

RESEARCH ARTICLE

Evaluation of Adversarial Adjudication and Divorce Mediation as Options for High-conflict Parents Experiencing Divorce

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Abstract

The primary objective of this paper is to evaluate the claim that participation in adversarial adjudication and divorce mediation is an appropriate option for low and high conflict couples respectively. Defining conflict in a way that conflates conflict with indicators of different type of violence is a major reason for not supporting this claim because it negates the possibility of assessing the intensity of conflict (low/high) independently of its indicators. In addition to content subsumed under Definition, evidence and argument presented under four other subheadings do not support the claim. The paper ends with a segment sub-headed Conclusion.

Keywords

Divorce, Violence, Adversarial adjudication

Introduction

During the past 25 years concerns about the adverse effects of parental conflict on the health and wellness of children have been expressed in legislation – the amended Canadian Divorce Act, 2021 (s 7.2)- and in an increasing number and variety of social science publications (American Bar Association, 2000; Archer-Kuhn, 2018; Braver and O'Connell, 1998; Dalton, Carbon and Olesen, 2003; Emery, 1999; Fidler, Bala, Birnbaum & Kavassalis, 2008; Kelly 2003; Saini and Birnbaum, 2007). High conflict parents also tend to increase the financial cost of administering the family court system by increasing re-litigation rates (motions courts), rates of abuse of the court process (Ellis, 2019; Fitch and Easteal, 2017; Government of Canada, 2001:1) and escalating conflicts to the point where they significantly increase the risk of serious and fatal injuries being inflicted on mothers (Ellis, 2015).

Notwithstanding the harm done to children, participation in adversarial proceedings is not considered to be inappropriate on this ground alone because high conflict researchers claim the intensity of conflict and the type of violence perpetrated by parents largely determine the appropriateness of litigation adversarial adjudication and divorce mediation.

With the harm experienced by children in mind, divorce mediation researchers claim that divorce mediation is the appropriate proceeding for parents who decide to divorce regardless of the intensity of conflict or the type of violence perpetrated by one or both of them because divorce mediation is a collaborative proceeding characterized by the presence of safety-promoting accommodations made during mediation, conflict de-escalating interventions and power-balancing. The primary objective of this paper is to evaluate the validity and utility of these competing claims. Perusal of the literature on high conflict between parents participating in divorce proceedings reveals that conflict is defined in a way that negates the possibility of assessing the intensity of conflicts independently of the means used to settle them.

For this reason, the evaluation that follows starts with a definition of conflict that requires conflict intensity to be assessed independently of the use of violence by parents. The argument for a definition that achieves this objective is presented under the subheading of Definition.

Violence perpetrated by divorcing parents can be assessed only if it is disclosed. Disclosure rates vary with methods of administering screening and risk assessment instruments. The face-to-face method used most frequently by both family lawyers representing clients in adversarial family court proceedings and by divorce mediators yields relatively low rates of disclosure. Empirical evidence on methods of administration that result in significantly higher rates of disclosure are described under the sub-heading of Disclosure.

Information disclosed to high-conflict researchers by parents participating in adversarial family court proceedings is used by them to support the claim about the major determinants of the appropriateness of litigation adversarial adjudication and divorce mediation. This claim and its grounding in a specific typology of perpetrators of parental violence is evaluated under the sub-heading of Differentiation.

Differentiation leads high conflict researchers to claim that participation in adversarial family court proceedings is safer and fairer than participation in divorce mediation in low conflict/ coercive controlling violence cases. Support for this claim is evaluated under the sub-headings of Safety and Fairness.

Evaluation grounded in evidence and argument is subsumed under the sub-headings of Definition, Disclosure, Differentiation and Safety and Fairness.

Definition

In social science, the validity of definitions of conflict is determined by consensus among social scientists conducting theory and research on this topic (Timasheff, 1947: 201). The relatively low degree of consensus on definitions of conflict and high conflict among parents experiencing separation and divorce is indicated by frequent references to the absence of a widely agreed upon definition that meets the criterion identified by Timasheff. For example, Anderson, Anderson, Palmer, Mutchler and Baker (2011:12) found the literature “offers limited assistance in defining high conflict”. In fact, the high conflict literature is replete with references to the absence of a valid definition of high conflict- that is, one researchers are prepared to replicate (American Bar Association, 2000; Anderson, 2010; Fidler and associates, 2008; Braver and O’Connell, 1998; Lynch, 2017; Saini and Birnbaum, 2007:3).

The studies reviewed here indicate that consensus on a definition of conflict has not yet been achieved by contributors to the study of “conflict/high conflict” in the context of marital dissolution. What is to be done?

Perusal of contributions made by social scientists to this body of literature may result in achieving greater progress towards this end when it is supplemented by seminal contributions made by social scientists to a wider body of literature on conflict and conflict resolution (Ellis and Anderson 2005:3-10; Landau & Wolfson, 2018; Wilmot and Hocker, 2001).

A review of the both bodies of literature that are frequently located in two different silos (Birnbaum, 2002) suggests that progress towards consensus may be achieved in two ways. First, by more accurately specifying the unit of analysis.

In this paper the dyadic unit of analysis is high conflict heterosexual parents who are attempting to settle conflicts associated with divorce by participating in litigation adversarial adjudication or divorce mediation.

Second, by using a definition of conflict in which conflict is not conflated with its indicators. A review of the literature on conflict reveals consensus on conflict as a relational concept – only occurs in the context of a relationship- but dissensus with respect to whether conflict should be defined subjectively (Aubert, 1963:25; Bennett and Herman, 1996:108; Wilmot and Hocker, 2001:400), 1995; Simmel, 1955:59-60) or objectively (Blalock, 1989:7; Coser, 1956:8, 37, Macmillan, 2020:).

In Aubert’s (1963:25) subjective definition, conflict is defined as “a state of ...hostility between two or more parties irrespective of how it originated or how it terminated”. Simmel (1955:59) defines conflict as a relationship characterized by the presence of antagonistic

feelings. In the objective definition conflict refers to harmful interaction/fighting and killing (Blalock, 1989:7; Coser, 1956:8, 37). In Macmillan's (2020:2) objective definition, conflict is defined as "fighting and killing. Lakoff and Johnson, (1980:4) conceive of arguments as a metaphor for war.

Not infrequently, a reviewer of the high conflict literature will be reading publications in which conflict/high conflict are not defined but its un-weighted indicators are identified (Birnbaum and Bala, 2010:404; Government of Canada, 2001:2; Lynch, 2017:11). The same reviewer reading publications on divorce mediation will discover that divorce mediators routinely differentiate "the problems/troubles that brought you to mediation" from attempts made by the couple to settle them.

The fundamental difference between the two definitions of conflict described here is that the subjective definition defines conflict itself and the objective definition defines conflict in terms of only one of a number of different ways (harmful physical and verbal interactions) of attempting to settle conflicts (Carnevale and Pruitt, 1992; Ellis and Anderson, 2005; Maccoby and Mnookin, 1992: 137; Wilmot and Hocker, 2001). Although hostile thoughts and feelings are often present when couples engage in mutually harmful interactions, the reverse is not necessarily true. For professional boxers and hockey players fighting is "just a job" (Laraque, 2012). "Cold wars" between couples, street gangs and nation states are characterized by the presence of mutual feelings of hostility and the absence of fighting and killing. The latter occur during "hot wars". A useful analogy is the difference between love and sex: sex trade workers engage in sex without love (just a job) and couples can love one another without engaging in sex. In all social relationships, the absence of mutual feelings of hostility in disagreements differentiates them from conflict.

Using attempts made to settle conflicts as indicators of conflict conflates conflict and conflict resolution. Including conflict and settlement attempts in the following definition of conflict differentiates them: conflict is a relationship characterized by the presence of mutually hostile feelings and tension instigated by perceptions of opposing values and interests that the parties attempt to reduce or eliminate through, action, interaction or avoidance.

This definition of conflict requires conflict to be assessed through indices, scales and/or narratives (e.g. Fernandez and Gregory, 2014) that disclose the intensity of mutually hostile feelings between parents and the frequency with which violence is included among the ways one or both parents disclose attempts to settle them.

Parental disclosure on matters that may reflect poorly on them as parents and persons is rarely full and spontaneous. More frequently, if not usually, disclosure of feelings of hostility and parental violence in the context of divorce must be elicited from them by researchers, mediators and family court professionals (Kernick, 2015; Department of Justice, 2020). The segment that follows is devoted to describing the specific conditions under which higher rates of disclosure are achieved.

Disclosure

Findings from meta-analytic evaluations of studies implementing the most methodologically sound study designs -random -controlled trials (RCT's) indicate that disclosure rates vary with the way in which methods of eliciting disclosure are administered. A review of 6 major data bases revealed 746 studies of screening for domestic violence but only 6 studies using an RCT study design were selected for evaluation by Hussain, Sprague, Madden, Hussain, Pindiprolu and Bhandari (2015).

Disclosure rates were reported for three types of screening tool administration – self-administered written screen; face-to-face interview screen and computer- assisted self -administered touch screen- administered by the authors of the following four widely used field validated screening instruments :WAST (Woman Abuse Screening Tool); PVS (Partner Violence Screen);E HITS (Hurt, Insult, Threat, Scream); and VAW (Violence Against Women). Hussain and associates found a computer assisted self -administered screen increased the odds of disclosure by 37%, compared with a face-to-face interview screen and by 23% compared with a self-administered screen.

These findings led the authors to conclude that "computer-assisted self- administered screens lead to higher rates of intimate partner violence (IPV) disclosure than both face-to face interview and-self -administered - screens" (p.69). In a health care setting, users of an

RCT study design reported findings indicating that computer-assisted self-administered screens yielded the highest rates of IPV disclosure and were preferred by a majority of patients to whom they were administered Ahmed, Hoss-Johnson, Stewart, Skinner, Glazier and Levinson (2009).

Rates of parental disclosure may also vary among parents using computer assisted, self-administered screens depending upon whether disclosure on this screen is elicited by qualitative narratives, constrained by responding to questions asked by interviewers or checking yes or no to questions asked by or included in the screening instruments created by researchers.

Finally, rates of parental disclosure will vary with how intentionally inflicted harms against family members by family members are defined. Perusal of the relevant literature (European Institute for Gender Equality, 2016; Dalton, Carbon and Olesen, 2003; Gelles, 1980; Istanbul Convention, 2021; ver Steeg and Dalton, 2008; Walby and Towers, 2017; World Health Organization, 2015) reveals a 1970's –2021 trend towards broadening the 1970's definition of "woman abuse" limited to physical violence by males against their female partners to broad definitions including physical, psychological and sexual violence to a significantly broader definitions that more accurately reflect the subjective experiences of victims.

Disclosure elicited by high-conflict and typological researchers referred to in this paper is limited to physical violence, sexual violence and psychological abuse. Consequently, the full range of harms experienced by divorcing parents are less likely to be disclosed than if they used a very broad definition such as the one included in Canada's *new Divorce Act* 2021.

In this Act family violence is defined as "any criminal or non-criminal conduct by a family member towards another family member that is violent or threatening or that constitutes a pattern of coercive and controlling behavior or that causes other family members to fear for their own safety or for that of another person-and in the case of a child, the direct or indirect exposure to such conduct" and includes nine enumerated types of family violence including physical, sexual, psychological, financial abuse and stalking.

Discourse on the means used to elicit disclosure does not appear to be salient for high conflict researchers whose interest in disclosure is limited to differentiating low from high conflict on the ground of the perpetration of violence resulting in serious physical and psychological injuries by one partner (low conflict) or the use of violence by both partners resulting in minor injuries (high conflict).

The differentiation between low and high conflict on the ground of type of violence disclosed by parents is evaluated under the sub-heading of Differentiation with this possibility in mind: differentiation between low and high conflict on the ground of the seriousness of violence may be an artifact of the minimization of the seriousness of conflict instigated violence.

Differentiation

School Conflict that is endemic in all social relationships can have functional positive or dysfunctional harmful consequences. Widespread agreement on differentiating between conflicts at this level of generality coexists with diversity on differentiating between low and high conflicts between parents participating in divorce proceedings. A review of the social science literature led Stewart (2001:3) to conclude; "there are no clear criteria available to differentiate between high conflict families and those struggling with the expected "normal" level and upset and conflict that follows most divorces". In 2011, Anderson and associates also reviewed "previous literatures related to high conflict". Unlike Stewart, they were able to locate "conflict" and "high conflict" on a conflict continuum, with "conflict"- focus on issues- at one end and "high conflict"- focus on the partner- at the other end by synthesizing contributions made by a number of researchers. The criterion (issue vs partner) used to differentiate conflict from high conflict is not grounded in a definition of conflict and consequently cannot be located on a conflict continuum.

Findings on conflicts associated with divorce reported by Maccoby and Mnookin (1992:137) reveal a "conflict pyramid" in which differences in the intensity of conflict are associated with differences in the way they are settled. Specifically, on a settlement continuum involving 933 cases, no conflict (uncontested) cases (50.4%) are located at one end and highest intensity of conflict cases settled through adjudication (3.7%) are located at the other end. Lower intensity of conflict cases (29.3%) settled through negotiation are

located in the middle. Higher intensity of conflict cases that are mediated (11.1%) or settled after evaluation (5.2%) are located closer towards higher conflict end of the continuum. Intensity of conflict was not assessed by these researchers and the possibility that it was inferred on the basis of their participation in different kinds of proceedings cannot be ruled out.

Analysis and findings presented here lead to the following conclusion. Conflict is endemic in relationships between intimate partners but violence varies with the intensity of conflict - the greater the intensity of conflict, the greater the probability of violence. This is the same conclusion reached about 50 years ago by Goode (1971: 632).

In 2006, contributions made by a sub-group of participants attending the Wingspread Conference (2006) resulted in a publication describing four types of violence (Kelly and Johnson, 2008). One of the four types they identified – Situational Couple Violence (SCV) is conflict instigated (Ellis and Stuckless, 1996). This most common type of violence in the wider society and between intimate partners “results from...arguments that escalate on occasion into physical violence” (p.485). Coercive controlling violence (CCV) is the second of the four types they described. CCV is defined as “a pattern of emotionally abusive intimidation and control differentiated from (SCV) in that it is grounded in structural and cultural gender inequality favoring males and is defined as “a pattern of emotionally abusive intimidation, coercion and control coupled with physical violence against partners”. This type of violence is asymmetrical - perpetrated “primarily by males”; patterned (ongoing and cumulative in its adverse effects) and tends to result in more serious injuries than SCV (Kelly and Johnson, 2008:488).

In studying SCV the unit of analysis must be a dyad because the violence is symmetrical – both parties are involved as perpetrators (Ellis and Stuckless, 1996; Capaldi and Kim, 2007; Dalton, Carbon and Olesen, 2003; Kwong, Bartholomew and Dutton, 1999; Straus and Gelles, 1990).

Differentiating between these two types of violence is relevant in the present context because- unlike the Kelly and Johnson typology- CCV and SCV are linked with conflict by high family conflict researchers Anderson and associates (2011) who built upon the work of earlier researchers (Dalton, Carbon, and Olesen: 2003) by claiming that the prevalence of CCV violence is significantly higher in high conflict families than in low conflict families.

Unlike, Kelly and Johnson, researchers Birnbaum and Bala (2010:403) did not ignore the association between violence and conflict they simply defined high-conflict cases as violence-free “communications problems” cases and low conflict cases as CCV violence cases. Citing the same Kelly and Johnson typology, researchers Anderson, Anderson, Palmer, Mutchler and Baker (2011;15-16) also differentiate between low and high conflict couples on the ground that the CCV violence perpetrated by male partners in low conflict cases is more instrumental, controlling, frequent, severe and degrading -hence low conflict/high obedience- than the reactionary CCV violence that occurs in low conflict cases.

Findings reported by Arendell, (1995:111-121) do not support this conclusion. She found a strong positive association between high-conflict and domestic violence. Specifically, 88% (n=77) of the divorced fathers in a non-randomly selected sample reported hostile feelings towards their former partners with whom they were engaged in a “war without end” that escalated following separation (Arendell, 1995: 111-121).

A recently published 10 -year survey (2008-2018) of police reported homicides in Canada revealed that arguments aimed at settling conflicts were among the top three motives for homicide, with 68% of them occurring in family residences (Beaupre, 2014:16; Chan, 2007; Johnson and Hotton, 2003:66; Levi, 1981; Roy and Marcellus, 2019). Authors of a Center for Disease Control and Prevention study of seven US states found “approximately 20 percent of homicides and 28 percent of suicides are preceded by a conflict with an intimate partner” (Alfano, 2006:1).

After 35 years of investigating intimate partner violence Dobash, Dobash, Cavanagh and Medina-Ariza (2007:344) concluded that “highly conflicted intimate partner relationships are at risk...for murder”. The dynamic that ends in murder is described in these terms: the male perpetrator attempts to settle conflicts associated with his female partner’s unilateral decision to separate by using tactics (promising, cajoling, threatening) aimed at persuading her to stay. When it becomes clear to him that these tactics will not persuade her to stay –he kills

her. The “project” had changed from settling the conflict to by persuading her to stay to settling the conflict by killing her.

According to Winstock and Esikovits (2008:292-293), the last of six phases of a conflict dynamic associated with the female partner’s decision to leave and take the children with her escalates from the mutual use of verbal exchanges to threats (physical violence, obtaining sole custody of the children) to the mutual use of violence inflicting injuries that vary from less serious to lethal.

Wilson and Daly (1992:93) broaden the argument by describing the dynamic underlying coercive controlling violence in these terms: “Men...strive to control women, albeit with variable success: women struggle to resist coercion and maintain their choices.... and homicide...preceded by violent arguments...is an outcome of slips in a dangerous game”. Women make the majority of “slips” in this game – 80% of the victims of intimate partner are female - and the context is “highly conflicted situations, regardless of the type of relationship (estranged or intact)” (Johnson and Hotton, 2003:80).

Victim survey findings indicate that non-fatal symmetrical violence associated with settling conflicts accounted for between 40% and 60% of respondent reports of intimate partner violence (Ellis and Stuckless, 1996; Stets, 1988, Whitaker, Haileyesus, Swahn and Saltzman, 2007).

Whitaker and associates analyzed (logistic regression) data from a nationally representative sample of 1,370 participants aged 18 to 25 that reported the occurrence of inter-partner violence in 18,761 heterosexual relationships. Two findings are noteworthy. First, violence associated with escalating conflicts resulted in greater injury to the parties involved.....than asymmetrical violence regardless of the gender of the perpetrator (AOR =4.4; 95% CI= 3.66) (p.941). Two, men inflicted greater injuries on women than women did on men regardless of the type of violence. These findings were cited in support of the conclusion that conflict instigated symmetrical violence was more dangerous for the victim, both men and women, than was asymmetrical violence” (p.945).

Caveat: Although respondents in the sample selected by Whitaker and associates were located in an age group (18-24) with the highest police reported rates of intimate partner violence - 600 per 100,000 versus 480 for persons aged between 35-44 and 270 for those aged between 45-54- (Sinha, 2013:6), the sample did not include “victims subjected to extreme control by their partners who were unable or unwilling to participate in the research” (p.946).

Taken together the findings on conflict instigated/situational couple violence reported here suggest- if they do not clearly indicate- that the differentiation between low and high conflict on the ground of the type of violence described in the Kelly and Johnson (2008) typology is an artifact of the minimization of the severity and frequency of violence of violence between high conflict parents participating in divorce proceedings. Beyond minimization, additional questions about the utility of using the Kelly and Johnson typology to differentiatie between low and high conflict parents follow.

First, like most typologies of violence and batterers, this one was designed with appropriate treatment programs for different violence sub-types in mind. Specifically, creative high-conflict researchers used the Kelly and Johnson typology to determine the appropriateness of participation in adversarial family court proceedings and divorce mediation. However, a rationale supporting its use based on comparisons with other typologies that could also be used to determine this outcome was not provided. Consequently, the possibility that sub-types identified by Kelly and Johnson as well as researchers such as Robinson (2005) and Schneider and Brimhall (2014) are positively associated with “secure”, “secure-ambivalent” or “insecure-ambivalent” couple attachment styles more reliably determine the appropriateness of divorce mediation and adversarial adjudication cannot be ruled out.

Second, use of the Kelly and Johnson typology commits high conflict researchers to equate the use of coercive controlling violence by male partners with control over their female partners. The use of historical (pre-separation) coercive controlling violence by male partners justifies participation in adversarial family court proceedings because the court more effectively protects the legal interests of mothers controlled by this type of violence than mediators conducting divorce mediation. Evidence and argument supporting the hypothesis that conflates violence and control is evaluated in the segment that follows.

Violence and control

A number of family conflict researchers and professionals claim that one significant reason why families experiencing “domestic violence” (CCV) should be differentiated from families experiencing conflict instigated violence (CCV) is the distribution of power in them. Specifically, they assert that power is equally balanced between the parties in conflict/high conflict cases and imbalanced in favor of the perpetrator in domestic violence (CCV) cases. In the latter case, the source of the power imbalance is male partner perpetrated CCV (Archer-Kuhn, 2018; Birnbaum and Bala, 2010; Fidler, Bala, Birnbaum and Kavassalis, 2008; Koch and Pincolini-Ford, 2006:16-17). These claims are not supported by findings reported by Coleman and Straus (1986).

In their study of a nationally representative sample of 2,143 married American couples they found the intensity of conflict varied significantly (Chi square 56.09, $p < .001$) across male dominant, female dominant and egalitarian couples with the highest level of conflict being reported by male dominant couples (30%, $n=200$). They also found the higher the level of conflict, the higher the rate of violence regardless of the parental power structure.

In one of the most frequently cited texts on family violence, the authors claim that violence by husbands against wives “should be understood primarily as the coercive control of wives by their husbands” in the context of “the patriarchy” (Dobash and Dobash, 1979:15, 43). Attempts by wives to resist being controlled often lead to conflicts resulting in arguments that often escalate to use of physical violence (wife beating) by husbands in order to settle the conflict and maintain their status as heads of the households (p.102).

Stets (1988) conceives of violence as “a way of doing power.... men use violence to establish or regain control”. Dynamic: he orders, demands, expects – she resists - there is conflict – he uses violence to gain/regain control (Mahoney, 1991) asserts that violence (and threats) is used by male partners to prevent wives from leaving them or to coerce them to return. In the Kelly and Johnson (2008) definition of “coercive controlling violence” violence is conceived of as a means used by males to control their female partners.

In all of these frequently cited sources violence, power and control are interrelated: Violence equals power, the greater the power the greater the control exercised by one partner over the other.

Wilson and Daly (1992:83) also define violence by husbands against wives as coercive control but the statement “Men strive to control women... albeit with variable success” indicates that the effectiveness of using violence as a means of control varies. Clearly – its effectiveness in controlling female partners ends when they are killed (p.83) and/or when 81% of female partners finally leave (divorce) male partners who perpetrated violence against them and who wanted them to stay (Bybee and Sullivan 2005:8). Other noteworthy modifications to the linear model follow.

Violence power and control are interrelated in the widely cited Power and Control Wheel (Pence & Paymar, 1993) but violence (physical and sexual) is only one of eight tactics of control used by male partners and “are used relatively infrequently” (p. 313) because the use of other seven control tactics is so effective (powerful) as to make the use of violence a relatively rarely used means of controlling female partners. This statement of the association between violence and power supports the hypothesis “Violence appears where power is in jeopardy” (Arendt, 1970: 44). It also supports the conclusion reached by Giddens (1993:218) based on his analysis of power, violence and domination. “Far from being index of power. the amount of violence used is an indication of a shallow and unstable power base”.

Stark and Hester (2018:90-91) exclude violence from the Power and Control Wheel on the ground that the coercive controlling tactics described in it occur “without incidents of violence”. This core claim is supported by findings they cite indicating that “80% of the women who reported forced sex, escalating violence or threats to their lives after separation [*italics in original*] were in a group reporting moderate to high coercive control but little or no physical violence” (p.90).

Violence, power and control figure prominently in the literature on the appropriateness of adversarial adjudication and mediation as proceedings aimed at settling conflicts associated with divorce. The segment that follows is devoted to an assessment of competing claims about safety made by advocates for these two proceedings.

Safety

One of the earliest claims “[divorce] mediation not only fails to protect women from subsequent violence but also their continued victimization” was made by Lerman (1984:7). Since 1984 the literature critical of divorce mediation is replete with references to its danger (Archer-Kuhn, 2018; Balakrishnan, 2019; Birnbaum and Bala, 2010; Ellis, 2021; Fidler, Bala, Birnbaum and Kavassalis, 2010; Kaganis and Piper, 1994; Koch and Piccolini-Ford, 2006; Krieger, 2002; Zorza, 2010).

A noteworthy attribute of these claims is the absence of empirical evidence indicating that adversarial adjudication is safer than divorce mediation in the presence of male partner violence. For example, none of the references (n=325) cited in Lundrum, (2003) and Kaganis and Piper, (2015); include findings supporting this claim (Adkins, 2010; Kelly, 2004:3). On the other hand, when “safer” is defined in terms of the probability of post separation-divorce violence, the literature is replete with findings indicating that participation in adversarial adjudication is positively associated with male partner violence and abuse during and following participation in adversarial family court proceedings.

Participation in adversarial adjudication in which the stakes are high, children are involved and only “opposition stories” are told (Menkel-Meadow, 1996:17) increases the intensity of conflict between litigants who bring the experience of historical conflict -instigated violence with them to these proceedings (Arendell, 1995; Ellis, 2016; Pruett and Jackson 1999). In the presence of a significant increase in the intensity of conflict between litigants participating in adversarial family court hearings and trials, judicially ordered parenting plans that increase contact between mothers and fathers who perpetrated historical violence against them, tends to increase the probability of mothers experiencing violence again during and following their participation in these proceedings (Dugan, Rosenfeld & Nagin, 2003).

Findings supporting the contact hypothesis are reported by a number of safety planning researchers (Ellis, 2020). The author’s observation of adversarial family court proceedings in six family courts in the Greater Toronto Area during seven academic years supports the claim “[family] courts operate on the basis of a presumption in favor of contact” (Kaganis and Piper (2015). In Canada and the United States, maximum contact, friendly parent and past conduct exclusionary rule provisions are consistent with judicial beliefs that the best interest of the child (BIC) is better served by continuing contact with abusive parents than no contact at all. Meier (2003:677) found that maximum contact/parent equality principles persist even in the face of clear evidence that one parent is violent and abusive to the other [and they] override contradictory information”.

Findings cited by Goodmark (1999:257) led her to conclude “in many appellate cases...judges clearly ignored extensive histories of domestic violence in making (shared) custody decisions”. Findings reported by a number of other researchers reveal that in the majority of custody cases family court judges minimize or reject evidence of historical violence presented mothers in determining parenting plans that maximize contact with formerly violent and abusive fathers (Cohen and Gershon, 2001; Davis, Lizdas, Murphy, & Yauch, 2010; Elrod, 2001; Harris, 2010; Hardesty and Chung, 2006; Saunders & Oheme, 2007; Silberg and Dallam, 2019).

Findings reported by Watson and Ancis (2013:174-180) indicate that intimidation/harassment and the use of coercive control tactics by male partners continued “during legal proceedings”. Similar findings were reported by (Elizabeth, Gavey, & Tolmie, 2012:472-473; Fitch and Easteal, 2017; Kaye, Stubbs and Tolmie, 2003; 65; Laing, 2017:12-15; Susser, 2000; ver Steeg, 2003:162-163; Vollans, 2010).

Findings indicating that participation in adversarial family court proceedings is positively associated with post-separation/divorce violence and abuse women- especially against mothers when children are being exchanged- are reported by a number of researchers, including (Harrison, 2008; Humphrey and Thiara, 2003; Macdonald, G.S.; 2016; Orenstein and Rickne, 2013; Zeoli, Rivera, Sullivan and Kubiak, 2013). Ellis (2016:10-11) reported a finding supporting the proposition that the risk of femicide will be greater among recently separated/divorced couples participating in adversarial adjudicative proceedings. This proposition was derived from a deductive conflict theoretic explanation of femicide.

Findings related to safety are not reported for divorce mediation because they could not be

found or, when found, did not include post-divorce violence and coercive control as outcomes. For example, Johnson, Saccuzzo and Koen (2005) did not include these outcomes among the “poor outcomes” for the domestic violence participants in their sample. So far as I know, unlike participation in adversarial family court proceedings, participation in divorce mediation has never been associated with femicide in any published study.

Fairness

Perusal of the claims made in the publications critical of divorce mediation reveals significant consensus on the specific claim that divorce mediation is inappropriate in cases involving male partner violence because violence invariably creates power imbalances favoring perpetrators that mediators, unlike family lawyers representing litigants in family court, are incapable of balancing.

In his seminal 1974 publication, Galanter asked the question “Why do the “haves” come out ahead” in court proceedings. His answer was “because of their ability to hire lawyers [who] regardless of the rightness of the merits of their case, permit them to prevail more often than “have-nots”. Findings reported by Pelletier and Patterson (2019) reveal gender differences in income locating male litigants among the “haves” and female litigants among the “have-nots” in a context where the average bill for high-conflict cases is \$40,104. Lawyer capability has been found to have a significant impact on the outcomes of court proceedings (Miller, Keith and Holmes, 2015; Sandefur, 2010) and income differences favoring fathers enables them to hire more capable lawyers than mother litigants. Consequently, fathers may be more likely than mothers to obtain the parenting plans they requested. In this forum, gender differences in income create power imbalances favoring fathers.

Currently between 60% and 85% of litigants- one or both- participating in adversarial family court proceeding are self-represented (MacFarlane, 2013; Shepard, 2010). Findings reported by Kroeper, Quintanilla, Frisby, Applegate, Sherman and Yei (2020) and Macmillan (2013) indicate that self-represented litigants are disadvantaged when they face legally represented litigants in family court. In cases where mothers and fathers are representing themselves, mothers are disadvantaged when they face fathers with greater financial resources who are entitled to cross-examine mothers who experienced on-going pre-separation use of coercive controlling tactics by fathers.

In her description of the ‘Theory of the Adversarial Approach’ ver Steeg (2003:161-162) refers to the assumption “the parties bring equal skill and power, in the form of an attorney and economic support, to bear upon their case”. However, she continues, “the parties are not evenly matched in this regard, and *there is no mechanism in place to compensate for the mismatch*”. This conclusion does not apply to divorce mediation where multiple power balancing mechanisms are in place especially when the definition of mediation includes third party facilitation of negotiation between the parties (Ellis and Anderson, 2005:81).

Negotiation itself levels the playing field because agreements between interdependent parties are jointly determined and the mediator role includes facilitating the process of jointly determining negotiated outcomes. In the presence of violence disclosed by one or both parties, mediators can promote the safety of participants by implementing structural arrangements that vary with the disclosed intensity of feelings of mutual hostility and current fear of being harmed. Arrangements include eliminating opportunities for participants to communicate with each other verbally or visually (shuttle mediation), communicating with each other verbally and visually from separate locations (virtually via Zoom) or verbally (via telephone). Where face -to- face mediation is warranted, mediators can arrange separate arrival and departure times, separate waiting rooms and escorts out of the building or office.

Process accommodations made during mediation include ground rules that make continuation in face-to-face mediation contingent upon compliance with agreed -upon safety-promoting ground rules (Ellis and Stuckless, 1996: 664-665). Advocates or support persons may also be permitted to attend mediation sessions and the parties may be referred to appropriate community- based service and support providers. Moreover, mediators can facilitate the de-escalation of arguments that elicit verbal abuse and threats to disagreements to constructive communications to principled negotiation by initially asking participants requiring all communications to the other party to be made through the mediator. Subsequently, participants may be invited to engage in rule governed barnstorming that reveals complementary values (e.g. best interest of the child), complementary values

underlying the positions stated by the parties (e.g. economic security) and facilitate the reconciliation of non-complementary values (education of their children in public or private schools).

Power imbalances can be balanced by making power-balancing interventions derived from an inductive, cross-cultural interpersonal process theory of power created by Gulliver (1979) and modified by Ellis and Anderson (2005:1135–167). The following four variables are interrelated in this theory: Resources (anything that, in context can be used in exercising power); Use of resources (willingness and ability to use resources effectively/persuasive strength); Outcomes (positive, negative or zero-sum); External factors (factors in the wider society that augment, deplete and modify resources available to parties involved in conflicts, e.g. the patriarchy). Power is defined as *a relationship in which differences in the parties' resources and in their willingness and ability to use them effectively are reflected in the reliability of achieving desired outcomes* (pp.140–141).

Analysis of over 30 mediator power balancing interventions suggested by Adler and Silverstein (2000), Emery, 2011; Gewurtz (2001), Murphy, and Rubinson, 2015; Parkinson, Robinson, and Johnson, 2020; indicates that all or most of them can be subsumed under Resources assessed by a Resource Differential Questionnaire (RDQ) and Use of Resources (Power Observation Grid-POG). RDQ and POG can be effectively deployed by any well-trained, power theory -informed professional mediator conducting “impasse mediation” (Johnston & Campbell, (1988).

Compared with the plethora of power balancing interventions in divorce mediation it is difficult to conceive of any steps that can be taken to decrease power imbalances between lawyers representing litigants participating in adversarial adjudication.

Conclusion

Based on findings presented in this paper, divorce mediators would probably conclude -as I do- that divorce mediation is the appropriate proceeding for couples participating in divorce proceedings generally and for SRL's particularly, especially in jurisdictions where family courts provide divorce mediation on a sliding income scale.

Evaluation of claims made by high conflict researchers using the Kelly and Johnson typology of violence were evaluated by content subsumed under five sub-headings. Content included under the subheading of Definition reveals that high conflict researchers define conflict in a way that conflates it with its indicators. Consequently, the possibility of assessing the intensity of conflict (low/high) independently of its indicators is negated.

Content included under Disclosure reveals the use of narrow definitions of conflict. Narrow definitions limit screening and disclosure to a narrow range of intentionally inflicted harms that do not accurately reflect the wide range of intentionally inflicted harms experienced by family members. Narratives elicited by divorce mediators during private intake sessions tend to reveal a wider range of intentionally inflicted harms, their types and patterning.

Evidence and argument presented under Differentiation indicates that determining the appropriateness of participation in litigation adversarial and divorce mediation on the basis of differentiating low conflict/use of coercive control violence resulting in serious injuries and high conflict/conflict instigated violence resulting in minor injuries is an unsound basis for differentiation on these grounds for two reasons. First, as the use of CCV by male partners does not reliably result in control of female partners- especially female partners who changed the balance of power by unilaterally deciding to end the relationship- and who may possess and use other means of controlling the user of CCV, the appropriateness of settlement proceedings should not be determined on this ground alone. Second, use of the greater severity of CCV as a factor determining the appropriateness of participation in adversarial family court proceedings is an artifact of minimizing the equally or more serious injuries resulting from conflict instigated violence.

Findings presented under the sub-headings of Safety and Fairness clearly indicate that participation in adversarial family court proceedings is neither safer nor fairer than participation in divorce mediation.

Taken together, evidence and argument subsumed under all five sub-headings supports the conclusion that divorce mediation is a more appropriate proceeding than adversarial adjudication for couples experiencing divorce.

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