

Triaging and Mediating to Meet the Needs of Families Under *The Family Dispute Resolution (Pilot Project) Act* of Manitoba

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ABSTRACT

The Family Dispute Resolution (Pilot Project) Act of Manitoba (“FDRA”) creates a three-year pilot project which will mandate the resolution of certain family disputes outside of the courts. Under the FDRA, “resolution officers” will be responsible for triaging families into these alternative resources. Currently, without supplementary regulations, the FDRA provides insufficient guidance to resolution officers to enable them to conduct this triaging role effectively. This is problematic as triaging is the first major step in the FDRA process and will set the course for the parties’ entire dispute resolution experience under the new scheme.

Given the importance of this step, and the likelihood that mediation will be one of the primary processes used to resolve disputes under the FDRA, I have attempted to create enhanced guidelines to help resolution officers match parties to the optimal type of mediation to fit their particular needs. These guidelines, which can hopefully help to inform the future drafting of regulations to the FDRA, were informed by both the mediation

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literature and the results of qualitative interviews which I conducted with some of Manitoba's most knowledgeable family mediators.

Ultimately, I outline several factors which can impact the resolution of family disputes through mediation, and which must therefore inform the triaging decisions of resolution officers. I also argue that resolution officers should be required to receive specific professional mediation designations, and that to facilitate the most successful implementation of the FDRA, the government should not only take the insights from my research into consideration but should also commit to further consultations with our province's family mediators and other ADR professionals.

I. INTRODUCTION

Separation, divorce, and the dissolution of family units through the courts have become commonplace occurrences in Canada; yet the devastating impacts that these events can have on families is far from ordinary. For instance, Manitobans who have gone through family proceedings through Manitoba's Court of Queen's Bench have recounted losing their jobs due to time spent away from work addressing their legal matters, losing their homes and all the equity in them, losing their overall physical health, and even losing their entire life savings.¹ Accordingly, the announcement of Bill 9, *The Family Law Modernization Act* of Manitoba ("FLMA")², which was intended to reduce the conflict, cost, and heartache incurred by families in Manitoba's family court system, has been viewed by some as a "glimmer of hope" for individuals who have exhausted nearly every resource they had fighting for a fair and reasonable resolution.³ This legislation, Manitoba's former Attorney General and Minister of Justice, Cliff Cullen, explained, will mandate the resolution of certain family law disputes outside of our family courts, providing families with the opportunity to resolve their disputes through alternative mechanisms such as mediation.

¹ Manitoba, Legislative Assembly, *The Standing Committee on Justice*, 4-44-LXXII, No 2 (9 May 2019) at 31 (Mr. Doyle Pivniuk).

² Bill 9, *The Family Law Modernization Act*, 4th Sess, 41st Leg, Manitoba, 2019, Explanatory Note (assented to 3 June 2019) [Bill 9].

³ *Ibid.*

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

Both Bill 9 and experts urge disputants to utilize court-connected, private, agency, clinic, or community-run conflict resolution programs which deliver mediation services to families undergoing separation and divorce.⁶ In Manitoba, for example, such services are offered by organizations like Mediation Services and the new Family Resolution Service, among others, which are each based in "'collaborative,' 'holistic,' and 'interdisciplinary' interventions rather than zealous advocacy."⁷

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

⁵ *Dunford v Birnboim*, 2017 MBCA 100 at para 5.

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

⁷ Jane C Murphy, "Revitalizing the Adversary System in Family Law" (2009) 78 U Cin L

However, despite the availability of these more affordable and accessible alternative frameworks, family conflicts continue to overwhelm our courts, and the access to justice issues continue to grow.⁸ Accordingly, over the last decade, Canadian provinces, including Manitoba, have begun to undertake various initiatives to try to transform the “hierarchical, ‘winner takes all’ approach of the dominant adversary system . . .” into a fairer, more expeditious, and more economical one rooted in peace-building.⁹ These provincial initiatives have been bolstered in recent years by the federal government’s recent introduction of Bill C-78, which, among other things, increases the obligation on family lawyers and parties to family disputes to consider dispute resolution processes outside of our courts.¹⁰

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

Rev 891 at 895.

⁸ *A Roadmap for Change*, *supra* note 4.

⁹ Jane C Murphy & Robert Rubinson, *Family Mediation: Theory and Practice* (New Providence, NJ: LexisNexis, 2009) at 152. Examples of provincial family law reform initiatives in Canada include Victoria’s “Early Resolution and Case Management Model,” Alberta’s one-year alternative dispute resolution pilot project, and Saskatchewan’s mandatory early family dispute resolution scheme in Prince Albert. See, respectively, “Victoria Early Resolution & Case Management Model” (last visited 10 May 2020), online: *Government of British Columbia* <www2.gov.bc.ca/gov/content/life-events/divorce/family-justice/your-options/early-resolution> [perma.cc/6TY3-846L]; Jennifer Koshan, Janet Mosher & Wanda Wieggers, “Mandatory Dispute Resolution Coming Back to Alberta, But What About Domestic Violence Cases?” (30 August 2019), online (blog): *The University of Calgary Faculty of Law Blog* <www.ablawg.ca/2019/08/30/mandatory-dispute-resolution-coming-back-to-alberta-but-what-about-domestic-violence-cases/> [perma.cc/EC53-JCUG]; and “Early Family Dispute Resolution” (last visited 10 May 2020), online: *Government of Saskatchewan* <www.saskatchewan.ca/residents/births-deaths-marriages-and-divorces/separation-or-divorce/early-family-dispute-resolution> [perma.cc/LJ5X-FRWR]).

¹⁰ Bill C-78, *An Act to amend the Divorce Act, the Family Orders and Agreements Enforcement Assistance Act and the Garnishment, Attachment and Pension Diversion Act and to make consequential amendments to another Act*, 1st Sess, 42nd Parl, 2019, cl 8 (assented to 21 June 2019).

recommendation for a three-year mediation-based pilot project. The FLRC's report recommends a pilot project that would implement a new administrative process for legal disputes falling under the jurisdiction of *The Family Maintenance Act*.¹¹

On June 3, 2019, then-Minister of Justice Cullen's aforementioned Bill, the FLMA, received Royal Assent from the Lieutenant Governor of Manitoba.¹² Among other pieces of legislation, the FLMA creates *The Family Dispute Resolution (Pilot Project) Act* ("FDRA"), which outlines the finalized three-year pilot project first envisioned by the FLRC in its report.¹³ Manitoba's legislation removes the possibility for families to confront those family matters covered by the FDRA through the courts. Under this legislation, either party to a dispute may commence the FDRA process by requesting assistance from the Director of Resolution Services.¹⁴ Unless the Director declines to resolve the dispute pursuant to reasons outlined in the FDRA, resolution of the dispute will take place in two distinct phases. The first is the facilitated resolution phase, in which parties are assisted by a resolution officer to try to reach a mutually satisfactory agreement on all aspects of their dispute.¹⁵ The second is the adjudication phase, in which an adjudicator holds a hearing and makes a recommended order to resolve any dispute that was not resolved in the first phase.¹⁶ If neither party objects to the adjudicator's recommended order under the second phase, it becomes an enforceable order of the Court of Queen's Bench of Manitoba. However, if either party disagrees with the order, he or she may file an objection in the Court of Queen's Bench, leaving it to the court to either confirm the adjudicator's order or make a new one.¹⁷

¹¹ Manitoba, Family Law Reform Committee, *Modernizing Our Family Law System: A Report from Manitoba's Family Law Reform Committee* (June 2018) at 1 [*Modernizing Our Family Law System*].

¹² Bill 9, *supra* note 2. This legislation also created the new *Child Support Service Act*, and four new pieces of legislation which will amend *The Arbitration Act*, *The Provincial Court Act*, *The Court of Queen's Bench Act*, *The Family Maintenance Act*, and *The Inter-Jurisdictional Support Orders Act*.

¹³ *Ibid.*

¹⁴ *Ibid.*, cl 5(1).

¹⁵ *Ibid.*, cl 9(1).

¹⁶ *Ibid.*

¹⁷ *Ibid.*, cl 31.

As originally envisioned by the FLRC, the initial phase of the FDRA will involve a resolution officer who is responsible for assisting the parties to “define the issues in dispute, explore solutions and reach a mutually satisfactory agreement on all aspects of their family dispute.”¹⁸ This requires the resolution officer to “determine the form of the dispute resolution process to be used in attempting to resolve the family dispute”¹⁹ and likely, to “refer the parties to another service or resource for assistance in resolving the dispute.”²⁰ According to the FLRC’s report, which gave rise to the FDRA process, this “opportunity to direct people into non-adversarial dispute resolution resources at a very early stage” is a “key” to this initiative.²¹ Unfortunately, both the FLRC’s report and the FDRA itself, without supplementary regulations, are rather vague in terms of how resolution officers will fulfill this key triage function.

For example, while the FLRC’s report specifically contemplates mediation as the primary dispute resolution process to be used in the first phase of the pilot project, the FDRA does not address the types of dispute resolution resources and services to which it envisions making referrals. Further, while subsection 10(2) of the FDRA instructs resolution officers to consider factors such as “the nature and complexity of the issues” and “the nature of the relationship between the parties” in determining the form of dispute resolution to be used in the first phase, the FDRA is silent in terms of how resolution officers are to determine, based on that information, which specific service or resource will have the best likelihood of resolving the issues in a non-adversarial way.²² As such, resolution officers could theoretically triage parties into evaluative, facilitative, narrative, or transformative mediation; judicially assisted dispute resolution; arbitration; assessments; therapy; or any other service that they favour. Moreover, while both the FLRC’s report and the FDRA touch on the issue of power imbalance briefly, neither seem to adequately address or prepare for the challenges that often arise in mediation when there are substantial power imbalances between the parties. While it is possible that these issues will be

¹⁸ *Ibid*, cl 10(1).

¹⁹ *Ibid*, cl 10(2).

²⁰ *Ibid*, cl 10(3)(b).

²¹ *Modernizing Our Family Law System*, *supra* note 11 at 6.

²² *Bill 9*, *supra* note 2, cl 10(2).

addressed in forthcoming regulations to the FDRA, as the Act currently stands, a number of questions remain unanswered.

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

In this article, I focus specifically on family mediation, just as the FLRC did in its initial report. While the FDRA refers generally to the use of "dispute resolution processes" in the facilitated resolution phase, the most likely process to be employed is mediation. My aim is to supply the theoretical research needed to crystallize the crucial triage role of resolution officers in the facilitated resolution phase of the project. This is important because triaging is the first major step in the process and will set the course for the parties' entire dispute resolution experience under the new scheme. Accordingly, more comprehensive guidelines for resolution officers to follow when triaging cases is necessary. In this article, I attempt to supplement what little triaging guidance is currently offered by the FDRA, in hopes that this added guidance might be taken into account in the future drafting of regulations to the legislation.

I build upon the few triaging guidelines outlined in subsection 10(2) of the FDRA to help resolution officers determine the type of mediation services which will best meet the individual needs of parties coming under the purview of the pilot project if they are to be referred to mediation. To do this, I analyze the facilitative, evaluative, and transformative mediation approaches, with an eye to ascertaining the most effective processes to address child custody and access issues, child and spousal support-related issues, and property-related issues. I also touch on the effectiveness and appropriateness of these mediation approaches in cases of varying degrees of complexity, conflict, and power imbalance between parties; including those imbalances arising as a result of domestic violence. To enable prospective resolution officers to effectively fulfill their triaging function,

this article also addresses the type of training and qualifications which will best prepare resolution officers to effectively do their jobs. In providing theoretical research underpinnings and suggesting guidelines which might be incorporated into future regulations, I will be filling in some gaps in the pilot project. Hopefully, my work, if applied to the FDRA, will enable resolution officers to effectively and thoughtfully fulfill their triaging functions, and increase the likelihood of the FDRA “[creating] a process outside the traditional court system that provides for the fair, economical, expeditious and informal resolution of family disputes.”²³

II. LITERATURE REVIEW

A. “The Big Three” Mediation Approaches

Mediation is a voluntary process wherein a neutral party facilitates a dialogue between two or more parties in order to assist them in creating a suitable resolution to their dispute.²⁴ Based on the fundamental principle of self-determination, the decision-making authority rests with the parties, not the mediator, and the parties have the right “to make their own voluntary and non-coerced decisions regarding the possible resolution of any issue in dispute.”²⁵ Family mediation, more specifically, is a multidisciplinary undertaking which melds mediation together with family law, counselling, therapy, and education.²⁶

Mediators achieve success, and they do so in a variety of ways, depending on their own particular approach or orientation toward mediation, be it facilitative, evaluative, transformative, or otherwise. In 1996, Leonard Riskin, a prominent American law-school professor and scholar introduced a seminal “grid” of mediator orientations ranging from “evaluative” to “facilitative.”²⁷ This grid consists of two intersecting

²³ *Ibid*, cl 1.

²⁴ Cheryl A Picard, *Mediating Interpersonal and Small Group Conflict* (Ottawa: The Golden Dog Press, 2002) at 22.

²⁵ ADR Institute of Canada Inc., *Code of Conduct for Mediators*, 2011 ch 3.1.

²⁶ Alberta, Alberta Law Reform Institute, *Court-Connected Family Mediation Programs in Canada* (Edmonton, AB: Alberta Law Reform Institute, 1994) at 4.

²⁷ Leonard L Riskin, “Mediator Orientations, Strategies and Techniques” (1994), 12:9 *Alternatives to High Cost Litigation* 111 [Riskin, “Mediator Orientations, Strategies and Techniques”].

continuums: one representing the mediator's approach to problem-definition, ranging from "narrow" to "broad," and the other representing the mediator's notion of his or her role in mediation, which ranges from "evaluative" to "facilitative."²⁸ With respect to the first continuum, Riskin argued that mediators who define the problems more narrowly tend to focus more heavily on court outcomes, uncertainty, delay and expense, leading the parties to "bargain adversarially, emphasizing positions over interests."²⁹ Mediators who define the problems broadly, on the other hand, "assumes that the parties can benefit if the mediation goes beyond the narrow issues that normally define legal disputes."³⁰ According to Riskin, these mediators tend to assist the parties in understanding and fulfilling the interests underlying their asserted positions.³¹

With respect to the second continuum, Riskin states, "The evaluative mediator assumes that the participants want and need the mediator to provide some direction as to the appropriate grounds for settlement based on law, industry practice or technology."³² The facilitative mediator on the other hand, "assumes that parties are intelligent, able to work with their counterparts, and capable of understanding their situations better than either their lawyers or the mediator."³³ As such, he explains, "the facilitative mediator assumes that his principle mission is to enhance and clarify communications between the parties in order to help them decide what to do."³⁴

In 2003, in response to considerable criticism of the grid as well as various advancements in the field of mediation, Riskin sought to revisit and revise his original model in order to foster a "more refined understanding and dialogue about mediation."³⁵ What resulted were two refined grid

²⁸ Leonard L Riskin, "Decision-Making in Mediation: The New Old Grid and the New New Grid System" (2003), 79:1 Notre Dame L Rev 1 at 3 [Riskin, "Decision-Making in Mediation"].

²⁹ Riskin, "Mediator Orientations, Strategies and Techniques", *supra* note 27.

³⁰ *Ibid* at 1.

³¹ *Ibid.*

³² *Ibid.*

³³ *Ibid* at 111.

³⁴ *Ibid* at 1.

³⁵ Riskin, "Decision-Making in Mediation", *supra* note 28 at 8.

systems which each attempted to update the original model to better fit current understandings of mediation. Ultimately, Riskin creates a series of grids which focus not only on the qualities of the mediator but also on the qualities of the parties and the lawyers involved in the mediation. Specifically, he focuses on the “range of potential decisions in and about a mediation, and the extent to which various participants could affect these decisions.”³⁶

In addressing the rigidity and limitations of his initial grid model, Riskin recognized certain distinct models of mediation which were unaddressed or excluded by his original concept. For example, in his attempts at reform, he recognized transformative mediation as a distinct mediation orientation intended to “improve the parties themselves through ‘empowerment and recognition.’”³⁷ This new mediation orientation eventually joined the evaluative and facilitative mediation orientations as one of “the big three” mediation models which are universally recognized in the dispute resolution world.³⁸

Riskin’s work is typically the starting point in any scholarly debate on mediator approach. Despite the varying degrees of support for and opposition to his work, it has “resonated within the community of mediation scholars and practitioners, suffusing discussions about what constitutes best practices in the field, scholarship, and law school texts.”³⁹ Some scholars, such as Folberg, Milne, and Salem, argue that debate over approaches may benefit the mediation community by helping to “achieve greater clarity regarding the variety of dispute resolution processes and the boundaries that distinguish them.”⁴⁰ However, other scholars maintain that the sort of labeling associated with this “model debate” can be a counterproductive effort which only limits our thinking about mediation.⁴¹

³⁶ *Ibid* at 34.

³⁷ *Ibid* at 23.

³⁸ Rachael Field, “Proposing a System of Contextual Ethics for Mediation for a Range of Mediation Models and in Both Ad Hoc and Institutional Environments” (2017) 10:2 *Contemp Asia Arb J* 293 at 294.

³⁹ Robert Rubinson, “Of Grids and Gatekeepers: The Socioeconomics of Mediation” (2016) 17:3 *Cardozo J Conflict Resol* 873 at 874.

⁴⁰ Folberg, Milne, & Salem, *supra* note 6 at 14.

⁴¹ Michael L Moffitt, “Schmediation and the Dimensions of Definition” (2005) 10 *Harv Negot L Rev* 69 at 72.

Accordingly, while it is useful to understand the unique characteristics and goals of the different models of mediation, it is important to remember that there is no one-size fits all model of mediation. Often, in practice, mediators will utilize techniques from a multitude of different models and may not even be aware of the style in which they practice. It follows that while evaluative, facilitative, and transformative mediation are typically recognized as the major models of mediation, they by no means comprise an exhaustive list of mediator orientations. However, facilitative, evaluative, and transformative mediation orientations encompass the “big three” mediation styles, they each have unique objectives and qualities, and they have become fundamentally embedded in the mediation literature. For this reason, they are the primary models of mediation explored in this article.

1. Facilitative Mediation

Facilitative mediators draw on the disputants’ opinions and insights to “facilitate a conversation between the parties about the conflict, its effects, and possible resolutions.”⁴² Relying on the parties’ understandings of the conflict, facilitative mediators strive to guide the parties to craft their own ideal resolution while preserving their relationship. In this sense, facilitative mediators are like orchestrators, “guiding people through a communication process in which the parties’ voices, thoughts, feelings and ideas are the important factors.”⁴³ As American conflict resolution icon Bernard Mayer succinctly explains, the four hallmarks of the facilitative process are that facilitative mediation is: (1) process oriented; (2) client centered; (3) communication focused; and (4) interest based.⁴⁴ These hallmarks of facilitative mediation have led many scholars to believe that this approach is particularly suitable to address child-custody and access disputes.

In a report regarding Canadian justice system responses to family disputes, Noel Semple and Nicholas Bala explored which of the facilitative, evaluative, or transformative models of mediation best advanced children’s

⁴² Laura E Reimer et al, *Transformative Change: An Introduction to Peace and Conflict Studies* (Lanham, MD: Lexington Books, 2015) at 124.

⁴³ Bernard Mayer, “Facilitative Mediation” in Jay Folberg, Ann L Milne, & Peter Salem, eds, *Divorce and Family Mediation: Models, Techniques and Applications* (New York, NY: The Guildford Press, 2004) 29 at 30.

⁴⁴ *Ibid* at 32–33.

interests and protected adult rights in a cost-effective manner.⁴⁵ In doing so, they highlighted the value of facilitative mediation in family disputes involving child custody and access. Ultimately, they concluded that facilitative mediation is the most suitable approach to address child-custody and access disputes, owing to:

1. the prospective and relationship-focused nature of the inquiry;
2. the likelihood that the parties will have an on-going interaction, ideally in a “parenting partnership;” and
3. the fact that the quality of this inter-parental relationship is relevant to the child’s interest.⁴⁶

Semple and Bala argue that where, as in most child-custody and access disputes, the parties will have an ongoing parenting relationship with each other beyond mediation, “direct communication between the parties . . . may be more important than the substantive outcome.”⁴⁷ In such cases, facilitative mediation’s collaborative, communicative, and interest-based orientation is better suited to the parties’ needs than the evaluative orientation.

Similarly, Scott Hughes has noted that facilitative mediation is better suited for disputants with ongoing relationships such as divorced couples with continuing child-custody and visitation dealings.⁴⁸ He notes that where such an ongoing relationship exists, facilitative mediation’s ability to assist the parties in repairing their relationship is crucial, as such reparation is often necessary to solidify any resolution of the custody and access issues.⁴⁹ Moreover, Hughes suggests facilitative mediation over evaluative mediation for disputes in which bargaining may be integrative as opposed to purely distributive, or where “opportunities exist for the parties to expand the pie instead of focusing merely on how much of the pie each will receive.”⁵⁰ In

⁴⁵ Noel Semple & Nicholas Bala, “Reforming Ontario’s Family Justice System: An Evidence-Based Approach” (2013) Association of Family and Conciliation Courts, Ontario Chapter at 29.

⁴⁶ *Ibid* at 29–30.

⁴⁷ *Ibid* at 30.

⁴⁸ Scott H Hughes, “Facilitative Mediation or Evaluative Mediation: May Your Choice Be a Wise One” (1998) 59 *Ala Lawyer* 246 at 249.

⁴⁹ *Ibid* at 248.

⁵⁰ *Ibid*.

other words, Hughes promotes facilitative mediation over evaluative mediation where the dispute is not merely focused on how much money each party will receive.⁵¹

Jeffrey Stempel also takes the position that “family law matters, particularly issues of child custody and visitation, appear to more closely track the facilitative model.”⁵² Similarly, Carolynn Clark Camp asserts that facilitative techniques should be favored over evaluative techniques for family cases, especially when they involve children.⁵³ She argues that such family disputes benefit more from facilitative than evaluative mediation due to the facilitative framework’s promotion of direct communication, encouragement of multiple, custom, party-made options, as well as its ability to allow parties to choose among those options without undue pressure.⁵⁴ In addition, Clark Camp notes that facilitative mediation tends to place less pressure on the parties to settle their issues quickly. This, she argues, is particularly important when dealing with emotionally-laden custody and parent-time issues. Extended discussions on these subjects can be emotionally and physically draining for parties, making it difficult for parents to make quick yet reasoned decisions.⁵⁵ A facilitative approach, Clark Camp asserts, “allows the parties the time needed to research information, think over potential options, and ultimately helps the parties come to wiser agreements.”⁵⁶ When parents are afforded this time, she states, “they will generally be more comfortable with the agreements they come to and more likely to abide by them in the future.”⁵⁷

The facilitative mediation model, however, has not escaped criticism. Notably, evaluative mediation proponents have argued that parties to a strictly facilitative mediation may be disadvantaged by the mediator’s failure

⁵¹ *Ibid.*

⁵² Jeffrey W Stempel, “The Inevitability of the Eclectic: Liberating ADR from Ideology” (2000) 2000:2 J Disp Resol 247 at 250.

⁵³ Carolynn Clark Camp, “Mediating the Indissoluble Family: Mediator Style in Domestic Relations Cases” (2012) 26:2 BYUJ Pub L 187 at 202.

⁵⁴ *Ibid* at 203.

⁵⁵ *Ibid* at 205.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

to provide parties with necessary and relevant information.⁵⁸ For instance, parties dealing with more complex family issues such as “major medical, educational and religious decisions” may require more from their mediator than what a facilitative mediator is willing or able to provide.⁵⁹ These parties may benefit from “more directive and intrusive service interventions” like evaluative mediation, wherein mediators can draw directly on their expertise to help the parties parse through more difficult issues and make informed decisions.⁶⁰

Similarly, given that facilitative mediators do not provide parties with the type of information they might be provided in evaluative mediation, evaluative mediation proponents such as Jeffrey Stempel have argued that “a facilitative approach can, in fact, serve to disempower people and exacerbate the power differential between parties.”⁶¹ This can have a negative effect on the negotiation capacity of parties in a mediation. Stempel argues that by refusing to provide disputants with “at least a rudimentary knowledge of their options under the legal regime outside of mediation,” facilitative mediators might inadvertently “permit one party to a dispute to bully the other [less powerful party] into submission or deceive them into a resolution that is clearly substandard under the default rules of the applicable law.”⁶² Moreover, Stempel has raised concerns regarding mediation’s inherent coercive nature. He argues that because mediators ordinarily exert pressure on disputants to resolve their matter, less powerful disputants who are of “less sophistication or will” may be easily led into disadvantageous settlements when facilitative mediators refrain from providing any type of evaluative information to them.⁶³ Accordingly, where there is a significant power imbalance between parties, it is argued that evaluative as opposed to facilitative mediation techniques may be required to level out the playing field.

⁵⁸ Mayer, *supra* note 43 at 49.

⁵⁹ Peter Salem, Debra Kulak & Robin M Deutsch, “Triaging Family Court Services: The Connecticut Judicial Branch’s Family Civil Intake Screen” (2007) 27:4 Pace L Rev 741 at 760.

⁶⁰ *Ibid.*

⁶¹ Mayer, *supra* note 43 at 49.

⁶² Stempel, *supra* note 52 at 255.

⁶³ *Ibid.*

2. *Evaluative Mediation*

Unlike the facilitative approach, evaluative mediation directly addresses the substance and merits of a given case with the primary goal of resolving the matter.⁶⁴ It is an active and decisive mediation approach which involves assessments of the parties' case, predictions of the outcome of a dispute at trial if settlement is not reached in mediation, and development and proposals of options to ultimately resolve the case.⁶⁵ For these and other reasons, scholars have found that evaluative mediation is particularly effective when addressing family disputes relating to child and spousal support and other monetary or property-related issues.⁶⁶

Noel Semple and Nicholas Bala comment that evaluative mediation is a "very efficient way to bring about a just resolution" in separation cases which do not involve issues relating to custody and access, but which involve legal entitlements to support and property division.⁶⁷ Semple and Bala note that property division and support can be more readily calculated than issues of child custody and access.⁶⁸ They assert that issues regarding property division and support might not require the type of creative problem-solving that is fostered in facilitative mediation.⁶⁹ They explain, "Legal entitlements to support and property division can in many cases be readily calculated by an expert mediator. Telling parties what payments a judge would probably require may allow them to quickly settle on those or similar terms and then move on with their lives."⁷⁰

Similarly, Scott Hughes asserts that "evaluative mediation may provide the best fit if money is the sole issue or the bargaining will be purely distributive (dividing the pie) as opposed to integrative (expanding the size of the pie)."⁷¹ He explains that, "[since] evaluative mediation calls upon the

⁶⁴ L Randolph Lowry, "Evaluative Mediation" in Jay Folberg, Ann L Milne & Peter Salem, eds, *Divorce and Family Mediation: Models, Techniques and Applications* (New York, NY: The Guildford Press, 2004) 72 at 73.

⁶⁵ *Ibid.*

⁶⁶ Semple & Bala, *supra* note 45; Hughes, *supra* note 48 at 248.

⁶⁷ Semple & Bala, *ibid* at 29.

⁶⁸ *Ibid.*

⁶⁹ *Ibid* at 31.

⁷⁰ *Ibid* at 29.

⁷¹ Hughes, *supra* note 48 at 248.

mediator to render opinions on the value of cases and to possibly predict the outcome of a dispute at trial, the natural medium of such discussions is money.⁷² Likewise, while Carolynn Clark Camp generally discourages against the use of evaluation in family disputes, she recognizes the effectiveness of evaluative techniques in certain family disputes involving monetary settlements, division of property and debts.⁷³

Interestingly, Paul E. Hopkins views evaluative mediators as advocates for families, and particularly children, experiencing separation and divorce.⁷⁴ Hopkins argues that “the stress of the dissolution process hinders parental objectivity,” rendering many parents “unable to separate decisions which may promote the children’s best interests from decisions which address the parents’ own personal needs of revenge, loneliness, self-vindication, or jealousy.”⁷⁵ Hopkins contends that the evaluative mediator’s recommendations and guidance are sometimes necessary to move parties “beyond their personal needs to a more objective appraisal,” therefore enabling them to make more rational and appropriate arrangements regarding children.⁷⁶

3. *Transformative Mediation*

In the early 1990s, Robert A. Baruch Bush and Joseph P. Folger introduced the concept of transformative mediation to the dispute resolution world.⁷⁷ Transformative mediation, they argue, has the potential to support positive human interaction, to promote individual moral development, and to transform relationships.⁷⁸ Unlike evaluative mediation, which aims to develop and produce settlements, and unlike

⁷² *Ibid.*

⁷³ Clark Camp, *supra* note 53.

⁷⁴ Paul E Hopkins, “Evaluative Mediation Upholding the Child’s Best Interests” (1982) 20:2 Conciliation Courts Rev 63 at 66.

⁷⁵ *Ibid* at 65.

⁷⁶ *Ibid.*

⁷⁷ Joseph P Folger & Robert A Baruch Bush, “Transformative Mediation and Third-Party Intervention: Ten Hallmarks of a Transformative Approach to Practice” (1996) 13:4 Mediation Q 263 at 264 [Folger & Bush, “Transformative Mediation”].

⁷⁸ Robert A Baruch Bush & Joseph P Folger, *The Promise of Mediation: the Transformative Approach to Conflict* (San Francisco: Jossey-Bass, 2005) at 1 [Bush & Folger, *Promise of Mediation*].

facilitative mediation, which aims to assist parties themselves in finding options for resolution, transformative mediation aims to enable conflicting parties to “develop a greater degree of both self-determination and responsiveness to others, while they explore solutions to specific issues.”⁷⁹ In order for these transformative effects to come to fruition, the model holds that mediators must “concentrate on the opportunities that arise during the process for party empowerment and interparty recognition.”⁸⁰ Bush and Folger define empowerment as “the restoration to individuals of a sense of their value and strength and their own capacity to make decisions and handle life’s problems.”⁸¹ Recognition refers to “the evocation in individuals of acknowledgment, understanding, or empathy for the situation and the views of the other.”⁸²

In order to promote empowerment and recognition, transformative mediators make it clear from the outset that they are not there to make decisions for the parties or to force them to come to an agreement.⁸³ Rather, they explain that formal agreement or settlement is merely one possible outcome of the process and that “the session can be successful if new insights are reached, if choices are clarified, or if new understandings of each other’s views are achieved.”⁸⁴ In accordance with this notion, transformative mediators consciously refuse to be judgmental about the parties’ views and decisions, and demonstrate an optimistic view of the parties’ competence and motives.⁸⁵ They also allow parties to express emotions such as anger, hurt or frustration as well as feelings of uncertainty, which, “when unpacked and understood, can reveal plentiful information about the parties’ views of their situation and each other.”⁸⁶

Ultimately, unlike the facilitative and evaluative approaches to mediation, the mediation literature seems to lack any solid discussion regarding the suitability of transformative mediation approaches to varying

⁷⁹ Folger & Bush, “Transformative Mediation”, *supra* note 77 at 264.

⁸⁰ *Ibid.*

⁸¹ Bush & Folger, *Promise of Mediation*, *supra* note 78 at 22.

⁸² *Ibid.*

⁸³ Folger & Bush, “Transformative Mediation”, *supra* note 77 at 266.

⁸⁴ *Ibid.*

⁸⁵ *Ibid* at 268.

⁸⁶ *Ibid* at 271–72.

types of family-law issues like custody, finances, and property. In their report on the Canadian justice system responses to family disputes, discussed above, Semple and Bala explain that while they set out to explore all of the big three mediation models, they ultimately limited their examination to just facilitative and evaluative mediation approaches, given the lack of evidence regarding transformative mediation. They explained that this lack of evidence may have been due to the state's unwillingness to accept the higher costs and lower commitment to settlement seeking associated with the transformative model.⁸⁷ Perhaps this explains the overall lack of discussion on this subject in the literature.

III. METHODOLOGY

It is important to note that while the Government of Manitoba is still in the early stages of its Family Law Modernization initiative under which the FDRA and pilot project fall, it has already made significant progress in its reform efforts (e.g., increased access to arbitration for family law disputes, changes to the Maintenance Enforcement Program, and a new Child Support Service and tools for self-represented litigants, to name a few). Accordingly, due to the ongoing nature of the implementation of this legislation, it is possible that questions or concerns raised in this research will be addressed as the initiative progresses. However, as the FDRA currently stands, there are still many questions and concerns with respect to the general scheme of the pilot project, and particularly, how resolution officers are to effectively choose processes to which to refer parties. In this section, I will outline my methodology which attempts to establish a framework to answer and respond to these matters.

My methodology for this research project focuses on qualitative interviews. I have interviewed family mediators practising in both privately-owned and government-run agencies in Manitoba, to gain insight into our province's family-mediation landscape. It is particularly important to speak to family mediators because family mediation is the most obvious and favoured dispute resolution process likely to be utilized in the FDRA scheme. After all, a substantial number of Manitoba family court cases were already being resolved through mediation at what was known as Family Conciliation Services, the former social services arm of the Family Division

⁸⁷ Semple & Bala, *supra* note 45 at 29.

of the Court of Queen's Bench and the Provincial Court of Manitoba. This resource has since been absorbed by the new Family Resolution Service. This agency, which oversaw family dispute resolution services across the province, dealt with over 1,200 family cases through its mediation and comprehensive co-mediation programs between the years of 2016 and 2019, making mediation the most widely used service of all of the services offered by Family Conciliation within that time period.

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

It is also important to speak to family mediators because while they might be one of the professional groups most significantly impacted by the FDRA, it is unclear how much influence this group had in the creation of the FDRA. Lawyers, on the other hand, seem to have been more involved in the process. For instance, the FLRC, which was tasked with providing advice and recommendations on an alternative family law model, and which ultimately crafted the general FDRA scheme, consists of four lawyers, five judges, one Manitoba Justice spokesperson, and four public representatives, one of whom is a lay bencher with the Law Society of Manitoba. Despite the fact that the committee was tasked with creating a new family model based in ADR which would be an alternative to the courts, ten of the fourteen committee members are directly involved in the legal court system, while not one is a professional mediator or member of the alternative dispute resolution community. Moreover, while a small handful of mediation agencies were included in the FLRC's report as stakeholders and contributors, and are said to have been contacted by the committee to provide their advice, it is unclear how much feedback these contributors were invited to produce to the committee, how much of their feedback was incorporated into the ultimate advice and recommendations of the FLRC,

or if it was incorporated or considered at all. As such, family mediators are the focus of my research.

Because the family mediation community in Manitoba is relatively small, and because I wanted to hear from as wide a sample of this community as I could, I invited all family mediators currently practising family mediation in Manitoba to participate in my research. To determine this list, I consulted both the online membership directory and mediator roster on the Family Mediation Manitoba website, and the “ADR Connect” function on the ADR Institute of Manitoba (“ADRIM”) website. This “ADR Connect” function enables people to search for mediators by last name, province, services provided, areas of expertise, cities serviced, mediator designations, and languages in which services are provided. Then, to ensure that I was not missing anyone, I also spoke directly with the Family Mediation Manitoba Executive member on the Board of ADRIM, who provided me with a current list of family mediators practising in the province.⁸⁸ If interviewees provided more names during the interview process, those mediators were added to my sample. Together, these inquiries yielded a list of 27 family mediators who were each invited to participate in my research. In accordance with my research protocol, which was approved by the University of Manitoba’s Joint Faculty Research Ethics Board (“REB”) in January of 2020, potential participants were advised that personal identifiers such as their names would not be included in the research when discussing interview results, unless they explicitly consented to being directly identified by their names. Ultimately, only two participants consented to the use of their names in the research.

The qualitative, face-to-face interviews that I conducted were based on a semi-structured interview guide which included a uniform list of open-ended questions. Interviews were audio-recorded and transcribed so that I could rely on direct quotations from interviewees as a main source of raw data. I examined the transcripts and conducted a thematic analysis reflective of Barney G. Glaser and Anselm L. Strauss’s Grounded Theory methodology of qualitative analysis.⁸⁹ Specifically, I analyzed whether there

⁸⁸ Telephone Conversation with Lisa Huberdeau (20 December 2019) Winnipeg, Manitoba.

⁸⁹ This methodology, which is defined by its “exclusive endeavour to discover an underlying theory arising from the systematic analysis of data,” is a widely accepted inductive research method. Rather than verifying theories through qualitative research, this methodology aims to generate the theory itself by grounding it in empirical

were certain trends or themes amongst the interviews or interviewees which could help to inform my analysis. This methodology enabled me to generate theory and guidelines grounded in my interview data and research. Then, from my analysis, I created triaging and training guidelines for resolution officers.

Interestingly, 24 of the 27 mediators that I invited to participate in my research were women.⁹⁰ Seven of the 27 family mediators agreed to participate. Unfortunately, one of these seven mediators was unable to participate in the research due to a family tragedy, so I conducted six interviews. All six of the family mediators whom I interviewed were women. While my ultimate participant pool was relatively small, Grounded Theory methodological approaches to qualitative research emphasize the depth and quality of the insights gathered from empirical research as opposed to the quantity. As such, it has been recognized that findings gathered from interviews with members of such a small population may still be generalized and used for thematic analysis,⁹¹ especially when that population is homogenous and comprised of experienced participants in the research topic.⁹² In fact, some scholars argue that in “exploratory, concept-generating

research. For discussion on the Grounded Theory methodology, see Méabh Kenny & Robert Fourie, “Tracing the History of Grounded Theory Methodology: From Formation to Fragmentation” (2014) 19:52 *Qualitative Report* 1 at 3; and Sydney Freeman Jr, “Utilizing Multi-Grounded Theory in a Dissertation: Reflections and Insights” (2018) 23:5 *Qualitative Report* 1160 at 1161.

⁹⁰ These numbers are consistent with studies which demonstrate the prevalence of female mediators in the field of family mediation. For example, see Alice F Stuhlmacher & Jean Poitras, “Gender and Job Role Congruence: A Field Study of Trust in Labor Mediators” (2010) 63 *Sex Roles* 489. In that study, Stuhlmacher and Poitras conclude at 497 that “no research or review has examined how gender influences case assignment to mediators.” However, they note at 497 that “It is possible that perceived gender and job role congruity may result in male mediators more commonly assigned to business or financial mediations while female mediators are more likely assigned to family or interpersonal mediations.” Similarly, Gina Viola Brown & Andrea Kupfer Schneider, “Gender Differences in Dispute Resolution Practice” (2014) 20:3 *Dispute Resolution Magazine* 36, found that women predominantly served as mediators in cases dealing with elder law and family law, while “corporate, construction, insurance, and intellectual property disputes are significantly male-dominated” (*ibid* at 38).

⁹¹ Molly Treadway Johnson, *Studying the Role of Gender in the Federal Courts: A Research Guide* (Washington, DC: Federal Judicial Center, 1995) at 69-70.

⁹² Khaldoun M Aldiabat & Carole-Lynne Le Navenec, “Data Saturation: The Mysterious Step In Grounded Theory Method” (2018) 23:1 *Qualitative Report* 245 at 254.

studies” involving in-depth interviews, “it is not only reasonable to have a relatively small number of respondents, but may even be positively advantageous.”⁹³

Mira Crouch and Heather McKenzie explain that respondents in qualitative interview-based research represent “meaningful experience-structure links” as opposed to individual persons who are “bearers of certain designated properties (or ‘variables’).”⁹⁴ As participants are viewed as “variants of a particular social setting . . . and of the experiences arising in it” rather than “systematically selected instances of specific categories of attitudes and responses,” Crouch and McKenzie argue that even just one case can lead to new insights.⁹⁵ While Crouch and McKenzie recognize that some variety in interview sources facilitates and enhances depth of meaning in thematic analysis, they argue that to achieve depth of meaning, “it is much more important for the research to be intensive, and thus persuasive at the conceptual level, rather than aim to be extensive with intent to be convincing, at least in part, through enumeration.”⁹⁶ Accordingly, they contend that small-sample research is capable of producing “concepts and propositions that have construct validity because they make sense as pivotal points in a matrix where interview yield intersects with pre-existing theoretical knowledge.”⁹⁷ It is my hope that I can achieve this construct validity with my small-sample, interview-based methodology.

IV. ANALYSIS

Every family has unique characteristics, values, beliefs, traditions, and experiences which inform the ways that it functions as a unit.⁹⁸ These shared characteristics can also influence the ways that families react and behave when the family unit is breaking down. Given these distinct characteristics, families may be impacted by the emotional, financial, physical, and social

⁹³ Mira Crouch & Heather Mckenzie, “The Logic of Small Samples in Interview - Based Qualitative Research” (2006) 45:4 *Social Science Information* 483 at 491.

⁹⁴ *Ibid* at 493.

⁹⁵ *Ibid*.

⁹⁶ *Ibid* at 494.

⁹⁷ *Ibid* at 493-94.

⁹⁸ Government of Manitoba, “Home” (last visited 10 May 2020), online: *Family Law Manitoba* <www.gov.mb.ca/familylaw/> [perma.cc/7CBS-PEYR].

hardships associated with separation and divorce in different ways. In turn, families will require different types of assistance and services to navigate a family breakdown so that their interests, needs, and goals are met.⁹⁹ Accordingly, “it would be virtually impossible to have a *pro forma* set of rules which will be applied to each and every family with an ideal outcome, because we’re just not a homogenous group.”¹⁰⁰

Manitoba’s current court-based family law system “does not always consider the social, relational and financial needs of the people who are most affected.”¹⁰¹ Rather, it is a rigid system based in law, which strives to treat parties in a uniform manner. However, through the implementation of the FLMA, and particularly, the FDRA, Manitoba is aiming to design a new family law system which is dependent on alternative dispute resolution mechanisms such as mediation, as opposed to the courts.¹⁰² In doing so, Manitoba is striving to create a system which is capable of tailoring the process to accommodate the different values, needs and goals of families.¹⁰³

To achieve this reformation, however, it is going to take more than the proclamation of legislation and a vague outline of a pilot project. It requires a fully realized dispute resolution framework supported by informative regulations and policies, which has been thoughtfully designed to achieve improvement. Such a framework must not only be informed by feedback from government entities, legal professionals, and the public, but also by

⁹⁹ Government of Manitoba, “About Family Law Modernization” (last visited 10 May 2020), online: *Family Law Manitoba* <www.gov.mb.ca/familylaw/about.html> [perma.cc/7CBS-PEYR] [Government of Manitoba, “About Family Law Modernization”].

¹⁰⁰ Interview with Mediator 4 (24 March 2020) in person, Winnipeg, Manitoba [Mediator 4].

¹⁰¹ Government of Manitoba, “About Family Law Modernization”, *supra* note 99; For example, according to the 2013 Report of the Action Committee on Access to Justice in Civil and Family Matters, most individuals coming into contact with the family law court system “earn too much money to qualify for legal aid, but too little to afford the legal services necessary to meaningfully address any significant legal problem.” In Manitoba, specifically, Legal Aid funding and coverage is available only to individuals and families of 4 with, respectively, “gross annual salaries of \$14,000 and \$27,000 and net annual salaries of \$11,800 and \$22,800.” This leaves many families without access to legal services for their family law problems (*A Roadmap for Change, supra* note 3 at 4.)

¹⁰² Government of Manitoba, “About Family Law Modernization”, *supra* note 99.

¹⁰³ *Ibid.*

scholarly research on ADR and on the input of those individuals most knowledgeable and experienced in the ADR field. More specifically, given the likelihood that mediation will be one of the primary dispute resolution processes used to resolve family disputes under the FDRA, it is particularly important that this new framework be informed by the input of Manitoba family mediators. Such a framework, which will hinge largely on the triaging decisions made by resolution officers early on in the pilot project, must take into consideration the mediation options that are available to Manitoba families, the distinct characteristics of families and family conflict, and how those characteristics could dictate the particular mediation option that is most appropriate and effective in a given case. In other words, this framework must be based on a solid understanding of the types of mediation services which will best meet the individual needs of parties coming under the purview of the FDRA.

A. Family Mediation in Manitoba

Falling under the umbrella term ADR, family mediation has long been considered a mere alternative to the court-based family law system. However, separation and divorce mediation is becoming more commonly recognized as an “appropriate” form of dispute resolution with which to address family law disputes.¹⁰⁴ In Manitoba, separation and divorce mediation occurs in several different settings, including court-connected government agencies, private mediation practices, and in connection with collaborative family law approaches. All of these family mediation frameworks assist families through the separation and divorce processes in productive, civil, and appropriate manners. They do so, however, in various ways, given their unique professional configurations, mission statements, policies, and approaches to mediation. Having had the opportunity to interview family mediators practicing within different frameworks in Manitoba, I was able to gain several unique perspectives on mediation, informed by various educational backgrounds, employment histories, and professional training.

Beginning with one of the two mediators who provided her consent to be named in my research, I was fortunate to interview Fay Lynn Katz (“Fay

¹⁰⁴ Carollynn J Lloyd, “Appropriate’ Dispute Resolution” (30 October 2017), online (blog): *Lerners Lawyers* <www.lerners.ca/lernx/appropriate-dispute-resolution> [perma.cc/EWJ3-7ACK].

Lynn”), who is a Crown attorney and mediator employed in the family law section of the civil legal services branch of Manitoba Justice.¹⁰⁵ Having completed a Bachelor of Laws degree, a family mediation course through the University of Toronto’s School of Continuing Studies, and numerous continuing legal education courses pertaining to family mediation and related topics, Fay Lynn has worked for Manitoba Justice for just under 20 years and works primarily as a lawyer-mediator in the comprehensive co-mediation program through what was formerly known as Family Conciliation Services.¹⁰⁶ At the time that this research was undertaken, Sandy Koop Harder (“Sandy”), the other interviewee who provided her consent to be named in my research, was a mediator and business manager at Facilitated Solutions, a private mediation firm in Winnipeg which offered various types of mediation services, including family mediation. Today, Sandy remains a partner with Facilitated Solutions, but no longer practices or functions in a managerial role. Facilitated Solutions no longer offers family mediation services at this time. Sandy has degrees in both theology and conflict resolution, a Master’s degree in business, and experience in victim-offender mediation, interfaith conflict mediation, and of course, family mediation.¹⁰⁷ Over the years, Sandy has completed mediation training through organizations such as Mediation Services in Manitoba, and she has attended numerous other conferences and training events covering topics such as domestic violence in mediation and mediating high-conflict couples. Additionally, she herself has prepared materials to be used in such mediation trainings.¹⁰⁸

Other interviewees have earned degrees in areas such as social work, conflict resolution, recreational studies, family dynamics, Indigenous studies, psychology, and law, and are also experienced in areas ranging from collaborative family law, to child-protection work, and to personal-injury mediation.¹⁰⁹ Together, they have undertaken training in areas such as

¹⁰⁵ Interview with Fay Lynn Katz (15 February 2020) in person, Winnipeg, Manitoba [Fay Lynn Katz].

¹⁰⁶ *Ibid.*

¹⁰⁷ Interview with Sandy Koop-Harder (27 January 2020) in person, Winnipeg, Manitoba [Sandy Koop Harder].

¹⁰⁸ *Ibid.*

¹⁰⁹ Interviews with Mediators 1-4 (20 January 2020 - 24 March 2020) in person, Winnipeg, Manitoba.

conflict resolution, basic mediation skills, co-mediation, dealing with anger, dealing with change, child development, parent-teen mediation, parental and child attachment, mediating high-conflict individuals, mediating high-conflict financial situations, mediating cases involving domestic violence, preparing parenting plans, drafting memoranda of agreement, and more.¹¹⁰

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

B. Conceptualizing Mediation Approaches

In order to ascertain the most effective and appropriate mediation approaches to use in addressing the various types of family-law cases coming under the new FDRA framework, I sought in my interviews to learn the approaches and techniques that are currently being used by Manitoba's family mediators. Facilitative, evaluative, and transformative mediation have become embedded in the mediation literature as the "big three" approaches and represent distinct orientations on a continuum of mediator styles. Accordingly, I sought to learn which of these approaches, or which offshoot or combination of them, were being utilized by family mediators in Manitoba today. To do this, I first needed to learn how the mediators understood their own approaches to mediation, and how they "conceptualize their role and give meaning to their work as mediators."¹¹¹

In 2002, Cheryl Picard conducted research into this area, asking "What Mediators Mean When They Talk About their Work."¹¹² She found that while quite often mediators describe their work in similar terms, they had disparate understandings of commonly-used mediation-related terms such as "facilitation, transformative, settlement, and humanistic."¹¹³ Similarly, I

¹¹⁰ *Ibid.*

¹¹¹ Cheryl Picard, "Common Language, Different Meaning: What Mediators Mean When They Talk About Their Work" (2002) 18:3 *Negotiation J* 251 at 252.

¹¹² *Ibid* at 251.

¹¹³ *Ibid.*

discovered that while Manitoba mediators were able to easily describe their roles in their mediation practices, and the tactics and strategies that they ordinarily use, there was “great diversity among mediators’ understanding of commonly-used terms like” facilitative mediation, evaluative mediation, and transformative mediation.¹¹⁴ Like Picard, I noticed that “the majority of mediators who participated in this study conceptualize their primary role in the mediation process as that of facilitation.”¹¹⁵ However, I found that their understandings of facilitative mediation were quite varied, and that in some cases, were more reflective of the other “big two” mediation approaches.¹¹⁶

For instance, consistent with typical interpretations of facilitative mediation, some participants described facilitation as a “party-driven,” “hands-off” mediation process in which the mediator monitors the process and facilitates the conversation for the clients in order for them to make their own decisions.¹¹⁷ However, others described facilitative mediation as a “settlement-focused,” “solution-oriented,” and “practical” process wherein the mediator coaches the parties and helps them to resolve issues.¹¹⁸ These descriptions are more consistent with common explanations of evaluative mediation. Some also believed that facilitative mediators aim to help parties understand the impact of their decisions on others,¹¹⁹ which is more consistent with the role of a transformative mediator, while some ultimately boiled facilitative mediation down to a midway point on a continuum between evaluative and transformative mediation.¹²⁰

Descriptions of evaluative and transformative mediation, when they were offered by the mediators, tended to be more consistent with one another, and more reflective of the commonly held understandings of these mediation approaches. While Fay Lynn and Mediators 1, 3 and 4 did not

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid* at 253.

¹¹⁶ *Ibid.*

¹¹⁷ Interview with Mediator 1 (20 January 2020) in person, Winnipeg, Manitoba [Mediator 1]; Sandy Koop Harder, *supra* note 107; and Interview with Mediator 2 (10 February 2020) in person, Winnipeg, Manitoba [Mediator 2].

¹¹⁸ Interview with Mediator 3 (14 February 2020) in person, Winnipeg, Manitoba [Mediator 3]; Fay Lynn Katz, *supra* note 105; and Mediator 4, *supra* note 100.

¹¹⁹ Mediator 3, *ibid.*

¹²⁰ Sandy Koop Harder, *supra* note 107.

provide definitions of the term “evaluative mediation,” the remaining mediators consistently described it as a “structured,” “directive,” “settlement-focused,” and outcome-oriented process, which focused on the potential outcomes for the parties outside of the mediation process.¹²¹ Interestingly, and perhaps slightly worrisome, Mediator 3 had never heard of the term before. With respect to transformative mediation, the mediators seemed to have a more consistent understanding of the approach. In describing the transformative approach, the mediators used terms like “relationship-focused,” and they explained that the process is intended to transform relationships and patterns of communication, to build deeper connections between the parties, and to build greater understanding in the parties of one another.¹²² The mediators also noted that transformative mediators tend to be less intrusive in the process, that they tend to let tensions between the parties play out, and that the parties are given significant power in terms of content direction and process.¹²³ As Sandy put it, “it’s their process, it’s their conflict, it’s their outcome.”¹²⁴

Despite the varied conceptions among the mediators of facilitative mediation, evaluative mediation, and transformative mediation, all but one of them, who categorized her practice as transformative mediation, self-identified as facilitative mediators. In describing their personal approaches to mediation, however, including their usual strategies, tactics, and levels of intervention, it became apparent that on paper, several of the mediators could be more accurately labeled as evaluative mediators or transformative mediators.

To illustrate, while both Fay Lynn and Mediator 4 self-identified as facilitative mediators, their descriptions of their mediation practices were highly reflective of the evaluative approach to mediation, which typically involves assessments of the parties’ case, predictions of the outcome of a dispute at trial if settlement is not reached in mediation, and development and proposals of options to ultimately resolve the case.¹²⁵ Referring to her

¹²¹ Sandy Koop Harder, *ibid*; Mediator 2, *supra* note 117.

¹²² Sandy Koop Harder, *ibid*; Mediator 2, *ibid*; Mediator 3, *supra* note 118; and Mediator 4, *supra* note 100.

¹²³ Mediator 3, *ibid*; Mediator 4, *ibid*; and Sandy Koop Harder, *ibid*.

¹²⁴ Sandy Koop Harder, *ibid*.

¹²⁵ Lowry, *supra* note 64.

mediation approach as “practical” and “settlement-oriented,” Fay Lynn explained that her work typically involves providing parties with relevant legal information pertaining to matters like family property accountings and child and spousal support, discussing different options available to the parties based on that legal information, and explaining the legal implications that those different options might have on the parties.¹²⁶ These are hallmarks of an evaluative mediation approach. Consistent with evaluative mediation’s main goal of helping the parties to resolve the dispute that brought them to mediation,¹²⁷ Fay Lynn explained that her actions as a mediator are taken with the primary goal of helping parties reach resolution quickly and in a cost-effective manner.¹²⁸

Likewise, Mediator 4 described her practice as “guided and more directive mediation.”¹²⁹ Noting that a large focus of her practice is on “education,” she explained that she provides parties “a very robust package of resources and checklists in advance, so that they come prepared and understand the work that [they are] going to be doing.”¹³⁰ Once in the mediation session, she then “[explains] the law in this province as it applies to them, and what options they may have.”¹³¹ Like evaluative mediator James H. Stark, who argues that meaningful self-determination in mediation is not possible without adequate legal information,¹³² Mediator 4 is of the opinion that the more informed people are, the better the mediation process will be.

In terms of transformative approaches, while Mediator 1 self-identified as a facilitative mediator, her description of her mediation practice contained several classically transformative elements. Consistent with the principle of transformative mediation that transformative mediators ought to demonstrate an optimistic view of the parties’ competence and

¹²⁶ Fay Lynn Katz, *supra* note 105.

¹²⁷ Michael Williams, “Can’t I get no satisfaction? Thoughts on The Promise of Mediation” (1997) 15:2 *Mediation Q* 143.

¹²⁸ Fay Lynn Katz, *supra* note 105.

¹²⁹ Mediator 4, *supra* note 100.

¹³⁰ *Ibid.*

¹³¹ *Ibid.*

¹³² James Stark, “The Ethics of Mediation Evaluation: Some Troublesome Questions and Tentative Proposals, from an Evaluative Lawyer Mediator” (1997) 38:2 *S Tex L Rev* 769 at 775–779.

motives,¹³³ Mediator 1 explained that her practice is based on a belief that “everyone is able to come to a solution on their own, in the right context, in the right framework, with the right support.”¹³⁴ In this sense, Mediator 1 has adopted the classic transformative belief that no matter how “disabled, weakened, defensive, or self-absorbed” a party may seem when they enter mediation, this is only a temporary state caused by the conflict between the parties, and “with assistance, but of their own volition – [the parties are capable of moving] from weakness to strength or from self-absorption to recognition of others.”¹³⁵ Moreover, the description of her goals as a mediator are more consistent with those of transformative, as opposed to facilitative mediation. She explained that some of her goals as a mediator are to help the parties “see the light” and become “transformed.”¹³⁶ By acting as a “navigator” in the mediation process, she strives to help the parties come to understand the impact of their actions on each other, learn to make better choices in the future, and implement changes to improve their situation going forward.¹³⁷ In other words, she aims to build empowerment and interparty recognition.¹³⁸

Accordingly, it is clear that with respect to the “big three” mediation approaches, “Common language does not imply common meaning.”¹³⁹ Therefore, the sort of labeling and classification associated with the mediation “model debate” may be less capable of clarifying the processes and boundaries that distinguish the “big three” mediation approaches than scholars and practitioners might have thought.¹⁴⁰ This desire to categorize mediation approaches into narrow boxes may actually set up an inappropriate, dichotomous conceptualization of mediation, where mediation could perhaps be more clearly and accurately understood in pluralistic terms.¹⁴¹

¹³³ Folger & Bush, “Transformative Mediation”, *supra* note 77 at 270.

¹³⁴ Mediator 1, *supra* note 117.

¹³⁵ Folger & Bush, “Transformative Mediation”, *supra* note 77 at 270.

¹³⁶ Mediator 1, *supra* note 117.

¹³⁷ *Ibid.*

¹³⁸ Bush & Folger, *Promise of Mediation*, *supra* note 78 at 22.

¹³⁹ Picard, *supra* note 111 at 264.

¹⁴⁰ Folberg, Milne, & Salem, *supra* note 6 at 14.

¹⁴¹ Picard, *supra* note 111 at 265.

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

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

C. Mediating Family Law Disputes in Manitoba

Consistent with the idea of the sliding scale, the family mediators described using a variety of techniques and methods in their mediation

practices which spanned the “big three” approaches to mediation.¹⁴² Many of them, knowingly or unknowingly, even described shifting between strategies and techniques which are more classically facilitative, evaluative and/or transformative in nature in a single mediation session.

In describing her practice, Sandy expressed a strong resistance to picking one “best framework” or “best approach” to mediation.¹⁴³ Rather, she explained that she adapts her process based on “where the participants are at.”¹⁴⁴ Like Kenneth Kressel, who argues that mediators do not necessarily fit within one stylistic box, Sandy noted that she demonstrates techniques and strategies from various mediation approaches depending on the circumstances and facts of a given case.¹⁴⁵ She explained that a large part of her job as a mediator is being able to “adapt in the moment” in order to meet a particular clients’ hopes, wants, and needs, and that accordingly, the techniques and approaches that she utilizes in each mediation session will be based on an individual assessment of the client and of those factors. For instance, where a party indicates that they “don’t want to go in circles and talk about the same conflict over and over again,” or where they feel that they are “not getting anywhere . . . [and] need some help,” she might “shift into a bit more of a directive kind of approach” to help them out of that rut.¹⁴⁶ Similarly, where “the level of intensity of the conflict between the participants” is particularly high, the goals of the parties may necessitate a “maximally directive” model.¹⁴⁷ She explained that where the conflict between the parties is so intense that it essentially halts the parties’ ability to communicate with one another, the goal of “transforming the relationship,” as in transformative mediation, may not be realistic. Rather,

¹⁴² While not the focus of my research, it is also interesting to note the possible separation between how the mediators envision and describe their mediation approaches and what they actually do in practice. To gain such insights I would have been required to engage in a more observational form of research, which I imagine would be challenging given the confidential and often sensitive nature of family mediation.

¹⁴³ Sandy Koop Harder, *supra* note 107.

¹⁴⁴ *Ibid.*

¹⁴⁵ Kenneth Kressel, “Mediation Revisited” in Morton Deutsch, Peter T Coleman & Eric C Marcus, eds, *The Handbook of Conflict Resolution: Theory and Practice*, 2nd ed (San Francisco, CA: Jossey-Bass, 2006) 726 at 743–745.

¹⁴⁶ Sandy Koop Harder, *supra* note 107.

¹⁴⁷ *Ibid.*

the goal often becomes quick resolution, with as minimal contact between the parties as possible. In order to satisfy these types of goals, Sandy explained, she might utilize more active, directive, and empowering interventions that allow her to take a stronger lead in the overall process.¹⁴⁸ In other words, given what Sandy described as the “let’s get ‘er done” mentality associated with evaluative mediation, she might utilize more classically evaluative techniques in such circumstances, to achieve a speedy resolution. However, Sandy cautioned that in every mediation, but particularly in those where more directive approaches like these are being used, it is important for mediators not to become so invested that they allow their personal biases and perspectives to cloud the process.¹⁴⁹

Sandy also explained that a major part of her job as a mediator is to “find ways to manage power in the room.”¹⁵⁰ Whether power differentials manifest in mediation as a result of gender differences, disparities in earning capacity, employment status, or childcare contribution, Sandy explained that she typically manages these sorts of imbalances through one-to-one coaching with the parties.¹⁵¹ Specifically, when she notices that power imbalances are causing parties to get “stuck” in their negotiations, she conducts separate meetings with the parties during mediation sessions or in between sessions in order to help them gain insight into the power differentials and how they may be impairing their progress. In helping the parties understand these power dynamics, and “the impact of their behaviors outside of the mediation room,” Sandy brings the issue of power out of the shadows, causing it to lose its “punch.”¹⁵² Additionally, reality checking with the parties in this way, which is a typically evaluative technique, may inspire the parties to move beyond the power plays which have been holding them back from reaching a negotiated settlement.

Where power imbalances exist in mediation as a result of domestic violence, however, Sandy’s approach is slightly different. She explained that in those circumstances, she begins formulating her approach before ever

¹⁴⁸ *Ibid.*

¹⁴⁹ *Ibid.*

¹⁵⁰ *Ibid.*

¹⁵¹ *Ibid.*

¹⁵² Charles Ewert et al., *Choices in Approaching Conflict: Principles and Practice of Dispute Resolution*, 2nd ed (Toronto: Emond Montgomery Publications Limited, 2019) at 138.

bringing the parties together in the room. Specifically, she explained that she conducts a careful front-end consultation process with the party with the least amount of power, wherein she has “transparent, open, direct, straightforward conversations about both the dynamic, and . . . the idea of coming together in a joint session. . . .”¹⁵³ For instance, Sandy tries to get an idea of how the power dynamic presents itself in interactions between the parties so that she can be prepared to intervene if one party is using their power over the other or intimidating them in a way which might unfairly disadvantage them in negotiations. Specifically, she asks the party to describe any subtle cues which she should be conscious of that might seem threatening to them or that might otherwise cause them to become disempowered. By way of example, Sandy described a story about a woman who was negatively triggered in a mediation session as a result of her former spouse touching his watch. To an uninformed mediator, this is a seemingly innocuous act which should be of no consequence to the parties’ progress, but in reality, it was an “unspoken communication...that was hugely meaningful to the two of them, and felt extremely threatening to the woman.”¹⁵⁴ By shedding light on these types of triggers before joint sessions, and determining what she can do as a mediator to support the party through these situations, Sandy and the vulnerable party are able to craft a so-called “escape plan” that will make the party feel comfortable heading into mediation.¹⁵⁵

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

¹⁵³ Sandy Koop Harder, *supra* note 107.

¹⁵⁴ *Ibid.*

¹⁵⁵ *Ibid.*

Fay Lynn described the co-mediation program as a “time-limited program” which only allows for a handful of mediation sessions per family.¹⁵⁶ Accordingly, she explained that “if [the parties] want to get through everything, we need to stay focused.”¹⁵⁷ Rather than focusing on the underlying issues which may have contributed or led to the separation or divorce, however, the focus in this program remains primarily on resolution – as in the evaluative stream of mediation. This is not to say that the parties’ wants and needs are not considered in this program. On the contrary, Fay Lynn explained that people utilizing this service typically “want someone to help them with [a] solution,” while “[spending] as little money and time [as possible] to [achieve] that solution.”¹⁵⁸ In order to help them achieve this, Fay Lynn uses a number of techniques which are reflective of the evaluative approach to mediation. For instance, in dealing primarily with issues relating to property, child support, and spousal support, one of Fay Lynn’s main objectives as a mediator is to make sure people “have the right information.”¹⁵⁹

Like evaluative mediation proponent Jeffrey Stempel, she is of the mindset that “disputants should ordinarily come to a resolution with at least a rudimentary knowledge of their options under the legal regime outside of mediation.”¹⁶⁰ She provides parties with this rudimentary knowledge by ensuring that they are aware of their different options under the law, and by explaining the possible implications of those options to them. As she explained it, she gets everyone to roll up their sleeves and work through the possible financial scenarios for each party with respect to the different elements of a family property accounting (e.g., the sale of the family home, the division of RRSPs or pensions, etc.). She then provides them with a document outlining the different figures which correspond to the different options, allowing the parties to process how they would like to proceed. Given the complex nature of the financial and property-related issues in a separation or divorce, Fay Lynn finds that taking the time to provide this type of information to the clients is necessary. Using these “more directive

¹⁵⁶ Fay Lynn Katz, *supra* note 105.

¹⁵⁷ *Ibid.*

¹⁵⁸ *Ibid.*

¹⁵⁹ *Ibid.*

¹⁶⁰ Stempel, *supra* note 52 at 248.

and intrusive service interventions,” she draws directly on her legal expertise to help the parties parse through and understand these more complicated issues so that they can make informed decisions.¹⁶¹

Similarly, Fay Lynn uses knowledge and information to combat issues arising from power imbalances between the parties. For example, disparities in income or earning capacity between parties can cause one party to fear the loss of income, property, and resources in the course of relationship dissolution. Where such disparities cause a party to compromise or concede on certain points in mediation in hopes of preserving greater access to income or resources, Fay Lynn might provide the parties with information which reinforces their financial or other legal entitlements under the law.¹⁶² In such circumstances, she will also remind the parties of their right to seek independent legal advice outside of the mediation session, and she might encourage them to do so.¹⁶³ In providing this information, she is seeking to empower the weaker party, thus reducing the overall power differential between the parties.¹⁶⁴

Likewise, Mediator 1 disseminates knowledge and information in mediation in order to level the power playing field. For example, she explained that when one parent, who holds more power over the other parent, becomes anchored in a position with respect to custody or access, she asks the parents to consider their best alternatives to a negotiated agreement.¹⁶⁵ More specifically, whether the issue is increased time with the other parent, increased decision-making power, or changes in the parenting schedule, she discusses the potential outcomes for each parent if they were to leave mediation without a resolution, and had to address their custody and access issues in the court system instead. As Jeffrey Stempel puts it, Mediator 1 might “[throw] some metaphorical cold water on the unreasonable demands [of a recalcitrant party] and [give] the party some insight into the default legal rules that govern the topic.”¹⁶⁶ By working through these real-life scenarios with the parties, Mediator 1 makes the

¹⁶¹ Salem, Kulak & Deutsch, *supra* note 59.

¹⁶² Fay Lynn Katz, *supra* note 105.

¹⁶³ *Ibid.*

¹⁶⁴ Mayer, *supra* note 43 at 49.

¹⁶⁵ Mediator 1, *supra* note 117.

¹⁶⁶ Stempel, *supra* note 52 at 248.

parties aware of the risks that they may face and the advantages that they may provide to their former spouses if they proceed to a hearing instead of resolving their matter in mediation.¹⁶⁷ In other words, Mediator 1 helps the parties to conduct self-assessments of their cases based on predictions of the outcome of their dispute if settlement is not reached.¹⁶⁸ In so doing, Mediator 1 may prevent disempowered parties from being pressured or bullied into an unfair resolution which is “substandard under the default rules of the applicable law.”¹⁶⁹

Despite the use of this classically evaluative technique, Mediator 1 also combats power imbalances in mediation with what appear to be more transformative mediation techniques – reinforcing the notion of mediator approach as variable or akin to a sliding scale. Specifically, Mediator 1 recounted a recent file that she worked on involving a mother who, throughout the relationship, had taken on greater childcare responsibilities and who had been, for all intents and purposes, the parental decision-maker. She explained that in that case, the mother entered mediation in a position of greater authority than the father with respect to the children, giving her somewhat of an upper hand when it came to negotiations regarding custody.¹⁷⁰ This manifested in mediation with the mother taking charge of discussions regarding parenting, while the father unquestioningly followed her lead.¹⁷¹ To address this power imbalance, Mediator 1 attempted to bring the father into the conversation by asking for his thoughts and opinions on parenting issues. Providing him an opportunity to be heard not only empowered him and made him “sit up a little straighter,” Mediator 1 explained, but it also demonstrated to the mother that he had legitimate insights with respect to the children, and that she could perhaps trust him to take a greater role in the children’s lives.¹⁷² In this sense, Mediator 1’s techniques helped to empower the father by providing him with a sense of value and strength as a parent, and helped

¹⁶⁷ Mediator 1, *supra* note 117.

¹⁶⁸ Lowry, *supra* note 64.

¹⁶⁹ Stempel, *supra* note 52 at 255.

¹⁷⁰ Mediator 1, *supra* note 117.

¹⁷¹ *Ibid.*

¹⁷² *Ibid.*

the mother hear the father and recognize his abilities as a parent.¹⁷³ These “aha moments” of empowerment and recognition, of course, are hallmarks of the transformative approach to mediation.¹⁷⁴

Like Sandy, Mediator 2 was hesitant to attach herself to any one mediator approach. Instead, she took a similar view to Margaret Shaw, who argues that mediator classifications are “simply too broad to cover the intuitive aspects of a mediator’s behavior.”¹⁷⁵ Specifically, she believes that mediator approach is “really dependent upon the parties and what their interests are in terms of what they state are their goals for the mediation and for their outcome afterwards.”¹⁷⁶ For instance, she explained that “if you’ve got a couple with no children, then their goals might be quite different . . . they may be looking at more of a settlement focus.”¹⁷⁷ In comparison, given the “intellectual understanding that they need to have about a co-parenting relationship,” Mediator 2 explained that couples with children might be more interested in taking the time to work on and perhaps transform their relationship in order to support that new co-parenting dynamic.¹⁷⁸ As such, Mediator 2 indicated a tendency to utilize more settlement-driven techniques when addressing family disputes relating to child and spousal support and other monetary or property-related issues, and less of a settlement-focused approach when dealing exclusively with issues such as child custody, access and parenting plans.¹⁷⁹ Reflecting the views expressed by scholars like Noel Semple, Nicholas Bala, Scott Hughes and Carolyn Clark Camp, Mediator 2 explained that when financial and property-related issues are at play, “it’s more about helping people to just problem solve and to really understand the impact of their decision making.”¹⁸⁰ In other words, when those sorts of issues are at play, Mediator 2 feels that the directive, problem-solving, and knowledge-based techniques which are commonly

¹⁷³ Bush & Folger, *Promise of Mediation*, *supra* note 78 at 22.

¹⁷⁴ Mediator 1, *supra* note 117.

¹⁷⁵ Margaret L Shaw, “Style Shmyle: What’s Evaluation Got to Do with It” (2005) 11:3 *Dispute Resolution Magazine* 17 at 19.

¹⁷⁶ Mediator 2, *supra* note 117.

¹⁷⁷ *Ibid.*

¹⁷⁸ *Ibid.*

¹⁷⁹ Semple & Bala, *supra* note 45; Hughes, *supra* note 48 at 248.

¹⁸⁰ Mediator 2, *supra* note 117.

associated with the evaluative mediation approach tend to be most warranted and effective.

When it comes to addressing and managing power imbalances between the parties which are negatively impacting the course of negotiations, Mediator 2, like Mediator 1, appears to utilize techniques rooted in transformative mediation theory. She explained that often, when there is a noticeable power differential between the parties, “there’s a real strong tendency to want to pull them apart and provide some one-on-one coaching.”¹⁸¹ While she recognizes that this can be quite beneficial and even necessary in certain circumstances, she tries, wherever possible, to keep them in the same room for the conversation.¹⁸² She believes that as the mediator, she must try to “hold time and space” for the parties to “help them really understand and think a little bit about why they think the way they think.”¹⁸³ For example, in a mediation between a mother who has been the primary caregiver for the children throughout the relationship, and a father who has been the primary breadwinner working outside of the home, the mother might rely on these traditional roles to bolster her entitlement with respect to custody of the children. As opposed to separating the parties in such a case to provide one-on-one coaching in the hopes of perhaps empowering the weaker party, Mediator 2 would attempt to keep the parties in the same room and have them work through this power dynamic together. What is important, Mediator 2 explained, is trusting that the parties can manage these types of conversations and allowing them to work through the tension between them.¹⁸⁴ In this sense, she takes after transformative mediators who take “an optimistic view of the parties’ competence and motives,” and who are “comfortable with having the parties take considerable time to sort through the conflict” and to experience feelings of uncertainty.¹⁸⁵

In contrast, where power imbalances exist between the parties as a result of domestic violence, Mediator 2 would not encourage the parties to work through the tension together in this traditional transformative way. Rather,

¹⁸¹ *Ibid.*

¹⁸² *Ibid.*

¹⁸³ *Ibid.*

¹⁸⁴ *Ibid.*

¹⁸⁵ Folger & Bush, “Transformative Mediation”, *supra* note 77 at 271-272.

she might be quicker to separate the parties and work with them one-on-one. For instance, in certain cases, like Sandy, she might split the parties up to conduct one-on-one coaching and “individual skill development” to prepare the parties to eventually work through these power dynamics together.¹⁸⁶ In other cases, depending on the particulars of the relationship, she conducts shuttle mediation in which the parties remain completely separate from one another, having only indirect negotiations through her as their mouthpiece.¹⁸⁷ In most circumstances, however, Mediator 2 “will try to see if there’s that option of being able to come back to a joint session after . . . going through a number of series of shuttle.”¹⁸⁸ Where this option does not exist, and the process seems to be “shutting the [parties] down” to the point that they do not have “the capacity for self-determination,” Mediator 2 questions whether mediation is really appropriate.¹⁸⁹

Interestingly, Mediator 3 was the only mediator to characterize her practice as transformative in nature. Not surprisingly, however, the description of her practice revealed elements of the other classical approaches to mediation as well. Reflecting both Fay Lynn’s and Mediator 2’s practices, Mediator 3 recognizes that financial and property-related issues “seem to be a little bit more naturally . . . settlement focused,” and that the techniques used when addressing those sorts of issues might reflect that.¹⁹⁰ Mediator 3 explained that while parties almost always end up discussing the hopes, feelings and fears underlying their stated positions in mediation, regardless of the predominant approach used by the mediator, these underlying emotions are often less obvious or prominent when dealing with the financial aspects of a separation and divorce, in comparison to when dealing with issues relating to the children.¹⁹¹ As such, there appears to be a tendency toward more evaluative techniques or at least a more settlement- or resolution-focused mindset when dealing with financial and property issues.

¹⁸⁶ Mediator 2, *supra* note 117.

¹⁸⁷ *Ibid.*

¹⁸⁸ *Ibid.*

¹⁸⁹ *Ibid.*

¹⁹⁰ Mediator 3, *supra* note 118.

¹⁹¹ *Ibid.*

Moreover, like Sandy, Mediator 3 explained that she might adopt a more classically evaluative approach when mediating cases for high-conflict couples. In a facilitative or even transformative fashion, Mediator 3 explained that she often seeks to guide the parties through discussion about certain events which might have negatively impacted them, so that they better understand how they have contributed to the conflict. Once these discussions have been had, she tries to encourage the parties to consider how they could do things differently in the future to avoid these negative results.¹⁹² However, she explained that sometimes, with high-conflict couples who have “really limited insight...there really is very little benefit in trying to learn from discussing past events.”¹⁹³ In these cases, she finds she has to “shift a bit more into settlement.”¹⁹⁴ Accordingly, to meet the particular needs and goals of a high-conflict couple, she will often adjust her approach to reflect a more evaluative, as opposed to transformative, mindset.

Similarly indicative of an evaluative approach to mediation, Mediator 3 explained that she tries to alleviate issues arising from power imbalances in mediation by ensuring that both parties have access to the same knowledge and information. Specifically, when I asked her what she does as a mediator to help level the playing field between parties, she indicated that her techniques are largely centered on the idea that knowledge is power.¹⁹⁵ Where, for instance, one party holds more power in mediation because, throughout the relationship, he or she was the primary breadwinner and was responsible for dealing with the couple’s finances, Mediator 3 would try to ensure that the other party was sufficiently aware of their financial rights and options.¹⁹⁶ Where, on the other hand, one party holds more power in mediation because, throughout the relationship, he or she was the primary childcare provider and was responsible for dealing with the couple’s children, Mediator 3 would try to ensure that the other party was educated in terms of child development.¹⁹⁷ With respect to power imbalances arising

¹⁹² *Ibid.*

¹⁹³ *Ibid.*

¹⁹⁴ *Ibid.*

¹⁹⁵ *Ibid.*

¹⁹⁶ *Ibid.*

¹⁹⁷ *Ibid.*

out of domestic violence, Mediator 3, like Mediator 2, indicated that she might, depending on the facts of a particular case, opt for shuttle mediation.¹⁹⁸

Like many of the others, Mediator 4 emphasized the importance of understanding the aspirations of the parties before beginning mediation, explaining that she begins her process by meeting with each party individually to determine these goals.¹⁹⁹ In fact, she indicated that she will not commence the joint mediation session unless she has had the opportunity to conduct these individual pre-mediation sessions with the parties, because she finds that often, “people can’t synthesize their goals for resolution with the other party looking at them.”²⁰⁰ However, Mediator 4’s ultimate approach to meeting those goals differs from mediators like Sandy or Mediator 2 or 3, who devote time in mediation to helping their clients work through the underlying issues that led to the breakdown of the relationship. Rather, more like Fay Lynn, Mediator 4’s practice is based largely in education and other classically evaluative techniques, with a major focus on reaching settlement and resolution. Mediator 4 plays a more active role in mediation by organizing the discussion, suggesting possible outcomes and settlement options, and providing plenty of information.²⁰¹ As Mediator 4 put it, “I am happy to see resolution. . . . If they need to go get therapy, they can go get very good help, but not from me!”²⁰²

Like many of the mediators, Mediator 4 sees education and knowledge dissemination as powerful tools to combat power imbalances between parties. Not only does she provide information to the parties herself before and throughout mediation to ensure that they are aware of their legal rights and options both in and out of mediation, she may also encourage the parties to meet with other professionals in between mediation sessions to ensure that they are on more equal footing with respect to topics falling outside of her direct expertise.²⁰³ Where, for example, as other mediators

¹⁹⁸ *Ibid.*

¹⁹⁹ Mediator 4, *supra* note 100.

²⁰⁰ *Ibid.*

²⁰¹ Jane Kidner, “The Limits of Mediator Labels: False Debate between Facilitative versus Evaluative Mediator Styles” (2011) 30 Windsor Rev Legal Soc Issues 167 at 177.

²⁰² Mediator 4, *supra* note 100.

²⁰³ *Ibid.*

discussed, there is a power imbalance between the parties given a disparity in the parents' level of childcare responsibility throughout the relationship, Mediator 4 sometimes refers parties out to parent coaches between mediation sessions who have specialized knowledge in what she refers to as "post-separation antics."²⁰⁴ The hope is that these parent coaches can educate the parent with less childcare skill and experience, so that they may become more familiar with the needs of the children and how to meet them. This is yet another example of a family mediator incorporating education and coaching into her approach, to manage potentially harmful power imbalances.

While it is evident in my research that mediation approaches differ amongst mediators and may even fluctuate for an individual mediator from session to session or within a session, this is not to say that there can be no structure or forethought with respect to how best to approach a mediation. On the contrary, with proper training, skills, practical experience, and preparation, family mediators come to learn how to effectively tailor their mediation approaches to "give the parties the most appropriate tool[s] to resolve their dispute and . . . best satisfy their interests."²⁰⁵ Accordingly, with proper training, skills, practical experience, and preparation, resolution officers might also come to learn how to match families to appropriate mediation resources capable of effectively resolving their disputes. The question remains: what types of skills, training, and qualifications must these resolution officers obtain in order to be able to do this?

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

The mediators unanimously agreed that prospective resolution officers ought to have "[actual], practical, hands on experience in a range of ADR processes."²⁰⁶ Sandy not only urges that resolution officers ought to have clinical experience as mediators, but that they should have at least "ten solid years of...being on the block on every possible [family mediation]

²⁰⁴ *Ibid.*

²⁰⁵ Frank EA Sander & Lukasz Rozdeiczer, "Matching Cases and Dispute Resolution Procedures: Detailed Analysis Leading to a Mediation-Centered Approach" (2006) 11 *Harv Negot L Rev* 1 at 2.

²⁰⁶ Mediator 3, *supra* note 118.

situation.”²⁰⁷ While recognizing that it is possible to gain a basic understanding and knowledge of family mediation, she differentiated this knowledge with the “skill and capacity and wisdom to be able to make decisions” that comes with years of practical experience.²⁰⁸ In this sense, she questions how someone could properly assess the dynamics of a situation and discern the best interests of the parties without having those “skills and experience that come from working in the trenches with people.”²⁰⁹ Similarly, Mediator 1 suggests that resolution officers have a background in mediation and ADR²¹⁰ and Mediator 2 suggests that they have a “strong ADR background and experience in the field as a practitioner.”²¹¹ Mediator 3 indicates that resolution officers ought to understand the mediation process;²¹² and Mediator 4 even went so far as to say that “if the dispute resolution officers aren’t adequately trained in family mediation, [she foresaw] doom.”²¹³ When asked who they imagined fulfilling the role of resolution officers under the FDRA, both Mediator 4 and Fay Lynn specifically indicated that they envisioned the mediators who, at that time, were working for Family Conciliation Services, and who are already doing the work today.²¹⁴

In addition to a background in ADR and mediation, some of the mediators recognized other disciplines which could benefit resolution officers in their triaging role. For instance, Mediator 3 suggested that proficiency in mental health might be a useful skill for resolution officers,²¹⁵ and Sandy and Fay Lynn both recognized that the skills required of a social worker would also translate to this role.²¹⁶ Additionally, some mediators considered the role that law plays in the triaging process. While Fay Lynn, Mediator 1, and Mediator 3 each suggested that resolution officers should

²⁰⁷ Sandy Koop Harder, *supra* note 107.

²⁰⁸ *Ibid.*

²⁰⁹ *Ibid.*

²¹⁰ Mediator 1, *supra* note 117.

²¹¹ Mediator 2, *supra* note 117.

²¹² Mediator 3, *supra* note 118.

²¹³ Mediator 4, *supra* note 100.

²¹⁴ Mediator 4, *ibid.*; and Fay Lynn Katz, *supra* note 105.

²¹⁵ Mediator 1, *supra* note 117.

²¹⁶ Sandy Koop Harder, *supra* note 107; and Fay Lynn Katz, *supra* note 105.

at least be familiar with the family-law process, none of them actually indicated that resolution officers ought to have a background in law. In fact, Mediator 1 noted that if resolution officers must have a background in law, then they should also be required to have a background in mediation, or at least be required to consult with a professional in that field in making decisions under the FDRA.²¹⁷ In a similar vein, while Mediator 3 indicated that a resolution officer should be “somebody who totally understands the court process,” she qualified this by stating that they must also understand the mediation process and obtain the skills required to conduct that process.²¹⁸

According to the mediators I interviewed, these mediation-related skills, which resolution officers ought to possess, include expertise in conflict, separation and divorce, child development, family dynamics, family violence, child protection, and power dynamics, among other topics.²¹⁹ They also include the ability to build trust and rapport with clients, conduct interviews, assess cases, screen cases for domestic violence and other emotional or physical safety issues, the ability to gauge the level of conflict between the parties, and their willingness and ability to mediate.²²⁰ With respect to expertise in domestic violence, Mediator 3 suggested that the FDRA should require a minimum level of training for resolution officers in assessment and screening procedures.²²¹ Additionally, the mediators urged that resolution officers ought to be familiar with the broad range of ADR options available to parties in Manitoba so that they can educate parties on their choices of dispute resolution mechanisms.²²² Having said that, a number of the mediators suggested that mediation should be the starting point in the facilitated resolution phase of the FDRA process, and that resolution officers ought to first triage parties into mediation before other forms of dispute resolution.

²¹⁷ Mediator 1, *supra* note 117.

²¹⁸ Mediator 3, *supra* note 118.

²¹⁹ Mediator 1, *supra* note 117; Mediator 2, *supra* note 117; Mediator 3, *ibid*; and Sandy Koop Harder, *supra* note 107.

²²⁰ *Ibid*.

²²¹ Mediator 3, *supra* note 118.

²²² Mediator 1, *supra* note 117; Mediator 3, *ibid*; and Sandy Koop Harder, *supra* note 107.

For instance, Mediator 2 indicated that her preference would be to “[start] at a mediated level,” and move on to other processes from there.²²³ Likewise, Mediator 4 suggested that parties start in mediation and move to arbitration if they are unsuccessful.²²⁴ According to Mediator 4, mediation is a logical starting point because even if a mediation does not ultimately resolve all of the issues on the table, it can at least “carve away” some of the issues, narrowing down the list of matters that the parties must ultimately resolve.²²⁵ Similarly, Sandy suggested that except where a case needs to be screened out of the mediation process due to issues like domestic violence or other safety concerns, mediation should be the default dispute resolution process to which resolution officers refer FDRA cases.²²⁶ In fact, she believes that “by and large, most situations would be resolvable by mediation,” and that accordingly, parties should only turn to other dispute resolution mechanisms after giving mediation “the full college try.”²²⁷ She explained that the direct, face to face, party-driven communication and problem-solving conversations promoted by mediation make it the best dispute resolution option from an outcome perspective, sustainability perspective, and cost perspective.²²⁸

V. CONCLUSIONS AND RECOMMENDATIONS

Evidently, family mediator approach is not based on some “ironclad formula.”²²⁹ Rather, it tends to vary to reflect “the personal style of the mediator as well as the desires of the disputants and the context and nature of the dispute.”²³⁰ As such, given the diverse mediation frameworks, educational backgrounds, employment histories, and professional training which inform Manitoba family mediators; the unique characteristics, values, beliefs, and goals of families; and the nuances of family disputes, no two

²²³ Mediator 2, *supra* note 117.

²²⁴ Mediator 4, *supra* note 100.

²²⁵ *Ibid.*

²²⁶ Sandy Koop Harder, *supra* note 107.

²²⁷ *Ibid.*

²²⁸ *Ibid.*

²²⁹ Stempel, *supra* note 52 at 248.

²³⁰ *Ibid.*

mediation approaches will look exactly alike. However, despite these distinctions, there are some commonalities amongst separating and divorcing families. Families must address similar types of legal issues, they must address these issues in a state of conflict, and their negotiating positions are often impacted in some way relating to the dissolution of the relationship. Similarly, despite the diversity in their backgrounds and practices, there are common threads which unite family mediators. These include a shared knowledge of basic mediation skills, a shared understanding of family dynamics, separation and divorce, and a collective belief that “the adversarial system is ill suited for . . . couples who are seeking to reframe their familial relationships in a fair and prompt manner.”²³¹ As evidenced by the preceding section, these commonalities amongst families and family mediators provide some shared ground in both the ways that mediators approach mediation, as well as the ways in which they train and prepare to do so. These shared connections inform my proposals to enhance the FDRA’s current triaging guidelines for resolution officers. They also inform my recommendations for training and qualification requirements, and my general suggestions as to how to promote the successful implementation of the FDRA.

A. Triaging Considerations for FDRA Resolution Officers

Without comprehensive supplementary regulations, which are likely still to come, the FDRA provides insufficient guidance to resolution officers to enable them to conduct effective triaging. The FDRA names just three factors for resolution officers to consider in determining the form of dispute resolution to be used in the facilitated resolution phase of the pilot project. These are: the “nature and complexity of the issues,” the “nature of the relationship between the parties,” and “other factors the resolution officer considers appropriate.”²³² As these factors are quite broad and are in no way explained or elaborated upon in the FDRA itself, they currently do very little to guide resolution officers in making informed triaging decisions in the first phase of the pilot project. Without exploring the meaning of these considerations and the potential implications they can have on families and family disputes; they are merely empty words. As evidenced by my research,

²³¹ *Modernizing Our Family Law System*, *supra* note 11 at 1.

²³² *Bill 9*, *supra* note 2, cl 10(2).

these, and other factors, like conflict intensity and power disparity, can manifest in unique ways in actual practice and can have a broad range of implications on the resolution of family disputes. The nature and complexity of the issues and the nature of the relationship between the parties, together with families' specific goals for mediation, their degree of negotiating power, their "capacity for self-determination" and their ability to mediate, significantly impact the techniques, behaviours and approaches that mediators employ.²³³ Accordingly, in order to thoughtfully determine the appropriate mediation resource to which to refer a given case, resolution officers must truly understand the meaning and repercussions of the factors outlined in subsection 10(2) of the FDRA. They must be aware of these and other factors which can impact the resolution process, they must understand the potential implications they may have on different families, and they must be conscious of the various approaches taken by Manitoba family mediators to address these implications.

With respect to the "the nature and complexity of the issues," it appears that the legislators are hinting at the various types of family-law issues which present themselves in separation and divorce, including child-custody and access issues, child- and spousal-support issues, and property-related issues. However, again, the FDRA, in its current state, merely enumerates these factors in subsection 10(2) without explaining how different types of issues might influence resolution officers' choices of dispute resolution mechanisms. Based on my research, the different types of family-law issues in each case can influence the goals of the parties in mediation. Both the literature and my interviews indicate that parenting and child-related issues tend to result in more "prospective and relationship-focused" objectives, given "the likelihood that the parties will have an on-going interaction" as parents.²³⁴ Financial and property-related issues, on the other hand, tend to elicit "more of a settlement focus."²³⁵ Given the mediators' tendencies to tailor their approaches to meet the needs of their clients, the "nature" of the issues tends to dictate the particular mediation approaches taken by mediators. Where the goals are more forward-looking and relationally focused, mediators tend to slide closer to the facilitative or transformative

²³³ Mediator 2, *supra* note 117.

²³⁴ Semple & Bala, *supra* note 45 at 29-30.

²³⁵ Mediator 2, *supra* note 117.

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

My research also indicates that the different types of family law issues in each case can impact the overall complexity of the matter and difficulty of its resolution. Where, for example, a couple has no children, no joint family property, and there are no claims for spousal support, the matter is likely less complex and simpler to resolve than one involving multiple financial and property-related issues. Intricate financial and property issues are often multifaceted, confusing, and difficult to navigate without a background in finance or law. As Fay Lynn stated, “when it comes to the financial [issues], people often don’t understand that stuff.”²³⁶ In fact, given the complex legal implications of these sorts of issues, Sandy’s firm, Facilitated Solutions, when it was still offering family-mediation services, generally declined to mediate these types of issues, despite being comprised of a team of extremely qualified and experienced mediators. It was not until Facilitated Solutions formed a partnership with Evans Family Law that it began addressing financial and property issues in what it called “comprehensive family mediation.”²³⁷ Through this service, Facilitated Solutions mediators addressed the “parenting plan and the communication plan with the family first, and then [brought] in a family law lawyer to co-mediate and . . . walk through all the financial issues and the legal implications.”²³⁸ This way, parties could benefit both from the mediation expertise of the Facilitated Solutions team, and the legal expertise of the lawyers. Accordingly, where more complicated financial issues are at play, it appears parties typically require a mediator with specialized legal expertise, who might be more willing to intervene than a facilitative or transformative mediator. In other words, financial and property disputes tend to require an evaluative mediator who can educate the parties on the complex issues

²³⁶ Fay Lynn Katz, *supra* note 105.

²³⁷ “Comprehensive Family Mediation Services” (last modified 21 September 2020), online: *Evans Mediation & Arbitration* <evansmedarb.ca/comprehensive-family-mediation-services> [perma.cc/Y6B2-7BUX].

²³⁸ Sandy Koop Harder, *supra* note 107.

at hand, help them make informed decisions with respect to those issues, and ultimately resolve their matter.²³⁹

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

For instance, with respect to conflict intensity, both the literature and my interviews reveal that higher conflict couples often require greater and more directive mediator intervention.²⁴⁰ Given that conflict generally clouds our judgment and impairs our ability to communicate effectively, it follows that where the level of conflict between the parties is particularly high, it might not be feasible for parties to resolve their dispute with the assistance of a mere process guide or facilitator. Rather, where the conflict is so high that party-led negotiations are untenable, parties will require a more directive, evaluative form of mediation wherein the mediator controls not only the process, but also the discussions and proposals for resolution. Similarly, where the parties enter mediation with disparate levels of power, competence, skill, education, wealth, access to resources, or parenting capacity, mediators often use more evaluative techniques and behaviours to level the playing field. By utilizing a more evaluative style of mediation in which they provide assessments of each party’s case and outcome predictions if settlement is not reached in mediation, mediators may highlight strengths in the weaker party’s case and weaknesses in the stronger party’s case that were unknown to the parties. By educating the parties in this way, mediators can bridge the power gap between them, facilitating fairer, more reasonable agreements. With respect to cases of power imbalance arising from domestic violence, my research does not reveal the same propensity for classical evaluative techniques. In fact, in accordance with the literature on this subject, which demonstrates a lack of universality when it comes to the treatment of domestic violence cases under dispute

²³⁹ Lowry, *supra* note 64.

²⁴⁰ Lisa Parkinson, “Mediating With High-Conflict Couples” (2000) 38:1 Fam Ct Rev 69 at 71; Sandy Koop Harder, *supra* note 106; and Mediator 3, *supra* note 118.

resolution schemes, my interviewees did not reveal any major trends with respect to these types of cases.

While I have learned through my research that one cannot definitively categorize mediators simply as members of the facilitative, evaluative, or transformative schools of mediation, certain mediation resources, given their unique professional configurations, mission statements, and/or policies, might be more representative of one mediation approach over another. Manitoba's comprehensive co-mediation program, for example, is more settlement-oriented than a resource like Facilitated Solutions. This is because of its time-limited nature, its direct ties to the courts and government, and its function as somewhat of a "docket-clearer," meant to unclog our overwhelmed family court system. To fulfill this role and to bring about quick resolutions, by and large, mediators utilize evaluative mediation techniques designed to produce settlement. A private mediation firm such as Facilitated Solutions, on the other hand, which operated independently, and unrestricted by outside forces like the courts, was less pressured to bring about quick resolutions. Accordingly, their focus was not necessarily settlement, but instead "facilitating challenging or conflicted conversations."²⁴¹ In this way, Facilitated Solutions could have been viewed as a more facilitative resource. Having said that, through the partnership that it had with Evans Family Law, it certainly delivered evaluative services as well.

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

Accordingly, rather than providing just the three broad factors which currently appear in subsection 10(2) of the Act for resolution officers to

²⁴¹ "About Us" (last visited 10 May 2020), online: *Facilitated Solutions* <www.familyconflict.ca/about-fs/> [perma.cc/XY8Y-K7YV].

consider when triaging cases under the first stage of the pilot project, future regulations to the FDRA ought to consider all of the factors which can impact the resolution process, the potential implications they may have on different families, and the various approaches taken by Manitoba family mediators to address these implications. For instance, rather than merely advising resolution officers to consider the nature and complexity of the issues, the nature of the relationship between the parties, and other factors the resolution officer considers appropriate, the FDRA might be improved by adding the following to subsection 10(2), or by incorporating something of this nature into supplementary regulations.

B. Process

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

- (a) the nature of the issues
 - (i) child custody and access issues
 - (ii) child support and spousal support issues
 - (iii) property-related issues
- (b) the complexity of the issues
 - (i) i.e. presence or absence of children and related claims
 - (ii) i.e. presence or absence of property and related claims
 - (iii) i.e. presence or absence of complex financial circumstances and related claims
- (c) the goals and objectives of the parties
 - (i) i.e. relationship-focused goals
 - (ii) i.e. settlement-focused goals
- (d) the nature of the relationship between the parties
 - (i) i.e. degree of conflict between the parties
 - (ii) i.e. degree of power imbalance between the parties (e.g. imbalance in level of education, wealth, access to resources, parenting capacity, etc.)
- (e) other factors the resolution officer considers appropriate
 - (i) i.e. history or presence of domestic violence

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

C. Training and Qualifications for FDRA Resolution Officers

It is not enough that resolution officers become familiar with the points outlined in this article. Resolution officers must grasp the distinct circumstances, needs, and goals of the families who will be coming under the jurisdiction of the FDRA, and ensure that those families are matched to the appropriate mediation resources. They must possess certain knowledge and skills and have practical experience in the field of ADR, in accordance with specific qualifications delineated in the FDRA or its regulations. Currently, without any regulations to the FDRA, it is unclear what prerequisites will be required of resolution officers. The FDRA only comments on the necessary qualifications of adjudicators, who, in the second phase of the pilot project, will be tasked with holding hearings and making recommended orders to resolve any disputes which remain unresolved after the facilitated resolution phase.²⁴² Accordingly, as the legislation stands today, a resolution officer could be a lawyer, a bureaucrat, a therapist, a social worker, a mediator, or even a student. To ensure the success of the pilot project, we must have a clear picture of who these resolution officers will be, and what they must bring to the table.

I believe that practical experience as a family lawyer could benefit resolution officers in their triaging role because that experience would enable resolution officers to understand the specific legal nuances of cases. However, I do not think that a law degree or designation as a practising lawyer under *The Legal Profession Act* ought to be required for resolution officers. Yes, resolution officers ought to be able to identify and understand “the nature of the legal issues” in determining how a matter can best be resolved. Having said that, I believe that practical experience in family mediation, rigorous mediation training, and familiarity with the concepts outlined in this research can equip resolution officers with the skills required to identify and appropriately treat those issues – a law degree is not essential. Resolution officers are primarily tasked with directing parties to the appropriate dispute resolution mechanism to resolve their dispute, not

²⁴² *Bill 9, supra* note 2, cl 34(2).

with conducting that resolution process. As such, they will not be required to delve into legal issues in the same manner as will a dispute resolution specialist tasked with resolving the dispute. Thus, they do not require the same level of specialized legal knowledge. Further, if the entire purpose of the pilot project is to move families from the “adversarial,” “complex,” and “inaccessible” court-based legal system into a system based in non-legal, “out-of-court options,” it is logical that the skills and qualifications of one of the project’s initiating actors reflect those of an “alternative” dispute resolution professional like a mediator as opposed to a “traditional” one like a lawyer.²⁴³

In accordance with the views of the mediators that I interviewed, I believe that to effectively fulfill their triaging role, resolution officers ought to take specialized training. Training must develop their expertise in the dynamics of conflict, families, separation and divorce, child development, family violence, child protection, and power.²⁴⁴ I also agree that resolution officers must be able to build trust and rapport with clients, conduct thorough interviews, recognize obvious and subtle clues of domestic violence and other emotional or physical safety issues, gauge the level of conflict between the parties, and gauge the parties’ willingness and ability to mediate.²⁴⁵ To gain this expertise and to hone these skills, I agree with the mediators that resolution officers ought to be individuals with “[actual], practical, hands on experience in a range of ADR processes.”²⁴⁶ More specifically, given that the majority of family mediators have training and experience not only in mediating but in screening or triaging cases in the pre-mediation phase of their practices, I believe that practical experience in family mediation must be a prerequisite for resolution officers. The “skill and capacity and wisdom” gained from triaging and mediation experience will place resolution officers in a better position to deal with the diverse and challenging family disputes that will inevitably make their way to their desks.²⁴⁷

²⁴³ Government of Manitoba, “About Family Law Modernization”, *supra* note 99.

²⁴⁴ Mediator 1, *supra* note 117; Mediator 2, *supra* note 117; and Sandy Koop Harder, *supra* note 107.

²⁴⁵ Mediator 1, *ibid*; Mediator 2, *ibid*; Mediator 3, *supra* note 118; and Sandy Koop Harder, *ibid*.

²⁴⁶ Mediator 3, *ibid*.

²⁴⁷ Sandy Koop Harder, *supra* note 107.

However, given mediation's lack of professional regulation in Manitoba, it is not enough for the FDRA to require resolution officers to have practical family-mediation experience. The FDRA must also require a specified degree of family mediation training. Mediators in Manitoba may belong to the ADR Institute of Canada ("ADRIC"), and its affiliate, the ADR Institute of Manitoba ("ADRIIM"), but these organizations do not actually regulate mediators, and mediators are not required to belong to them. Rather, ADRIC and ADRIIM are intended to "[provide] an infrastructure that allows ADR practitioner-members to be self-regulating professionals and [give] the public confidence in their professionalism."²⁴⁸ Similarly, family mediators in Manitoba may choose to join Family Mediation Canada ("FMC"), Canada's "national association for conflict resolution specifically focused on family mediation."²⁴⁹ Again, this organization is not a governing body for family mediators but a resource to help promote the self-regulated field of family mediation and inspire confidence in the public with respect to its members. As such, given mediation's lack of professional qualifications and its self-regulated nature, anyone could hypothetically call themselves a mediator, open a mediation firm, and offer family-mediation services. In this sense, someone with "practical experience in family mediation" could be someone who has never taken any formal training and who has been offering services for only a brief period. Accordingly, the FDRA must not only require that resolution officers have practical experience in mediation. It must specify a required degree of family-mediation training as well.

With respect to mediation training, members of ADRIIM, ADRIC and FMC may apply for nationally recognized designations which allow them to "convey their level of experience and skill to prospective users of their services" based on an objective third party assessment.²⁵⁰

²⁴⁸ "Code of Conduct" (last visited 10 May 2020), online: *ADR Institute of Manitoba* <adrmanitoba.ca/rules-codes/> [perma.cc/AQC5-CF69]

²⁴⁹ "Family Mediator National Certification Program" (last visited 10 May 2020) at 1, online (pdf): *Family Mediation Canada* <www.fmc.ca/wp-content/uploads/2019/04/FMC-Certification-Brochure-2019.pdf> [https://perma.cc/9JSV-L3WE].

²⁵⁰ "Professional Designations" (last visited 10 May 2020), online: *ADR Institute of Manitoba* <www.adrmanitoba.ca/member-resources/professional-designations> [perma.cc/H4JE-SHME] [ADR Institute of Manitoba, "Professional Designations"].

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

Q. Med. designations through ADRIM indicate that a mediator has “been judged to be practising at an intermediate level,” whereas C. Med. designations, which both Sandy and Mediator 3 have, indicate that a mediator is “highly experienced.”²⁵¹ To become a Q. Med., mediators must have completed a minimum of 10 days of basic mediation training and an additional 5 days of specialized training in areas such as multiparty negotiation strategies, case development, influence of culture on conflict resolution approaches, and advanced mediation skills.²⁵² Further, they must have conducted at least 2 supervised and assessed practice or actual mediations, and they must “complete and provide documentation of a 3rd actual mediation . . . within 3 years of the designation being awarded.”²⁵³ To become a C. Med., mediators must have completed “at least 80 hours of mediation theory and skills training in mediation training programs approved by ADRIC,” and “100 hours of study or training in dispute resolution generally, the psychology of dispute resolution, negotiation, public consultation, mutual gains bargaining, communication, management consulting, conflict management, or specific substantive areas such as law, psychology, social work, counselling, etc.”²⁵⁴ Additionally, they “must have conducted at least 15 [paid] mediations as the sole mediator or

²⁵¹ *Ibid.*

²⁵² “Principles, Criteria, Protocol and Competencies Required for the Designation of Qualified Mediator” (last visited 10 May 2020) at 2–3, online (pdf): *ADR Institute of Canada* <www.adric.ca/wp-content/uploads/2019/05/ADRIC_QMed_Requirements.pdf> [perma.cc/7UXU-NQTL] [ADR Institute of Canada, “Principles, Criteria, Protocol for the Designation of Qualified Mediator”].

²⁵³ *Ibid.* at 3.

²⁵⁴ “Principles, Criteria, Protocol and Competencies Required for the Designation of Chartered Mediator” (last visited 10 May 2020) at 3, online (pdf): *ADR Institute of Canada* <adric.ca/wp-content/uploads/2021/07/ADRIC_CMed_Criteria_July-2021.pdf> [perma.cc/4USU-7AXA].

the mediation chairperson,” and they must demonstrate competency in over 20 key mediation skills.²⁵⁵

FMC’s certification process is equally as rigorous. In addition to its mandatory minimum requirement of “80 hours of basic conflict resolution & mediation training” and “100 [-150] hours of further education & training in specific areas of family issues,” applicants must have also either completed a 30 hour supervised mediation practicum, or, if they have been a practicing family mediator for at least two years, be able to provide “two positive peer evaluations from references who have mediation experience and knowledge of the candidate’s mediation practices.”²⁵⁶ Additionally, they must produce a video-taped role-play assessment and skills assessment, and they must write a final examination.²⁵⁷

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

I believe the FDRA must rely on the nationally recognized mediation designations and certification processes of ADRIIC, FMC and government appointments to determine the required degree of family-mediation training and experience for FDRA resolution officers. In order to be a resolution officer under the FDRA, I argue one must satisfy any of the following three options:

1. Be designated as a Chartered Mediator by ADRIIC, and prove that they have conducted at least 15 paid family

²⁵⁵ *Ibid.*

²⁵⁶ “Family Mediator National Certification Program”, *supra* note 249 at 2.

²⁵⁷ *Ibid* at 1.

- mediations as the sole mediator or the mediation chairperson;
2. Be designated as a Certified Family Relations Mediator or Certified Comprehensive Family Mediator by FMC; or
 3. Be designated as a Designated Mediator of the Court of Queen's Bench by the Minister of Justice of Manitoba.

While a C. Med designation through ADRIC, on its own, demonstrates a “superior level of generalist competence” in mediation, I have included an additional requirement that resolution officers prove that they have conducted at least fifteen paid family mediations. This is to demonstrate that they not only have a superior level of generalist mediation competence, but also a superior level of specific competence in family mediation which appears to be inherent in both of the FMC designations and in the designation given by the Court of Queen's Bench. I did not choose to include a designation as a Q. Med through ADRIC as a qualification option for resolution officers. This is because I do not believe that the practical experience component of the Q. Med. designation process equips mediators with the degree of practical experience required of resolution officers. After all, this designation is an “intermediate step for mediators working to receive their Chartered Mediator designation.”²⁵⁸

In addition to satisfying these training requirements, I agree with the mediators I interviewed that resolution officers ought to be familiar with the broad range of ADR options available to parties in Manitoba, and particularly familiar with the mediation options. I believe that they should have an understanding of all “big three” mediation approaches, regardless of their own self-identified mediator approach. Familiarity with these different resources and with the nuances of the “big three” mediation approaches will not only enable resolution officers to educate families on their choices of dispute resolution mechanisms but will also help them narrow down the most suitable resources to meet the needs of those families.

²⁵⁸ ADR Institute of Canada, “Principles, Criteria, Protocol for the Designation of Qualified Mediator”, *supra* note 252 at 2.

D. Going Forward

Resolution officers are key players in the proposed FDRA pilot project. Tasked with setting the stage for Manitoba's re-imagined family-law system, they will be responsible for "[determining] the form of the dispute resolution process to be used in attempting to resolve . . . family disputes."²⁵⁹ As I have demonstrated in this article, this triaging is crucial, as it is the first major step in the process and will set the course for the parties' entire dispute resolution experience under the new scheme. As such, the pilot project will require at least five competent, properly qualified individuals who can fill the role of resolution officers full-time, ensuring that the process gets off to a productive start. However, equally crucial are those ADR professionals who will undertake to help resolve the disputes coming under the new scheme. These professionals will include family mediators, who are the most likely group to provide services under the FDRA scheme. Despite the fact that family mediators will likely be one of the professional groups most significantly impacted by the FDRA, and the fact that they have a wealth of ADR experience and expertise to offer, my interviews revealed that family mediators did not have a powerful voice in the creation of the FDRA. In fact, none of the mediators I interviewed were even invited to offer their opinions or feedback to the Family Law Reform Committee ("FLRC") on the proposed pilot project, which, at the time of the FLRC's initial report, was imagined as a mediation-based system.

As many of the family mediators put it, "if you're building a mediation program that's an alternative to court, it makes sense to consult with mediators about what that process looks like, what might be some bumps or some roadblocks, or things to consider or things to be mindful of."²⁶⁰ Even though mediation is not the only resource which can be utilized under the new scheme, family mediators are ADR professionals who are deeply experienced in a field which exemplifies the exact values and attributes the government now seeks to embody in the new family-law system. As such, they should have been consulted in a more meaningful way. A system which supports Manitobans in making decisions and resolving their family law matters collaboratively while meeting their unique needs requires the input

²⁵⁹ Bill 9, *supra* note 2, cl 10(2).

²⁶⁰ Mediator 3, *supra* note 118.

of research and mediators.²⁶¹ I have attempted to provide the research background to support and sustain the FDRA. My interviewees have provided the experiential knowledge and insights into how the program will need to work on the ground. They are some of the best sources of ADR knowledge in Manitoba from which the government could draw. However, up to this point, their knowledge and experience seems to have been largely untapped. To continue in this manner would be a missed opportunity and a mistake. I believe that to facilitate the most successful implementation of the FDRA, the government must not only take the insights from my research into consideration but must also commit to further and perhaps more comprehensive consultations with our province's family mediators and other ADR professionals. These consultations would yield greater clarity on important issues such as the treatment of domestic violence under the Act and the necessary training and qualifications for FDRA resolution officers. Consultations with Manitoba's family mediators could reveal problems which have not yet been considered by the government, shed light on undiscovered opportunities for improvement in the legislation, and could ensure that the FDRA fulfills its goal of creating a "fair, economical, expeditious and informal" family-law system in Manitoba.

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

²⁶¹ Government of Manitoba, "About Family Law Modernization", *supra* note 99.

major areas in the FDRA which, without informative regulations, are currently lacking: (1) triaging guidelines for resolution officers; and (2) qualifications and training requirements for resolution officers.

With respect to the former, Manitoba must supplement and improve upon what little triaging guidance is currently offered to resolution officers by the FDRA, so that resolution officers can be properly prepared to meet the unique needs of affected families in a reasoned and meaningful way. One way the province can do this is by informing resolution officers, via regulations to the legislation or related policies, of the various factors considered by family mediators when determining how best to tailor their approach in a given mediation session. As my research demonstrates, these factors include the type and complexity of family-law issue, the degree of conflict between the parties, and the existence or absence of power imbalance or domestic violence between the parties. Resolution officers will be better able and more likely to set participants up for success in the FDRA process when they are aware of these factors.

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

and informal family dispute resolution system it has set out to provide to Manitobans.