

POWER AND GENDER IN FAMILY MEDIATION

by

Barbara Jean Britton  
B.A., University of Lethbridge, 1974

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We accept this thesis as conforming  
to the required standard

DEAN

Dr. William Carroll, Supervisor  
(Department of Sociology)

Dr. Cecilia Benoit, Departmental Member  
(Department of Sociology)

Barbara Whittington, Outside Member  
(Department of Social Work)

Dr. Katherine Teghtsoonian, External Examiner  
(Department of Political Science)

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University of Victoria

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Supervisor: Dr. William Carroll

**ABSTRACT**

Mediation has been promoted by some theorists as a large step forward in the consensual resolution of family disputes, providing positive benefits for both participants in the process. In particular, mediation is believed to offer a less adversarial approach to resolving family conflict than the existing adjudicative system.

One of the strongest purported benefits of mediation agreements is that power is balanced during mediation, leading to a process that promotes fair and equitable settlements for both women and men. However, statistics indicate that marriage breakdown can have serious financial consequences for women. Feminists question whether the state's investment in maintaining gendered power relationships may also extend to the process of family mediation.

This thesis investigates the experiences of women and men who participated in family mediation in the Canadian province of British Columbia. Using qualitative analysis, the participants' narratives are used to explore how power might enter and affect the process and outcome of mediation. Their experiences of power are then theorized in relation to patriarchal hegemony in Canadian society today.

Although power was very present in the process of

mediation for the participants in my study, its expression did not always mirror gender ideology. The complex interplay of the law, power, gender, and the beliefs and values of the participants and mediators showed that power for the participants was contextual. At the same time, however, the process and outcome of mediation were influenced by laws that do not recognize structural differences between women and men in Canadian society. The results of this research complement the developing body of theoretical literature on power in family mediation.

Examiners:

[REDACTED]

Dr. William Carroll, Supervisor  
(Department of Sociology)

[REDACTED]

Dr. Cecilia Benoit, Departmental Member  
(Department of Sociology)

[REDACTED]

Barbara Whittington, Outside Member  
(Department of Social Work)

[REDACTED]

Dr. Katherine Teghtsoonian, External Examiner  
(Department of Political Science)

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## DEDICATION

This thesis is dedicated to the memory of my father.

## INTRODUCTION

Mediation is a type of alternative dispute resolution technique for resolving conflicts outside of the formal legal system. Although mediation is used in different cultures around the world, one of its most recent forms is developing in North America today. Because of problems with the traditional administration of justice, mediation in North America is believed to offer a more appropriate process for dealing with certain types of disputes. These problems include the win-lose nature of the adversarial system, high legal costs and litigation delays (Eisler and Kelley, 1990). Some writers have hailed mediation as a process that promotes a win-win solution for certain types of disputes, based on the idea that the participants do not have to subject themselves to the intrusiveness of the justice system. It is argued that disputants can deal with problems more effectively through an informal process that focuses on communication, equality, and balance of power between participants (Lerman, 1984).

Yet, as mediation is more widely practised, there is a growing concern about its benefits. Theorists that study mediation have investigated problems associated with power imbalance between the participants. Some of the research has focused on factors such as differences in race, marital power, and communication skills (Blumrosen, 1972; Hart,

1984; Kolb and Coolidge, 1988). There is also a growing body of literature, predominantly written by feminists, on the relationship between gender, power balance and family mediation (Rifkin, 1984). One major concern in the feminist literature is whether family mediation promotes fair and equitable resolutions for women, because mediation may be particularly susceptible to power imbalance. The family is regarded by some theorists as a site that perpetuates gender-based power differentials that ascribe more power to male than to female members. It is argued, moreover, that this gender power imbalance is legitimated by our social, political and economic systems (Leitch, 1986) in advanced industrial countries.

Although some theorists maintain that mediation is an effective vehicle for dealing with power imbalance between men and women (Davis and Salem, 1984), very little empirical research is available to substantiate either claim. In fact, very little is known about how power is perceived and experienced by the participants -- male and female -- in mediation. The participants' reports of how power is experienced can help to assess whether mediation balances power and promotes equitable agreements for women (Sussking and Cruikshank, 1987), or supports the opposite thesis of perpetuating women's inequality (Smart, 1984).

My research addresses the question of power balance in mediation by exploring the relationship between power and

gender in family mediation. These results are then discussed within the societal context where this process is presently gaining prominence. That is to say, the micro-process of mediation, investigated first-hand, is framed within the larger socio-legal structure of present-day Canadian society.

Chapter I describes the theoretical framework for this study. The framework is based on the feminist assumption that the state in advanced industrial countries plays a key role in reproducing gendered social relations through patriarchal hegemony (O'Brien and McIntyre, 1986). This occurs primarily through values and beliefs that support gendered relations and that are perceived as "common sense". These beliefs are perpetuated by the family, due to the view that they are "natural" rather than "social" (Riddiough, 1981). Through the influence of the law in mediation, the state also plays a smaller and more direct role in reproducing gendered relations. My study is based on the assumption that the structure of family mediation, with both direct and indirect links to law and the family, renders it particularly susceptible to the effects of gendered social relations.

The potential for replication of patriarchal hegemony in family mediation highlights the importance of exploring power differentials between men and women in mediation.

Chapter II describes how my methodology, based on a feminist

epistemology, investigates power in mediation in relation to patriarchal hegemony. The study is situated in the Canadian province of British Columbia, which has a similar socio-economic structure to other advanced industrial areas. I conducted open-ended interviews, based on the perceptions of female and male participants who have attended mediation. The chosen design is exploratory and primarily inductive, but my theoretical analysis and discussion of implications for mediation have focused on women's experience.

Chapter III discusses the use of the legal system by the respondents in mediation, and shows how the law can have a very strong presence in mediation. This is particularly the case when participants are not getting what they want through the cooperative process of mediation. The chapter presents primary data on how the participants in my exploratory study often invoked the power of law to assist them in mediation, and used it to help assess the fairness of their mediation agreements. My data on this issue show that the new gender-neutral laws in family mediation, which divide marital assets equally in disputes, do not necessarily result in equal power and economic position after the spouses separate (Steel, 1987). The gender-neutral laws may in fact replicate existing gender inequality in society.

Chapter IV, also based on primary data, discusses how the participants themselves perceived power balance and

power imbalance in mediation. Some of this information is presented in a brief case study format to illustrate the complexity of the tensions and shifts in power between partners. My participants' responses provide an overview of how power shifts and changes throughout the process of family mediation. My focus was to explore how they perceive power rather than to define power for them a priori. Although not all participants felt that power was present in mediation, many of them reported experiencing shifts between power balance and imbalance. A minority experienced power balance during the mediation sessions, which was often a transitory state that reverted to a situation of power imbalance. There were some gender differences in the types of events that increased power for the participants, but the exercise of power did not appear to be related to the participants' gender.

Chapter V discusses factors that the participants felt contributed to more or less power in mediation. My data show that there is a pronounced gender difference in the participants' selection of factors that decrease power. The male participants felt that power was affected by their ability to maintain a relationship with their children through shared guardianship and visitation. The female participants provided many more examples of power, and in particular cited economic factors as central to power. The participants generally viewed mediators, regardless of their

gender, as facilitators of communication who encouraged power balance. However, the participants did not think that the mediator had the power to influence the terms of the agreement.

Chapter VI addresses the participants' political awareness of mediation by presenting primary data on their views on the social context of power and gender in mediation. Most of the participants characterized mediation as an event that occurs between individuals. Although many of them felt that power imbalance occurs quite frequently in mediation, they did not relate this to gender relations in society. In fact, most of them enthusiastically recommended mediation on the basis of its ability to promote communication between spouses, even if their personal experience with the agreement was not satisfactory.

The conclusion of my study addresses the developing body of theoretical literature on power in family mediation. Many writers on the theory of mediation promote it as a mechanism for resolving disputes in an environment assumed to be free of power imbalance between the participants. In contrast, the feminist analysis of mediation views it as a mechanism which, in failing to challenge existing imbalances, replicates those imbalances. The application of gender-neutral family legislation to mediation agreements may also replicate existing inequality between men and women. The consistencies and contradictions in this study's

findings are discussed in relation to patriarchal hegemony in North American society today.

## CHAPTER I

THEORIZING GENDER AND POWER IN FAMILY MEDIATION

Feminist theorists are devoting increasing attention to the subject of gender and power in family mediation. Their concern that mediation may perpetuate existing structural disadvantage for women challenges the view of more traditional theorists who believe that power can be balanced between couples in mediation. This chapter begins with a description of the structure and organization of mediation in order to understand how feminists theorize the hegemonic reproduction of gendered relations in mediation. Different feminist perspectives on how power can enter and affect mediation are then discussed. This is followed by a brief review of feminist conceptualizations of male power, and their adequacy in explaining power in different contexts and family forms. The chapter concludes with a description of my conceptual framework for this study.

The Structure of Family Mediation

Mediation is defined as "the intervention into a dispute or negotiation by an acceptable, impartial and neutral third party who has no decision-making power, to assist disputing parties in voluntarily reaching their own mutually acceptable settlement of issues in dispute"

(Canadian Bar Association Task Force Report, 1989:5). Although most mediators have some knowledge and understanding of the law, unless they are lawyer-mediators they are not professionally licensed. However, a number of professional mediation associations in Canada have established their own standards of practice (Hoffman and Scambler, 1990). At the present time, Canadian mediation organizations and agencies are considering the feasibility of implementing professional certification.

Family mediation is a dispute resolution technique used by both married and common-law couples to arrive at an agreement about issues involving family conflict. These issues include such concerns as division of assets, spousal maintenance, custody of children, access (visitation), and child support. Family mediation is an alternative to the adversarial court system for working out a separation agreement, or a "mediation agreement".

If a married couple is divorcing, the mediation agreement can form the basis of a formal separation agreement. Whether or not the couple is divorcing, when a mediation agreement is registered in court it has the force and effect of a court order in Canada. Whether or not the mediation agreement will be part of a divorce, the professional standards for mediators require that mediators recommend that a lawyer review the final mediation agreement

before it is signed by both parties.

When lawyers review mediation agreements, they usually compare it to the spouses' rights under the law. These rights include the presumption that parents are legally obligated to support their children, that both spouses are expected to become self-sufficient after separation, and that each spouse is entitled to an equal share of the family assets (Legal Services Society, 1989). The best interests of the child are used to determine custody and access. Sole custody is usually granted to the parent with whom the child lives most of the time. Custody may be shared if the child will live part of the time with each parent (ibid). When one parent has sole custody, the child usually has regular visits with the other parent. The parent who has guardianship of the child makes the decisions about major parenting concerns like the child's health and education. When guardianship is shared, both parents are involved in such decisions affecting the child's future.

Spousal maintenance is the payment of financial support to one spouse. Its goal is to make sure that a spouse does not suffer economically after separation, and that the spouse who has custody of the children is not financially disadvantaged (Department of Justice Canada, 1989).

Mediation usually takes place over a period of months, averaging two to eight sessions, with the assistance of

provincially registered mediators (Department of Justice Canada, 1988). The sessions are conducted in private; all proceedings and files are kept fully confidential. Mediators have a professional responsibility to protect the privacy of their clients and the confidentiality of the proceedings.

Although the sharing of all information pertinent to separation, including financial resources, is critical in mediation, the mediator has no authority or "discovery" powers to collect information (Hart, 1984). He or she relies on the goodwill and cooperation of both clients to reveal information that may affect the terms of the agreement. It is also not the role of mediators to dispense legal advice; in fact, they are expected to advise each client to retain his or her own lawyer to review the final agreement. This review of the final mediation agreement is required to ensure that the legal rights of both clients are protected (Department of Justice Canada, 1988).

The privacy of mediation and its relationship to the law have raised questions about the replication of gender ideology in mediation. These aspects of the structure and organization of mediation render it susceptible to the direct and indirect influence of gendered relations legitimated by the law and the state.

### Gender in Family Mediation

Although the use of mediation for the resolution of family disputes is increasing in Canada, very little research has explored whether the gender of the participants might affect the process and outcome of mediation. Most of the empirical studies that have been conducted on mediation have focused on satisfaction with the outcome of mediation. Devlin and Ryan (1986) maintain that studies comparing participants in court and mediation show a higher degree of satisfaction with mediation due to increased communication and understanding between the participants. Kolb and Rubin (1989) studied two dimensions of outcome, and report that people in general like mediation and mediation results in high rates of settlement and compliance.

Yet, although much of the research on mediation has concluded that it is effective for dispute resolution, studies have not closely examined whether mediation is equally effective and empowering for both female and male participants. Women may report greater satisfaction with mediation than with court challenges, but this does not necessarily indicate that they are receiving fair and equitable mediation agreements. A more recent study of alternative dispute resolution found that men and women from the Canadian province of British Columbia responded differently to mediation (Eisler and Kelley, 1990). The

results of this study indicate, in fact, that mediation appears to be much less satisfactory and effective for women than for men, and that women experience less control than men during mediation.

Much of the theory of mediation asserts that if the participants in mediation cannot achieve a balance in power by themselves, the mediator should intervene in the process (Davis and Salem, 1984; Sussking and Cruikshank, 1987).

The mediator's intervention may indeed promote better communication and more effective sharing of information during the process of dispute resolution. But can the mediators ensure that the structural disadvantages of women in North American society do not adversely affect their bargaining power during mediation?

The feminist concern with family mediation stems from mediation's relation with the law and the family. Mediation is viewed as a powerful mechanism through which social relations are reproduced. However, mediation's unique relationship to law and the family tends to obscure its power dynamics because mediation is conducted "in the shadow of the law" (Bottomley, 1985:179).

Although the use of mediation in family breakdown has many documented benefits (Sander, 1984), the theory of mediation is still evolving. As mediation is increasing in popularity, it is critical that research is conducted to

assess whether mediation lives up to its claim of balancing power and providing fair and equitable mediation agreements for women.

### Feminist Analysis of Law and Oppression

A feminist analysis of law and oppression seeks to understand the ways in which law facilitates the reproduction of gendered power relationships. According to Scott (1988:44-45), "[g]ender is a primary way of signifying relationships of power ... gender is a primary field within which or by means of which power is articulated." Feminist theory of law analyzes the constitution of knowledge upon which law is based, and some theorists like MacKinnon (1987) assume that the epistemology of law is fundamentally androcentric. However, there is agreement among many feminist theorists that when males systematically dominate and subordinate females, the oppression is patriarchy (Henderson, 1991:412).

The conceptual framework of this research is that patriarchy is reproduced hegemonically through organized consent in civil society and the institutional ideology of the law. Riddiough (1981:80) maintains that the family constitutes a primary unit of civil society and that ideology is reproduced by the legitimacy ascribed to values and beliefs perpetuated by the family. Many of these values

and beliefs are gendered, based on the rationale that what is social is "natural". Historically, these beliefs were embedded in formal law. In modern times, patriarchal values are more often reproduced hegemonically through the family, and subtly supported by institutional doctrine.

The concept of hegemony is based on power, or "the ability to determine, manipulate, rule or influence the action of others" (Whittington, 1990). Patriarchal hegemony is the dominance of the masculine point of view throughout society. The net result is the marginalization of all other views within society. Hegemony theory can explain how male power (patriarchy) is institutionalized and sustained by ideological structures such as the state and the law. Hegemony theory can also explain how power is legitimized and reproduced through beliefs and values perpetuated by the family.

The successful replication of dominant hegemony is dependent on achieving consent throughout society at the level of both structure and agency. However, hegemony in society is never complete, because it creates counter-hegemony (O'Brien and McIntyre, 1986:75), or the conscious perception of competing beliefs and values. Feminism is a counter-hegemonic form because it actively challenges the epistemology of patriarchal hegemony. Hegemony may also create other, marginalized discourses that do not formally

challenge the dominant world-view, but still indicate dissatisfaction with the status-quo (Connelly and Christiansen-Ruffman, 1977; Scott, 1990).

According to O'Donovan (1985) and Eisenstein (1983), hegemony perpetuates the gendered ideological separation between public and private spheres that has accounted for the modern subordination of women. Men are associated with the public sphere, which gives them power and authority in politics, religion, intellectual life, as well as in the workplace. Within the ideology of patriarchy, women's appropriate place is in the private sphere of the home and family, centred around children and domestic life. It is argued that the separation of public and private spheres forms the basis for the sexual division of labour, which attributes more power, value and status to the tasks performed by men. The ideological division of public and private spheres is associated with the "natural" rather than "social" characteristics of men and women.

A primary instrument of patriarchal hegemony is the ideology of the traditional family, consisting of working father and stay-at-home mother, which legitimates male control of the family. Although traditional families are a minority in North America, there is a gap "...between ideals and ideologies about families, and how individuals actually live out their lives together" (Gittins, 1985:2). Although

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the traditional family structure no longer dominates western society (according to Thorne, 1982:5, only 16% of U.S. households have a traditional family structure), the values and beliefs that dominate North American culture still separate men's productive labour from women's reproductive and domestic labour. and attribute greater value to men's work than to women's work.

Some theorists attribute the replication of patriarchal hegemony to the organization of wage labour in advanced industrial countries. According to Williams (1989:822), "[w]estern wage labour is premised on an ideal worker with no child care responsibilities...where...men and women workers are allocated very different roles." Men are expected to be ideal workers, which precludes major responsibility for child care. Women are expected to undertake the primary responsibility for the day-to-day care and maintenance of their male partner and children, even when they are also employed in the workforce. Women's assumption of primary child-care duties gives men better access to well-paid jobs and greater opportunity for training, education and promotion. Women often select work that allows them to continue their primary childrearing responsibilities, therefore "...choosing' to marginalize themselves economically in order to allow their husbands to perform as ideal workers..." (ibid:824). Women's labour-

force participation is often undervalued, underpaid and offers few opportunities for promotions (Boyd, 1989:135). Men and women, therefore, often "... make different long-term assumptions about what a paid job will mean, because of its relation to domestic labour" (Gaskell, 1991:232). These choices are ostensibly made on the basis of the "natural" characteristics of the sexes. The result is continued economic vulnerability of women.

In brief, although the law purportedly protects the sanctity of the home through a policy of non-regulation, feminists believe that it retains an ideological view of how the family should be structured. This ideology is maintained through vestiges of male power entrenched in formal law, through traditional views of gender embodied in substantive law, and hegemonically through the family. For example, until recently, the male role as "head of household" was directly enshrined in law (Crean, 1988). Although legislation has now removed much of the male power that was vested in formal law, the individualization of families in the private realm has provided an environment for the reproduction of patriarchy. The distinction between public and private spheres may facilitate the exercise of patriarchal hegemony through the institution of the family. The following section describes how the process of mediation

is susceptible to patriarchy hegemony through the direct and indirect influence of the law.

### Patriarchal Hegemony in Mediation

Family mediation is susceptible to patriarchal hegemony directly through the influence of public law on mediation, and indirectly through values held by the mediators and participants themselves. The direct role of the law in maintaining patriarchy through gendered rights and legislation has been subject to much sociological, legal and political analysis, with the result that women's rights in the public sphere are now viewed as a legitimate object of struggle. The areas of public law that historically reflected patriarchal relations have included the following: women were deprived of their "personhood"; husbands had rights to their wives' bodies; husbands had ownership of their wives' property; husbands had the role of head of the family in statute and case law until the last decade (Okin, 1989:129). Although many changes in law in this century have enhanced the social and legal status of women, some theorists question whether the recent equality provisions in the gender-neutral laws result in fair and equitable separation agreements for women (Crean, 1988; Weitzman, 1985). At the same time, other theorists question whether mediation agreements are really developed as a private

contract between couples, free from the influence of the state and the law (Bottomley, 1985).

The close relationship of mediation to the law provides many opportunities for the epistemology on which law is based to enter and directly affect mediation. At the same time, mediation is conducted in private, free from the scrutiny to which most public legal processes are subject. The confidentiality of mediation encourages the view that mediation is a private arrangement between two people, obscuring its social nature.

According to Abel (1982), the state indirectly extends its control to the private sphere of the family through mechanisms such as the practice of informal justice in mediation. In mediation, subtle coercion can take the form of techniques used to question, affirm and persuade the parties in a particular direction legitimated by the state. There is little sign of state authority behind the informal atmosphere and language of mediation because the parties ostensibly reach a voluntary agreement based on compliance. Abel maintains that examples such as these show that mediation is in fact an effective state mechanism for replicating social relations, through indirect persuasion and guidance.

Spitzer (1982) also notes that law has a more powerful effect in society when it has the appearance of non-

involvement. The absence of overt legal authority in mediation can increase the influence of socially sanctioned expectations for men and women by categorizing them as events between individuals, rather than as expressions of power in social relations. This enables patriarchy to be reproduced hegemonically through consent, rather than through the immediate force of law.

Power can be directly exhibited in mediation through different interpersonal tactics employed by the participants and by the mediator(s). Power can also be employed in mediation through the strategic use of the law by the mediation participants. This may happen in different ways: 1) the participants usually retain lawyers to review the final agreement to ensure that their legal rights are protected; 2) the participants may move back and forth between mediation, lawyers and the court system, using one when the other does not appear that it will provide the anticipated results. It is clear, then, that the participants can strategically invoke the authority and power of the law in mediation.

Irving and Benjamin (1987) provide an example of the reciprocity between the law and mediation that demonstrates how the power of the law influences mediation. When lawyers review the final mediated agreement, they often provide advice on the fairness or equity of the agreement. They

also usually advise the participants of the terms of the settlement they would likely receive if they proceeded to court. Thus, the assumption underlying the review of each agreement is that further action through court is possible if the client does not think that the agreement is fair and equitable. At the same time, however, the client is constrained by everything that court may entail: high legal costs, long delays, and an adversarial and public process. The law, therefore, has a strong presence in mediation, but it is a presence that is indirect, unspecific and not clearly visible.

### Participant Power

Existing feminist research suggests that mediation may be affected by the structural position, values and beliefs of the participants and mediators. Although there are numerous theories on the different perspectives that men and women bring into mediation, some theorists maintain that "... the spouses enter the mediation process with only the training that has come from socialization" (Leitch, 1986:168).

According to Okin (1989), women are structurally disadvantaged before mediation has even begun, which affects their position in the negotiating process. She questions how much leverage women could possibly have in a bargaining

process when financial support and child custody are at stake. The Report of the Attorney General's Advisory Committee on Mediation in Family Law (1989) states that systemic power imbalance between men and women may have adverse consequences in mediation if the woman's spouse is a better negotiator, has more earning potential, or is more familiar with the financial situation of the family or business. The report also summarizes the results of a number of researchers who have described how socialized gender differences may adversely affect women in mediation:

- a) women do not base their entitlement to support, property and custody on law. They premise their entitlement on their role as peacemaker and guardian of the family unit.
- b) in this capacity of peacemaker, women are socialized to co-operate, to avoid risks, to be self-sacrificing and to 'make do' with what they have;
- c) women often feel entitled to negotiate for their children but not for themselves (p.49).

As mentioned above, one of the strengths promoted in the theory of mediation is its focus on mutual compromise to attain agreement. Hart (1984) acknowledges the vital role of compromise, which she believes can contribute positively to cooperative dispute resolution. Gilligan (1982) maintains that the focus on compromise in mediation may perpetuate existing gender inequality. She cautions that women who have learned to value compromise more than their own needs may risk losing their bargaining power in the

process.

Although an overemphasis on compromise and cooperation in settling disputes can reduce women's bargaining leverage, attention must also be paid to other factors which may disadvantage women in mediation. A study by Beer and Stief (1985) concludes that the process of mediation is affected by the reasons why men and women make the initial choice to mediate: men choose mediation to enhance the terms of their settlement, and women to avoid conflict. Kolb and Rubin (1989) stress that power between participants is influenced by the cultural value that men and women place on assertion and compromise. This can affect the way that men and women negotiate in mediation, as well as their expectations regarding the outcome.

Going beyond the socialization argument, Fineman (1989) proposes that the greater structural power that men in North American society have gives them less personal investment in the outcome of mediation. This is because they are under less actual and potential economic duress. This is partly due to their better occupational opportunities, and the fact that men rarely have sole custody or sole guardianship of the children. Because society generally does not vest men with the responsibility for ensuring the day-to-day care and maintenance of children, they are less likely to have the primary financial responsibility of child-rearing after

separation. The parent with whom the child or children live(s) after separation, usually the mother, often bears the major costs associated with the daily care of children.

Ironically, the very role that many women tend to cherish in the family can have a negative influence on the outcome of mediation. Women often derive value and "specialness" from their role as nurturer of children and caretaker of the family. However, the woman's role in the family is also one of unpaid (and often undervalued) daily labour. In contrast, the man's role in the family is identified more closely with the pay, status and power associated with labour in the workforce (Crean, 1988). These perceptions can influence bargaining power in mediation, with the assumption that the man is entitled to a greater share of 'his' earnings, while a woman is expected to further contribute unpaid labour in the care of the children.

It seems, then, that the powerful familial ideology of mother as nurturer and father as provider may significantly influence the terms of the final mediated agreement. In mediation, the image of the self-sacrificing mother may seem congruent with our society's gendered perception of a healthy family but in fact be contrary to the interests of the woman undergoing marital separation.

*endnote*

### Mediator Power

Some mediation theorists place most of the responsibility for redressing power imbalance between participants in the hands of the mediator (Davis and Salem, 1984; Sussking and Cruikshank, 1987). Although these theorists maintain that mediators can affect power imbalance and ensure that participants have equal bargaining power, they say little about how this is actually accomplished. \*  
Marshall (1990) maintains that the 'empowering' philosophy of mediation is not implemented in the actual practice of mediation.

The mediators have many sources of informal power that may affect the process and outcome of mediation. They have the power of authority and influence: to frame the issues, propose communication patterns, and validate the structure of the agreement. They also have the power to intervene if the process is not proceeding as desired and to withdraw from the proceedings if they are not satisfied with the process or outcome. Although the mediators' role is formally that of an impartial guide, in fact their actual and potential power is great (Marshall, 1990).

The power that mediators may employ is often used to intervene in the mediation process. MacDougall (1984) believes that mediators can effectively address power disparities through intervention, and that the resulting

improvement in communication will promote the achievement of justice. Davis and Salem (1984:19) agree on the influence of the mediator, maintaining that "...people who have been socialized to feel powerless rise to the occasion during mediation, especially with gentle but insistent reminders from the mediator that they are responsible for designing the agreement." Sussking and Cruikshank (1987) state that mediators can affect power imbalance by reminding them that everyone in mediation shares information and will have a chance to talk.

On the other hand, Bottomley sees the influence of the mediator as being particularly suspect because mediation purports to give the participants control over the process, all under the "benevolent eye of an expert rather than fought out between lawyers" (1985:175). She contends:

1) that the mediation process is more dangerous than formal adjudication because the amount of control that the mediator has is hidden by the appearance of consensus and agreement, and 2) that mediators have the freedom to respond in many different ways without the constraints of standards and criteria.

Although the evidence remains unclear at this point in time, the capacity of the mediator to effectively address power imbalance seems to be limited. The reality is that mediators are trained in a system that has not closely

examined nor separated itself in theory and practice from the prevailing ideology of power differentials between men and women. If mediators have not considered the effects of gender ideology on the types of mediation agreements they encourage through subtle approval or lack of intervention, they may inadvertently endorse agreements that further disadvantage women. The powerful influence of gendered social expectations can therefore seriously limit the range of perceived options in the negotiations.

It is questionable, then, whether the mediator can employ sufficient interventions to put the participants on an equal footing in a few mediation sessions. As already noted, women are generally socialized to be caregivers of children and men; men are generally socialized to be providers for women and children: both enter mediation with this world view. The mediator is as susceptible to this perspective as the participants, and therefore enters the bargaining process from a position where power differentials associated with unpaid and paid labour are the norm.

The mediator's dual responsibilities of balancing power while remaining impartial may also work against each other in mediation. As 'neutral' guides responsible for the perceived fairness of the process and outcome, the mediator's intervention into power balance may be viewed as a departure from impartiality. If mediators become too

engaged in assisting one client over the other, their role may be perceived as one of advocacy (Kolb and Rubin, 1989). According to Sussking and Cruikshank (1987), although mediators are responsible for balancing power, they must also guard against representing clients who are not effective negotiators in mediation. They believe that this can seriously harm the perceived impartiality of the mediator. As mediation is currently structured, the so-called impartiality of the mediator is viewed as essential to the resolution of disputes and acceptance of the mediator by both parties. This leaves mediators with very few options to balance power in mediation while maintaining congruence with their "objective" role.

In summary, the most common function of mediators, explained in mediation theory as instrumental in balancing power, is dispensing information and promoting communication. If both participants have access to the same legal and financial information and are able to openly discuss their needs, concerns and priorities, the balance of power should shift to a more equitable position (Folberg, 1984). However, this assumption is theoretically based on mediation as a psychological event between two individuals, completing ignoring structural effects on the process. Although the impact of information is undoubtedly very influential, a more vital concern is how the participants

interpret and apply the information in their negotiations. Mediators are vested with the responsibility for balancing power in a system that discourages their over-involvement and identification with either of the participants. At the same time, mediators bring their own preconceptions to the bargaining table. The net effect can mean that mediation may not live up to its potential for balancing power and dispensing fair and equitable settlements.

Marshall (1990) offers an analysis that demonstrates some of the problems resulting from a poor fit between the 'empowering' theory of mediation and the actual practice of mediation. He maintains that the ideal of empowerment through cooperation and compromise in actual practice can turn into more heavy-handed tactics to force the participants to settle the dispute, including manipulation by the mediator and the threat of court. He also feels that participants who believe that they are the authors of their own mediation agreement and outcome are misled due to the fact that the mediators can and do withdraw from agreements that do not fit their preconceived ideal.

#### Conceptual Framework: Family Forms and the Context of Power

Many of the feminist and non-feminist theories of mediation do not clearly explain the relationship between family structure and power. Some of the feminist and non-

feminist literature (e.g. Leitch, 1987) is based on the "traditional" family form -- husband as bread-winner, wife as full-time, stay-at-home mother -- which is not a common structure in contemporary family life. Other theories of mediation (e.g. Davis and Salem, 1984) do not discuss variations in family structure in relation to power at all. Yet, an understanding of the historicity of the ideal, traditional family is necessary for an adequate analysis of power in family mediation.

The historical development of family ideology based on gender in North America helps to explain why women were considered "...a lesser form of being...[and men were considered]...suited to govern, to make decisions, to direct women and children..."(Gittins, 1985:157). The appeal of the traditional family structure increased in the late 18th century, affected by the patriarchal influence of religion and science, and the rise in political power of the middle class. Middle class families had the resources to maintain a traditional family structure at that time. The political influence of the middle class was instrumental in affecting beliefs and legislation concerning the ideal family form and the consequent division of labour based on gender difference.

By the 19th century, the political influence of the middle class had resulted in the entrenchment of gender

ideology that organized labour on the basis of middle-class values, vesting male power in the public sphere and male authority over women and children in the private sphere of the family. This traditional gender ideology is still considered "natural", even though the material form of most present-day families is quite different (ibid). The ideology of the traditional family continues to be enshrined in the social, economic and legal systems in advanced industrial countries, although 1977 statistics of U.S. households, for example, indicate that "...only 16 percent included a father as sole wage earner, a full-time homemaker mother, and at least one child living at home" (Thorne, 1982:5). The family continues to be a site of gendered power relations, but it is essential to recognize that there are many diverse family forms and alternative structures of power in present-day Canadian society. Diverse groupings of people with different organizations of "... co-residence, economic relations, sexuality and reproduction ..." (Gittins, 1985:64) are now calling themselves families. For example, single parents, blended households and homosexual couples are claiming family status. These new family arrangements may have alternative structures of power that do not follow the "traditional" model.

In addition to recognizing alternative family structures and sites of power in my analysis of mediation,

it is important to consider how different feminist theories conceptualize power and are able to explain "lived" experience. Some of the earlier feminist theorists based their views of power between men and women on social roles, while more recent theorists problematize the ideology of law and the state. The poststructuralist theorists view power in a more localized, specific context.

Liberal feminists emphasized the similarity of men and women, and argued that the sexes could not achieve equality in society until they were treated equally (Williams, 1989:798). Liberal feminist theory was largely responsible for political pressure which led to implementation of gender-neutral legislation in the 1970's in family law in Canada. The new laws removed gender bias from the existing legislation in family law, and treated men and women as equals in Canadian legislation. A frequent criticism of the "sameness" principle is that it does not account for structural inequalities between men and women.

Since the 1970's, some feminist theorists, including Gilligan (1982), have focused on gender differences between women and men to show how men exert power over women. Gilligan believes that women have a moral voice and a relational orientation toward others. Her theory is based on an essentialist view of women, regarding "sex" and "gender" as the same thing. However, Gilligan's theory is

inadequate to explain the exercise of power when it does not conform to essential categories based on gender. For example, Gilligan cannot explain why some men are nurturing and some women competitively seek power (Williams, 1989:802).

Gilligan's work has been widely criticized for its simplistic theorization of gender. Many current feminist analyses of male oppression have abandoned an essentialist perspective and consider the interrelationship between the state, the law and patriarchy as instrumental in theorizing male power. For example, MacKinnon (1989) explores inequalities of power based on male and female sexuality. However, she analyzes male power as a universal dominance that is legitimated by the state and law, without considering its different cultural meanings. MacKinnon views law and the state as a unified body that uses all forms of direct and indirect power to maintain women's oppression (Williams, 1989:420).

Although MacKinnon's unified model of patriarchy, state and law provides useful insights into the reproduction of male hegemony using a "top-down" model of power, it cannot explain the diverse configurations of power at the level of agency (Olsen, 1984; Boyd, 1987; Smart, 1984). According to Connell (1987:111), "... we must distinguish the global or macro-relationship of power, in which women are subordinated

to men in the society as a whole, from the local or micro-situation in particular households, particular workplaces, particular settings."

Connell (1987:63) and Sawicki (1991) use poststructuralist theory to help explain how power reflects different interests in localized settings and may therefore appear inconsistent and contradictory. Connell emphasizes that the concept of male hegemony does not rely on a centralized and reductionist understanding of the relationship between power and gender. Although he acknowledges the state's investment in reproducing gender relations through its regulation of institutions like marriage, he stresses the contingent nature of power and the importance of context (1987:130,134). He recognizes that male power may result in the subordination rather than the elimination of other forms of power.

Sawicki (1991) argues for a theory based on a "politics of difference" that acknowledges variety in experience, avoiding essential categories of gender and "binary modes of oppression". Although she bases many of her ideas on Foucault's postmodernist model of power, Sawicki also acknowledges particular interests such as women's oppression. She does not fully accept Foucault's relational model of power, which rejects the idea of power as domination emanating downward from a central source such as

the state or law. Although Sawicki believes that power must be analyzed "from the bottom up", she does not endorse the idea of pluralism, in which there is no point of reference for identifying the positive or negative aspects of power. Sawicki believes that the theory of power must be contextualized and judgements about power must be provisional, recognizing the potential for male oppression without universalizing its expression.

In considering how different theories of patriarchal hegemony may be applied to concrete social relations, it is important to be able to account for diverse experiences of power in different family forms. The following section describes some feminist theories of power and their potential application to the primary data in my study.

#### Participants' Experience of Power

Although a universal theory of patriarchy serves to highlight the problems of male power, it also neglects the fact that not all men dominate and employ power strategies to control women. Nor are all women are powerless. An adequate theory of patriarchal hegemony must be able to account for the diverse relations of power in everyday life.

In my study, I explore power in mediation from the "bottom-up", as it is perceived by my participants. According to Lips (1981:136), research has shown that there

is no "objective" reality true for both spouses on which to assess power in decision-making in families. She concludes that "[t]he subjective realities of husband and wife, although often discrepant, may carry the greatest import." Power does not objectively exist "out there", but rather is experienced, perceived and interpreted by my participants. Their sense of power in mediation affects how they work with their spouse and mediator to develop a mediation agreement.

In order to explore my participants' perceptions of power, I devised interview questions that would encourage them to reflect on their experience of the presence or absence of power, without influencing their response in a particular direction. By asking a range of questions about participant assumptions and expectations, I hoped to explore a wide range of potential areas through which power could enter and affect mediation.

In theorizing about the results of my study, I realize that there are many different ways to conceptualize patriarchal oppression. As stated previously, power can be theorized using the "sameness" or "difference" principle, a "top-down" model of law, the state and patriarchy, or a "bottom-up" model on the basis of the participants' experiences. Regardless of the model used, choices must be made about how the participants' experiences are traced back to patriarchal power. Walby (1990:12) believes that the

oppression of women can occur in both the public and private spheres, and has many different forms: "paid work, housework, sexuality, culture, violence and the state". In my study, the relationship between work and family responsibilities which, as the literature suggests, tends to leave women economically vulnerable during mediation and after mediation, are central to gendered power relations. In theorizing power and gender in family mediation, then, I focus on the participants' perceptions of power and its relation to their satisfaction with the process and outcome of mediation. These data are discussed within the context of women's economic vulnerability in family dissolution in North America today.

### Conclusion

It seems clear from the existing sociological literature that the mediation process may be vulnerable to the effects of patriarchal hegemony and may itself become an instance in the practice of male hegemony. Feminist theorists describe how the social construction of gender, which promotes power imbalance between men and women, can enter mediation through its organization and structure. This is possible because disputes are resolved in mediation in a private and confidential setting that is for the most part unmonitored and unregulated.

Other theorists discuss how the relationship of mediation to the law may also affect its susceptibility to power imbalance between men and women. The structural inequality that was historically vested in public law has been replaced with gender-neutral legislation that emphasizes equality between men and women. Concern is now expressed that these new laws may promote inequitable resolutions for women because they treat men and women as equals in a society where power differentials remain the norm.

The gender-neutral laws have a direct influence on mediation through legal review of the mediation agreement by a lawyer. However, even when the law is not involved, the powerful influence of gendered social relations and expectations can hegemonically enter and affect mediation through the influence of the mediator and the participants. In particular, beliefs and values that promote the ideology of mother as nurturer and father as provider can result in a less direct but still profound application of power differentials to the process and outcome of family mediation. These beliefs can affect the mediation agreement by placing less value on the contribution that many women make towards primary child-care and domestic duties, while attributing more status and power to the traditional male role of provider.

Mediators may unconsciously legitimate these gendered values by framing the issues, encouraging communication in a particular direction, and endorsing particular types of mediation agreements. Their powers of intervention may enable them to subtly control the process under the appearance of consensus. Even though, theoretically, mediation appears quite susceptible to the effects of gendered power differences, we have little understanding of how power actually works in mediation. The next chapter describes the methodology used in this exploratory study to investigate the perceptions of a small group of male and female participants who have attended family mediation. The focus of the methodology is to gain a better understanding of how power in mediation is perceived by each gender and whether power balance and imbalance enters and influences the mediation process and outcome. The relationship of patriarchal hegemony to power in mediation is then discussed.

## CHAPTER II

### METHODOLOGY

#### Existing Research Methodologies

The empirical research on mediation conducted to date contains very few studies of power in mediation. Most of the research has used deductive and quantitative methodologies, with little interest in exploring what actually happens in mediation.

A single, deductive methodology has often been used in research to evaluate the effectiveness of mediation. Some studies have assessed satisfaction and compliance with mediation through interviews with participants shortly after mediation ended (Dolan, 1990; Canadian Bar Foundation, 1984). Compliance has also been studied as an indicator of effectiveness in longitudinal, quantitative designs to determine if the terms of the agreement have been upheld over a period of time (Vidmar, 1984).

Although mediation has often been studied using a single quantitative methodology, it has also been the focus of comparative, multimethod designs (Richardson, 1988; Yates, 1990). Both single and multimethod designs, however, have generally used a variable-oriented, survey approach to analyze the effectiveness and appeal of mediation. This has been accomplished by eliciting the opinions of participants

either before or after mediation.

Some researchers have attempted to provide more insight into the process of mediation by adding a qualitative component to a quantitative design. This has been done by observing the roles and behaviour of the participants and the mediator during the mediation process (Vidmar, 1984; McEwan and Maimen, 1981). However, the minor qualitative component in these studies was insufficient to provide any real insight into the process of mediation.

In brief, few mediation studies have been based entirely on descriptive designs to study the mediation process. An exception to this tendency is a qualitative, case-oriented study conducted by Davis and Roberts (1988), who used in-depth interviews with participants to explore out-of-court mediation of disputes. The authors describe the participants' perceptions of mediation and the mediator, by addressing a large number of issues in the process of mediation. Unfortunately the wide range of issues included in this qualitative study did not permit a thorough investigation of each theme.

Another study expanded our understanding of mediation by including the mediator as a subject of study, who is also part of the mediation process. Slaikeu et al (1985) used a design that quantified social-exchange processes that occur in mediation. The authors developed a scale to rate common

verbal and non-verbal behaviours in mediation, in order to link mediator and disputant behaviour to outcome.

Girdner (1987) used secondary analysis to provide another perspective on the influence of mediators, by studying their professional orientations and philosophy in relation to their roles in mediation. Using textual data from published articles by mediators, Girdner explored mediators' strategies for social control and empowerment in mediation, which she contends reflect ideologies of power. Although Girdner provides a useful analysis of power in relation to mediation, her textual methodology precludes an exploration of power in the actual setting of mediation.

The methodologies used in both quantitative and qualitative studies of mediation have contributed to our understanding of perceptions and behaviours of the participants in mediation. However, these research designs have consistently compartmentalized the study of mediation by focusing on mediation as a micro-process operating in isolation from the influence of the important sociological variables of power and gender in society. The research designs used to date have not included an analysis of the power issues that might affect the interplay between participants and the mediation process.

### Research Questions

The types of methodologies that have been used to study mediation have been adequate for an investigation of the types of concerns described above. However, these methodologies are not suitable to explore my research questions, which have emerged from an examination of the sociological literature on mediation.

My research explores the following questions in family mediation: How do the participants in mediation experience power? Are there gender differences in their experiences of power? If so, do they affect the process and outcome of mediation? Can gender and power in mediation be traced back to patriarchal hegemony in society?

In order to answer these questions, I have sought a methodology that allows me to explore the perceptions, expectations, and experiences of the participants in mediation. My search has resulted in an approach that emphasizes exploratory, inductive research in a qualitative methodology informed by a feminist perspective.

### A Qualitative-Inductive Design

The most appropriate methodology for the research of the exploratory type I have chosen -- ie., with gender and power as the central variables -- is one that is qualitative and exploratory, allowing description that enhances our

understanding of gender and power in mediation as experienced by the participants. Through in-depth interviews, both women as well as men can use their "authentic voices" to describe their very individual and personal experiences of power in mediation (Smith, 1987). According to Eichler (1987:33), "[q]ualitative methods ... are particularly appropriate for exploring subjective experiences about which little is known at the collective level ..." In contrast, a quantitative methodology, which assumes that "...all things that truly exist must exist in some number, and exist 'out there' in some finite form that is knowable as truth ..." (Locke et al, 1987: 89) does not have the openness or flexibility to explore how the participants construct and frame their reality of power in mediation.

Although a qualitative methodology may involve a search for uniformities in the data, it can also provide an opportunity for the reporting and interpretation of contrasting experiences (Kirby and McKenna, 1989). By using qualitative methods and an inductive design, new and previously unreported information can emerge to contribute to a more complete understanding of power in mediation (Ragin, 1987). A qualitative approach combined with an inductive, idiographic process fosters the collection of rich and descriptive data in context, which then forms the

basis for analysis (Abercrombie et al, 1988).

### A Feminist Epistemology

The methodology I use to address the research questions is based on a feminist epistemology, which understands the social world by studying the meanings and assumptions that constitute knowledge (Fonow and Cook, 1991). This knowledge is reflected in the participants' interpretations of their experiences in mediation, and therefore forms the basis of their practice in mediation. Understanding how their knowledge takes shape and form in mediation can help us to understand power in mediation as it is presently constituted (Hammersly and Atkinson, 1990).

In reflecting on how perceptions, practice, actions, behaviours and expectations come together to produce knowledge of events in mediation, it is clear that the participants' experiences do not only occur within the micro-context of the mediation process. Their experiences also take place within and are influenced by the context in which mediation occurs (Hammersly and Atkinson, 1990). Using a feminist epistemology, the micro-event of mediation is therefore situated within the macro-context of gendered power relations in society in an attempt to analyze and understand how agency and structure work together in mediation.

Although there are no separate "feminist" methods, a feminist perspective influenced the complete research design for this project. Feminist research is based on a feminist perspective, which is "...a mode of analysis, a method of approaching life and politics, a way of asking questions and searching for answers, rather than a set of political conclusions about the oppression of women" (Hartsock, 1979:58-59). It includes research that is "...informed by a commitment to social justice for women..." (Eichler, 1987:47). A feminist epistemology forms the basis of a feminist research process (Fonow and Cook, 1991). In my own research this included:

- a) a critical examination of reflexivity in the research process. This consists of reflection on the methods that could be employed to best address the research question, consistent with broad feminist goals of exploring the oppression of women;
- b) a feminist orientation, as reflected in most aspects of the research project, including: selection of the topic; considering the effect of gender; theoretical orientation of the research question; non-directive phrasing in the interview guide; and studying both praxis and theory with the goal of exploring the oppression of women;

- c) a research goal of contributing towards emancipatory action for women.

### Personal Background

Over the past twenty years, both men and women in North American society have become much more conscious of so-called "women's" issues. During the same time period, there have been changes that have increased the legal and social status of women in society. However, although there are now more opportunities and improved choices for women, there is also a certain complacency that permeates some parts of society, with the belief that women have equal power with men and should get on with their lives.

My lengthy interest and involvement in feminism influenced my decision to study mediation from a feminist perspective. My view is that one of the major remaining tasks of feminists today is to challenge complacency and extend feminism into the grey areas in the private domain where gendered power relations are not clearly visible. One such "grey area" recently highlighted by feminists concerns the types of settlements that women are currently receiving after separation and divorce. These settlements are contributing to the "feminization of poverty", or the disproportionate numbers of women who are poor in North America (Weitzman, 1985). As a former single parent who has

had much of the financial responsibility for childrearing, I am very aware of the burden that an inadequate financial settlement can place on the custodial mother.

In addition to my own personal experience, in the past few years I have become aware of feminist research in the area of family mediation. Much of the feminist literature has cautioned that family disputes over children and resources that take place within the private realm of mediation are particularly susceptible to power imbalance (Crean, 1988). My personal experience and intellectual interest prompted my desire to learn more about the effect of power on women in mediation.

### Research Instrument

The methodology for my research had three phases:

- 1) an informal pilot study;
- 2) a screening questionnaire that was sent to all the clients who had participated in family mediation at the Surrey/White Rock Conflict Resolution Centre;
- 3) in-depth interviews with men and women who completed the screening questionnaire and consented to be interviewed.

## 1) Pilot Study

An informal pilot study was initially conducted in order to clarify whether my tentative focus for the interviews would be effective for exploring gender and power in mediation. The pilot study consisted of seven informal interviews with both male and female participants who had recently completed family mediation. It was conducted with participants who were not part of the formal data-gathering stage.

The first interview, with a male who had completed mediation several years ago, was made possible through the personal reference of a mutual friend. The interview was basically an informal discussion about mediation and the participant's feelings about the process and the outcome of mediation. Since the interview was very unstructured, no attempt was made to record it, although notes were taken. This participant also provided much useful feedback on the development screening questionnaire (Appendix A) later on in the research process.

The final six interviews to complete the pilot study and pre-test the interview guide became possible with the assistance of a key informant, a lawyer-mediator. These interviews were held separately with three couples who had previously been married, and who had been through divorce mediation with a lawyer-mediator. These particular couples

were interviewed because the key informant was willing to personally contact three sets of couples for whom he had recently conducted mediations, and ask if they were willing to be part of the pilot study. Since the client lists of participants in mediation are highly confidential, it is difficult to locate potential interviewees. With the assistance of this person, it was possible to conduct a full pilot study to pre-test the interview guide.

All of the interviews were tape-recorded, except for the first one which took place before I had a tape recorder. Two of the interviews were transcribed, and due to time limitations the rest of the material was reviewed by listening to the tapes. This information was then used to further develop the final interview guide.

## 2) Screening Questionnaire

At the time of the survey, approximately eighty clients attended mediation at the Surrey/White Rock Conflict Resolution Centre in the lower mainland area of southwestern British Columbia. After a number of meetings with the Executive Director of the Conflict Resolution Centre and approval for my project by their Board of Directors, the Centre agreed to send out a screening questionnaire on my behalf to their clients. The purpose of the screening questionnaire was to gather information about participants

so a final list of those suitable to be interviewed could be compiled. My goal was to interview equal numbers of male and female participants who reported diverse experiences of power at different points in the mediation process: before, during and after mediation, and when they completed the screening questionnaire.

The screening questionnaire asked about the relationship between the separating spouses before they participated in mediation, and their satisfaction with the process, outcome, and compliance of mediation. It also asked participants if they were willing to be interviewed about their experience with mediation. Those who responded affirmatively were asked to include their name and telephone number on the questionnaire. If they were selected to provide further information, an interview would be arranged at their convenience.

Of the eighty screening questionnaires that were sent out, eleven responses were returned unopened due to unknown forwarding addresses. Thirteen completed questionnaires were received from participants, which is a response rate of almost nineteen percent. This low response could be due to a number of factors, including the possibility that the other people who had attended mediation: a) were satisfied with mediation and therefore had no reason to discuss it; b) did not wish to talk about an emotionally upsetting

event; c) did not think the questions about power and satisfaction were relevant to their situation; d) wanted to maintain their privacy; e) were so busy they did not have time to complete it. The low response rate does not necessarily detract from the results since the questionnaire was intended as a screening mechanism.

Twelve of the people who completed and returned the questionnaires indicated that they were willing to be interviewed. Only two of the twelve questionnaires were from male participants, which prevented me from implementing my original design of equal numbers of male and female interviewees. The low male response rate might have been influenced by my gender identification on the questionnaire as a female researcher. The low number of male responses also prevented me from selecting male interviewees who reported diverse experiences of power in mediation. This resulted in less diversity in the experiences of power between the male participants than among the five female participants. My small sample size does not permit me to make generalizations from the results.

### 3) Interviews

The participants to be interviewed were selected on the basis of gender and their responses to questions on power in the screening questionnaire. Since only two males had

responded, both of them were included in the sample. The remaining five (female) participants to be interviewed were chosen because of the different configurations of power balance and imbalance they reported in mediation on the screening questionnaire. The final sample of seven participants represented the most diverse experiences of power that had been reported on the screening questionnaire.

Informal and in-depth interviews were held with seven participants, using an interview schedule (Appendix B) as a guide. The interviews were semi-structured, open-ended and exploratory, reflecting my chosen methodology, and approximately 1 1/2 hours long.

In the interview, I asked questions that fell into seven areas, several of which form components of my conceptual framework: 1) Selection of Mediation 2) Process 3) Outcome 4) Mediator 5) Power 6) Negotiation 7) General. These areas were selected on the basis of an extensive literature review on mediation, power and feminism, and many discussions with mediators, lawyers, clients of mediation and others.

In "Selection of Mediation", I hoped to gain a general idea of where the participants were in the separation process and how they came to choose mediation - in other words, what were their expectations of mediation and why was it important. My questions about the "Process" of mediation

sought an understanding of how these events transpired and what meanings they held for the participants.

My questions on the next three areas - "Mediator", "Power"<sup>1</sup>, and "Negotiation" - were focused on bargaining, strategies of power, power balance, changes in power and the effect of the mediator on the dynamics in mediation. In the last section, "General", I explored whether the participants had any thoughts on gendered relations in mediation, and whether in fact mediation was a process that they would recommend to others.

The interviews allowed me to explore the meaning behind the social construction of gendered power relations. By taping the interviews, I could capture the nuances and variety in experience as participants described the techniques and practices of power in mediation.

All of the interviews were transcribed and the data was entered into Notebook Two, a qualitative data analysis computer program. After the interviews were transcribed, the participants' names were changed to protect their identity.

### The Participants

Table 1 shows the ages and genders of the participants that were interviewed, the number of mediation sessions they attended, and whether or not they signed a mediation

agreement.

Both men and women practice as mediators at the Conflict Resolution Centre in Surrey/White Rock. Although the preference of the Centre is to have two mediators, one male and one female, mediate each family dispute, this is not always possible. Since gender is a major variable in the study, the number and gender of the mediators used by the participants have been provided in Figure 1.

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Table 1: Participants by Age, Gender, Number of Mediation Sessions and Whether They Signed a Mediation Agreement

	Participant #:						
	1	2	3	4	5	6	7
Age	22	46	29	42	46	33	32
Gender	F	F	F	M	F	M	F
No. of sessions	9	2	2	3	1	4	2
Signed agreement?	No	Yes	No	No	No	No	Yes

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### Analysis

I used the screening questionnaire and the interview as two research techniques that, when combined, would more deeply explore the research question (Brewer and Hunter,



attempted to remain attentive to common themes that might contribute to theory development on power in mediation. By applying a modified constant comparative method (Glaser and Strauss, 1967), I worked closely with the data in order to discover findings on the phenomena of power, as well as to reveal possible similarities in experiences of power based on gender. When common concepts and themes emerged in the data, they have been described as much as possible in the participants' own voices. Such information, I believe, that remains close to the data, can provide the basis for inductive theory building.

The data analysis proceeded following a standard system for qualitative analysis (Jayarantine and Stewart, 1991; Strauss and Corbin, 1990), with the goal of discovering the structure and meaning of the experience of power. I began by coding and conceptualizing the data in different ways and then by constructing different categories with the coded data that fit together and data that stood in isolation. I considered different dimensions of the data, and began to construct categories that seemed self-evident once I let them emerge. The profiles of different types of power balance provided an insight into power that was enhanced by describing other details about the participants' relationships. And the exploration of factors that contributed to more or less power was possible both through

identifying patterns in experience, and finding isolated experiences as well.

The most important part of the analysis was maintaining the authenticity of each participant's experience. This required careful reading and re-reading of the transcribed notes from the interviews. With the analysis directed by my theoretical interest, I was able to extract examples and illustrations that revealed different experiences of power as well as to identify concepts that appeared to relate conceptually or theoretically to one another. My chosen methodology, however, also permitted me to remain open to unexpected findings.

### Conclusion

I used an idiographic, qualitative approach with a feminist perspective to address my research question on power and gender in mediation. To fully explore the experiences of the participants in relation to power, informal and in-depth interviews were conducted after mediation. The interviews focused on providing depth and variety in response, and retaining the authenticity of the subject's experience. These methods were employed in a design emphasizing exploratory, emergent research, focusing on women's experience, in order to contribute to the development of theory on power and gender in mediation.

The following chapters explore my data on the phenomena of power in mediation. The relationship between mediation and the powerful institution of law is discussed in Chapter III. This is followed by an exploration of how power is experienced by the participants in mediation in the subsequent chapters.

Notes

1. There are no specific articles in the literature on mediation or feminism that led me to choose certain questions to explore the perceptions of power by the participants in mediation. Through a combination of extensive literature review and many discussions with mediators, lawyers, clients of mediation and others, I decided to include questions that asked about cooperation, compromise, control, and coercion, as well as power. By using this loosely structured continuum of "power" in the interview, which included words that encouraged reflection on equal or shared power as well as on power imbalance, I hoped to provide a broad enough framework so that the participants could talk about power in many forms and means. As well as asking questions that would elicit rich description of power, I also asked questions about "satisfaction", "success", "equity", and "likes and dislikes" to achieve as much description about the process of mediation as possible.

## CHAPTER III

MEDIATION AND THE LEGAL SYSTEM

This chapter explores the relationship of the law to mediation by describing the interplay between the participants' use of the court system, lawyers and mediation. Information about the participants' involvement with the legal system was not solicited prior to their interviews. Although this topic was not addressed in depth in the interviews, the results are included here to indicate the potential of the law to exert a powerful influence in mediation.

Advocates of mediation maintain that mediation provides better settlements for couples than the adversarial court system because the couples can develop their own agreement free from the influence of the state or the legal system. In the liberal climate of North America today, people are under the impression that "...regulation has largely disappeared...[and] ... divorcing couples are allowed great freedom to determine themselves their postdissolution rights and responsibilities" (Mnookin, 1984: 364). Yet an examination of the relationship between mediation and the legal system for the participants in my exploratory study suggests that, contrary to some opinions, mediation and the law are closely linked.

### The Participants

The participants were asked to describe how they chose mediation as a process to resolve a dispute with their partner or spouse over division of assets, custody, visitation or support. The answers provided demonstrated that for most participants, there was a fairly close relationship between mediation, lawyers, and the court system in settling disputes. Although mediation normally requires the services of a lawyer only at the end of the process to review the final mediated agreement, these participants described situations which involved court and lawyers on a much closer basis.

In fact, only one participant had court-ordered mediation, while the other participants chose mediation voluntarily. The participants manifested four different configurations of the interplay between mediation, court and lawyers:

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Figure 2: Contacts with the Legal System during Mediation

Mediation--->Lawyer

Jean

Lawyer--->Mediation

Grace  
Winnie

Court--->Mediation

Ron  
Cathy

Court-->Mediation-->Court

Bronwyn  
Frank

---

The most common relationship between mediation and the law was the configuration where contact with a lawyer or court preceded involvement in mediation. In only one case did the involvement with the legal system reflect the minimal type of involvement generally recommended in mediation, where participants attend mediation and then have the mediation agreement reviewed by their respective lawyers.

Grace<sup>1</sup> and her husband had the least amount of involvement with the legal system. They worked out all details of their separation agreement through a lawyer before they attended mediation to discuss child support. According to Grace, who is currently not happy with the terms of the mediated agreement, court is an option she wishes she had:

Court? I'd love to take him to court. But who can afford it?

Grace, not surprisingly, also had the least legal involvement in mediation, and was the only participant to indicate that court was not a viable alternative for her because of the cost.

Bronwyn and her husband, on the other hand, had the highest involvement with the legal system in mediation. Bronwyn began the process of dispute resolution by going to court in an attempt to collect child support. She

subsequently attended nine mediation sessions with her husband. She finally realized that mediation would not work for her, and ended up taking her husband to court again.

The use of the legal system occurred in the majority of cases with issues concerning the couples' children. In particular, two female participants used court action to enforce payment of child support. Both of their spouses then counter-sued for custody. According to these female participants, their spouses had no real desire for custody but were using it as a power play to avoid paying child support. Both participants ultimately received child support.

One male participant who received a summons for child support from his girlfriend stressed that he very deliberately held the process up through the legal system:

... when the lawsuit [for child support] came through, I got a lawyer and I instructed my lawyer that I wanted the [paternity] test done. ...So I was able to stall in a way. Thanks to a friend I have that is very knowledgeable in this way. He said: 'The only way to slow this process is to confirm the doubt you have whether he's your son or not.'

Even though all participants, except for one, had used the legal system much more than required for mediation, they nevertheless all held quite negative perceptions of the legal system. They generally viewed it as promoting animosity and mistrust and ultimately creating more problems than it solved. When Ron had to have a lawyer represent him

in court before mediation started, he felt that:

..it was turning into a fight amongst the two of us as parents, not focusing on what was best for the little one. It became a very political struggle and I don't think the lawyers helped at all.

Grace had a similar experience, feeling like her lawyer was too aggressive in his position towards her husband:

I don't know whether I ought to do as my lawyer says and screw the guy for all I can get or whether to just walk away from it [but] I don't feel like taking him for all I can get. I don't want to be like that.

Even though the participants did not like the idea of the adversarial court process, some of them still used the process when their needs weren't being met in mediation. For example, Bronwyn chose court because she thought it would give her more power than she felt she had in mediation. Frank also chose court as a last resort because he was not making any progress in mediation. These two participants, as well as Grace mentioned above, saw court as an option through which they would have more power to get their needs met than in mediation. However, though court was viewed as a solution to dispute resolution in some cases, all except two of the participants stated that court was not a positive option. They viewed mediation in a much more favorable light, as a process that involved the two partners working together in an atmosphere of cooperation to develop an agreement.

The information about the relationship of the law to mediation was supplemented with data about the types of settlements that the participants were negotiating. Two of the seven participants had a signed mediation agreement and two had a court-ordered separation agreement. The rest of the participants were still in the process of negotiation or adjudication. Even though they did not all have finalized agreements, they all had certain assumptions about the terms of the settlement.

Six of the participants had to deal with issues concerning property, and five of these people thought that a general 50/50 division of assets was fair. The sixth participant, Grace, received 9/10 of the proceeds from the sale of the family home. She used this money to purchase a house for herself and her children to live in.

Spousal maintenance, for either the male or the female partner, was not paid or under negotiation for any of the participants. Two of the women said that they wished they had asked for spousal maintenance.

The size of child support payments and the terms of visitation emerged in my exploratory study as the largest mediation issues. All male participants were paying child support to their female partners, and the children were all living with their mothers. The issues of custody and guardianship, although discussed by the ex-spouses, did not

appear problematic.

All participants in the sample, except for Ron, expected the mother to have sole custody of the children and the father to have visitation rights. Both parents would share guardianship. Ron was the only participant who wanted joint custody; he wished to live with his daughter at least half of the time.

### Conclusion

It is evident from the results of my study that the formal legal system had a continuing and strong influence in mediation for the participants. The legal system was used strategically by two of the female participants in my study in an attempt to get something that they could not achieve cooperatively in mediation - payment of child support. Even though child support was agreed to in mediation, enforcing compliance was very difficult without a court order. Regardless of their negative view of the courts, it worked to the advantage of these women. The use of the legal system in these two cases can be interpreted as helping to ensure that power balance between the spouses is maintained.

In contrast, when one of the two male participants received a summons for child support, he used the law to slow the legal process down. The ex-spouses who countersued for custody reacted in a similar way. This tactic

shows that the law can also be used to avoid or delay paying child support.

The participants' assumptions about the terms of their settlements generally correspond very closely to the assumptions based in the gender-neutral laws: each spouse is expected to become self-supporting, so there will be a 50/50 division of assets, no spousal maintenance, and shared child support. The expectation that the children will live with their mother by the majority of the participants closely follows the "tender years doctrine" which is based on the belief that young children of either gender should be primarily cared for by their mothers. This principle is not formally in effect anymore but is often substantively used in legal decisions (Boyd, 1989:126). Although technically in present-day Canadian law each spouse is supposed to have equal rights to custody, this presumption is not often substantively applied, and works for women and against men in this particular case.

In summary, the image of mediation as a non-legal process involving lawyers only at the end of the process to review the agreement was a situation described by only one participant in my study. Surprisingly, there was much more involvement of the court and legal system than strictly required in the standards for mediation. Two female participants used the law as a strategic resource to enforce

payment of child support; one male participant used the law to avoid or delay paying child support. The close interplay between mediation and the legal system for these participants of different genders indicates that the law can easily be accessed during mediation to exert power at different stages in the process.

The idea that a mediation agreement is free from the influence of the state and the law is not well supported by my data. The assumptions that participants made about the terms of their separation and mediation agreements indicate that many of them think they deserve very similar rights to those promoted in formal law. Although not all of the participants were happy with the terms under discussion or already in place in their own mediation agreements, in general they seemed very accepting of the same terms as the rights they have in formal law.

These results indicate that the law may have a powerful structural influence on mediation, and act as a guide for spousal and parental rights in mediation. The law may also be used to exert power not available in mediation, to enforce shared parental responsibility for child support. The law can also be used in a counter-strategic way to avoid or delay child support payments.

Although it is evident that the law is a powerful force and resource in mediation, the question of how such power

may work in the micro-process of mediation remains unanswered. In the next chapter, the perceptions of micro-power dynamics utilized by the male and female participants in my research are explored in detail. In particular, attention is paid to the dynamic of power balance and imbalance between the participants.

**Notes**

1. The names of the participants have been changed in order to protect their identities.

## CHAPTER IV

### POWER BALANCE AND IMBALANCE

As discussed in Chapter I, much of the research on mediation has focused on the satisfaction with mediation and its effectiveness in relation to adjudication, without exploring whether these benefits are related to gender. The benefits of mediation have typically been discussed using gender-neutral terminology. Very little empirical research has actually investigated how power balance in mediation is experienced by female versus male participants.

This chapter explores my data on the perceptions of power in mediation as described by participants of different genders. Section One is a discussion of whether or not the participants problematized power in their relationships with their spouses. Section Two provides profiles of my participants and their detailed descriptions of their perceptions of the balance of power during the complete mediation process. The perceptions of power dynamics in mediation described by the interviewees have been contextualized in a brief comparative case study format, using the four most diverse examples of power (im)balance they have identified. Section Three supplements the participant profiles with further examples of perceptions of

power (im)balance provided by the remaining participants who were interviewed.

### Participants' Perceptions of Power

The participants were asked in the Screening Questionnaire if power was a problem in their relationship with their spouse and whether one partner had more power at different stages in the mediation process: before mediation, during mediation, after mediation, and when they completed the questionnaire. The participants could also indicate that power was equal during any of those stages.

Most of the participants reported on the questionnaire that power was a problem in their relationship with their spouse (Table 2). Of the two participants who did not respond affirmatively to this question, one replied on the questionnaire: "not applicable". The other stated that power was not a problem in her relationship. When I interviewed this person later, however, she had changed her mind and decided that power had been a problem that she had not recognized. This was a conclusion that she reached by herself between completing the questionnaire and being interviewed.

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Table 2: Participants' Perception that Power was a Problem in their Relationship with their Spouse: Interview Response

		<u>Gender</u>	
		M	F
Was Power a Problem?	Yes	1	5
	No	0	0
	N/A	1	0

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Of the participants who affirmed that power was a problem in their relationship, two women replied that power was maintained exclusively by one person throughout the process (Table 3). One of these women stated that her ex-spouse had more power before, during and right after mediation, and when she completed the questionnaire. The other woman had the opposite experience: she had more power than her ex-spouse before, during and right after mediation, and when she completed the questionnaire.

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Table 3: Configuration of Power in Mediation Reported by the Participants on the Questionnaire: Who Had Power Before, During and After Mediation

<u>Power during Mediation Process:</u>	<u>M</u>	<u>F</u>
1) was held exclusively by spouse		1
2) was held exclusively by self		1
3) changed during the process	1	3

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Four of the participants reported that power changed during the process of mediation (Table 4). Table 4 shows that three of these four participants thought that power was equal between the spouses during mediation. However, all four participants said that power changed after mediation and that it reverted to their ex-spouse. Only one person thought she had power equal to her ex-spouse when she completed the questionnaire.

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Table 4: Perception of Change in Power during Mediation: Interview Responses

<u>Who had Power in Mediation?</u>	<u>Bronwyn</u>	<u>Cathy</u>	<u>Ron</u>	<u>Jean</u>
Power before mediation	self	equal	ex	ex
Power during mediation	ex	equal	equal	equal
Power after mediation	ex	ex	ex	ex
Power now	self	ex	ex	equal

---

In reviewing the responses about power, it is clear that most of the participants feel that power was a problem in their relationship. However, there are diverse opinions on who held power at different points in the process of mediation: the participant, the spouse, or both of them.

When power balance occurs during the process, which three of the seven participants found, it most often

occurred during the actual mediation reported. This balance in power appeared to be quite transitory, however, reverting to power imbalance right after mediation in all three cases.

### Profiles of Power Balance/Imbalance

This section presents a profile of the perceptions of power balance and imbalance experienced by four of the participants. These particular participants were selected in order to present the most diverse examples of experiences of power before, during and after mediation, and at the time they completed the questionnaire. The profiles represent responses from the only two men in the sample, and two of the women. The profiles describe the following examples of power:

- a) power held exclusively by the spouse;
- b) power held exclusively by the participant;
- c) power changed during the process of mediation;
- d) power was not an issue in mediation. (Although this is not really a profile of power, it is included here in order to provide a point of reference for the other profiles).

#### a. Power Held Exclusively by the Spouse

Grace is 45 years old and has one adult and two teenage sons living at home with her. She considered herself to be

quite happily married to her husband of 23 years until one day he informed her that he was leaving her. This came as a complete surprise to her, for she had no indication of major problems with her husband and they had just moved into a large new home.

Grace had led the traditional, supportive role of wife and mother for 23 years:

Well, [I] was just trying to make sure that he doesn't want for anything and that I never let myself go, you know, I never got to be a slob or anything. I was always nicely dressed when he came home from work and the house was tidy and the family as unobtrusive as possible and my time was for him. And I tried to be his wife in every way, and somehow I always had this feeling that ... I wasn't passing the exam.

In the last years of Grace's marriage she had worked part-time, two evenings a week. She felt that this gave her some outside interests but didn't interfere with her duties as a wife and mother.

Grace holds very traditional views on the role of women, which may have influenced the role she took in her marriage:

I don't like lady ministers, and I don't like ... you know, lady pilots or whatever, which is stupid and a terrible betrayal of women, but I just feel that I can lean on a man better.

Grace's role in her marriage consisted of the day-to-day care of her husband, children and the home, while her husband was the major income-earner and responsible for

major business and financial transactions. Grace believed that before and during mediation, her ex-spouse had more power because he had all of the information about the family's financial situation. Although she knew the amount of her husband's salary, she did not know the details of her husband's profit-sharing arrangements in his place of employment.

Because Grace had limited financial resources and most of the responsibility for the children, she was dependent on her husband for financial assistance. During the mediation process, Grace felt that her husband had the power because he wouldn't provide the information necessary for an equitable financial settlement:

I wasn't properly armed before I went [to mediation] and I think I had underestimated my husband's deviousness too. So that, you know, between us both, I came out worse. But that wasn't the mediator's fault. Because the mediator tried to get at the details of the profit-sharing and my husband wouldn't tell him. He just would say: 'Well, it varies from year to year, it could be less. ... until it became painfully obvious that there was no answer forthcoming.'

Grace felt that the lack of information left her in a less powerful position to negotiate in mediation:

My husband is a very clever man. He deals with company law and stuff all the time, so there's just no contest. ... I mean that he was trying to get away with paying me as little as he possibly could while looking to be really generous. ... And [the figures were] all fudged away and I just couldn't handle that. I just couldn't begin to understand this well of intricacy with his financial dealings.

While they were still in mediation, Grace moved her family to an older, more modest home that was more affordable. Although she didn't really know the actual costs of running and maintaining this home, she had to estimate the costs in order to negotiate a financial settlement in mediation. And she felt that she was as prepared as she could have been at the time:

Now having run a house on my own for six or seven months I'd be a lot better prepared, but I was as prepared as somebody in the dark could possibly be at that time in the midst of all the confusion and wondering whether to trust my husband or not to trust my husband ...

Grace was quite anxious that she not be perceived as 'gouging' her husband in working out the financial part of the agreement. In fact, she was not at all sure what would constitute a just and reasonable settlement. However, she and her husband did reach an agreement, and when it was signed Grace felt quite happy about the terms of the agreement:

I was satisfied as far as it went, but I hadn't been through a year on my own so that I didn't know how it was actually going to work out in practice - the financial arrangements. I mean on paper it looked great but in practice you don't really know how much your hydro bills are going to be in a house that's a third of the size of your old one but doesn't have double glazing.

I interviewed Grace eight months after her mediation agreement was signed. During that time, she realized that she had grossly underestimated the costs of living in a

smaller, older home. She felt under severe financial strain. As well, her eldest adult son had lost his job and moved in with her and her two younger boys. As she became more aware of the true costs of running a home and raising children, Grace felt resentful about the difference in incomes between herself and her ex-spouse and, in hindsight, about the financial terms of their mediation agreement:

Although still underneath it I did feel 'darn it', he's earning \$70,000 a year and I'm getting \$12 an hour part time. And it worked out 50/50, the finances. ... that's why I don't feel so good now because I realize now that the fog is lifting that the bastard is getting away with a lot of money and I'm getting nothing. And I've got the children and expenses and the house and everything else. ... And I can't get it out of my husband at all whenever I approach him about that and say: 'You earn \$70,000 a year, you're getting loads of topsoil into your garden and meanwhile we can't even...you know, it has to be macaroni for three days. This is not right.

Grace also was angry because their agreement provided for her husband to spend two evenings a week with their sons while she was at work. She is quite anxious that her husband be there to supervise because, according to her, her children roam the malls and they drink. She is upset that he complies to the letter with their financial settlement yet does not abide by the terms for visitation:

It's not the agreement that's the problem. It's my husband won't stick to it. I mean, I don't think two evenings a week is too much to ask for a Dad to look after his own family. You know, I mean I do it every day of the week and five nights of the week. What's

his problem with two evenings? You know, I thought that was pretty reasonable considering that everything was to be 50/50.

Grace's ex-husband refused to consider giving Grace more money to help provide for either the actual costs of her house or supporting their children. Grace's satisfaction with the agreement changed drastically, and she maintains that her ex-spouse still has the power in their relationship.

Grace sums up her feelings of powerlessness in terms of negotiating for herself:

God, it would be wonderful if [my marriage] had been my job...[because] you can always get another job. But you can't just get another marriage, another divorce. ... Power is when you can walk away from a bargain if it doesn't please you. [So you didn't feel that you were good at negotiating?] Not when there was so much at stake... I was definitely not powerful at that time.

#### b. Power Held Exclusively by the Participant

Winnie is 32 years old and has three children: two young sons by her first marriage and a baby daughter from her current marriage. In recalling her first marriage and the mediation process after separation, Winnie still sounds bitter, even though she says that she consistently had more of the power in the relationship with her ex-spouse.

Winnie knew her marriage was in trouble when her husband first left her during her seventh month of her

second pregnancy. He returned for the birth of their second son and they attempted to reconcile. However, he left her for the last time when the new baby was one month old and their first son was three years old.

According to Winnie, she held the power in her marital relationship before, during and after mediation as well as when she completed the questionnaire. Her ex-spouse took a passive role in their marriage and demonstrated little interest in being involved in major or minor decisions related to finances, child care, and running the house. The structure of power in Winnie's family differed markedly from the traditional family model. Winnie, in her view, took control of everything:

I ran the house. I did everything. I worked full-time. I had a real responsible job. I set up all the daycare. I did everything. And he just more or less, you know, was there. And I think obviously that was a big problem in our marriage. All the finances, all the major decisions, you know, I mean I would speak to him about them but most of the time I had already made up my mind anyway. ... He would just let me take control. He wanted me to take control. But in the end I don't think that's what he wanted. He wanted to be the one with the control.

Winnie was so busy taking charge that she had no time for herself, let alone for her husband. After realizing that Winnie was not willing to make time for him, her husband left her.

Winnie believes that because her husband had no desire

to take any control in their relationship, she ended up with all the responsibility and power. She also noted that her husband may have tried to gain some power over her by saying he wanted joint custody. Winnie maintains that she has no intention of letting her ex-spouse have any power with the children because she feels that she can't rely on him:

Because he's unpredictable and he's a lot different than I am as a person and he doesn't follow through on a lot of things. He talks about things and that falls through and ... Even though I really believe in his heart he feels that, you know, he wanted to do all these things, but I don't think he could have accomplished them.

During the mediation process, Winnie sought power in the relationship to get what she wanted - sole custody of her two children. Since she was working full-time and making more money than her husband, she was not in a vulnerable economic position. So she proposed an attractive financial trade-off to her husband, which he accepted:

Well, I knew the money was a hot issue with him and I knew that if I wanted full custody, that was the way I was going to get it. ... Money to me is, you know, I guess it was more important to me to have sole custody of the kids than any kind of dollar figure, you know. Because I wanted that control and I felt my children deserved it. ... I think that my ex-husband was just really scared I was going to take him to the cleaners, you know.

Winnie maintains that she still has more power in her relationship with her ex-spouse since mediation has ended, primarily because she has sole custody and can make more

decisions with regard to the children. Although she believes that her ex-husband wants more power, she thinks that he is mostly talk and little action:

He also didn't really understand what joint custody was. And I had done a lot of research on, you know, what it was and he just wanted to look good from the outside. He's just that type of individual and, you know, if someone asked him: 'Oh, yes, I have joint custody.' And I knew that he really didn't understand what it meant ...

Winnie said that her husband has tried to use the child support money as a power play on her. According to her, her husband would always make her ask for her child support cheque, and often wait for it as well. She finally took action by registering with the family maintenance support program, who put a lien on his house. Her ex-partner now sends the cheques directly to the program.

Winnie feels completely justified in exerting more control over the children because her husband deserted her and left her to deal with two children and the house. They have a visiting schedule in the mediation agreement, and although she has followed it to the letter until now, she has the option of not following it because she has custody:

He walked out and went to Mexico, so, yeah, I was pretty bitter. And I had to sell the house; I had to take care of a newborn and I had the dog and my cat and the whole shlamozzle, you know. ... for three years my life was on hold for the children ... And I felt that because I had done all that, that I had a bigger say in their lives as far as visitation goes, as far as planning things. And I did not feel it was 50/50 for

him to have the same say as me in these decisions. ...I just feel that I have sole custody and I have these decisions. If he doesn't like it that's too bad.

Winnie also feels that she can choose not to follow the terms of the agreement, which gives her more power:

But I feel that I have every right to do this because [the children] live with me all year long and I basically organize their lives and he just kind of comes in and takes them for a weekend and has fun and sends them home again. So I feel that .. I'm building a family life here and really the solid structure is here for my kids...

Winnie has since remarried and has had another child with her new husband. She works part-time and believes that power is more equally shared between her and her current spouse. According to her, "...my life is 100% better you know. And [my ex-spouse's] life is still miserable."

#### Discussion: the Female Participants

In discussing power balance, both Grace and Winnie mentioned that earning capacity was important. Grace also said that having incomplete information about family finances and running a house affected power balance, and gave her less power. In contrast, Winnie was involved in all aspects of running the house and made all the decisions. It is likely that Winnie had very complete information about the household finances and running a home. Two key differences between Grace and Winnie, then, are that 1)

Winnie had high earning power and Grace had low earning power 2) Winnie was well-informed and Grace lacked information.

Two additional concerns were noted by Grace. She mentioned a number of times that she was 'afraid to gouge': to be seen as taking more than she deserved. This could be interpreted as over-compromising, because ultimately she found that she was getting far less money than she needed to live. This may fit in with her traditional view of women primarily being housewives who are usually undervalued as well as unpaid. The second concern was her husband's non-compliance with visitation. Grace didn't like to leave her sons alone, unsupervised. Being a single parent with little money, however, left her with few options but to rely on her husband's compliance with the agreement. Winnie did not have the same concern about options, which could be the result of two things: 1) she considers herself a professional who can therefore earn good money to support herself and her children 2) she has since remarried, providing another source of family income.

In brief, the key difference between the reports of Grace and Winnie are that Grace was in a much more vulnerable financial situation than Winnie. In addition to working part-time and earning much less than her husband, Grace was not aware of the complete financial picture of the

family. She therefore felt that she was at a disadvantage during the mediation process. On the other hand, Winnie knew exactly what she wanted and she achieved that - because she was not financially vulnerable. The good salary she earned gave her the ability to bargain for sole custody in exchange for a smaller financial settlement from her husband. Winnie is quite clear about the fact that having sole custody was her most important priority - which she had the power to achieve.

#### c. Power Changed During the Process

Ron was just about to separate from his wife of five years and move into an apartment of his own when his wife found out that she was pregnant. For the sake of the child they decided to stay together, but finally separated when their daughter was four years old. At the time of the interview, Ron and his wife had been separated for more than two years and had been to court before they attended mediation.

Because his wife was a nurse and worked 12 hour shifts and Ron's work schedule was flexible, he spent a lot of time taking care of his daughter. He views himself as more family-oriented than his career-minded partner, and he says that she took little interest in spending time with their daughter. Ron believes that his daughter prefers to be with

him because he is more family-oriented and he has spent more time raising her than her mother. Ron maintains that it is a struggle whenever he has to return his daughter to his wife because the child doesn't want to go.

When Ron and his wife went to court, they were separated and had been sharing guardianship of their daughter, who attended a daycare in a facility near his wife's residence. Ron became concerned that the daycare was not a good environment for the daughter because of overcrowding and signs of possible abuse, and talked to his wife about finding another daycare facility. She did not believe, however, that there were problems with the existing daycare arrangement, and refused. Out of concern for his daughter, Ron finally took action himself, and placed his daughter in another daycare near his own residence. This action prompted his wife to take him to court for custody.

In court, Ron applied for joint custody and his wife applied for sole custody. The court responded by ordering a Section 15 - a family court counselling investigation. During the initial interview for the investigation, it was recommended that they attend mediation. At the time of the interview, Ron's wife had court-ordered sole custody of their daughter, pending the outcome of the family court counselling investigation.

Ron and his wife had already divided up their marital

assets before mediation began:

Fair is fair. We never had a problem dividing our assets up half and half. That's as simple as that and that's not a problem. ... We've both got to live. We've got to start out again. Just divide everything up and away we go.

Ron felt that in general, power was fairly evenly shared between he and his wife before they separated. It differed from the traditional family structure in which the husband is vested with most of the power. But by the time Ron and his spouse entered mediation, Ron felt powerless because the court had awarded his wife sole interim custody and she was denying him access to his daughter.

She was awarded sole interim custody until this investigation or some sort of agreement comes out. So she withdrew the access that I had. I was spending about 50 or 60% of the time with [my daughter]. [My wife] decided that that's it, you're not seeing her anymore. ... You'll get her one or two days a month.

Ron feels that his ex-wife had all the power before they began mediation because of the court order. He also feels that his ex-wife has used this power to get back at him:

My feeling before we went in [to mediation] was that her purpose for maintaining her position was one 'I'm not letting you have your daughter. I don't want you to have any part of your daughter's life. You left me and that's it. That's fine. You've cut the ties and you're not spending any time with her.'

During the mediation process, Ron felt that the power balance changed and that he had equal power with his ex-spouse. One of the reasons was because the mediators

discouraged them from making accusations or emphasizing who had power over the other. The mediators instead focused on making the communication more equal:

I was able to express my point of view and not just have somebody walk away or hang the phone up or pick up and leave when they wanted to. You were there for two hours and the two hours we had we both talked and we both expressed our opinion, so in that light I felt yes, I was able to get more across to her, as far as where I was coming from. And I think the things that she said, such as 'I have sole custody, I say what happens, and that's all there is to it' was broken down. They would say 'Wow, this is a real impasse, why talk about this?' So they were able to get through ... there was no real struggle. ... So there was no real power there. We were more or less equally able to get our points across.

Ron has trouble understanding his wife's decision to withhold access:

So now I think that she feels that she holds the stack, she holds the cards, which is a real funny way to approach the issue when you're talking about children. I don't understand it myself. When you're dealing with a child who you know plainly, doesn't want to be with you, doesn't like the situation, but you're doing this just because you hold the cards, because it's what you want ...

Ron believes that his wife wants to keep control at all cost:

And it's not [her] question of 'what's best for my daughter.' 'There's a chance I'm going to lose my daughter, you're going to take her away from me.' Which was never the issue. I've never, ever through the whole thing said 'you're not seeing your daughter.' That's not the intention. But it was her feeling that she was going to lose perhaps control, maybe that might be a better word. But the issue always came back to 'no, you're going to take my daughter away from me.'

However, Ron feels that he was not seeking control but rather considering what was best for his daughter.

Ron also feels helpless that his wife was constantly using his past behavior as a bargaining point to demonstrate that he would not be a good father. She brought up information about his past at every opportunity - in court, in mediation, and in family court counselling:

In the past we used to smoke [marijuana] a fair bit. But since, I suppose about 15 years ago I lost interest and, once in a while, but on a very limited basis. And that is always brought up ...: 'You smoke dope. How can you be normal; how can you focus on life if you've done that?'

In some ways, since mediation, Ron has received support from the investigator for the family court counselling investigation for his action of taking his daughter out of the daycare:

..[the investigator has] already said he's recommending strongly this daycare be shut down and, to the point where they're doing some investigating themselves. So I can't see [my daughter] going back into the situation, into that daycare.

Unlike Grace, finances do not appear to be an issue to Ron. Both he and his ex-wife are professionals and earn good salaries, although Ron earns more than his wife. Since the investigation started, his ex-wife has been talking with him about support. She would like to quit work, and asked Ron if he would support her so that she could stay home with

their daughter. According to Ron, he is willing to consider that possibility.

Ron's main concern is having contact with his daughter, with whom he has always been close. However, with the court involved, he must recognize that his ex-wife has temporary custody. And he will have to abide by the final court order regarding custody, even if it is not in his favour.

#### d. Power Was Not a Problem in Mediation

Frank is the only participant in the sample who was never married. In fact, he had been living with his new girlfriend for only a month when she announced that she was pregnant. Frank was upset at this discovery, since she had told him that she was using birth control and that their relationship was basically casual. Frank held the traditional attitude that birth control was the responsibility of the woman. The last thing Frank had expected was for his girlfriend to become pregnant.

Frank ended the relationship shortly after this unexpected revelation, because he felt that she had deceived him and wanted to ensure they would stay together by having a baby. After the baby was born, Frank heard little from his ex-girlfriend until he received a court summons for child support. By this time, his ex-girlfriend was living with another man. Frank responded by obtaining a lawyer and

agreeing to pay support if she could verify, through a paternity test, that the child was indeed his own.

After a lengthy period of time, Frank's ex-girlfriend officially verified that he was indeed the father of their young son. Both of them had secured lawyers at this point in time, who suggested that their clients attend mediation to discuss ongoing child support payments and child custody. Since Frank's paternity had been established, he felt it very important to establish a relationship with his son:

I wanted to give [Edward] an opportunity to know who his father is. Basically because I went through something like that when I was young; I never got to know who my father is. And it had a very strong effect on me as a person and that's lifelong.

Frank and his ex-girlfriend attended three mediation sessions over a period of about one year. During the first session, they agreed that the ex-girlfriend would have sole custody and that they would have joint guardianship. They also agreed that Frank would pay her a lump sum for retroactive child support and monthly child support payments. At each of the subsequent sessions, his ex-girlfriend asked for more money. His first response to her was:

'Look, I can't afford to pay her a lot of money. I have to pay other bills and things like that. And she said: 'What do you think is reasonable?' I said: 'For [our son's] age, I think \$\_\_ is O.K.'

At the next mediation session, his ex-girlfriend said she

needed more money because of the cost of daycare for their son, Edward. So Frank agreed that his support payment would be equal to half the cost of the daycare fee. At the third session, his ex-girlfriend again said that she needed more money because if she lost her job, she wanted Edward to be provided for. Frank did not like this turn of events:

Why do I have to address her losing her job? I'm not legally married to her or responsible for her, [although] I'm responsible for Edward.

At the same time that they were discussing child support, they were also working on a visitation agreement. According to Frank, however, his ex-girlfriend and her new boyfriend had no intention of letting him have regular visits with his son, even though this was agreed to in mediation.

Frank doesn't think that his ex-girlfriend went to mediation in good faith, and instead was trying to stall for time to avoid having to go to court, at which time access would likely be enforced:

I mean she agreed that she would take home three months of my work schedule, she would return the work schedule on the 20th of January past to my lawyer allocating days and times I'd like to see Edward. Nobody said anything to my lawyer. I mean it's very obvious that she came there with the intent not to have faith. And what's the point of coming?

Her lack of commitment to their mediation agreement became clear to Frank during the last mediation session.

According to Frank,

[t]he only thing I find a disadvantage to the mediation process is that [the] individuals signing an ongoing agreement could turn around, for example, Michelle, the day she took the [mediation agreement], lifted it up in the air and says: 'This is worth nothing, it's nothing.' ... that's real contempt.

Frank's ex-girlfriend has not even allowed him to take his son out of her apartment or for an overnight visit. They never did sign the final mediated agreement and, at the time of the interview, Frank was preparing to take her to court to have access enforced.

Frank stated that he had thought about his decision to take her to court for a long time. He didn't like the thought of 'fighting it out'; however, he was at a point where he felt that he had no options left to access his son.

Surprisingly, however, Frank completed my questionnaire and later when I interviewed him, he did not think that the term 'power' was applicable to his relationship:

I think that's a very old fashioned concept. I think [we should be able] to sit down and disagree but be able to come to a mutual understanding which is beneficial to both of us.

Frank really liked the idea of mediation and thought that it reflected the way that couples should ideally communicate: by each presenting their own opinions and ultimately coming to a resolution that worked for both of them. Throughout the whole mediation process, Frank felt that he had control

because he was clear about what he wanted in the situation. He did not think that power played a role in or was a part of the mediation process between him and his girlfriend. Yet this does not mean that Frank was not actively involved in a power struggle -- only that he was unaware of it or unwilling to talk about it. At only one point in the interview did he mention that power might have had an effect. In discussing the fact that the mediation centre couldn't enforce the visitation schedule, he said: "She's playing the power game, a power trip."

#### Discussion: the Male Participants

In reviewing both Ron and Frank's profiles, it is clear that they both share the same concern - access to and visitation with their children. Both of their partners had sole custody and were severely restricting access at the same time. Since the children were living with their mothers full-time, they had more control of the situation. The limited access to their children was a major source of distress for both fathers.

Each father's reaction to restriction of access was quite different, however. Ron was quite definite that his ex-wife was doing this as a power play, to have all the control, and to get back at him because he left her. Ron was also concerned that the information that his ex-wife

kept bringing up regarding his past behavior of smoking marijuana would be used against his case for joint custody.

Although Frank was subject to a similar restriction regarding child access, he did not think that power was involved at all. However, he did mention once that his ex-girlfriend was playing a power game over visitation. The fact that Frank was resorting to court might indicate that he was exerting the power of the law, since the court has enforcement powers. Yet until he had a written mediation agreement that was registered in court, he would not have the power of a court order.

The power that Ron's ex-wife had before mediation changed to a power balance during mediation. According to Ron, this was due to shared communication and the mediator's guidelines about the dialogue. Ron said that no-one could walk out. They both had to stay there for two hours. Since his ex-wife could not emphasize that she had the power through sole custody or bring up his past behaviour in mediation, he felt that they could have a positive dialogue. When they ended mediation, however, he felt that power went back to his wife again.

It is notable that both men have very little to say regarding finances. Certainly they both reflect a departure from the traditional image of the husband who is not much interested in visiting his children and tries to get away

with paying as little as possible for child support. On the other hand, neither stated that employability or rate of pay was a concern.

#### Power Change Experienced by the Other Participants

Four people in the sample reported that power changed during the complete mediation process - Bronwyn, Cathy, Ron and Jean (Table 4). One of these participants, Ron, was profiled in the previous section. In this section, examples provided by the other three people in the sample who believed that power changed during the process are discussed. All three participants are female.

Their comments regarding the change in power are presented in the following paragraphs to provide additional insight into the power dynamics in mediation.

##### 1. Cathy

Cathy thought that power was equal in her relationship before mediation and during mediation. However, during the mediation process, she had some doubts about whether the mediators were fully aware of the potential for problems with the agreement they were encouraging - that is, to have her ex-spouse take their children temporarily until she was more settled. By the time mediation was over, Cathy felt that power had shifted to her husband because he had gained

temporary custody of their two children and was refusing to let them live with her again. In speaking of her ex-husband, Cathy says:

I knew he was going to do this to me, and take the kids from me. He just agreed to everything and took the kids and realized not having signed anything that there was not a thing I could do right now, and that's what bugs me. There's not a thing I could do.

Cathy let herself believe that the mediators could ensure that the arrangement would indeed be temporary, although as noted above, she had her doubts. However, she did feel somewhat pressured and coerced by the mediators into giving up her children, because she did not really believe that her ex-husband would return the children:

And that's how I came to agree, and that's what [the mediators] kept on telling me: 'It's just temporary.'

At the time of our interview, Cathy was working on a joint guardianship arrangement with her ex-spouse while trying to come to terms with the possibility of not having custody of her children. She felt that after she agreed to let the children move in with their father, he gained most of the power and that she was not able to get her power back.

## 2. Bronwyn

Bronwyn, at 23 years old and with a baby son, wanted out of a marriage with a spouse who always wanted, in her

words, to be in control. Although Bronwyn was employed and her husband unemployed before mediation, she constantly felt overpowered by him. During mediation, Bronwyn felt manipulated and unable to recognize and verbalize her own needs in her husband's presence.

Bronwyn felt that she had power before mediation, because she was in the process of going to court for child support and knew what she wanted. The lawyers recommended mediation, but after the process started, she realized that the power had shifted from herself to her ex-husband:

[Did you feel you had any control in mediation as far as the proceedings went?] No. [Why?] Just because of his nature and mine, the mediator was there to facilitate but not really to interfere, so it was very much in [my ex-husband's] control. ... So I continued to let him control me until I realized that for us, mediation just wasn't going to work because I was going to continue to let him control me. That's when I decided to go to court.

After Bronwyn returned to court, she feels that she regained her power and can now recognize what is important. She believes that her relationship with her ex-spouse has also improved because she can represent herself in discussions:

Personally I think our relationship was better after going to court, because now I have some power and he doesn't just dictate to me and we can actually discuss things...

### 3. Jean

Jean originally thought that power was not a problem in her relationship but by the time she was interviewed, she had changed her mind:

[I noticed in your questionnaire that you said power wasn't a problem in your relationship.] That's dead wrong (laughs). [You mean you've changed your mind?] Yes, power was a problem, yeah, a big problem.

Jean thought that her husband had more power before mediation because he was so manipulative. However, she thought that power became more equal during mediation because of their communication:

[Did you enjoy any of the negotiating?] Yeah, I did. I enjoyed hearing his point of view. I enjoyed hearing his wishes in an unthreatening situation. [So you hadn't had that opportunity?] No. ... so it was nice to have that out of the way. You're just not going to get away with that garbage here. And he knew it. He never even tried it. So just in the situation for me it was different.

Although Jean felt that their only mediation session proceeded very well to an interim agreement, things changed soon after. Her husband refused to abide with her desire for privacy and was threatening her. He also had developed some animosity towards her and he went to a lawyer:

But for us I found [mediation] very peaceful, very kind of a slow process, unthreatening, whereas a lawyer-only process, I think is very threatening. You're always thinking, 'Oh, God, what is he telling his lawyer?' And now that they've received this I'm wondering: 'Oh God, now what is he going to respond with?'

Both Jean and her ex-husband were involved in legal

proceedings at the time of our interview. Jean felt that her husband had regained all of the power in their relationship by going to a lawyer with the intention of taking her to court.

#### Discussion: Power Changed in Mediation

Three of the four participants (two female and one male) who said that power changed during the process of mediation believed that the power balance was equal during mediation. All three of these participants stated that power reverted to their ex-spouse after mediation.

Both Cathy and Jean felt that they lost power after mediation when their ex-spouses did not comply with the main terms they had agreed to in mediation. Jean felt that she also lost power when her ex-husband retained a lawyer. When mediation was over for Ron and he was subject to a court decision, he felt a loss of power as well.

For Ron and Jean, the change from mediation to court signified a loss in power. For Bronwyn, moving the dispute from mediation to court gave her a feeling of more power.

#### Conclusion

The four profiles distinguish the participants' different perceptions of power balance before, during and after mediation, and when they completed the questionnaire.

As well, the four profiles represent two male and two female voices.

The main differences between the the participant who perceived she had all of the power throughout the complete process and the participant who perceived she had no power during the process was earning capacity and access to pertinent information. The powerful participant (a female) had both; the powerless participant had little of either. The powerful participant felt that she had bargaining power because she had information about the family finances, and was financially independent enough to bargain for what she wanted.

It is interesting that both of these participants are women. Winnie does not fit the image of the traditional woman, because she has both earning power and complete knowledge of family finances. She therefore has the power to effectively bargain for sole custody. Winnie is quite aware of her use of power, and appears to have little interest in compromising. She does not seem intimidated by conflict and in fact actively and consciously uses her financial and informational leverage as a bargaining tool for sole custody.

On the other hand, Grace exhibits many of the qualities that render woman vulnerable in mediation as discussed in the feminist analysis of mediation in Chapter I. She did

not know what she wanted in mediation, wasn't sure what she deserved, was afraid of being aggressive and "gouging", and wanted to be nice about it all. Consistent with Okin's (1989) theory, Grace had little bargaining leverage because her children and her home were her life - giving her very little with which to bargain. Grace's position is similar to one described in the Report of the Attorney General's Advisory Committee on Mediation in Family Law (1989). Grace felt the effects of systemic power imbalance because she didn't know the complete financial situation of her family. Nor did she have effective earning potential of her own.

My male participants' discussions of power focused almost entirely around their access to and visitation of children, which differed from the primary concerns of most of my female participants. Both male participants valued their relationship with their children and wanted to ensure that it was protected through regular visitation and shared parenting time. When this was jeopardized, the men felt that they had less power. They did not use payment of child support to bargain for access, and instead felt their only recourse was legal action. Their lack of confidence in being able to obtain and maintain access to their children might be due to structural bias which may influence custody and access decisions. This bias may affect legal and quasi-legal decisions through interpretations made by judges and

mediators in favor of the mother's relationship with their children. Ron's desire for shared custody reflects a departure from the traditional male lack of participation in daily custody of their children. Even though the maternal preference rule no longer applies to the custody laws (Fineman, 1989) and men and women have equal rights to joint custody and guardianship, the substantive interpretations of judges, lawyers and mediators may weigh in the woman's favor.

The female participants' discussions of power featured more diverse concerns than the men's concerns, which may be due to the greater number of female participants. Two women talked about compliance by the ex-spouse with terms of visitation, two women discussed gaining custody, and two women talked about receiving child support. Two women also felt that earning capacity and information about household finances was a source of power. One woman mentioned that division of assets was a concern and another was concerned with physical threat from her ex-spouse.

For both of the men and two of the women, then, ensuring that shared parenting and visitation by the father took place was a point of power. This had a gender-based difference: the men wanted to maintain a relationship with their children, while the women wanted to ensure that they could rely on the visitation arrangements so they could

schedule their own work or activities. Apart from Ron, the other participants assumed that the children would live full-time with their mother, who would have primary responsibility for them, and the father would have visitation. These findings are consistent with our gendered social expectations that women will have primary responsibility for the physical care of children (Crean, 1988).

The most common concern for my female participants was money-related issues. Three women felt that their husbands tried to withhold child support or information about family finances as a power play. None of the women asked for or felt that they would be eligible for spousal support, although two of them said that they thought they needed it.

It is interesting to theorize about the reasons that financial concerns were common for the women and not a concern of the men. The women may assume that they will have primary care of the children. As stated in Chapter I, women have fewer opportunities for well-paid jobs in the workforce, particularly when they choose work that permits them to continue primary child care. My female participants' concerns about division of assets, size of child support payments and collection of child support indicate a concern about being able to financially provide for themselves and their children. They held these views

even though some of my female participants were relatively well-paid professionals. According to Polatnick (1984:26), "[s]hould all other barriers to economic power for women suddenly vanish, childrearing responsibility would still handicap them hopelessly in economic competition with men". Fineman (1989) suggests that because men are under less economic duress than women in mediation, they have less investment in the outcome.

For the participants who reported a perceived power change, two of them who had less power before mediation said that power balance was achieved during mediation. This was because threats were not allowed during the process, and good communication was encouraged. They ascribed this primarily to the influence of the mediators. On the other hand, mediation was seen as a process that took the power away from one participant (who felt powerful before mediation), because the mediator could not control the proceedings. These examples show that the role of the mediator can be critical in mediation, by establishing a communication framework and highlighting the issues to be discussed. The ability of the mediator to successfully promote power balance between participants, however, is not assured.

The next chapter investigates more examples of perceived power in mediation by describing events that the

participants believe gave them more or less power in mediation.

**CHAPTER V****FACTORS THAT AFFECT POWER**

The different profiles of power described by my female and male participants in the previous chapter provide an overview of perceived power balance and imbalance in mediation. Four diverse examples of perceived power have been featured. This chapter recounts some of the specific events that the participants believe contributed to a feeling of more or less power in mediation. Although there is some overlap between this analysis and the dynamics of perceived power balance between spouses as described in Chapter IV, an attempt has been made to focus this chapter on the participant's individual experiences of events that affect power. This chapter also discusses the role of the mediator in affecting perceived power.

The types of power described by the participants have been loosely divided into two categories: 1) factors that seem to contribute to less perceived power, including power plays by the spouse, and 2) those that contribute to more perceived power.

## Less Power

### a. Giving In

Three of my five female participants found themselves giving in or giving up at some point in mediation. They found it difficult being assertive and knowing what their needs were. This affected their position in the mediation process. According to Cathy:

Sometimes I feel like a child. I don't know how to stand up for myself. I give up. And other times I know exactly what I want.

Cathy felt that this realization sometimes came to her after it was too late to change:

..I often walk out of [mediation] and go home and I feel good. I've achieved something. But I look back on it sometimes and think: 'I should have been stronger, stated my needs more aggressively .. sometimes I realize things that were important to me are more important than I even gave them credit for.'

Bronwyn, the participant who went to court because she could not assert herself in mediation, said:

And also the best part of me was feeling sorry for him. So I gave in to a lot of things thinking that if I made him feel better he would start being nicer. And I found at the end of mediation I not only gave in to everything but he still wasn't being any nicer.

Bronwyn ultimately found that the only place that she could assert herself and regain her power was in court because there she wasn't intimidated by her husband's presence.

Grace felt that her timidity made her afraid to ask for enough money to run a household and to raise her sons. She

still felt unsure about how much financial support to ask for from her ex-spouse, and she had trouble acknowledging to herself that her needs were genuine:

... but now that I know more I would go back and push for more money. I mean that sounds really vulgar. I was too in good taste, or timid, or something to be gouging at the time, but now I'm not because I'm faced with all these bills.

The examples of giving in or giving up provided by Cathy, Bronwyn and Grace are similar in that these female participants all realize at some point after mediation that they are not adequately standing up for their own needs or interests. After eight or nine mediation sessions, Bronwyn finally took a definitive step to regain her power by going to court. Grace realized some time after the mediation agreement was signed that she hadn't been assertive enough and she didn't have the money to take her ex-spouse to court. Cathy was still in mediation at the time of our interview, working on staying in control and feeling somewhat optimistic about it.

The only participants who did not mention giving in or giving up power at some point in the process were the two men and Winnie, who maintained power throughout the whole process. Winnie said that in the second mediation session, she clarified to herself what she wanted and expressed her needs, resulting in a feeling of power and control. And as

Ron spent more time in mediation, he became even clearer on what he wanted and firm in his belief that his position was the right one for him. Frank also said that after his girlfriend sued him for custody, he became firmer about what he wanted, resulting in a feeling of control during the process.

#### b. Control over other Relationships

Two of the female participants felt that their ex-spouse tried to take power by controlling their relationships with other people through the terms of the agreement. Jean said that her ex-husband would let her live in their former shared house with their handicapped daughter as long as she didn't have a relationship:

And he at first wanted it put in the agreement that I could have the house as long as there was never a third party in my life. ... So there was the power. He wanted to have the power. And I said 'no'. I needed to have my residence just as he would and my life was my own.

Cathy's ex-spouse used their custody battle to defend his concern about her getting involved with someone else:

Yeah, but then he'll manipulate to cover it up with: 'Well, the kids need this, the kids need that.' Like, I wasn't supposed to have a relationship and I shouldn't have men sleeping over and all that, but that's not for fear of what that's going to do to the kids, we all know what that could do to the kids. It was more because he didn't want me being with anybody.

Although these attempts to control their relationships with men were interpreted as a direct power play, neither of the women had any intention of letting their former partners control their personal lives .

### c. Negative Surprises

Negative surprises were discussed by two of the female participants as a type of power play, particularly when they led to a feeling of more vulnerability and less control during mediation.

Winnie was not expecting her ex-spouse's new wife to be in the waiting room during the first mediation session. This took her by surprise, since her ex-spouse was apparently involved with the same woman while Winnie was pregnant and still living with her now ex-husband. This surprise during the first mediation session led Winnie to feel that she lost control:

...and then we got into the room and I guess I was just so stressed already that I couldn't really guide where we wanted to go and I guess I expected the mediator more or less to guide things a little bit better. And it ended up that the focus was really shifting from where I felt it should have been.

Cathy was also afraid a surprise could jeopardize her chances of getting custody of her children. It was really important to her that her ex-spouse feel satisfied with the mediation process so she could assure herself that he would

not try to take power:

If I know he's satisfied then I don't feel I have to watch my back. ... I feel he's satisfied then I don't feel like he's going to pull any dirty tricks on me. [What sort of tricks?] For example, filing a custody thing and not letting me know. Or reporting to human resources something I've done, an anonymous phone call or something like that.

The two types of negative surprises described by the participants had very different consequences. Winnie was so taken aback by the presence of the new girlfriend that she couldn't get a feeling of control in the negotiations. For Cathy, the potential consequences were much more severe because they could jeopardize her chances of regaining guardianship of her children.

#### d. Coercion

An act of coercion is defined as: 'to compel by pressure or threat' (Morris, 1975:271). For the purposes of this study, it is defined as a more overt and extreme use of perceived power to get what one wants in mediation, through pressure or threat.

Participants reported that two different types of coercion were used during mediation between the partners:

1) physical threat and 2) information threat.

Two of the women were afraid that their ex-spouses would physically kidnap their children, because they had

received threats from them. These were the only two participants who stated that custody was an issue. Both of these women had tried to collect child support from their ex-spouses, and both of their ex-spouses then responded by suing them for custody.

Another female participant had been physically threatened by her normally mild-mannered ex-husband. She found that even though they had agreed that her ex-husband would request permission before visiting, he did not follow through:

He couldn't stand to lose me. And so he really became very assertive, aggressive, manipulative and scary because he also threatened my life and I ended up calling the RCMP over this. ... And subsequently I came to the realization that the only way that I could ever be free was to put the place up for sale, you know, us living in it was .. I would always have him here, always.

At the time of the interview, Jean had a 'For Sale' sign on the front lawn, and was feeling more in control. She attributed this to taking matters into her own hands by putting the house up for sale, and now felt that she had regained power over her own life.

The final two examples of the use of coercion were provided by the male participants. Frank believed that his ex-girlfriend used delaying tactics by not providing information on a visiting schedule for his son as promised, because she had no intention of letting him see his son.

This was the only example that Frank provided of perceived power imbalance in mediation. And Ron felt that when his ex-wife used information about his marijuana smoking to negatively portray him as a parent during custody discussion, that that was a coercive move.

e. Compliance with the Agreement

The factor most often associated with perceived powerlessness was lack of compliance with the mediation agreement. Compliance was an issue in varying degrees for all the participants. Six participants answered a question on a scale of 1 - 5 about their level of satisfaction with compliance with the agreement (Table 5). Five of the six participants selected the lowest rating, indicating that they were not satisfied with compliance with the agreement when they completed the questionnaire.

The problems with compliance primarily related to children and fell into three areas - visitation, custody and child support.

Both Grace and Winnie experienced problems with visitation: Winnie's ex-spouse wouldn't provide the required notice for cancellation of visits, and Grace's ex-spouse wouldn't visit as agreed. Frank had a major problem establishing details of visitation because his ex-girlfriend wouldn't respond with a schedule of times during which he

could visit his son.

Cathy had problems with compliance because she felt that her ex-spouse reneged on an agreement to return the children to her after temporarily being in his care. She feels quite bitter about this, and would like to see more enforcement power in mediation:

I just think the thing I would like to see, and I've warned everybody ever since, when I went through mediation, I say: 'Whatever you agree on mediation doesn't mean it's binding. Protect yourself. Protect your rights under the big major agreement. Don't give before you protect yourself.'

Winnie also found that the act of signing a mediation agreement is really a voluntary agreement to comply, and dependent on the goodwill of both parties:

And I think also another reason why I wasn't completely satisfied is because my ex-husband doesn't really follow what we said on paper. ... I guess, what I'm saying is the mediation process can only really be effective if the two individuals are willing to follow it ...

Jean provided one of the few examples of non-compliance that did not involve children. Her ex-husband refused to knock or otherwise to give notice when he came to the house that they had once shared but where she now lived with their children. Although the mediation agreement specified that she would continue to live in the family home with their handicapped daughter until 1993, and that he would respect her privacy and ask permission to visit, he did not comply:

The other point we negotiated [in mediation] was that I would have the house as my residence and that he would have to respect my right to privacy and to my own life. And that any time that he wanted to come to the house he had to talk to me directly, because I knew that what he would do was he'd phone [our handicapped daughter], he would then just arrive and he'd say: 'Well, I told [our daughter]'.

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Table 5  
Differences in Satisfaction with the Process, Outcome  
and Compliance in Mediation

Satisfied with	<u>Very</u>	<u>Quite</u>	<u>Satisfied</u>	<u>Somewhat</u>	<u>Not</u>
<u>process (n):</u>					
Right after	4	1	0	1	1
Now	2	1	0	3	1
.....					
Satisfied with					
<u>outcome (n):</u>	<u>Very</u>	<u>Quite</u>	<u>Satisfied</u>	<u>Somewhat</u>	<u>Not</u>
Right after	2	2	1	0	1
Now	1	2	1	1	1
.....					
Satisfied with					
<u>compliance (n):</u>	<u>Very</u>	<u>Quite</u>	<u>Satisfied</u>	<u>Somewhat</u>	<u>Not</u>
Right after	1	1	0	0	3
Now	0	1	0	0	4

---

### More Power

The participants provided many more examples about perceived power imbalance than perceived power balance in mediation. However, they also talked about the value of having a feeling of power. This feeling of power seems to center around two things: mutual compromise and information/communication.

#### a. Mutual Compromise

The fear of losing the children - either in terms of custody or visitation - appears to be a very powerful motivator in mediation. Cathy summed up the importance of mutual compromise in relieving those fears:

He's in great fear of losing the kids. And that's really funny that he says that because he's, I feel like [he's] pushing me to the point where I feel like that's the only way I'm going to get my kids, is packing up and running away. The thought has crossed my mind: 'That's what your biggest fear is, but you're pushing me towards that. Do you understand what you're doing? Give me what I want a little bit and you won't have to fear for that.'

Although Cathy has not threatened her husband that she might kidnap the children, the thought has occurred to her. In this statement, Cathy has perhaps captured the essence of compromise in mediation: that both participants need to feel that their ex-spouse is compromising in order to feel more power and less fear.

#### b. Power of Information

All of the participants -- both male and female -- emphasized the importance of information and communication in the mediation process. It was cited as the most important factor contributing towards a positive feeling of power. The information exchanged in mediation strongly affected them not only in terms of being listened to and

heard, but also in terms of learning about their partner's views and possible problem areas they might have to deal with in the future.

Both of the men in the sample felt more powerful because of the mutual dialogue in mediation. Even though Frank did not have much power in the overall mediation situation because his girlfriend had full child custody and was denying him access, he felt that power wasn't an issue because he had control through his knowledge about his girlfriend's position.

Winnie felt that she regained control in the second mediation session when she could state her own needs and be heard:

The first session I didn't feel I had any control. The second one, definitely, because I went in there knowing that this is what I'm asking for and these are the things I want to cover.

### The Role of the Mediators

All of the male and female participants, except for one female, were very satisfied with the mediators during mediation, regardless of the mediator's gender. They saw the mediator's role primarily as one of a guide, providing intervention if the communication process was not proceeding as anticipated. Five of the participants said that they and their ex-spouse did most of the communicating, while the

mediators intervened only if they reached an impasse or needed to explore an issue more deeply. According to Ron:

And they made it very clear at the outset that 'We're not here to make decisions for you. We're here to guide you through the little hurdles or the big hurdles and try and make you two, the two of you, make a decision. We're not taking sides.'

Jean particularly appreciated the mediator's role in promoting communication:

..I felt that the facilitators were very patient and their listening skills were incredible.

However, three of the female participants had trouble expressing themselves in mediation and clarifying their needs. On the other hand, two of them felt that the mediators played an active role in helping them to stand up for themselves. Grace said that:

...I felt that this [mediator] gave me some strength to stand up for myself where otherwise I wouldn't. ... [He] gave me the strength to state my case a little more strongly than I otherwise would have.

Cathy also thought that the mediators knew when she needed to say something but was not able to verbalize it:

And then they'll both kind of get it out of me. So I don't feel control, but I do because I know I can count on [the mediators] if I can't count on myself. Because sometimes they say things, I don't even realize there's something on my mind.

Although most participants did not see the mediators as powerful because they did not overtly direct the

proceedings, Ron interpreted their role as a powerful one:

They were able to keep us on the track, which I think is very, if you want to call it, powerful, I'd say they were powerful in that respect. But as far as telling you what to say or what to do, no, they wouldn't. That would be us. So it wasn't power in a bad way, it was power in a very constructive, progressive way.

Two of the participants had some negative feedback about the mediators, however. As mentioned in the previous chapter, although Cathy thought that they were very helpful and skilled, she also felt that they subtly pressured her in mediation. She finally agreed to let her ex-spouse keep the children on what she believed was a temporary basis. However, she later found that she had to 'prove' herself to him to get her children back:

But the mediators talked to me and they basically said: 'Who are you thinking of right now, yourself or the kids?' And I feel I was kind of coerced into feeling it was the right thing to do and maybe it was. The only thing that bugs me is that it doesn't matter now. Now I'm having to stay in mediation to try to get my kids back.

Although Grace was not happy with the financial terms of her mediation agreement, she felt that their mediator did all he possibly could to obtain the pertinent financial information from her husband. Bronwyn, however, was the only participant who did not feel that her mediator did a good job:

I would have liked it if he had recognized more what was going on and had said to them: 'maybe this isn't going to work; maybe it's not in your best interests

to be doing this; maybe it's not in [your son's] best interests to be mediating.' She felt that the mediator was more interested in developing an agreement than in helping her to express herself.

### Conclusion

Many of the participants in the sample talked about events that seemed like a power play or contributed to them feeling less powerful in mediation, which included: giving up, control over other relationships, negative surprises, coercion and lack of compliance.

Neither of the men mentioned giving up in mediation or not knowing what they wanted, and in fact both of them stressed that they became surer of their position in mediation which increased their feeling of power and control. A number of the female participants were not sure what their position should be, and/or gave up at some point in the process. Gilligan's (1982) theory that bargaining is affected by the more cooperative position of females and the more competitive position of males appears to be supported by this. Gilligan believes that women lose their bargaining power through compromise and are therefore at risk of consensually perpetuating male power over women. Winnie's position, in which she actively uses her bargaining power to get what she wants, is more similar to the 'autonomous and competitive' male position described by Gilligan.

Both men and women agreed on the factors that they felt contributed to more perceived power in mediation: communication and mutual compromise. The importance of communication was stressed over and over again by the participants, while mutual compromise was mentioned by a few participants. The vital role of communication in promoting power balance is stressed in the non-feminist theory of mediation (Lerman, 1984). Although communication was definitely the factor most commonly associated with increasing power for most participants, it did not necessarily result in a perceived balance of power.

Probably the most interesting gender difference is the number and variety of examples provided by the women of events that contributed to a feeling of less power. The men provided only one example each of perceived powerlessness, whereas each woman went into much more detail. Although similar events may also have happened to the men in mediation, they did not bring them up or mention them in relation to power in mediation. The women appeared much more conscious of and sensitized to power issues, and discussed them in much greater detail than the men. Also, the issues that represented power to the women were quite different than the concerns of the men. Hartsock (1983:151) suggests that "[w]omen's different understanding of power provides suggestive evidence that women's experience of

power relations, and thus their understanding, may be importantly and structurally different from the lives and therefore the theories of men."

Consistent with the findings in Chapter IV, the mediators were again seen as having a key role in influencing the power between participants. This supports the theory that perceived power in mediation increases through the intervention of the mediator (Davis and Salem, 1984). Although there were different configurations of mediator number and sex in the mediation sessions (Figure 1), this did not appear to influence how the mediator was perceived by the participants.

There were some negative comments about the mediators, but the feeling of many of the participants in mediation was that the mediators were valued and appreciated in their roles as guides and facilitators of communication. Although many participants noted that the mediators intervened only when they saw a problem, this was interpreted as intervention in the interests of the participants; it was not interpreted as lack of intervention because the agreement was acceptable to the mediator. Mediators were therefore perceived as benignly influencing power between the participants but not as having power of their own to influence the agreement. Their role in establishing communication patterns, intervening on particular issues and

validating the structure of the agreement was generally interpreted as a facilitative role. Although one participant noted the power of the mediator to keep the participants "on track", this was viewed as a constructive use of power. Two female participants, however, felt that their mediator did not act in their best interests.

The subtle guidance of the mediator(s) made the participants feel as if they were controlling the mediation sessions, especially when mediation was proceeding in the manner that the mediator desired. However, the fact that the mediator can choose when to intervene and when to support the proceedings through lack of intervention indicates that they can legitimate or discourage many aspects of the proceedings.

The mediator's assistance with communication and in helping the female participants to stand up for themselves helped to create the perception of a more equal power balance. Yet, the fact that power seemed imbalanced for five of the seven participants before mediation and balanced during mediation for only three participants indicates that the mediator(s) does not always achieve a perceived power balance.

## CHAPTER VI

### PERCEPTIONS OF GENDER AND POWER

This chapter discusses the participants' thoughts on gender relations between men and women, and their definition of power in mediation. The participants had many different experiences of power in mediation, as described in previous chapters, and it is clear that they had different understandings of the meaning of power as well. The section on gender and power is followed by the participants' reflections on their overall experience of family mediation. Their perceptions help demonstrate how they make sense of their experience of mediation, and how they contextualize their participation within the larger societal framework of gender relations and power.

#### The Concept of Gender Differences

Three participants thought that mediation might be different for men and women, and saw the differences in very similar ways. Winnie thought that men and women bring different priorities to mediation, with men thinking about themselves more and being more objective, and women being more subjective and considering their children's needs first. Cathy held similar views, viewing men as more businesslike, with concrete goals, and women as more

emotional and using mediation to work out their feelings of separation. Ron as well felt that women were more emotionally involved, which could work against them:

I think [mediation is] harder for a woman because of the sheer fact that I think emotion plays a greater role in a woman's life as opposed to a man's life.

He also provided a perspective on the male view of the financial side of divorce:

I think there's a very bitter feeling amongst most men that go through a divorce [that]: 'Well, I'll take you for everything you've got.' And that's the feeling that I'd say most men have.

Ron commented in the interview that he would be willing to support his ex-wife if she chose to stay at home with their daughter. Although he did not appear to have any personal concerns about their financial settlement, he made it clear that some men did.

### The Concept of Power

Frank thought that the concept of power was old-fashioned and didn't apply to relationships today. However, when asked to define power, he chose the word "dominance", and defined power as: "... somebody that has final say in making a decision in a relationship". Winnie also defined power as "dominance" and added the word "control". She thought that the person who made the decisions, earned the money, had the most knowledge and took action would have the

power in a relationship. Jean saw power in the most negative light, feeling that it was related to threat and abuse, including verbal and emotional abuse and completely taking over the rights of another person.

Three of the participants believed that power had both negative and positive connotations. Grace distinguished between aggressive and assertive power, and also saw power as being potentially positive: "But power to me is getting what you want out of the relationship and the other person ought to be the same too." Bronwyn saw power as something that could be misused but also as something positive - as having her own rights and making her own decisions and not having to ask permission. And Ron conceptualized power as having two sides: the power within yourself to do positive things, and the power to be destructive and not validate other's opinions.

#### Participants' Overall Perceptions of Mediation

The participants were most satisfied with mediation right after the process of mediation was over (Table 5). Four participants reported that they were "very satisfied" with the process of mediation right after it was finished. This most likely corresponds to the earlier responses that power was often more equal during mediation. In contrast, their satisfaction with compliance with the mediated

agreement was much lower: One person reported being quite satisfied and four people reported being not satisfied with compliance by the time they completed the questionnaire. Not everyone responded to this question because some had not completed their mediation agreement at the time of the interview.

Even though there was a major drop in satisfaction level between the process of mediation and compliance, this did not seem to negatively affect the participants' perceptions of mediation. Many of the participants found that their ex-spouses did not comply with the terms at some point in the process or after the agreement was complete, and therefore experienced dissatisfaction. However, this feeling does not seem to have affected their overall view of mediation. Six of the seven participants were very happy with the mediation process and would definitely recommend it to others. Most would also go through mediation again themselves, though perhaps not with the same partner.

The major concerns with mediation were problems with power balance and lack of compliance, and some participants said that they would not go through mediation again without legal backup or protection of some sort. However, the participants still were very positive about the process,

especially with the communication with their ex-spouse. Ron said that he was:

Very, very satisfied with the process. I think it's an excellent process.

and Grace stated that:

It was the best. I mean of all the experiences I have had in this separation, [mediation] was the best and we've been to counselling and all kinds of different things, you know. But mediation was the most down to earth, common sense approach which is sadly lacking in this society...

Jean sums up her perspective on mediation, which in her view is a humanizing and equalizing process:

A successful mediation is when both parties have had a chance to explore the issues in an open and honest way and they've had the benefit of a trained person to facilitate this. I also think that there's equality in it. Both parties get an equal chance to voice their opinion. You do get a chance to be heard. ... I think it's a humanistic way of treating people. It's not degrading and there's no loss of self-esteem.

### Conclusion

Six of the participants discussed the concept of power when they were interviewed. Three of these participants felt that there were gender-related differences in mediation. All three of these participants portrayed the gender differences along objective - emotional lines, with men being perceived as more objective and women as more emotional. These attributes are consistent with those associated with the "normal" and "traditional" female and

male roles (Eisenstein, 1983:8). Although none of the participants described how this would specifically affect the process, they did seem to feel that emotion would work against a woman in mediation and leave her feeling more vulnerable.

In defining power, it is evident that the participants did not share a common meaning of power. All of the participants saw some negative aspects to it, in particular the potential to dominate and control and make decisions for someone else. Some of the participants were also able to see a positive side of power, a side that affirmed their ability as to take action and effect positive change on their own behalf.

In summary, the participants thought that men and women bring attributes into mediation that closely follow the "traditional" separation of the "private" woman and the "public" man (O'Brien, 1989). The belief that the men are more objective and the women are more emotional can function as a powerful aspect of patriarchal hegemonic reproduction.

Mediation was not viewed as a process affected by the social relations of gender and power. The participants interpreted mediation as a personal experience, and did not view it in a wider social context. The apparent absence of understanding of the political implications of the social relations of gender and power -- ie., the oppression of

women in society -- can be interpreted as another example of patriarchal hegemony.

## CHAPTER VII

### INTERPRETATION AND DISCUSSION

The prevalence of reported power imbalance over power balance for the participants in my study indicates that perceived power is often contested in mediation, and that mediation doesn't necessarily result in a perception of power balance between men and women. Fewer than half of my participants perceived power balance with their spouse during the mediation process. The more frequent reports of power imbalance by my respondents indicates that family mediation is not always perceived as taking place in an environment of power balance.

#### Power Balance

When power was perceived to have changed in mediation, it very frequently meant that power was viewed as balanced during mediation but reverted to power imbalance after mediation. The mediator was often regarded as instrumental in achieving power balance, by enhancing communication between participants. However, increased communication did not reliably lead to a perception that power was balanced between the participants either during mediation or after mediation. In fact, the communication among Cathy, her spouse and the mediators resulted in a perceived loss of

power for Cathy. This was due to her relinquishing custody in what she believed to be a temporary move.

The lowest level of satisfaction for participants was in relation to compliance after mediation had ended. After mediation, the participants had to rely on the compliance of their ex-spouse or ex-partner, and compliance was reported to be poor. The mediator was no longer involved after mediation ended, and most participants reported poor communication and poor relations with their ex-partner.

When power imbalance was reported by my participants, it was not always power of the male over the female. For example, Winnie, Bronwyn and Jean all said that they had more power than their male ex-spouses at different times after mediation. These results do not follow the structuralist "binary" view of males exerting power "over" females. Yet, family mediation has close ties to the dominant hegemonic structures of law and the family, which structurally reinforce an idealistic view of traditional patriarchal relationships. My data, however, indicate that at the level of micro-processes, the participants' perceptions of power reflected a diversity of family arrangements that did not always mirror the hegemonic status quo.

An interesting nuance in power imbalance is provided by two of my female participants. Winnie reported more power

than her ex-spouse, and Grace reported less power than her ex-spouse, throughout the complete process of mediation. Winnie maintained power by using her resources, which were greater than her ex-spouses' resources. On the other hand, Grace could not achieve power because she had no resources with which to bargain; she was very dependent on her husband in many ways in their traditional relationship.

The examples of Grace and Winnie exemplify how hegemony can work in mediation. Grace is 45 years old, and has been married and a housewife for over 20 years. She exhibits an internalization of patriarchal values in her dislike for women in non-traditional occupations, and her economic vulnerability. Grace may embody MacKinnon's "collective subordination" of women in the private realm of the home by affirming the traditional patriarchal values perpetuated by the state and the law (1989:168).

Grace feels that the terms of her mediation agreement are very unfair, and the unsatisfactory settlement is her fault. Yet, she regards her difficulties with the mediation agreement as her own private problem, and not a public issue (Connelly and Christiansen-Ruffman, 1977). Although Grace lacks awareness of structural inequality between men and women and its relationship to the terms in her mediation agreement, she still voices her displeasure. According to Scott (1990:19), her grumbling and complaints can reveal a

"discourse of resistance" that functions as a nonhegemonic voice. Grace hasn't fully accepted the unequal distribution of resources in her mediation agreement, yet does not exhibit a counter-hegemonic awareness.

On the other hand Winnie, at age 32, grew up when feminism began to impact on relations in the home and the workplace. Although Winnie does not reveal a structural understanding of patriarchal relations, her economic and familial authority and control indicate that on a micro-level, she has many resources and much bargaining power in her non-traditional family structure. Winnie not only has a great deal of control and power in the economic sphere, she has much decision-making power in her "private" family. She actively uses both her public and private power to achieve the type of mediation agreement she wants. Winnie's use of power does not follow Gilligan's (1982) thesis of women being "other oriented" and "cooperative", and therefore at a disadvantage in mediation. Winnie's case demonstrates that Grace's situation of perceived powerlessness cannot be universalized. Instead, Winnie's situation shows the limitations to the "top-down" model of women's oppression, where law, the state and patriarchy are viewed as inseparable (MacKinnon, 1989:238).

In Winnie's non-traditional family role, she recognizes only a personal dimension to her beliefs, values and family

role. Winnie exhibits a nuance in power relations that is not truly counter-hegemonic, since she relies on her "...individual actions and personal solutions" to solve her problems in family mediation (Connelly and Christiansen-Ruffman, 1977:173), which she does not view as social in nature. Nevertheless, Winnie's case does not support the "dominance" model of male power over women.

The experiences of Jean and Bronwyn reflect additional variations in perceived power between the genders. Both Jean and Bronwyn had financial power in their relationships but appeared to have little marital power in the home. Bronwyn exhibited many qualities of the traditional "subservient" wife who could not assert her own needs to her husband. She resolved the power imbalance by going to court. Bronwyn may have internalized certain patriarchal values that interpret the expression of the wife's needs as antithetical to her children's or her husband's needs. Although Jean did not have Bronwyn's lack of confidence, her husband was physically threatening her. The threats were sufficiently powerful to prompt her to sell the family home. The experiences of both Bronwyn and Jean indicate that although financial resources may have increased their power, they were certainly not sufficient to give them equal power with their ex-spouses. Perceived power appears to be much

more complex, and is not just vested in the "public" sphere of finances.

### Power Change

Both genders of participants reported that similar events led to an increase in perceived power in mediation. The mediators assisted the female participants who had trouble standing up for themselves; and both males felt an increased sense of power through enhanced communication. These findings support the theory that mediation can promote a feeling of power balance through the communication frameworks established and maintained by the mediator (Sussking and Cruikshank, 1987).

However, the participants' perceptions of the events that reduced their power may be related to their gender. The male participants experienced decreased power almost exclusively in the areas of custody and visitation of children. Both males wanted to ensure that they could maintain a relationship with their children. They were not able to resolve these issues in mediation and they lacked confidence that the court would rule on their behalf. In contrast, the female participants experienced decreased power in many more diverse ways, which may be partially due to my study having more female "voices". The female participants' primary areas of concern were related to

finances: their ability to adequately support themselves and their children, to rely on receiving child support payments from their ex-spouse, and to be considered for spousal maintenance. Only one female participant did not mention any financial concerns.

The areas that led to decreased power for my participants appear to be related to two gendered bases of power. These bases correspond to O'Brien's (1989) conceptualization of the "politics of reproduction", on which she grounds hegemonic patriarchy. They include:

- 1) financial power - based on masculine relations of production, which are traditionally male-identified;
- 2) child-centred power - based on relations of reproduction, which are traditionally female-identified. For example, the fact that female sole custody was an issue for only one of my participants demonstrates how hegemonic values can influence "neutral" legal decisions. For my participants, these values may discriminate against male equality in child custody and access decisions. Rick felt that he had very little power in contesting custody of his daughter, because of his wife's strategic use of the power of the mother-child relationship, affirmed by the state.

The application of gendered hegemonic values may also result in inadequate financial maintenance for females who must support the children who live with them. Even if the

female custodial parent is earning a good income, her financial obligations can burden her if she does not receive sufficient child support.

The male participants' concerns about maintaining a continuing relationship with their children reflect the greater power society gives to women's relationship with their children. Both Ron and Frank have somewhat non-traditional values in their insistence on a very present voice in their children's lives. Yet they seem to fully understand the hegemonic power that women have in the legal system with regard to their children. This is particularly true in Rick's case, because he appears to have had at least equal or more involvement in his daughter's upbringing than his ex-spouse.

Most of my participants recognized gendered power bases in mediation, and some of them actively used their power to bargain with their spouse for what they wanted. For example, Ron considered supporting his ex-wife if she chose to quit her job and stay at home with their daughter. Perhaps he hoped his proposal would increase the chances of his wife agreeing to joint custody. However, the power used in bargaining was not always related to gendered sources of power promoted in ideology. Jean used her financial power to sell the family home and buy another house, to escape from her ex-spouses' threats. And Ron used the knowledge he

gained from close daily contact with his daughter to raise serious questions about the type of care she was receiving in daycare. His allegations forced the custody issue between Ron and his ex-wife into court. These responses suggest that power is not "fixed" for either gender, but rather is a relation that is exercised between participants (Weedon, 1987:113-114). The form that power appears to take between participants cannot be predicted in advance.

#### Patriarchal Hegemony and the Law

The institutional state apparatus of the law did not consistently reinforce patriarchal hegemony in mediation. The law was used to promote a perception of power balance for some of the participants: Winnie registered with the family maintenance program to ensure that she would receive child support; Bronwyn took her husband to court for custody and child support; and Frank planned to sue his ex-girlfriend for access. In contrast, Ron and Jean both perceived a loss in power through the legal action taken by their spouses. Although the law's patriarchal roots have been well-documented (Crean, 1988), the effects of the strategic use of law by my participants in mediation were contradictory. MacKinnon's theory that "... the state, through law, institutionalizes male power over women through the male point of view in law" was not evident in my results

(1989:169). Instead, the law both increased and decreased power for participants of both genders. In my study, although power was reported much of the time, its hegemonic expression was not always supported by central institutions like the state and law. These results are consistent with the theories of Connell (1987) and Sawicki (1991), who state that power is contextual and its expression cannot be universalized.

#### Conceptualizations of Gender and Power

The views of some of the participants on the role that men and women take in mediation are consistent with the patriarchal separation of male and female roles into "public" and "private" spheres. This separation is based on the ideological belief that the "emotional" female is more suited for nurturing and caretaking in the private sphere of the family. The "objective" male, however, is more suited to the rational world of work in the public sphere. However, the results of my research indicate that the female participants were not always dominated by their male spouses. As well, the male participants appeared to have very little perceived power in relation to their female partners. The diverse expressions of power reported by the participants reveal subordinate, marginalized knowledges that reflect different experiences of power at the level of

agency. Although patriarchy is still the dominant hegemony in North America, the participants had a variety of family structures that exhibited more complex relational forms of power.

The participants saw no relationship between their individual mediation sessions and gender/power relationships in society. This lack of association may contribute to the hegemonic reproduction of patriarchy, because the participants viewed their negotiations as events between individuals, with no social influence. And although many of the participants expressed dissatisfaction with the perceived power balance, the terms of the mediation agreement, and lack of compliance, most still enthusiastically recommended mediation. This curious juxtaposition demonstrates the power of hegemony. The consensual and communicative components of mediation appear to be more important than the participants' dissatisfaction with many parts of the process and outcome.

The participants' acceptance of mediation when its results are not that satisfactory may be related to their perception that the law promotes "fair" and "equal" settlements between spouses. The law has a very strong influence when mediation agreements are reviewed by lawyers. Almost all of the terms agreed to or under discussion in mediation by my participants closely followed the gender-

neutral family laws in Canada regarding division of assets, spousal maintenance and child support: equal division of assets, discouragement of spousal maintenance, provision of child support by the non-custodial parent. The exception to this was decisions about custody and access to children. These decisions appeared to favour the hegemonic "maternal preference" model, although the "best interests of the child" should be the determining factor (Department of Justice Canada, 1989:9). The question that arises from this is to what extent are mediation agreements developed freely between the participants? Aside from the fact that the participants have different values that they bring into the process, the legal review ensures that their agreements closely follow the gender-neutral legislation. The only terms of the agreement that actually seem to be freely negotiated are the terms of visitation and the amount of child support.

#### Mediation and Family Law

Mediation agreements modelled on the gender-neutral family laws may disadvantage any gains in power made by women on the micro-level of the family. The emphasis in law on "absolute equality" between men and women may not promote fair and equitable mediation agreements for women. Until 1970, women's primary role as caregiver of children was

recognized in family law by legislation that was designed to assist the separating woman to fulfil this role. In particular, women were often granted child support, alimony and the family home (Okin, 1989). Over the past 20 years, however, family law has reflected a shift from "moral entitlement" based on "conduct" to a criterion of "need" in determining settlements in family disputes. Married women's participation in the workforce was a key factor in designing the new laws (Smart, 1984), which have significant economic implications for women.

In the 1970's, law reform in Canada underwent major changes to eliminate "maternal preference" rules and gender bias, and to institute gender neutral legislation (Boyd, 1989:126). The revisions in family law were made to promote more equal economic agreements as a result of family breakdown (Crean, 1988:46). Family law in Canada now promotes equal division of marital assets, and economic self-reliance of both spouses by discouraging spousal maintenance. The non-custodial parent is expected to contribute child support.

Even though revisions in the past 20 years to family law in Canada have sought to provide economic equality to men and women in domestic disputes, the net result of absolute equality provisions can economically disadvantage women (Howe, 1989). Weitzman believes that the gender

neutral laws economically disadvantage women because:

1) although custody may be shared, women often have guardianship of the children. In cases where there is joint guardianship, women are still often the primary caretaker. The majority of the participants in my study assumed that the children would live with the mother, and the father would have access and visitation; 2) the family assets, as well as the proceeds from the sale of the family home, are equally divided. The agreements that were being discussed by the participants in my study assumed an equal division of assets for all participants except one; 3) the family's "career assets" are primarily the property of husbands and are not shared through "future earning potential". The example provided by Grace emphasizes how women assuming the traditional female role in a marriage can be disadvantaged by not considering career assets. Weitzman concludes that women cannot achieve equal self-sufficiency under the new equality laws because the division of human and financial assets in family dissolution results in inequity for women.

Although the concept of absolute equality is meant to reflect women's enhanced opportunities in the labour force, women are still subject to significant limitations in entering and progressing through the workforce. Okin (1989:148) maintains that "[a]t any given level of skill, experience, and education, men earn considerably more than

women." According to Weitzman (1985:323), "...when income is compared to needs, divorced men experience an average 42 percent rise in their standard of living in the first year after the divorce, while divorced women (and their children) experience a 73 percent decline." She ascribes this to the equality provisions of the law, which do not recognize women's structural inequality in society. Crean (1988:40) agrees, and maintains that family breakdown is a major cause of the feminization of poverty.

The difficulty that women have in ensuring compliance with the terms of the mediation agreement can have adverse economic effects when the children live with the mother. Most of the participants in my study were unhappy with compliance with the terms of the agreement. This was most likely associated with the perception of power imbalance reported after mediation.

In determining the size of child support payments in mediation, there is the insidious influence of "ownership" on the sharing of assets and services when the agreement is formulated. This can have the appearance of a male wage-earner consenting to share "his" wages, and a female caretaker of children proposing a value on services which, in today's society, are unpaid (Steel:1987).

Although figures on child support differ, they are all similar in the bleak economic picture they present for

women. Statistics Canada (1984:27) reports that "... single-parent families of mothers with young children have the lowest average family income, and the highest frequency of low income, in the country." Foote (1986:8) reports that, in Canada "[n]ot only do most women and children, especially those who are already of low socio-economic status, not obtain maintenance awards, but the awards which are obtained are often for low amounts that are inadequate for meeting normal needs and covering real living costs." Those who are awarded support, moreover, must rely on the compliance of their ex-spouses. Dulude (1984:54-55) notes that when child support is ordered in Canada, "... the general pattern in most jurisdictions is for one-third of the families to receive the ordered amount, one-third to receive less than the ordered amount, and the final third to receive no payment at all."

The reluctance of the legal system to award maintenance to spouses can also work against women who have sole custody of the children. None of the female participants in my study were awarded spousal maintenance, although two of them thought they might need it. According to the Law Society of British Columbia (Gender Bias Committee, 1991:3), "Canadian studies show spousal maintenance is commonly not ordered and, if awarded, is too low to adequately provide for the spouse who has custody of the children of the marriage."

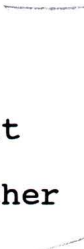
Nearly 60% of divorced women who have custody of one or more children from the marriage have total incomes below the poverty line, even when maintenance is included".

### Conclusion

The types of settlements being awarded in family mediation are of serious concern to feminists. Steel (1987) states that one out of six families in Canada with children is headed by one parent, who is usually female. Kolb and Coolidge (1988:6) report that "[i]n divorce mediation, the settlements women received are inferior economically to those awarded in adjudication". Although the prevailing liberal belief is that women and men have equal opportunities in the workforce, statistics show that women's opportunities to be fully self-supporting are not the same as those of men. The single family unit headed by a woman has by far the least capacity for maintaining the pre-separation marital level of income.

If the current situation continues in Canada, women will be awarded custody most of the time. They will be responsible for supporting their children on the basis of settlements developed following the gender-neutral legislation. These settlements often do not adequately provide for the increased costs associated with raising children alone. They also do not adequately compensate for

career opportunities lost or delayed due to women's significant role in primary childcare. According to Williams (1989:798-799) "[f]eminists now realize that the assimilationists' traditional focus on gender-neutrality may have rendered women more vulnerable to certain gender-related disabilities that have important economic consequences." In a society with structural gender inequality, mediation agreements modelled after laws that assume equality between women and men may perpetuate rather than rectify power imbalance in family mediation.



## CHAPTER VIII

### CONCLUSION

The results of this research show that the female and male participants experienced power in mediation in many different ways. Perceived power was contextual for most of the participants, but the requirement for legal review of the mediation agreements also had a structural impact. Power was believed to enter and affect mediation, and can be traced to patriarchal hegemony in some cases. In other cases, power appears as a discourse that is marginalized but not counter-hegemonic. A counter-hegemonic discourse challenges the dominant hegemony and "...create[s] independent organizational bases for advancing alternatives" (Carroll, 1992:10). In contrast, a marginalized discourse protests the status quo but not in an organized and strategic fashion. Resistance to patriarchal hegemony was exhibited by some of the participants in my study, but not with the intent of "... social and political transformation" (ibid:9).

Power imbalance between the spouses was perceived quite frequently throughout the complete process of mediation, which included the prelude, the process and the aftermath of mediation, as well as the moment at which they completed the questionnaire. Power balance between the spouses was

perceived much less frequently, and generally only during the actual mediation sessions.

Power was experienced in very diverse configurations: one female participant felt she had less power than her spouse throughout the mediation process, and another female participant felt that she held power exclusively throughout the process. Perceived power fluctuated between balance and imbalance for some male and female participants, and one male participant did not consider power to be a problem. The exercise of power for the participants in my study was not associated with sex-gender categories or a "top-down" model of male dominance.

Most participants of both genders experienced an increased sense of power through enhanced communication promoted by the mediator. However, there were gender differences in the participants' perceptions of factors that reduced their power in mediation. These appear to be related to the patriarchal hegemonic values of financial power associated with the male sphere, and child-centred power associated with the female sphere. These gender differences in the perceptions of power affected the type of settlements the participants expected to receive. However, the gender differences in expectations did not affect the participants' exercise of power in mediation. Their use of power did not appear to be related to the power associated

with gender ideology. The diverse exercise of power demonstrates the contextuality of power relations (Weedon, 1987:25) in the participants' practices in family mediation.

The influence of the law in mediation did not always reflect the standpoint of male dominance or increase the women's perceived powerlessness (MacKinnon, 1989:168). Invoking the power of the law in mediation resulted in a feeling of both increased and decreased power for participants of both genders. These results indicate that the forms of power personally exercised and also invoked through the law by the participants could not be known in advance based on gender ideology.

It is evident that there were many discourses of power, not only in law, but also in family arrangements that were operating for the participants in my study. However, although the exercise of power for most participants was relational rather than fixed in gender ideology, their legal rights enshrined in law had a structural impact on the mediation agreements. The mediation agreements in place or under discussion for the participants reflected the principles underlying the Canadian gender-neutral laws: each spouse will become self-supporting, their material assets will be equally divided, and the non-custodial parent will contribute child support. The principle that was a notable exception in the mediation agreements was the

assumption for most participants that the children would live with their mother.

The legal review of mediation agreements can ensure that the agreements closely follow the provision of equal rights of spouses before the law. When they do not, as in the case of child-centred decisions, it appears that gendered power relations can be perpetuated as traditional or "common-sense" understandings. One feminist concern with the types of mediation agreements under negotiation by my participants is that the women are generally receiving sole custody of the children. At the same time, they are also receiving a division of marital resources that may not adequately compensate them for the real costs of raising their children and their lost opportunities in the workforce due to child-rearing responsibilities. Even women who earn a good income in this era of advancing occupational opportunities for females may find it difficult to meet the increased financial responsibilities that accompany custody.

For the participants in my study, the exercise of power in mediation was contextual for both genders, influenced by the diverse relations of family forms and most likely by other factors not included in this study. However, mediation was not an entirely "private" event, due to the influence of "public" family law on the mediation agreements. This influence can be traced to patriarchal

hegemony through the belief of "equality" between women and men vested in law. Moreover, it can be traced to the beliefs and values hegemonically reproduced by the participants and mediators, which influence allocation of marital resources and decisions about children in the mediation agreements. The combined influence of structure and agency for the participants in my study rendered their mediation agreements vulnerable to the replication of patriarchal hegemony.

Some problems in applying the feminist systemic model of patriarchal oppression (Phelan, 1990:427) to the experiences of the participants in my study were revealed when I interpreted my results. MacKinnon (1989:161-162) asserts that "[t]he state is male in the feminist sense: the law sees and treats women in the way men see and treat women. The liberal state coercively and authoritatively constitutes the social order in the interest of men as a gender - through its legitimating norms, forms, relation to society, and substantive policies." The universalizing tendencies of the systemic model neglect the construction and experience of power for participants that is mediated by many influences, including factors associated with diverse family forms. However, this macro-approach to women's oppression can also sensitize us to structures that can perpetuate patriarchal power. Although all participants in

my study had different experiences of power, the gender-neutral legislation and the participants' beliefs and values had the effect of hegemonically influencing their mediation agreements. These influences are not "objectively" negative; rather, they are potentially negative, for they have the capacity to perpetuate existing gender inequality in our society. Our understanding that perceived power relations between the genders in family mediation are contextual must therefore be informed by the potential for replication of patriarchal oppression of women.

The analysis and interpretation of the perceptions of the participants in my study has helped reveal the concrete relations of power between men and women in family mediation. Further research on family mediation could proceed in many directions: comparing the perceptions of power in mediation for both spouses; assessing perceived power in relation to the actual terms of mediation agreements; longitudinal evaluation of agreements regarded as equitable for women; more detailed exploration of contextual and structural bases of power in mediation. Although further research may not always provide concrete solutions, the questions that invariably result will ultimately contribute to our understanding of power and gender in mediation. Continued research can only benefit the practitioners and participants in family mediation,

ultimately increasing the effectiveness of family mediation as a technique that promotes equitable agreements for women.

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11. Which of these issues were to be dealt with in mediation?
- |                                   | Major Issue | Minor Issue | Not an Issue |
|-----------------------------------|-------------|-------------|--------------|
| a. custody of children            | _____       | _____       | _____        |
| b. access to children             | _____       | _____       | _____        |
| c. division of assets             | _____       | _____       | _____        |
| d. financial support for children | _____       | _____       | _____        |
| e. financial support for self     | _____       | _____       | _____        |
| f. financial support for spouse   | _____       | _____       | _____        |
12. How satisfied were you that the mediation process met your needs...
- (i) Right after mediation:
- | Very Satisfied | Quite Satisfied | Satisfied | Somewhat Satisfied | Not Satisfied |
|----------------|-----------------|-----------|--------------------|---------------|
|                |                 |           |                    |               |
- (ii) As you look back on it now:
- | Very Satisfied | Quite Satisfied | Satisfied | Somewhat Satisfied | Not Satisfied |
|----------------|-----------------|-----------|--------------------|---------------|
|                |                 |           |                    |               |
13. How satisfied were you with the final mediation agreement...
- (i) Right after mediation:
- | Very Satisfied | Quite Satisfied | Satisfied | Somewhat Satisfied | Not Satisfied |
|----------------|-----------------|-----------|--------------------|---------------|
|                |                 |           |                    |               |
- (ii) As you look back on it now:
- | Very Satisfied | Quite Satisfied | Satisfied | Somewhat Satisfied | Not Satisfied |
|----------------|-----------------|-----------|--------------------|---------------|
|                |                 |           |                    |               |
14. How satisfied were you with your ex-spouse's compliance with the agreement...
- (i) Right after mediation:
- | Very Satisfied | Quite Satisfied | Satisfied | Somewhat Satisfied | Not Satisfied |
|----------------|-----------------|-----------|--------------------|---------------|
|                |                 |           |                    |               |
- (ii) As you look back on it now:
- | Very Satisfied | Quite Satisfied | Satisfied | Somewhat Satisfied | Not Satisfied |
|----------------|-----------------|-----------|--------------------|---------------|
|                |                 |           |                    |               |

15. In your opinion, how was power distributed between you and your ex-spouse?

	<u>I had more power</u>	<u>My ex-spouse had more power</u>	<u>In general, we had equal power</u>
a. before mediation	_____	_____	_____
b. during mediation	_____	_____	_____
c. right after mediation	_____	_____	_____
d. at present	_____	_____	_____

16. Was power a problem in your relationship with your ex-spouse?

Yes                       No

If so, please explain: \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

*Some of the people who complete this questionnaire will be asked if they are interested in participating in an interview. Those who agree and who are interviewed will be paid a small amount of money for their time. If you would like to be considered for a one hour interview at your convenience, please print your name and telephone number below. Return both the signed Consent Form and the completed questionnaire in the stamped, addressed envelope by February 20, 1992.*

## APPENDIX B

INTERVIEW GUIDESelection of Mediation

- can you describe why you chose mediation?
- did you have a primary goal in choosing mediation?
- how was the mediator selected?
- can you describe in general the terms of the agreement (% split of assets, maintenance, support, custody, access)

Process of Mediation

- can you describe the mediation process?
- how much room was there for negotiation?
- did you or your ex-spouse have things you wouldn't compromise on? - can you talk about cooperation and compromise in the process?
- how much control did you feel? Did you actively influence the proceedings? Did one person talk more? Louder?
- did you feel well-prepared for mediation?
- was there any time in the mediation that you felt coerced?
- was there any pressure to settle due to time and economics?
- did you consult a lawyer? What influence did s/he have?

- what did you like best about mediation? Worst? Surprises?
- how would you describe a successful mediation?
- satisfaction with the process.

#### Outcome of Mediation

- satisfaction with the final agreement.
- how fair and equitable is the agreement? Describe reasons for this.
- would the agreement have been different if you didn't have children?
- if the agreement isn't fair, what would a fair agreement be?
- did the things you agreed on become non-issues?

#### Mediator

- What role did the mediator(s) take? Should the mediator have done anything differently?
- did the mediator actively intervene in establishing terms of agreement? In affecting the power balance?
- did it matter whether the mediator was male or female?

#### Power

- can you talk about the power balance in your relationship with your ex-spouse before mediation?
- can you discuss who had power in mediation: yourself, your ex-spouse, and the mediator. What kind of power? Examples.

- how would you define power in relationships?
- did mediation change the existing power balance in your relationship? In the short-term? In the long-term?
- did power affect the terms of the agreement?

#### Negotiation

- did you have a strategy for trying to get some of the things you wanted?
- are you good at negotiating for yourself? Did you enjoy any of it?
- when you negotiated, whose needs did you consider the most?
- how important was it to you that your spouse was satisfied with the agreement?

#### General

- do you think that mediation is different for men and women? Do they bring different priorities/skills to mediation? Where do these come from?
- if you went through mediation again, what would you have done differently? Would you still choose mediation? Would you recommend mediation to someone else?

VITA

Surname: Britton

Given Names: Barbara Jean

Place of Birth: Red Deer, Alberta Date of Birth: July 3, 1951

Educational Institutions Attended:

University of Edmonton	1969 to 1971
University of Lethbridge	1971 to 1974
University of Victoria	1983 to 1985
University of Victoria	1990 to 1992

Degrees Awarded:

B.A.	University of Lethbridge	1974
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Honours and Awards:

University of Victoria Dean's Scholarship	1991-1992
Government of the Northwest Territories' Graduate Student Scholarship	1991-1992

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Title of Thesis: Power and Gender in Family Mediation

Author



BARBARA BRITTON

September 10, 1992