depending on the interaction of the parties.<sup>12</sup>

### **Sources of Power – A Framework**

There is a vast amount of scholarship identifying sources of power. In his article “(Re)Designing Mediation to Address the Nuances of Power Imbalance,” Ilan G. Gewurz mentions two commonly cited works in this area: the works of French and Raven, as well as that of Roger Fisher.<sup>13</sup> French and Raven describe five main categories of power: reward power, coercive power, legitimate power, referent power, and expert power.<sup>14</sup> Similarly, Roger Fisher identifies six main categories of power: the power of skill and knowledge, good relationships, a good alternative to a negotiated agreement, an elegant (or creative) solution, legitimacy, and commitment.<sup>15</sup> Michael Coyle offers a more recent classification of categories of power which

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<sup>10</sup> Ilan G. Gewurz, “(Re)Designing Mediation to Address the Nuances of Power Imbalance” (2001) 19 *Conflict Resolution Quarterly* 135 at 137.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.* at 136.

<sup>13</sup> *Ibid.* at 137-138.

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*

include: attributes, preferences, and best alternatives to a negotiated agreement (BATNAs).<sup>16</sup>

Many other academic writings offer alternative classifications of power; however, Gewurz's classification of power sources is very comprehensive and builds upon the seminal works of the authors mentioned above. Consequently, Gewurz's classification will be used to examine which power sources are common to divorcing couples who have a history of domestic violence. Only the relevant power sources will be discussed. Gewurz classifies power sources as follows:

- I. Dispute-specific power dynamics
  - A. Procedural power
    1. Informational power and expertise
    2. Commitment to the negotiation process
    3. Personal power
      - a. Patience
      - b. Eloquence
      - c. Education
      - d. Occupation
      - e. Physical presence
      - f. Confidence
      - g. Emotional control
    4. Referent power
    5. Negotiating skills and style
  - B. Substantive power
    1. Coercive and reward power
    2. Resource control (economic power)
    3. Alternative to a negotiated solution
- II. The relationship context
  - A. Relationship precedent
  - B. Psychological power
    1. Self-esteem
    2. Emotional stability
    3. Gender dynamics
  - C. Legitimate power
    1. Authority
    2. Reputation
    3. Socially granted power<sup>17</sup>

### **Differentiating Between Types of Domestic Violence**

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<sup>16</sup> *Supra* note 9 at 161-167.

<sup>17</sup> *Supra* note 10 at 146-147.

The term ‘domestic violence’ most often conjures images of a domineering and intimidating husband systematically abusing his physically and emotionally feeble wife. This portrayal holds true in many instances; however, this situation does not accurately depict all cases of domestic violence. Johnson and Kelly explain that domestic violence can be differentiated based on partner dynamics, context, and consequences and can be grouped into four different categories: coercive controlling violence, violent resistance, situational couple violence, and separation-instigated violence.<sup>18</sup> First, coercive controlling violence is characterized by a pattern of power and control and can include the following behaviours: intimidation; emotional abuse; isolation; minimizing, denying, stalking, and blaming; use of children; asserting male privilege; economic abuse; extreme jealousy; coercion; violence; and threats of violence.<sup>19</sup> This type of violence is usually more frequent and severe than the other types of domestic violence; thus, it is considered a key risk factor for continued or increased abuse.<sup>20</sup> Second, violent resistance can be described as “violence that takes place as an immediate reaction to an assault and that is intended primarily to protect oneself or others from injury.”<sup>21</sup> Most spouses who engage in violent resistance are women who have been subject to coercive controlling violence by their spouse.<sup>22</sup> Third, situational couple violence is violence perpetrated by both men and women and is sparked by arguments between spouses that escalate into physical violence. Situational couple violence is usually infrequent, only involves minor forms of violence, and is not accompanied by a chronic pattern of control.<sup>23</sup> Lastly, separation-instigated violence occurs at the time of or during the separation where there was no prior history of domestic abuse. This type of violence can include mild to severe forms of violence including:

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<sup>18</sup> *Supra* note 7 at 476.

<sup>19</sup> *Ibid.* at 481-483.

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.* at 484.

<sup>22</sup> *Ibid.* at 485.

<sup>23</sup> *Ibid.* at 485-486.

sudden lashing out, throwing objects at the partner, destroying property, brandishing a weapon, and sideswiping or ramming the partner's car or that of his/her lover.<sup>24</sup> This type of violence, also perpetrated by both men and women, is uncharacteristic of the spouse that commits the violence and can be seen as a complete loss of psychological control.<sup>25</sup>

Differentiating between types of violence is important, as the power dynamics in each are unique and require separate assessment. Although examining the power sources in each type of violence would be useful, only the power sources present in coercive controlling violence will be analyzed in this paper. Therefore, the term 'domestic violence' in this paper will only be referring to coercive controlling violence. Moreover, as discussed above, both men and women can be violent; however, studies have shown that a gender pattern exists in coercive controlling violence in which the violence is overwhelmingly male-perpetrated.<sup>26</sup> Consequently, this paper will focus on and refer to 'abusive husbands' and 'abused wives'. It is important to note that men can also be victims of this type of violence, although it is rare.

### **Sources of Power – Divorce Mediation & Domestic Violence**

As presented in Gewurz's classification, power sources emanate from dispute-specific power dynamics and from the relationship context. The major sources of power that are generated from dispute-specific power dynamics include procedural powers and substantive powers. In the relationship context, psychological powers are major sources of power and are particularly influential in cases involving domestic violence. Below, each source will be separately analyzed.

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<sup>24</sup> *Ibid.* at 487.

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.* at 482.

## ***Procedural Powers***

Procedural powers refer to powers that give one party an advantage over another in the negotiating process and include: informational powers, commitment to the negotiation process, personal powers (patience, eloquence, education, occupation, physical presence, confidence, and emotional control), and negotiating skills and style.<sup>27</sup> Each case has its own unique set of facts, but in general, powers that are considered procedural powers often tilt in the husband's favour due to social structure; therefore, these power sources are common in many marriages and are not unique to divorces involving a history of domestic violence.

First, informational power is the ability to gather information to support a particular position in a negotiation.<sup>28</sup> This power allows a party to have a superior understanding of his/her BATNA in addition to that of the other spouse. The more information a party has, the better prepared a party will be in negotiations. In our society and in most relationships where domestic violence exists, the husband is often the primary breadwinner of the household, has higher educational training, and often occupies a more senior position in the workplace than his wife.<sup>29</sup> Thus, in terms of informational power, this may create power for the husband in several ways. Not only may the husband be able to better afford a lawyer who can provide him with advice about how his situation might unfold in a courtroom and what negotiation strategies might improve his position, but he might also have superior researching skills to obtain information on his own. Owen Fiss also comments that "...the poorer party may be less able to amass and analyze the information needed to predict the outcome of the litigation, and thus be disadvantaged in the bargaining process."<sup>30</sup> As a result, the wife may not realize the strength of her BATNA because she may not recognize that her position in the courtroom would be better

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<sup>27</sup> *Gewurz, supra* note 10 at 147.

<sup>28</sup> *Ibid.*

<sup>29</sup> *Newmark et. al., supra* note 4 at 32.

<sup>30</sup> Owen M. Fiss, "Against Settlement" (1984) 93 *Yale L.J.* 1073 cited in *Coyle, supra* note 9 at 183.

than that of her husband. This may prevent her from claiming value in a negotiation when she has a good opportunity to do so. However, an abusive husband may also underestimate his wife's ability to gather information in an effective manner and might be underprepared in the negotiation process, giving his wife a source of power.

Second, commitment to the negotiation process is a source of power when a party is able to define his/her vision of what he/she wants from the settlement and stay committed to those goals.<sup>31</sup> In negotiations between spouses who have a history of domestic violence, the husband may be in a better position to determine what he can get out of the settlement and firmly stick to those goals, especially if he has superior informational power. If the wife has not obtained sufficient information she may not have any expectations with respect to the settlement and may be more easily persuaded to change her mind in terms of what she wants and what she is not willing to accept.

Third, personal power consists of personal attributes and traits that make someone an effective negotiator, such as patience, eloquence, education, occupation, physical presence, confidence, and emotional control.<sup>32</sup> Husbands typically have both educational and occupational superiority over their wives, which may better prepare them to negotiate effectively.<sup>33</sup> This experience may have exposed them to negotiations and may have taught them how to clearly articulate their ideas. Also, abusive husbands often appear charming, eloquent and reasonable in comparison to their wives who may appear hysterical, irrational, silly, and less assertive – characteristics that are not conducive to an effective negotiation.<sup>34</sup> In terms of physical presence, the mere fact that an abusive husband is in the same room as his wife may create power for him. Intimidation may inhibit the spouse from voicing her needs and desires in the presence of her

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<sup>31</sup> *Gewurz, supra* note 10 at 147-148.

<sup>32</sup> *Ibid.* at 148.

<sup>33</sup> *Meyers, supra* note 5 at 866.

<sup>34</sup> *Ibid.* at 861.

abuser. Abusive husbands may also gain power by being much more confident and collected than their wives; these wives often have very little self-confidence and may be suffering from post-traumatic stress or depression. These ailments can impact their emotional control and how well they articulate their positions in a negotiation. However, if an abused wife was the one to leave the relationship, she may feel empowered and more confident. An abused wife may also gain power if her husband is less patient and loses his emotional composure if he is feeling as though he is losing his control over his wife.

Fourth, an abused spouse's negotiating style would most likely put her at a disadvantage in comparison to the abuser. An abused spouse would most likely be a conflict avoider, while the abusive spouse would most likely be a competitive negotiator. Thus, the abused spouse might be willing to accept an unfavourable settlement to avoid any possible conflict with her husband. Newark et. al. explain that "[d]omestic abuse creates a dynamic in which the victim is likely to be intimidated, fearful, and afraid to confront or challenge the wishes of the abuser."<sup>35</sup>

### ***Substantive Powers***

Substantive powers refer to powers that emanate from the possession of tangible resources and the degree to which one person is dependent on the other for those resources.<sup>36</sup> Substantive powers include: coercive and reward power, resource control (economic power) and alternatives to a negotiated agreement (BATNA).<sup>37</sup>

First, coercive and reward power is the ability of one spouse to subject the other to reward or punishment.<sup>38</sup> This source of power is particularly relevant in cases of domestic abuse. Through threats or the use of physical violence, the abuser has power over the abused spouse. As mentioned above, the use of violence creates an environment of fear whereby the

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<sup>35</sup> *Supra* note 4 at 32.

<sup>36</sup> *Gewurz, supra* not 10 at 149.

<sup>37</sup> *Ibid.* at 146.

<sup>38</sup> *Ibid.* at 149.

abused spouse does not challenge the abuser to avoid punishment. This can give the abuser significant power in a negotiation as the other spouse may be inclined to accept whatever settlement the abuser proposes.

Second, economic power imbalance is one of the most common power imbalances in divorce negotiations. In our society, “men have social and economic advantages in earnings, employment, and occupational status that may contribute to a female victim’s economic dependence on the abuser and reduce her resources for coping with the crisis.”<sup>39</sup> Especially in situations of domestic abuse, the husband may not allow his wife access to finances and may prevent her from working so that he can exert more control over her. Having limited economic power can limit a party’s BATNA, affect his/her ability to gather information, and can pressure a party into accepting an unattractive settlement. For example, an abused wife who has left an abusive relationship often has few economic resources. Even though she may know that a better deal could be reached if she were to pursue the matter more aggressively, she may accept an unfavourable deal in order to accelerate payment.<sup>40</sup> However, Coyle warns that “...it would be a strategic error to assume that in every negotiation, the party with greater economic resources has a bargaining advantage.”<sup>41</sup>

Third, BATNA is another source of substantive power. BATNA refers to the best alternatives to a negotiated agreement and acts as a reference point that determines the range of acceptable outcomes; essentially, it determines a party’s ability to walk away from the negotiated agreement.<sup>42</sup> If the party’s BATNA is strong and the party perceives his/her BATNA to be strong, this is a source of power in a negotiation because he/she has less to lose if the negotiation process fails. On the other hand, if the party’s BATNA is weak and he/she perceives his/her

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<sup>39</sup> *Newmark et. al.*, *supra* note 4 at 32.

<sup>40</sup> *Fiss*, *supra* note 30 at 183.

<sup>41</sup> *Supra* note 9 at 163.

<sup>42</sup> *Ibid.* at 167.

position to be weak, the party may easily give up value. A party's perception of his/her BATNA, as well as his/her perception of the other party's BATNA is very important. An abusive husband may have sufficient financial resources to afford litigation; however, he may know that in going to court his chances of obtaining what he believes to be a 'good' settlement are weaker than what he thinks he could get in a negotiated settlement. The abusive husband may also perceive his wife's BATNA to be weak. He may know that his wife could not afford litigation or emotionally withstand the process, enabling him to bargain hard and exploit her weaknesses. In terms of the wife's BATNA, she may have limited economic resources, a low tolerance for stress, and may also want to sever her ties with her husband as fast as possible. From the wife's perspective her BATNA might be weak. However, she may overestimate her husband's BATNA, thereby reducing her expectations and lowering her standards for what she considers to be an acceptable outcome. If the husband is a skilled negotiator, he may also be able to convince his spouse that her BATNA is weaker than it actually is, thus reducing her expectations even further and creating a situation in which she overlooks her advantages.

### ***Relationship Precedent & Psychological Powers***

The relationship precedent and psychological powers are arguably the most influential factors in abusive relationships. In any relationship of some permanence, patterns of interaction emerge that characterize power dynamics between individuals. This history accounts for the psychological power one individual develops over the other. In abusive relationships, the history of the couple is often characterized by patterns of control, exploitation, dominance, and mistrust. These characteristics help to explain parties' psychological and emotional states, as well as the power dynamics in negotiations. It is well documented that marital power varies with spousal

abuse.<sup>43</sup> Abused wives often have very little control over their lives because their husbands control virtually all aspects of their lives. In fact, abused wives perceive their partners as having a large amount of decision-making power in most areas.<sup>44</sup> Also, disputes between the individuals with a history of domestic violence have typically been handled in a particular way – with violence or intimidation. This is due to the fact that when an abusive spouse feels that he is being deprived of control, he uses violence and intimidation against his partner to reassert his control.<sup>45</sup> For this reason, it is not likely that an abused wife would be accustomed to ‘winning’ an argument or even disagreeing with her abusive husband. The presence of dominance throughout a relationship is a gender-typical factor that affects power dynamics in many heterosexual relationships – especially in abusive relationships. Dominance refers to a man’s tendency to monopolize and control conversations with his wife and to monopolize and control decision-making.<sup>46</sup> Studies have also shown that men interrupt their wives more than their wives interrupt them.<sup>47</sup> This is a particular source of power in a negotiation since it is important that both parties are heard and have an equal chance to express their interests. If a wife is prevented from doing so, her interests might be compromised. Being in a relationship of some length also makes a person vulnerable in negotiations since both parties know each other intimately; they know what might trigger the other to behave in a rash manner, how to manipulate one another, what the other’s preferences might be, and how to take advantage of the other’s weaknesses.

Psychological power develops through a couple’s interaction over the period of the relationship and can greatly impact how a party behaves at the bargaining table. Sources of psychological power include self-esteem, emotional stability, and gender dynamics. First, a loss

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<sup>43</sup> Desmond Ellis & Noreen Stuckless, *Mediating and Negotiating Marital Conflicts* (Thousand Oaks: Sage, 1996) at 79.

<sup>44</sup> *Newmark et. al.*, *supra* note 4 at 43.

<sup>45</sup> *Ellis*, *supra* note 1 at 532.

<sup>46</sup> *Meyers*, *supra* note 5 at 866.

<sup>47</sup> *Ibid.* at 867.

of self-esteem has been shown to be a major psychological effect of domestic violence.<sup>48</sup> This becomes important in negotiations because women with low self-esteem are likely to accept very unfavourable terms and can be easily persuaded.<sup>49</sup> Individuals with low self-esteem also tend to have low aspirations. Even in traditional relationships where there is no abuse, women typically have lower aspirations and a lower sense of reward expectation than their husbands.<sup>50</sup> Consequently, this would be a source of power for a husband in a negotiation because his wife may hesitate to claim value or bargain hard in areas where her BATNA is strong.

Second, a lack of emotional stability can be a major source of power for either party. A lack of emotional stability in abused wives can stem from fear, severe anxiety, or mental illness such as depression or post-traumatic stress.<sup>51</sup> This instability can disadvantage a woman in several ways. For one, it can impact a wife's BATNA in that she may feel as though she could not emotionally withstand litigation, which might lead her to accept a severely unfavourable agreement. It might also signal to the abusive husband that he may easily take advantage of his wife's emotional weaknesses. Depression in particular causes a person to "see themselves as powerless, and to expect themselves to perform poorly in situations requiring intelligence, common sense, and social adeptness" which could decrease a wife's motivation to actively participate in the negotiation.<sup>52</sup> Moreover, if an abused wife is demonstrating behaviours of severe anxiety or fear, an abusive husband may exploit her instability even further by threatening her before or during negotiations so that she fears for her safety and accepts any settlement to protect herself. Similarly, an abused wife may be able to take advantage of her husband's emotional instability. For example, the wife may realize that her husband is at the stage in the

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<sup>48</sup> *Johnson et. al.*, *supra* note 7 at 483.

<sup>49</sup> *Meyers*, *supra* note 5 at 867.

<sup>50</sup> *Ibid.*

<sup>51</sup> *Johnson et. al.*, *supra* note 7 at 483.

<sup>52</sup> *Meyers*, *supra* note 5 at 867.

cycle of abuse where he is feeling extremely guilty and remorseful.<sup>53</sup> Knowing this, the wife may be able to improve her bargaining position by exploiting his guilt and getting him to accept an agreement that may be much more beneficial to her.

Third, gender dynamics may operate to empower men during negotiations. Many scholars have argued that the process of negotiation favours men over women for several reasons. Deborah Kolb argues that women are at a disadvantage to men at the bargaining table because they interact differently than men in a way that may not be as effective in a negotiation. For example, she argues that women hold a relational view of others and understand events in terms of how they impact relationships, while men focus on individual achievement. Power gained at the expense of others is also foreign to many women, which may make them seem passive or inactive compared to their male counterparts in a negotiation. Additionally, women solve problems by exploring ideas verbally and interacting with others, while men prefer to argue and persuade.<sup>54</sup> This is not to say that men always bargain more effectively than women since women can be very effective negotiators; however, this argument suggests that the way women generally communicate and problem-solve is not in line with the traditional negotiation model. Another gender dynamic that may empower men during negotiations is the phenomenon of the fear of achievement. Research suggests that women – even highly capable women - are afraid to behave competitively with men, especially men with whom they significantly relate such as a husband.<sup>55</sup> These tendencies have been shown to be exacerbated where competitive behaviour would be met with disapproval.<sup>56</sup> This is particularly relevant to abused wives since an abused wife would know that her husband would disapprove of any competitive behaviour

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<sup>53</sup> Lenore E. Walker, *The Battered Woman Syndrome* (New York: Springer Pub. Co., 1984).

<sup>54</sup> Deborah M. Kolb, "Her Place at the Table: Gender and Negotiation" in Lavinia Hall, ed., *Negotiation: Strategies for Mutual Gain* (Newbury Park: Sage, 1993) 138 at 140-143.

<sup>55</sup> Meyers, *supra* note 5 at 868.

<sup>56</sup> *Ibid.*

with him, which might cause her to be less assertive and less likely to express her wants and needs in a negotiation.

This section has described numerous sources of power that may exist in negotiations involving divorcing spouses who have a history of domestic abuse. In the following section, the process of mediation will be examined to determine what approaches, considerations, and tactics can be used to remedy these power imbalances.

### **Mediation**

In Ontario, family mediation is a voluntary and consensual process whereby a neutral party helps couples discuss and resolve their family issues.<sup>57</sup> Mediation seeks to empower disputants by improving communication; fostering interest-based negotiations; promoting a constructive, respectful atmosphere; and promoting party autonomy that is undistorted by power or social class.<sup>58</sup> Although the objectives of mediation might often be the same, there is no one-size-fits-all approach to the practice. Different styles of mediation exist. Some mediators will acknowledge that they have a basic style of mediation, but most mediators employ different styles depending on the personalities, approaches, and dynamics of the clients and might even change styles several times in the course of one mediation session.<sup>59</sup> Some mediators may take a more directive approach, while others may decide that an elicitive approach is more appropriate in the circumstances. Before these approaches are examined, the significance of screening the parties will be discussed.

The process of screening disputants before accepting them into mediation is important as it allows the mediator to identify power imbalances, detect domestic violence, and characterize the parties. This allows the mediator to adopt appropriate safeguards and determine which

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<sup>57</sup> Ontario Association of Family Mediation, *What is Mediation?*, online: Ontario Association of Family Mediation <<http://www.oafm.on.ca/general/mediation.html>>.

<sup>58</sup> Coyle, *supra* note 9 at 181.

<sup>59</sup> Gewurz, *supra* note 10 at 152.

approach(es) would be best suited to the situation. For example, a mediator's approach used in a situation where a divorcing couple with children seeks to have a continuing relationship would most likely be different from the mediator's approach in a situation where an abused wife divorcing her husband never wants to have relations with him in the future. Through the screening process, the mediator can determine which style(s) of mediation are most appropriate, what must be done in order to equalize power, and whether or not power can be balanced at all. In cases that have been screened for domestic abuse, a mediator must also assess the danger the wife is in and implement appropriate safeguards. Screening for domestic violence is not always an easy task, since abused women are often fearful of raising the history of violence; however, Ontario accredited family mediators are very well trained to screen for domestic violence, among other things. It is also important to note that a mediator must continuously be aware of the power dynamics between his/her clients and adjust his/her approach accordingly.

In his influential and widely used grid, Leonard Riskin offers a depiction of four mediator orientations: elicitive narrow, elicitive broad, directive narrow, and directive broad.<sup>60</sup> It should be noted that Riskin recently re-named these orientations as he found the old terminology problematic; the term 'elicitive' used to be termed 'facilitative' and the term 'directive' used to be termed 'evaluative'.<sup>61</sup> These are general orientations and Riskin acknowledges that mediators may use a combination of approaches; however, they are useful for analysis purposes. First, if a mediator takes an elicitive approach, the mediator allows the parties to direct their own path and make their own choices based on their own understandings by drawing ideas, issues, alternatives, and proposals from the parties.<sup>62</sup> By comparison, if a mediator takes a directive approach, the mediator demonstrates predictive or directive behaviours that generally direct

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<sup>60</sup> *Supra* note 3 at 31.

<sup>61</sup> *Ibid.* at 4.

<sup>62</sup> *Ibid.* at 19-20.

parties “toward particular views of their problems, toward a particular outcome, or toward settlement in general.”<sup>63</sup> Many individuals have criticized this approach for impeding on a party’s self-determination. Indeed, this approach puts the mediator’s neutrality and impartiality into question, but the approach exists and in many circumstances is very effective. The second layer to the grid is the broad-narrow distinction. Generally, a narrow framing of the process accounts for the immediate interests of the parties, while a broad framing of the process includes the interests of others. More specifically, a narrow approach is a goal-directed, settlement-oriented approach that seeks to settle specific matters in a way that would parallel the likely outcome of litigation. On the other hand, the broad approach helps parties examine themselves to discover the interests that lie between them.<sup>64</sup> Many mediators begin using a broad approach which then helps them to narrow-in on a particular issue.

In voluntary divorce mediation involving domestic violence (to reiterate ‘domestic violence’ in this paper is referring solely to coercive controlling violence) the directive approach is an appropriate approach for the mediator to adopt. Due to the specific power imbalances described above, the abused wife is often very vulnerable and can easily be taken advantage of. For this reason, many critics of mediation believe that litigation is a better process for these women because the legal system inherently balances many power discrepancies. An elicitive mediation approach, where the mediator allows the parties to reach their own agreement without making any suggestions or proposals, would not protect a vulnerable spouse enough in domestic violence situations. The psychological complexities and relational dynamics involved in domestic abuse cases require more substantive protection from the mediation process.<sup>65</sup> As previously described, abusive relationships are characterized by mistrust, anger, fear, dominance,

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<sup>63</sup> *Ibid.* at 18-19.

<sup>64</sup> *Ibid.* at 143.

<sup>65</sup> *Gewurz, supra* note 10 at 154.

and control. The abused spouse is often at a substantial financial and social disadvantage to her husband and likely suffers psychologically from the emotional and physical trauma that she endured during the relationship. A directive approach is superior for several reasons. First, having a mediator assist parties to recognize their best interests in light of what a court might do can help anchor the negotiation and prevent the abusive party from severely exploiting the vulnerable spouse's position. Second, it can help empower spouses at an informational disadvantage by educating them on the law, presenting them with options, and suggesting the use of objective criteria to assess settlement options.<sup>66</sup> In doing so, this can increase vulnerable parties' aspirations and expectations and help them recognize an unfavourable settlement if it is proposed. Third, examining the strengths and weaknesses of each party's position may also assist parties to re-evaluate or "reality-check" their perceptions of the strength of their BATNAs.<sup>67</sup> From the wife's perspective, this can prevent her from underestimating her BATNA and can also help her explore BATNAs that she did not know existed. From the husband's perspective, this can keep him from overestimating his BATNA. Although directive mediation can be very effective in this type of situation, it can also be risky. A mediator will lose his/her credibility if he/she is perceived by either party as siding with one of the party's interests.<sup>68</sup> Therefore, a mediator must be cautious when using this approach. In terms of the narrow-broad distinction, it is advisable that a mediator always begin with a broad approach and only narrowing the scope if need be.

In cases of domestic violence, procedural safeguards are implemented to keep an abused party safe, but are also effective at balancing power. Depending on the risk assessment of the situation between the spouses, different safeguards can be employed. In very high risk cases,

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<sup>66</sup> *Coyle, supra* note 9 at 179.

<sup>67</sup> *Ibid.*

<sup>68</sup> *Ibid.* at 180.

safeguards such as conducting shuttle, telephone, or on-line mediation can be employed, as well as holding separate mediation sessions.<sup>69</sup> In cases where it is assessed that parties are able to be in the same room as one another, safeguards can include: escorting partners to and from the mediation premises; interpersonal contact only in public places or with trusted third parties present; communication only through trusted third parties; communication only through journals exchanged and subject to monitoring by the mediator; parties arriving and leaving at different times or routes; parties not waiting in the same room as one another; and using metal detectors.<sup>70</sup> In situations of domestic violence a mediator should always advise the parties to receive professional assistance such as counselling and therapy.<sup>71</sup> Counselling can help lower the risk of future violence by allowing an abuser to address his feelings and deal with the breakdown of his marriage.<sup>72</sup> Therapy can assist in balancing power by allowing a victim to strengthen her emotional and psychological state and to recognize when she is being exploited. By being more self-aware and understanding the power dynamics of the cycle of violence, the victim may be better able to identify and overcome her spouse's use of manipulative power against her.

Apart from procedural safeguards, there are certain skills and strategies a mediator can adopt in cases where one party may be feeling intimidated by the other. Establishing firm ground rules is very important. Ground rules can preclude parties from – among other things – name-calling, swearing, interrupting, and using threats (either verbally or through gestures). The ground rules should also include the consequences of breaching those rules. For example, in the Agreement to Mediate, the mediator should include a clause stating that he/she has no obligation

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<sup>69</sup> *Ellis, supra* note 1 at 533.

<sup>70</sup> *Ibid.*

<sup>71</sup> Hon. Leonard Edwards, Steve Baron & George Ferrick, “Domestic Violence and Mediation: A Dialogue” (2008) 46 *Fam. Ct. Rev.* 586 at 590.

<sup>72</sup> Holly A. Magana & Nancy Taylor, “Child Custody Mediation and Spouse Abuse: A Descriptive Study of a Protocol” (1993) 31 *Fam. Ct. Rev.* 50 at 54.

to maintain confidentiality with regards to certain criminal offences.<sup>73</sup> Also, a mediator can give frequent summaries of the discussion, ensure that each party has equal time to be heard and intervene where one party tends to monologue. A mediator can also conduct private meetings to address any concerns of either spouse.<sup>74</sup> A private meeting presents a good opportunity for a mediator to ensure that a wife who is meeting face-to-face with her abusive husband is feeling safe and is not being threatened. Lastly, in domestic violence situations mediators may be very sympathetic to one side of the dispute. In order to be non-judgmental, the mediator must be aware of his/her tendency to want to side with one party and “to understand fully the dynamics of marital and family interactions so that when empathy is elicited from the mediator, it can be put into a helpful systems perspective.”<sup>75</sup> All of these elements should be considered in addressing power imbalances.

### **Conclusion**

This paper has examined sources of power that divorcing couples bring to the table when there is a history of domestic violence. Given the nature of domestic abuse - coercive controlling violence in particular - abusive husbands often have greater procedural, substantive, and psychological power than their wives. However, by appropriately screening parties before mediation, implementing suitable safeguards, adopting a directive mediation approach, establishing firm ground rules, and remaining non-judgmental, mediators can help to equalize the power between the spouses.

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<sup>73</sup> Ruth Charlton & Micheline Dewdney, *The Mediator's Handbook: Skills and Strategies for Practitioners* (Sydney: LBC Information Services, 1995) at 229.

<sup>74</sup> *Ibid.* at 239-240.

<sup>75</sup> *Ibid.* at 46.

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