Family Mediation:
The Impact of the Feminist Critique on its Practice

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Abstract

Feminist legal reformers have historically criticized the use of family mediation. They support their criticisms in the disadvantaged position of women in a society with patriarchal structures of power and the impossibility for mediation, as a private process, to effectively deal with these inequities. Recognizing the importance of the feminist critique of mediation, the family mediation community promoted in 1992 the creation of a formal dialogue between family mediators and feminist legal reformers through the organization of the Toronto Forums on Women Abuse in 1992 and in 1993. As a consequence of these Forums, policy changes in the standards of practice of family mediation were recommended by representatives of the two groups, which were introduced into the standards of practice in 1994. This thesis explores the current views, both of feminists and family mediators, about the practice of family mediation ten years after these changes were introduced. This thesis demonstrates that, despite the changes introduced, there still remains a debate between feminist legal scholars and family mediators regarding the current practice of family mediation. This thesis encourages a systematic dialogue between feminist legal reformers, family mediators, victims of abuse and other social actors interested in the debate.

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Chapter 1 – Introduction to the Thesis

This thesis examines the impact of the feminist legal reformers' critique on the practice of family mediation with a sharper focus on the use of family mediation in instances of domestic violence. Moving away from the focus of most of the articles written about the practice of family mediation, this thesis does not argue whether or not mediation is suitable for cases of spousal abuse. Rather, I preferred to focus on the way the practice of family mediation has been nourished by feminist legal reformers' considerations and the valuable role played by the mediation community in recognizing and accepting the importance of the feminist legal reformers' critique for the practice of family mediation. The aim of the thesis is to provide an examination of the current practice of family mediation and to explore the state of the feminist legal reformers' and family mediators' critique since the time of the Toronto Forums.

The literature consulted up to 1994 revealed the existence of two sets of voices stressing the advantages and disadvantages of the use of mediation in family law cases where relationships are marked by violence: the feminist legal reformers' and family mediators'. Feminist legal reformers' theories about social relations describe the disadvantaged position of women in a modern society organized with a patriarchal design. These disadvantages are, among others, the product of social and economic inequalities between men and women; different power relations where women have less power than men; and, the resolution of women's problems in a private sphere rather than in the

public judicial system. From their view, the mediation process is unable to overcome the disadvantaged position of women in society.

Family mediators highlight the potential of family mediation in dealing with the interactional, psychological and emotional consequences associated with divorce because the main focus of family mediation is to assist divorcing couples to collaboratively negotiate mutually satisfactory outcomes for their marriage dissolution, especially when there are children involved. Both feminist legal reformers and family mediators criticize the failure of the legal system when dealing with disputes involving family matters. Feminist legal reformers stress the failure of divorce law reforms in addressing and recognizing substantive inequality within society. Feminist legal reformers, however, are reluctant to accept family mediation as the solution for an inefficient legal system because of the risks involved for women. Although hesitant, feminist legal reformers recognize the possibilities of the legal system in ensuring protection for women while stressing the limitations of the process of family mediation to protect women' rights outside the mediation room.

Recognizing the importance of the feminist critique for the practice of family mediation, the family mediation community promoted the opportunity to engage in a dialogue between feminist legal reformers and family mediation practitioners. In May of 1992 the Ontario Association for Family Mediation[1] organized a Forum on Women Abuse that brought together family mediators

[1] See Landau, B: "The Toronto Forum on Women Abuse: The Process and the Outcome" in Family and Conciliation Courts Review 33(1), 1995, 63-78.

and representatives of women's groups from across North America. This event provided the first formal opportunity in Canada for both groups to hear each other and to express their respective concerns and recommendations in relation to the practice of family mediation in instances of spousal abuse. That Forum, and the one which followed in March of 1993, were a step forward in the dialogue between mediation advocates and feminist legal reformers. As an outcome of the Toronto Forums on Women Abuse, a Report was written which included policy recommendations. The recommendations were focused mainly on the topics of training for mediators, screening processes, safety measures and alternatives to mediation. In 1994, Family Mediation Canada (FMC) incorporated these recommendations in its standards of practice. A Policy on abuse was also created by the Ontario Association for Family Mediation (OAFM).[2]

More than ten years have passed since the second Toronto Forum on Women Abuse. Little has been written during this time about the impact of the changes that have been incorporated into the practice of family mediation; nor has there been another formal opportunity to continue engaging the dialogue between feminist legal reformers and family mediation practitioners. This necessarily caught my attention while raising some questions: To what extent has the practice of family mediation changed after 1994? Were the changes introduced after 1994 substantial enough to satisfy both feminist legal

[2] See www.oafm.on.ca/mediators/abusepolicy.html; www.fmc.ca/pdf/standardsweb2003.pdf

reformers' and family mediators' expectations? What new considerations do feminist legal reformers and family mediators have nowadays?

Recognizing the important contribution the Toronto Forums on Women Abuse had for the practice of family mediation and for the feminist legal reformers' and family mediators' communities, I found it interesting and necessary at this point in time to explore how the feminist legal reformers' critique has impacted the practice of family mediation. Therefore, the objectives of this thesis are twofold.

1. Explore whether the recommendations and resulting policy changes from the Toronto Forums on Women Abuse were substantial enough to satisfy both feminist legal reformers' and family mediators' concerns about the use family mediation in cases involving domestic violence.

2. Explore what feminists and advocates of family mediation think about the current practice of family mediation after changes were introduced in its practice.

In the quest for the answer to my questions and to accomplish the objectives of my thesis, I decided to talk to professionals who represent the two constituencies in the debate. In doing so, personal interviews with open-ended questions were organized. My purpose in promoting the conversations was to provide an opportunity to reflect about the current practice of family mediation and to offer opinions and recommendations in relation to what should be modified and incorporated into a healthier practice of family mediation. I believed that after ten years, there was the necessity to explore

the state of the two sides of the debate. Thus, I set out to open a small door to show the family mediation community the current concerns associated with the practice of mediation. The interviews demonstrated that there remains a debate about the practice of family mediation in cases of domestic violence and the need for both feminist legal reformers and family mediation practitioners to have a space to systematically share their current views about the practice of family mediation.

Three constructs used throughout this thesis need defining: family violence, mediation and family mediation.

Family violence, as a specific type of violence that occurs within the kinship unit, is defined as an act carried out intentionally or non-accidentally, to cause physical pain or injury to a family member.[3] Spousal abuse is understood as any kind of mental, physical, emotional, sexual, economic and psychological abuse perpetrated by the man to his wife or common law partner.[4] Abuse refers to a pattern of behaviour or conduct in an intimate relationship that is associated with the unacceptable exercise of power and control, and adversely affects the ability of one or more participants to make free informed decisions.[5] Family violence is a problem that can have lasting impacts on both the individual and society. Along with the physical,

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[3] Barnett, O; Miller-Perrin, C. & Perrin, R: Family Violence Across the Lifespan: An Introduction. Thousand Oaks, CA: Sage, 1997 at 43.

[4] See Astor, H: "Violence and Family Mediation: Policy" in Australian Journal of Family Law 8(1), 1994 at 4; Fischer, K. et al: "The Culture of Battering and the Role of Mediation in Domestic Violence" in Southern Methodist University Law Review 46, 1993 at 2121; Corcoran, K. & Melamed, J. C: "From Coercion to Empowerment: Spousal Abuse and Mediation" in Mediation Quarterly 7(4), 1990 at 305.

[5] www.fmc.ca/pdf/standardsweb2003.pdf

psychological, social and economic consequences on individuals directly affected, family violence can have significant social and economic costs in health care systems, civil and criminal justice systems, housing and shelter services and community services.[6]

Mediation, in its simplest definition, is a form of assisted negotiation. It is a dispute resolution process in which an impartial third party (the mediator) acts as a facilitator of the communication and negotiation processes between disputants. Summarizing common definitions offered by different authors, mediation can be understood as an alternative conflict resolution process in which a third party, called a mediator, impartially intervenes in the conflict between two or more parties. This intervention is intended to help the parties reach an agreement by facilitating the communication process between them. The mediator has no decision-making power and has no authority to impose a settlement on the parties.[7]

Family mediation involves mediation between family members over familial matters or domestic disputes.[8] It includes issues pertaining to

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[6] Because the vast majority of the violence within the household is committed by men against women, for the purpose of this research, from now on the woman will be identified as the victim and the man as the perpetrator or abuser.

Although the author recognizes that there are many other situations within the family where the woman is not the victim but the abuser and that abuse also is a reality in same-sex couples, these situations are beyond the scope of this investigation.

[7] See: Astor, *supra* note 4 at 3; Goundry, S. et al: Family Mediation in Canada: Implications for Women's Equality. Ottawa: Status of Women in Canada, 1998 at 18; Gribben, S: "Violence and Family Mediation: Practice" in Australian Journal of Family Law 8(1), 1994 at 23; Landau, B. et al: Family Mediation Handbook. (3rd Edition). Toronto: Butterworths, 2000 at 20; Picard, C: Mediating Interpersonal and Small Group Conflict. Ottawa: The Golden Dog Press, 2002 at 16; Yarn, D: Dictionary of Conflict Resolution. San Francisco: Jossey- Bass, 1999 at 277.

[8] Yarn, *supra* note 7 at 184.

separation, divorce, settlement of property issues, custody and visitation rights. Family mediation is defined as a facilitative, non-adversarial conflict resolution process in which one or more family mediators intervene in family issues in order to help the family develop and design its own solutions to issues, and to help the family change its communication and negotiation styles from adversarial and confrontational to co-operative and integrative.[9]

The thesis is divided into five main chapters. The second chapter looks into the family mediation process. It discusses the insertion of family mediation within the family justice system and describes the process of family mediation for divorcing couples. The third chapter is divided into two sections. The first part of this chapter looks at the feminist legal reformers' critique of the family law system in general and family mediation in particular. This section examines feminist theories about social relations and its impact on women, which set the grounds for the main three criticisms of family mediation. They are: impossibility to overcome social inequities; inability to surpass the structural power imbalance inherent to relationships between the two genders; and the danger of family mediation as a private process rather than a public process. These three issues are the core of the thesis. The second section of chapter three focuses on the significance of the Toronto Forums as the first formal opportunity to promote a constructive dialogue between feminist legal reformers and family mediation practitioners. It also looks at the recommendations that were proposed during the Forums and the changes

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[9] www.fmc.ca/pdf/standardsweb2003.pdf

introduced in the practice of family mediation as a consequence of the recommendations. This section sets the grounds for the construction of the questions for the interview. The fourth chapter analyses the results of the interviews carried out as part of the research and the significance of the interviewees' answers. The last chapter provides a retrospective look at what has been achieved and what still remain as important questions to be explored regarding the practice of family mediation.

Finally, I should say that I enjoyed doing this research although there were days of frustration where the end of the tunnel was not clear at all. Eventually, the light started to appear. My position in this thesis has changed more than once. Before starting the research I was so much in favour of family mediation that it was impossible for me to understand why there was so much criticism of its use. It was not until I became engaged in the research and analysis that I realized how dangerous this process could be for abused women if not conducted properly. These years of study and research were for me a very enriched learning experience both as a woman and as a young professional in the field of Social Sciences.

Chapter 2 - Family Mediation

2.1 Family Mediation's place within the Family Justice System

The family justice system refers to the whole range of dispute resolution processes that may by used by two parties who are undergoing a divorce. Court hearings, negotiation through lawyers, arbitration and mediation are some of the available processes divorcing couples can choose from. This range of processes involves public institutions such as the Court as well as private institutions including negotiation through lawyers and mediation. The public dimension of the family justice system is the role of the Court in divorce cases. The Divorce Act establishes that a divorce judgement must be obtained from the Court to legally finalize the termination of the marriage. This Act also establishes the jurisdictional competence of a court to grant a divorce.[10] The literature suggests, however, that the majority of divorces are uncontested with the parties settling their differences by negotiating through their lawyers without having to go through an adversarial process.

> Typically the parties do not go to court at all until they have worked matters out and are ready for the rubber stamp.[11]
>
> Less than 4% of all divorces involve a trial of contested issues where the spouses give evidence in open court.[12]

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[10] Divorce Act; R.S.C. 1985 (2nd Supp.), c.3, s. 3-6, s. 8(1), s. 14.

[11] Mnookin, R & Kornhauser, L: "Bargaining in the Shadow of the Law: The Case of Divorce" in Yale Law Journal 88, 1979 at 955.

[12] Payne, J & Payne, M: Canadian Family Law. Toronto: Irwin Law, 2001 at 176.

If only 4% of all divorces go through an adversarial court process, where are the remaining 96% of the divorces settled? Mnookin and Kornhauser answered this question more than twenty-five years ago with a memorable phrase: negotiation takes place "in the shadow of the law".[13] What does this concept of bargaining in the shadow of the law mean? Parties to a marriage negotiate their own legally enforceable commitments consequent on divorce through private negotiations with their lawyers before going through a formal divorce proceeding through the court.[14] Current legislation explicitly recognizes and encourages private negotiation in family divorce disputes; for instance, the Divorce Act establishes as the duty of lawyers who represent a spouse in a divorce proceeding to discuss with the spouse the advisability of negotiating the matters that may be the subject of a support order or a custody order.[15] Through these private negotiations the parties, independently represented by their lawyers, discuss and attempt to reach an agreement on issues of division of property, custody, support and access to their children. A majority of divorcing couples try to settle their differences through negotiation because it is a cost-efficient and time-saving process when compared to an adversarial legal process.[16] Moreover, contrary to the adversarial process, the parties are the ones who decide the outcome of their negotiations.

If 96% of the divorces are uncontested, what is the role of the court in this large majority of uncontested divorce cases? In these cases the court is

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[13] See Mnookin & Kornhauser's article, *supra* note 11.

[14] *Idem* at 955.

[15] R.S.C. 1985 (2nd Supp.), c.3, s. 9(2).

[16] Payne & Payne, *supra* note 12 at 143.

not involved in an adversarial legal proceeding. Here the role of the court, at least in theory, is to review the terms of the agreement reached by the parties and to make sure the legal rights and entitlements of the parties and their children are preserved. In practice, according to Mnookin and Kornhauser[17], in most uncontested divorce hearings the judge orders the divorce on the terms agreed to by the parties prior negotiations through their lawyers, rubber stamping the agreement reached between the parties.

When the parties are not able to negotiate for themselves or when no agreement is reached by the parties after private negotiations through their lawyers, the case goes to an adversarial legal process within the court. Here the Judge has the duty to decide for the parties and to establish their legal rights and entitlements. According to the literature that is only the case of 4% of the divorces.[18]

Thus, if the family justice system has two components as we have seen, one private represented by lawyer/client negotiations and one public represented by the courts, then where does family mediation fit within the structure of the family justice system? In Canada, divorce mediation emerged in the 1970's in the context of the existing legal system rather than as a discrete alternative.[19] Contrary to some arguments that see divorce mediation as an alternative to the legal system that tries to replace the legal process for

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[17] Mnookin & Kornhauser, *supra* note 11 at 959.

[18] See Payne & Payne, *supra* note 12 at 176.

[19] Devlin, A & Ryan, J: "Family Mediation in Canada: Past, Present and Future Developments" in Mediation Quarterly. No. 11, March 1986 at 8.

the resolution of conflicts involving family members[20], this thesis locates divorce mediation in the private component of the family justice system. As with lawyer/client negotiations, in the mediation process the parties privately negotiate the terms of the agreement. Divorce mediation should not be understood as an alternative to the family legal system, on the contrary, the legal system and divorce mediation are complementary rather than competing or contradictory processes.[21]

> Too often mediation is juxtaposed against the adversarial system. They are false opposites. Even the discussion of which mode of dispute resolution is the alternative tends to frame the discussion in linear, either/or terms and set up unnecessary polarity.[22]

Divorce mediation was not intended to replace the legal system but to complement the judicial side of the court and to achieve non-adversarial solutions of family disputes.[23] Divorce cases that are settled through mediation are subject to a formal court hearing before a judge who is the one that ultimately orders the divorce.

If the private component of the family justice system is already represented by lawyer/client negotiations, then why the need for divorce mediation? In previous paragraphs it was discussed that a significant

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[20] Woods, L: "Mediation: A Backlash to Women's Progress on Family Law Issues" in Clearinghouse Review 19(4), 1985 at 435.

[21] Payne & Payne, *supra* note 12 at 162.

[22] Benjamin, R: "The Use of Mediative Strategies in Traditional Legal Practice" in Journal of the American Academy of Matrimonial Lawyers 14(7), 1997 at 205.

[23] Richardson, J: Court-Based Divorce Mediation in Four Canadian Cities: Overview of Research Results. A Report Prepared for the Department of Justice Canada, 1988 at 9.

percentage of divorcing couples settle their conflict through private negotiations. Does it mean that the entire 96% of the couples that settle their dispute through private negotiations actually do it through their lawyers? Within that 96% there are couples that are unable to negotiate with each other and cannot reach an agreement but, at the same time, wish to avoid adversarial postures of the legal system.[24] This is when divorce mediation comes into the picture. The Divorce Act in its section 9(2) requires the lawyer to instruct their clients about the possibility to settle their dispute through family mediation and direct their clients to the mediation services available in the community.[25] In that sense it can be said that divorce mediation does not intend to replace lawyer/client negotiations but rather it acts as a supplementary process in cases where the parties are not able to reach an agreement for themselves or through their lawyers.

How does divorce mediation differ from lawyer/client negotiations as a form of assisted negotiation? What added value does divorce mediation provide to the negotiation process between the parties? As defined in the first chapter of this thesis, divorce mediation is a form of assisted negotiation where an impartial third party helps the parties to communicate and to negotiate issues pertaining to divorce. Divorce mediation is a process aimed at facilitating the consensual resolution of the economic and parenting consequences of marriage breakdown.[26] Divorce mediation differs from

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[24] *Idem* at 148.

[25] R.S.C. 1985 (2nd Supp.), c.3, s. 9(2).

[26] Payne & Payne, *supra* note 12 at 145.

lawyer/client negotiation through the addition of a neutral third party to the negotiation process. This new impartial party, the mediator, acts as a facilitator between the parties in trying to reach a negotiated agreement. As previously discussed, couples are directed to mediation services when they are having difficulties in negotiating their own agreement unassisted or through their lawyers and want to avoid the adversarial legal system. The role and responsibilities of the neutral third party in the divorce process represents the major distinction between lawyer/client negotiations and divorce mediation. The mediator's responsibility is to help the parties to understand each other's interests and to explore options for reaching an interest-based resolution to their conflict. The mediator also teaches the parties to improve the communication and to reduce the tension between them.[27] In teaching and helping the parties to effectively negotiate, the mediator helps the parties avoid going through long, costly adversarial court hearings.[28] The mediator helps the parties to establish a framework for future communication and an ongoing exchange of information respecting the upbringing of the children.[29] In the case of lawyer/client negotiations the role of the lawyer differs from the role of the mediator. In lawyer/client negotiations the lawyer acts as an advocate for the party that he or she represents. Each party has to have independent legal representation by their lawyer; therefore lawyers are not neutrals to the process. The lawyer, acting as a private representative of the party, ensures

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[27] *Idem* at 149.

[28] See Goundry et al *supra* note 7 at 30-31; Richardson, *supra* note 23 at 1, 9.

[29] Payne & Payne, *supra* note 12 at 149.

that the party is fully informed of their legal rights and entitlements and negotiates them on behalf of the party. It is important to highlight that lawyer/client negotiations can be very adversarial and difficult. Because lawyers focus on the rights and entitlements of their clients, often the negotiations are hostile and competitive because of the concealing interests of each party. In contrast, because of the nature of the mediation process and the role of the neutral third party within it, mediation may help to transform an adversarial negotiation process into a more collaborative negotiation process.

Why does the family justice system encourage the use of mediation when the parties cannot reach an agreement through lawyer/client negotiations instead of dealing itself through an adversarial legal process for these cases? From my view, this is due to two main factors. Firstly, the number of divorces in Canada is increasing. In 2002 there were 70,155 divorces while in 2003 there were 70,828[30]. If the family justice system does not promote the resolution of marital conflicts through private negotiations, it will be impossible for it to handle the exorbitant number of divorces cases through adversarial proceedings. Secondly, there has been a recognition that family litigation is distinguished from other civil actions. The former involves a much greater emotional element requiring different procedures than those generally utilized in the rest of civil cases, and the use of adversarial approaches to deal with family litigation are inappropriate, intensify pain and

[30] Taken from http://www40.statcan.ca/l01/cst01/famil02.htm

suffering, and impede the possibility of an amicable settlement.[31] Acknowledging the latter, the family justice system encourages family mediation as a non-adversarial process available to divorcing couples who cannot reach an agreement through lawyer/client negotiations. Divorce mediation provides the couple with an opportunity to settle their conflict without having to go through an adversarial court hearing. As is emphasized in the literature, divorce mediation complements the judicial side of the court and seeks to achieve non-adversarial resolutions of family disputes and, whenever possible, divert cases from adversarial court hearings.[32] It can be said that the family justice system, recognizing the peculiar characteristics of family conflicts, encourages and promotes divorcing couples to settle their dispute through private negotiations. However, a semi-official estimate by an organization of family mediators in Ontario indicates that only ten percent of divorces are mediated rather than settled by lawyer/client negotiations or litigation. This is only an estimate, but it does give some indication that mediation's place within the family justice system is still on the margins. If the mediation process fails, the adversarial court process is the obvious fallback position.[33]

What are the peculiarities of divorce that makes it different from other civil processes, raising so much debate in the literature? The psychological literature suggests that divorce does not just imply a breakdown of the family,

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[31] Richardson, *supra* note 23 at 8.

[32] *Idem* at 9.

[33] Boyd, N: Canadian Law: An Introduction. (3rd Edition). Toronto: Nelson Thomson Learning, 2002 at 163.

but basically a redefinition of its boundaries.[34] Divorce does not end parental and family relationships; it changes them and creates more complicated family structures and family relationships.[35] Divorce carries lasting consequences, not only to the couple and their children, but also to extended family members. These consequences not only impact the private sphere of the family, but also influence the social relations of divorcing couples and their children. This includes school, workplace, circle of friends, and community, to name only some. The major consequences associated with divorce can be classified into four categories: 1) *psychological consequences*; the research data indicates that divorce is accompanied by considerable emotional distress, psychological confusion, relationship strain and life upheaval for parents and children.[36] In some extreme cases the consequences could lead to important psychosomatic disorder and pathopsychological diseases[37]; 2) *interactional consequences* are associated with the effect of divorce on the relations among former spouses. Women have a longer post-divorce adjustment and therefore are less likely to be involved in a new relationship. Divorce increases the likelihood of conflictual communications among former partners; at the same time women are less affected by residual hostility[38]; 3) *social consequences* are associated with the impact of the divorce on the network of relationships of former spouses. Children, friends, family members are going to be affected by

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[34] Emery, R: Renegotiating Family Relations: Divorce, Child Custody and Mediation. New York: The Guilford Press, 1994 at viii.

[35] Richardson, *supra* note 23 at 6, citing others.

[36] Emery, *supra* note 34 at 200.

[37] Irving, H & Benjamin, M: Family Mediation: Contemporary Issues. Thousand Oaks: Sage Publications, 1995 at 51-52, 56.

[38] *Idem* at 52-53.

the divorce. Each spouse faces a post-divorce adjustment, which is going to be longer for women basically because of their smaller social network[39]; and 4) *financial consequences*; research data shows that divorce leaves men better off, but destines a majority of women and their children to relative poverty.[40]

From the abovementioned consequences of divorce it is easy to understand that divorce leads to immediate and lasting challenges for both parents and children. Divorce is a complex experience that combines legal aspects, family processes and parties' conflicting and strong emotions. After analyzing the consequences that divorce carries to the couple, to the family and to the society in general, it can be said that divorce is, first and foremost, a personal event that carries legal implications.

While in this chapter we try to locate family mediation within the private component of the family justice system, a majority of the literature tends to frame them as alternatives or contradictory processes. In that sense it would be useful to explore a little bit the differences between family mediation and adjudication; although this thesis does not see them as alternatives processes. The difference in approach and ideology between both processes makes a substantial distinction between them. On the one hand, because of its interest-based orientation, the values and the ethics underlying mediation promote an understanding of conflict not as an objective fact, but as a relational event

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[39] *Idem* at 54.

[40] Richardson, *supra* note 23 at 8.

between human beings that are facing an important and traumatic episode in their lives. On the other hand, because of its right-based orientation, adjudication handles the conflict in a linear way, stressing the legal aspects involved in it. Family mediation differs from adjudication in that in the former, the parties have the potential to achieve their own decisions; while in the latter a third party makes an authoritative ruling on contested questions of law or fact.[41] Because a third party decides for the parties in the adjudication process, he or she must decide in favor of one or the other party, which results in one party becoming a winner and the other a loser of the process. Consequently, during the process, the parties adopt an adversarial position by trying to strengthen their own arguments and minimizing the other party's claims.[42] In divorce mediation, the parties are encouraged to resolve their conflict in a non-adversarial way generating outcomes that benefit both parties, hence the win-win nature of the process.[43] During the process of family mediation parties feel empowered when they are encouraged to decide the issues they want to discuss; when their ability to speak for themselves is validated; and when they are allowed to reach their own decisions.[44] Empowerment occurs when parties recognize their personal capacity to identify and handle their conflicts, rather than relying on outside agencies or

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[41] Picard, C. et al: The Art and Science of Mediation. Toronto: Emond Montgomery Publications Limited, 2004 at 35.

[42] *Idem* at 37.

[43] *Idem* at 136.

[44] Lichtenstein, M: "Mediation and Feminism: Common Values and Challenges" in Mediation Quarterly 18(1), 2000 at 21.

the threat of force.[45] The process of adjudication does not offer the parties the possibility of empowerment, this feature being a very important difference between divorce mediation and adjudication. Divorce mediation focuses on the interpersonal aspects of the relationship between the parties[46], therefore it will pay closer attention to the emotional, psychological and interactional consequences associated with the divorce. It is said that the legal system is not able to supervise or enforce the fragile and complex interpersonal relationships between family members that continue after divorce[47], and paying attention to the future dynamics of the relationships between the parties is not an issue.[48] During adjudication the parties are viewed as merely bearers of the problem, having no right to participate directly on it; instead their lawyers represent them in the adversarial legal proceeding.[49] Conversely, in divorce mediation the parties are encouraged to speak for themselves even when counsel attends the mediation session.[50]

Mediation literature emphasizes that family mediation is particularly helpful to families going through the painful period of divorce.[51] Divorce mediation is useful for parties to redefine their relationships, allowing them and

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[45] Picard et al, *supra* note 41 at 61.

[46] *Idem* at 136.

[47] Folberg, J: "A Mediation Overview: History and Dimensions of Practice" in Mediation Quarterly, No.1 September 3-14, 1983 at 10.

[48] Picard et al, *supra* note 41 at 37.

[49] *Idem* at 36.

[50] *Idem* at 136.

[51] See Landau, B: "Family Mediation" in A. Stitt, ed., Alternative Dispute Resolution Practice Manual. Don Mills: CCH Canadian, 1996 at 3123; Lemmon, J: Family Mediation Practice. New York: Free Press, 1985 at 7.

their children to maintain a functional system.[52] The emotional connection between the spouses and the possibility that they may need to continue contact after divorce, mainly if they have children, makes family mediation a good choice. It is seen as an effective way to redress the negative effects of the traditional adversarial system dealing with marriage breakdown.[53] As we can see, the advantages of divorce mediation are basically related to a humanitarian approach to the process of conflict resolution by focusing on the future dynamics of the interpersonal relations between the ex-partners.

2.2 Family Mediation: Theory and Practice

As previously defined in the introductory chapter of the thesis, family mediation is a process designed to help families that have made the decision to separate or divorce. In a more comprehensive definition, family mediation is understood as follows:

> Family Mediation is a mediation of family matters, including married and unmarried persons, before and after judgments involving dissolution of marriage; property division; shared or sole parental responsibility; or child support, custody, and visitation involving emotional or financial considerations not usually present in other circuit civil cases.[54]

Family mediation is understood as a facilitative, non-adversarial conflict resolution process in which one or more family mediators intervene in family

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[52] Emery, *supra* note 34 at vii-viii.

[53] Richardson, *supra* note 23 at 9.

[54] Yarn, *supra* note 7 at 184.

conflicts assisting divorcing spouses to develop and design their own solutions to issues; and to help them to change their communication and negotiation styles from adversarial and confrontational to co-operative and integrative.[55]

According to family mediation literature, family mediation rests on four major pillars of knowledge and skills: family law; mediation and other conflict resolution theories; an understanding of family, adult and child development; and, specific information about the processes and structures involved in the specific dispute.[56] In other words, mediation of family matters not only requires mediators to have an understanding of the conflict at hand and the theories that they will employ to help the parties through the resolution of the conflict; but also, based on the peculiar consequences associated with marriage breakdown that were described in the previous section, it is necessary for family mediators to understand the complexity in the dynamics that exist in these conflicts and the important personal, legal and social consequences that its outcome leads to.

The family unit is the focus of attention for family mediators, therefore their primary task is directed to understanding family dynamics. According to Taylor[57], family mediators need to have theoretical knowledge about the dynamic of families that will help them to make sense of the struggle. Family mediators need to know about the theory and practical implications of how families maintain themselves, change, communicate, and function on a daily

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[55] www.fmc.ca/pdf/standardsweb2003.pdf

[56] Taylor, A: The Handbook of Family Dispute Resolution. San Francisco: Jossey-Bass, 2002 at 4.

[57] *Idem* at 3-4.

basis. Because of the particular type of relations of interdependence in family dynamics, mediation processes involving conflicts within the family unit have specific characteristics. Family dynamics are extremely complex, requiring family mediators to have a solid knowledge and understanding of the characteristics and structures of families in order to provide adequate dispute resolution when conflicts occur. Family dynamics and structures are also particularly diverse and variable, requiring family mediators to adapt to different family conflict dynamics.

Current literature on mediation recognizes the existence of different approaches to mediation. Picard et al examine the problem-solving, evaluative, transformative, facilitative, narrative and insight models; recognizing that "there is no one theory of mediation process and outcome."[58] It is not the intention of this thesis to analyse the characteristics of each approach. At present there is a critical debate over models of mediation practice.[59] The current state of the theoretical debate reaches the field of family mediation. There is not just one model that characterizes the practice of family mediation.[60] Some family mediators, especially lawyers-mediators, tend to adopt a more problem-solving, evaluative approach emphasizing the legal rights and entitlements of the parties and focusing on urging the parties to accept settlement and reach an agreement.[61] Family mediators who subscribe to the transformative approach pay attention to the interactions between the

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[58] Picard et al, *supra* note 41 at 101.

[59] See Picard et al, *supra* note 41 Chapter 4 (101-132).

[60] Landau et al, *supra* note 7 at 53.

[61] Picard et al, *supra* note 41 at 116.

parties focusing on transforming people by promoting recognition and empowerment to the parties.[62] In the narrative approach the mediator does not act as an expert that will do something for the parties, but rather the mediator will do something with the parties.[63] In this model, the mediator works with the parties' stories and deconstructs and re-constructs the stories to create shared meaning and mutual understanding.[64] In the insight approach the mediator helps the parties gain insights that shift the course of the conflict and create spaces for collective action. This insight enables them to reach consensual decisions that accommodate their needs.[65] Family mediators will use the approach they feel more identified with and the one that best suits the conflict at hand. Thus, it is not possible at present to identify either a dominant approach or a more appropriate theoretical model in the practice of family mediation.

Family mediators are organized in professional organizations. The first association of professionals interested in family mediation was created in Ontario in 1982. Other provincial associations for family mediators were created in the provinces of Alberta (1983), British Colombia (1985), New Brunswick (1985), Quebec (1985), Nova Scotia (1986), Saskatchewan (1986), Newfoundland (1987), and Manitoba (1987).[66] In 1985 a national organization was created: Family Mediation Canada. It is an interdisciplinary association of

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[62] Taylor, *supra* note 56 at 131.
[63] *Idem* at 134.
[64] Picard et al, *supra* note 41 at 127.
[65] *Idem* at 127.
[66] Landau et al, *supra* note 7 at 15; Devlin & Ryan, *supra* note 19 at 99.

lawyers, social workers, human services, and health care professionals, working together to create a better way to provide cooperative conflict resolution in a range of family issues. Family Mediation Canada established in 1996 the standards of practice as well as the certification process required to become a family mediator.[67] The Ontario Association for Family Mediation also regulates the practice of family mediators through its standards of practice[68]; its code of ethics[69] adopted on June 1986; and its policy on abuse[70] adopted on June 1994.

Family Mediation Canada (FMC) and the Ontario Association for Family Mediation (OAFM) establish the training and skills required for individuals seeking certification and accreditation from these organizations. For mediators certified as family mediators by FMC and/or OAFM their training covers the following areas: conflict resolution theories; psychological issues in separation and divorce, family dynamics and power imbalance; family law including custody, support, asset evaluation and distribution; family economics; and domestic violence education (FMC establishes 21 hours and OAFM established 14 hours of training). Interestingly, both organizations recognize that the establishment of these accreditation and certification processes does not prevent individuals who do not have these credentials from practicing as private family mediators. For family mediators ascribed to the family court system there are requirements as well. Family mediators, providing services in

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[67] www.fmc.ca/pdf/standardsweb2003.pdf

[68] www.oafm.on.ca/mediators/accfm_criteria.html

[69] www.oafm.on.ca/mediators/codeofethics.html

[70] www.oafm.on.ca/mediators/abusepolicy.html

connection with the Family Court, are required to have qualifications at least comparable to those of a "practicing mediator" as set out by the Ontario Association for Family Mediation (OAFM).[71]

There are several ways by which a couple enters into mediation. These are: 1) self-referral; 2) referral by lawyer; 3) referral by mental health professional; and 4) court-ordered mediation.

The Divorce Act in section 9(2) requires the lawyer to instruct their clients about the possibility to settle their dispute through family mediation and direct their clients to the mediation services available in the community.[72] At the Provincial level each province has legislation governing separation and relationship breakdown.[73] In most provinces, mediation is ordered or arranged with the parties' consent. In Quebec, Manitoba, Saskatchewan, Alberta and New Brunswick, however, couples can be ordered to attend at least one meeting with a mediator, but only after they have been screened for domestic violence.[74] In the province of Ontario[75], legislation provides for court-ordered mediation upon consent of the parties. Under the Children's Law Reform Act[76] *(C.L.R.A)* section 31(1), the Court can, upon application for custody of, or access to children and at the request of the parties, appoint a person selected by the parties to mediate any matter specified in the order. The Ontario Family

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[71] Taken from www.attorneygeneral.jus.gov.on.ca/english/family/mediation.asp

[72] R.S.C. 1985 (2nd Supp.), c.3, s. 9(2).

[73] Goundry et al, *supra* note 7 at 22.

[74] Landau et al, *supra* note 7 at 2.

[75] See Goundry et al, *supra* note 7 at 24; Landau et al, *supra* note 7 at 5, 23-24.

[76] R.S.O. 1990, c. C.12.

Law Act[77] *(F.L.A)* section 3 follows the same principle of the Children's Law Reform Act. That is, the court, subject to the parties' consent, may order mediation to resolve disputes related to property division and child and spousal support.

Common to all mediation models is that each mediation session, independently of the type of conflict, has three phases: the beginning, where the issues and parties to the conflict are identified; the middle stage, where the needs and concerns underlying parties' demands and positions are explored; and the end, where options to resolve the issues and meet underlying needs are generated, evaluated and agreed upon.[78] Whether mandatory or voluntary, participants reserve the right to end the mediation process at any time. The ethical stance of client self-determination is one of the most important characteristics of the mediation process.[79]

Before formally accepting clients for mediation, the mediator should screen the clients through intake or pre-mediation to be sure that they are appropriate candidates. The Ontario Association for Family Mediation (OAFM) Policy on Abuse[80] recognizes that not all cases involving domestic violence are suitable for mediation; moreover, the assumption is that mediation is probably inappropriate in cases of domestic violence. Nevertheless, the OAFM has established screening mechanisms to determine the potential of some

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[77] R.S.O. 1990, c. F.3.

[78] Picard, *supra* note 7 at 23-24.

[79] Taylor, *supra* note 56 at 310.

[80] www.oafm.on.ca/mediators/abusepolicy.html

cases to go to mediation. One of the most comprehensive screening processes identified in the literature is the Conflict Assessment Protocol (CAP) developed by Girdner.[81] This Protocol was developed with the aim to assess which divorcing couples are suitable for going to a mediation process, based on the degree of violence in their relationship. It was designed to be used by mediators in court, community or private practice. The Protocol is intended to help mediators to identify and learn about the parties' patterns of interactions and the dimensions of power and control in the relationship. Based on the information obtained through the screening, mediators assess the appropriateness of the case to go through a mediation process.[82]

The family mediator frequently interviews the parties independently to identify whether or not there is a history of spousal abuse. By doing so, the mediator can ask questions which detect incidents of spousal abuse. There is general agreement in the literature that individual meetings provide a safe place for the battered party to answer questions without the influence of the abuser.[83]

When domestic violence has been identified, the mediator decides if the case is appropriate for mediation. According to Perry, there are two criteria to determine if mediation is suitable: 1) the parties' ability to negotiate effectively

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[81] Girdner, L: "Mediation Triage: Screening for Spouse Abuse in Divorce Mediation" in Mediation Quarterly 6, 1990 at 366.

[82] For a more detailed explanation of the Conflict Assessment Protocol (CAP), refer to Girdner's article, *supra* note 81.

[83] Perry, L: "Mediation and Wife Abuse: A Review of the Literature" in Mediation Quarterly 11 (4) Summer, 1994 at 318.

and 2) the potential for future violence.[84] Girdner proposes how to determine when a case is not suitable for mediation.

> A case is inappropriate for mediation if the victim is unable to identify and promote her own needs, or if the abuser has a need to control the victim, gets easily frustrated by the idea of not getting all that he wants, accepts no responsibility for the abuse, has recently obtained or plans to obtain a weapon, has used a weapon in the past against someone, has been convicted of assaulting someone, is violently jealous, has fantasies or thoughts of killing his wife or children or has attempted to do so, has suicidal ideation, or has threatened suicide in response to separation or divorce.[85]

After concluding the screening process, the mediator should be able to determine whether or not the parties are: appropriate for mediation without any additional support, which is the case where an isolated episode of non-severe violence has occurred in the past; appropriate for mediation under specific circumstances, which is the case where there may have been a history of some abuse, primarily verbal or psychological, in which case it may be necessary for a lawyer, psychotherapist, family member or friend to be present acting as support for the victim; and not appropriate for mediation, which is the case where the parties are not able to negotiate safely.[86] Girdner sees these three categories in a continuum; on one side are the cases of non-abusive and non-controlling relationships and, on the other, are severely abusive, controlling and potentially lethal relationships. Girdner's concern lays on what

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[84] *Idem* at 319.

[85] Girdner, *supra* note 81 at 374.

[86] See Perry, *supra* note 83 at 318; Landau et al, *supra* note 7 at 35-36.

she named the "grey zone". For her, determining the grey boundaries between these three levels is the difficult part of the process.[87] In the cases that fall under categories one and two, the mediation process generally continues.

The middle stage of the process is the core of the mediation process. Here is where the mediator helps the parties to collaborate, acting as an advocate for both parties. When the parties are inclined to be adversarial and engage in positional bargaining, the mediator tries to empower and enable them to collaborate.[88] While maintaining a neutral position, the mediator educates the parties on the nature and elements of collaborative interaction and their role and responsibilities during the process. This includes helping the parties understand that the other party has different perceptions, interpretations, behaviours, emotions and goals that are legitimate as well. The mediator cultivates collaboration between the parties making, them realize the importance of the problem for them and the advantages of collaborative interaction and negotiation.[89] The mediator builds trust between the parties by facilitating the communication process between them. He or she helps the parties to move from a destructive to a constructive interaction; from an aggressive to an assertive interaction; from a hostile to a respectful interaction; from a positional to a collaborative interaction. Mediators assist each participant to identify the issues in dispute and state their respective hopes with the mediation process. During this stage the needs and concerns of the

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[87] Girdner, *supra* note 81 at 372.

[88] Picard et al, *supra* note 41 at 94-95.

[89] *Idem* at 168.

parties are discussed and brought out by providing the parties the opportunity to speak for themselves, while the mediator ensures that each party hears and understands the other participant's interests, concerns and needs. The mediator explores mutual and non-adversarial or competing interests in this stage, so that the parties are encouraged to resolve their problem collaboratively instead of minimizing the importance of the other party's interests. The mediator helps the parties to generate options to optimize negotiated outcomes. That is, the parties are encouraged to brainstorm options to meet their common interests. Subsequently, the parties select from the range of options the ones that meet their mutual interests and are realistic, contributing this way to a win-win outcome.[90]

The parties are encouraged by the mediator to obtain independent legal advice before and during the process to ensure the agreement is reached voluntarily and is fair for both parties.[91] At the end of the process, the mediator prepares a report, known as Memorandum of Understanding that contains the specific terms agreed to by the parties in relation to the issues discussed during the process. The parties have the option to decide before entering into mediation if they prefer open or closed mediation. Depending on the type of mediation chosen by the parties the content of the Memorandum of Understanding varies. If the parties have chosen open mediation the mediator is to file a full report on the mediation, including anything that the mediator

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[90] See Landau et al, *supra* note 7 at 58-60; Picard, *supra* note 7 at 24.

[91] Landau et al, *supra* note 7 at 20.

considers relevant to the matter in mediation.[92] If the parties have chosen closed mediation the mediator is to file a limited report, no evidence of anything said or of any admission or communication made in the course of the mediation is admissible in any proceeding, except with the consent of all parties to the proceeding in which the mediator was appointed.[93] Nevertheless, the Memorandum of Understanding always includes the terms agreed to during the mediation process.[94] At the end of the Memorandum of Understanding there is a clause advising the parties not to sign it right away until discussing the terms of the agreement with their respective lawyers.[95] The divorce process does not finish at this point. What the parties have done so far is to negotiate the terms and conditions of their divorce, but the mediator does not have the judicial power to end the parties' marriage. In that sense, a divorce judgment must be obtained from the Court in order to legally finalize the termination of the marriage.[96]

As outlined in this chapter, divorce mediation is a process designed to help the parties to personally negotiate the terms and conditions of their separation. The divorce process does not culminate when the parties sign the Memorandum of Understanding revised by their lawyers. For the legal termination of the marriage a decree of divorce from a Judge is needed. Because all divorce mediation processes are required to come back to the

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[92] Ontario Family Law Act; R.S.O. 1990, c. F.3, s. 3 (4-a).

[93] Ontario Family Law Act; R.S.O. 1990, c. F.3, s. 3 (4-b).

[94] Landau et al, *supra* note 7 at 221.

[95] See "Sample of Memorandum of Understanding" included in Landau et al, *supra* note 7 at 314.

[96] Payne & Payne, *supra* note 12 at 175.

legal system to get finalized, as discussed in the first section of this chapter, the place of mediation in the family justice system can be seen as a two-step process: the first part where the parties privately negotiate the terms of their separation through divorce mediation; and the second part where the terms and conditions of the divorce settlement are incorporated into the formal order of divorce in the public institution of the Court. One of the major concerns of many of the feminist critics of mediation is that what takes place in the first private stage of the mediation process, effectively dictates the outcome of the subsequent public judicial stage of the divorce process. The next chapter provides an overview of the feminist legal reformers' critique of the family justice system and family mediation in particular.

Chapter 3 – Feminist Legal Reformers' Criticisms of Family Mediation and the Mediation Community's Response: The Toronto Forums

3.1 Feminist legal reformers' critique of the Family Justice System and Family Mediation

As discussed in the previous chapter, advocates of family mediation express concern regarding the inability of the adversarial legal process to deal with the non-legal relational, emotional, and inter-personal aspects of divorce. Conversely, one of the fronts in which family mediation has been highly criticized by feminist legal reformers has been its inability to address the legal aspects associated with divorce. Those who object to the use of divorce mediation base some of their arguments on the private nature of the process. The lack of legal protection and safeguards for women and their children within a family mediation process is one of the major concerns associated with the private nature of family mediation.[97] It is said that because divorce mediation is conducted in the "shadow of the law", it will be less bound to rules of procedure, substantive law and precedent, and therefore it is questioned if whether the process itself is fair and the agreement is just.[98] The public nature of the legal system is recognized and accepted as one of its important and basic features. Divorce has been largely accepted as a legal event mostly because the law defines the rights and obligations of the parties arising out of their marriage. Moreover, the parties often have adverse or competing

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[97] See Abel, R: "The Contradictions of Informal Justice" in Abel, R (ed.) The Politics of Informal Justice. New York: Academic Press, 1982, 267-320; Lerman, L: "Mediation of Wife Assault Cases: The Adverse Impact of Informal Dispute Resolution on Women" in Harvard Women's Law Journal 7, 1984 at 57-113.

[98] Folberg, *supra* note 47 at 11.

interests and may not always be able to resolve them though negotiation; hence the Court has the duty and responsibility to deal with the legal aspects associated with the divorce.[99] Furthermore, there is the need to protect the parties' interests and their children's. It is the law's function to do this, providing safeguards to ensure that parties do not negotiate away their legal rights and entitlements. It is argued that the law ensures protection through the judicial process itself and legal representation of the parties.[100] The legal system protects individuals' rights and entitlements basically because of its public nature, while family mediation does not offer any guarantees.[101]

Feminist legal reformers and those who favour the use of family mediation share some concerns about the weaknesses of the adversarial legal process when dealing with divorce cases. However, the focus of many feminist legal reformers' critique of the legal system differs significantly from the one offered by family mediation advocates. While there are many different theoretical orientations apparent in the feminist critical literature, several commons themes emerge, among which is a structural concern about the disadvantaged position of women in society and the potential of the legal system in addressing this reality. Three main criticisms of the family justice system expressed by the feminist community follow. First, in our society there is a system of social inequality between men and women as social groups; the legal system is not able to overcome that inequality. Second, legal reforms

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[99] Marlow, L & Sauber, R: The Handbook of Divorce Mediation. New York: Plenum Press, 1990 at 6.

[100] *Idem* at 6-7.

[101] Goundry et al, *supra* note 7 at 35.

within the family justice system have produced a re-privatization of family law. Third, power and power imbalance have a negative impact on the relationship between the two genders; the family justice system is not able to overcome the structural power imbalance between the two genders.

It is important to recognize that the themes of inequality, power imbalance and the effects of the privatization of family law explored in this chapter are strongly interconnected. Accepting that, I will explain each of these three themes separately in order to provide a more thorough examination of their particular features. In doing so, we will be able to identify and understand the socio-structural roots in the feminist legal reformers' critique of family mediation. Let us then move to examine each of these three issues in more detail.

A. Inequality Between Men and Women

General speaking, inequality is about entitlements, that is: who gets what, how and why? It reflects a condition and a process where preferential access to the good things in life is not randomly distributed, but patterned around human differences that are defined as socially significant to merit entitlement. Inequities of power, wealth and status are embedded in the structures of society itself.

Most of the feminist legal reformers' analyses about the position of women in society are based on the gendered distribution of power in society.

Feminist scholars ask questions of how patterns of gender inequality reproduce themselves and how social relations are structured to sustain these inequalities. Majury states that structural situations of inequality exist because of a weaker position imposed on or ascribed to certain groups of people in society; women are one of these groups.[102]

Prominent feminist legal reformers argue that contemporary society is arranged following a patriarchal design, which implies that the social, economic and political spheres are controlled by men who have access to the good things in life.[103] As a consequence, women as a social group have often been denied opportunities available to the majority of men. Although women have achieved formal equality under the rule of law, in practice, in a society with patriarchal structures of power, women as a social group continue to be discriminated against and in some cases their individual rights are neglected or jeopardized. Smart identifies a distinction between law as practice and law as legislation when she explains:

> While a focus on law as legislation highlights the political gains achieved by feminist campaigns for change, a focus on law as practice often reveals the means by which a repressive social order is reproduced.[104]

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[102] Majury, D: "Unconscionability in an Equality Context" in Canadian Family Law Quarterly 7, 1991 at 133.

[103] Fleras, A: Social Problems in Canada: Conditions, Constructions, and Challenges. (4th Edition). Toronto: Prentice Hall, 2005 at 118.

[104] Smart, C: Law, Crime and Sexuality: Essays in Feminism. London: Sage Publications, 1995 at 154.

As Eichler points out:

> Legally we have to deal with the paradox that because the law mandates legal equality, it presumes that equality exists despite socio-economic inequality.[105]

The term substantive inequality[106] refers to the persistence of unequal living conditions, opportunities, and cultural status for women, even in areas of life where they have achieved formal legal equality. In their research, Goundry et al share their insights about how they feel that substantive inequality is manifested and reproduced.

> Substantive inequality is reflected in problems such as the persistence of domestic and other forms of violence against women, the undervaluation of women's paid and unpaid labor, the systemic barriers to women's full participation in the market economy, and high rates of female and child poverty. Policies and programs that are not designed carefully to address these issues are unlikely to serve women well. Instead, they are likely to reinforce and exacerbate substantive gender inequality.[107]

Women represent about half the world's population and perform nearly two-thirds of the work; nevertheless they earn about one-tenth of the income, while owning less than one one-hundredth of the property.[108] Boland and Wychreschuk offer similar information:

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[105] Eichler, M: "Social, Economic, and Legal Trends Affecting Families" Chapter 2 in Family Shifts: Families, Policies and Gender. Toronto: Oxford University Press, 1997 at 40.

[106] Goundry et al, *supra* note 7 at 5-6.

[107] *Idem* at 6.

[108] Fleras, *supra* note 103 at 113.

> Major differences between women and men persist in many areas of life including occupational status, employment, income levels, family responsibilities, education, social status, political influences and vulnerability to violence.[109]

The feminist legal reformers' criticism of inequality is also aimed at the legal system where women are believed to be victims of discrimination through the law itself, through legal procedures and in court judgments. Some critics have argued that the introduction of formal equality has actually reinforced existing inequalities.[110] To mention just one example, the Ontario Family Reform Law Act presumes that husbands and wives have the same economic responsibilities within the family. Wives are conceptualized as equal to their husbands and children are considered as the dependants of both parents. Reality shows, however, that in many marriages there is an unequal contribution in both financial and childcare and household management. Women's financial contribution to the family is less than that of men. Conversely, men are less likely to devote most of their time to house/children responsibilities, while women are the care provider par excellence. After divorce, women are less likely to maintain the same standards of living conditions they had during the marriage.[111] This particular example shows the

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[109] Boland, B & Wychreschuk, E: Making it Safe: Women, Restorative Justice and Alternative Dispute Resolution. Newfoundland: Provincial Association against Family Violence, 2000 at 8.

[110] Eichler, *supra* note 105 at 13.

[111] Douglas, K: Divorce Law in Canada. Ottawa: Parliamentary Research Branch, 2001 in http://proxy.library.carleton.ca:17220/login?url=http://dsp-psd.communication.gc.ca/Collection-R/LoPBdP/CIR/963-e.htm

incongruence of the laws assuming formal legal equality with the socio-economic reality for women that reflects substantive inequality.

Despite all the criticisms of the legal system in addressing the disadvantaged position of women in society, many feminist legal reformers believe that the use of family mediation presents even greater possibilities of inequality for women because the practice of family mediation is less open to public scrutiny and has fewer accountability structures. Hilton supports this last statement:

> The mediation movement has constructed a philosophy that far from resolving battered women's disadvantaged position, more likely, bars mediators from appreciating that the fundamental causes of wife assault lie in a society of substantive inequality which cannot be overcome simply by sitting a battered woman down with her abuser.[112]

Fischer et al[113] state that both the ideology and practice of mediation are incompatible with the dynamic of the abusive relationship between the parties and its cultural context of domination and control. Bailey[114] criticizes the extent to which family mediators have failed to recognize and address the reality that family mediation usually deals with a dispute between a man and a woman, therefore issues of gender inequality must be addressed. Shaffer[115] stresses that mediation rests on the assumption of two equal and competent

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[112] Hilton, Z: "Mediating Wife Assault: Battered Women and the New Family" in Canadian Journal of Family Law 9, 1991 at 48.

[113] Fischer et al, *supra* note 4 at 2118.

[114] Bailey, M: "Unpacking the Rational Alternative: A Critique Review of Family Mediation Movement Claims" in Canadian Journal of Family Law 8, 1989 at 93-94.

[115] Shaffer, M: "Divorce Mediation: A Feminist Perspective" in University of Toronto Faculty of Law Review 46 (1), 1988 at 166.

negotiators, which is an ideal that does not conform to the reality of the gendered organization of society; therefore it will replicate conditions of inequality supported by patriarchy.

In general, feminist legal reformers criticize the judicial system in recognizing and addressing the social disadvantaged and unequal position of women in society as a result of its patriarchal organization. Feminist legal reformers are even more concerned with the impact of the practice of mediation on women because of the individualist approach taken in the mediation process. Mediation practice relies on the presumption that gender equality has been achieved or that the mediator may act as if it has been achieved.[116] Feminist legal reformers criticize family mediators of not being able to realize and take into account the structural inequalities inherent to any dispute between a man and a woman.

B. Re-privatization of Family Law

Feminist legal reformers are concerned with some of the changes the family justice system has incorporated in custody law. These changes include, among others, the replacement of the concept of "parental rights" with the more child-centred "best interests of the child test".[117] This test offers no preference to maternal or paternal custody, appearing to be gender-neutral.[118]

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[116] Fischer et al, *supra* note 4 at 2162.

[117] Cohen, J & Gershbain, N: "For the Sake of the Fathers? Child Custody Reform and the Perils of Maximum Contact" in Canadian Family Law Quarterly 19, 2001 at 122.

[118] *Idem* at 123.

Feminist legal scholars argue that the changes imply a tendency towards the re-privatization of the family and that the gender-neutral reform provisions in Family Law may have produced a new class of poor-divorced women.[119] It is held that:

> A gender-neutral analysis of custody ignores or obscures the inequalities in power relations that exist between men and women by treating unequals as if they were equals. This analysis does not lead to equality and justice but more deeply entrenches inequality and power imbalances.[120]

It is argued that in custody provisions, the best interests of the children doctrine can create a pro-father situation because it is usually the father who provides more economic security and the one who has made less child rearing mistakes because of his less contact with the children.[121] Mothers seeking custody of their children in contested cases face a dual problematic. On the one hand, they fail to meet before the court the traditional expectations of the ideology of motherhood; on the other hand, they fail to demonstrate to the court economic self-sufficiency comparable to their husband as expected by the ideology of equality.[122] Likewise, feminist legal reformers are concerned with the growing tendency to embrace joint custody provisions in family law. The feminist legal reformers' critique of family law has highlighted the failings and danger of joint custody. They point out the potential of joint custody to

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[119] Boyd, S & Sheehy, E: Feminist Perspectives on Law: Canadian Theory and Practice. Ottawa: Faculty of Social Sciences, Carleton University, 1986 at 27-28.

[120] Cohen & Gershbain, *supra* note 117 at 160.

[121] Boyd & Sheehy, *supra* note 119 at 28.

[122] *Idem* at 30.

lessen the bargaining power of women and to devalue the primary parenting which a mother has taken, as well as undermine her autonomy after the relationship terminates.[123] Moreover, it is said that joint custody translates into legal rights to children and often has little to do with corresponding responsibilities. That is, it denotes an arrangement whereby both parents are legally entitled to make decisions concerning children, but only one parent, generally the mother, is given responsibility for the children's day-to-day care. Consequently, the residential parent has sole decision-making authority but must seek the approval of the non-residential parent regarding major events in children's lives.[124] For divorcing women with children these privatizing tactics serve to perpetuate and create situations where the women and their children remain bound to the former partner and therefore subject to his control.[125] Hence, from the feminist legal perspective, in practice, joint custody stresses substantive inequality.

Pickett outlines that although there has been a great deal in criticizing the role of law in the subordination of women, feminist legal reformers such as Woods, Bailey and Lerman, have concluded that the legal process provides a more appropriate and effective instrument for the protection of the rights of individual women than non-adversarial methods such as mediation. They argue that the public nature of the legal process provides the opportunity to create precedent, which not only impacts the case at hand but will also

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[123] *Idem* at 28.

[124] Bailey, *supra* note 114 at 79; Bourque, D: "Reconstructing the Patriarchal Nuclear Family" in Canadian Journal of Law and Society. Vol. 10, No. 1, 1995 at 3.

[125] Bourque, *supra* note 124 at 3.

influence future cases; therefore the public nature of the legal process makes it a more effective tool for affecting social change with respect to women's political and social status.[126] Pickett states that:

> If the choice were between mediation and formal legal process, most feminist legal commentators would appear to prefer the latter.[127]

Some feminist legal reformers have expressed concern with the privatization of family dispute resolution, which mediation entails and which is associated with the influence of a patriarchal familial ideology on the practice and discourse of mediation.[128] A common concern among feminist legal reformers is that family mediation privatizes rights and obligations, and the resolution of the dispute is removed from the formal justice system.[129] The privatization of family law carries as a consequence the failure of family mediation to protect individual rights and entitlements because of its limited public accountability relative to the court system.[130] In that sense, there is no recourse to the procedural and substantive safeguards that protect litigants as part of the public justice system.[131]

> In light of the substantial gains women have made in family law, family mediation trivializes family law issues by relegating them to a lesser forum. It diminishes the public perception of the relative importance of laws addressing women's and

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[126] Pickett, E: "Familial Ideology, Family Law and Mediation: Law Casts More Than a Shadow" in Journal of Human Justice Vol. 3, No. 1, 1991 at 27.

[127] *Idem* at 28.

[128] *Idem* at 27.

[129] Goundry et al, *supra* note 7 at 34-36.

[130] Hilton, *supra* note 112 at 46.

[131] Goundry et al, *supra* note 7 at 34.

> children's rights in the family by placing these rights outside society's key fundamental system of dispute resolution – the legal system.[132]

As a consequence of the privatization of family law, social inequities may be reproduced on a collective level and the existing power imbalance between the parties may be perpetuated on an individual level. As a result the status quo is maintained and women's inequality in relation to this private sphere of the family is no longer a public concern.[133]

Feminist legal scholars state that the arguments for mediation centre on the notion of the reconstruction of the family after divorce in order to continue to fulfil its role as the basic unit of society.[134] This reconstruction of the family envisioned in the mediation discourse, is to take place upon familial, patriarchal lines. Because the mediation process reproduces patriarchal relations and operates subtly to secure consensus from its participants, this process has been of central concern for feminist legal reformers.[135] Based on the mediation community's discourse about the reconstruction of the family, it is said that mediation favours joint custody as an excellent means to reconstruct the family.[136]

> Commitment to the formation of the binucleated family often results in a bias toward joint custody in much mediation literature.[137]

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[132] Woods, *supra* note 20 at 435.
[133] Goundry et al, *supra* note 7 at 34.
[134] Bourque, *supra* note 124 at 4.
[135] Pickett, *supra* note 126 at 32.
[136] Bourque, *supra* note 124 at 4-5.
[137] Pickett, *supra* note 126 at 32.

> Most Canadian mediators are explicitly biased in favour of joint custody and they have been successful in increasing the percentage of joint custody agreement. Mediators argue that joint custody is in the best interests of the children and therefore is advocated as the means of achieving this custody result.[138]

Feminist legal reformers state that family mediators' bias toward joint legal custody imposes enormous disadvantages on women, especially because it further weakens the woman' financial position in divorce mediation. That is, in order to resist the mediator's bias toward joint custody, the woman may give up more ground financially and negotiate away legal entitlements in order to trade it for custody of her children.[139]

In essence, feminist legal reformers argue that family mediation services have not eradicated the problems associated with the family justice system, but rather it has reproduced them in a forum that remains outside of the legal standards and public scrutiny.[140] For feminist legal reformers the legal system is the main system of dispute resolution rather than one of the many options that exist as was described in the first part of chapter two.

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[138] Bailey, *supra* note 114 at 76.

[139] Goundry et al, *supra* note 7 at 42 (citing others)

[140] *Idem* at 47.

C. *Power and Power Imbalance*

Power, from a sociological perspective, is explained from the different patterns of social stratification such as: class, gender, race and ethnicity, and regional location. Power in a relationship is linked to the dependence of one person to the other. Power can be recognized as the capacity to act or exert force; the capacity to influence the behavior of others. The dictionary of Conflict Resolution offers a broad definition of power using various concepts proposed by diverse authors.

> Power may be defined generally in terms of potential to influence the condition of others; the ability to change the outcome, benefits, or costs of others in a relationship; or the ability to control access to emotional, economic, and physical resources desired by the other person.[141]

From the feminist legal reformers' perspective, power imbalance has its roots in the structure of society. Power imbalance can be recognized as the consequence of a society that is mainly organized and guided by patriarchal norms, that is differentiated and stratified by gender, and that has an institutionalized ideology justifying male dominance in all socially significant contexts.[142] Power imbalance emerges in the literature as one of the women's movement's main concerns and incentives for social and political reform.

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[141] Yarn, *supra* note 7 at 354.

[142] Hart, B.J: "Gentle Jeopardy: The Further Endangerment of Battered Women and Children in Custody Mediation" in Mediation Quarterly 7, 1990 at 319 quoting Ellis, D: "Marital Conflict Mediation and Postseparation Wife Abuse" in Law and Inequality 8, 1989.

Neumann[143] makes reference in her article to the fact that for women's groups it is imperative to make changes in the patriarchal foundation of society and in society's sex roles and systems of power distribution.

Power imbalance is one of the key themes where feminist legal reformers ground their critique about the use of family mediation, especially in cases of spousal abuse. The concern is that family mediators may fail to recognize that although some couples can go to the mediation room with relatively equal bargaining power from an individualist perspective, there will always be present an imbalance in the power that women and men experience and express because of existing social structures. Zoe Hilton emphasizes the tendency for mediators to focus on individual characteristics and overlook social influences. She says:

> The problem is not that mediators necessarily discriminate against women as women, but they may fail to recognize the gender specific socialization patterns, which render women vulnerable in apparently gender-neutral practices. Beyond the gender equality of the written law, traditional expectations of domestic privacy and feminine ideals still abound.[144]

According to Diane Neumann[145], many feminist legal reformers defend the notion that family mediators cannot address the power differences between spouses because the mediator does not have the power to change the fundamental rules of a patriarchal society; therefore, mediation is not a

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[143] Neumann, D: "How Mediation Can Effectively Address the Male-Female Power Imbalance in Divorce" in Mediation Quarterly 9(3) 1992 at 228.

[144] Hilton, *supra* note 112 at 35-36.

[145] Neumann, *supra* note 143 at 228.

suitable alternative. Martha Bailey[146] highlights how some mediators discuss inequality of bargaining power in a gender-neutral way, suggesting that disparities in power are solely the result of personal characteristics of individuals and are unrelated to gender. Bailey argues that regardless of the model or individual mediator's approach, the rule is to treat psychological, economic, and emotional imbalances as personal matters to be addressed on an individualized basis rather than as existing within a framework of systemic imbalance.[147]

Feminist legal reformers criticize the incapacity of mediators to see the structural power imbalances between men and women that exist in a patriarchal society. From their perspective, mediators cannot overcome a substantive gender inequality and a gender power imbalance rooted in the patriarchal organization of contemporary society. The neutral role mediators are supposed to play prevents them from actively intervening during mediation to deal with the socially inherent imbalance in power between men and women. In regard to this Astor states:

> It is a critical aspect of mediator neutrality that the mediator should not take sides and should treat the parties equally. The problem here is that, if two unequal parties are treated equally, the result is inequality.[148]

Some feminist legal reformers express the fear that mediation is ineffective and inappropriate in cases with overtones of domestic violence

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[146] Bailey, *supra* note 114 at 93-94.

[147] *Idem* at 93-94.

[148] Astor, *supra* note 4 at 5.

because the objective of family mediation is to resolve conflicts or disagreements between the parties, while domestic violence is rooted in a struggle for power and control.[149] Hilary Astor[150] argues that violence creates such a strong imbalance of power that it is generally recognized that family mediation is not appropriate for those cases. Some feminist legal reformers argue against the use of family mediation in cases of domestic violence based on the notion of the culture of battering. Two important elements of this notion are the ideas that the "relationship between the victim and the abuser is folded into a systematic pattern of control and dominance by the abuser"[151], and that there is a "tendency, on both the part of victim and the abuser, to hide, deny, or minimize the abuse and the total control that the abuser attempts to exert on the victim."[152]

Feminist legal reformers are especially concerned with the use of family mediation in cases of domestic violence. They stress that mediating cases involving domestic violence fails to protect victims from future abuse and fails to empower victims with the ability to take control over their lives. It is argued that the methodology of mediation, which is designed to deal with conflict, is ill equipped to deal with violence. Family mediation generally requires contact between the victim and the abuser, which places the victims at risk, thus it contributes to re-victimizing abused women. Feminist legal reformers believe that mediation results in unfair agreements for battered women, who as a

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[149] Fischer et al, *supra* note 4 at 2118.

[150] Astor, *supra* note 4 at 5.

[151] Fischer et al, *supra* note 4 at 2120.

[152] *Idem* at 2120.

result of the abuse they have suffered, are unable to negotiate for their own self-interests. The abuser's control over his victim is maintained by the threat of future violence, which impedes the woman's ability to be her own advocate. It is argued that the mediation process with its emphasis on compromise and healing relationships may actually serve to undo the abused woman's initial steps to find empowerment as an individual person. Mediation cannot promise to protect battered women from the abuse that might result from expressing their needs; therefore the protection of battered women is not ensured through the mediation process. The expressions of the culture of battering are so subtle that screening processes employed to identify violence may be trumped by the hidden symbols of dominance and control shared only by the couple.[153]

In general, feminist legal reformers demand that family mediators recognize power imbalance as a reality that exists between men and women as social groups, instead of seeing power imbalance residing only at the personal level. They criticize the fact that family mediators fail to consider the dynamics of power and power imbalance from a structural perspective. Feminist legal reformers are particularly concerned with the use of family mediation in cases of wife abuse, stressing their concern on the feasible potential of the mediation process to effectively deal with these cases. In this critique, it is important to take into account a study conducted in Nova Scotia in 1999 regarding mediation in settling family law issues. This research was

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[153] See generally, Fischer et al, *supra* note 4 at 2157-2171; Hart, *supra* note 142 at 318-321; Joyce, H: "Mediation and Domestic Violence: Legislative Responses" in Journal of the American Academy of Matrimonial Lawyers 14(7), 1997 at 453-455; Lerman, *supra* note 97 at 71-97.

organized by the Transition House Association of Nova Scotia (THANS) in 1999. The goals of the research were to "gather abused women's experiences with mediation generally and in the new programs of the Family Division, and to collect specific input from women in groups that face compound discrimination."[154] The report from Nova Scotia indicates that mediation with an abuser instead became revictimization and unfairness for abused women. Their rights were compromised through misleading statements and/or lack of legal representation. The mediators showed limited ability to detect or handle abuse issues. The report main recommendation is that there should be established a zero-tolerance screen-out policy when abuse comes to the attention of a conciliator, mediator, lawyer or judge.[155]

As we have seen, feminist legal reformers criticize the use of family mediation based on socio-structuralist arguments. Family mediation is regarded as carrying risks for women in a society regulated by patriarchal rules, systematic gender inequality and power imbalance between men and women. Feminist legal reformers argue that the practice of family mediation focuses only on the individual and does not pay attention to the structural differences between the two genders that exist in a patriarchal society. Feminist legal reformers' concern is that family mediation does not diminish social inequalities and that family mediation does not make things any better for women.

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[154] Rubin, P: Abused Women in Family Mediation: A Nova Scotia Snapshot. A Report Prepared by the Transition House Association of Nova Scotia, 2000 at 3.

[155] *Idem* at 3.

3.2 Creation of a Dialogue: The Toronto Forums on Women Abuse

Violence against women and their children is one of the main concerns of the feminist legal reformers about the use of family mediation. Particularly in the 80's and beginning of the 90's, the feminist community had a strong voice in denouncing the danger of mediation for women, especially in cases involving abuse.[156] In 1991 the Government of Ontario responded to these concerns by taking the position that unless mediators could demonstrate that mediation was not harmful to abused women, there would be no further funding or legislative support for family mediation.[157] That governmental stance certainly got the attention of the Ontario Association for Family Mediation. In addition, family mediators also expressed concern about who qualifies as an appropriate candidate for mediation and under what conditions. The heightened awareness of the predicament of abused women in mediation and the recognition of the importance of the feminist legal reformers' critiques of mediation, created the idea for mediators to promote a dialogue with women's groups, particularly those with direct experience in helping women victims of abuse.[158] In that sense, the Ontario Association for Family Mediation decided to create a venue to bring together women's advocates and family mediators from across North America to talk about their concerns in relation to the use of family mediation in cases of abuse.

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[156] See previous section for discussion of the criticisms of family mediation from the feminist legal reformers' perspectives.

[157] Landau, *supra* note 1 at 63.

[158] Landau, *supra* note 1 at 64; Landau, B. et al: Report from the Toronto Forum on Woman Abuse and Mediation. June 1993 at 1.

> The concept of a forum on domestic violence was initiated in response to the deeply felt concerns of women's advocates about the risks of family mediation in cases of abuse.[159]

Landau described how much effort and time it took to put together an agenda that calls the attention of women's groups and shelter workers. The objectives of the Forum were:

> "To bring together individuals with different perspectives on the role of mediation in the divorce process where there has been abuse in order to hear the concerns of shelter workers and battered women's advocates about mediation; to explore differences and similarities in views, particularly with respect to screening for suitability, education of mediators, and standards of practice; and to discuss appropriate referral and areas of cooperation between different services/professional in the future."[160]

Representatives of family mediation associations and women's advocacy groups from across North America were invited to the Forum. In the list of participants important emphasis was put on the inclusion of native women, women of colour, immigrant women and women with disabilities. Landau recognizes the assistance she received from a number of women's advocates, shelter workers and academics both in framing the agenda and in suggesting the names of participants.[161] Landau highlights the importance of cautiously selecting the names of key women's advocates, she states:

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[159] Landau, *supra* note 1 at 63.

[160] *Idem* at 65.

[161] *Idem* at 63-65.

> I needed to build some bridges with a few, very credible, high-profile women's advocates across North America, so that front-line workers would feel that it was safe and acceptable to attend.[162]

Public funding for the meetings was obtained through mediation associations and women's advocacy groups.[163]

The first Toronto Forum was held in May 28-30, 1992, coalescing fourteen family mediators and approximately fifty women and children's advocates.[164] It was decided to invite a significantly higher number of women's advocates than mediators so that the women's advocates would feel in a safer and powerful position. The meeting was structured following the steps of a mediation process trying to create a bond between the participants and a feeling of common ground considering the considerable tension that existed among participants prior to the forum. It was necessary to narrow the gap that exists between family mediators and women's advocates, which was conditioned by the high level of distrust and possible misunderstanding about the extent of their differences. Attempting to accomplish this objective, the opening panel comprised of representatives of women's advocates, had the opportunity to speak to the mediators regarding their concerns about the existing services for divorcing families. Two prominent American feminist legal reformers, Barbara Hart and Linda Girdner, stressed the concerns about family mediation in cases of abuse and the need for screening the clients prior

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[162] *Idem* at 64.

[163] *Idem* at 64.

[164] Landau et al, *supra* note 158 at 1.

to mediation.[165] Participants were asked to choose among the topics of screening, mediator education and alternative referrals and to explore the needs under each topic and then the options for meeting these needs. Both mediators and women's advocates participated in a demonstration of a mediation screening session where they were encourage to offer suggestions to the mediator as to how to proceed.

> The women's advocates participated enthusiastically and were extremely helpful on generating ideas about how to screen, safety planning, and alternatives when mediation was clearly not appropriate. They also guided an experienced co-mediation team through the process of safely terminating without revealing the woman's disclosure of the family secret.[166]

At the end of the first Toronto Forum family mediators recognized the enrichment of the experience and expressed their willingness to continue working collaboratively with women's and children advocates and shelter workers in making positive changes in the standards of practice for family mediators, including screening practices, mediators' education, and use of alternative resources when mediation is not appropriate.[167]

The second Toronto Forum was organized one year later in March of 1993 for three days. Landau highlighted the difference in tension between the first Forum and the second one as a positive implication of the first Forum.

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[165] Landau, *supra* note 1 at 66-67.

[166] *Idem* at 68.

[167] *Idem* at 68.

> Although there was still some apprehension by the women's advocates about being co-opted into endorsing something they felt was unsafe, there was an acceptance that mediators were beginning to take the issue of abuse seriously.[168]

The objective of the second Forum was to engage in cooperative policy development addressing the issue of abuse.[169] Of important relevance to this second Forum was the joint work between family mediators and women groups' advocates in addressing some issues of common concern. The participants' inputs to issues such as screening process, alternatives to mediation, safety and training of mediators were considered for the recommendations stressed in the Report from the Toronto Forum. In the second Toronto Forum abuse was defined more broadly, covering both psychological and physical aspects; the importance of screening and its objectives, as well as alternative approaches and safe termination were discussed; issues regarding the safety measures for clients, children and the mediator were addressed; the necessity to improve the training of the family mediators and its content was stressed; and the alternatives to mediation when the clients do not meet the established criteria was discussed.[170]

The Toronto Forums marked a shift in the way feminist legal reformers and family mediators were expressing their opinions in relation to the use of family mediation in cases of domestic violence. Landau describes the significance of the Toronto Forums. She states:

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[168] *Idem* at 69.
[169] *Idem* at 68.
[170] *Idem* at 69-70.

> The meetings were emotionally and physically exhausting, but also exhilarating. At the end, there were many touching moments as each participant expressed what he or she had gained, both professionally and personally, from the experience of collaborating together. In general people felt well heard, respected, and accepted on a personal level.[171]

Landau sees as one of the most positive outcomes of the Forums the building of trust and cooperation between family mediators and women's advocates. The concerns raised by the latter group, when listened to respectfully, were of enormous help in suggesting improvements in the standards of practice of mediators.[172]

In June of 1993 some participants from both Toronto Forums gathered together the recommendations proposed at the end of the second Toronto Forum. Contributors to the drafting of this report were both representatives from women's advocates and family mediators. The purpose of the report is explicitly outlined in its introduction: "to help family mediation associations to devise and promulgate standards of practice, policies and protocols for the safe, fair and specialized practice of family mediation in cases involving abuse against women."[173] The recommendations addressed four main topics:

1) Education and training of mediators: mediation associations ought to establish standards for the education and skills training of family mediators in areas of abuse in intimate relationships and its

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[171] Landau, *supra* note 1 at 70.

[172] *Idem* at 71.

[173] Landau et al, *supra* note 158 at 1.

consequences for mediation; the unique needs for culturally diverse populations; procedures, skills and instruments to screen for abuse; specialized skill interventions to ensure safety; and alternatives to mediation.[174]

2) Screening of candidates for mediation: mediation should never occur without first screening for abuse; clients should be interviewed separately and in a safe environment; screening instruments ought to be carefully designed to determine the nature and extent of abuse and its effects in safety, voluntariness and fairness.[175]

3) Safety issues in mediation: provisions for client and staff's safety should be in place prior to offering mediation services. Screening for abuse and maintaining safety provisions are on-going obligations throughout the entire mediation process. Shuttle mediation; ensuring the woman arrives after her partner and leaves before him; allowing the presence of an advocate person are some of the strategies recommended for ensuring the safety of the women.[176]

4) Alternatives to mediation for abused women: jurisdictions should provide education about the benefits and risks of available alternatives to marital dissolution for abused women.[177]

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[174] *Idem* at i.
[175] *Idem* at ii.
[176] *Idem* at ii.
[177] *Idem* at iii.

One of the direct consequences of the Toronto Forums was the adoption in June 11th, 1994 by the Ontario Association for Family Mediation (OAFM) of a Policy on Abuse, which was incorporated into OAFM's Standards of Practice. The OAFM was the first Canadian mediation association to adopt a domestic violence screening policy.[178] Many of the concepts and recommendations adopted in the Policy on Abuse came from the Report from the Toronto Forum. The Policy on Abuse established safety standards and criteria for assessing whether mediation may be appropriate, including also the necessary training of the family mediator to effectively recognize and deal with cases of abuse.[179] Different institutions have developed criteria for mediator qualifications. For instance, Family Mediation Canada (FMC) and other provincial organizations, such as Ontario Association for Family Mediation (OAFM) have established the necessary training that a family mediator requires in order to mediate disputes where violence has been identified. The training includes issues related to psychological and physical abuse and its impact on family members; effective techniques for screening, implementing safety measures and safe termination; and referral to appropriate resources in addition to or instead of mediation.[180] Standards of practice have been developed as a step forward that recognize and incorporate the feminist legal reformers' critique in relation to the competence of the family mediator to deal with cases of domestic violence. The goal is to ensure the family mediation

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[178] Landau et al, *supra* note 7 at 14.

[179] www.oafm.on.ca/mediators/abusepolicy.html

[180] See www.oafm.on.ca/mediators/abusepolicy.html; www.fmc.ca/?p=Professionals/Certification-QandA.htm

community understands and realizes that good practice requires family mediators have the sufficient skills and knowledge, in particular about family dynamics, violence and power relations.

The two Toronto Forums give some indication that the practice of family mediation has been influenced by the feminist legal reformers' critique of family mediation. Landau stated that this critique has offered family mediators an opportunity to reconsider some of the fundamental assumptions about mediation and to shift their positions and practices to recognize and incorporate the criticisms.[181] In that sense, the family mediation community has accepted and recognized the importance of the critique for the development of family mediation as a profession. Recommendations for change by feminist legal reformers and women's groups are valuable as many members of these groups deal on a daily basis with battered women and are aware of women's reactions, needs, concerns, responses, behaviours, fears, and expectations. Their suggestions, if taken seriously by family mediation practitioners, can advance the practice of family mediation in a positive and substantial way by helping family mediators become more accountable in their practice. Both family mediators and women's groups share a common value: to protect women and to provide them with the necessary support they will need when facing a situation of abuse.

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[181] Landau, B: "Qualifications of Family Mediators: Listening to the Feminist Critique" in C. Morris and A. Pirie (eds.), Qualifications for Dispute Resolution: Perspectives on the Debate. Pub. University of Victoria, Institute for Dispute Resolution, 1994 at 27.

The Toronto Forums were the formal space provided to feminist legal reformers and family mediators that comes across in the literature to engage in a constructive dialogue expressing their concerns about the practice of family mediation and to recommend specific changes in its practice. In 1994, OAFM incorporated in its standards of practice recommendations for change proposed in the Report from the Toronto Forum. When analyzing the dimension of the changes introduced in the practice of family mediation as a result of the Toronto Forums, some reflections arise for me. The OAFM establishes the requirement of using a written questionnaire in order to obtain basic information and assess whether or not there has been violence in the relationship. However, it does not provide in its standards of practice a uniform tool or a pre-established set of questions to be followed by all family mediators. How then can family mediators know what type of questions are more effective to ask and how to ensure a full disclosure of the violence if mediators will be asking questions that have not been tested as effective for disclosure? The OAFM Policy on Abuse establishes as safety procedures that the mediator makes sure the women arrives at the mediation session after the abuser and leaves before him; encourages the mediator to use shuttle mediation and to allow a support person in the waiting room during screening and the mediation session. Are these safety measurements sufficient to protect battered women and their children? The OAFM Standards of Practice requires a minimum of 14 hours on domestic violence education. Is 14 hours of training enough to identify and effectively address all the complex issues

associated with the dynamic of violence and its psychological and social effects, especially keeping in line with the concerns addressed in the Nova Scotia report in 1999? The standards of practice established by OAFM are a set of regulations that must be followed by accredited family mediators. How to ensure that all family mediators practitioners not accredited by OAFM have the necessary training and screen for violence? How might this lack of training impact the practice of family mediation? More than ten years have passed since the last Toronto Forum. As a researcher, it seemed important and timely to take the dialogue further and to find the answers to my concerns. To do this, I talked with professionals that represent the two constituencies in the debate about their thoughts regarding the implementation of policy changes in the practice of family mediation. The next chapter provides information about our conversations.

Chapter 4 - Analysis of the Interviews

4.1 Introduction

As discussed in the previous chapter, in 1992 the family mediation community organized a formal space to promote a dialogue between feminist legal reformers and family mediation practitioners. This initiative was generated by the feminist legal reformers' critique of family mediation, especially with regard to domestic violence. It was also discussed how during the Toronto Forums a constructive dialogue between these two groups was engaged and the positive implications that dialogue had for the practice of family mediation. It is interesting to notice that after 1994 there have been relatively few publications[182] coming from the feminist legal reformers addressing their current opinions in relation to the practice of family mediation, nor is there any indication in the literature regarding the organization of other Forums providing the opportunity for dialogue between these two groups. It seemed necessary to explore the state of the dialogue between feminist legal reformers and family mediation practitioners ten years after their first formal dialogue. Talking with representatives of the two sets of voices participative in the dialogue would provide information on whether the policy changes introduced to the practice of family mediation actually reflect each groups' concerns, as well as determine whether these two sets of voices share some

[182] See Boland, B. & Wychreschuk, E: Keeping an Open Mind: A Look at Gender Inclusive Analysis, Restorative Justice and Alternative Dispute Resolution. Newfoundland: Provincial Association Against Family Violence, 1999; Boland & Wychreschuk, *supra* note 109, Goundry et al, *supra* note 7; Neilson, L. et al: Spousal Abuse, Children and the Legal System. Final Report for Canadian Bar Association, Law for the Futures Fund. Fredericton: Muriel McQueen Fergusson Centre for Family Violence Research, 2001 in www.unbf.ca/arts/CFVR/spousal_abuse.pdf; Rubin, *supra* note 154.

of the same concerns and perspectives today as in 1994. My intention with the conversations was also to provide a space for the participants to express their current concerns and suggestions about family mediation as it is practiced today in Ontario. By no means are the considerations offered reflective of the feminist legal reformers and family mediation communities' opinion in general. However, the insights do provided a glimpse of the state of the dialogue between the two groups. In subsequent pages are described the opinions expressed by the aforementioned groups in relation to the current practice of family mediation.

4.2 Investigative Approach

This interview study was designed following the principles of qualitative research, which emphasize that qualitative analysis is designed to uncover questions and answers that create verifiable descriptions of social phenomena[183] and it is "aimed to produce a wealth of detailed information about a small number of cases."[184] It can be said that qualitative methods are characterized by the investigator's flexible exploration of the phenomena of interest with the aim of comprehending it.

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[183] Rothe, J.P: Undertaking Qualitative Research: Concepts and Cases in Injury, Health and Social Life. Edmonton: University of Alberta, 2000 at 20.

[184] Patton, M.Q: Qualitative Research and Evaluation Methods. Thousand Oak, California: Sage Publications, 2002 at 14.

A. *The Participants*

Qualitative research does not require large samples to produce relevant information. According to Patton[185] the size of the sample depends on what you want to find out, why you want to find it out, how the findings will be used, and what resources (including time) you have for the study. The selection of the participants was based on the necessity for this study to obtain relevant information from professionals that represent the two voices of the discourse.

Five lawyers, two psychologists and one social worker composed the groups of participants in this study; all were from Ontario. All of them are professionals with more than ten years of experience in their field of work. This study does not require participants to divulge their personal identities. Participants were offered anonymity, which they all accepted by signing the Informed Consent Form required by the Research Ethics Committee of Carleton University. The names of the participants are not disclosed, although their respective professional roles as family mediators or feminist advocates are identified in the research. The participants were distributed in two nominal groups of four people each for a total of eight participants. Members of both groups were very enthusiastic and collaborative in participating in this project. They all acknowledged the necessity of research and offered interesting views in their reflections.

The first group was named the "Feminists Group" and included four participants, three from the Ottawa area and one from Kingston. There was

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[185] *Idem* at 228.

one professor from Queen's University who has written articles questioning the impact of family mediation on abused women. She was labelled respondent one. There were two professors from Carleton University, who were labelled respondents two and four. Respondent two was chosen based on her work in the area of family law and in her active role in the violence against women movement. She has also written articles regarding the impact of abuse on women. Respondent four does research and teaches about violence against women and children and its personal and social effects. The other member of this group was an executive from the Canadian Association of Elizabeth Fry Societies who has an extensive experience working with battered women. She was labelled respondent three. In general, members of this group have a direct connection with the critique of family mediation in cases of domestic violence; have written articles about it; and have done research about the impact of abuse on women. All members from this group were females and their age ranged from mid-forties to mid-fifties.

The other group was named "Family Mediators" and it was comprised of four family mediators located in Ottawa. The family mediators from this group have different backgrounds. There were two lawyers, one social worker and one child psychologist. Participants in this group have practiced as family mediators for ten or more years and have considerable experience dealing with divorce cases involving domestic violence during the course of their practice. These participants were labelled five, six, seven and eight. The first three respondents from this group were family mediators working for the

Ottawa Family Court. The other member of this group was a private family mediation practitioner. Two females and two males composed this group. Respondents in this group ranged in age from late-thirties to late-fifties.

B. The Interview Study

For the purpose of this study personal interviews were used, which allowed me to obtain relevant information directly from each participant. The type of interview selected was the standardized open-ended interview, which is characterized by the fact that each interviewee is asked essentially the same questions, so the interview questions should be written out in advance and the interviewer should ask those questions exactly the way they were written.[186] This type of interview allowed me to ensure that each participant was asked the same questions while at the same time give them the opportunity to freely and openly express their opinions using their own words and using as much time as needed. From my view, this type of interview in which the participants are expected to express all their experience, reflections and opinions about a specific topic implies recognition of their expertise. It was precisely in the quest for their opinions and reflections and because of their expertise, that I was interested in talking to them.

The interview questions are included in Appendix I. The questions were developed based on both the feminist legal reformers' concerns regarding the practice of family mediation and the policy changes introduced in the practice

[186] Patton, *supra* note 184 at 344, 346.

of family mediation as a result of the Toronto Forums. The questions were intended to explore the feasibility of the policy changes in fulfilling the concerns regarding the use of family mediation in cases of spousal abuse as they were expressed in the Toronto Forums. The rationale for these questions was based on concerns the researcher was left with at the end of chapter three. Question one was an introductory question to open the dialogue between the researcher and the participants and to engage them in the topic at hand. Question two intended to get a sense about if there was uniformity among participants in recognizing the historical critique of family mediation. Questions three to five were based on the changes that occurred in the practice of family mediation as a result of the Toronto Forums in the areas of training, screening and safety procedures. The purpose of these questions was to elicit personal and professional opinions regarding the impact of the changes that occurred in these areas for the current practice of family mediation. Question six had the objective to provide an opportunity to the interviewees to brainstorm about the future development of family mediation practice. Questions seven and eight aimed to provide a space for the two groups to think about the arguments against and in favour of mediation from the other' sides perspective. While doing the literature review, I found relative few publications[187] since 1994 addressing feminist concerns about the practice of family mediation and their considerations about the impact of the changes introduced in the practice of family mediation after the Toronto Forums. That

[187] See Rubin, *supra* note 154.

caught my attention, especially because there was a lot of feminist legal reformers' publications during the 80's and beginning of the 90's. The objective of question nine was to gather information about the participants' opinions regarding this situation. Question ten is a closing question designed to give the participants an opportunity to express any other thoughts they had or wanted to share about the topic of the interview.

The personal interviews were conducted by the researcher between the months of February-March 2005 in the cities of Ottawa and Kingston, in the province of Ontario. The interviews ranged from one to one and a half hours in duration and all of them were recorded with explicit acceptance of the participants.

4.3 Limitations of the Study

This study, as all human creations, has limitations. The first major shortcoming of this research has to do with the size of the sample. Although efforts were conducted to gather more participants and more professionals were invited to participate in the research, only the current eight participants were the ones who accepted to be part of the study. Issues with timing and other professional commitments were the major factors that made it inconvenient for some people to be able to participate.

Another downside of the research was the regional representation of the sample. All the participants were located in Ontario, a majority of them in

Ottawa. The results obtained in this study do not represent a national perspective but a very regional one. It would be interesting to find out if and how the perspectives change throughout the different regions of the country. This limitation was mainly a product of the researcher's lack of contacts in other parts of the country and her personal preference in conducting in-person interviews instead of telephone interviews.

Another flaw in this research is the notable absence of the perspectives of battered women who have experienced the process of family mediation. The perspectives of these women would be invaluable in a study of this sort, making women's needs heard in women's own voices. This researcher opted for not including battered women in her sample because of the difficulty in finding some women willing to talk about this issue with a stranger. Another important reason that reinforced my decision of not interviewing battered women was my self-awareness about my lack of personal and professional experience in dealing with people who have been victims of abuse.

4.4 Results of the Interviews

After transcribing the interviews in their entirety, I created a matrix by assigning the accounts of each participant to each question in order to better organize the responses. I searched for the topics of screening process, training and safety procedures that surfaced within each interview, gathering similar remarks wherever they appeared in each person's account, and then summarizing them in descriptive sentences while identifying possible

quotations. A general summary of the answers that participants from both groups offered to the questions follows.

"What do you understand as the critique of family mediation in cases of domestic violence?"

The feminist group when responding to this question stressed the existence of social inequality between men and women. From their point of view, this inequality is inevitably reproduced during the mediation process. All the respondents in this group recognized and are familiar with the historical criticisms of family mediation in cases of domestic violence coming from the feminist community. Issues of power imbalance, inequality between men and women in society, the role of the mediator and re-victimization of women, were stressed in their answers both as the most relevant criticisms and as those shared by them. The following quotes exemplify their ideas about the topic.

> "Having a process that required both parties to participate in person will provide an opportunity for re-victimization."[188]
>
> "One problem is that women who go to mediation probably do not recognize they have been abused and even if they recognized it, they probably will not disclose it."[189]
>
> "To presume you can equalize a dispute that has not started from an equal basis is absurd."[190]
>
> "Power differentials will exist in any case where there are a man and a woman involved in mediating any issue, but in cases of battered woman it will be more pronounced...I do not know

[188] Personal interview, Participant 1

[189] Personal interview, Participant 2

[190] Personal interview, Participant 3

> if the mediator can really protect the women or articulate the women's best interests."[191]

Family mediator respondents are also aware of the critique of family mediation in cases of domestic violence. In their answers to this question, issues of power imbalance, inequality between men and women, re-victimization of women and the role of the mediator were identified. Three out of four of the respondents in this group mentioned the issue of power imbalance between the parties. Respondent six did not mention this issue at all in his answer. Respondents six and eight recognized inequality between men and women and the role of the mediator as criticisms of family mediation in cases of domestic violence. It was only respondent five who mentioned the problematic of re-victimization of women in mediation.

The content of the respondents' answers underlines the reasons by which feminist legal reformers have historically criticized family mediation, which are: systemic inequality between men and women; power imbalance between the two genders; and the potential re-victimization of women during the mediation process. It is interesting to note that issues that were identified twenty years ago by feminist legal reformers, as outlined in chapter three, still remain as current concerns expressed by legal academics. An interesting note is that some family mediation practitioners also recognized these issues as topic of concerns. The fact that there still remains concerns regarding the potential of family mediation to address the feminist legal reformers' criticisms

[191] Personal interview, Participant 4

implies doubt about the practical possibilities of family mediation to surpass the structural problems feminist legal reformers critique.

"How effective would you consider to be the screening process employed to determine the appropriateness of cases for mediation?"

The feminist group emphasized that if a woman does not want to disclose violence she will not.

> "A mediator cannot effectively screen if a woman is not ready to disclose or does not want to. These women have learned to live hiding their feelings for such a long time to their friends and even family, that they have become pretty good at that."[192]
>
> "The more marginalized a woman is, the less likely it is she reveals her abusive relation."[193]

In the case of respondent four, there was a direct reference to the training of the family mediator not only for screening, but also especially for dealing with such difficult cases.

> "If people are going to work in this area, they have to be very informed and skilled."[194]

In general, the feminists are concerned with two aspects: the difficulty for mediators to successfully screen for violence and the necessity for them to receive a specific training to deal with these issues.

In their answer to this question, the majority of family mediators expressed their concerns about the lack of regulation regarding the use of the

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[192] Personal Interview, Participant 2

[193] Personal Interview, Participant 3

[194] Personal Interview, Participant 4

screening process. A common concern was that every individual family mediator could use her own screening tools. The OAFM does not provide a guideline about how the screening tools should be employed. Examples of these concerns are expressed in the following quotes.

> "The OAFM requires in its ethic standards that family mediators screen for violence but it does not give them an instrument for doing it."[195]
>
> "There is no formal mediation authorized set of questions to ask clients."[196]
>
> "The screening process has to be used in a uniform way."[197]

Another concern raised by family mediators was about the role of mediators during the screening process, specifically their skills to identify violence in the relationship. In this regard, participants five and eight stated:

> "Sometimes the abuser and the abused are very skillful in covering up the violence and if that is the case then it may or may not be discovered in the process of mediation."[198]
>
> "If a person wants to lie about the violence it will be difficult to identify by the mediator."[199]

On the other hand, the other two respondents from this group do not express concern about this issue. According to their experience, their clients always have revealed to them the violence.

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[195] Personal Interview, Participant 7
[196] Personal Interview, Participant 6
[197] Personal Interview, Participant 8
[198] Personal Interview, Participant 5
[199] Personal Interview, Participant 8

> "I have never been aware that my clients have not disclosed violence during the intake interview."[200]
>
> "Majority of my clients disclose violence without misleading me."[201]

Although the family mediation practitioners mostly agreed about the lack of regulation in the profession and the necessity for a body of regulation that helps family mediators to effectively screen for violence, when expressing their views and personal experiences about the effectiveness in the role of the mediator during the screening process, their answers differ.

Family mediation practitioners offered a new consideration in relation to the topic of this question. They were concerned about the lack of standards in screening. This concern in itself is not surprising, as indicated in the second section of chapter three, although the OAFM requires mediators to screen for violence, it does not provide them with a guideline about how the screening tools should be employed and as a consequence, the screening process is not used in a standard way. Family mediators believe that the standardization of the screening process would facilitate family mediators' work and at the same time, would provide them with a uniform tool that will help them to identify violence.

The answers to this question revealed that legal academics and family mediators have concerns about the effectiveness of the current screening process used during the mediation process. Similar concerns lie on the

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[200] Personal Interview, Participant 7

[201] Personal Interview, Participant 6

feasible possibilities of the screening process to effectively identify violence. Some respondents asserted that if a woman is not ready to disclose her violent relationship it is very unlikely the family mediator is able to recognize the signs or even get her to disclose it. These participants' concerns can be explained from a culture of battering perspective, which emphasizes the idea that the abuser exerts psychological control over the victim even without his physical presence; therefore his influence on her is going to be present during the intake and throughout the process in general.[202]

"Family mediators have developed safety procedures to protect abused women Do you think that with the introduction of these procedures feminists' concerns about mediation are covered?"

Feminist respondents agreed to the point that the safety procedures established to address the safety concerns of women are useful only during the mediation process. Some of their concerns are as follows:

> "The mediator is there for a limited period of time and for specific circumstances. It is fine to put safety plans and so on, but that cannot protect from further abuse."[203]
>
> "The abuser can find the woman later and there is nothing the mediator can do about that."[204]

From their point of view, these mechanisms do not prevent the abuser from having access to the victim out of the mediation room.

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[202] See Fischer et al, *supra* note 4 at 2163.

[203] Personal Interview, Participant 2

[204] Personal Interview, Participant 4

Family mediation practitioners offered different concerns in relation to this question. The following quotes exemplify their basic ideas.

> "It is artificial to think that with the woman leaving the mediation room before the abuser she will be safe and/or he will not be able to find her."[205]
>
> "I use all of them myself and from personal experience I can see they are useful."[206]
>
> "The mediator only will help the parties to reach an agreement but his job ends there."[207]

Based on the family mediators' answers, it seem that the safety procedures are effective only during the mediation process. But how to ensure that they really work within the process? Family mediators do not believe they are able to further protect the woman once she leaves the mediation room. Family mediation practitioners stressed the idea that their responsibility for the safety of women is limited to the mediation session. In their answers, family mediators are reflecting a comprehension of their professional role according to what is regulated in the safety standards established by OAFM Policy on Abuse:

> The mediator must promote the safety of all participates in the mediation process and its outcome.[208]

Family mediators are aware of their professional responsibility in creating the necessary conditions to preserve women's safety during the

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[205] Personal Interview, Participant 8

[206] Personal Interview, Participant 7

[207] Personal Interview, Participant 6

[208] www.oafm.on.ca/mediators/abusepolicy.html

mediation session as established by the OAFM Policy on Abuse. Examples of methods employed to ensure their professional responsibility are the use of shuttle mediation, private meeting with the parties, use of separate waiting areas and different arrival and leaving times. The family mediation process however, is not designed to protect women beyond the mediation context. Family mediation processes have a more immediate and limited effect on its participants, therefore the family mediator does not assume responsibility for what happens to the women outside the mediation session.

Both feminists and family mediators share the concern that safety procedures do not have any further effect other than protecting the woman in the immediate context of the mediation session and do not prevent the abuser from hurting the women later on. This finding reflects feminist legal reformers' general concern about the unsuitability of family mediation for women in the sense that compared to the legal system, family mediation has fewer accountability structures. In general, feminist legal reformers are concerned about the effect of privatizing family law as it was described in the first part of chapter three.

"What needs to be included in the practice of family mediation to make it safe for women?

There was a general agreement among the four respondents from the feminist group about the necessity of ensuring safeguards for women who decide go to mediation. A common response was that there should be a

presumption that women should have an advocate person in the mediation room with her. When asked who this person should be, respondent three said:

> "This person should be someone that has had extensive experience dealing with battered woman and therefore, is able to identify signals, gestures easily. This advocate would have the possibility to stop the process at any time if they notice it is becoming dangerous or uncomfortable for the woman."[209]

Respondent two highlighted the importance of ensuring that the woman preserves her legal rights during the mediation process, especially in the agreement. This participant also suggested that the family mediation process should be modified in such a way that the private concern about mediation can be covered. She said, "Find a way to make the process more accountable, more public, more reviewable, without undermining the meaning of mediation." An interesting point came from respondent four. This participant emphasised the necessity of informing and educating the public about whom they should hire when searching for family mediation services. This respondent stated:

> "Because the practice of family mediation is so unregulated, there are people practicing it without the adequate training for doing so and that is very dangerous for abused women."[210]

Family mediator participants insisted on the necessity of having private individual meetings with each party before accepting the couple into mediation. They recognized that because of the current lack of regulation in

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[209] Personal Interview, Participant 3

[210] Personal Interview, Participant 4

the profession, some family mediators do intake while others do not. They highlighted the importance of doing intake prior to accepting the case. These practitioners declared that although the mediator should be screening for violence during the whole process, a thorough intake is paramount. For that reason, it is also important that the mediator ask the right questions to the parties. But since the practice of family mediation is unregulated, questions being asked are not uniform and it is difficult to test how effective they are. To this end, respondents six and seven stated:

> "Every family mediator should be required to do individual intake before the joint session starts."[211]
>
> "There should be a mandatory questionnaire to make sure that right questions are asked."[212]

Respondent eight emphasized the training and the personal and professional attitude of family mediators when practicing, and its social impact. Her remarks were:

> "I think the more professional we become in understanding what process will work for people in the context of mediation and tailoring what we do to people's needs, the better our reputation will be. If you do it without a screening tool, without an initial interview, without a lot of thoughts at front, then you will have a lot of unhappy people and more unhappy people mean that the larger social context in the acceptance of mediation will not be there."[213]

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[211] Personal Interview, Participant 6

[212] Personal Interview, Participant 7

[213] Personal Interview, Participant 8

Participant eight also drew attention to the necessity of instructing the public about what they should be looking at when shopping for family mediators.

Feminists and family mediators' answers to this question reflect the necessity to keep implementing changes in the practice of family mediation, particularly about mandatory screening and uniform screening tools. Respondents from both groups offered suggestions regarding the issues that, according to them, need more debate and potentially, further implementation in the practice of family mediation. The answers to this question reflect the potential to continue pursuing in a constructive dialogue between feminist legal reformers and family mediation practitioners.

"*Do you think the training of family mediators is sufficient to deal with matters involving violence?*

Feminists were particularly concerned about the effectiveness of the training. Respondents one and three made reference to the low standards established by the Ontario Association for Family Mediation (OAFM).[214] Respondent three said: "I do not think fourteen hours of training can provide a good understanding of how difficult the dynamics of violence can be and to learn how do deal with it." Respondents two and four expressed their concerns about the previous professional experience of family mediators who are taking the training. They both were in agreement that previous experience dealing with abusive situations is paramount. Respondent four stated:

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[214] According to the OAFM Criteria for Accredited Family Mediators, it is a requirement that the applicant provide proof of having a minimum of 14 hours on domestic violence education. See http://oafm.on.ca/mediators/accfm_criteria.html

> "For those mediators who do not have a social work or psychology background they will be required to learn these skills that social workers and psychologists have, because you want to be able to work with abusive situations, you want to read people, you want to know about the clinical side of the after-effects of abuse."[215]

Only participant two expressed her concern about the qualifications of the people that are providing the training. She said:

> "One thing to take into account is who is doing the training and how much they understand about gender differentials and power imbalances."[216]

Family mediators' thoughts about training diverged. For instance, respondent five said that instead of fourteen hours of training there must be twenty-one hours or three days. In contrast, respondents six and seven felt that fourteen hours of training established by OAFM is enough. Only respondent eight made a distinction about this topic. She said:

> The training is sufficient for screening but not for becoming a mediator working with victims and you cannot become that person in a training environment, you will need a deeper knowledge. People who deal with cases involving domestic violence must be those who have worked with these types of cases extensively.[217]

Participant seven also expressed her concern about the unfeasibility of evaluating how well any given course addresses the issue of violence, mostly because of the wide range of courses that are offered throughout the country.

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[215] Personal Interview, Participant 4

[216] Personal Interview, Participant 2

[217] Personal Interview, Participant 8

All four participants from this group made particular emphasis on the necessity to establish that every person that practices family mediation has to have training in domestic abuse issues and dynamics of family violence. Respondent six stated: "In Ontario you can practice mediation with no training at all." In addition, respondent five said: "Many private practitioners do not have training."

In general participants from both groups showed concerns with the current training family mediators are required to obtain. They stressed the low standards set by OAFM in relation to the duration of the training and therefore, the impossibility for family mediators to gain a deep knowledge for dealing with issues associated with violence. Family mediators suggested a deeper training regarding the dynamic of violence and its personal and social effects.

Based on the complexity in the dynamics and interactions that exist in family conflicts, family mediators must receive adequate training to enable them to provide good service. Without this training it is unlikely that family mediators will have the appropriate tools to effectively screen for violence and to implement safety procedures during the mediation process. The training of the family mediator is the corner stone for ensuring appropriate preparation of the mediators to successfully deal with cases of domestic violence. That premise pertains to the goals and objectives of family mediation as a profession.

"What do mediators need to learn from the critiques and living stories of women who have been involved in domestic violence situations?

Respondents one, two and three highlighted the importance of understanding the dynamic of violence and its complexity. They stressed that because violence may have multiple manifestations, it is critical the family mediator is prepared to recognize them and be able to deal with them. They also recognized that this is not an easy task requiring substantial training and personal and professional experience. Respondent four took a slightly different approach. Her answer focused on the lessons mediators can extract from others' experience. She recommended talking with the women who have been through the process and get their feelings and experiences about what was good or bad in the mediation. This respondent also recommended getting the same kind of input from family mediators who have been working with this type of cases for some time. One of her comments was:

> "I think that the people who have been through the process have a lot of information. It is also important to look at the people who have not gone through the process: why they did not go through it because they might have some very valid reasons."[218]

Answering this question, respondents five and eight agreed that having abused women, who have gone through mediation, talk about their experience during the process of mediation would be worthwhile. These two respondents highlighted that women who have been through mediation are the ones that

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[218] Personal Interview, Participant 4

should be talking about its advantages and disadvantages. Some of these respondents' thoughts are as follows:

> "I think the stories and experiences are important to sensitize professionals who do not have personal experiences. It is also important to provide the opportunity to listen and to discuss with people who have had this experience or who work with these people."[219]
>
> "Feminists talking for people who have been abused is not what should be happening. We need to have as mediators a dialogue with people who have been in these situations and they need to show or explain what has worked for them and what is appropriate for them."[220]

"What do those who critique family mediation need to know about the value it has for individual women?

Feminists asserted that family mediation could possibly be beneficial for some women while not for others. Their main concern was, however, how to properly determine who those women are that can effectively go to mediation. Respondent two offered the following contention:

> "There are a lot of couples that can go to mediation and that will be the fastest, easiest, most amicable best way for them to resolve their problem. But the question is: how can you know this couple is able to do this by themselves and this other couple is not."[221]

Family mediation practitioners' answers were split. Respondents six and seven focused their answers on the benefits of family mediation as an

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[219] Personal Interview, Participant 5

[220] Personal Interview, Participant 8

[221] Personal Interview, Participant 2

empowering process for women. They stated that family mediation gives the woman the opportunity to express her feelings and fight for her demands and that empowers her. To this end, respondent seven explained:

> "The actual involvement in mediation can be a huge step forward for women who decide to leave an abusive marriage because they get to say what they want to say. Feminists have not seen this positive part of mediation."[222]

The other two participants from this group took a similar approach as in their own answers to the previous question. Respondents five and eight stressed that the dialogue must be tripartite. It is not wise to have feminist legal reformers and family mediation practitioners arguing back and forth about the advantages and disadvantages of family mediation for women, without listening to the women who have been through the process. Some of their remarks are as follows:

> "I think both groups need to look at the experiences of people who have been in abusive relations and who have gone through family mediation and who have the experience to say, "you know, this helped me, this made me feel that for the first time I was able to say to somebody he did this to me and I want it to stop" or "it was the worst experience in my life, it felt terrible and did not help me at all."[223]
>
> "We need to have academics and mediators talking about what this really means, but also social action research participation needs to happen with people who have experienced violence and that is where we can create something real that would give

[222] Personal Interview, Participant 7

[223] Personal Interview, Participant 5

> women the power and choice and meet their needs at the same time."[224]

The answers to the last two questions show that participants from both groups have similar perceptions about the importance of having a tripartite dialogue: feminist legal reformers, family mediation practitioners and abused women who have gone through a family mediation process.

"Why there seems to be so few publications since 1994 addressing feminist's concerns about the practice of family mediation?"

In this regard, respondents were not sure why this was happening and their answers were based on their own hypotheses. Interestingly, none of their thoughts coincided. Each of the participants offered distinctive appreciations. Some of the opinions of the feminists group are as follows:

> "Organizations that provide services to victims of domestic violence continue to give messages to them about mediation and the risks associated with it but in a different way."[225]
>
> "It is not a burning issue right now. The academics moved on to something else."[226]
>
> "I think one of the problems is that women's groups have been devastated by funding cuts. Some important national women's organizations have been disintegrated because of lack of funds. Also, there is nothing actually new to say."[227]

Common thoughts offered by family mediation practitioners were that the family mediation community has recognized the feminist legal reformers'

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[224] Personal Interview, Participant 8

[225] Personal Interview, Participant 1

[226] Personal Interview, Participant 2

[227] Personal Interview, Participant 3

critique and have changed the practice of family mediation. Respondents five and six pointed out:

> "I think the mediation community, both people who teach and train as well as practitioners, are much more aware of the feminist critique now."[228]
>
> "Feminist critique had an important push in making mediators recognize this danger for women. I think it stopped because the mediators got the message and did something about it."[229]

Respondents seven and eight shared the idea that probably the feminist legal reformers community does not have anything new to say. Respondent eight stated: "Maybe the reason is that the conversation had gone as far as it can from being a critical standpoint."

As pointed out at the beginning of this chapter, there are relatively few articles concerning the current practice of family mediation from the feminist legal reformers' perspectives. Some publications from the family mediation practitioners' side were found.[230] These articles can be seen as an expression of the family mediation community's interest in addressing the effects of the feminist legal reformers' recommendations and their implementation in the

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[228] Personal Interview, Participant 5

[229] Personal Interview, Participant 6

[230] See Gewurz, I: "(Re) Designing Mediation to Address the Nuances of Power Imbalance" in Conflict Resolution Quarterly 19(2) 2001, 135-161; Landau, B & Landau, N: "Domestic Violence Policy: Lessons Still to be Learned" 2001 www.coop-solutions.com/articles/article4.html; Salem P. & Milne A: "Making Mediation Work in a Domestic Violence Case" in Family Advocate 17, 1995 34-38; Sharp, A: "The Training of Potential Mediators" in Rethinking Disputes: The Mediation Alternative. Toronto: Emond Montgomery, 1997, 349-358; Thoennes, N; Salem, P & Pearson, J: "Mediation and Domestic Violence: Current Policies and Practices" in Family and Conciliation Courts Review 33(1), 1995, 6-29.

practice of family mediation after 1994; as well as recognizing the value of the feminist legal reformers' inputs for the practice of family mediation.

As a final observation it can be said that the pattern of the answers obtained in this study basically reflects that to some degree, there is a convergence between feminist academics and family mediators' groups in the identification of the problems associated with the screening process, the training of mediators and safety procedures. Participants from both groups share concerns pertaining to the implementation of the changes introduced in the practice of family mediation, specifically in Ontario. Participants from both groups question the practical suitability of the modifications implemented in 1994 in these topics to cope with domestic violence cases. Nevertheless, the interviews subjects indicated some degree of divergence of views between the two groups over some aspects of aforementioned issues.

Chapter 5 – What are We Left With in the 21st Century?

Before 1992 there were two distinct sets of voices analyzing the impact of family mediation for women. These two sets of voices represent two different lenses analyzing the use of family mediation. The first one was represented by feminist legal reformers who condemn the use of family mediation based on socio-structural arguments highlighting the disadvantaged position of women in a society with patriarchal structures of power where issues of inequality between men and women, power imbalance and lack of protection for women will be perpetuated in a mediation context. The other set of voices was represented by family mediators who advocate for the use of mediation based on its potential for addressing and dealing with the interactional, psychological and emotional consequences associated with the divorce.

During the Toronto Forums these two sets of voices engaged in a fruitful dialogue, identifying common issues of concern in the practice of family mediation. The dialogue has positively influenced family mediation practice, not only for what was achieved in its outcome but more important, for what it represented to have family mediators and feminist groups working together. The Toronto Forums provided the space for these two sets of voices to express their thoughts, beliefs and feelings, and also to listen to the other side of the debate and gain in comprehension about the other party's points of view. An important significance of this face-to-face dialogue was that the parties stopped misrepresenting each other, insofar as they started gaining a

clearer understanding about the underlying interests in the other party's position. The dialogue was valuable because it brought a shift in focus, in the sense that the participants were more willing to listen to each other and learn from each other instead of being closed-minded and clinging to their positions. Of significance in the Toronto Forums was the shared agreement and recognition between the two sides of the debate of tangible issues that affect the practice of family mediation to address the needs of abused women and their children. In that sense, the changes introduced to the practice of family mediation after the Toronto Forums were based on explicit recommendations coming from the feminist legal reformers' community and family mediators practitioners. It is interesting to note that the changes proposed address the historic criticisms of family mediation as discussed in chapter three (power imbalance; lack of protection for women; and training of mediators), and were implemented in line with the basic principles and philosophy of family mediation as a science and profession discussed in chapter two. These modifications were directed towards changes in the content of the training for family mediators to identify and deal more effectively with cases of domestic violence; improvement in the screening process to identify violence; alternatives to family mediation when it is not a safe process for women; and safety measures for clients and the mediator. But, how effective were the changes implemented in addressing the feminist legal reformers' and family mediators' concerns about family mediation? Were the changes implemented sufficient to overcome all the deficiencies identified in the practice of mediation

during the Forums? The Nova Scotia Report in 1999 is an indication that the concerns are very real and valid. It is clear that more research need to be done in this topic.

The analysis of the interviews shows that at present, both family mediators and legal academics continue to share concerns about the effectiveness of the screening process established to identify violence; the potential of the safety procedures the mediator employs to adequately protect the abused party; and the content and duration of the training family mediators undertake. The current topics of concern expressed in the interviews are similar to the ones identified in the Toronto Forum. This finding implies that the changes that have occurred in the practice of family mediation since 1994 were important and significant, but there still remains a debate between feminist academics and family mediators that brings new questions to the surface regarding the suitability and scope of these changes. The results of the study reveal the need for both feminist legal reformers and family mediation practitioners to have a space to share their current views about the impact of the changes introduced in 1994 in the practice of family mediation.

The conversations with the participants in this study echo important questions that remain part of the debate. To what extent are the content and the length of the training in domestic violence adequate to make mediators ready to deal with the complex issues related to violence and its post-effects? How can the lack of a uniform screening tool affect the screening process established by family mediation organizations? How to ensure that private

non-accredited family mediators screen for violence when there is not any regulation that compels them to do it? Would it be enough to require the uniform implementation of screening tools to ensure an accurate disclosure and/or identification of violence? How would the culture of battering perspective influence the screening tools employed in the identification and disclosure of violence? What is the impact of not having all family mediators integrated in a professional organization? Is there anything family mediators can do to guarantee protection for abused women outside the mediation setting?

Common thoughts offered by participants from both groups was the significance of having not only mediators and feminist groups talking about the advantages and disadvantages of mediation for abused women, but that it is also indispensable to include in that dialogue the women who have gone through the family mediation process. Abused women have important information and experiences to share. They are very valuable in the sense that they are the actors of the process and the ones that can really judge how the process worked for them. They can provide information about: How did they enter into family mediation? Did they feel forced to participate? How did they feel during the mediation session? How effective did they consider the screening process to be if there was any? How safe did they feel during the process; how empowering was the mediation process for them and so on. In future dialogues between feminist groups and family mediators the voices of abused women should be present. In fact, following up on one of the

suggestions of the interviewees, it would be important to engage in further studies on abused women who have experienced a mediation process. The most recent study of this kind in Canada is the one conducted by the Transition House Association of Nova Scotia (THANS) in 1999. As described at the end of chapter two, this report gathered the experiences of thirty-four that were interviewed individually as well as fifty-nine women who participated in discussion/focus groups regarding the process of family mediation. All of these women were victims of abuse.[231] Specific and important findings and recommendations[232] were proposed as part of this study that should serve as a wake-up call to family mediation's organizations, as well as other agencies of the family justice system.

An important observation that the interviews showed is the necessity of instructing and educating the public about what to look for when searching for a family mediator. People should be aware that there are accreditation standards established by OAFM and FMC and not all family mediators meet these standards. The aforementioned problem is connected with the issue of the professionalization of the practice of family mediation. National and provincial organizations of family mediation do not establish as a requirement for practicing that all family mediators be accredited by the organizations. What factors have inhibited national and provincial organizations in promoting the professionalization of the profession? What are the concerns associated with this? Would the professionalization of the profession result in better

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[231] Rubin, *supra* note 154 at 3.

[232] *Idem* at 13-19.

consumer protection and a better protection of the integrity of the family mediation process? The lack of professionalization in the family mediation field is counterproductive in the sense that it does not ensure uniform and safe standards of practice. On the other hand, the fact that it is established by OAFM that all mediators should screen for violence without providing them a uniform tool implies risks as well. It also opens the question about how seriously FMC and OAFM have taken the feminist legal reformers' and family mediators' concerns and recommendations about the necessity of screening with uniform tools? Why is that after ten years there is still no standard screening tool for family mediators, especially given that there was broad agreement at the Toronto Forum and between both groups of participants in this study of the need for uniform standard screening tools? This appears to suggest that in some respects at least, the practical implementation of the Toronto Forum's recommendations has fallen short of the expectations of the participants at the Forums.

This thesis reveals that there is a broader concern among the feminist legal reformers' literature as well as the interviewees from the feminist' group, regarding the capacity of family mediation to address the structural concern about substantive inequality and gender power imbalances. The concern is that even if all the proposed reforms in the standards of practice of family mediation are implemented, the mediation process is not able to overcome structural situations of inequality and power imbalance inherent in a society with patriarchal structures of power because of the individualist approach

taken in the mediation process and its private nature. Feminist legal reformers tend to privilege the role of the courts as the most appropriate forum for addressing family and divorce issues. Yet, as we have seen in chapter two, the vast majority of divorces cases are uncontested with the parties privately negotiating their legal rights and entitlements outside the courtroom. Reality shows however, that in these cases, the Judge orders the divorce on the terms agreed to by the parties, rubber stamping divorce settlements that have been privately negotiated between the parties. This raises the question why mediation is seen as privatizing family disputes more than lawyer-assisted negotiation? Why is the focus of the feminist legal critique on mediation while little is paid to other private practices such as lawyer/client negotiations? It seems that many of the same concerns regarding the practice of mediation are likely to be applicable to these privately negotiated divorce settlements which also take place "in the shadow of the law" without significant public accountability or review in the courts, particularly when approximately only 10% of the divorce cases are settled through mediation, as indicated in chapter two. This gives some indication that the critique of family mediation seems to have left out of its concerns the rest of the family mediation system. If 4% of contested cases go to Court, and only 10% even of the remainder is mediated, this leaves approximately 86% of separation and divorce cases settled through lawyer/client negotiations. Interestingly enough, very little of the feminist critique of family mediation seems to acknowledge this issue, even though many of the feminist's concerns are as relevant to lawyer/client

negotiations as to the family mediation process. Attention should be given to the capacity of the family justice system as a whole in addressing the feminist legal reformers' concerns about structural gender inequalities and power imbalances in cases of abuse.

If we compare the potential of family mediators with that of lawyers to deal with uncontested divorce cases a major distinction surfaces. Family mediators are better equipped to deal with the non-legal consequences associated with divorce than lawyers are. Family mediators accredited by OAFM are also required to have training in Family Law as well as training in identifying and addressing issues of power imbalances and abuse in divorce situations. The question then is: how are lawyers equipped to deal with the non-legal consequences of divorce? Are they required to have any training dealing with the psychological, interactional and relational consequences associated with divorce described in chapter two? As the percentage of uncontested divorces is significantly higher than contested ones, as discussed in chapter two, this suggests that not only family mediators but lawyers as well should have appropriate training to identify and deal with cases involving abuse. Another question arises: to what extent do judges recognize the structural inequality facing women and how can this affect women during the divorce process? Divorcing couples that do not require going to trial need to have reliable services in which they can trust. A more important and general concern should be about the feasible training, not only for family mediators but

also for other agents of the family justice system, such as lawyers and judges, to effectively deal with divorce cases.

The similarity in the concerns expressed during the interviews and the ones offered during the Toronto Forums are an expression of the potential for a dialogue that still remains between feminist legal reformers and family mediation practitioners. Ten years ago the Toronto Forums identified the topics of training, screening and safety as important areas in which the practice of mediation needed to be improved. The results of the interviews show that these same areas still remain as topics of discussion as my interviewees recognized their personal and professional concerns about them. One possible interpretation of this is that the changes introduced within each of these areas, although they were important and significant for the development of the practice of family mediation, did not silence current concerns as the interviews showed. This implies the need to continue working through more research and more dialogue to improve the practice of family mediation. The Toronto Forums consciously created the opportunity for a dialogue where representatives of feminist legal reformers and family mediation's group shared their opinions. Probably it will be important to favour the opportunity for a new formal dialogue between feminist legal reformers and family mediators, this time including in the debate the voice of abused women and other interest groups as well. New ideas and concerns have surfaced since then, which need to be exposed. Social, political and legal contexts have changed since 1994; therefore the practice of family mediation needs to

ensure it has adapted to the new conditions. On the other hand, national and provincial family mediation organizations should continue to work independently on the improvement of the practice of family mediation and not only rely on outside agencies for its improvement. The family mediation community needs to continue taking these concerns seriously and should implement, through its national and provincial organizations, an ongoing process of research and evaluation of their policies and practices. This systematic process will continue to influence the improvement of the practice of mediation, rendering better consumer protection and more professionalization in its practice.

Family mediation, as a profession, has demonstrated itself to be open to incorporate changes that its social practice demands. It is important to keep in mind that although it would be useful to stimulate further debate, another "Toronto Forum" will not make the practice of family mediation perfect. The development of any profession is a consequence of a continuous questioning of its possibilities and a permanent exchange of different points of view. The existence of discrepancies between different sides of the debate should not be considered negative. On the contrary, as I once read, conflict enhances relations, creates new understandings and provides opportunities for growth.[233] The Toronto Forums opened an avenue not only for future similar events, but also for an ongoing dialogue between family mediators, feminist legal reformers, victims of abuse, and other social actors interested in the

[233] Picard et al, *supra* note 41 at 1.

debate. Keeping an ongoing dialogue will certainly improve the practice of family mediation without making things perfect; but the absence of a dialogue can potentially make things worse.

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Appendix I

Research/Personal Interview Guide

1. How are you involved or interested in the topic of family mediation in cases of domestic violence?

2. What do you understand as the critique of family mediation in cases of domestic violence?

3. How effective would you consider to be the screening process employed to determine the appropriateness of cases for mediation?

4. Family mediators have developed techniques and procedures to address the safety concerns of women who have experienced violence and the potential impact of a power imbalance, such as safety plans, separate meetings with the parties and shuttle mediation. Do you think that with the introduction of these procedures feminist's concerns about mediation are covered? If no, why not?

5. Do you think the training of family mediators is sufficient to deal with matters involving violence? If no, what would you like to see included in their training?

6. What else needs to be included in the current practice of family mediation to make it safe for women who decide to use mediation instead of the court system to resolve family matters?

7. What do mediators need to learn from the critiques and living stories of women who have been involved in domestic violence situations and from the groups who advocate on their behalf? How would this impact their work as family mediators?

8. What do those who critique family mediation need to know about the value it has for individual women?

9. Have you read any recent critiques about the practice of family mediation after 1994? If so, can you direct me to them?

10. Do you have any other comments you would like to share about family mediation in cases of spousal abuse or its critique?