



# Family Violence & Family Law Brief

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## Family Law Mediation in Family Violence Cases: Basics & Best Practices

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Family Violence Research



ALLIANCE OF CANADIAN  
RESEARCH CENTRES  
ON GENDER-BASED VIOLENCE

This Brief was prepared by the Atlantic Research Team of the *Supporting the Health of Survivors of Family Violence in Family Law Proceedings* project and the Muriel McQueen Fergusson Centre for Family Violence Research (MMFC) on behalf of the Alliance of Canadian Research Centres on Gender-Based Violence.

The MMFC is based at the Faculty of Arts, University of New Brunswick, Fredericton, New Brunswick, Canada, on the traditional and unceded territory of the Wolastoqiyik, Mi'kmaq, and Peskotomuhkati peoples.

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Family Violence Research

**PROJECT DESCRIPTION:**

## **Supporting the Health of Survivors of Family Violence**

*Supporting the Health of Survivors of Family Violence* is a project aimed at addressing the challenges that survivors of family violence experience within the family court system. Parties are often faced with multiple legal matters at once while being self-represented and in need of protection. These overlapping processes create delays and confusion, further exhausting the emotional and financial resources of families, and distancing them from the supports and protections they need.

Funded by the Public Health Agency of Canada, this project has established five regional Communities of Practice (CoP) through the [Alliance of Canadian Research Centres on Gender-based Violence](#). The **Atlantic Family Violence & Family Law Community of Practice** is coordinated in collaboration with the [Muriel McQueen Fergusson Centre for Family Violence Research](#). The Atlantic CoP members from a wide variety of sectors, including family law lawyers, mediators, criminal law practitioners, social workers, family violence and transition house counsellors, Indigenous leaders, addictions and mental health nursing, and several community organizations, including the Public Legal Education and Information Service of New Brunswick (PLEIS NB), the Elizabeth Fry Society, and White Ribbon Fredericton. Contact **LA Henry**, [la@la-henry.ca](mailto:la@la-henry.ca) to learn more about the Atlantic Family Violence & Family Law CoP and its upcoming activities!

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## Defining Mediation

Mediation is a dispute resolution process where parties use a neutral third-party to help them reach a voluntary agreement regarding their dispute. Mediation aims to facilitate points of agreement, achieve better outcomes of conflict, and reduce its many “collateral effects” (Feresin et al., 2018). Since mediation is non-adversarial in nature, it is recognized as a beneficial option for parties who want to remain on good terms or who will have to work together in the future, such as parents sharing child custody (Neilson, 2014). Mediation can not only aid parties in reaching a self-made agreement, it also provides the opportunity to voice opinions and address difficult issues without further conflict escalation (Jiang et al., 2022). The process is a carefully structured conversation, centred on the principles of mutuality and fairness, and designed to “move parties from competition to collaboration” (Crampton, 2021, p. 1443).

Mediators thus have a unique role: assist the parties in negotiating a mutually acceptable settlement. Although lawyers are praised for their adversarial skills, their power to broker agreements is often more valuable. “Discourage litigation” was the advice offered by Abraham Lincoln in an 1850 law lecture, when he urged young lawyers to play the role of peacemaker, persuading one’s “neighbors to compromise whenever you can” (as cited in Bromwich & Harrison, 2019, p. ix). It remains solid counsel, particularly given the costs, time periods, and revictimizing effects of settling disputes at trial. The mediator’s role as a neutral third party “gives the parties the possibility of having another perspective on the problems discussed” (Paraschiv & Parashiv, 2014, p. 130). However, there are boundaries mediators cannot cross. Mediators cannot impose a decision on parties without both party’s explicit consent to the agreement (Krieger, 2002). Rather, mediation’s “defining characteristic is the absence of an imposed outcome – mediation produces a resolution only if the parties agree on the terms” (Semple, 2012, p.209).

*There is a “distinction between ‘voice’ (control of the process) and ‘choice’ (control over the decision). Being heard and having one’s views taken into account (voice) is one of the main determinants of the perception that the decision making process is fair, even if the outcome is not the one that is wanted” (Parkinson & Cashmore, 2008, p. 20).*

Mediation is often described in stages, beginning with an introductory, trust-building stage, where the mediator provides a general explanation of the mediation process to the parties, including the role of the mediator as a neutral facilitator, and the collaborative role of the parties (Toledo, 2021). This is

followed by an agenda-setting and issue-identification stage, where the mediator clarifies the parties’ understanding of the facts and identifies what the parties agree upon. This allows the mediator to distill the dispute down to its essential components and establish ‘common ground’ for the parties to begin resolution discussions. Finally, the mediator works with the parties to come to a solution by encouraging each party to brainstorm ideas and engage in mutual accommodation, which can eventually establish the terms of a tentative agreement. By providing parties with the opportunity to “add their own contributions to the settlement,” mediation can “increase the likelihood of compliance of both sides” (Toledo, 2021, p. 31). Research has also found that mediated agreements are generally more successful, longer-lasting, and thought of more favourably by the parties than litigated settlements (Holtzworth-Munroe et al., 2021).

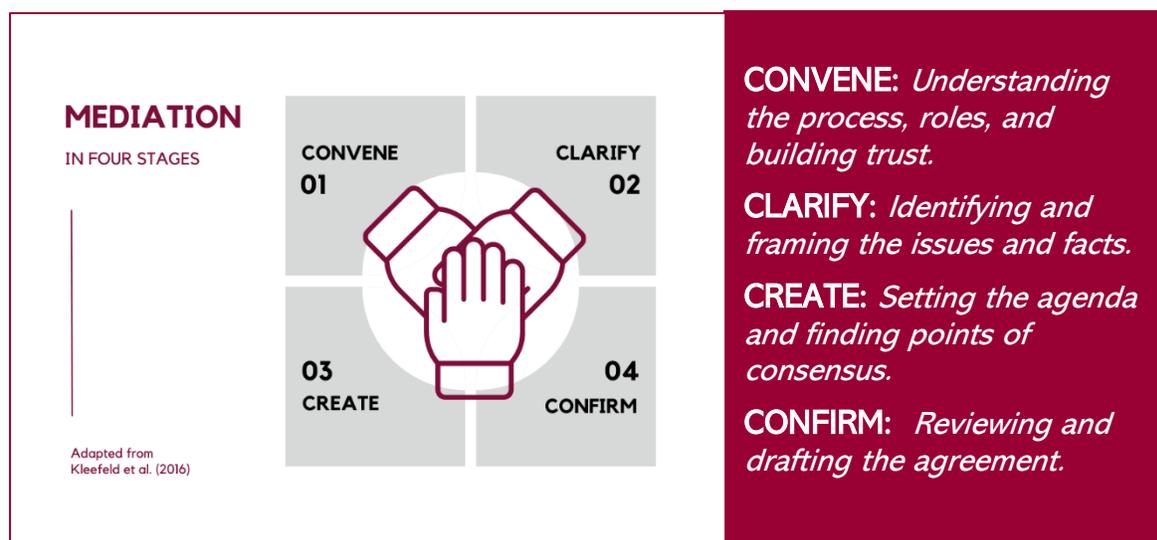
## The Dispute Resolution Continuum

Mediation is only one form of dispute resolution. There are several other means of addressing legal conflict, some of which focus on reaching consensus, such as negotiation or conciliation. Other dispute resolution processes are based more on a command model, such as arbitration or adjudication, and offer far fewer options for participant decision-making (Medhekar, 2021). Dispute resolution processes can therefore be classified along the consensus-command continuum according to the amount of control participants are given over the process and its

*The ‘one size fits all’ ideology of the common law legal system that assumes that all disputes can and should be dealt with through adjudication appears both limited and unrealistic. The assumption that every conflict should and can be resolved by the application of rules by a third party ignores the complexity and variety of conflict and our complex and varied responses to it. Although the adjudicative process of courts and tribunals remains an important mechanism for resolving some type of conflict, there are many other alternatives (Kleefeld et al., 2016, p. 111-112).*

outcome, as well as the degree of public scrutiny that oversees the process (Kleefeld & Srivastava, 2005). Mediation falls in the middle of the dispute resolution continuum. The parties have a certain degree of control over the process and its outcome, both of which are overseen by a neutral third party and protected by confidentiality.

The wide variety in these models has led many to suggest the dispute resolution process is better described as a “continuum” so that the parties can be reminded that “processes are not mutually exclusive, that one blends into another, and that there is no reason in theory or principle why the processes cannot be mixed and matched to meet the needs of the parties and the dispute” (Kleefeld, et al., 2016, p. 112). The rejection of the “one size fits all” approach to conflict resolution is of particular use in the family law context, where access to justice obstacles prevent equitable outcomes. The need for more efficient and affordable conflict resolutions has given rise to several alternative dispute resolution processes, including family law mediation.



# Mediation in the Family Law Context

Mediation in the family law context promotes the ideal that spouses can be self-determining and jointly responsible for the consequences of their separation and/or divorce (Payne & Payne, 2020). The key to family mediation is therefore about finding a solution that has input from and can be accepted by everyone involved. This requires a process that is solution-focused, rather than an assignment of blame or fault. Instead, mediators work to establish the equal power and control of each party, both in terms of the mediation process itself, and its outcomes (Feresin et al., 2018). Just as there are several benefits to mediation generally, there are specific benefits to its use in the family law context.

The highly emotional nature of family conflicts can be aggravated by the adversarial litigation process, enhancing negative emotions and obstructing compromise. Mediation offers a collaborative alternative, where separation or marriage breakdown can be discussed in ways that “empower[s] parties to reach agreements specific to their needs and to reduce the trauma felt by all parties” (Krieger, 2002, p. 243). The mediation setting also provides greater privacy, which can encourage the parties to be more honest and forthcoming. Settlements achieved through mediation are more likely to be respected by the parties, allowing for more certainty and stability for any children involved (Payne & Payne, 2020).

Mediation is particularly effective in disputes involving children. Its “tailor-made” solutions for complex issues such as custody and access provide parents with the opportunity to “establish a framework for future communication and an ongoing exchange of information and ideas respecting the upbringing of children” (Payne & Payne, 2020, p. 149). For parties with children who must maintain a workable relationship, the collaborative nature of mediations can promote a healthier future for the parties and their children.

## GUIDING PRINCIPLES OF MEDIATION FOR FAMILY LAW

(with information from the [Code of Conduct for Mediators](#), ADR Institute of Canada; and [The Voice of the Child in Family Law: Exploring Strategies, Challenges and Best Practices for Canada](#), 2019, Justice Canada)

### SELF-DETERMINATION

Parties have a right to make voluntary, informed, and non-coerced decisions. This includes choices about the mediation process and its outcomes. Volition is key to lasting and meaningful agreements.



### INDEPENDENCE & IMPARTIALITY

Mediators must not act as advocates for either party during a mediation. They must be free of any personal interest in the outcome. Although they can provide guidance about laws and available options, mediators should not offer advice.



### SAFETY & CONFIDENTIALITY

All parties need to feel safe and protected from harm or coercion. Risk assessment for family violence is crucial. The neutrality of the mediator and the confidentiality of what is said are also integral to the safety of the parties. Mediation proposals can't be used or referred to in court proceedings.



### FAMILY EMPOWERMENT

Mediation can address feelings of helplessness and loss of control by providing families with the power to make shared decisions. Research shows that including children's voices in family dispute resolutions improves both legal decisions and the children's lives they affect.



### CULTURAL COMPETENCY

Dispute resolution processes that are reflective of the beliefs and cultural contexts of the parties are essential for empowered and shared decision-making. Cultural awareness and avoidance of stereotypes and bias is also key to family violence risk assessments.



## Understanding Family Violence in Mediation

Historically, family violence has been considered in the context of violence between intimate partners – referred to either as “intimate partner violence” (IPV) or “domestic violence” (DV). Much of the literature on family violence and mediation aligns with this focus on violent interactions between two romantic partners, although the desire to bring children’s voices to the table in family law proceedings has increased alongside international recognition of children’s rights (Razbani-Tehrani & Kaptyn, 2022). Research has also shown that excluding children from meaningful participation in family law matters, such as custody and access disputes, can have detrimental effects, such as increased stress, anger, and insecurity (Department of Justice, 2019). Moreover, there is mounting evidence that participation in family law proceedings is not only beneficial for children but is also in keeping with what they want (Birnbaum, 2017). Several studies have found that, when given the opportunity, “children enthusiastically welcomed the chance to be interviewed by a mediator” (Howard, 2018, p. 85).

Mediation can be a safe forum for children to voice their experiences and desires with respect to custody and access agreements and some mediators have argued that children may benefit from observing healthy discussions and dispute management models between parents (Howard, 2018). Where, however, family

*“[M]e and my brother, we’ve had a lot of social workers and lawyers and stuff, but none of them actually wanted to talk to us, they just wanted to talk to our parents, so I thought it was nice that they wanted to know our point of view (Birnbaum, 2017, p. 151).*

violence is present, several concerns arise about the use of mediation, particularly when the child may be subject to manipulation or control. As Emery (2002) cautions, “it is easy for angry parents, and well-intentioned professionals, to cross the line from giving children the right to be heard and enter the territory where we give children the responsibility for making adult decisions” (p. 165).

In mediations, family violence may present itself as controlling or manipulative behaviour, sarcastic/degrading/humiliating comments, name-calling or penalizing the abused person for asserting independence or autonomy (Ontario Association for Family Mediation [OAFM], 2016). While it is not unusual for people in mediations to threaten litigation or take a hard bargaining stance, these tactics can signal the presence of family violence. 2021 Amendments to Canada’s *Divorce Act* recognized this, including “coercive and controlling behaviour” in the revised definition of “family violence” (section 2(1)).

Understanding how these patterns of control and domination present themselves in the mediation context is crucial to establishing the safety and equality of the parties and the process. Abusers may capitalize on “bargaining chips” during mediations that undermine the parenting skills or credibility of the abused spouse, withhold financial support, or endanger

Read more about the *Divorce Act* amendments and coercive control in previous issues of the Family Violence & Family Law Research Briefs!



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children (Nonomura et al., 2021). Courts recognize the use and prevalence of litigation harassment and abusive tactics in IPV (*MAB v LAB*, 2013 NSSC 89; *Docherty v Catherwood*, 2015 ONSC 5240). This is especially prevalent when child custody and financial support are mediation agenda items.

### *Moving Towards a “Culture of Negotiation”*

The Supreme Court of Canada has described the 2021 amendments to Canada’s *Divorce Act* as creating a “culture of negotiation,” noting the requirement (in section 7.3) that parties settle matters through family dispute resolution processes rather than court proceedings (*Colucci v. Colucci*, 2021 SCC 24, para. 70). Importantly, the court noted that this mandate applies “absent family violence or significant power imbalances” and that a history of family violence is a relevant consideration when assessing the parties’ safety concerns or allegations of bad faith (para. 69, 99).

Understanding how family violence presents itself within the context of mediation is also crucial for lawyers and mediators seeking to counteract power imbalances and safeguard against further trauma. With increased awareness of how coercive control operates both in and outside of the mediation context, mediators can craft action plans that minimize the control opportunities between the spouses moving forward (Nonomura et al., 2021).

## **Perspectives on Mediation & Family Violence**

While mediation is an effective resolution tool, its use in the family violence context faces criticism. The effects of coercive control are not left at the door. Rather, intimidation, isolation, humiliation, exploitation, and micromanaging tactics “may preclude a fair mediation resolution” (Behounek & Miller, 2022, p. 75). The power imbalances can result in re-victimization which may hinder an effective mediation because of the increased fear that the abuser will seek retribution (Behounek & Miller, 2022). Trauma-informed mediations, however, emphasize the need for safety as a precursor to equal bargaining power. Many family law practitioners maintain that mediation can be a safe and beneficial process with the necessary screening and precautionary measures.

### **Mediation Shortfalls in Family Violence Cases**

There are three primary concerns regarding mediation in a family violence context: (1) the lack of adequate screening practices and training resources; (2) ensuring the safety of the parties; and (3) navigating the power imbalance.

In terms of training and screening, critics argue that mediators are not, as a rule, educated in recognizing signs of trauma and family violence; this can result in well-meaning mediators

*“[T]he lack of widespread domestic violence training available to mediators... [is] a flaw [that] potentially renders mediation of such cases either futile or actually dangerous... [A]n untrained mediator may attribute the abuse to conflict. However, in cases involving a history of domestic violence, the conflict is only the pretext for abuse, which really stems from a need to dominate and control. Thus, an untrained mediator attempting to resolve the conflict may, in fact, ignore the real problem” (Zylstra, 2001, p. 257).*

attempting to mediate the occurrences of violence – displacing blame onto the victim (Zylstra, 2001). In the absence of formal training, there is a lack of confidence in a mediator’s ability to detect IPV (Semple, 2012).

Impacts to physical, psychological, and non-physical wellbeing are considered when assessing the involved parties' safety. Mediators do not have the same power as the law to "constrain power abuses and ensure that pre-existing power disparities, rather than law, will dictate divorce agreement's terms" (Semple, 2012, p. 219). In addition, financial security could be an agenda item used to control the survivor's ability to negotiate meaningfully (Semple, 2012). Furthermore, mediation traditionally necessitates that the parties be physically present in the same room to allow for negotiations to take place. However, this presents a challenge when there is a risk of psychological abuse or revictimization during the mediation or a risk of physical confrontation by providing the perpetrator with a window of opportunity (Feresin et al., 2018). Notably, breakups or separations are an IPV risk factor: 45% of survivors abused by a former spouse report experiencing violence after separation (Conroy, 2021, p.7).

Navigating the power imbalance in IPV cases attracts the most criticism. The nature of mediation is a "shared responsibility model" where parties come to the table with equal bargaining power and come to a mutually acceptable agreement (Feresin et al., 2018). IPV, however, is an exercise in domination, which can render the survivor unable to effectively negotiate their own interests (Behounek & Miller, 2022). Often, this is driven by the perpetrator's unwillingness to compromise and need for control. Tishler (2004) found that abusive

*"[Y]ou've got people who have been completely disempowered in their family relationships attempting to negotiate when there's not a chance that they're going to be able to do that. Where there is a really good chance that the perpetrator is going to be able to do that really well ... so we need to understand that there's this friction point and that will always prevent us from getting complete safety for a woman in that situation."* (Family Law Mediator, as cited in Heward-Belle et al., 2018, p. 141)

partners were more likely to be inflexible in mediation proceedings, as well as being twice as likely as non-violent fathers to seek sole custody of any children. Any propensity to placate among abused parties further compounds these power imbalances. The coercive aspect of domestic violence continues into the mediation process with abusers using a variety of tactics to sabotage

### *Signs of Manipulation in Mediation*

- The abuser fails to bring necessary materials;
- The abuser refuses to share information;
- The abuser attempts to delay the process;
- The abuser is absent or consistently shows up late;
- The abuser controls the agenda;
- The abuser adopts a take-it-or-leave-it negotiation style;
- The abuser constantly asks to change or adjust agreements.

Adapted from Lux & Gill (2021)

the resolution process: failing to bring necessary materials, withholding information, withholding funds, delaying the intervention, failing to show up consistently or show up on time, controlling the agenda, adopting a take-it-or-leave-it negotiation style, refusing to honour agreements, constantly asking to change or adjust agreements, or feigning confusion (Lux & Gill, 2021, p. 824). The abuser may also monopolize speaking time. One survivor in a study shared: "[It] was 90% his talking, 10% me" (Feresin et al., 2018, p. 518).

## Mediation Strengths in Family Violence Cases

Despite criticisms, mediation is a beneficial resolution mechanism in some family violence cases. The ability to caucus as needed provides an opportunity for mediators to separate the parties when destructive or “negative behaviours, such as yelling or making accusations” likely to hinder the mediations efficacy begin to occur (Rossi et al, 2017, p. 392). The mediator can navigate the power imbalances in a way that formal adversarial litigation processes cannot. Where the adversarial litigation model tends to increase tension between parties, appropriately conducted mediations can foster effective communication and collaboration (Department of Justice, 2016). In addition, the absence of flexibility in the adversarial litigation process can leave victims feeling disempowered (Zylstra, 2001).

The mediation process, on the other hand, allows for customizations that can increase the mediation’s likely success. For instance, shuttle mediations allow the parties to maintain physical separation. In shuttle mediations, the mediator moves from one room to the next relaying the information the parties equipped them with. The parties themselves never have to come into contact. The physical separation may promote safety and help control or minimize the abusers’ ability to intimidate the survivor (Rossi et al, 2017). Consequently, shuttle mediations “may help provide a more comfortable atmosphere where parties can articulate negative feelings when needed and voice their interests without being confronted by the other party” (Rossi et al, 2017, p. 393). Enhancing the survivor’s comfort level is crucial to facilitate a mediation where both parties are *willingly* coming to an agreement. For IPV cases in particular, shuttle mediations provide the mediator the opportunity to “encourage parties to consider arrangements that focus on safety issues” (Rossi et al, 2017, p. 393). Likewise, mediation can provide longer term, “therapeutic” solutions not available through the court system (Department of Justice, 2016).

Furthermore, audio-visual mediation can provide an opportunity for the parties to mediate without having to relocate to a common location (Rossi et al, 2017). This may help women who are traditionally disadvantaged because of frequent moves that occurred in an attempt to escape the violence (Zylstra, 2001). So long as all parties have the equipment and software required to engage in a virtual mediation, the survivor also does not need to reveal their current whereabouts. For survivors who have needed to move to escape IPV, this may be a beneficial mediation forum that carries with it the potential benefits of shuttle mediation while also having the ability to convene in the same virtual room if appropriate.

The bottom line, for proponents of mediation, is threefold: (1) the process can be uniquely adapted to individual needs; (2) with proper mediator training, power imbalances can be controlled more effectively than in the adversarial model; and (3) mediation aids in long-term success.

## Best Practices for Mediating Family Violence Cases

Although arguments about the use of mediation in family violence cases are far from settled, there is much agreement that the debate amounts to an “exercise in futility” given how often mediation is used in cases involving domestic violence (Capulong, 2013; Zylstra, 2001). The vast majority of family law disputes are resolved outside of the courtroom through settlement discussions, negotiation, and mediation (Poitras et al., 2021). Recent estimates in the United States suggest that at least half of all separation mediations include a history of IPV (Behounek & Miller, 2022). The percentage of Canadian family law cases that are settled through mediation is even higher (Saini et al., 2016). Rates of mediation are also expected to increase following amendments to the *Divorce Act* in 2021 which now mandate the use of family dispute resolution processes (rather than court proceedings) for all cases where safety is not a concern (Department of Justice, 2021). This creates an imperative for adequate training and best practices development, including family violence screening tools for family law practitioners and service providers to ensure that dispute resolutions are safe and equitable in both process and outcome.

## Professional Guidelines & Trauma-informed Training

Many mediators and family law practitioners have answered the call for specialized training and tools for identifying and addressing family violence. Moreover, the need for mediators to assess and screen for the presence and risk of abuse is now widely recognized. The OAFM’s [\*Policy on Intimate Partner Violence and Power Imbalances\*](#) identifies the critical need for trauma-informed training for mediators as one of its guiding principles, alongside family violence screening practices that take place “from the initial contact through to the conclusion of the mediation” (OAFM, 2022, E1). Research has shown that well-trained mediators enhance “family understanding, feelings of calm, communication and a culture of shared thinking and collaborative decision-making (Retter et al., 2020, p. 22). The reverse has also been found to be true. Participants in a 2018 review of a (U.S. based) child protection mediation program reported a negative experience with mediation when the mediator “was passive about the family situation” or “did not intervene when discussions got heated” (Retter et al., 2020, p. 22). Equality and anti-violence advocates have long argued that “legislative change in itself is insufficient in producing the intended changes in the norms surrounding family law” (Sowter & Koshan, 2021, para. 5). Instead, law reform must be accompanied by education on “the complexities of family violence” and “how to use appropriate

### Continuing Legal Education in Family Violence & Family Law – ONLINE MODULE

Many online modules are now available through the Department of Justice website that examine the impact of the 2021 *Divorce Act* amendments, including its mandate for **family dispute resolution** processes and the implications of **family violence** in these cases. Several Law Societies have accredited the courses for CPD/CLE credit. The modules are self-paced and cover a number of essential topics, including the disclosure and assessment of family violence, and guidelines for parenting arrangements in cases of family violence.

*Access it now by clicking on the boxed image.*



family violence screening tools” before the safety and empowerment of families can be ensured (NAWL et al., 2018, p. 10).

This recommendation has been adopted in several codes of conduct and standards of practice for mediators in Canada. Family Mediation Canada requires mediators to acquire a minimum of twenty-one hours of specialized training focused on risk identification, management, and assessment of family violence (Department of Justice, 2016, fn. 348). British Columbia’s Family Law Act also has minimum training standards for dispute resolution professionals, which include fourteen hours of training in family violence screening (Department of Justice, 2016). Apart from which tools are adopted, equally important is how they are used.

*“Looking at mediation through the lens of trauma provides a very different understanding of parties who may be living in a world that feels unsafe. Mediators must be vigilant in their professional obligation to do no harm, and this includes understanding trauma and the impact it has on peoples’ lives and the need to ensure not only physical safety but also an emotionally safe process for all participants” (OAFM, 2022, D11).*

## Appropriate Screening Practices

Critics and proponents of mediation in family violence contexts find common ground concerning the necessity of proper screening measures (Department of Justice, 2016). Research has found that without them, mediators fail to detect family violence or misidentify it in ways that minimize its harm or isolate it from parenting or custody decisions (Feresin et al., 2018). Several factors can

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Linda C. Neilson (2014) identifies the following **4-stage assessment** to determine the **suitability of mediation in a family violence context**:

- (1) assessment of the pattern, type, frequency, severity and effects of IPV (distinguishing minor or isolated violence without coercion and control);
- (2) assessment of the risk and likelihood that physical or lethal violence will ensue;
- (3) assessment of the parties to ensure that exposure to IPV in the past has not affected capacity to participate in the process in a balanced, equitable fashion; and
- (4) assessment of the settlement process itself to determine whether expertise and procedural options are available to address any vulnerabilities, power imbalances, and safety concerns identified in the first three assessments.

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further challenge IPV screening, including the parties’ unwillingness to disclose, or even a lack of understanding or acceptance of the acts as violence, sometimes attributable to the IPV having been normalized by the family (Razbani-Tehrani & Kaptyn, 2022). Issues with recollection or avoidance are also linked to family violence, sometimes in the form of posttraumatic stress disorder (Neilson, 2014). These complexities demonstrate the inadequacy of a “one size fits all” approach to screening. Instead, assessment tools must be multi-faceted, ongoing, and able to detect a full range of IPV behaviours and patterns, including coercive control (Rossi et al., 2021).

Even where mediation may be deemed appropriate for the parties, screening can identify what measures might be needed to ensure safety and a balance of power throughout the mediation process. “Shuttle” mediation can be used, keeping the parties in separate rooms throughout the mediation with the mediator relaying information back and forth. Videoconferencing has also been used to mediate family violence cases, however, research has found it to result in fewer agreements than in those cases that were shuttle mediated (Holtzworth-Munroe et al., 2021).

### **Assessing IPV Risk Assessments – What do we want to predict?**

Several IPV risk assessment tools have been developed for use among a wide range of professionals, including social workers, law enforcement, and first responders, although research has shown that these instruments may not be measuring the same things (Graham et al, 2021). Common risk factors used by IPV assessment tools include a history of violent or controlling behaviour, weapon use, mental health concerns, or substance abuse, as well as unemployment, involvement with police, or recent life changes (Graham et al, 2021). It is important that these assessment tools are themselves subject to review for inequality. Structural inequities and systemic bias will result in some risk factors occurring more frequently for oppressed groups, thus inflating assessed levels of risk (Messing, 2022).

Apart from the risk of future violence, IPV assessment tools also aim to measure the lethality of prospective assaults. The **Danger Assessment Tool**, for example, asks a number of questions pertaining to incidents of abuse within the last year to determine the victim’s risk of being killed in the next assault (Campbell, 2019). Even when some risk factors are not present when assessed, practitioners working with the tools “can provide education about these risks, including information that particular behaviors indicate increased risk for reassault or homicide, and tell the survivor to be watchful for these factors” (Messing, 2019, p. 107).

Several studies have been done of family violence screening tools in Canada, including the Calgary Domestic Violence Collective’s (2018) report, *Examining Domestic Violence Screening Practices of Mediators and Lawyers*; the Department of Justice (2018) report (prepared by Luke’s Place), *What You Don’t Know Can Hurt You: The importance of family violence screening tools for family law practitioners*; and the *Intimate Partner Violence Risk Identification and Assessment Tool User Guide* (2020) funded by the Law Foundation of Ontario.

Trauma-informed training assists in the implementation of risk assessment tools. The trauma of IPV can impair the parties’ ability to fully participate in a mediation. Conversely, abusers may be incapable of participating in a resolution process where both parties are expected to have equal power (Cleak et al., 2018). Lack of access to legal representation intensifies the inherent power imbalance in family violence cases, and in cases where the parties are not both represented, mediation may not be appropriate. Continuous and informed assessment of the parties’ vulnerabilities and levels of control is critical to ensuring survivors feel comfortable voicing concerns and are not hesitant to disagree with the abuser’s demands in the mediation. In addition to trauma-informed training, a mediator’s cultural competency is integral to establishing and maintaining a mediation context of safety, empathy, and empowerment.

## Cultural Competency

One of the trends in social demographics observed by family law specialists has been the influx of immigrants and refugees to several countries, highlighting the imperative for cultural competency among family law practitioners (Medhekar, 2021). Newcomers face unique vulnerabilities related

*“In my family litigation and mediation practice, working with marginalized populations of immigrants, refugees, and non-status women, along with their children, I have noticed that if their experiences of oppression and intersectional needs and the resulting vulnerabilities are not factored into the family dispute resolution process, the outcome is not fair or sustainable.”*

— Archana Medhekar, family mediator in Toronto, ON (2021)

to their status as immigrants or refugees, including fears of deportation or child custody loss, a mistrust of the police, and concerns about subjecting the family to increased state surveillance that can deter disclosures of family violence (Holtmann & Rickards, 2018).

These factors intersect with language barriers, social isolation, unemployment, sexism, and racism to make social and legal services harder to access for newcomer women living in abusive homes (Razbani-Tehrani & Kaptyn, 2022). Belief systems and socio-political orders which privilege male power over women or enforce a sense of “cultural betrayal” can also work to conceal family violence (Critelli & Yalim, 2020). Mediators who are sensitive to the parties’ cultural contexts of vulnerability will be better positioned to identify and respond to IPV safely and effectively.

## Regional Research Spotlight: Trauma-Informed Training



Trauma informed practice is a client-centered model built on knowledge of the impact trauma has on the brain and body. It actively seeks to employ strategies that reduce or avoid compounding trauma-related harm and its effects. While IPV trauma often occurs in family law, a survivor’s experience may impact an insurance matter, a landlord/tenant dispute, or any number of other legal proceedings. Funded by the Law Foundation of New Brunswick, Sexual Violence New Brunswick (SVNB) has begun to develop and deliver trauma-informed training and resources for lawyers in all civil practice areas of the province. Through SVNB’s training, lawyers will gain insight into how to minimize survivors’ trauma in practice, including:

- An introduction to the basics of trauma and its impacts on human behaviour.
- A guide to knowledgeable and respectful interactions with clients who have experienced trauma, including but not limited to sexual violence.
- Learning to identify the unique needs of clients who have experienced trauma and develop strategies for balancing these with the requirements of the justice process at each stage of the legal process, including: client support, case management, examinations for discovery, mediation and settlement conferences, and trial.
- Information about and referrals to medical, legal, and community-based resources for survivors of sexual violence in New Brunswick; and
- The ability to identify vicarious trauma, how it can impact lawyers, and strategies for mitigation its impacts on individuals and organizations.

SVNB anticipates launching this trauma informed training in the spring of 2022.

# Webinar Highlights

Mediation in Family Violence in Family Law

October 20, 2021



Speaker: Jennifer Davis, Conflict Resolution Specialist

## What is Mediation?

- Consider mediation as a toolbox of options, models, strategies, and approaches to conflict. The dispute resolution professional reaches for different tools based on the party's needs.
- Mediation is not a short term "fix", it is a long term process aimed at resolving one matter, not the entire relationship.
- Not all mediation models are conducive to disputes involving family violence. Likewise, mediation is not suitable for all parties. Dispute resolution professionals assess their client's needs to determine if mediation is an appropriate recourse avenue. If mediation would be fruitful in the dispute, consider the following when selecting a mediation model.

## ASSESSING A MEDIATION MODEL

<b>Has the model been applied to cases with a history of domestic violence?</b> <ul style="list-style-type: none"><li>• Does the model involve other professionals? i.e. social workers, counsellors</li><li>• When other professionals are involved, are there mechanisms in place to enforce confidentiality concerns?</li></ul>	<b>Does the model place emphasis on safety and autonomy above all?</b> <ul style="list-style-type: none"><li>• Are safety plans designed for each participant?</li><li>• Does the model remove the ability of one party to coerce the other??</li></ul>	<b>Does the model screen for domestic violence?</b> <ul style="list-style-type: none"><li>• Does the model determine the prevalence of various forms of domestic violence?</li><li>• Does the model recognize all people who may be touched by the violence? i.e. elderly parents, children, other dependants, etc.</li></ul>
<b>Is the model flexible to accommodate family circumstances?</b> <ul style="list-style-type: none"><li>• Does the model allow for a support person?</li><li>• Does the model allow for involvement of other parties?</li><li>• Is the model flexible to account for various family structures?</li></ul>	<b>Does the dispute resolution professional have training on domestic violence?</b> <ul style="list-style-type: none"><li>• Can the DRP identify and classify power imbalances? Is the training recent? Can they accurately interpret body language? Can they adjust power imbalances in their role as a neutral third party?</li><li>• Most importantly: do they have <b>experience</b>?</li></ul>	

## Mediation as a Long-Term Process

Mediation is not a one and done solution in the family violence context. The ideal mediation model does not end at the mediation. Mediators should check in a few months post mediation, sooner if needed, to see how the solution is working. The parties relationship with each other is always evolving; What was a solution in theory, might not have that outcome in practice. Therefore, mediators should follow up with the parties to see if any changes to the resolution are needed. But remember, mediations focus on the issue at hand (i.e. how to exchange children at drop off times) not the overall relationship break down between the parties. It is easy to want to fix the relationship with the parties, but viewing mediation as one step in a much broader dispute resolution process helps narrow the focus to just the issue being mediated. Success on that issue may pave the way for progress elsewhere, but only tackle one issue at a time.

## Contact Us

To learn more about the *Supporting the Health and Well-being of Survivors of Family Violence in Family Law Proceedings* project, go to <https://alliancevaw.ca> or our partnered research centres:

### Muriel McQueen Fergusson Centre for Family Violence Research in partnership with St. Thomas University



Muriel McQueen  
Fergusson Centre for  
Family Violence Research

<https://unb.ca/mmfc/>

Dr. Catherine Holtmann ([website](#))

Dr. Karla O'Regan ([website](#))

### The Centre for Research and Education on Violence Against Women



Western

Centre for Research & Education on  
Violence Against Women & Children

<https://learningtoendabuse.ca>

Dr. Peter Jaffe ([website](#))

Dr. Katreena Scott ([website](#))

### The Freda Centre for Research on Violence Against Women and Children



The FREDA Centre  
for Research on Violence  
Against Women and Children

<https://www.fredacentre.com>

Dr. Margaret Jackson ([website](#))

### Recherches Appliquées et Interdisciplinaires sur les Violences intimes, familiales et structurelles in partnership with Université du Québec à Montréal



UQÀM

<https://www.raiv.ulaval.ca/en>

Dr. Geneviève Lessard

Dr. Dominique Bernier ([website](#))

### RESOLVE: Research and Education for Solutions to Violence and Abuse



<https://umanitoba.ca/resolve>

Dr. Kendra Nixon ([website](#))

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