

Triaging and Mediating to meet the Needs of Families under
The Family Dispute Resolution (Pilot Project) Act of Manitoba

by

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ABSTRACT

The Family Dispute Resolution (Pilot Project) Act of Manitoba (“FDRA”) creates a three-year pilot project which will mandate the resolution of certain family disputes outside of our courts, through alternative mechanisms like mediation. Under the FDRA, “resolution officers” will be responsible for triaging families into these alternative resources. Currently, the FDRA provides insufficient guidance to resolution officers to enable them to conduct this triaging role effectively. This is problematic as triaging is the first major step in the FDRA process and will set the course for the parties’ entire dispute resolution experience under the new scheme.

Given the importance of this step, and the likelihood that mediation will be one of the primary processes used to resolve disputes under the FDRA, I have attempted to create enhanced guidelines to help resolution officers match parties to the most optimal type of mediation to fit their particular needs. These guidelines were informed by both the mediation literature and the results of qualitative interviews which I conducted with some of Manitoba’s most knowledgeable family mediators. Considering factors like the nature of the family law issue, the complexity of the case, the level of conflict, and the degree of power imbalance between parties, I attempted to evaluate whether facilitative, evaluative or transformative mediation methods will be the most effective. I also explored the training and qualifications which might best prepare resolution officers to fulfill their triaging functions.

Ultimately, I outline several factors which can impact the resolution of family disputes through mediation, and which must therefore inform the triaging decisions of resolution officers. With respect to qualifications and training, I argue that resolution officers must either be designated as Chartered Mediators by the ADR Institute of Canada, Certified Family Relations Mediators or Certified Comprehensive Family Mediators by Family Mediation Canada, or Designated Mediators of the Court of Queen’s Bench. Finally, I argue that to facilitate the most successful implementation of the FDRA, the government must not only take the insights from my research into consideration but must also commit to consultations with our province’s family mediators and other ADR professionals.

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CHAPTER I INTRODUCTION

Separation, divorce, and the dissolution of family units through the courts have become commonplace occurrences in Canada; yet the devastating impacts that these events can have on families is far from ordinary. For instance, Jason Bekiarif, a citizen of Manitoba, has undergone a legal separation from his common law spouse through Manitoba's Court of Queen's Bench. During the roughly four years that Mr. Bekiarif spent inside the courtroom dealing with custody and access of his three children, he recounts losing his job due to time spent away from work addressing his legal matters, losing his home and all the equity in it, losing his overall physical health, and losing his entire life savings of \$161,000.¹ So, when Manitoba's Attorney General and Minister of Justice, Cliff Cullen, addressed the Legislative Assembly regarding new legislation intended to reduce the conflict, cost, and heartache incurred by families in Manitoba's family court system, Mr. Bekiarif had plenty to say to the Standing Committee on Justice.

Cullen explains that Bill 9, *The Family Law Modernization Act of Manitoba* ("FLMA") will mandate the resolution of certain family law disputes outside of our family courts, providing families with the opportunity to resolve their disputes through alternative mechanisms such as mediation. This opportunity for families to deal with disagreements outside of the court system, Bekiarif explained, was a "glimmer of hope" for individuals like him who had exhausted nearly every resource they had fighting for a fair and reasonable separation.² He stated:

¹ Manitoba, Legislative Assembly, *The Standing Committee on Justice*, 41st Leg, 4th Sess, Vol. LXXII No. 2 (9 May 2019) at p 31 (Mr. Doyle Piwniuk).

² *Ibid.*

Whether child custody disputes, division of property and sorting out child and spousal support, Bill 9 offers an alternative to the outrageous court costs levied to those who find their relationship ending. The estimate, according to CBC News, is that 3,000 to 5,000 couples or more divorce or separate each year in Manitoba. Based on those numbers alone, can you imagine the dollars spent each year in the family law system that would be better spent on our children's future?³

Regrettably, Mr. Bekiarif's story is not unique, but is only one of many instances of individuals suffering from what has been deemed the "access problem" which continues to plague Canadian adversarial family law systems.⁴ The problem is not only that people cannot afford the legal services they require to properly address their family disputes in court, but that they cannot effectively represent themselves in family matters without a lawyer. What is worse is that these individuals must also navigate an adversarial system which has proven time and time again to be "ill-suited for ...couples who are seeking to reframe their familial relationships in a fair and prompt manner."⁵ Growing numbers of individuals like Mr. Bekiarif, who are unable to afford the legal services needed to address their family matters, and increasing concerns regarding the suitability of our adversarial system for the resolution of such emotionally charged disputes, has led to a mounting call for alternative dispute resolution mechanisms such as those proposed in Bill 9.

³ *Ibid.*

⁴ This "access problem" has impacted family law systems across Canada, resulting in a national surge in attention to this issue. For example, see Canada, Action Committee on Access to Justice in Civil and Family Matters, *Access to Civil & Family Justice: A Roadmap for Change* (Report), (Ottawa: Action Committee on Access to Civil and Family Matters, October 2013) [*A Roadmap for Change*]; Canada, The Canadian Bar Association, *Reaching Equal Justice: An Invitation to Envision and Act* (summary report by the CBA Access to Justice Committee), (Ottawa: Canadian Bar Association, August 2013) [*Reaching Equal Justice*]; Joanne J. Paetsch, Lorne D. Bertrand & John-Paul E. Boyd, "An Evaluation of the Cost of Family Law Disputes: Measuring the Cost Implication of Various Dispute Resolution Methods" (2017) Canadian Research Institute for Law and the Family (des Libris), etc.

⁵ *Dunford v Birnboim*, 2017 MBCA 100 at para 5, [2017] W.D.F.L. 5564.

Both Bill 9 and experts urge disputants to utilize court-connected, private, agency, clinic, or community-run conflict resolution programs which deliver mediation services to families undergoing separation and divorce.⁶ The traditional adversarial system minimizes direct communication between parties and takes the ultimate decision making power out of their hands. Family mediation's framework deemphasizes the role of lawyers and judges, "[encourages] parents to develop positive post-divorce co-parenting relationships" and empowers the parties to determine the outcome themselves.⁷ In Manitoba, for example, such services are offered by organizations like Family Conciliation Services, Facilitated Solutions, and Mediation Services, among others, which are each based in "'collaborative,' 'holistic,' and 'interdisciplinary' interventions rather than zealous advocacy."⁸ However, despite the availability of these more affordable and accessible alternative frameworks, family conflicts continue to overwhelm our courts, and the access to justice issues continue to grow.⁹ Accordingly, over the last decade, Canadian provinces, including Manitoba, have begun to undertake various initiatives to try to transform the "hierarchical, 'winner takes all' approach of the dominant adversary system..." into a fairer, more expeditious, and more economical one rooted in peace building.¹⁰ These provincial initiatives have been bolstered in recent years by the federal government's recent introduction of Bill C-78, which, among other things, increases

⁶ Jay Folberg, Ann Milne, & Peter Salem, *Divorce and Family Mediation: Models, Techniques and Applications* (New York, NY: The Guildford Press, 2004) at 10-14.

⁷ Jane C. Murphy, "Revitalizing the Adversary System in Family Law" (2010) 78 U. Cin. L. Rev. 891 at 895 (HeinOnline).

⁸ *Ibid.*

⁹ *A Roadmap for Change*, *supra* note 4.

¹⁰ Jane C. Murphy & Robert Rubinson, *Family Mediation: Theory and Practice* (New Providence, NJ: LexisNexis, 2009) at 152.

the obligation on family lawyers and parties to family disputes to consider dispute resolution processes outside of our courts.¹¹

For instance, as of May 2019, *Family Law Act* matters filed in the Victoria Provincial Court registry in British Columbia are now subject to a new “Early Resolution and Case Management Model.”¹² Among other requirements, this model obliges parties to participate in at least one consensual dispute resolution session prior to filing a family law matter claim in court.¹³ Acceptable dispute resolution processes under this scheme include mediation conducted by Family Justice Counsellors or private family mediators, facilitated negotiations led by Child Support Officers, or private collaborative law processes under a collaborative participation agreement.¹⁴

Similarly, in September 2019, the Court of Queen’s Bench of Alberta began a one-year pilot project wherein all civil and family litigation would be subject to mandatory alternative dispute resolution provisions set out in the *Alberta Rules of Court*.¹⁵ These provisions require parties to civil or family proceedings to provide certification proving that they participated in one of the acceptable dispute resolution processes set out in the rules prior to being able to

¹¹ Bill C-76, *An Act to amend the Divorce Act, the Family Orders and Agreements Enforcement Assistance Act and the Garnishment, Attachment and Pension Diversion Act and to make consequential amendments to another Act*, 1st Sess, 42nd Parl, 2019, cl 8 (assented to 21 June 2019).

¹² “Victoria Early Resolution & Case Management Model” (last visited 10 May 2020), online: *Government of British Columbia* <www2.gov.bc.ca/gov/content/life-events/divorce/family-justice/your-options/early-resolution>

¹³ *Ibid.*

¹⁴ “Steps in the Victoria Early Resolution & Case Management Process” (last visited 10 May 2020), online: *Government of British Columbia* <www2.gov.bc.ca/gov/content/life-events/divorce/family-justice/your-options/early-resolution/each-step>

¹⁵ Jennifer Koshan, Janet Mosher & Wanda Wieggers, “Mandatory Dispute Resolution Coming Back to Alberta, But What About Domestic Violence Cases?” (30 August 2019), online (blog): *The University of Calgary Faculty of Law Blog* <www.ablawg.ca/2019/08/30/mandatory-dispute-resolution-coming-back-to-alberta-but-what-about-domestic-violence-cases/>

obtain a trial date.¹⁶ These provisions, which were enacted in 2010 with the implementation of the “new” *Alberta Rules of Court*, were subsequently suspended by the Court in 2013 because “limited judicial resources were being stretched beyond capacity and lead times for JDRs became unacceptably long due to a higher demand for them created by the new ADR/JDR Rules.”¹⁷ However, in an attempt to “encourage parties to attempt alternative means to resolve their disputes,” while still addressing the concerns which led to the suspension in the first place, the Court lifted the suspension of these rules in the 2019 pilot project.¹⁸

Likewise, on January 1, 2020, the Government of Saskatchewan began the implementation of a mandatory early family dispute resolution scheme in Prince Albert.¹⁹ Under this scheme, “most family law matters that come to family court will be required to attempt a family dispute resolution process before they will be able to continue with any further court proceedings.”²⁰ Dispute resolution processes under this scheme include family mediation, family arbitration, parenting coordination and collaborative family law processes.²¹

In October 2017, Manitoba’s then-Minister of Justice, Heather Stefanson created the Family Law Reform Committee (“FLRC”) in order to explore the possibility of similar initiatives for Manitoba. The FLRC was tasked with providing advice and recommendations on how to reform Manitoba’s family law system to make it more accessible and less adversarial. In June 2018, it released its report entitled, “Modernizing Our Family Law System,” outlining its

¹⁶ *Alberta Rules of Court*, AR 124/2010, rr 4.16(1), 8.4(3), 8.5(1)(a) and 12.34.

¹⁷ *Koshan, Mosher & Wieggers, supra* note 15.

¹⁸ *Ibid.*

¹⁹ “Early Family Dispute Resolution” (last visited 10 May 2020), online: *Government of Saskatchewan* <www.saskatchewan.ca/residents/births-deaths-marriages-and-divorces/separation-or-divorce/early-family-dispute-resolution>

²⁰ *Ibid.*

²¹ *Ibid.*

mandate, findings, and its recommendation for a three-year mediation- based pilot project, which differs slightly from the approaches taken by the abovementioned provinces. The FLRC's report recommends a pilot project that would implement a new administrative process for legal disputes falling under the jurisdiction of *The Family Maintenance Act*. Under the pilot project, these disputes would be assessed and triaged by a new administrative official known as the Chief Resolution Officer, who would be responsible for assessing issues, triaging cases into mediation resources with the best likelihood of successfully resolving matters outside of court, and monitoring the progress of the program in which s/he directs the parties to participate. The FLRC's report explains that if parties cannot resolve the matter in this first stage, their cases will then be referred to an adjudicator who will decide the matter in an expedited fashion.

On June 3, 2019, Minister of Justice Cullen's aforementioned Bill, *The Family Law Modernization Act* ("FLMA"), received Royal Assent from the Lieutenant Governor of Manitoba.²² The FLMA creates *The Family Dispute Resolution (Pilot Project) Act* ("FDRA"), which outlines the finalized three-year pilot project first envisioned by the FLRC in its report.²³ Unlike the initiatives undertaken in Victoria, Alberta, and Saskatchewan, which each require family law disputants to attempt some form of alternative dispute resolution prior to being able to obtain a court date, Manitoba's legislation removes the possibility for families to confront those family matters covered by the FDRA through the courts. Under this legislation, either party to a dispute may commence the Family Dispute Resolution Act process by requesting assistance from the Director

²² Bill 9, *The Family Law Modernization Act*, 4th Sess, 41st Leg, Manitoba, 2019, Explanatory Note (assented to 3 June 2019). This legislation also created the new *Child Support Service Act*, and four new pieces of legislation which will amend *The Arbitration Act*, *The Provincial Court Act*, *The Court of Queen's Bench Act*, *The Family Maintenance Act*, and *The Inter-Jurisdictional Support Orders Act*.

²³ *Ibid.*

of Resolution Services. This Director is responsible for the effective management and operation of resolution services provided under the FDRA.²⁴ Unless the Director declines to resolve the dispute pursuant to reasons outlined in the FDRA, resolution of the dispute will take place in two distinct phases. The first is the facilitated resolution phase, in which parties are assisted by a resolution officer to try to reach a mutually satisfactory agreement on all aspects of their dispute. The second is the adjudication phase, in which an adjudicator holds a hearing and makes a recommended order to resolve any dispute that was not resolved in the first phase.²⁵ If neither party objects to the adjudicator's recommended order under the second phase, it becomes an enforceable order of the Court of Queen's Bench of Manitoba. However, if either party disagrees with the order, he or she may file an objection in the Court of Queen's Bench, leaving it to the court to either confirm the adjudicator's order or make a new one.²⁶

As originally envisioned by the FLRC, the initial phase of the FDRA will involve a resolution officer who is responsible for assisting the parties to "define the issues in dispute, explore solutions and reach a mutually satisfactory agreement on all aspects of their family dispute."²⁷ This requires the resolution officer to "determine the form of the dispute resolution process to be used in attempting to resolve the family dispute"²⁸ and likely, to "refer the parties to another service or resource for assistance in resolving the dispute."²⁹ According to the FLRC's report, which gave rise to the FDRA process, this "opportunity to direct people into non-adversarial

²⁴ *Ibid* at cl 5(1).

²⁵ *Ibid* at cl 9(1).

²⁶ *Ibid* at cl 31.

²⁷ *Ibid* at cl 10(1).

²⁸ *Ibid* at 10(2).

²⁹ *Ibid* at cl 10(3)(b).

dispute resolution resources at a very early stage” is a “key” to this initiative.³⁰ Unfortunately, both the FLRC’s report and the FDRA itself are rather vague in terms of how resolution officers will fulfill this key triage function.

For example, while the FLRC’s report specifically contemplates mediation as the primary dispute resolution process to be used in the first phase of the pilot project, the FDRA fails to address the types of dispute resolution resources and services to which it envisions making referrals. Further, while section 10(2) of the FDRA instructs resolution officers to consider factors such as “the nature and complexity of the issues” and “the nature of the relationship between the parties” in determining the form of dispute resolution to be used in the first phase, the FDRA is silent in terms of how resolution officers are to determine, based on that information, which specific service or resource will have the best likelihood of resolving the issues in a non-adversarial way.³¹ As such, resolution officers could theoretically triage parties into agency-run, community-run, private or court-connected mediation; evaluative, facilitative, narrative, or transformative mediation; judicially assisted dispute resolution, arbitration; assessments; therapy; or any other service that they favour.

Moreover, while both the FLRC’s report and the FDRA touch on the issue of power imbalance briefly, neither seem to adequately address or prepare for the challenges that often arise in mediation when there are substantial power imbalances between the parties. Such imbalances can result from factors such as the parties’ personalities, culture, gender, employment or socioeconomic status, ability to retain legal counsel, and perhaps most notably,

³⁰ Manitoba, Family Law Reform Committee, *Modernizing Our Family Law System: A Report from Manitoba’s Family Law Reform Committee* (June 2018) at 6 [*Modernizing Our Family Law System*].

³¹ *Bill 9, The Family Law Modernization Act*, *supra* note 22 at cl 10(2).

a history of domestic violence. For instance, the FDRA requires resolution officers, adjudicators and the director of resolution services to inquire about histories of domestic violence or stalking and to consider whether taking any action to resolve a family dispute under the new scheme could expose a party or a child to a risk of domestic violence or stalking. However, it does not explicitly exempt cases from mediation where such findings are made, and it contains no clear indication as to how these actors are to treat such cases or if they are to proceed with them.³² While it is possible that these issues will be addressed in forthcoming regulations to the FDRA, as the Act currently stands, a number of questions remain unanswered.

Both the FLRC's Report and the FDRA boast a system capable of improving the way we resolve family disputes in Manitoba. However, the potential success of the FDRA process rests largely on an underdeveloped dispute resolution-based scheme; one which is not supported by logistical details or theoretical research into family mediation or other potential dispute resolution processes. The level of discretion afforded to actors in the new process and lack of guidance in the statute may result in inappropriate triaging and unsuccessful dispute resolution outcomes. This is unfortunate, as these oversights could jeopardize the overall success of this new framework.

In light of these and other concerns, this new system will function through a low risk pilot project which "will enable the model to prove its value (or not) without committing to large investments of resources or permanent infrastructure."³³ Moreover, this pilot project will be introduced by the Public Service through a three-phase public engagement approach which

³² *Ibid* at cl 39.

³³ *Modernizing Our Family Law System*, *supra* note 30 at 3.

incorporates a distinct final phase dedicated to prototyping, testing and refining solutions.³⁴ In other words, continuous evaluation of the project is recommended by the FDRA. Specifically, the FDRA recommends evaluation of the project by the Minister of Justice to determine whether it achieves its purpose of creating a process outside the traditional court system that provides for the fair, economical, expeditious and informal resolution of family disputes.³⁵ My thesis can be viewed as an early evaluation of the pilot project, as it is currently imagined in the legislation. My hope is that my findings can be used to further test and refine the pilot project over time.

In this thesis I focus specifically on family mediation, just as the FLRC did in its initial Report. While the FDRA refers generally to the use of “dispute resolution processes” in the facilitated resolution phase, the most likely process to be employed is mediation. My aim is to supply the theoretical research needed to crystallize the crucial triage role of resolution officers in the facilitated resolution phase of the project. This is important because triaging is the first major step in the process and will set the course for the parties’ entire dispute resolution experience under the new scheme. Accordingly, more comprehensive guidelines for resolution officers to follow when triaging cases is necessary. In this thesis, I attempt to supplement and improve upon what little triaging guidance is currently offered by the FDRA .

I build upon the few triaging guidelines outlined in s. 10(2) of the FDRA to help resolution officers determine the type of mediation services which will best meet the individual needs of parties coming under the purview of the pilot project, if they are to be referred to mediation. To

³⁴ Manitoba, Manitoba Justice, *Family Law Modernization Public Engagement Approach: Phases 1 and 2 Report* (January 2, 2020) <www.gov.mb.ca/familylaw/documents/Family-Law-Modernization-Public-Engagement-Report.EN.pdf>

³⁵ *Bill 9, The Family Law Modernization Act*, *supra* note 22 at cl 44.

do this, I analyze the facilitative, evaluative, and transformative mediation approaches, with an eye to ascertaining the most effective processes to address child custody and access issues, child and spousal support-related issues, and property-related issues. I also touch on the effectiveness and appropriateness of these mediation approaches in cases of varying degrees of complexity, conflict, and power imbalances between parties; including those imbalances arising as a result of domestic violence. To enable prospective resolution officers to effectively fulfil their triaging function, my thesis also addresses the type of training and qualifications which will best prepare resolution officers to effectively do their jobs. In providing theoretical research underpinnings, improving upon FDRA guidelines, highlighting best approaches, and suggesting qualifications, I will be filling in some gaps in the pilot project. Hopefully, my work, if applied by the FDRA, will enable resolution officers to effectively and thoughtfully fulfill their triaging functions, and increase the likelihood of the FDRA “[creating] a process outside the traditional court system that provides for the fair, economical, expeditious and informal resolution of family disputes.”³⁶

In the next chapter, I will review the scholarly literature relevant to the pilot project. My literature review will focus on the facilitative, evaluative and transformative mediation approaches and their application and effectiveness in varying types of family law cases. In chapter three, I will explain my methodology for my qualitative study of family mediators in Manitoba. My method is comprised of qualitative interviews of family mediators because family mediation is the most obvious and favoured dispute resolution process likely to be utilized in the FDRA process. In order to better understand the various mediation approaches and techniques, and the ways in which family mediators are addressing different types of family law issues, cases

³⁶ *Ibid* at cl 1.

of varying degrees of complexity, varying levels of conflict intensity, and issues of power imbalance, I have interviewed prominent, experienced family mediators in Manitoba. The insights gathered from these mediators regarding their respective mediation practices, their views on the field of family mediation, and their views on the prospective utility of the FDRA have informed my analysis in chapter four. In chapter four I will apply the principles of the mediation literature to the commentary gathered from my interviewees to build a deeper understanding of several things. First, to illuminate how family mediators in Manitoba have come to learn the skills that are required to evaluate the appropriateness of mediation and determine a particular course of action in a given case. Second, to develop a better understanding of how to match families to appropriate mediation resources that will “give the parties the most appropriate tool to resolve their dispute and... best satisfy their interests,” given the distinct nature of their case.³⁷ And third, to discern the skills required of resolution officers to match families to the appropriate mediation resources. Finally, in chapter five I will suggest factors which resolution officers ought to consider when triaging cases into mediation. I will also recommend training and qualifications required for resolution officers to effectively conduct their triaging role. Finally, I will outline factors to be considered by the government of Manitoba to facilitate the successful implementation of the FDRA, and transition to a “fair, economical, expeditious and informal” family law system in Manitoba.

³⁷ Frank EA Sander & Lukasz Rozdeiczer, "Matching Cases and Dispute Resolution Procedures: Detailed Analysis Leading to a Mediation-Centered Approach" (2006) 11 Harv Negot L Rev 1 at 2.

CHAPTER II LITERATURE REVIEW

“The Big Three” Mediation Approaches

Mediation is a voluntary process wherein a third party neutral facilitates a dialogue between two or more parties in order to assist them in creating a suitable resolution to their dispute.³⁸ Based on the fundamental principle of self-determination, the decision-making authority rests with the parties, not the mediator, and the parties have the right “to make their own voluntary and non-coerced decisions regarding the possible resolution of any issue in dispute.”³⁹ Family mediation, more specifically, is a multidisciplinary undertaking which melds mediation together with family law, counselling, therapy, and education.”⁴⁰ As such, it is often referred to as “the intersection of legal work and therapeutic/counseling practice.”⁴¹ It aims to resolve legal disputes while moving parties away from the typical outcomes of litigation, including the “escalation in the strength of problem-saturated narratives held by each spouse about the other...[the] demonization of the soon-to-be ex-spouse and the ratcheting up of negative behaviors and emotions...”⁴² Family mediation does this by removing the conflict from the courts, “enabling parties to engage in creative problem-solving, crafting detailed

³⁸ Cheryl A. Picard, *Mediating Interpersonal and Small Group Conflict*, (Ottawa: The Golden Dog Press, 2002) at 21.

³⁹ Canada, ADR Institute of Canada Inc., *Code of Conduct for Mediators*, art 3.

⁴⁰ Alberta, Alberta Law Reform Institute, *Court-Connected Family Mediation Programs in Canada* (Edmonton AB: Alberta Law Reform Institute, 2008) at 4.

⁴¹ Rachid Baitar et al, "Styles and Goals: Clarifying the Professional Identity of Divorce Mediation" (2013) 31:1 Conflict Resolution Q 57 at 58. (HeinOnline).

⁴² John Winslade & Gerald Monk, *Practicing Narrative Mediation: Loosening the Grip of Conflict* (San Francisco, CA: Jossey-Bass, 2008) at 132.

agreements that are more flexible and finely tuned to the needs of participants than a judge could order, and allowing parties to be in control of their own destiny.”⁴³

Mediation is a favorable mechanism of dispute resolution to use under *The Family Dispute Resolution (Pilot Project) Act* (“FDRA”) given its proven success in other Canadian court-connected mediation programs. For instance, an Ontario study which analyzed 1,000 family court files in Toronto and Windsor in 2014 and 2015 revealed that 87.8% of cases which utilized mediation to resolve family disputes resulted in settlements that were submitted to the courts.⁴⁴ A survey conducted in 2017 of Quebec parents who had used family mediation services in the resolution of their family disputes revealed:

- 84 percent of parents reached an agreement with their former spouse during the family mediation process;
- 81 percent of parents were satisfied with the services obtained, among other things because the process was easy (97 percent) and because mediation took the interests of their children into account (90 percent); 90 percent of respondents would use the services again if needed.⁴⁵

Mediators achieve success, and they do so in a variety of ways, depending on their own particular approach or orientation toward mediation, be it facilitative, evaluative, transformative, or otherwise. In 1996, Leonard Riskin, a prominent American law school professor and scholar introduced a seminal "grid" of mediator orientations ranging from “evaluative” to “facilitative.”⁴⁶ This grid consists of two intersecting continuums: one representing the mediator’s approach to problem-definition, ranging from “narrow” to “broad,”

⁴³Robert Rubinson, "Of Grids and Gatekeepers: The Socioeconomics of Mediation" (2016) 17:3 *Cardozo J of Conflict Resolution* 873 at 874-875.

⁴⁴ Michael Saini et al, "Understanding Pathways to Family Dispute Resolution and Justice Reforms: Ontario Court File Analysis & Survey of Professionals" (2016) 54:3 *Family Court Rev* 382 at 389.

⁴⁵ Charles Ewart et al., *Choices in Approaching Conflict: Principles and Practice of Dispute Resolution*, 2d ed (Toronto: Edmond Montgomery Publications Limited, 2019) at 192.

⁴⁶ Leonard Riskin, "Mediator Orientations, Strategies and Techniques" (1994), 12:9 *Alt High Cost Litig.*, 111.

and the other representing the mediator's notion of his or her role in mediation, which ranges from “evaluative” to “facilitative.”⁴⁷ With respect to the first continuum, Riskin argued that mediators who define the problems more narrowly tend to focus more heavily on court outcomes, uncertainty, delay and expense, leading the parties to “bargain adversarially, emphasizing positions over interests.”⁴⁸ Mediators who define the problems broadly, on the other hand, “[assume] that the parties can benefit if the mediation goes beyond the narrow issues that normally define legal disputes.”⁴⁹ According to Riskin, these mediators tend to assist the parties in understanding and fulfilling the interests underlying their asserted positions.⁵⁰

With respect to the second continuum, Riskin states:

The evaluative mediator assumes that the participants want and need the mediator to provide some direction as to the appropriate grounds for settlement- based on law, industry practice or technology. She also assumes that the mediator is qualified to give such direction by virtue of her experience, training and objectivity.

The facilitative mediator assumes the parties are intelligent, able to work with their counterparts, and capable of understanding their situations better than either their lawyers or the mediator. So the parties may develop better solutions than any that the mediator might create. For these reasons, the facilitative mediator assumes that his principle mission is to enhance and clarify communications between the parties in order to help them decide what to do.⁵¹

⁴⁷Leonard Riskin, “Decision-Making in Mediation: The New Old Grid and the New New Grid System” (2003), 79 Notre Dame L. Rev. 1 at 3.

⁴⁸ *Riskin, supra* note 46.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

From these two intersecting continuums come four quadrants representing mediator orientations: (1) the evaluative narrow mediator; (2) the evaluative broad mediator; (3) the facilitative narrow mediator; and (4) the facilitative broad mediator.”⁵² Riskin argues that mediators within each of these orientations tend to employ unique strategies. For instance, evaluative narrow mediators tend to urge parties to accept narrow, position-based settlements while evaluative broad mediators tend to push parties toward broad, interest-based settlements.⁵³ Facilitative narrow mediators tend to help the parties develop and evaluate position-based proposals, while facilitative broad mediators tend to help the parties develop and evaluate interest-based proposals.⁵⁴

In 2003, in response to considerable criticism of the grid as well as various advancements in the field of mediation, Riskin sought to revisit and revise his original model in order to foster a “more refined understanding and dialogue about mediation.”⁵⁵ What resulted were two refined grid systems which each attempted to update the original model to better fit current understandings of mediation. In his first attempt at reform, Riskin’s “New Old Grid,” he replaces the words “evaluative” and “facilitative” with “directive” and “elicitive,” in order to better reflect “the impact of the mediator’s behaviour on party self-determination.”⁵⁶ The term “directive” refers to “the extent to which almost any conduct by the mediator directs the mediation process, or the participants, toward a particular procedure or perspective or outcome,”⁵⁷ while the term “elicitive” refers to the extent to which the mediator’s conduct

⁵² *Ibid* at 112-113.

⁵³ *Ibid* at 112.

⁵⁴ *Ibid*.

⁵⁵ *Riskin, supra* note 47 at 8.

⁵⁶ *Ibid* at 30.

⁵⁷ *Ibid*.

“elicits the parties' perspectives and preferences and then tries to honor or accommodate them.”⁵⁸ In the second updated version, referred to by Riskin as the “New New Grid,” he creates a series of grids which focus not only on the qualities of the mediator but also on the qualities of the parties and the lawyers involved in the mediation. Specifically, the “New New” grid focuses on the “range of potential decisions in and about a mediation, and the extent to which various participants could affect these decisions.”⁵⁹

In addressing the rigidity and limitations of his initial grid model, Riskin recognized certain distinct models of mediation which were unaddressed or excluded by his original concept. For example, in his attempts at reform, he recognized transformative mediation as a distinct mediation orientation intended to “improve the parties themselves through ‘empowerment and recognition’.”⁶⁰ This new mediation orientation, which he classified as broad and elicitive, eventually joined the evaluative and facilitative mediation orientations as one of “the big three” mediation models which are universally recognized in the dispute resolution world.⁶¹ I will discuss the transformative model in detail later in this chapter.

Riskin’s work is typically the starting point in any scholarly debate on mediator approach. Despite the varying degrees of support for and opposition to his work, the terms evaluative, facilitative, directive and elicitive have “resonated within the community of mediation scholars and practitioners, suffusing discussions about what constitutes best practices in the field, scholarship, and law school texts.”⁶² Some scholars, such as Folberg,

⁵⁸ *Ibid.*

⁵⁹ *Ibid* at 34.

⁶⁰ *Ibid* at 23.

⁶¹ Rachael Field, "Proposing a System of Contextual Ethics for Mediation for a Range of Mediation Models and in Both Ad Hoc and Institutional Environments" (2017) 10:2 CAA J. 293 at 294.

⁶² *Rubinson, supra* note 43 at 874.

Milne, and Salem, argue that debate over approaches may benefit the mediation community by helping to “achieve greater clarity regarding the variety of dispute resolution processes and the boundaries that distinguish them.”⁶³ However, other scholars maintain that the sort of labeling associated with this “model debate” can be a counterproductive effort which only limits our thinking about mediation.⁶⁴

For instance, Margaret Shaw argues that such classification can risk oversimplification and confusion. It can cause disputants who have requested or who are expecting a particular mediator approach to become resistant to different and perhaps more productive approaches.⁶⁵ Shaw argues that that the model debate can “disadvantage talented mediators who may not be chosen to handle particular kinds of cases, while, at the same time, advantaging other kinds of mediators who may find themselves in situations in mediation they may be underequipped to handle.”⁶⁶ Other scholars emphasize the futility of such a model debate, arguing that mediators do not necessarily fit within one stylistic box. Rather, mediators may demonstrate techniques and strategies from various mediation approaches depending on the circumstances and facts of a given case.⁶⁷

Accordingly, while it is useful to understand the unique characteristics and goals of the different models of mediation, it is important to remember that there is no one-size fits all model of mediation. Often, in practice, mediators will utilize techniques from a multitude of

⁶³ *Folberg, Milne, & Salem, supra* note 6 at 14.

⁶⁴ Michael L Moffitt, "Schmediation and the Dimensions of Definition" (2005) 10 Harv Negot L Rev 69 at 72.

⁶⁵ Margaret L. Shaw, "Style Shmyle: What's Evaluation Got to Do with It (2005) 11:3 Dispute Resolution Magazine 17 at 19.

⁶⁶ *Ibid.*

⁶⁷ Kenneth Kressel, "Mediation Revisited" (2006) in M. Deutsch, P. T. Coleman, & E. C. Marcus, *The Handbook of Conflict Resolution: Theory and Practice* (pp 726-756) (San Francisco, CA: Jossey-Bass, 2006) at 743-745.

different models and may not even be aware of the style in which they practice. It follows that while evaluative, facilitative and transformative mediation are typically recognized as the major models of mediation, they by no means comprise an exhaustive list of mediator orientations. Mediators may practice in unique, hybrid ways. However, facilitative, evaluative and transformative mediation orientations encompass the “big three” mediation styles, they each have unique objectives and qualities, and they have become fundamentally embedded in the mediation literature. For this reason, they are the primary models of mediation explored in this thesis.

1. Facilitative Mediation

Facilitative mediation is viewed by many as the purest form of mediation. Some argue it should be the basis for all other approaches.⁶⁸ Facilitative mediators draw on the disputants’ opinions and insights to “facilitate a conversation between the parties about the conflict, its effects, and possible resolutions.”⁶⁹ Relying on the parties’ understandings of the conflict, facilitative mediators strive to guide the parties to craft their own ideal resolution while preserving their relationship. In this sense, facilitative mediators are like orchestrators, “guiding people through a communication process in which the parties’ voices, thoughts, feelings and ideas are the important factors.”⁷⁰ In taking a step back and allowing the parties to be the

⁶⁸ Kenneth M. Roberts, “Mediating the Evaluative-Facilitative Debate: Why Both Parties Are Wrong and a Proposal for Settlement” (2007) 39 Loy. U. Chi. L.J. 187 at 193.

⁶⁹ Laura E. Reimer et al, *Transformative Change: An Introduction to Peace and Conflict Studies* (Lanham: Maryland: Lexington Books, 2015) at 124.

⁷⁰ Bernard Mayer, “Facilitative Mediation” in Jay Folberg, Ann Milne, & Peter Salem, *Divorce and Family Mediation: Models, Techniques and Applications* (pp 29-51) (New York, NY: The Guildford Press, 2004) at 30.

driving force of the mediation, facilitative mediators “[supply] the process that allows these voices to come together in an effective and harmonious way.”⁷¹

Facilitative mediation compares more closely to the broad, facilitative, elicitive and party-influenced descriptions of mediation found in Riskin’s grids. For instance, it exemplifies Riskin’s initial explanation of “facilitative broad” mediation in that it employs techniques unique to that approach such as “[encouraging parties] to consider underlying interests rather than positions and [helping] them generate and assess proposals designed to accommodate those interests.”⁷² It correlates with “elicitive broad mediation” under Riskin’s “New Old Grid” in that facilitative mediators tend to elicit and accommodate the parties’ perspectives and preferences as opposed to directing them toward their own particular procedure, perspectives and/or outcomes.⁷³ Finally, it exemplifies more party-influenced and party self-determined forms of mediation found under Riskin’s “New New Grids”, as it is typically the parties and lawyers and not the facilitative mediator who exert the greatest influence over the “substantive, procedural, and meta-procedural” decision making that occurs in the course of facilitative mediation.⁷⁴

In fulfilling this broad, facilitative, and elicitive role, the facilitative mediator “...asks questions, validates and normalizes parties’ points of view; searches for interests underneath the positions taken by parties; and assists the parties in finding and analyzing options for resolution.”⁷⁵ Facilitative mediators typically do this by asking probing and clarifying questions of the disputants, restating and paraphrasing the disputants’ words, summarizing any interests

⁷¹ *Ibid.*

⁷² *Riskin, supra* note 46 at 112-113.

⁷³ *Riskin, supra* note 47 at 30.

⁷⁴ *Ibid* at 34-37.

⁷⁵ Zena Zumeta, "Styles of Mediation: Facilitative, Evaluative and Transformative Mediation," *Mediate.com* (September, 2000), online (blog): [Mediate.com <www.mediate.com/articles/zumeta.cfm.Zumeta>](http://www.mediate.com/articles/zumeta.cfm.Zumeta)

which the disputants may voice, holding private caucuses with the parties only when needed, and reframing the disputants' words or behavior when they "[slip] into a negative or contentious mode."⁷⁶ The facilitative mediator does not influence the parties' decisions or coerce them into reaching certain agreements based on their own predictions or opinions.⁷⁷ In essence, the facilitative mediator "focusses on managing the mediation *process* fairly and even-handedly, thus making it possible for the parties themselves to control the *content* of the dispute and the substantive terms of its resolution."⁷⁸

American conflict resolution icon Bernard Mayer outlines four hallmarks of the facilitative process: (1) facilitative mediation is process oriented; (2) client centered; (3) communication focused; and (4) interest based.⁷⁹ These hallmarks of facilitative mediation have led many scholars to believe that this approach is particularly suitable to address child custody and access disputes. According to Canadian divorce jurisprudence, custody, or "the care and control of a child by a parent of that child," as it is defined in *The Family Maintenance Act*⁸⁰, refers to a parent's right to exercise the powers of the legal guardian over the child.⁸¹ These rights include the right to make decisions relating to the child's welfare, growth, and development,⁸² including decisions regarding a child's residence, education, property, religious affiliation, medical treatment, etc.⁸³ Access, on the other hand, while not formally defined in

⁷⁶ Ewart, *supra* note 45 at 74-75.

⁷⁷ Susan Nauss Exon, "The Effects That Mediator Styles Impose on Neutrality and Impartiality Requirements of Mediation" (2008) 42:3 USF L Rev 577 at 591.

⁷⁸ Field, *supra* note 61 at 295.

⁷⁹ Mayer, *supra* note 70 at 32-33.

⁸⁰ *The Family Maintenance Act*, C.C.S.M. c. F20, s 1.

⁸¹ Julien D. Payne & Marilyn A. Payne, *Canadian Family Law*, 7th ed (Toronto: Irwin Law Inc., 2017) at 547.

⁸² *Ibid* at 548.

⁸³ Simon R. Fodden, *Essentials of Canadian Law: Family Law* (Toronto: Irwin Law, 1999) at 183.

the FMA, can be understood as the right of a non-custodial parent to communicate, visit with, and in certain cases, obtain information about a child who is in the custody of some other person.⁸⁴

In the context of the traditional legal system, a court may order sole custody, joint custody with shared periods of physical care and control, joint custody with the designation of one primary care and control parent, and varying degrees of access in between. Generally, an order of sole custody authorizes one parent to maintain exclusive responsibility for the care and upbringing of the children, including making decisions regarding education, religion, health and well-being, to the exclusion of the other parent.⁸⁵ Joint custody refers not to the physical sharing of the child's residence, but "to joint *legal* custody where the parents share responsibility in decision-making."⁸⁶ As such, even where a judge makes an order of joint custody, this does not necessarily mean that the parents will share equal physical care and control of the child. Rather, both parents will maintain their legal responsibilities for the child's upbringing; either with one parent having primary physical care and control of the child and the other having periods of care of control, or with both parents alternating periods of physical care and control.⁸⁷

In a report regarding Canadian justice system responses to family disputes, Noel Semple and Nicholas Bala explored which of the facilitative, evaluative or transformative models of mediation best advanced children's interests and protected adult rights in a cost-effective

⁸⁴ Noel Semple, "Whose Best Interests - Custody and Access Law and Procedure" (2010) 48:2 Osgoode Hall LJ 287 at 288.

⁸⁵ *Tiveron v. Collins*, 2014 ONCJ 574, [2014] O.J. No. 5239 at para 138.

⁸⁶ *Poirier v. Poirier*, 2011 SKQB 298, [2011] S.J. No. 499 at para 45.

⁸⁷ *Murray v. Murray*, [1989] W.D.F.L. 1416 at paras 18-19, 23 R.F.L. (3d) 97.

manner. In doing so they highlighted the value of facilitative mediation in family disputes involving child custody and access. Noting the lack of evidence regarding transformative mediation due to the state's unwillingness to accept its higher costs and lower commitment to settlement seeking, they limited their examination to evaluative and facilitative mediation.⁸⁸ Ultimately, they concluded that facilitative mediation is the most suitable approach to address child custody and access disputes, owing to:

1. the prospective and relationship-focused nature of the inquiry;
2. the likelihood that the parties will have an on-going interaction, ideally in a "parenting partnership;" and
3. the fact that the quality of this inter-parental relationship is relevant to the child's interest.⁸⁹

Semple and Bala argue that where, as in most child custody and access disputes, the parties will have an on-going parenting relationship with each other beyond mediation, "direct communication between the parties... may be more important than the substantive outcome."⁹⁰ In such cases, facilitative mediation's collaborative, communication, and interest-based orientation is better suited to the parties' needs than the evaluative orientation. Further, they argue:

The presence of "common or complementary interests" in a given dispute also augurs well for facilitative mediation. By contrast to a money-related dispute, parents in a child custody or access dispute often have very significant complementary interests, even if they need help to recognize them. Most obviously, they almost invariably have a mutual interest in their child's health and happiness. Moreover, most adults want to spend part of their waking hours doing something other than caring for a child, which creates a complementary interest in sharing childcare responsibilities.⁹¹

⁸⁸ Noel Semple & Nicholas Bala, "Reforming Ontario's Family Justice System: An Evidence-Based Approach" (2013) Association of Family and Conciliation Courts, Ontario Chapter at 29.

⁸⁹ *Ibid* at 29-30.

⁹⁰ *Ibid* at 30.

⁹¹ *Ibid*.

Similarly, Scott Hughes has noted that facilitative mediation is better suited for disputants with ongoing relationships such as divorced couples with continuing child custody and visitation dealings.⁹² He notes that where such an ongoing relationship exists, facilitative mediation's ability to assist the parties in repairing their relationship is crucial, as such reparation is often necessary to solidify any resolution of the custody and access issues.⁹³ Moreover, Hughes suggests facilitative mediation over evaluative mediation for disputes in which bargaining may be integrative as opposed to purely distributive, or where "opportunities exist for the parties to expand the pie instead of focusing merely on how much of the pie each will receive."⁹⁴ In other words, Hughes promotes facilitative mediation over evaluative mediation where the dispute is not merely focused on how much money each party will receive.⁹⁵

Jeffrey Stempel also takes the position that "family law matters, particularly issues of child custody and visitation, appear to more closely track the facilitative model."⁹⁶ Similarly, Carolynn Clark Camp asserts that facilitative techniques should be favored over evaluative techniques for family cases, especially when they involve children.⁹⁷ She argues that such family disputes benefit more from facilitative than evaluative mediation due to the facilitative framework's promotion of direct communication, encouragement of multiple, custom, party-

⁹² Scott H. Hughes, "Facilitative Mediation or Evaluative Mediation: May Your Choice Be a Wise One" (1998), 59 *The Alabama Lawyer* 246 at 249.

⁹³ *Ibid* at 248.

⁹⁴ *Ibid*.

⁹⁵ *Ibid*.

⁹⁶ Jeffrey W Stempel, "The Inevitability of the Eclectic: Liberating ADR from Ideology" (2000) 2000:2 *J Disp Resol* at 250.

⁹⁷ Carolynn Clark Camp, "Mediating the Indissoluble Family: Mediator Style in Domestic Relations Cases" (2012) 26:2 *BYUJ Pub L* 187 at 202.

made options, as well as its ability to allow parties to choose among those options without undue pressure.⁹⁸ In addition, Clark Camp notes that facilitative mediation tends to place less pressure on the parties to settle their issues quickly. This, she argues, is particularly important when dealing with emotionally laden custody and parent-time issues. Extended discussions on these subjects can be emotionally and physically draining for parties, making it difficult for parents to make quick yet reasoned decisions.⁹⁹ A facilitative approach, Clark Camp asserts, “allows the parties the time needed to research information, think over potential options, and ultimately helps the parties come to wiser agreements.”¹⁰⁰ When parents are afforded this time, she states, “they will generally be more comfortable with the agreements they come to and more likely to abide by them in the future.”¹⁰¹

A large faction of the ADR community favours a facilitative orientation, almost viewing it as “something of an orthodox ideology if not an orthodox theology.”¹⁰² However, this model has not escaped criticism. Notably, evaluative mediation proponents have argued that parties to a strictly facilitative mediation may be disadvantaged by the mediator’s failure to provide parties with necessary and relevant information.¹⁰³ For instance, parties dealing with more complex family issues such as “major medical, educational and religious decisions” may require more from their mediator than what a facilitative mediator is willing or able to provide.¹⁰⁴ These parties may benefit from “more directive and intrusive service interventions” like

⁹⁸ *Ibid.*

⁹⁹ *Ibid* at 205.

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

¹⁰² *Stempel, supra* note 96 at 249.

¹⁰³ *Bernard, supra* note 70 at 49.

¹⁰⁴ Peter Salem, Debra Kulak & Robin M Deutsch, "Triaging Family Court Services: The Connecticut Judicial Branch's Family Civil Intake Screen" (2007) 27:4 Pace L Rev 741 at 760.

evaluative mediation, wherein mediators can draw directly on their expertise to help the parties parse through more difficult issues and make informed decisions.¹⁰⁵ Similarly, given that facilitative mediators do not provide parties with the type of information they might be provided in evaluative mediation, evaluative mediation proponents such as Barbara J. Hart, Lisa G. Lerman and Jeffrey Stempel, to name a few, have argued that “a facilitative approach can, in fact, serve to disempower people and exacerbate the power differential between parties.”¹⁰⁶

In family mediation there are many different sources of power which have the potential to impact a mediation session. These include power differentials which manifest in the specific dispute at hand and power differentials which “rest in the relationship, rooted in the parties' shared history.”¹⁰⁷ For example, family mediation may occur between a former couple, wherein one spouse was more physically, emotionally, or financially powerful than the other during the course of the relationship.¹⁰⁸ Moreover, one party may have a stronger personality than the other, and one may enter the mediation in a position of greater authority than the other with respect to the children.¹⁰⁹ For example, starting off as the presumptive custodial parent may place a spouse in a position of greater power than the other spouse who may be seeking custody or access. Further, power differentials may arise in the course of mediation, where one party is represented by a lawyer and the other is not; where the mediation takes place in a

¹⁰⁵ *Ibid.*

¹⁰⁶ *Bernard, supra* note 70 at 49.

¹⁰⁷ Ilan G Gewurz, "(Re)Designing Mediation to Address the Nuances of Power Imbalance" (2001) 19:2 *Confl. Resolut. Q* 135 at 147.

¹⁰⁸ *Ibid* at 149.

¹⁰⁹ *Ibid* at 150.

setting familiar to one party and not to the other; or where one party has more clearly defined legal rights or entitlements under the law.¹¹⁰

Of all the situations which generate power imbalances, however, spousal abuse and domestic violence are often seen as the most worrisome. Domestic violence has been described as “a cumulative, patterned process that occurs when an adult intimate or former intimate partner attempts to coerce, dominate, monitor, intimidate and otherwise control the other by emotional/psychological, physical, financial or sexual means.”¹¹¹ Where there is a history of domestic violence between parties to family mediation, the perpetrator may use “intimidation, fear, withholding resources, or physical abuse to control the outcome of negotiations.”¹¹² Accordingly, there are various views on how, or if, domestic violence ought to be handled in mediation and therefore the topic is extensively dealt with in the literature.¹¹³

¹¹⁰ *Murphy & Rubinson, supra* note 10 at 151-152.

¹¹¹ Linda C. Neilson, “At Cliff’s Edge: Judicial Dispute Resolution in Domestic Violence Cases” (2014) 52 *Fam. Ct. Rev.* 529 at 530 (HeinOnline).

¹¹² Barbara Landau et al, *The Family Dispute Resolution Handbook*, 6th ed (Ontario: LexisNexis Canada Inc., 2018) at ch 4 (Lexis Advance Quicklaw).

¹¹³ For discussions about the dangers of mediating cases involving domestic violence, see Linda C Neilson, "At Cliff's Edge: Judicial Dispute Resolution in Domestic Violence Cases" (2014) 52:3 *Fam. Ct. Rev.* 529; Jamila A. Chowdhury, *Gender Power and Mediation: Evaluative Mediation to Challenge the Power of Social Discourses* (Newcastle upon Tyne, UK: Cambridge Scholars Publishing, 2012) at 139; Susan Landrum, "The Ongoing Debate about Mediation in the Context of Domestic Violence: A Call for Empirical Studies of Mediation Effectiveness" (2011) 12:2 *Cardozo J of Conflict Resolution* 425; Nancy Ver Steegh, "Yes, No, and Maybe: Informed Decision Making about Divorce Mediation in the Presence of Domestic Violence" (2003) 9:2 *Wrn & Mary J Women & L* 145; Sarah Krieger, "The Dangers of Mediation in Domestic Violence Cases" (2002) 8:2 *Cardozo J L & Gender* 235; Leigh Goodmark, "Alternative Dispute Resolution and the Potential for Gender Bias" (2000) 39:2 *Judges' J* 21; Andree G Gagnon, "Ending Mandatory Divorce Mediation for Battered Women" (1992) 15 *Harv JL & Gender* 272; Trina Grillo, "The Mediation Alternative: Process Dangers for Women" (1991), 100 *Yale L.J.* 1545; Barbara J. Hart, "Gentle Jeopardy: The Further Endangerment of Battered Women and Children in Custody Mediation" (1990) 7:4 *Mediation Q* 317; Desmond Ellis, "Marital Conflict Mediation and Post-Separation Wife Abuse" (1990) 8:2 *Law & Ineq* 317; M Sun & L Woods, *Mediator's Guide to Domestic Abuse* (Chicago: National Center on Women and Family Law, Inc., 1989); Martha Shaffer, "Divorce Mediation: A Feminist Perspective" (1988) 46:1 *UT Fac L Rev* 162; Lisa G Lerman, "Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women" (1984) 7 *Harv JL & Gender* 57. For discussions about the promises of mediation in cases involving domestic violence, see Charles A Bethel & Linda R Singer, "Mediation: A New Remedy for Cases of Domestic Violence" (1982) 7:1 *Vermont L Rev* 15;

Ultimately, any type of power differential can have an effect on the negotiation capacity of parties in a mediation. These effects, according to Stempel, might be exacerbated by a facilitative mediation approach. Specifically, Stempel argues that by refusing to provide disputants with “at least a rudimentary knowledge of their options under the legal regime outside of mediation,” facilitative mediators might inadvertently “permit one party to a dispute to bully the other [,less powerful party] into submission or deceive them into a resolution that is clearly substandard under the default rules of the applicable law.”¹¹⁴ Moreover, Stempel has raises concerns regarding mediation’s inherent coercive nature. He argues that because mediators ordinarily exert pressure on disputants to resolve their matter, less powerful disputants who are of “less sophistication or will” may be easily led into disadvantageous settlements when facilitative mediators refrain from providing any type of evaluative information to them.¹¹⁵ Accordingly, where there is a significant power imbalance between parties, it is argued that evaluative as opposed to facilitative mediation techniques may be required to level out the playing field.

2. Evaluative Mediation

Stephen K Erickson & Marilyn S McKnight, "Mediating spousal abuse divorces" (1990) 7:4 Mediation Q 377; Johnston J., & Campbell, L., "A clinical typology of interparental violence in disputed: Custody divorces" (1993) 63:2 Am J Orthopsychiatry, 190-199; Barbara Davies et al, "A STUDY OF CLIENT SATISFACTION WITH FAMILY COURT COUNSELLING IN CASES INVOLVING DOMESTIC VIOLENCE" (1995) 33:3 Family & Conciliation Courts Rev 324; Lisa Newmark, Adele Harrell & Peter Salem, "DOMESTIC VIOLENCE AND EMPOWERMENT IN CUSTODY AND VISITATION CASES" (1995) 33:1 Family & Conciliation Courts Rev 30; Leonard Edwards, "Comments on the Miller Commission Report: A California Perspective" (2007) 27:4 Pace L Rev 627; Leonard Edwards, Steve Baron & George Ferrick, "A COMMENT ON WILLIAM J. HOWE AND HUGH MCISAAC'S ARTICLE FINDING THE BALANCE PUBLISHED IN THE JANUARY 2008 ISSUE OF FAMILY COURT REVIEW" (2008) 46:4 Family Court Rev 586; and Joan B Kelly & Michael P Johnson, "DIFFERENTIATION AMONG TYPES OF INTIMATE PARTNER VIOLENCE: RESEARCH UPDATE AND IMPLICATIONS FOR INTERVENTIONS" (2008) 46:3 Family Court Rev 476.

¹¹⁴ *Stempel, supra* note 96 at 255.

¹¹⁵ *Ibid.*

Unlike the facilitative approach, evaluative mediation directly addresses the substance and merits of a given case with the primary goal of resolving the matter.¹¹⁶ It is an active and decisive mediation approach which involves assessments of the parties' case, predictions of the outcome of a dispute at trial if settlement is not reached in mediation, and development and proposals of options to ultimately resolve the case.¹¹⁷ Relying on case assessments of this nature, evaluative mediators generally "exert a considerable degree of influence over [the content and process of a dispute] in pursuit of settlement."¹¹⁸ The evaluative mediator, who "assumes that [s/he] is capable of not only facilitating the mediation process but also making judgments about its content," often directly advises the parties as to what decisions they should or should not make.¹¹⁹ In this sense, evaluative mediators embody many of the partisan characteristics typical of arbitrators or judges, and are sometimes colloquially referred to as "Rambo mediators."¹²⁰ As such, evaluative mediation is sometimes described as "litigation or a 'settlement conference' under another name," causing many mediation scholars to question its utility and ethical boundaries in the mediation world.¹²¹ Specifically, opponents of evaluative mediation such as John Lande tend to focus on what they describe as the poor quality of the evaluative process and techniques, its tendency to cause confusion among disputants with respect to what to expect from mediation, and its potential for coercion.¹²²

¹¹⁶ L. Randolph Lowry, "Evaluative Mediation" in Jay Folberg, Ann Milne, & Peter Salem, *Divorce and Family Mediation: Models, Techniques and Applications* (pp 72-91) (New York, NY: The Guildford Press, 2004) at 73.

¹¹⁷ *Ibid.*

¹¹⁸ Dorothy J Della Noce, "Evaluative mediation: In search of practice competencies" (2009) 27:2 *Confl. Resolut. Q* 193 at 194.

¹¹⁹ Lowry, *supra* note 116.

¹²⁰ Murray S Levin, "The Propriety of Evaluative Mediation: Concerns about the Nature and Quality of an Evaluative Opinion" (2001) 16:2 *Ohio St J Disp Resol* 267 at 271.

¹²¹ Robert Rubinson, "Indigency, Secrecy, and Questions of Quality: Minimizing the Risk of 'Bad' Mediation for Low-Income Litigants" (2016-2017) 100:4 *Marq L Rev* 1353 at 1358.

¹²² John Lande, "Stop Bickering! A Call for Collaboration" (1998) 16:1 *Alternatives* 10 at 11.

Leila Love and Kimberly K. Kovach, two notable critics of evaluative mediation, refer to the approach as an oxymoron, given its inconsistency with the core ideas of facilitative mediation, including neutrality, facilitated negotiation and party self-determination.¹²³ Love and Kovach argue that evaluative mediators are less capable of facilitating negotiation, encouraging parties to examine and articulate underlying interests, recognizing common interests and complementary goals amongst the parties, and engaging in creative problem-solving to find resolutions acceptable and optimal for all parties.¹²⁴ Instead, Love and Kovach argue that evaluative mediators assess and favour one side over the other, discourage understanding between the parties, and perpetuate an adversarial climate.¹²⁵ Further, they argue that evaluative mediation is at odds with the ethical norms and codes of conduct of the practice of mediation, which stress the importance of party self-determination and which strongly caution mediators against providing professional advice.¹²⁶ Accordingly, they contend that accepting evaluative mediation as a true mediation approach may blur the lines between mediation and the adversarial legal system, threatening the uniformity of the rules, standards, ethical norms, certification requirements, and goals of the traditional mediation process.¹²⁷ This lack of uniformity, they argue, can cause confusion with respect to the essential nature of mediation, leading to a destruction of the public's confidence in alternative dispute resolution.¹²⁸

¹²³ Kimberlee K. Kovach & Lela P. Love, "'Evaluative' Mediation Is An Oxymoron", (1996) 14 *Alternatives* 31.

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*

¹²⁷ *Ibid* at 32.

¹²⁸ *Ibid.* In 1997, Love crystalized these views of evaluative mediation, outlining the top ten reasons why mediators should not evaluate. See Lela P Love, "The Top Ten Reasons Why Mediators Should Not Evaluate" (1997) 24:4 *Fla. St. UL. Rev.* 937 at 938.

Similarly, Joseph P. Stulberg has argued that “any orientation that is ‘evaluative’ as portrayed on the Riskin grid is conduct that is both conceptually different from, and operationally inconsistent with, the values and goals characteristically ascribed to the mediation process.”¹²⁹ Specifically, Stulberg agrees with Love and Kovach that evaluative activities are at “cross-purposes” with the goals of facilitated negotiation, such as the promotion of party participation in problem solving and party choice.¹³⁰

Jacqueline Nolan-Haley views evaluative mediation as a mere extension of our adversarial legal system. Similar to Kovach, Love and Stulberg, she expresses concerns that mediator evaluation is blurring the lines between mediation and the adversarial legal system, referring to evaluative mediation as both “a watered down version of adjudication” and “a troublesome surrogate for arbitration.”¹³¹ Mediation’s move to the zone of the adversarial legal system is problematic, according to Nolan-Haley, in that “it clashes with mediation’s core values of self-determination and participation” and “limits the spectrum of options available to disputing parties, depriving them of mediation’s benefits: the opportunity to experience individualized justice as a relief from the rigidity of the formal justice system.”¹³²

¹²⁹ Joseph B. Stulberg, "Facilitative versus Evaluative Mediator Orientations: Piercing the Grid Lock" (1997) 24:4 Fla. St. UL. Rev. 985 at 986.

¹³⁰ *Ibid* at 990.

¹³¹ Jacqueline Nolan-Haley, "Mediation: The New Arbitration" (2012) 17 Harv. Negot. L. Rev. 61 at 85.

¹³² *Ibid*. Several scholars have raised concerns regarding evaluative mediation. For further discussions, see Kimberlee K Kovach & Lela P Love, "Mapping Mediation: The Risks of Riskin's Grid" (1998) 3 Harv Negot L Rev 71; Nancy A. Welsh, "The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalism?" (2001) 6 Harv Negot L Rev 1. 23-27; Murray S Levin, "The Propriety of Evaluative Mediation: Concerns about the Nature and Quality of an Evaluative Opinion" (2001) 16:2 Ohio St J Disp Resol 267; James J Alfani, "Mediation as a Calling: Addressing the Disconnect between Mediation Ethics and the Practices of Lawyer Mediators" (2008) 49:4 S Tex L Rev 829; Carolyn Clark Camp, "Mediating the Indissoluble Family: Mediator Style in Domestic Relations Cases" (2012) 26:2 BYUJ Pub L 187.

On the other hand, proponents of evaluative mediation dismiss these challengers as being “out of touch with the way the world really works.”¹³³ For instance, evaluative mediation proponent James Alfini writes that “parties often seek out and want a mediator who is willing and able to provide an opinion on their issue, and that depending on the type of issue and conflict, it is acceptable for mediators to be evaluative, at least some of the time.”¹³⁴ Similarly, Kenneth Roberts has written that many parties need, want and expect that a mediator can do more than simply facilitate the conversation. He states:

Parties do not want a referee to tell them to play nicely. The advantage of a neutral third party mediator is the value he adds by providing information, organizing the discussion, and assisting the parties in the reevaluation of their positions. Suggesting possible outcomes and consequences, settlement possibilities, and appropriate bargaining ranges are all designed to help align the parties and bring them closer to settlement.¹³⁵

Furthermore, evaluative practitioners like Jonathan B. Marks “[opine] that evaluative mediation [is] not an oxymoron, but rather an essential mediator's tool.”¹³⁶ Marks argues that “the most effective mediator is the one who adapts his or her role to help the parties overcome specific barriers to reaching a negotiated settlement...” and that such adaptation might require the mediator to “go beyond what many see as the appropriate role of the mediator” and instead “into the middle of the parties’ merits disputes.”¹³⁷ For instance, high-conflict couples will typically have to overcome more significant emotional barriers than lower-conflict couples

¹³³ Lande, *supra* note 122.

¹³⁴ Jane Kidner, “The Limits of Mediator Labels: False Debate between Facilitative versus Evaluative Mediator Styles” (2011) 30 Windsor Rev Legal Soc Issues 167 at 177.

¹³⁵ *Ibid.*

¹³⁶ Shaw, *supra* note 65 at 17.

¹³⁷ Jonathan B. Marks, “Evaluative Mediation-Oxymoron or Essential Tool”, published at jams-endispute.com (March, 1981), cited in Margaret L. Shaw, “Style Shmyle: What’s Evaluation Got to Do with It (2005) 11:3 Dispute Resolution Magazine 17.

in order to reach a negotiated settlement in mediation. In such cases, “high-conflict couples need more active and empowering interventions by the mediator...” such as those typically provided by evaluative mediators.¹³⁸ Similar sentiments are expressed by evaluative lawyer/mediator John Bickerman, who asserts that while facilitative mediation may “help the parties identify interests and increase the settlement pie”, oftentimes, “persistent coaxing with frequent references to the risk of continued litigation” may be required in order to resolve how to share that pie.¹³⁹

Likewise, evaluative mediator James H. Stark has taken issue with Love and Kovach’s characterization of evaluative mediation as an oxymoron. He asserts that most disputants desire and expect that legal rules will be treated as relevant to their dispute; that meaningful self-determination is not possible without adequate legal information; and that competent evaluators can provide information and advice without being committed to a particular outcome and without losing neutrality.¹⁴⁰ However, while Stark advocates for the use of evaluation in mediation, he acknowledges that it will not always be the most appropriate model, and that its effectiveness will depend on “a complex variety of disputant, dispute, forum, and mediator characteristics.”¹⁴¹

¹³⁸ Lisa Parkinson, "MEDIATING WITH HIGH-CONFLICT COUPLES" (2000) 38:1 Family & Conciliation Courts Rev 69 at 71.

¹³⁹ John Bickerman, "Evaluative Mediator Responds" (1996) 14:6 Alternatives 70.

¹⁴⁰ James Stark, "The Ethics of Mediation Evaluation: Some Troublesome Questions and Tentative Proposals, from an Evaluative Lawyer Mediator" (1997) Faculty Articles and Papers 769 at 775-779.

¹⁴¹ *Ibid* at 779. For further discussion regarding the benefits of evaluative mediation, see James H. Stark, "Preliminary Reflections on the Establishment of a Mediation Clinic" (1996) 2 Clinical L Rev 457 at 487; Carrie Menkel-Meadow, "Is Mediation the Practice of Law?" (1996) 14 Alternatives to the High Cost of Litig 57; Robert B Moberly, "Mediator Gag Rules: Is It Ethical for Mediators to Evaluate or Advise" (1997) 38:2 S Tex L Rev 669.

In terms of disputes which are suitable for an evaluative orientation, scholars have found that evaluative mediation is particularly effective when addressing family disputes relating to child and spousal support and other monetary or property-related issues.¹⁴² Child support refers to monies paid by one separated or divorced parent to the other as financial support for a child or children of their union. In Manitoba, such orders are dictated in part by the Child Support Guidelines, which are intended “to establish a fair standard of support for children that ensures that they benefit from the financial means of both parents.”¹⁴³ Spousal support refers to monies paid by one separated or divorced spouse to the other as financial support for the recipient spouse whose income and standard of living might be negatively impacted by the separation or divorce. In granting such an order under provincial legislation, Manitoba courts will consider several factors. These typically include: the financial means, earnings and earning capacity of each spouse or common law partner, the standard of living of the spouses or common-law partners, and any impairment of the income-earning capacity and financial status of either resulting from the marriage or common-law relationship, among others.¹⁴⁴ Finally, property-related issues arising in the course of a separation or divorce include the division of debts, liabilities and assets. Typical assets may include “real or personal property or legal or equitable interest therein including...a chose in action, money, jewelry and a family home.”¹⁴⁵

¹⁴² *Semple & Bala*, *supra* note 88; *Hughes*, *supra* note 92 at 248.

¹⁴³ Man Reg 15/2011, s 1.

¹⁴⁴ *The Family Maintenance Act*, *supra* note 80 at s 7(1).

¹⁴⁵ *The Family Property Act*, C.C.S.M. c. F25, s 1(1).

Noel Semple and Nicholas Bala comment that evaluative mediation is a “very efficient way to bring about a just resolution” in separation cases which do not involve issues relating to custody and access, but which involve legal entitlements to support and property division.¹⁴⁶ Semple and Bala note that property division and support can be more readily calculated than issues of child custody and access.¹⁴⁷ They assert that issues regarding property division and support might not require the type of creative problem-solving that is fostered in facilitative mediation.¹⁴⁸ They explain, “Legal entitlements to support and property division can in many cases be readily calculated by an expert mediator. Telling parties what payments a judge would probably require may allow them to quickly settle on those or similar terms and then move on with their lives.”¹⁴⁹ Similarly, Scott Hughes asserts that “evaluative mediation may provide the best fit if money is the sole issue or the bargaining will be purely distributive (dividing the pie) as opposed to integrative (expanding the size of the pie).”¹⁵⁰ He explains that, “[since] evaluative mediation calls upon the mediator to render opinions on the value of cases and to possibly predict the outcome of a dispute at trial, the natural medium of such discussions is money.”¹⁵¹ Likewise, while Carolynn Clark Camp generally discourages against the use of evaluation in family disputes, she recognizes the effectiveness of evaluative techniques in certain family disputes involving monetary settlements, division of property and debts.¹⁵²

¹⁴⁶ *Semple & Bala, supra* note 88.

¹⁴⁷ *Ibid.*

¹⁴⁸ *Ibid* at 31.

¹⁴⁹ *Ibid* at 29.

¹⁵⁰ *Hughes, supra* note 92 at 248.

¹⁵¹ *Ibid.*

¹⁵² *Clark Camp, supra* note 97.

According to evaluative mediation proponents like Stempel, evaluative as opposed to facilitative mediation may be required where serious power imbalances exist. Stempel has argued that “even in the most facilitative of mediations, disputants should ordinarily come to a resolution with at least a rudimentary knowledge of their options under the legal regime outside of mediation.”¹⁵³ This knowledge, which is not ordinarily provided to parties by facilitative mediators, can prevent disempowered parties from being pressured or bullied into unfair resolutions which are “substandard under the default rules of the applicable law.”¹⁵⁴ As evaluative mediators ensure that the parties are aware of their options under the law, where there is a significant power imbalance between parties, it is argued that evaluative as opposed to facilitative mediation techniques can better manage them.

Where the parties will have an ongoing relationship and where children are involved, Clark Camp argues that evaluative mediation is inappropriate for a number of reasons.¹⁵⁵ Firstly, she highlights the fact that evaluative mediation tends to limit communication between the parties.¹⁵⁶ This is particularly problematic, she argues, if both parents intend to stay actively involved in the care of the children, requiring that they communicate effectively with one another in the future.¹⁵⁷ Clark Camp explains,

If divorcing spouses are to transform their relationship into that of co-parents who must work together to make joint decisions regarding their children, exchange the children frequently, and make frequent adjustments to ongoing parent time schedules, these parents will require a high degree of ongoing communication and cooperation.¹⁵⁸

¹⁵³ *Stempel, supra* note 96 at 248.

¹⁵⁴ *Ibid* at 255.

¹⁵⁵ *Clark Camp, supra* note 97.

¹⁵⁶ *Ibid* at 203.

¹⁵⁷ *Ibid*.

¹⁵⁸ *Ibid*.

Evaluative mediation, which limits communication between the parties and focuses more on reaching a speedy settlement, does not assist the parties in fostering this type of cooperation.

Facilitative mediation, on the other hand,

can become a first step and a model in teaching the parties improved communication techniques. Not only can the subject of communication itself be a topic of discussion in the course of the mediation, but also the practice of sitting down face-to-face and discussing difficult issues with the aid of a skilled mediator can teach parties how to engage each other more effectively in the future. At the very least, many parties realize it is possible to communicate effectively with each other without it becoming a shouting match.¹⁵⁹

Clark Camp argues that evaluative mediation is also inappropriate when addressing custody and access issues because evaluations place undue pressure on the parties to accept mediator-made solutions which do not adequately fit their individual situations.¹⁶⁰ Specifically, she asserts:

By first focusing on legal norms and potential court-imposed outcomes and then applying pressure on the parties to accept the same, the [evaluative] mediator may guide or pressure the parties to accept an outcome not far different than what might happen in court. This result is problematic in that...court-directed outcomes are generally less than ideal, especially when dealing with highly individualized arrangements regarding children.¹⁶¹

Accordingly, where the parties will have an ongoing relationship and where children are involved, Clark Camp advocates strongly for facilitative over evaluative mediation.

Contrary to this position, Paul E. Hopkins views evaluative mediators as advocates for families, and particularly children, experiencing separation and divorce.¹⁶² Hopkins argues that “the stress of the dissolution process hinders parental objectivity,” rendering many parents

¹⁵⁹ *Ibid.*

¹⁶⁰ *Ibid.*

¹⁶¹ *Ibid* at 204.

¹⁶² Paul E Hopkins, "Evaluative Mediation Upholding the Child's Best Interests" (1982) 20:2 Conciliation Courts Rev 63 at 66.

“unable to separate decisions which may promote the children's best interests from decisions which address the parents' own personal needs of revenge, loneliness, self-vindication, or jealousy.”¹⁶³ Hopkins contends that the evaluative mediator’s recommendations and guidance are sometimes necessary to move parties “beyond their personal needs to a more objective appraisal,” therefore enabling them to make more rational and appropriate arrangements regarding children.¹⁶⁴

3. Transformative Mediation

In the early 1990s, Robert A. Baruch Bush and Joseph P. Folger introduced the concept of transformative mediation to the dispute resolution world, arguing that mediation has the potential to accomplish much more than simply resolving a contest between disputants.¹⁶⁵ Mediation, they argue, has the potential to support positive human interaction, to promote individual moral development, and to transform relationships.¹⁶⁶ This is not only beneficial to the parties themselves, but to society in general.¹⁶⁷ They assert that conflict “de-skills” people, making them weak, self-absorbed, and alienated from both themselves and others.¹⁶⁸ Unlike evaluative mediation, which aims to develop and produce settlements, and unlike facilitative mediation, which aims to assist parties themselves in finding options for resolution, transformative mediation aims to enable conflicting parties to “develop a greater degree of

¹⁶³ *Ibid* at 65.

¹⁶⁴ *Ibid*.

¹⁶⁵ Joseph P Folger & Robert A Baruch Bush, "Transformative mediation and third party intervention: Ten hallmarks of a transformative approach to practice" [1996] 13:4 Mediation Q 263 at 264.

¹⁶⁶ Robert A. Baruch Bush & Joseph P. Folger, *The Promise of Mediation: the Transformative Approach to Conflict* (San Francisco: Jossey-Bass, 2005) at 1.

¹⁶⁷ Robert A. Baruch Bush & Joseph P. Folger, “Transformative mediation and third party intervention: Ten hallmarks of a transformative approach to practice” (1995-1996) 13 Mediation Q 263 at 264.

¹⁶⁸ Lisa P Gaynier, "Transformative mediation: In search of a theory of practice" (2005) 22:3 Conflict Resolution Q 397 at 398.

both self-determination and responsiveness to others, while they explore solutions to specific issues.”¹⁶⁹ In order for these transformative effects to come to fruition, the model holds that mediators must “concentrate on the opportunities that arise during the process for party empowerment and interparty recognition.”¹⁷⁰ Bush and Folger define empowerment as “the restoration to individuals of a sense of their value and strength and their own capacity to make decisions and handle life’s problems.”¹⁷¹ Recognition refers to “the evocation in individuals of acknowledgment, understanding, or empathy for the situation and the views of the other.”¹⁷²

In order to promote empowerment and recognition, transformative mediators provide opening statements which describe their role as the mediator and the objectives of the mediation in terms based on empowerment and recognition.¹⁷³ In other words, transformative mediators make it clear from the outset that they are not there to make decisions for the parties or to force them to come to an agreement. Rather, they state that formal agreement or settlement is merely one possible outcome of the process and that “the session can be successful if new insights are reached, if choices are clarified, or if new understandings of each other’s views are achieved.”¹⁷⁴ Further, transformative mediators leave responsibility for outcomes with the parties, focusing instead on supporting the parties in their communication and decision making as they work toward problem solving, healing, and reaching resolutions on their own terms.¹⁷⁵

¹⁶⁹ *Bush & Folger, supra* note 167.

¹⁷⁰ *Ibid.*

¹⁷¹ *Bush & Folger, supra* note 166 at 22.

¹⁷² *Ibid.*

¹⁷³ *Bush & Folger, supra* note 167 at 266.

¹⁷⁴ *Ibid.*

¹⁷⁵ *Ibid* at 267.

Another characteristic practice of transformative mediators is the conscious refusal to be judgmental about the parties' views and decisions.¹⁷⁶ Transformative mediators take the position that they know far less about the parties' situations than the parties themselves, and that the parties are ultimately in the best position to determine how to proceed, even if the mediators may personally disagree with their choices.¹⁷⁷ This awareness allows transformative mediators to "consciously step away from their own judgments and refuse to influence the parties' views and choices."¹⁷⁸ In a similar vein, transformative mediators also demonstrate an optimistic view of the parties' competence and motives. More specifically,

The mediator sees the disputants, even in their worst moments, as being only temporarily disabled, weakened, defensive, or self-absorbed. The mediator is convinced that while the conflict may be causing the parties to be alienated from themselves and each other, it has not destroyed their fundamental ability to move - with assistance, but of their own volition - from weakness to strength or from self-absorption to recognition of others.¹⁷⁹

Moreover, transformative mediators allow parties to express emotions such as anger, hurt or frustration as well as feelings of uncertainty.¹⁸⁰ Expressions of emotions and feelings of uncertainty are viewed as important opportunities for empowerment and recognition, which, "when unpacked and understood, can reveal plentiful information about the parties' views of their situation and each other."¹⁸¹ Transformative mediators are "comfortable with having the parties take considerable time to sort through the conflict, and the mediator can accept the lack of closure if the disputants cannot reach a clear understanding of what the past has been

¹⁷⁶ *Ibid* at 268.

¹⁷⁷ *Ibid*.

¹⁷⁸ *Ibid*.

¹⁷⁹ *Ibid* at 270.

¹⁸⁰ *Ibid* at 271-272.

¹⁸¹ *Ibid* at 272.

about or what the future should be.”¹⁸² This means that transformative mediators are comfortable with mediation sessions that last significantly longer than evaluative mediation sessions. It also means that not reaching a settlement is fine with transformative mediators. Due to this “conflict positivity,” Dan Simon suggests that transformative mediation is particularly well suited to high-conflict couples “who are at an intense place with each other.”¹⁸³ Instead of feeling ashamed of their anger or pressured to appear more amicable in mediation, Simon argues that through transformative mediation, intensely upset disputants “receive the sort of understanding and support that makes it most likely they’ll be able to shift to a better place.”¹⁸⁴

Transformative mediators utilize techniques such as paraphrasing, restating, and reframing. Unlike facilitative mediators, however, who reframe a disputant’s comments into a more positive, future oriented statement, transformative mediators restate the disputants’ comments back to them without softening or reframing any negative or derogatory aspects.¹⁸⁵ In addition to demonstrating to the disputants that their emotions are valid, this technique also provides disputants an opportunity to reflect on their thoughts and to recognize the impacts of their words on the other party. Ultimately, as with most aspects of transformative mediation, the goal of this practice is to promote empowerment and recognition.

¹⁸² *Ibid.*

¹⁸³ Dan Simon, “What Types of Cases are Best for Transformative Mediation?” (25 June 2019), online (blog): *Institute for the Study of Conflict Transformation* <www.transformativemediation.org/what-types-of-cases-are-best-for-transformative-mediation/>

¹⁸⁴ *Ibid.*

¹⁸⁵ Reimer, *supra* note 69 at 127.

Transformative techniques have proven to be successful on a wide scale. In the 1990s, in response to growing numbers of informal and formal equal employment opportunity complaints being filed by employees of the United States Postal Service (“USPS”), the USPS made significant efforts to offer mediation to employees to assist with these issues.¹⁸⁶ Initially introduced as a facilitative-based mediation pilot project in the Florida Panhandle region in 1994, the Resolve Employment Disputes Reach Equitable Solutions Swiftly (“REDRESS”) program was eventually offered to USPS employees on a nation-wide basis.¹⁸⁷ This national REDRESS program was delivered by outside mediators who were trained in transformative mediation practices and ensured that the REDRESS program was consistent with the transformative model.¹⁸⁸ By 2001, more than 14,000 transformative REDRESS mediations had taken place within the USPS, and research demonstrated that the program correlated with a drop in equal employment opportunity complaint filings at the USPS.¹⁸⁹ In 2014, Bush and Folger explained the success of the program in terms of its transformation of conflict interactions and “upstream effects,” including improved workplace culture. While acknowledging that there have yet to be any direct observations, recorded transcripts of mediation sessions, or qualitative or analytic research studies conducted to strengthen the assessment of the program, Bush and Folger maintain that the majority of participants were satisfied with the process and outcomes of the mediations, that they experienced an improved

¹⁸⁶ Tina Nabatchi & Lisa B Bingham, "Transformative Mediation in the USPS Redress Program: Observations of ADR Specialists" (2001) 18:2 Hofstra Lab & Empl LJ 399 at 403.

¹⁸⁷ *Ibid.*

¹⁸⁸ *Ibid.*

¹⁸⁹ *Ibid* at 405.

quality of interaction with their disputants, and that mediation contributed to an improved workplace culture.¹⁹⁰

Bush and Folger argue that transformative mediation is to be preferred over facilitative mediation because facilitative mediation is no longer truly facilitative. They argue that facilitative mediation is beginning to threaten “the preservation of mediation’s unique capacities for supporting self-determination and communication.”¹⁹¹ Bush and Folger are critical, because contrary to traditional understandings of facilitation, facilitative mediators often end up focusing more on achieving specific outcomes for their clients as opposed to empowering the disputants to do so themselves.¹⁹² As such, Bush and Folger argue that facilitative mediation has begun to lose its unique potential for supporting empowerment and recognition shifts amongst disputants.¹⁹³ They argue that more and more, mediation has come to resemble “the forms of conflict intervention it was intended to replace - directive, top-down processes of resolution by an authoritative outsider.”¹⁹⁴ According to Bernard Mayer, when facilitative mediators adopt this type of solution focus and strive to achieve win-win solutions, they may consequently restrict the parties’ own engagement in the conflict in the same manner as those evaluative mediators whose practices they so strongly oppose.¹⁹⁵

¹⁹⁰ Joseph Folger & Robert A Baruch Bush, "Transformative Mediation: A Self-Assessment" (2014) 2:1 Intl J of Conflict Engagement & Resolution 20 at 25-26. For further discussion regarding the REDRESS program, see Stephen K Huber, "Transformative Mediation in the Workplace" (1999) 1:3 J of Alternative Dispute Resolution in Employment 37; Barbara McAdoo, "Transformative Mediation and its Role in Changing Corporate Culture" (1999) 1:1 J of Alternative Dispute Resolution in Employment 12; and Cynthia J Hallberlin, "Transforming Workplace Culture through Mediation: Lessons Learned from Swimming Upstream" (2001) 18:2 Hofstra Lab & Empl LJ 375.

¹⁹¹ *Folger & Bush, supra* note 190 at 21-22.

¹⁹² *Mayer, supra* note 70 at 50.

¹⁹³ *Folger & Bush, supra* note 190 at 21.

¹⁹⁴ *Ibid.*

¹⁹⁵ *Bush & Folger, supra* note 166 at 101.

However, there are also problems with transformative mediation. It has been criticized on several fronts, including its hyper focus on empowerment and recognition; its confusing practical application; its grandiose vision; and perhaps most prominently, its apparent devaluation of “resolution, settlement, or the development of tangible outcomes for disputes.”¹⁹⁶ For instance, early on, Michael Williams raised concerns regarding Bush and Folger’s disparagement of what they called the “satisfaction story”- the stream of mediation which aims to “help the parties to resolve the dispute that brought them to mediation” (“SATMED”).¹⁹⁷

Specifically, Williams rejects Bush and Folger’s philosophy that SATMED “inevitably leads to the mediator becoming directive and imposing a solution on the parties” such that SATMED can never result in party satisfaction.¹⁹⁸ Further, Williams rejects their argument that “it is impossible for a mediator to work with parties in a problem-solving mode aiming toward SATMED, and at the same time guide them toward Transformation.”¹⁹⁹ Bush and Folger disavow hybrid practices which incorporate elements of SATMED. Bush and Folger state that “a mediator cannot develop at the same time twin strategies to find a workable solution to a specific problem and to help the parties rise above their combat.”²⁰⁰ Williams, however, disagrees. Relying on his own experience as a so-called SATMED mediator, Williams notes that

¹⁹⁶ *Folger & Bush, supra* note 190 at 21-22.

¹⁹⁷ Michael Williams, "Can't I get no satisfaction Thoughts on The Promise of Mediation" (1997) 15:2 *Mediation Q* 143. Williams uses the abbreviated term “SATMED” to refer to mediation based on what Bush and Folger call the “Satisfaction Story.” According to the “Satisfaction Story,” “mediation can facilitate collaborative, integrative problem solving rather than adversarial, distributive bargaining” and “can thereby produce creative, ‘win-win’ outcomes that reach beyond formal rights to solve problems and satisfy parties’ needs in a particular situation or, alternatively, remedy parties’ difficulties.” (*Bush & Folger, supra* note 166 at 9.)

¹⁹⁸ *Ibid* at 144.

¹⁹⁹ *Ibid*.

²⁰⁰ *Ibid* at 150.

while mediators may certainly be tempted on occasion “to push an obviously sensible solution to a problem, or to take sides,” they are often “sufficiently self-critical to detect the temptation, and to resist it.”²⁰¹ In resisting this temptation, they allow parties to make the ultimate choices while still helping them to resolve the dispute that brought them to mediation.²⁰² Further, citing the goals that he brings to his mediation work, Williams argues that he is able to work with parties in a problem-solving mode aiming toward SATMED, and at the same time guide them toward transformation.²⁰³ He explains that in each mediation session, he strives for his clients to solve the problems that brought them to mediation, for the solutions to be theirs and not his, and for them to be able to “avoid needing [his] help in future, by converting [their] relationship from a machine that needs to be repaired by an outsider into a machine that can repair itself[.]”²⁰⁴ He argues that if he can achieve all of these goals, then the parties can achieve a workable solution to a specific problem and be “transformed” in Bush and Folger's terms.²⁰⁵ Similarly, community mediator and conflict management educator Timothy Hedeem takes issue with transformative mediation's disavowal of hybrid practice.²⁰⁶ Hedeem states: “that transformative practice cannot be co-mingled with other approaches, and that mediators are fully 'transformative' or they're not at all, these assertions strike me as contrary to mediation's premise of recognizing multiple realities and responding differently to various contexts.”²⁰⁷

²⁰¹ *Ibid* at 149.

²⁰² *Ibid* at 143.

²⁰³ *Ibid* at 144.

²⁰⁴ *Ibid* at 149.

²⁰⁵ *Ibid*.

²⁰⁶ *Gaynier, supra* note 168 at 401.

²⁰⁷ *Ibid*.

Lisa Parola Gaynier argues that Bush and Folger and other transformative mediation proponents have fallen prey to the same moral pitfalls they assign to results-focused mediators.²⁰⁸ She argues that ultimately, the transformative mediator's strict focus on moral growth and development comes to trump the values of the disputants, just as an evaluative mediator's focus on settlement or a facilitative mediator's focus on satisfaction of client interests might diminish a disputant's right to self-determination.²⁰⁹ Like Williams and Hedeem, Gaynier takes issue with Bush and Folger's dismissal of SATMED. She argues that transformative mediation is not so different from SATMED, in that its "[moral] imperative is an 'objective' just as resolution or settlement is."²¹⁰

In this chapter, I examined the literature pertaining to facilitative, evaluative and transformative mediation, or the "big three" mediation approaches. I paid particular attention to their application and effectiveness in family mediation cases dealing with the various family law issues to which *The Family Dispute Resolution (Pilot Project) Act* ("FDRA") applies, including child custody and access issues, child and spousal support-related issues, and property-related issues. I also focused on their application in cases with varying degrees of complexity, conflict intensity, and power imbalance.

²⁰⁸ *Ibid* at 406.

²⁰⁹ *Ibid*.

²¹⁰ *Ibid*. Several scholars have expressed concerns regarding transformative mediation. For further discussions, see Jeffrey R Seul, "How Transformative is Transformative Mediation: A Constructive-Developmental Assessment" (1999) 15:1 Ohio St J Disp Resol 135 and Robert J Condlin, "The Curious Case of Transformative Dispute Resolution: An Unfortunate Marriage of Intransigence, Exclusivity, and Hype" (2013) 14:3 Cardozo J of Conflict Resolution 621.

My research will explore which of these models might be the most effective process to be used by FDRA actors to address the various family law issues falling under the purview of the FDRA. In Manitoba, family law disputants subject to provincial legislation may currently seek relief from our courts with respect to several family law issues. These include, but are not limited to: issues of non-cohabitation, parenting arrangements, declarations of parentage, child support, spousal support, common law partner support, division of family property, partition, sale, or postponement of the sale of the family home, and protection.²¹¹ During the course of the three year family dispute resolution pilot project created under the FDRA, provincial disputants will no longer have access to the courts for relief from some of the most prevalent of these family law issues. Specifically, subject to certain exceptions, they will be required to resort to the FDRA's alternative dispute resolution process outside of the traditional court system when dealing with:

(a) a dispute about custody, access or support and maintenance for which an application may be made under *The Family Maintenance Act*;

(b) a dispute about property between spouses or common-law partners for which an application may be made under *The Family Maintenance Act*, *The Family Property Act*, *The Law of Property Act* or another Act.²¹²

Therefore, although federal family law issues and other provincially regulated family law issues do exist, my thesis only explores those family law issues governed by the FDRA; namely, provincially governed child custody and access issues, child and spousal support and maintenance issues, and property-related issues. Currently, each of these issues are dealt with under *The Family Maintenance Act*, *The Family Property Act*, and *The Law of Property Act* in

²¹¹ The Queen's Bench (Family Division), Petition, Form 70B.

²¹² *Bill 9, The Family Law Modernization Act*, *supra* note 22 at cl 3(2).

accordance with specific substantive and procedural laws. Under the FDRA, however, resolution officers could theoretically deal with these types of issues however they choose. Importantly, they do not have to choose mediation. However, given that family mediation is one of the most obvious and favored dispute resolution processes likely to be utilized in the FDRA scheme, in this thesis, I proceed on the assumption that resolution officers will often choose mediation.

Resolution officers are given significant discretion in how they assist parties in the resolution of their disputes. The only real “rules” that they must follow are that they must “[have] regard to the nature and complexity of the issues, the nature of the relationship between the parties and other factors [they consider] appropriate” in determining the form of dispute resolution.²¹³ Resolution officers must provide their services in a manner that:

- (a) minimizes conflict and promotes the resolution of disputes by cooperation and agreement;
- (b) takes into account the impact of the dispute on a child if a child is involved; and
- (c) is fair and is as economical, expeditious and informal as possible.²¹⁴

Accordingly, provided resolution officers choose mediation, they could refer disputants to facilitative, evaluative or transformative mediation services to resolve their custody, access, support, maintenance or property-related disputes. But how are they to choose? The scholarship indicates that this decision should not be made blindly. The complexity of the issues in each case, as well as the intensity of conflict and degree of power imbalance between

²¹³ *Ibid* at cl 10(1).

²¹⁴ *Ibid* at cl 4.

parties, tends to make some cases more suitable for certain mediation approaches over others.²¹⁵ Having said that, the scholarship also contains debate over whether a single discreet model is even possible to deliver in practice and whether the “model debate” is productive in the first place.²¹⁶ This is a topic which I will touch on later in my analysis. In the following chapter, I will explain the methodology I have used to build upon the FDRA’s current triaging guidelines in order to help resolution officers thoughtfully determine the type of mediation services which will best meet the individual needs of parties coming under the purview of the pilot project. This methodology has also enabled me to recommend training requirements and qualifications which might prepare resolution officers to fulfill their triaging functions.

²¹⁵ *Salem, Kulak & Deutsch, supra* note 104 at 758- 764.

²¹⁶ *Kressel, supra* note 67.

CHAPTER III METHODOLOGY

In chapter two I explained the “big three” approaches to mediation, namely: facilitative, evaluative and transformative. In this chapter I will outline the methodology I have used to reveal which of these might be the most effective approach to be used by *The Family Dispute Resolution (Pilot Project) Act* (“FDRA”) actors to address the various family law issues falling under the purview of the FDRA. In this way, my methodology has been directly informed by the review of the mediation scholarship I undertook in the previous chapter.

The purpose of my research is to critically analyze the FDRA and supply the theoretical information needed to crystallize the triaging role of resolution officers in the facilitated resolution phase of the FDRA scheme. This includes shedding light on the type of training and qualifications which might best prepare resolution officers to effectively fulfill their triaging functions. Currently, the FDRA provides very little guidance to resolution officers with respect to how to effectively and efficiently determine the appropriate resources to which to refer cases. This type of guidance, which I hope to provide, is necessary to ensure that resolution officers provide parties with the appropriate tools to resolve their disputes, given their particular needs and interests.²¹⁷ Specifically, I aim to provide more comprehensive guidelines to help resolution officers determine the type of mediation services which will best meet the individual needs of parties coming under the purview of the pilot project, if they are to be referred to mediation. These guidelines are meant to supplement the otherwise vague and discretionary legislative framework set out in section 10 of the FDRA.

²¹⁷ *Sander & Rozdeiczer, supra* note 37.

It is important to note that the Government of Manitoba is still in the early stages of its Family Law Modernization initiative under which the FDRA and pilot project fall. Accordingly, due to the ongoing nature of the implementation of this legislation, it is possible that questions or concerns raised in this research will be addressed as the initiative progresses. However, as the FDRA currently stands, there are still many questions and concerns with respect to the general scheme of the pilot project, and particularly, how resolution officers are to effectively choose processes to which to refer parties. In this chapter, I will outline my methodology which attempts to establish a framework to answer and respond to these matters.

My methodology for this research project focuses on qualitative interviews. I have interviewed family mediators practicing in both privately owned and government-run agencies in Manitoba, to gain insight into our province's family mediation landscape. It is particularly important to speak to family mediators because family mediation is the most obvious and favoured dispute resolution process likely to be utilized in the FDRA scheme. After all, a substantial number of Manitoba family court cases are already being resolved through mediation at Family Conciliation Services, the social services arm of the Family Division of the Court of Queen's Bench and the Provincial Court of Manitoba. This agency, which currently oversees family dispute resolution services across the province, dealt with over 1,200 family cases through its mediation and comprehensive co-mediation programs between the years of 2016 and 2019, making mediation the most widely used service of all of the services offered by Family Conciliation within that time period.²¹⁸

²¹⁸ Manitoba Families, *Manitoba Families Annual Report 2018-2019* at 102. In addition to mediation, Family Conciliation Services offers resources such as its parent information program called For the Sake of the Children,

Mediation was the only specific dispute resolution process explicitly discussed by the Family Law Reform Committee (“FLRC”) in its initial Report introducing the idea of the pilot project to the public. In explaining the outline of what eventually became the facilitated resolution phase of the FDRA scheme, the Report states that individuals coming under the scheme will be directed to meet with the best or most appropriate ADR resource provider for their particular case, and that this will usually be a mediator.²¹⁹ The Report goes on to reference mediation as the specific form of ADR to be used under the scheme on numerous occasions, and uses the terms “mediation” and “ADR” interchangeably, indicating an intention to utilize mediation as the primary, if not the sole form of dispute resolution under the new ADR-based scheme.²²⁰ As such, family mediators are the focus of my research project.

It is important to speak to family mediators because while they might be one of the professional groups most significantly impacted by the FDRA, it does not seem like they had a powerful voice in the creation of the FDRA. Lawyers, on the other hand, seem to have been more involved in the process. For instance, the FLRC, which was tasked with providing advice and recommendations on an alternative family law model, and which ultimately crafted the general FDRA scheme, consists of four lawyers, five judges, one Manitoba Justice spokesperson, and four public representatives, one of whom is a lay bencher with the Law Society of Manitoba.²²¹ Despite the fact that the committee was tasked with creating a new family model

conciliation counselling focused on short term problem solving, provision of support and information for individuals and families going through separation and divorce, brief consultations to help address the wishes or concerns of older children ages 11 to 16, and an information and referral service to assesses people’s needs and assist them to determine the appropriate service for their needs.

²¹⁹ *Modernizing Our Family Law System*, *supra* note 30 at 5.

²²⁰ *Ibid.*

²²¹ *Ibid* at 11.

based in ADR which would be an *alternative* to the courts, ten of the fourteen committee members are directly involved in the legal court system, while not one is a professional mediator or member of the alternative dispute resolution community. Moreover, while a small handful of mediation agencies were included in the FLRC's Report as stakeholders and contributors, and are said to have been contacted by the committee to provide their advice, it is unclear how much feedback these contributors were invited to produce to the committee, how much of their feedback was incorporated into the ultimate advice and recommendations of the FLRC, or if it was incorporated or considered at all.

Because the family mediation community in Manitoba is relatively small, and because I wanted to hear from as wide a sample of this community as I could, I decided to invite all family mediators currently practicing family mediation in Manitoba to participate in my research. To determine this list, I consulted both the Family Mediation Manitoba website, and that of the ADR Institute of Manitoba ("ADRIM"). Family Mediation Manitoba is a non-profit association which was founded in 1986 to promote family mediation in Manitoba. It is described as a "network of interdisciplinary professionals made up of private and court-based mediators, lawyers, social workers, judges, human services workers and students."²²² In August 2019, Family Mediation Manitoba merged with ADRIM, which is a not for profit affiliate of the ADR Institute of Canada. Like Family Mediation Manitoba, ADRIM seeks to promote the use of alternative dispute resolution in Manitoba by providing the public with access to various alternative dispute

²²² "About Us" (last visited 1 March 2020), online: *Family Mediation Manitoba* <www.familymediationmanitoba.com/about-us.html>

resolution resources like arbitration and mediation.²²³ ADRIM is also Manitoba's "regional centre of ADR information, education and research."²²⁴

To determine whom I might interview, I first consulted Family Mediation Manitoba's online membership directory and mediator roster. This roster contains names and contact information for lawyer/mediators, family mediators practicing separation and divorce mediation, and family mediators practicing family relations mediation in Manitoba. Then I consulted ADRIM's online "ADR Connect" function, which is described as "Canada's largest database of ADR Professionals...which the public uses to find mediators and arbitrators."²²⁵ This function enables people to search for mediators by last name, province, services provided, areas of expertise, cities serviced, mediator designations, and languages in which services are provided. In conducting my search, I looked specifically for ADR professionals in Manitoba who provide family mediation services in any language. Then, to ensure that I was not missing anyone, I also spoke directly with the Family Mediation Manitoba Executive member on the Board of ADRIM, who provided me with a current list of family mediators practicing in the province.²²⁶ If interviewees provided more names during the interview process, those mediators were added to my sample. Together, these inquiries yielded a list of 27 family mediators who were each invited to participate in my research.

²²³ "About Us" (last visited 10 May 2020), online: *ADR Institute of Manitoba* <www.adrmanitoba.ca/what-we-do-who-we-are/about-us/>

²²⁴ "Home" (last visited 10 May 2020), online: *ADR Institute of Manitoba* <www.adrmanitoba.ca>

²²⁵ *ADR Institute of Manitoba*, *supra* note 223

²²⁶ Telephone Conversation with Lisa Huberdeau (20 December 2019) Winnipeg, Manitoba.

My research methodology involved qualitative, face-to-face interviews based on a semi-structured interview guide which covered topics and questions pertaining to my research questions. To ensure that I gathered the same general areas of information from each participant, while maintaining a degree of flexibility in each individual interview to reflect interviewee responses, interviews were guided by a uniform list of just under 70 open-ended questions. Depending on the nature of the interviewee's practice, which was revealed in the course of each interview, or her answers to previous interview questions, certain questions were omitted due to lack of relevance or to avoid repetition. The entire list of questions which was posed to interviewees is attached to this thesis at Appendix A. Transcripts of each interview will remain on secure file with the author and will remain securely stored until August 2021, at which point they will be deleted.

Interviews were audio-recorded and transcribed so that I could rely on direct quotations from interviewees as a main source of raw data. I examined the transcripts and conducted a thematic analysis reflective of Barney G. Glaser and Anselm L. Strauss's Grounded Theory methodology of qualitative analysis.²²⁷ Specifically, I analyzed whether there were certain trends or themes amongst the interviews or interviewees which could help to inform my analysis. This methodology enabled me to generate theory and guidelines grounded in my interview data and research. Then, from my analysis I created triaging and training guidelines for resolution officers.

²²⁷ This methodology, which is defined by its "exclusive endeavour to discover an underlying theory arising from the systematic analysis of data," is a widely accepted inductive research method. Rather than verifying theories through qualitative research, this methodology aims to generate the theory itself by grounding it in empirical research. For discussion on the Grounded Theory methodology, see Kenny & Fourie, "Tracing the History of Grounded Theory Methodology: From Formation to Fragmentation" (2014) 19:52 TQR at 3; and Freeman Jr., "Utilizing Multi-Grounded Theory in a Dissertation: Reflections and Insights" (2018) 23:5 TQR at 1161.

According to the University of Manitoba's Research Ethics & Compliance policies, "All research projects involving humans conducted at, or under the auspices of the University of Manitoba, require prior ethics review and approval by a Research Ethics Board."²²⁸ Accordingly, on November 25, 2019, I applied to the Joint Faculty Research Ethics Board ("REB") for approval of my new Master of Laws (LL.M) study. In order to apply for approval, I was first required to complete an 8-part online course on Ethical Conduct for Research Involving Humans. This course, known as TCPS 2: CORE (Course on Research Ethics), outlines the core principles of ethical research. It prepares researchers for projects involving human subjects by reviewing how to define research and assess its risks and benefits, and by outlining topics such as consent, privacy and confidentiality, fairness and equity, and conflicts of interests. Each module provides in-depth explanations on various topics regarding ethical research, interactive exercises, and quizzes to test the researcher's knowledge of the subject area. I completed this course on November 15, 2019 and received a certificate of completion, which was submitted to the REB.

After completing this course, I began working on the remaining documents required for my REB application. These included a Protocol Submission Form, data collection instruments which would be utilized in the research, an informed consent form, and recruitment documents which would be provided to participants. A sample copy of this consent form is attached to this thesis at Appendix B. The University's 11-page Protocol Submission Form required that I outline several items. These included the purpose of my research, my research methods and instruments, my participant population, the recruitment and informed consent process, any

²²⁸ University of Manitoba, "REB Human Ethics Fort Garry Campus" (last visited 10 May 2020), online: *Research and International: Office of Research Ethics & Compliance* <www.umanitoba.ca/research/orec/ethics/human_ethics_index.html>

potential risks and benefits of my research to participants, and how I would securely manage the data obtained in my research, among other things. It also required that I attach copies of the interview questions that I intended to rely upon in my study, and the email invitation and informed consent forms which I intended to provide to potential participants.

On December 17, 2019 I received feedback from the REB regarding my proposed protocol, informing me that I was required to provide some additional information, clarification and revisions prior to receiving approval to begin my study. I was required to produce a cover letter explaining how I had addressed each of the REB's questions about my research protocol, and to complete a revised application, including revised appendices, in which any revisions or changes that I made were marked in some way to make the revisions easily identifiable to the REB. On December 20, 2019, I submitted this cover letter and revised application to the REB, and on January 3, 2020, I was informed that my protocol had been approved by the REB Chair. On January 7, 2020, after submitting one final copy of all required documents to the REB, free of all track changes, highlighting and bolding to indicate revisions, I received an official protocol approval certificate approving my research.

In accordance with my approved research protocol, I contacted potential interviewees by email, inviting them to participate in the research. I also provided an explanation of the research and an informed consent form which they were made to review and sign prior to being interviewed. Included in this consent form was a description of my research questions and methods and an overview of the interview procedure. It also contained explanations regarding recording devices which would be used in the interview, data collection and storage, benefits and risks to participants, and use of personal identifiers in the research. The consent form also

addressed credit and remuneration to participants, potential withdrawal from the research, dissemination and summaries of research results, and feedback and review mechanisms for participants.

In addition to providing general consent to participate in my research by signing the consent form, potential participants were directed to consider a few additional items. First, potential participants were advised that personal identifiers such as their names would not be included in my research when discussing interview results, unless they explicitly consented to being directly identified by their names. They were given the opportunity to consent to being personally identified in my research by name, by marking an “X” under a designated heading and providing their signatures. Participants were advised that if they did not mark an “X” and provide their signatures on the form, they would be identified only as family mediators practicing within the province of Manitoba. In order to distinguish the interviewees’ responses from one another, I have numbered the participants to make things clearer for the reader. Second, participants were given an opportunity to review any direct quotations that I intended to include from their interviews in my thesis. Potential participants were advised that if they wished to review said quotations, they were to mark an “X” under the designated heading, prompting me to contact them prior to dissemination and publication of the research to provide them the opportunity for review. Finally, participants were given an opportunity, if they chose, to receive a brief 1-3-page summary of my results via regular mail or email by October 2020. They were offered a copy of any published version of the research, if it is to be published, upon request. Potential participants were advised that if they wished to receive a summary and/or a copy of published work, they

were to mark an “X” next to the applicable heading, and to indicate whether they wished to receive these by regular mail or email.

I invited 27 family mediators to participate in my research. Interestingly, 24 of the 27 mediators were women.²²⁹ Seven of the 27 family mediators agreed to participate, and 2 consented to the use of their names in the research. Unfortunately, one of these 7 mediators was unable to participate in the research due to a family tragedy, so I conducted 6 interviews. All 6 of the family mediators whom I interviewed are women. While my ultimate participant pool is relatively small, Grounded Theory methodological approaches to qualitative research emphasize the depth and quality of the insights gathered from empirical research as opposed to the quantity. As such, it has been recognized that findings gathered from interviews with members of such a small population may still be generalized and used for thematic analysis,²³⁰ especially when that population is homogenous and comprised of experienced participants in the research topic.²³¹ In fact, some scholars argue that in “exploratory, concept-generating studies” involving

²²⁹ These numbers are consistent with studies which demonstrate the prevalence of female mediators in the field of family mediation. For example, see Alice F. Stuhlmacher & Jean Poitras, “Gender and Job Role Congruence: A Field Study of Trust in Labor Mediators” (2010) 63 *Sex Roles* 489. In that study, Stuhlmacher and Poitras conclude that “no research or review has examined how gender influences case assignment to mediators.” However, they note that “It is possible that perceived gender and job role congruity may result in male mediators more commonly assigned to business or financial mediations while female mediators are more likely assigned to family or interpersonal mediations.” (at 497). Similarly, Andrea Kupfer Schneider & Gina Viola Brown, “Gender Differences in Dispute Resolution Practice” (2014) 20:3 *Dispute Resolution Magazine* 36 found that women predominantly served as mediators in cases dealing with elder law and family law, while “corporate, construction, insurance, and intellectual property disputes are significantly male-dominated.” (at 38).

²³⁰ Molly Treadway Johnson, *Studying the Role of Gender in the Federal Courts: A Research Guide* (Washington, D.C.: Federal Judicial Center, 1995) at 69-70; and *Kenny & Fourie*, *supra* note 226.

²³¹ Aldiabat & Le Navenec, “Data Saturation: The Mysterious Step In Grounded Theory Method” 23:1 *TQR* (2018) at 254.

in-depth interviews, “it is not only reasonable to have a relatively small number of respondents, but may even be positively advantageous.”²³²

Mira Crouch and Heather McKenzie explain that respondents in qualitative interview-based research represent “meaningful experience-structure links” as opposed to individual persons who are “bearers of certain designated properties (or ‘variables’).”²³³ As participants are viewed as “variants of a particular social setting...and of the experiences arising in it” rather than “systematically selected instances of specific categories of attitudes and responses,” Crouch and McKenzie argue that even just one case can lead to new insights.²³⁴ While Crouch and McKenzie recognize that some variety in interview sources facilitates and enhances depth of meaning in thematic analysis, they argue that to achieve depth of meaning, “it is much more important for the research to be intensive, and thus persuasive at the conceptual level, rather than aim to be extensive with intent to be convincing, at least in part, through enumeration.”²³⁵ To achieve this persuasiveness, this type of research requires “careful history-taking, cross-case comparisons, intuitive judgments and reference to extant theoretical knowledge.”²³⁶ Accordingly, they contend that small-sample research is capable of producing “concepts and propositions that have construct validity because they make sense as pivotal points in a matrix where interview yield intersects with pre-existing theoretical knowledge.”²³⁷ It is my hope that I can achieve this construct validity with my small-sample, interview-based methodology.

²³² Mira Crouch & Heather McKenzie, “The Logic of Small Samples in Interview- Based Qualitative Research” (2006) 45 *Social Science Information* 483 at 491.

²³³ *Ibid* at 493.

²³⁴ *Ibid*.

²³⁵ *Ibid* at 494.

²³⁶ *Ibid* at 493.

²³⁷ *Ibid* at 493-494.

Participants were requested to attend one in-person interview session at a location of their choice. They typically chose their offices, and interviews usually lasted one hour to one and a half hours. Interviews were audio recorded by me using the iPhone Voice Memo application on my cellular phone. The audio recorded interviews were temporarily stored on my cell phone, which is password protected, and then transferred to my laptop computer which is protected by biometric facial recognition technology and a password. This laptop remains supervised by me when taken out of my home and into the public. The audio recorded interviews were transferred by me from my cell phone to my laptop computer by syncing the cell phone with iTunes on the computer. Once I transferred the audio recordings to my computer, I transcribed the audio recordings and deleted the original audio recordings from my cell phone. This data will remain on my computer until August 2021, which is approximately a year after the intended completion date of my thesis. At that point, the data will be deleted from my files and from my computer's recycling bin.

I was primarily interested in learning three things. Therefore, I hoped my qualitative interview methodology would reveal:

1. How family mediators in Manitoba have come to learn the skills that are required to evaluate the appropriateness of mediation and determine a particular course of action in a given case;
2. Which mediation approaches and techniques are currently being practiced in Manitoba in various family mediation contexts, and what factors are influencing mediators to utilize these approaches and techniques; and
3. The views of Manitoba family mediators with respect to:

- a. The necessary skills and qualifications for FDRA resolution officers; and
- b. How FDRA resolution officers can fulfill their crucial triaging role.

To gain insight into these areas, I asked interviewees a series of questions regarding their mediation training and experience, their knowledge of the “big three” mediation approaches, their personal approach to mediation, and the practices and techniques they employ in family mediation. In terms of practices and techniques, I was interested in those they utilize in mediation generally, and those they choose in response to obstacles which are caused by particularly complex or conflict-laden cases, or those involving power imbalances arising out of gender differences, socioeconomic status, and domestic violence. Additionally, I asked interviewees about their involvement in the Family Law Modernization initiative and the creation or implementation of the FDRA, and I asked for their thoughts and opinions on the legislation, including questions pertaining to the FDRA’s current explanations of the roles and qualifications of resolution officers.

In surveying Manitoba family mediators on these points, I had several hopes. First, I wanted to understand the intricacies of the various mediation frameworks and resources operating in Manitoba. In gaining this understanding, my hope was to discover the factors considered by Manitoba family mediators in making assessments about how to deal with different family cases. Ultimately, my goal was to reveal which Manitoba resources, given the particular mediation approach offered, or the manner in which they address obstacles like power imbalance, might be best suited to address the different family cases coming under the FDRA. I believed that these insights could help to narrow down the list of potential resources to which FDRA participants may be referred for the resolution of their disputes. Most importantly, I hoped

the results of my research would provide guidance to resolution officers to enable them to effectively fulfill their triaging functions.

Second, by analyzing interviewees' thoughts and opinions on the legislation, I hoped to be in a position to provide guidance to the government of Manitoba with respect to certain details of the pilot project which have yet to be finalized. For instance, feedback from family mediators could assist in determining the type of training and qualifications which might best prepare resolution officers to effectively apply triaging guidelines in fulfilling their triaging function. Given the crucial triaging role that resolution officers will play in the FDRA, these decisions will have a significant impact on the success of the facilitated resolution phase, and of the FDRA. Therefore, interviewees' views on the FDRA scheme was important data to obtain.

Interviewees' comments together with my analysis resulted in the development of insights regarding the potential of the legislation to actually provide the fair, economical, expeditious and informal system it purports to create. My hope is that my inquiries and analysis will actually improve the odds of reaching those goals.

CHAPTER IV ANALYSIS

Every family has unique characteristics, values, beliefs, traditions, and experiences which inform the ways that it functions as a unit.²³⁸ These shared characteristics can also influence the ways that families react and behave when the family unit is breaking down. Given these distinct characteristics, families may be impacted by the emotional, financial, physical and social hardships associated with separation and divorce in different ways. In turn, families will require different types of assistance and services to navigate a family breakdown so that their interests, needs, and goals are met.²³⁹ Accordingly, “it would be virtually impossible to have a *pro forma* set of rules which will be applied to each and every family with an ideal outcome, because we’re just not a homogenous group.”²⁴⁰

Manitoba’s current court-based family law system “does not always consider the social, relational and financial needs of the people who are most affected.”²⁴¹ Rather, it is a rigid system based in law, which strives to treat parties in a uniform manner. However, through the implementation of *The Family Law Modernization Act* (“FLMA”), and particularly, *The Family Dispute Resolution (Pilot Project) Act* (“FDRA”), Manitoba is aiming to design a new family law system which is dependent on alternative dispute resolution mechanisms like mediation, as

²³⁸ Government of Manitoba, “Home” (last visited 10 May 2020), online: *Family Law Manitoba* <www.gov.mb.ca/familylaw/>

²³⁹ Government of Manitoba, “About Family Law Modernization” (last visited 10 May 2020), online: *Family Law Manitoba* <www.gov.mb.ca/familylaw/about.html> [*About Family Law Modernization*].

²⁴⁰ Interview of Mediator 4 (24 March 2020) in person, Winnipeg, Manitoba [Mediator 4].

²⁴¹ *About Family Law Modernization*, *supra* note 239; For example, according to the 2013 Report of the Action Committee on Access to Justice in Civil and Family Matters, most individuals coming into contact with the family law court system “earn too much money to qualify for legal aid, but too little to afford the legal services necessary to meaningfully address any significant legal problem.” In Manitoba, specifically, Legal Aid funding and coverage is available only to individuals and families of 4 with, respectively, “gross annual salaries of \$14,000 and \$27,000 and net annual salaries of \$11,800 and \$22,800.” This leaves many families without access to legal services for their family law problems (*A Roadmap for Change*, *supra* note 4 at 4.)

opposed to the courts.²⁴² In doing so, Manitoba is striving to create a system which is capable of tailoring the process to accommodate the different values, needs and goals of families.²⁴³

To achieve this reformation, however, it is going to take more than the proclamation of legislation and a vague outline of a pilot project. It requires a fully realized dispute resolution framework which has been thoughtfully designed to achieve improvement. Such a framework must not only be informed by feedback from government entities, legal professionals and the public, but also by scholarly research on alternative dispute resolution (“ADR”) and on the input of those individuals most knowledgeable and experienced in the ADR field. More specifically, given the likelihood that mediation will be one of the primary dispute resolution processes used to resolve family disputes under the FDRA, it is particularly important that this new framework be informed by the input of Manitoba family mediators. Such a framework, which will hinge largely on the triaging decisions made by resolution officers early on in the pilot project, must take into consideration the mediation options that are available to Manitoba families, the distinct characteristics of families and family conflict, and how those characteristics could dictate the particular mediation option that is most appropriate and effective in a given case. In other words, this framework must be based on a solid understanding of the types of mediation services which will best meet the individual needs of parties coming under the purview of the FDRA.

In this chapter I will use the insights gathered from my interviewees to build this understanding so that this framework may come to fruition. This chapter will culminate in a guide for resolution officers to follow when triaging cases under the FDRA, which will hopefully enable

²⁴² *About Family Law Modernization, supra* note 239.

²⁴³ *Ibid.*

them to determine the type of mediation services which will best serve the parties affected by the pilot project. Articulated guidelines will prepare resolution officers to effectively do their jobs, thus improving the chances of the FDRA “[creating] a process outside the traditional court system that provides for the fair, economical, expeditious and informal resolution of family disputes.”²⁴⁴

Family Mediation in Manitoba

Falling under the umbrella term “ADR”, family mediation has long been considered a mere alternative to the court-based family law system. However, separation and divorce mediation is becoming more commonly recognized as an “appropriate” form of dispute resolution with which to address family law disputes.²⁴⁵ In Manitoba, separation and divorce mediation occurs in several different settings, including court-connected, government agencies, private mediation practices, and in connection with collaborative family law approaches. Each framework utilizes various mediation approaches and techniques to assist families as they navigate their family breakdown and as they transition into the new phase of their life.

For example, families going through separation or divorce in Manitoba may currently opt into or be referred by the court to participate in a free, government-operated comprehensive mediation program through Family Conciliation Services. These court-connected family mediations are conducted by family relations mediators and family lawyer mediators, and address both parenting and financial issues.²⁴⁶ Typical parenting issues addressed through the program include regular care and control of the children, division of

²⁴⁴ *Bill 9, The Family Law Modernization Act*, *supra* note 22 at cl 1.

²⁴⁵ Carolynn J. Lloyd, “‘Appropriate’ Dispute Resolution” (30 October 2017), online (blog): *Lerners Lawyers* <www.lerners.ca/lernx/appropriate-dispute-resolution/>

²⁴⁶ “Family Conciliation Services” (last visited 10 May 2020), online: *Government of Manitoba* <manitoba.ca/fs/childfam/family_conciliation.html> [Family Conciliation Services]

time with the children over holidays, parental decision-making, mobility and travel issues, etc.²⁴⁷ Typical financial issues addressed through this program include child support, spousal support, and division of marital property.²⁴⁸ In some circumstances, participants will meet independently with the family relations mediator to mediate issues relating to parenting, and separately with the lawyer-mediator to address issues regarding finances and property.²⁴⁹ In others, the parties will meet jointly with both professionals to mediate all aspects of the conflict at once.²⁵⁰ In this way, participants can benefit from the perspectives of two uniquely qualified mediators capable of addressing a broad range of family issues outside of the courts.

Alternatively, family mediation is offered in Manitoba by private practitioners who can provide comprehensive services encompassing financial, property, and parenting issues.²⁵¹ Private family mediation is provided by professionals such as certified mediators, family dynamics specialists, mental health professionals, social workers and lawyers.²⁵² For example, Facilitated Solutions, a private mediation firm in Winnipeg, offers preventative conflict resolution skills training, parent coaching, and both face-to-face and online family mediation services via a video conferencing platform.²⁵³ It offers comprehensive mediation services covering family matters such as “separation, family reorganization, parenting issues, adult siblings, parent/teen conversations, extended families and family businesses.”²⁵⁴ These services

²⁴⁷ Interview of Mediator 1 (20 January 2020) in person, Winnipeg, Manitoba [Mediator 1].

²⁴⁸ *Family Conciliation Services*, *supra* note 246.

²⁴⁹ *Ibid.*

²⁵⁰ *Ibid.*

²⁵¹ *Folberg, Milne, & Salem*, *supra* note 6 at 12.

²⁵² *Ibid.*

²⁵³ “Services” (last visited 10 May 2020), online: *Facilitated Solutions* <www.familyconflict.ca/services>

²⁵⁴ “Comprehensive Family Mediation” (last visited 10 May 2020), online: *Facilitated Solutions* <www.familyconflict.ca/services/resolve/> [Comprehensive Family Mediation]

are provided by trained mediators, conflict resolution specialists, and “mediation-friendly” lawyers practicing in the area of collaborative family law in Winnipeg.²⁵⁵ Similar to Family Conciliation’s co-mediation program, collaborative lawyer-mediators co-mediate with Facilitated Solutions mediators, focusing mainly on financial issues, providing general legal information, explaining legal implications of decisions made in mediation, and drafting legal separation agreements if the parties require it.²⁵⁶

Families may also become involved in family mediation through Manitoba’s collaborative family law sector. Collaborative practice is an out-of-court approach to family law which utilizes a team of professionals which, in addition to lawyers, might include financial specialists, mental health professionals, child specialists and mediators, depending on the particular needs and wishes of the parties.²⁵⁷ The collaborative process is based on several key principles. The parties all pledge not to go to court; to be honest; to be transparent; to disclose all relevant information to further negotiations towards settlement; and to base negotiations and settlement on the needs of both the parents and the children.²⁵⁸ If settlement is not reached through this process, parties understand that all collaborative professionals must withdraw and that they must start over outside of the collaborative process.²⁵⁹ In addition to collaborating with and referring parties to mediators at private mediation firms, collaborative

²⁵⁵ *Ibid.* Facilitated Solutions works in partnership with collaborative lawyers at Evans Family Law. Other collaborative family law firms offering mediation services in Manitoba include Academy Family Law and McCaffrey Family Law, among others. The ADR Institute of Manitoba website indicates other private mediation firms in Manitoba, including Signature Mediation and Fairway Divorce Solutions.

²⁵⁶ Interview of Sandy Koop-Harder (27 January 2020) in person, Winnipeg, Manitoba [Sandy Koop Harder].

²⁵⁷ “Benefits of Collaborative Practice” (last visited 10 May 2020), online: *Collaborative Practice Manitoba* <www.collaborativepracticemanitoba.ca/the-experience/benefits-of-collaborative-practice-manitoba/>

²⁵⁸ “The Experience” (last visited 10 May 2020), online: *Collaborative Practice Manitoba* <www.collaborativepracticemanitoba.ca/the-experience/>

²⁵⁹ *Ibid.*

family lawyers may also offer direct mediation services to their clients, covering a wide range of issues such as “division of assets, spousal support, child maintenance and custody and access issues.”²⁶⁰

All of these family mediators assist families through the separation and divorce processes in productive, civil, and appropriate manners. They do so, however, in various ways, given their unique professional configurations, mission statements, policies, and approaches to mediation. Having had the opportunity to interview family mediators practicing within different frameworks in Manitoba, I was able to gain several unique perspectives on mediation, informed by various educational backgrounds, employment histories, and professional training.

Beginning with one of the two mediators who provided her consent to be named in my research, I was fortunate to interview Fay Lynn Katz (“Fay Lynn”), who is a crown attorney and mediator employed in the family law section of the civil legal services branch of Manitoba Justice.²⁶¹ Having completed a Bachelor of Laws degree, a family mediation course through the University of Toronto’s School of Continuing Studies, and numerous continuing legal education courses pertaining to family mediation and related topics, Fay Lynn has worked for Manitoba Justice for just under twenty years and works primarily as a lawyer-mediator in the comprehensive co-mediation program through Family Conciliation Services.²⁶² Sandy Koop-Harder (“Sandy”), the other interviewee who provided her consent to be named in my research, is a mediator and business manager at Facilitated Solutions. Sandy has degrees in both theology and conflict resolution, a Master’s degree in business, and experience in victim-

²⁶⁰ *Ibid.*

²⁶¹ Interview of Fay Lynn Katz (15 February 2020) in person, Winnipeg, Manitoba [Fay Lynn Katz].

²⁶² *Ibid.*

offender mediation, interfaith conflict mediation, and of course, family mediation.²⁶³ Over the years, Sandy has completed mediation training through organizations such as Mediation Services in Manitoba, and she has attended numerous other conferences and training events covering topics such as domestic violence in mediation and mediating high conflict couples. Additionally, she herself has prepared materials to be used in such mediation trainings.²⁶⁴

Other interviewees have earned degrees in areas such as social work, conflict resolution, recreational studies, family dynamics, indigenous studies, psychology, and law, and are also experienced in areas ranging from collaborative family law, to child protection work, and to personal injury mediation.²⁶⁵ Together, they have undertaken training in areas such as conflict resolution, basic mediation skills, co-mediation, dealing with anger, dealing with change, child development, parent-teen mediation, parental and child attachment, mediating high conflict individuals, mediating high conflict financial situations, mediating cases involving domestic violence, preparing parenting plans, drafting memoranda of agreement, and more.²⁶⁶

Together, the contrasting and overlapping insights, opinions and perspectives of these diverse Manitoba family mediators has helped paint a comprehensive picture of Manitoba's current family mediation landscape. More importantly, they have helped to demonstrate some of best practices and mediation approaches within that landscape. These diverse insights, opinions and perspectives, which I will now outline, will help guide resolution officers in their triaging role, thus helping to facilitate the successful implementation of the FDRA.

²⁶³ *Sandy Koop-Harder, supra* note 256.

²⁶⁴ *Ibid.*

²⁶⁵ Interviews of Mediators 1-4 (20 January 2020- 24 March 2020) in person, Winnipeg, Manitoba [Mediators 1-4].

²⁶⁶ *Ibid.*

Conceptualizing Mediation Approaches

In order to ascertain the most effective and appropriate mediation approaches to use in addressing the various types of family law cases coming under the new FDRA framework, I sought in my interviews to learn the approaches and techniques that are currently being used by Manitoba's family mediators. Specifically, given that facilitative, evaluative and transformative mediation have become embedded in the mediation literature as the "big three" approaches, representing distinct orientations on a continuum of mediator styles, I sought to learn which of these approaches, or which offshoot or combination of them, were being utilized by family mediators in Manitoba today. To do this, I first needed to learn how the mediators understood their own approaches to mediation, and how they "conceptualize their role and give meaning to their work as mediators."²⁶⁷

In 2002, Cheryl Picard conducted research into this area, asking "What Mediators Mean When They Talk About their Work."²⁶⁸ She found that while quite often, mediators describe their work in similar terms, they had disparate understandings of commonly-used mediation-related terms like "facilitation, transformative, settlement, and humanistic."²⁶⁹ Similarly, I discovered that while Manitoba mediators were able to easily describe their roles in their mediation practices, and the tactics and strategies that they ordinarily use, there was "great diversity among mediators' understanding of commonly-used terms like" facilitative mediation, evaluative mediation, and transformative mediation.²⁷⁰ Like Picard, I noticed that "the majority

²⁶⁷ Cheryl Picard, "Common Language, Different Meaning: What Mediators Mean When They Talk About Their Work" (2002) 18:3 Negotiation J 251 at 252.

²⁶⁸ *Ibid* at 251.

²⁶⁹ *Ibid*.

²⁷⁰ *Ibid*.

of mediators who participated in this study conceptualize their primary role in the mediation process as that of facilitation.”²⁷¹ Given that facilitative mediation is viewed by many as the purest form of mediation, and that which should form the basis for all other approaches, this is not surprising.²⁷² However, I found that their understandings of facilitative mediation were quite varied, and that in some cases, were more reflective of the other “big two” mediation approaches.²⁷³

For instance, consistent with typical interpretations of facilitative mediation, some participants described facilitation as a “party-driven,” “hands-off” mediation process in which the mediator monitors the process and facilitates the conversation for the clients in order for them to make their own decisions.²⁷⁴ However, others described facilitative mediation as a “settlement-focused,” “solution-oriented,” and “practical” process wherein the mediator coaches the parties and helps them to resolve issues.²⁷⁵ These descriptions are more consistent with common explanations of evaluative mediation. Some also believed that facilitative mediators aim to help parties understand the impact of their decisions on others²⁷⁶, which is more consistent with the role of a transformative mediator, while some ultimately boiled facilitative mediation down to a midway point on a continuum between evaluative and transformative mediation.²⁷⁷

²⁷¹ *Ibid* at 253.

²⁷² *Roberts, supra* note 68.

²⁷³ *Picard, supra* note 267 at 253.

²⁷⁴ *Mediator 1, supra* note 247; *Sandy Koop Harder, supra* note 256; and Interview of Mediator 2 (10 February 2020) in person, Winnipeg, Manitoba [Mediator 2].

²⁷⁵ Interview of Mediator 3 (14 February 2020) in person, Winnipeg, Manitoba; *Fay Lynn Katz, supra* note 261; and *Mediator 4, supra* note 240.

²⁷⁶ *Mediator 3, supra* note 275.

²⁷⁷ *Sandy Koop Harder, supra* note 256.

Descriptions of evaluative and transformative mediation, when they were offered by the mediators, tended to be more consistent with one another, and more reflective of the commonly held understandings of these mediation approaches. While Fay Lynn and Mediators 1, 3 and 4 did not provide definitions of the term “evaluative mediation,” the remaining mediators consistently described it as a “structured,” “directive,” “settlement-focused” and outcome-oriented process, which focused on the potential outcomes for the parties outside of the mediation process.²⁷⁸ Interestingly, and perhaps slightly worrisome, Mediator 3 had never heard of the term before. With respect to transformative mediation, the mediators seemed to have a more consistent understanding of that approach. In describing the transformative approach, the mediators used terms like “relationship-focused,” and they explained that the process is intended to transform relationships and patterns of communication, to build deeper connections between the parties, and to build greater understanding in the parties of one another.²⁷⁹ The mediators also noted that transformative mediators tend to be less intrusive in the process, that they tend to let tensions between the parties play out, and that the parties are given significant power in terms of content direction and process.²⁸⁰ As Sandy put it, “it’s their process, it’s their conflict, it’s their outcome.”²⁸¹

Despite the varied conceptions among the mediators of facilitative mediation, evaluative mediation, and transformative mediation, all but one of them, who categorized her practice as transformative mediation, self-identified as facilitative mediators. In describing their

²⁷⁸ *Sandy Koop Harder, supra note 256; and Mediator 2, supra note 274.*

²⁷⁹ *Sandy Koop Harder, supra note 256; Mediator 2, supra note 274; Mediator 3, supra note 275; and Mediator 4, supra note 240.*

²⁸⁰ *Mediator 3, supra note 275.; Mediator 4, supra note 240, and Sandy Koop Harder, supra note 256.*

²⁸¹ *Sandy Koop Harder, supra note 256.*

personal approaches to mediation, however, including their usual strategies, tactics, and levels of intervention, it became apparent that on paper, several of the mediators could be more accurately labeled as evaluative mediators or transformative mediators.

To illustrate, while both Fay Lynn and Mediator 4 self-identified as facilitative mediators, their descriptions of their mediation practices were highly reflective of the evaluative approach to mediation, which typically involves assessments of the parties' case, predictions of the outcome of a dispute at trial if settlement is not reached in mediation, and development and proposals of options to ultimately resolve the case.²⁸² Referring to her mediation approach as "practical" and "settlement-oriented," Fay Lynn explained that her work typically involves providing parties with relevant legal information pertaining to matters like family property accountings and child and spousal support, discussing different options available to the parties based on that legal information, and explaining the legal implications that those different options might have on the parties.²⁸³ These are hallmarks of an evaluative mediation approach. Consistent with evaluative mediation's main goal of helping the parties to resolve the dispute that brought them to mediation,²⁸⁴ Fay Lynn explained that her actions as a mediator are taken with the primary goal of helping parties reach resolution quickly and in a cost-effective manner.²⁸⁵

²⁸² *Lowry, supra* note 116.

²⁸³ *Fay Lynn Katz, supra* note 261.

²⁸⁴ *Williams, supra* note 197.

²⁸⁵ *Fay Lynn Katz, supra* note 261.

Likewise, Mediator 4 described her practice as “guided and more directive mediation.”²⁸⁶ Noting that a large focus of her practice is on “education,” she explained that she provides parties “a very robust package of resources and checklists in advance, so that they come prepared and understand the work that [they are] going to be doing.”²⁸⁷ Once in the mediation session, she then “[explains] the law in this province as it applies to them, and what options they may have.”²⁸⁸ Like evaluative mediator James H. Stark, who argues that meaningful self-determination in mediation is not possible without adequate legal information,²⁸⁹ Mediator 4 is of the opinion that the more informed people are, the better the mediation process will be.

In terms of transformative approaches, while Mediator 1 self-identified as a facilitative mediator, her description of her mediation practice contained several classically transformative elements. Consistent with the principle of transformative mediation that transformative mediators ought to demonstrate an optimistic view of the parties’ competence and motives,²⁹⁰ Mediator 1 explained that her practice is based on a belief that “everyone is able to come to a solution on their own, in the right context, in the right framework, with the right support.”²⁹¹ In this sense, Mediator 1 has adopted the classic transformative belief that no matter how “disabled, weakened, defensive, or self-absorbed” a party may seem when they enter mediation, this is only a temporary state caused by the conflict between the parties, and “with assistance, but of their own volition – [the parties are capable of moving] from weakness to

²⁸⁶ *Mediator 4, supra* note 240.

²⁸⁷ *Ibid.*

²⁸⁸ *Ibid.*

²⁸⁹ *Stark, supra* note 140.

²⁹⁰ *Bush & Folger, supra* note 167 at 270.

²⁹¹ *Mediator 1, supra* note 247.

strength or from self-absorption to recognition of others.”²⁹² Moreover, the description of her goals as a mediator are more consistent with those of transformative, as opposed to facilitative mediation. She explained that some of her goals as a mediator are to help the parties “see the light” and become “transformed.”²⁹³ By acting as a “navigator” in the mediation process, she strives to help the parties come to understand the impact of their actions on each other, learn to make better choices in the future, and implement changes to improve their situation going forward.²⁹⁴ In other words, she aims to build empowerment and interparty recognition. As Bush and Folger put it: “the restoration to individuals of a sense of their value and strength and their own capacity to make decisions and handle life’s problems,” and “the evocation in individuals of acknowledgment, understanding, or empathy for the situation and the views of the other.”²⁹⁵

Accordingly, it is clear that with respect to the “big three” mediation approaches, “Common language does not imply common meaning.”²⁹⁶ Therefore, the sort of labeling and classification associated with the mediation “model debate” may be less capable of clarifying the processes and boundaries that distinguish the “big three” mediation approaches” than scholars and practitioners might have thought.²⁹⁷ This desire to categorize mediation approaches into narrow boxes may actually set up an inappropriate, dichotomous conceptualization of mediation, where mediation could perhaps be more clearly and accurately

²⁹² *Bush & Folger, supra* note 167 at 270.

²⁹³ *Mediator 1, supra* note 247.

²⁹⁴ *Ibid.*

²⁹⁵ *Bush & Folger, supra* note 166 at 22.

²⁹⁶ *Picard, supra* note 267 at 264.

²⁹⁷ *Folberg, Milne, & Salem, supra* note 6 at 14.

understood in pluralistic terms.²⁹⁸ In fact, according to Picard, “conceptualizing mediation as a plurality of practices rather than a single-model approach” can “encourage the development of new mediation approaches that may better respond to social, cultural, economic and other differences that unfold in multicultural societies like Canada.”²⁹⁹

Therefore, without completely disregarding the “big three” mediation categories, I believe that for the purposes of my research, mediator approaches should be more properly understood in terms of a pluralistic sliding scale. Like sliding scale fees, which are calculated and customized to meet an individual’s unique financial circumstances and needs at a given period of time, so too are mediation approaches tailored to meet the unique and evolving circumstances, goals and needs of families undergoing separation and divorce. As with a sliding fee scale, which considers a variable factor such as income to determine what the appropriate fee should be, mediators determine their particular behaviors, actions and strategies in a given mediation session based on factors such as the types and complexity of family law issues to be mediated, the degree of conflict between the parties, and/or the existence of underlying power imbalances in the relationship. In this sense, a mediator’s approach to mediation should not simply be understood as “facilitative,” “evaluative,” or “transformative,” but instead as a combination or blend of facilitative, evaluative and/or transformative behaviours and techniques employed in response to varying circumstances, goals and needs. Accordingly, to ascertain the most effective and appropriate mediation approaches to use in addressing the FDRA cases, it is not necessarily useful to pin down which of the “big three” approaches are

²⁹⁸ *Picard, supra* note 267 at 265.

²⁹⁹ *Ibid.*

being utilized by family mediators in Manitoba today. In fact, it appears that I will be unable to definitively ascertain whether facilitative, evaluative, or transformative mediation will be the most effective process to use in the varying types of FDRA case, as I originally set out to do in this thesis. After all, as Mediator 4 put it,

...family law is really very fact specific. Each family is different. They're differently configured, they function differently, they have different values, they're from different cultures. And it would be virtually impossible to have a *pro-forma* set of rules which will be applied to each and every family with an ideal outcome, because we're just not a homogenous group.³⁰⁰

Just as fees on a sliding scale vary with different individuals' financial circumstances and needs, mediator approaches will fluctuate between strategies and techniques which are classically facilitative, evaluative and/or transformative in nature, depending on a family's circumstances and needs. As such, I have learned through my interviews that what is more important, for the purposes of my research, is being able to recognize the distinct circumstances, needs and goals of the families who will be coming under the jurisdiction of the FDRA, and understanding how Manitoba family mediators structure and adapt their mediation practices to best meet those needs and fulfill those goals.

Mediating Family Law Disputes in Manitoba

Consistent with the idea of the sliding scale, the family mediators described using a variety of techniques and methods in their mediation practices which spanned the "big three" approaches to mediation.³⁰¹ Many of them, knowingly or unknowingly, even described shifting

³⁰⁰ Mediator 4, *supra* note 240.

³⁰¹ While not the focus of my research, it is also interesting to note the possible separation between how the mediators envision and describe their mediation approaches and what they actually do in practice. To gain such insights I would have been required to engage in a more observational form of research, which I imagine would be challenging given the confidential and often sensitive nature of family mediation.

between strategies and techniques which are more classically facilitative, evaluative and/or transformative in nature in a single mediation session. They shifted depending on the parties' goals and factors such as the type and complexity of family law dispute at issue, the existence of power imbalance, and the degree of conflict between the parties.

In describing her practice, Sandy expressed a strong resistance to picking one “best framework” or “best approach” to mediation.³⁰² Rather, she explained that she adapts her process based on “where the participants are at.”³⁰³ Like Kenneth Kressel, who argues that mediators do not necessarily fit within one stylistic box, Sandy noted that she demonstrates techniques and strategies from various mediation approaches depending on the circumstances and facts of a given case.³⁰⁴ She explained that a large part of her job as a mediator is being able to “adapt in the moment” in order to meet a particular clients’ hopes, wants, and needs, and that accordingly, the techniques and approaches that she utilizes in each mediation session will be based on an individual assessment of the client and of those factors. For instance, where a party indicates that they “don’t want to go in circles and talk about the same conflict over and over again,” or where they feel that they are “not getting anywhere...[and] need some help,” she might “shift into a bit more of a directive kind of approach” to help them out of that rut.³⁰⁵ Similarly, where “the level of intensity of the conflict between the participants” is particularly high, as was the case in a recent file that Sandy was involved in, the goals of the parties may necessitate a “maximally directive” model.³⁰⁶ She explained that where the conflict between

³⁰² *Sandy Koop Harder, supra note 256.*

³⁰³ *Ibid.*

³⁰⁴ *Kressel, supra note 67.*

³⁰⁵ *Sandy Koop Harder, supra note 256.*

³⁰⁶ *Ibid.*

the parties is so intense that it essentially halts the parties' ability to communicate with one another, the goal of "transforming the relationship," as in transformative mediation, may not be realistic. Rather, as was the case in her recent high conflict file, the goal often becomes quick resolution, with as minimal contact between the parties as possible. In order to satisfy these types of goals, Sandy explained, she might utilize more active, directive, and empowering interventions that allow her to take a stronger lead in the overall process.³⁰⁷ In other words, given what Sandy described as the "let's get 'er done" mentality associated with evaluative mediation, she might utilize more classically evaluative techniques in such circumstances, to achieve a speedy resolution. For example, in that particular high conflict case, drawing on what she had learned in a training session about high conflict families, she actually laid out three options for the ways that the parties could respond to particular questions, to ensure that they stayed on task and avoided fighting over "what seemed to be the most minute details."³⁰⁸ However, Sandy cautioned that in every mediation, but particularly in those where more directive approaches like these are being used, it is important for mediators not to become so invested that they allow their personal biases and perspectives to cloud the process.³⁰⁹

Sandy also explained that a major part of her job as a mediator is to "find ways to manage power in the room."³¹⁰ Whether power differentials manifest in mediation as a result of gender differences, disparities in earning capacity, employment status, or childcare contribution, Sandy explained that she typically manages these sorts of imbalances through

³⁰⁷ *Ibid.*

³⁰⁸ *Ibid.*

³⁰⁹ *Ibid.*

³¹⁰ *Ibid.*

one-to-one coaching with the parties.³¹¹ Specifically, when she notices that power imbalances are causing parties to get “stuck” in their negotiations, she conducts separate meetings with the parties during mediation sessions or in between sessions, in order to help them gain insight into the power differentials and how they may be impairing their progress. In helping the parties understand these power dynamics, and “the impact of their behaviors outside of the mediation room,” Sandy brings the issue of power out of the shadows, causing it to lose its “punch.”³¹² Additionally, reality checking with the parties in this way, which is a typically evaluative technique, may inspire the parties to move beyond the power plays which have been holding them back from reaching a negotiated settlement.

Where power imbalances exist in mediation as a result of domestic violence, however, Sandy’s approach is slightly different. She explained that in those circumstances, she begins formulating her approach before ever bringing the parties together in the room. Specifically, she explained that she conducts a careful front-end consultation process with the party with the least amount of power, wherein she has “transparent, open, direct, straightforward conversations about both the dynamic, and...the idea of coming together in a joint session...”³¹³ For instance, Sandy tries to get an idea of how the power dynamic presents itself in interactions between the parties so that she can be prepared to intervene if one party is using their power over the other or intimidating them in a way which might unfairly disadvantage them in negotiations. Specifically, she asks the party to describe any subtle cues which she should be

³¹¹ *Ibid.*

³¹² Charles Ewert et al., *Choices in Approaching Conflict: Principles and Practice of Dispute Resolution* 2d ed (Toronto: Emond Montgomery Publications Limited, 2019) at 138.

³¹³ *Sandy Koop Harder, supra note 256.*

conscious of that might seem threatening to them or that might otherwise cause them to become disempowered. By way of example, Sandy described a story about a woman who was negatively triggered in a mediation session as a result of her former spouse reaching for and touching his watch. To an uninformed mediator, this is a seemingly innocuous act which should be of no consequence to the parties' progress, but in reality, it was an "unspoken communication...that was hugely meaningful to the two of them, and felt extremely threatening to the woman."³¹⁴ By shedding light on these types of triggers before joint sessions, and determining what she can do as a mediator to support the party through these situations, Sandy and the vulnerable party are able to craft a so called "escape plan" that will make the party feel comfortable heading into mediation.³¹⁵

Ultimately, underlying each of Sandy's techniques is a focus on what the parties hope to accomplish in mediation and what they need in order to do so. Given that she mediates out of a privately owned firm, which operates on its own terms and without restrictions from other outside forces, she is able to devote the time to help her clients work through some of the underlying issues in their relationships. In this way, her clients can determine what it is that they really hope to gain from mediation. Unsurprisingly, for Fay Lynn, a government-employed lawyer mediator operating in the shadow of the law, her approach is influenced by other, and perhaps more pragmatic or standardized factors.

³¹⁴ *ibid.*

³¹⁵ *ibid.*

Fay Lynn described the government's comprehensive co-mediation program as a "time-limited program" which only allows for a handful of mediation sessions per family.³¹⁶ Accordingly, she explained that "if [the parties] want to get through everything, we need to stay focused."³¹⁷ Rather than focusing on the underlying issues which may have contributed or led to the separation or divorce, however, the focus in this program remains primarily on resolution- as in the evaluative stream of mediation. However, this is not to say that the parties' wants and needs are not considered in this program. On the contrary, Fay Lynn explained that people utilizing this service typically "want a solution," and "want someone to help them with the solution," while "[spending] as little money and time [as possible] to [get] that solution."³¹⁸ In order to help them achieve this, Fay Lynn uses a number of techniques which are reflective of the evaluative approach to mediation. For instance, in dealing primarily with issues relating to property, child support and spousal support, one of Fay Lynn's main objectives as a mediator is to make sure people "have the right information."³¹⁹ Like Jeffrey Stempel, she is of the mindset that "disputants should ordinarily come to a resolution with at least a rudimentary knowledge of their options under the legal regime outside of mediation."³²⁰ She provides parties with this rudimentary knowledge by ensuring that they are aware of their different options under the law, and by explaining the possible implications of those options to them. As she explained it, she gets everyone to roll up their sleeves and work through the possible financial scenarios for each party with respect to the different elements of a family property

³¹⁶ *Fay Lynn Katz, supra* note 261.

³¹⁷ *Ibid.*

³¹⁸ *Ibid.*

³¹⁹ *Ibid.*

³²⁰ *Stempel, supra* note 96 at 248.

accounting (e.g. the sale of the family home, the division of RRSPs or pensions, etc.). She then provides them with a document outlining the different figures which correspond to the different options, allowing the parties to process how they would like to proceed. Given the complex nature of the financial and property-related issues in a separation or divorce, Fay Lynn finds that taking the time to provide this type of information to the clients is necessary. Using these “more directive and intrusive service interventions,” she draws directly on her legal expertise to help the parties parse through and understand these more complicated issues so that they can make informed decisions.³²¹

Similarly, Fay Lynn uses knowledge and information to combat issues arising from power imbalances between the parties. For example, disparities in income or earning capacity between parties can cause one party to fear the loss of income, property and resources in the course of relationship dissolution. Where such disparities cause a party to compromise or concede on certain points in mediation in hopes of preserving greater access to income or resources, Fay Lynn might provide the parties with information which reinforces their financial or other legal entitlements under the law.³²² In such circumstances, she will also remind the parties of their right to seek independent legal advice outside of the mediation session, and she might encourage them to do so.³²³ In providing this information, she is seeking to empower the weaker party, thus reducing the overall power differential between the parties.³²⁴

³²¹ *Salem, Kulak & Deutsch, supra* note 104.

³²² *Fay Lynn Katz, supra* note 261.

³²³ *Ibid.*

³²⁴ *Mayer, supra* note 70 at 49.

Likewise, Mediator 1 disseminates knowledge and information in mediation in order to level the power playing field. For example, she explained that when one parent, who holds more power over the other parent, becomes anchored in a position with respect to custody or access, she asks the parents to consider their “BATNAs”- their best alternatives to a negotiated agreement.³²⁵ More specifically, whether the issue is increased time with the other parent, increased decision-making power, or changes in the parenting schedule, she discusses the potential outcomes for each parent if they were to leave mediation without a resolution, and had to address their custody and access issues in the court system instead. As Jeffrey Stempel puts it, Mediator 1 might “[throw] some metaphorical cold water on the unreasonable demands [of a recalcitrant party] and [give] the party some insight into the default legal rules that govern the topic.”³²⁶ By working through these real life scenarios with the parties, Mediator 1 makes the parties aware of the risks that they may face and the advantages that they may provide to their former spouses if they proceed to a hearing instead of resolving their matter in mediation.³²⁷ In other words, Mediator 1 helps the parties to conduct self-assessments of their cases based on predictions of the outcome of their dispute if settlement is not reached.³²⁸ In so doing, Mediator 1 may prevent disempowered parties from being pressured or bullied into an unfair resolution which is “substandard under the default rules of the applicable law.”³²⁹

³²⁵ *Mediator 1, supra* note 247.

³²⁶ *Stempel, supra* note 96 at 248.

³²⁷ *Mediator 1, supra* note 247.

³²⁸ *Lowry, supra* note 116.

³²⁹ *Stempel, supra* note 96 at 255.

Despite the use of this classically evaluative technique, Mediator 1 also combats power imbalances in mediation with what appear to be more transformative mediation techniques—reinforcing the notion of mediator approach as variable or akin to a sliding scale. Specifically, Mediator 1 recounted a recent file that she worked on involving a mother who, throughout the relationship, had taken on greater childcare responsibilities and who had been, for all intents and purposes, the parental decision-maker. She explained that in that case, the mother entered mediation in a position of greater authority than the father with respect to the children, giving her somewhat of an upper hand when it came to negotiations regarding custody.³³⁰ This manifested in mediation with the mother taking charge of discussions regarding parenting, while the father unquestioningly followed her lead.³³¹ To address this power imbalance, Mediator 1 attempted to bring the father into the conversation by asking for his thoughts and opinions on parenting issues. Providing him an opportunity to be heard not only empowered him and made him “sit up a little straighter,” Mediator 1 explained, but it also demonstrated to the mother that he had legitimate insights with respect to the children, and that she could perhaps trust him to take a greater role in the children’s lives.³³² In this sense, Mediator 1’s techniques helped to empower the father by providing him with a sense of value and strength as a parent, and helped the mother hear the father and recognize his abilities as a parent.³³³ These “aha moments” of empowerment and recognition, of course, are hallmarks of the transformative approach to mediation.³³⁴

³³⁰ *Mediator 1, supra* note 247.

³³¹ *Ibid.*

³³² *Ibid.*

³³³ *Bush & Folger, supra* note 166 at 22.

³³⁴ *Mediator 1, supra* note 247.

Like Sandy, Mediator 2 was hesitant to attach herself to any one mediator approach. Instead, she took a similar view to Margaret Shaw, who argues that mediator classifications are “simply too broad to cover the intuitive aspects of a mediator’s behavior.”³³⁵ Specifically, she believes that mediator approach is “really dependent upon the parties and what their interests are in terms of what they state are their goals for the mediation and for their outcome afterwards.”³³⁶ For instance, she explained that “if you’ve got a couple with no children, then their goals might be quite different...they may be looking at more of a settlement focus.”³³⁷ In comparison, given the “intellectual understanding that they need to have about a co-parenting relationship,” Mediator 2 explained that couples with children might be more interested in taking the time to work on and perhaps transform their relationship in order to support that new co-parenting dynamic.³³⁸ As such, Mediator 2 indicated a tendency to utilize more settlement-driven techniques when addressing family disputes relating to child and spousal support and other monetary or property-related issues, and less of a settlement-focused approach when dealing exclusively with issues such as child custody, access and parenting plans.³³⁹ Reflecting the views expressed by scholars like Noel Semple, Nicholas Bala, Scott Hughes and Carolynn Clark Camp, Mediator 2 explained that when financial and property-related issues are at play, “it’s more about helping people to just problem solve and to really understand the impact of their decision making.”³⁴⁰ In other words, when those sorts of issues are at play, Mediator 2 feels that the directive, problem-solving, and knowledge-based

³³⁵ Shaw, *supra* note 65.

³³⁶ *Mediator 2*, *supra* note 274.

³³⁷ *Ibid.*

³³⁸ *Ibid.*

³³⁹ *Semple & Bala*, *supra* note 88; and *Hughes*, *supra* note 92 at 248.

³⁴⁰ *Mediator 2*, *supra* note 274.

techniques which are commonly associated with the evaluative mediation approach tend to be most warranted and effective.

When it comes to addressing and managing power imbalances between the parties which are negatively impacting the course of negotiations, Mediator 2, like Mediator 1, appears to utilize techniques rooted in transformative mediation theory. She explained that often, when there is a noticeable power differential between the parties, “there’s a real strong tendency to want to pull them apart and provide some one-on-one coaching.”³⁴¹ While she recognizes that this can be quite beneficial and even necessary in certain circumstances, she tries, wherever possible, to keep them in the same room for the conversation.³⁴² She believes that as the mediator, she must try to “hold time and space” for the parties to “help them really understand and think a little bit about why they think the way they think.”³⁴³ For example, in a mediation between a mother who has been the primary caregiver for the children throughout the relationship, and a father who has been the primary breadwinner working outside of the home, the mother might rely on these traditional roles to bolster her entitlement with respect to custody of the children. As opposed to separating the parties in such a case to provide one-on-one coaching in the hopes of perhaps empowering the weaker party, Mediator 2 would attempt to keep the parties in the same room and have them work through this power dynamic together. For instance, she might ask the mother to explain what she means when she declares that “the children should be with [her] because [she is] the mother,” or she might ask the father to outline some of the challenges that he might foresee as a result of the potential

³⁴¹ *Ibid.*

³⁴² *Ibid.*

³⁴³ *Ibid.*

restructuring of their traditional family roles.³⁴⁴ What is important, Mediator 2 explained, is trusting that the parties can manage these types of conversations, and allowing them to work through the tension between them.³⁴⁵ In this sense, she takes after transformative mediators who take “an optimistic view of the parties' competence and motives, “ and who are “comfortable with having the parties take considerable time to sort through the conflict,” and to experience feelings of uncertainty.³⁴⁶

In contrast, where power imbalances exist between the parties as a result of domestic violence, Mediator 2 would not encourage the parties to work through the tension together in this traditional transformative way. Rather, she might be quicker to separate the parties and work with them one-on-one. For instance, in certain cases, like Sandy, she might split the parties up to conduct one-on-one coaching and “individual skill development,” to prepare the parties to eventually work through these power dynamics together.³⁴⁷ In other cases, depending on the particulars of the relationship, she conducts shuttle mediation in which the parties remain completely separate from one another, having only indirect negotiations through her as their mouthpiece.³⁴⁸ In most circumstances, however, Mediator 2 “will try to see if there’s that option of being able to come back to a joint session after...going through a number of series of shuttle.”³⁴⁹ Where this option does not exist, and the process seems to be

³⁴⁴ *Ibid.*

³⁴⁵ *Ibid.*

³⁴⁶ *Bush & Folger, supra* note 167 at 271-272.

³⁴⁷ *Mediator 2, supra* note 274.

³⁴⁸ *Ibid.*

³⁴⁹ *Ibid.*

“shutting the [parties] down” to the point that they do not have “the capacity for self-determination,” Mediator 2 questions whether mediation is really appropriate.³⁵⁰

Interestingly, Mediator 3 was the only mediator to characterize her practice as transformative in nature. Not surprisingly, however, the description of her practice revealed elements of the other classical approaches to mediation as well. Reflecting both Fay Lynn’s and Mediator 2’s practices, Mediator 3 recognizes that financial and property-related issues “seem to be a little bit more naturally... settlement focused,” and that the techniques used when addressing those sorts of issues might reflect that.³⁵¹ Mediator 3 explained that while parties almost always end up discussing the hopes, feelings and fears underlying their stated positions in mediation, regardless of the predominant approach used by the mediator, these underlying emotions are often less obvious or prominent when dealing with the financial aspects of a separation and divorce, in comparison to when dealing with issues relating to the children.³⁵² Perhaps this is because financial and property-related issues tend to be more readily calculated than issues of child custody and access.³⁵³ Alternatively, this may be the case because these types of issues tend to be more complex and confusing, requiring that the parties focus more of their energy on simply understanding their options and the implications of their choices. Whatever the reason, there appears to be a tendency toward more evaluative techniques or at least a more settlement or resolution-focused mindset when dealing with financial and property issues.

³⁵⁰ *Ibid.*

³⁵¹ *Mediator 3, supra* note 275

³⁵² *Ibid.*

³⁵³ *Semple & Bala, supra* note 88.

Moreover, like Sandy, Mediator 3 explained that she might adopt a more classically evaluative approach when mediating cases for high conflict couples. In a facilitative or even transformative fashion, Mediator 3 explained that she often seeks to guide the parties through discussion about certain events which might have negatively impacted them, so that they better understand how they have contributed to the conflict. Once these discussions have been had, she tries to encourage the parties to consider how they could do things differently in the future to avoid these negative results.³⁵⁴ However, she explained that sometimes, with high conflict couples who have “really limited insight...there really is very little benefit in trying to learn from discussing past events.”³⁵⁵ In these cases, she finds she has to “shift a bit more into settlement.”³⁵⁶ Accordingly, to meet the particular needs and goals of a high conflict couple, she will often adjust her approach to reflect a more evaluative, as opposed to transformative, mindset.

Also indicative of an evaluative approach to mediation, Mediator 3 explained that she tries to alleviate issues arising from power imbalances in mediation by ensuring that both parties have access to the same knowledge and information. Specifically, when I asked her what she does as a mediator to help level the playing field between parties, she indicated that her techniques are largely centered on the idea that knowledge is power.³⁵⁷ Where, for instance, one party holds more power in mediation because, throughout the relationship, he or she was the primary breadwinner and was responsible for dealing with the couple’s finances, Mediator

³⁵⁴ *Mediator 3, supra* note 275.

³⁵⁵ *Ibid.*

³⁵⁶ *Ibid.*

³⁵⁷ *Ibid.*

3 would try to ensure that the other party was sufficiently aware of their financial rights and options.³⁵⁸ Where, on the other hand, one party holds more power in mediation because, throughout the relationship, he or she was the primary childcare provider and was responsible for dealing with the couple's children, Mediator 3 would try to ensure that the other party was educated in terms of child development, or "the types of things folks might learn in *For the Sake of the Children*," Family Conciliation Services' parenting program for separating and divorcing parents.³⁵⁹ With respect to power imbalances arising out of domestic violence, Mediator 3, like Mediator 2, indicated that she might, depending on the facts of a particular case, opt for shuttle mediation.³⁶⁰

Like many of the others, Mediator 4 emphasized the importance of understanding the aspirations of the parties before beginning mediation, explaining that she begins her process by meeting with each party individually to determine these goals.³⁶¹ In fact, she indicated that she will not commence the joint mediation session unless she has had the opportunity to conduct these individual pre-mediation sessions with the parties, because she finds that often, "people can't synthesize their goals for resolution with the other party looking at them."³⁶² However, Mediator 4's ultimate approach to meeting those goals differs from mediators like Sandy or Mediator 2 or 3, who devote time in mediation to helping their clients work through the underlying issues that led to the breakdown of the relationship. Rather, more like Fay Lynn, Mediator 4's practice is based largely in education and other classically evaluative techniques,

³⁵⁸ *Ibid.*

³⁵⁹ *Ibid.*

³⁶⁰ *Ibid.*

³⁶¹ *Mediator 4, supra* note 240.

³⁶² *Ibid.*

with a major focus on reaching settlement and resolution. Mediator 4 plays a more active role in mediation by organizing the discussion, suggesting possible outcomes and settlement options, and providing plenty of information.³⁶³ As Mediator 4 put it, “I am happy to see resolution... If they need to go get therapy, they can go get very good help, but not from me!”³⁶⁴

Like many of the mediators, Mediator 4 sees education and knowledge dissemination as powerful tools to combat power imbalances between parties. Not only does she provide information to the parties herself before and throughout mediation to ensure that they are aware of their legal rights and options both in and out of mediation, she may also encourage the parties to meet with other professionals in between mediation sessions to ensure that they are on more equal footing with respect to topics falling outside of her direct expertise.³⁶⁵ Where, for example, as other mediators discussed, there is a power imbalance between the parties given a disparity in the parents’ level of childcare responsibility throughout the relationship, Mediator 4 sometimes refers parties out to parent coaches between mediation sessions who have specialized knowledge in what she refers to as “post-separation antics.”³⁶⁶ The hope is that these parent coaches can educate the parent with less childcare skill and experience, so that s/he may become more familiar with the needs of the children and how to meet them. Mediator 4 explained that while “getting that parent who was maybe not doing the heavy lifting up to full speed is a learning curve,” this type of coaching helps to empower that

³⁶³ *Kidner, supra* note 134.

³⁶⁴ *Mediator 4, supra* note 240.

³⁶⁵ *Ibid.*

³⁶⁶ *Ibid.*

parent in mediation when they are up against another parent who knows how to meet the needs of the children “in their sleep.”³⁶⁷ This is yet another example of a family mediator incorporating education and coaching into her approach, to manage potentially harmful power imbalances.

My research demonstrates that a family mediator’s approach to mediation cannot simply be understood in terms of “facilitative, “evaluative,” or “transformative.” Rather, mediator approaches may reflect elements from the facilitative, evaluative and transformative streams of mediation and may employ a combination of behaviours and techniques from these models depending on the varying circumstances, goals and needs of the families. However, while approaches differ amongst mediators, and may even fluctuate for an individual mediator from session to session or within a session, this is not to say that there can be no structure or forethought with respect to how best to approach a mediation. On the contrary, with proper training, skills, practical experience, and preparation, family mediators come to learn how to effectively tailor their mediation approaches to “give the parties the most appropriate [tools] to resolve their dispute and... best satisfy their interests.”³⁶⁸ For instance, based on my interviews, it appears that family mediators consider the following factors when determining how best to tailor their approach in a given mediation session:

- Type of family law issue (e.g. child custody and access issues, child and spousal support issues, and property-related issues)
 - Often, parenting and child-related issues tend to result in more prospective and relationship-focused objectives for clients, yielding a desire for more facilitative or transformative approaches.
 - Financial and property-related issues often elicit more of a settlement focus from clients, yielding a desire for more evaluative approaches.

³⁶⁷ *Ibid.*

³⁶⁸ *Sander & Rozdeiczer, supra note 37.*

- Complexity of family law issue
 - Often, cases involving complicated financial and property-related issues require a mediator with specialized legal expertise, yielding a need for more evaluative techniques.
- Degree of conflict between the parties
 - Cases involving higher conflict couples often require greater and more directive mediator intervention, revealing a need for more evaluative techniques.
- Existence or absence of power imbalance between the parties (e.g. disparate levels of power, competence, skill, education, wealth, access to resources, or parenting capacity)
 - Often, where there are significant power imbalances between the parties, mediators will feel the need or desire to utilize more evaluative techniques in order to minimize the power disparities between the parties, facilitating fairer, more reasonable agreements.

Accordingly, with proper training, skills, practical experience, and preparation, resolution officers might also come to learn how to match families to appropriate mediation resources capable of effectively resolving their disputes. The question remains: what types of skills, training, and qualifications must these resolution officers obtain in order to be able to do this?

Triaging Family Disputes under The Family Dispute Resolution (Pilot Project) Act of Manitoba

The mediators unanimously agreed that prospective resolution officers ought to have “[actual], practical, hands on experience in a range of ADR processes.”³⁶⁹ Sandy not only urges that resolution officers ought to have clinical experience as mediators, but that they should have at least “ten solid years of...being on the block on every possible [family mediation] situation.”³⁷⁰ While recognizing that it is possible to gain a basic understanding and knowledge of family mediation, she differentiated this knowledge with the “skill and capacity and wisdom to be able to make decisions” that comes with years of practical experience.³⁷¹ In this sense,

³⁶⁹ *Mediator 3, supra* note 275.

³⁷⁰ *Sandy Koop Harder, supra* note 256.

³⁷¹ *Ibid.*

she questions how someone could properly assess the dynamics of a situation and discern the best interests of the parties without having those “skills and experience that come from working in the trenches with people.”³⁷² Similarly, Mediator 1 suggests that resolution officers have a background in mediation and ADR³⁷³ and Mediator 2 suggests that they have a “strong ADR background and experience in the field as a practitioner.”³⁷⁴ Mediator 3 indicates that resolution officers ought to understand the mediation process;³⁷⁵ and Mediator 4 even went so far as to say that “if the dispute resolution officers aren’t adequately trained in family mediation, [she foresaw] doom.”³⁷⁶ When asked who they imagined fulfilling the role of resolution officers under the FDRA, both Mediator 4 and Fay Lynn specifically indicated that they envisioned the Family Conciliation mediators who are already doing the work today.³⁷⁷

In addition to a background in ADR and mediation, some of the mediators recognized other disciplines which could benefit resolution officers in their triaging role. For instance, Mediator 3 suggested that proficiency in mental health might be a useful skill for resolution officers,³⁷⁸ and Sandy and Fay Lynn both recognized that the skills required of a social worker would also translate to this role.³⁷⁹ Additionally, some mediators considered the role that law plays in the triaging process. While Fay Lynn, Mediator 1 and Mediator 3 each suggested that resolution officers should at least be familiar with the family law process, none of them actually indicated that resolution officers ought to have a background in law. In fact, Mediator 1 noted

³⁷² *Ibid.*

³⁷³ *Mediator 1, supra note 247.*

³⁷⁴ *Mediator 2, supra note 274.*

³⁷⁵ *Mediator 3, supra note 275.*

³⁷⁶ *Mediator 4, supra note 240.*

³⁷⁷ *Mediator 4, supra note 240; and Fay Lynn Katz, supra note 261.*

³⁷⁸ *Mediator 1, supra note 247.*

³⁷⁹ *Sandy Koop Harder, supra note 256; and Fay Lynn Katz, supra note 261.*

that if resolution officers *must* have a background in law, then they should also be required to have a background in mediation, or at least be required to consult with a professional in that field in making decisions under the FDRA.³⁸⁰ After all, she stated, “the legal piece is so small when we’re talking about family separation and divorce.”³⁸¹ In a similar vein, while Mediator 3 indicated that a resolution officer should be “somebody who totally understands the court process,” she qualified this by stating that they must also understand the mediation process and obtain the skills required to conduct that process.³⁸²

According to the mediators I interviewed, these mediation-related skills, which resolution officers ought to possess, include expertise in conflict, separation and divorce, child development, family dynamics, family violence, child protection, and power dynamics, among other topics.³⁸³ They also include the ability to build trust and rapport with clients, conduct interviews, assess cases, screen cases for domestic violence and other emotional or physical safety issues, the ability to gauge the level of conflict between the parties, and their willingness and ability to mediate.³⁸⁴ With respect to expertise in domestic violence, Mediator 3 suggested that the FDRA should require a minimum level of training for resolution officers in assessment and screening procedures.³⁸⁵ Additionally, the mediators urged that resolution officers ought to be familiar with the broad range of ADR options available to parties in Manitoba so that they can educate parties on their choices of dispute resolution mechanisms.³⁸⁶ Having said that, a

³⁸⁰ *Mediator 1, supra* note 247.

³⁸¹ *Ibid.*

³⁸² *Mediator 3, supra* note 275.

³⁸³ *Mediator 1, supra* note 247; *Mediator 2, supra* note 274; *Mediator 3, supra* note 275; and *Sandy Koop Harder, supra* note 256.

³⁸⁴ *Ibid.*

³⁸⁵ *Mediator 3, supra* note 275.

³⁸⁶ *Mediator 1, supra* note 247; *Mediator 3, supra* note 275; and *Sandy Koop Harder, supra* note 256.

number of the mediators suggested that mediation should be the starting point in the facilitated resolution phase of the FDRA process, and that resolution officers ought to first triage parties into mediation before other forms of dispute resolution.

For instance, Mediator 2 indicated that her preference would be to “[start] at a mediated level,” and move on to other processes from there.³⁸⁷ Likewise, Mediator 4 suggested that parties start in mediation and move to arbitration if they are unsuccessful.³⁸⁸ According to Mediator 4, mediation is a logical starting point because even if a mediation does not ultimately resolve all of the issue on the table, it can at least “carve away” some of the issues, narrowing down the list of matters that the parties must ultimately resolve.³⁸⁹ Similarly, Sandy suggested that except where a case needs to be screened out of the mediation process due to issues like domestic violence or other safety concerns, mediation should be the default dispute resolution process to which resolution officers refer FDRA cases.³⁹⁰ In fact, she believes that “by and large, most situations would be resolvable by mediation,” and that accordingly, parties should only turn to other dispute resolution mechanisms after giving mediation “the full college try.”³⁹¹ She explained that the direct, face to face, party-driven communication and problem-solving conversations promoted by mediation make it the best dispute resolution option from an outcome perspective, sustainability perspective and cost perspective.³⁹²

³⁸⁷ *Mediator 2, supra* note 274.

³⁸⁸ *Mediator 4, supra* note 240.

³⁸⁹ *Ibid.*

³⁹⁰ *Sandy Koop Harder, supra* note 256.

³⁹¹ *Ibid.*

³⁹² *Ibid.*

In the following, concluding chapter I will apply the principles of the mediation literature, the trends and parallels in the commentary gathered from my interviewees, and the suggestions proposed by Manitoba’s family mediators to formulate advisory guidelines for FDRA resolution officers. These guidelines will supplement the otherwise vague and discretionary legislative framework set out in section 10 of the FDRA with additional factors to be considered by resolution officers during triage. They will also suggest the types of skills, training, and qualifications that resolution officers ought to obtain to be properly prepared to do their jobs. In doing so, these guidelines are meant to advise resolution officers with respect to how to effectively tailor their mediation approaches to “give the parties the most appropriate [tools] to resolve their dispute and... best satisfy their interests.”³⁹³

³⁹³ *Sander & Rozdeiczer, supra* note 37.

CHAPTER V CONCLUSIONS AND RECOMENDATIONS

Evidently, family mediator approach is not based on some “ironclad formula.”³⁹⁴ Rather, it tends to vary to reflect “the personal style of the mediator as well as the desires of the disputants and the context and nature of the dispute.”³⁹⁵ As such, given the diverse mediation frameworks, educational backgrounds, employment histories, and professional training which inform Manitoba family mediators; the unique characteristics, values, beliefs, and goals of families; and the nuances of family disputes, no two mediation approaches will look exactly alike. However, despite these distinctions, there are some commonalities amongst separating and divorcing families. Families must address similar types of legal issues, they must address these issues in a state of conflict, and their negotiating positions are often impacted in some way relating to the dissolution of the relationship. Similarly, despite the diversity in their backgrounds and practices, there are common threads which unite family mediators. These include a shared knowledge of basic mediation skills, a shared understanding of family dynamics, separation and divorce, and a collective belief that “the adversarial system is ill suited for ...couples who are seeking to reframe their familial relationships in a fair and prompt manner.”³⁹⁶ As evidenced by the preceding chapter, these commonalities amongst families and family mediators provide some shared ground in both the ways that mediators approach mediation, and the ways in which they train and prepare to do so. These shared connections inform my proposals to enhance the FDRA’s current triaging guidelines for resolution officers.

³⁹⁴ *Stempel, supra* note 96 at 248.

³⁹⁵ *Ibid.*

³⁹⁶ *Modernizing Our Family Law System, supra* note 30 at 1.

They also inform my recommendations for training and qualification requirements, and my general suggestions as to how to promote the successful implementation of the FDRA.

Triaging Considerations for FDRA Resolution Officers

In its current form, the FDRA provides insufficient guidance to resolution officers to enable them to conduct effective triaging. This is problematic as triaging is the first major step in the FDRA process and one which will set the course for the parties' entire dispute resolution experience under the new scheme. The FDRA names just three factors for resolution officers to consider in determining the form of dispute resolution to be used in the facilitated resolution phase of the pilot project. These are: the "nature and complexity of the issues," the "nature of the relationship between the parties," and "other factors the resolution officer considers appropriate."³⁹⁷ As these factors are quite broad and are in no way explained or elaborated upon in the FDRA, they do very little to guide resolution officers in making informed triaging decisions in the first phase of the pilot project. Without exploring the meaning of these considerations and the potential implications they can have on families and family disputes; they are merely empty words. As evidenced by my research, these and other factors, like conflict intensity and power disparity, can manifest in unique ways in actual practice and can have a broad range of implications on the resolution of family disputes. The nature and complexity of the issues and the nature of the relationship between the parties, together with families' specific goals for mediation, their degree of negotiating power, their "capacity for self-determination" and their ability to mediate, significantly impact the techniques, behaviours and approaches that

³⁹⁷ *Bill 9, The Family Law Modernization Act, supra* note 22 at cl 10(2).

mediators employ.³⁹⁸ Accordingly, in order to thoughtfully determine the appropriate mediation resource to which to refer a given case, resolution officers must truly understand the meaning and repercussions of the factors outlined in section 10(2) of the FDRA. They must be aware of these and other factors which can impact the resolution process, they must understand the potential implications they may have on different families, and they must be conscious of the various approaches taken by Manitoba family mediators to address these implications. These insights, which are wholly lacking in the FDRA, are illustrated in my analysis of the mediation literature in chapter two and the commentary of my interviewees as described in chapter four.

With respect to the “the nature and complexity of the issues,” it appears that the legislators are hinting at the various types of family law issues which present themselves in separation and divorce, including child custody and access issues, child and spousal support issues, and property-related issues. However, again, the FDRA merely enumerates these factors in section 10(2) without explaining how different types of issues might influence resolution officers’ choices of dispute resolution mechanisms. Based on my research, the different types of family law issues in each case can influence the goals of the parties in mediation. Both the literature and my interviews indicate that parenting and child-related issues tend to result in more “prospective and relationship-focused” objectives, given “the likelihood that the parties will have an on-going interaction” as parents.³⁹⁹ Financial and property-related issues, on the other hand, tend to elicit “more of a settlement focus.”⁴⁰⁰ Given the mediators’ tendencies to tailor their approaches to meet the needs of their clients, the “nature” of the issues thus tends

³⁹⁸ *Mediator 2, supra* note 274.

³⁹⁹ *Semple & Bala, supra* note 88 at 29-30.

⁴⁰⁰ *Mediator 2, supra* note 274.

to dictate the particular mediation approaches taken by mediators. Where the goals are more forward-looking and relationally focused, mediators tend to slide closer to the facilitative or transformative points on the approach scale. Here they hope to enable the parties to more effectively communicate with one another, to craft their own ideal solutions, and to work toward relationship transformation. Where the goals are more settlement-focused, Manitoba mediators tend to take more of an evaluative approach, marked by greater mediator control, knowledge dissemination, reality testing, and case assessments.

My research also indicates that the different types of family law issues in each case can impact the overall complexity of the matter and difficulty of its resolution. Where, for example, a couple has no children, no joint family property, and there are no claims for spousal support, the matter is likely less complex and simpler to resolve than one involving multiple financial and property-related issues. Intricate financial and property issues are often multifaceted, confusing, and difficult to navigate without a background in finance or law. As Fay Lynn stated, “when it comes to the financial [issues], people often don’t understand that stuff.”⁴⁰¹ In fact, given the complex legal implications of these sorts of issues, Sandy’s firm, Facilitated Solutions, generally declined to mediate these types of issues for many years, despite being comprised of a team of extremely qualified and experienced mediators. It was not until just recently, when Facilitated Solutions formed a partnership with Evans Family Law, that it began addressing financial and property issues in what it calls “comprehensive family mediation.”⁴⁰² Through this service, Facilitated Solutions mediators address “parenting plan and the communication plan with the

⁴⁰¹ *Fay Lynn Katz, supra* note 261.

⁴⁰² *Comprehensive Family Mediation, supra* note 254.

family first, and then bring in a family law lawyer to co-mediate and... walk through all the financial issues and the legal implications.”⁴⁰³ This way, parties can benefit both from the mediation expertise of the Facilitated Solutions team, and the legal expertise of the lawyers. Accordingly, where more complicated financial issues are at play, it appears parties typically require a mediator with specialized legal expertise, who might be more willing to intervene than a facilitative or transformative mediator. In other words, financial and property disputes tend to require an evaluative mediator who can educate the parties on the complex issues at hand, help them make informed decisions with respect to those issues, and ultimately resolve their matter.⁴⁰⁴

The “nature of the relationship between the parties” is even broader than the “nature” and “complexity” of the issues. This factor might encompass considerations such as the degree of animosity and conflict between the parties, the power dynamics which existed throughout their relationship and in relationship dissolution, and considerations like historical or active domestic violence. As with the nature and complexity of the issues, the nature of the relationship between the parties can dictate the needs of the parties, their capacity to mediate, and the course of the mediation process.

For instance, with respect to conflict intensity, both the literature and my interviews reveal that higher conflict couples often require greater and more directive mediator intervention.⁴⁰⁵ Given that conflict generally clouds our judgment and impairs our ability to communicate effectively, it follows that where the level of conflict between the parties is

⁴⁰³ *Sandy Koop Harder, supra note 256.*

⁴⁰⁴ *Lowry, supra note 116.*

⁴⁰⁵ *Parkinson, supra note 138; Sandy Koop Harder, supra note 256; and Mediator 3, supra note 275.*

particularly high, it might not be feasible for parties to resolve their dispute with the assistance of a mere process guide or facilitator. Rather, where the conflict is so high that party-led negotiations are untenable, parties will require a more directive, evaluative form of mediation wherein the mediator controls not only the process, but also the discussions and proposals for resolution. Similarly, where the parties enter mediation with disparate levels of power, competence, skill, education, wealth, access to resources, or parenting capacity, mediators often use more evaluative techniques and behaviours to level the playing field. By utilizing a more evaluative style of mediation in which they provide assessments of each party's case and outcome predictions if settlement is not reached in mediation, mediators may highlight strengths in the weaker party's case and weaknesses in the stronger party's case that were unknown to the parties. By educating the parties in this way, mediators can bridge the power gap between them, facilitating fairer, more reasonable agreements. With respect to cases of power imbalance arising from domestic violence, my research does not reveal the same propensity for classical evaluative techniques. In fact, in accordance with the literature on this subject, which demonstrates a lack of universality when it comes to the treatment of domestic violence cases under dispute resolution schemes, my interviewees did not reveal any major trends with respect to these types of cases. While some of the mediators discussed using techniques like one-on-one coaching, individual skill development or shuttle mediation to address domestic violence, ultimately, the interviews did not yield any obvious patterns which might guide resolution officers in how best to manage cases with elements of domestic violence.

While I have learned through my research that one cannot definitively categorize mediators simply as members of the facilitative, evaluative, or transformative schools of mediation, certain mediation resources, given their unique professional configurations, mission statements, and/or policies, might be more representative of one mediation approach over another. Manitoba's Family Conciliation comprehensive co-mediation program, for example, is more settlement-oriented than a resource like Facilitated Solutions. This is because of Family Conciliation's time-limited nature, its direct ties to the courts and government, and its function as somewhat of a "docket-clearer," meant to unclog our overwhelmed family court system. To fulfill this role and to bring about quick resolutions, by and large, mediators utilize evaluative mediation techniques designed to produce settlement. A private mediation firm like Facilitated Solutions, on the other hand, which operates independently, and unrestricted by outside forces like the courts, is less pressured to bring about quick resolutions. Accordingly, their focus is not necessarily settlement, but instead "facilitating challenging or conflicted conversations."⁴⁰⁶ In this way, Facilitated Solutions can be viewed as a more facilitative resource. Having said that, through its partnership with Evans Family Law, it certainly delivers evaluative services as well.

With this in mind, if resolution officers encounter cases involving particularly complex financial or property-related issues, particularly high conflict couples, or signs of a significant power imbalance between the parties, they would be wise to consider mediation resources known to specialize in evaluative techniques. It follows that non-evaluative mediation resources in Manitoba might wish to consider offering some evaluative services in addition to their ordinary services, as Facilitated Solutions did. If it appears that these specific challenges are not in issue,

⁴⁰⁶ "About Us" (last visited 10 May 2020), online: *Facilitated Solutions* <www.familyconflict.ca/about-fs/>

resolution officers may have more latitude in their choice of mediation resource, perhaps referring families to a facilitative, transformative, or more experimental mediation resource.

Accordingly, rather than providing just the three broad factors which currently appear in section 10(2) of the Act for resolution officers to consider when triaging cases under the first stage of the pilot project, the FDRA ought to inform resolution officers of all of the factors which can impact the resolution process, the potential implications they may have on different families, and the various approaches taken by Manitoba family mediators to address these implications. For instance, rather than merely advising resolution officers to consider the nature and complexity of the issues, the nature of the relationship between the parties and other factors the resolution officer considers appropriate, section 10(2) of the FDRA might be improved by adding the following:

Process

10(2)

For the purpose of the facilitated resolution phase, the resolution officer may determine the form of the dispute resolution process to be used in attempting to resolve the family dispute, having regard to:

- (a) the nature of the issues
 - (i) child custody and access issues
 - (ii) child support and spousal support issues
 - (iii) property-related issues
- (b) the complexity of the issues
 - (i) i.e. presence or absence of children and related claims
 - (ii) i.e. presence or absence of property and related claims
 - (iii) i.e. presence or absence of complex financial circumstances and related claims
- (c) the goals and objectives of the parties
 - (i) i.e. relationship-focused goals
 - (ii) i.e. settlement-focused goals

- (d) the nature of the relationship between the parties
 - (i) i.e. degree of conflict between the parties
 - (ii) i.e. degree of power imbalance between the parties (e.g. imbalance in level of education, wealth, access to resources, parenting capacity, etc.)
- (e) other factors the resolution officer considers appropriate
 - (i) i.e. history or presence of domestic violence

Armed with knowledge and insight into the abovementioned factors, and with proper training, resolution officers will hopefully be able to make informed triaging decisions in the first phase of the pilot project, setting families up for success under the new scheme.

Training and Qualifications for FDRA Resolution Officers

It is not enough that resolution officers become familiar with the points outlined in this thesis. Resolution officers must grasp the distinct circumstances, needs and goals of the families who will be coming under the jurisdiction of the FDRA, and ensure that those families are matched to the appropriate mediation resources. They must possess certain knowledge and skills and have practical experience in the field of ADR, in accordance with specific qualifications delineated in the FDRA or its regulations. Currently, the FDRA provides no such prerequisites for resolution officers. It only comments on the necessary qualifications of adjudicators, who, in the second phase of the pilot project, will be tasked with holding hearings and making recommended orders to resolve any disputes which remain unresolved after the facilitated resolution phase. According to section 34(2) the FDRA, “Each adjudicator must be a practising lawyer under *The Legal Profession Act*, be appointed following a merit-based process, and meet any other requirements specified in the regulations.”⁴⁰⁷ However, as the legislation stands

⁴⁰⁷ *Bill 9, The Family Law Modernization Act, supra* note 22 at cl 34(2).

today, a resolution officer could be a lawyer, a bureaucrat, a therapist, a social worker, a mediator, or even a student. To ensure the success of the pilot project, we must have a clear picture of who these resolution officers will be, and what they must bring to the table.

I believe that practical experience as a family lawyer could benefit resolution officers in their triaging role because that experience would enable resolution officers to understand the specific legal nuances of cases. However, I do not think that a law degree or designation as a practising lawyer under *The Legal Profession Act* ought to be required for resolution officers. Yes, resolution officers ought to be able to identify and understand “the nature of the legal issues” in determining how a matter can best be resolved. Having said that, I believe that practical experience in family mediation, rigorous mediation training, and familiarity with the concepts outlined in this research can equip resolution officers with the skills required to identify and appropriately treat those issues; a law degree is not essential. Resolution officers are primarily tasked with directing parties to the appropriate dispute resolution mechanism to resolve their dispute, not with conducting that resolution process. As such, they will not be required to delve into the legal issues in the same way that the dispute resolution specialist tasked with resolving the dispute will have to. Thus, they do not require the same level of specialized legal knowledge. Further, if the entire purpose of the pilot project is to move families from the “adversarial,” “complex,” and “inaccessible” court-based legal system into a system based in non-legal, “out-of-court options,” it is logical that the skills and qualifications of one of the project’s initiating actors reflect those of an “alternative” dispute resolution professional like a mediator as opposed to a “traditional” one like a lawyer.⁴⁰⁸

⁴⁰⁸ *About Family Law Modernization, supra* note 239.

In accordance with the views of the mediators that I interviewed, I believe that to effectively fulfill their triaging role, resolution officers ought to take specialized training. Training must develop their expertise in the dynamics of conflict, families, separation and divorce, child development, family violence, child protection, and power.⁴⁰⁹ I also agree that resolution officers must be able to build trust and rapport with clients, conduct thorough interviews, recognize obvious and subtle clues of domestic violence and other emotional or physical safety issues, gauge the level of conflict between the parties, and the parties' willingness and ability to mediate.⁴¹⁰ To gain this expertise and to hone these skills, I agree with the mediators that resolution officers ought to be individuals with "[actual], practical, hands on experience in a range of ADR processes."⁴¹¹ More specifically, given that the majority of family mediators have training and experience not only in mediating but in screening or triaging cases in the pre-mediation phase of their practices, I believe that practical experience in family mediation must be a prerequisite for resolution officers. The "skill and capacity and wisdom" gained from triaging and mediation experience will place resolution officers in a better position to deal with the diverse and challenging family disputes that will inevitably make their way to their desks.⁴¹²

However, given mediation's lack of professional regulation in Manitoba, it is not enough for the FDRA to require resolution officers to have practical family mediation experience. The FDRA must also require a specified degree of family mediation training. Mediators in Manitoba

⁴⁰⁹ *Mediator 1, supra note 247; Mediator 2, supra note 274; and Sandy Koop Harder, supra note 256.*

⁴¹⁰ *Mediator 1, supra note 247; Mediator 2, supra note 274; Mediator 3, supra note 275; and Sandy Koop Harder, supra note 256.*

⁴¹¹ *Mediator 3, supra note 275.*

⁴¹² *Sandy Koop Harder, supra note 256.*

may belong to the ADR Institute of Canada (“ADRIC”), and its affiliate, the ADR Institute of Manitoba (“ADRIM”), but these organizations do not actually regulate mediators, and mediators are not required to belong to them. Rather, ADIC and ADRIM are intended to “[provide] an infrastructure that allows ADR practitioner-members to be self-regulating professionals and [give] the public confidence in their professionalism.”⁴¹³ Similarly, family mediators in Manitoba may choose to join Family Mediation Canada (“FMC”), Canada’s “national association for conflict resolution specifically focused on family mediation.”⁴¹⁴ Again, this organization is not a governing body for family mediators but a resource to help promote the self-regulated field of family mediation and inspire confidence in the public with respect to its members. As such, given mediation’s lack of professional qualifications and its self-regulated nature, anyone could hypothetically call themselves a mediator, open a mediation firm, and offer family mediation services. In this sense, someone with “practical experience in family mediation” could be someone who has never taken any formal training and who has been offering services for only a brief period. Accordingly, the FDRA must not only require that resolution officers have practical experience in mediation. It must specify a required degree of family mediation training as well.

With respect to mediation training, members of ADRIM, ADIC and FMC may apply for nationally recognized designations which allow them to “convey their level of experience and skill to prospective users of their services based on an objective third party assessment.”⁴¹⁵

⁴¹³ “Code of Conduct” (last visited 10 May 2020), online: *ADR Institute of Manitoba* <www.adrmanitoba.ca/rules-codes/code-of-conduct/>

⁴¹⁴ “Family Mediator National Certification Program” (last visited 10 May 2020) at 1, online (PDF): *Family Mediation Canada* <www.fmc.ca/wp-content/uploads/2019/04/FMC-Certification-Brochure-2019.pdf>

⁴¹⁵ “Professional Designations” (last visited 10 May 2020), online: *ADR Institute of Manitoba* <www.adrmanitoba.ca/member-resources/professional-designations/> [Professional Designations].

Specifically, ADRIM and ADRIC members may apply to be designated as either Qualified Mediators (“Q. Med.”) or Chartered Mediators (“C. Med.”), and FMC members may apply to become either Family Relations Mediators (“FMC Cert. FRM”) or Comprehensive Family Mediators (“FMC Cert. CFM.”).

According to ADRIM,

Users of ADR services or lawyers and other professionals referring clients feel confident knowing that when they choose an ADR professional with a designation granted by ADR Institute of Canada (ADRIC) they are choosing an individual whose performance has been reviewed and assessed by a committee of senior and respected practitioners who have verified that the professional is working at a particular level.⁴¹⁶

Specifically, Qualified Mediator designations indicate that a mediator has “been judged to be practising at an intermediate level,” whereas Chartered Mediator designations, which both Sandy and Mediator 3 have, indicate that a mediator is “highly experienced.”⁴¹⁷ To become a Qualified Mediator, mediators must have completed a minimum of 10 days of basic mediation training covering topics such as interest-based mediation, process and skills, conflict resolution, negotiation, and communication skills.⁴¹⁸ They must also complete an additional 5 days of specialized training in areas such as multiparty negotiation strategies, case development, influence of culture on conflict resolution approaches, and advanced mediation skills.⁴¹⁹ Further, they must have conducted at least 2 supervised and assessed practice or actual mediations, and they must “complete and provide documentation of a 3rd actual

⁴¹⁶ *Ibid.*

⁴¹⁷ *Ibid.*

⁴¹⁸ “Principles, Criteria, Protocol and Competencies Required for the Designation of Qualified Mediator” (last visited 10 May 2020) at 2-3, online (PDF): *ADR Institute of Canada* <www.adric.ca/wp-content/uploads/2019/05/ADRIC_QMed_Requirements.pdf> [Principles, Criteria, Protocol].

⁴¹⁹ *Ibid.*

mediation...within 3 years of the designation being awarded.”⁴²⁰ To become a Chartered Mediator, mediators must have completed “at least 80 hours of mediation theory and skills training in mediation training programs approved by ADRIIC,” and “100 hours of study or training in dispute resolution generally, the psychology of dispute resolution, negotiation, public consultation, mutual gains bargaining, communication, management consulting, conflict management, or specific substantive areas such as law, psychology, social work, counselling, etc.”⁴²¹ Additionally, they “must have conducted at least 15 [paid] mediations as the sole mediator or the mediation chairperson,” and they must demonstrate competency in over 20 key mediation skills.⁴²² Among others, these skills include the ability to “establish and describe to the disputants key mediation processes and ground rules, such as confidentiality, role of the mediator, caucusing, authority to settle, and respectful behaviour”; the ability to “work with the parties effectively to get the facts, issues and perceptions clearly out on the table”; and the ability to “listen actively,” “deal with strong emotion,” “earn trust and develop rapport.”⁴²³

FMC’s certification process is equally as rigorous. In addition to its mandatory minimum requirement of “80 hours of basic conflict resolution & mediation training” and “100 [-150] hours of further education & training in specific areas of family issues,” applicants must have also either completed a 30 hour supervised mediation practicum, or, if they have been a practicing family mediator for at least 2 years, be able to provide “two positive peer evaluations from references who have mediation experience and knowledge of the candidate's mediation

⁴²⁰ *Ibid* at 3.

⁴²¹ *Ibid*.

⁴²² *Ibid*.

⁴²³ *Ibid* at 6-7.

practices.”⁴²⁴ Additionally, they must produce a video-taped role-play assessment and skills assessment, and they must write a final examination.⁴²⁵ The required topics for Certified Family Relations Mediators and Certified Comprehensive Family Mediators include family dynamics of separation and divorce, power imbalances and the dynamics and effects of family abuse on family members, and financial issues relating to separation, divorce and family reorganization.⁴²⁶

Manitoba family mediators can earn professional credibility through government appointments. For instance, pursuant to section 41 of *The Court of Queen’s Bench Act*, Fay Lynn and two of the other mediators I interviewed have been appointed as “designated mediators” of the Court of Queen’s Bench by Manitoba’s Minister of Justice. According to Fay Lynn, the appointment process for designated Queen’s Bench mediators is reflective of the qualification processes for Qualified and Chartered Mediators through ADRIC and Certified Family Relations Mediators and Certified Comprehensive Family Mediators through FMC. Like those designation processes, designated Queen’s Bench mediators must first apply and undergo a third-party assessment and meet certain requirements which indicate that they are sufficiently experienced and qualified to provide widespread mediation services to Manitoba citizens.

I believe the FDRA must rely on the nationally recognized mediation designations and certification processes of ADRIC, FMC and government appointments to determine the required

⁴²⁴ “Family Mediation National Certification Program” (last visited 10 May 2020) at 1, online (PDF): *Family Mediation Canada* <www.fmc.ca/wp-content/uploads/2019/04/FMC-Certification-Brochure-2019.pdf>

⁴²⁵ *Ibid.*

⁴²⁶ *Ibid* at 3-4.

degree of family mediation training and experience for FDRA resolution officers. In order to be a resolution officer under the FDRA, I argue one must satisfy any of the following three options:

1. Be designated as a Chartered Mediator by ADRIC, and prove that they have conducted at least 15 paid *family* mediations as the sole mediator or the mediation chairperson;
2. Be designated as a Certified Family Relations Mediator or Certified Comprehensive Family Mediator by FMC; or
3. Be designated as a Designated Mediator of the Court of Queen’s Bench by the Minister of Justice of Manitoba.

While a Chartered Mediator designation through ADRIC, on its own, demonstrates a “superior level of generalist competence” in mediation, I have included an additional requirement that resolution officers prove that they have conducted at least 15 paid *family* mediations. This is to demonstrate that they not only have a superior level of generalist mediation competence, but also a superior level of specific competence in family mediation which appears to be inherent in both of the FMC designations and in the designation given by the Court of Queen’s Bench. I did not choose to include a designation as a Qualified Mediator through ADRIC as a qualification option for resolution officers. This is because I do not believe that the practical experience component of the Q. Med. designation process equips mediators with the degree of practical experience required of resolution officers. After all, this designation is an “intermediate step for mediators working to receive their Chartered Mediator designation.”⁴²⁷

⁴²⁷ *Principles, Criteria, Protocol, supra* note 418 at 2.

In addition to satisfying these training requirements, I agree with the mediators I interviewed that resolution officers ought to be familiar with the broad range of ADR options available to parties in Manitoba, and particularly familiar with the mediation options. These include various facilitative, evaluative, transformative, or hybrid resources offered through court-connected mediation programs, private mediation practices, services provided by collaborative family lawyers, and others who assist families as they navigate family breakdown and restructuring. I believe that they should have an understanding of all “big three” mediation approaches, regardless of their own self-identified mediator approach. Familiarity with these different resources and with the nuances of the “big three” mediation approaches will not only enable resolution officers to educate families on their choices of dispute resolution mechanisms, but will also help them narrow down the most suitable resources to meet the needs of those families.

In summary, to demonstrate that one possesses the requisite knowledge, skill, and practical mediation experience to effectively fulfill the role of a resolution officer under the FDRA, he or she must:

1. Be designated as a Chartered Mediator by ADRIC, and prove that s/he has conducted at least 15 paid *family* mediations as the sole mediator or the mediation chairperson;
2. Be designated as a Certified Family Relations Mediator or Certified Comprehensive Family Mediator by FMC; or
3. Be designated as a Designated Mediator of the Court of Queen’s Bench by the Minister of Justice of Manitoba; and
4. Be well-informed regarding:

- a. the broad range of ADR options available to parties in Manitoba
- b. the mediation options available to parties in Manitoba; and
- c. the “big three” mediation approaches.

Going Forward

Resolution officers are key players in the proposed FDRA pilot project. Tasked with setting the stage for Manitoba’s reimagined family law system, they will be responsible for “[determining] the form of the dispute resolution process to be used in attempting to resolve...family disputes.”⁴²⁸ As I have demonstrated in this thesis, this triaging is crucial, as it is the first major step in the process and will set the course for the parties’ entire dispute resolution experience under the new scheme. As such, the pilot project will require at least 5 competent, properly qualified individuals who can fill the role of resolution officers full-time, ensuring that the process gets off to a productive start. However, equally crucial are those ADR professionals who will undertake to help resolve the disputes coming under the new scheme. These professionals will include family mediators, who are the most likely group to provide services under the FDRA scheme. Despite the fact that family mediators will likely be one of the professional groups most significantly impacted by the FDRA, and the fact that they have a wealth of ADR experience and expertise to offer, my interviews revealed that family mediators did not have a powerful voice in the creation of the FDRA. In fact, none of the mediators I interviewed were even invited to offer their opinions or feedback to the Family Law Reform Committee (“FLRC”) on the proposed pilot project, which, at the time of the FLRC’s initial report, was imagined as a mediation-based system.

⁴²⁸ *Bill 9, The Family Law Modernization Act, supra* note 22 at 10(2).

As many of the family mediators put it, “if you’re building a mediation program that’s an alternative to court, it makes sense to consult with mediators about what that process looks like, what might be some bumps or some road blocks, or things to consider or things to be mindful of.”⁴²⁹ Even though mediation is not the only resource which can be utilized under the new scheme, family mediators are ADR professionals who are deeply experienced in a field which exemplifies the exact values and attributes the government now seeks to embody in the new family law system. As such, they should have been consulted. A system which supports Manitobans in making decisions and resolving their family law matters collaboratively while meeting their unique needs, requires the input of research and mediators.⁴³⁰ I have attempted to provide the research background to support and sustain the FDRA. My interviewees have provided the experiential knowledge and insights into how the program will need to work on the ground. They are some of the best sources of ADR knowledge in Manitoba from which the government could draw. However, up to this point, their knowledge and experience has been largely untapped. To continue in this manner would be a huge missed opportunity and a mistake. I believe that to facilitate the most successful implementation of the FDRA, the government must not only take the insights from my research into consideration but must also commit to consultations with our province’s family mediators and other ADR professionals. These consultations would yield greater clarity on important issues such as the treatment of domestic violence under the Act and the necessary training and qualifications for FDRA resolution officers. Consultations with Manitoba’s family mediators could reveal problems

⁴²⁹ *Mediator 3, supra* note 275.

⁴³⁰ *About Family Law Modernization, supra* note 239.

which have not yet been considered by the government, shed light on undiscovered opportunities for improvement in the legislation, and they could ensure that the FDRA fulfills its goal of creating a “fair, economical, expeditious and informal” family law system in Manitoba.

Manitoba’s current family justice system is complex, formal, slow, and expensive, and often uncondusive to the good of the people who are most affected by it. *The Family Dispute Resolution (Pilot Project) Act* (“FDRA”) is a mechanism designed to combat these shortfalls. The FDRA intends to create a family justice process outside of Manitoba’s rigid court system, which relies instead on alternative forms of dispute resolution such as family mediation. It is believed that these alternative mechanisms can better meet the needs of Manitoba families undergoing separation and divorce, and that they can do so in a simpler, faster, less formal, and less expensive way. In order to achieve this new, more just, and more efficient family law process, however, additional steps must be taken by the Province to ensure that the FDRA and any accompanying regulations will efficiently prepare its participants for the groundbreaking dispute resolution which the legislation hopes to achieve. Specifically, the Province must take further steps to crystallize the role of resolution officers in the FDRA pilot project, who are tasked with setting the course for the parties’ entire dispute resolution experience under the new scheme. In particular, the Province must focus its energy on two major areas in the FDRA which are currently lacking: (1) triaging guidelines for resolution officers; and (2) qualifications and training requirements for resolution officers.

With respect to the former, Manitoba must supplement and improve upon what little triaging guidance is currently offered to resolution officers by the FDRA, so that resolution officers may be better prepared to meet the unique needs of affected families in a reasoned and

meaningful way. One way the Province can do this is by informing resolution officers, via the legislation, of the various factors considered by family mediators when determining how best to tailor their approach in a given mediation session. As my research demonstrates, these factors include the type and complexity of family law issue, the degree of conflict between the parties, and the existence or absence of power imbalance or domestic violence between the parties. Resolution officers will be better able and more likely to set participants up for success in the FDRA process when they are aware of these factors.

Resolution officers must also be aware of the approaches taken by Manitoba family mediators. The FDRA must clearly delineate the type of training and qualifications which will best prepare resolution officers to effectively do their jobs. Based on my research and the opinions and commentary of my interviewees, it is apparent that these qualifications must be particular and that they must hold prospective resolution officers to a high standard. After all, the entire FDRA process begins in the hands of these resolution officers, who can make or break the parties' chances of achieving successful resolution based on their early actions and decision making. Specifically, my research leads me to believe that resolution officers must either be designated Chartered Mediators by the ADR Institute of Canada, Certified Family Relations Mediators or Certified Comprehensive Family Mediators by Family Mediation Canada, or Designated Mediators of the Court of Queen's Bench. Resolution officers must also be required to be well-informed of the broad range of alternative dispute resolution options available to parties in Manitoba, the mediation options available to parties in Manitoba, and of the major mediation approaches which tend to permeate Manitoba's mediation landscape. Incorporating these changes and supplementing the current FDRA framework to include the theoretical and

qualitative mediation research outlined in this thesis, will give resolution officers the tools to ensure that the FDRA one day achieves the fair, economical, expeditious and informal family dispute resolution system it has set out to provide to Manitobans.

APPENDIX A



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Interview Questions

Triaging and Mediating to meet the Needs of Families under
The Family Dispute Resolution (Pilot Project) Act of Manitoba

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Introduction Questions

1. What is your name?
2. What is your educational background?
3. Where are you employed?
4. Can you tell me about this organization?
5. How long have you been employed there?
6. What is your job title?
7. Can you describe your job?
8. What type of training have you received with respect to mediation?
9. Have you mediated professionally anywhere else?

Mediation Styles

10. How would you describe facilitative, evaluative and transformative mediation?
11. What are the benefits of facilitative, evaluative and transformative mediation?
12. What are the weaknesses of facilitative, evaluative and transformative mediation?
13. Were you trained in any of these styles of mediation in particular?
14. Of these styles, which best identifies your mediation practice?
15. Can you describe your personal style of mediation?

Mediation Styles and Specific Family Law Issues

16. Which of custody and access, support or property related issues do you mediate most frequently?
17. Are there typical challenges that tend to arise in the course of mediating child custody and access disputes, specifically?
18. Are there typical challenges that tend to arise in the course of mediating child and spousal support-related disputes, specifically?

19. Are there typical difficulties that tend to arise in the course of mediating property-related disputes, specifically?
20. Do you tend to use different styles of mediation when mediating different types of family law issues? If so...
 - a. What style of mediation do you tend to use when mediating child custody and access-related issues and why?
 - b. What style of mediation do you tend to use when mediating child and spousal support-related issues and why?
 - c. What style of mediation do you tend to use when mediating property-related issues and why?

Impacts of Mediation on Different Groups

Women vs. Men

21. What are some of the typical behaviors that you notice about men in mediation sessions?
22. What are some of the typical behaviors that you notice about women in mediation sessions?
23. How often is it that both spouses in your family mediation sessions is employed?
 - a. In these cases, does one spouse tend to earn a higher income than the other?
24. Where only one spouse is employed, is it more often the elder of the two spouses?
25. How often are the unemployed spouses not working in order to care for children?
26. How often are unemployed spouses obligated to obtain employment as a result of mediation negotiations?
27. Do disparities in earning capacity affect the negotiating positions of the parties to a mediation? If so, how?
28. Do disparities in employment status affect the negotiating positions of the parties to a mediation? If so, how?
29. Do disparities in childcare responsibilities affect the negotiating positions of the parties to a mediation? If so, how?
30. What can you do as a mediator to combat these power imbalances?
31. In your family mediation practice, do you try to deemphasize or avoid discussions of fault or blame between the parties? If so...
 - a. How do you do this?
 - b. What are the advantages to doing this?
 - c. Are there any possible disadvantages to doing this? If so...
 - i. What steps should mediators take in mediation to combat these disadvantages?
32. Generally, do you think women are positioned to be advantaged or disadvantaged by the mediation process?
 - a. If you believe they are advantaged...
 - i. Why?
 - ii. What steps need to be taken in mediation to ensure that both parties have a fair experience?
 - b. If you believe that they are disadvantaged...
 - i. Why?
 - ii. What steps needs to be taken in mediation to ensure that they are not?

2. Generally, do you think that men are positioned to be advantaged or disadvantaged by the mediation process?
 - a. If you believe they are advantaged...
 - i. Why?
 - ii. What steps needs to be taken in mediation to ensure that both parties have a fair experience?
 - b. If you believe that they are disadvantaged...
 - i. Why?
 - ii. What steps needs to be taken in mediation to ensure that they are not?
3. Is there one specific style of mediation which is best suited to handle the imbalances which might occur between men and women in mediation? If so, why?

Domestic Violence Cases

33. Are you permitted to mediate family cases where child abuse, domestic violence, or stalking are at issue?
 - a. If not, what is the rationale for this?
 - b. If so, is there a special protocol or process in place to address these types of cases?
34. In your mediation training, did you receive any specialized instruction related to domestic violence?
35. Does your employer require you to have specialized domestic violence training?
36. In your opinion, is mediation appropriate where there are allegations of child abuse, domestic violence or stalking? Why or why not?
37. Generally, do you think that domestic violence victims are positioned to be advantaged or disadvantaged by the mediation process?
 - a. If you believe they are advantaged...
 - i. Why?
 - b. If you believe that they are disadvantaged...
 - i. Why?
 - ii. What steps needs to be taken in mediation to ensure that they are not?
38. Is there one specific style of mediation which is best suited to handle the imbalances which might occur in mediation between participants affected by child abuse, domestic violence or stalking? If so, why?

Self-Represented Litigants vs. Litigants with Counsel

39. Can parties bring lawyers with them to your family mediation sessions?
40. How often do parties bring lawyers with them to family mediation sessions?
41. Can you describe a typical family mediation session where lawyers are present?
42. Generally, do family mediation sessions tend to be more successful or unsuccessful when lawyers are present?
43. What, if any, are the benefits of having lawyers present in a family mediation session?
44. What, if any, are the challenges of having lawyers present in a mediation session?
45. How often is one party represented by a lawyer while the other party is not?
46. Can you describe a typical family mediation session where only one party is represented by a lawyer and the other party is not?

47. Do you notice power imbalances between the parties where only one party is represented by a lawyer?
48. What types of behaviors demonstrate this power imbalance to you?
49. What can you do as a mediator to combat this power imbalances?
50. Generally, would you say that self-represented litigants are positioned to be disadvantaged by the mediation process?
 - a. If you believe that they are disadvantaged...
 - i. Why?
 - ii. What steps needs to be taken in mediation to ensure that they are not?
51. Is there one specific style of mediation which is most appropriate or effective to use when both parties have lawyers present in the mediation? If so, why?
52. Is there one specific style of mediation which is best suited to handle the imbalances which might occur between a self-represented participant and a participant represented by counsel in mediation? If so, why?

The Family Dispute Resolution (Pilot Project) Act of Manitoba

*Italicized text indicates explanation from me to the interviewees

53. Did you have any involvement in the Family Law Reform Committee’s 2018 Report regarding its proposed alternative dispute resolution pilot project in Manitoba?
 - a. If so...
 - i. What type of involvement did you have?
 - b. If not...
 - i. Do you think you should have been involved in this process? Why?
54. Prior to reading my thesis proposal, which briefly outlines Manitoba’s *Family Law Modernization Act* and *Family Dispute Resolution (Pilot Project) Act*, what did you know about these Acts?

In its current state, the FDRA does not explicitly explain how to treat cases involving significant power imbalances or a history of domestic violence and stalking...

55. Do you think that this is something that needs to be explicitly addressed in the legislation? If so, how should it be addressed?

Director of Resolution Services

Under this new legislation, a Director of resolution services will be appointed by the Minister of Justice and will be responsible for the effective management and operation of resolution services provided under the FDRA. He or she may decline to handle cases under the FDRA if they meet any of the criteria outlined in the Act as exceptions to the pilot project, or if he or she is of the opinion that:

- a. *The request for assistance does not disclose a legitimate family dispute or is an abuse of process;*
- b. *Issues in the dispute are too legally or factually complex to be resolved under this Act, or it is otherwise impractical to provide assistance under this Act; or*
- c. *It is not in the interests of justice or fairness for assistance to be provided under this Act.*

56. Who is best suited to be the Director of Resolution Services under the FDRA?

57. What qualifications should be required of the Director of Resolution Services?

Resolution Officers

Under this new legislation, resolution of applicable family disputes will take place in two distinct phases. The first of these is the facilitated resolution phase, in which parties are assisted by a resolution officer to try to reach a mutually satisfactory agreement on all aspects of their dispute. Under this phase, resolution officers will be responsible for:

- a. *Assisting the parties to “define the issues in dispute, explore solutions and reach a mutually satisfactory agreement on all aspects of their family dispute; and*
- b. *Determining the specific dispute resolution process to be used in attempting to resolve the family dispute, which will likely involve them referring the parties to another service or resource for assistance in resolving the dispute...*

58. Who is best suited to be a resolution officer under the FDRA?

59. What qualifications should be required of a resolution officer?

60. What types of dispute resolution processes are best suited to resolve family disputes in the facilitated resolution phase of the FDRA?

61. Which specific services or resources are best suited to resolve family disputes in the facilitated resolution phase of the FDRA?

62. How can resolution officers determine what type of dispute resolution process and what specific resource or service is best suited for a given case?

Adjudicators

The second phase of the FDRA is the adjudication phase, in which an adjudicator holds a hearing and makes a recommended order to resolve any dispute that was not resolved in the first phase.

63. Who is best suited to be an adjudicator under the FDRA?

64. What qualifications should be required of an adjudicator?

Final Questions

65. Have you been made aware of how your organization might be involved in this pilot project? If so...

- a. Have you been made aware of the process for addressing cases that are referred to your organization by a resolution officer in the facilitated resolution phase of the pilot project?
- b. Have you been made aware of any changes being made within your organization considering this new legislation?

66. Do you think that the new pilot project will be capable of creating a process outside the traditional court system that provides for a fairer, more economical, and more expeditious and informal resolution of family disputes?

- a. If so, why?
- b. If not, what changes do you think could be made to it to achieve these goals?

APPENDIX B



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Consent Form

Triaging and Mediating to meet the Needs of Families under
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This consent form, a copy of which will be left with you for your records and reference, is only part of the process of informed consent. It should give you the basic idea of what the research is about and what your participation will involve. If you would like more detail about something mentioned here, or information not included here, you should feel free to ask. Please take the time to read this carefully and to understand any accompanying information.

Background:

In October 2017 the provincial government announced plans to reform Manitoba's family law system to make it more accessible and less adversarial. The Family Law Reform Committee ("FLRC") was formed by the Minister of Justice to provide advice and recommendations on how to achieve a meaningful change of this nature. In June 2018 the FLRC released its report entitled, "Modernizing Our Family Law System," outlining its mandate, findings, and its recommendation for a three-year mediation- based pilot project.

The FLRC's report recommends a pilot project that will implement a new administrative process for legal disputes falling under the jurisdiction of *The Family Maintenance Act*. Under the pilot project, these disputes will be assessed and triaged by a new administrative official known as the Chief Resolution Officer, who is responsible for assessing issues, triaging cases into mediation resources with the best likelihood of successfully resolving the matter outside of court, and monitoring the progress of the program in which s/he directed the parties to participate. The FLRC's report explains that if parties cannot resolve the matter in this first stage, their cases will then be referred to an adjudicator who will decide the matter in an expedited fashion.

On June 3, 2019, *The Family Law Modernization Act* (“FLMA”) received Royal Assent from the Lieutenant Governor of Manitoba.⁴³¹ In addition to the new *Child Support Service Act* created by this legislation, and the four new Acts created under it which will amend provincial legislation such as *The Family Maintenance Act* and *The Inter-jurisdictional Support Orders Act*, the FLMA creates *The Family Dispute Resolution (Pilot Project) Act* (“FDRA”), which outlines the finalized three-year pilot project first envisioned by the FLRC in its report (the “FDRA Process”).⁴³²

Subject to certain exceptions outlined in the Act, the FDRA Process will be mandatory for resolving custody, access, support, maintenance and property-related disputes which otherwise fall under the jurisdiction of *The Family Maintenance Act*, *The Family Property Act*, and *The Law of Property Act*.⁴³³ Either party to a dispute may commence the FDRA Process by requesting assistance from the Director of Resolution Services, who will be responsible for the effective management and operation of resolution services provided under the FDRA.⁴³⁴ Unless the Director declines to resolve the dispute pursuant to reasons outlined in the FDRA, resolution of the dispute will take place in two distinct phases: (1) the facilitated resolution phase, in which parties are assisted by a resolution officer to try to reach a mutually satisfactory agreement on all aspects of their dispute; and (2) the adjudication phase, in which an adjudicator holds a hearing and makes a recommended order to resolve any dispute that was not resolved in the first phase.⁴³⁵ If neither party objects to the adjudicator’s recommended order under the second phase, it becomes an enforceable order of the Court of Queen’s Bench. However, if either party disagrees with the order, he or she may file an objection in the Court of Queen’s Bench, leaving it to the court to either confirm the adjudicator’s order or make a new one.⁴³⁶

As originally envisioned by the FLRC, the initial phase under the FDRA Process will involve a “resolution officer” who is responsible for assisting the parties to “define the issues in dispute, explore solutions and reach a mutually satisfactory agreement on all aspects of their family dispute.”⁴³⁷ This requires the resolution officer to “determine the form of the dispute resolution process to be used in attempting to resolve the family dispute...”⁴³⁸ and likely, to “refer the parties to another service or resource for assistance in resolving the dispute.”⁴³⁹ According to the FLRC’s report, which gave rise to the FDRA Process, this “opportunity to direct people into non-adversarial dispute resolution resources at a very early stage” is a “key” to this initiative.⁴⁴⁰ Unfortunately, both the FLRC’s report and the FDRA itself are rather vague in terms of how resolution officers will fulfill this key triage function.

⁴³¹ *Bill 9, The Family Law Modernization Act*, *supra* note 22.

⁴³² *Ibid.*

⁴³³ *Ibid* at s 3(2).

⁴³⁴ *Ibid* at s 5(1).

⁴³⁵ *Ibid* at s 9(1).

⁴³⁶ *Ibid* at s 31.

⁴³⁷ *Ibid* at s 10(1).

⁴³⁸ *Ibid* at s 10(2).

⁴³⁹ *Ibid* at s 10(3)(b).

⁴⁴⁰ *Modernizing Our Family Law System: A Report from Manitoba’s Family Law Reform Committee*, 2018 report of the Family Law Reform Committee at page 6.

For example, while the FLRC's report specifically contemplates mediation as the primary dispute resolution process to be used in the first phase of the pilot project, the FDRA fails to address the types of mediation resources and services to which it envisions making referrals. Further, while it instructs resolution officers to consider factors such as "the nature and complexity of the issues" and "the nature of the relationship between the parties" in determining the form of dispute resolution process to be used in the first phase of the process, the FDRA is silent in terms of how resolution officers are to determine, based on that information, which specific service or resource will have the best likelihood of resolving the issues in a non-adversarial way.

Both the FLRC's Report and the FDRA boast a system capable of improving the way we resolve family disputes in Manitoba. However, the potential success of the FDRA Process rests largely on an underdeveloped dispute resolution-based scheme which is not supported by logistical details or theoretical or empirical research into family mediation. In its report, the FLRC recognizes that the pilot project may have gaps of this nature which it hopes to fill over the course of the project's three years.⁴⁴¹ It is not clear whether the pilot project will actually achieve better and more sustainable outcomes, whether matters will actually be resolved faster, or whether it will actually be significantly cheaper for users of the system.⁴⁴² As such, the FDRA recommends evaluation of the project by the Minister of Justice to determine whether it achieves its purpose of creating a process outside the traditional court system that provides for the fair, economical, expeditious and informal resolution of family disputes.⁴⁴³

Research Question:

How should disputes be addressed in family mediation under the first phase of the FDRA Process in order for the Act to achieve its purpose (achieving more fair and sustainable outcomes, quicker resolutions, and a reduction in overall costs in an informal manner outside of the traditional court system)?

Research Method:

To address my proposed research question, I will focus on family mediation as the primary dispute resolution process to be utilized in the facilitated resolution phase of the FDRA Process, and I will:

1. Analyze the facilitative, evaluative and transformative styles of mediation;
2. Determine which of these mediation styles is the most effective process to be used to address the following types of family law issues which will fall under the FDRA:
 - a. Child custody and access issues;
 - b. Child and spousal support-related issues; and
 - c. Property-related issues.
3. Analyze the impacts of these mediation styles on the following demographic groups:
 - a. Women vs. men;
 - b. Couples affected by domestic violence; and
 - c. Self-represented litigants vs. litigants represented by counsel;
4. Determine which of these mediation styles is the most appropriate process to be used when addressing the disputes of these different demographic groups.

⁴⁴¹ *Ibid* at 10.

⁴⁴² *Ibid*.

⁴⁴³ *Supra* note 1 at s 44.

In doing so, I will examine the existing literature pertaining to family mediation in legal and peace and conflict studies contexts. I will also interview family mediators currently practicing in Manitoba in order to learn the particular mediation styles and techniques currently being practiced in this province, the particular challenges faced by Manitoba family mediators, the ways in which family mediators are addressing these obstacles, and, based on their firsthand knowledge and experience, the ways that they feel family mediation ought to be conducted under the FDRA Process in order to fulfill the purpose of the legislation.⁴⁴⁴

Procedure:

Participants will be asked to attend one interview session at a mutually agreed upon location (e.g. their office, or a classroom at Robson Hall at the University of Manitoba) in which they will be asked a series of questions regarding their mediation practices, their personal views on mediation, and their personal views on *The Family Dispute Resolution (Pilot Project) Act* of Manitoba. Interviews will take approximately 1 hour.

Recording Devices:

All interviews will be recorded on the iPhone Voice Memo application. I will later transcribe these recordings myself, and these transcriptions will be relied upon in the research. These recordings and transcripts will only be available to me and my Advisor.

Data Collection and Storage:

Audio recordings will be temporarily stored on the Principal Investigator's password protected cell phone, and then transferred to her laptop computer which is protected by biometric facial recognition technology and password and which remains supervised by the Principal Investigator when taken out of her home and into the public.

The Principal Investigator will personally transfer the audio recordings from her cell phone to her computer by syncing her cell phone with iTunes on her laptop computer and then saving the uploaded recording as a file to her computer. Once the Principal Investigator has transferred the audio recordings to her laptop computer, she will personally delete the information from her cell phone. Interview transcripts of the audio recordings will also be stored on the Principal Investigator's laptop computer. The Principal Investigator's laptop is primarily located at her home, which is secured by an alarm system. She is the only one living at her home who can access the laptop computer via facial recognition technology and/or password.

Benefits to Participants:

Participants will have an opportunity to contribute to a critical and timely conversation regarding their field of family mediation and its central role in the forthcoming modernization of Manitoba's family law system under the FDRA. In drawing on their firsthand professional knowledge and experience, they will have the chance to potentially inform the ways in which this new legislation will operate in the future, and the ways in which they, as family mediators can contribute to a meaningful reform to Manitoba's family law system. As such, participants may ultimately learn new information relevant to their lives and

⁴⁴⁴ Supra note 1 at s 1.

can contribute to the advancement of knowledge in an area that directly affects them and Manitobans generally.

Risks to Participants:

The probability and magnitude of possible harms participants may experience as a result of their involvement in the research is no greater than those they might encounter in the aspects of their everyday life relating to family mediation.

Personal Identifiers:

Personal identifiers such as names of participants shall not be included in the research when discussing interview results, **unless the participant explicitly consents to being directly identified by their name.** Unless the participant explicitly consents to being directly identified by their name, participants will be identified only as family mediators practicing within the province of Manitoba.

If you consent to being personally identified in the research, please mark an “X” next to “Personal Identifiers” below and provide your signature in the space provided. **By marking an “X” next to “Personal Identifiers”, and providing your signature in the space provided, you are consenting to being personally identified in the research by name.**

*Personal Identifiers _____

*Participant’s Signature _____

Credit and Remuneration:

There will be no form of tangible credit or remuneration for participating in this research project.

Withdrawal from Research:

Participation is voluntary. Participants may withdraw from the research at any point in time without any negative consequences **prior to June 1, 2020. After June 1, 2020, participants will be unable to withdraw from the research as the Principal Investigator intends to begin disseminating the research to internal and external reviewers at that point.** Participants who wish to withdraw before June 1, 2020 shall notify the principal investigator of their intention to withdraw by emailing the principal investigator at the email address indicated at the top of this form.

Debriefing of Data:

Participants will be made fully aware of the purpose and goals of the research in advance of the interview, and will have an opportunity, at the conclusion of their interview, to debrief, ask questions, and express any concerns they may still have regarding the research.

Dissemination of Results:

Interview results will be disseminated to the principal investigator’s research supervisor, Dr. Jennifer L. Schulz; Associate Dean (Research & Graduate Studies) of Robson Hall, Dr. Donn Short; the principal investigator’s thesis examining committee, in the principal investigator’s thesis, in MSpace, and in potential journals, conference presentations, or other publications in which the principal investigator may choose to publish her research.

Feedback from Participants

Upon request, participants may review any direct quotations that the principal investigator intends to include from their interviews in the research. If you wish to review said quotations, please mark an "X" next to "Review Quotations" below, and, the principal investigator shall contact you prior to dissemination and publication of the research to provide you an opportunity for review.

***Review Quotations _____**

Summary of Results for Participants:

A brief 1-3-page summary of results shall be made available to participants through a mechanism of their choice (e.g. regular mail or e-mail) by October 2020. Further, if the principal investigator produces a published version of the research, a copy will also be made available to participants upon request. If you wish to receive said summary and/or a copy of published work, please mark an "X" next to the applicable heading below, and next to the mechanism by which you wish to receive it:

Brief Summary _____ Copy of Published Research _____ Regular Mail _____ Email _____

Your signature on this form indicates that you have understood to your satisfaction the information regarding participation in the research project and agree to participate as a subject. In no way does this waive your legal rights nor release the researchers, sponsors, or involved institutions from their legal and professional responsibilities. You are free to withdraw from the study at any time, and /or refrain from answering any questions you prefer to omit, without prejudice or consequence. Your continued participation should be as informed as your initial consent, so you should feel free to ask for clarification or new information throughout your participation.

The University of Manitoba may look at your research records to see that the research is being done in a safe and proper way.

This research has been approved by the Joint-Faculty Research Ethics Board. If you have any concerns or complaints about this project you may contact any of the above-named persons or the Human Ethics Coordinator at 204-474-7122 or humanethics@umanitoba.ca. A copy of this consent form has been given to you to keep for your records and reference.

Participant's Signature _____

Date _____