



Custody Mediation and Domestic Violence

A RESOURCE GUIDE FOR MEDIATORS





ustody mediation (or parenting time mediation) is a form of alternative dispute resolution that gives parents an opportunity to shape their own custody or parenting agreement outside of the formal court process. Mediation operates on the principle that individuals reach better outcomes when they craft their own solutions, and research indicates that parties are often more satisfied with the outcome when they are given this option. For mediation to work, however, parents must be able to stand up to one another when they disagree, identify their own and their children's interests, recognize potential safety issues or concerns, and bring those concerns to the mediator's attention (either privately or in joint session).

For families that have experienced domestic violence, many practitioners worry that mediation is ill-advised, as parents who have experienced domestic violence may struggle with power differentials that affect their ability to negotiate on equal terms. Critics of mediation in cases involving domestic violence argue that mediation provides batterers with an additional opportunity to exert control over survivors, that the mediation itself may present physical risks to the survivor and the mediator, and that batterers may coerce survivors into making concessions during mediation to protect themselves from further abuse or to protect their children from court involvement or continued coercion. In addition, the batterer's desire for power and control may not be aligned with mediation principles such as good faith and fair dealing, honest and confidential communication, and a focus on what will work best for the family.

While these concerns should not be taken lightly, it is also the case that mediation that properly accounts for safety and power differentials can offer a positive experience for some survivors. Specifically, mediation can create an environment in which survivors are empowered to voice their needs and concerns in a way that may not be possible in court. Successful mediation can prevent prolonged involvement in the court process, which a batterer may use to commit further abuse (e.g., by filing multiple motions). Moreover, mediation is typically a less expensive option for all parents, including survivors.

Mediation is widely used in the area of family law, where custody mediation is often mandated by statute or ordered by the court.² According to statistics collected by the **National Intimate Partner** and **Sexual Violence Survey (NISVS)**, approximately 1 in 4 women and 1 in 10 men experience contact sexual violence, physical violence, and/or stalking by an intimate partner and report an intimate partner violence related impact during their lifetime.³ Intimate partner violence is also reported in more than half of all divorce cases.⁴ Based on these numbers, custody mediators are

Sicafuse, L., Decision-Making in Custody Cases Involving Domestic Violence: A Review of the Literature, NCJFCJ (2016), available at https://www.rcdvcpc.org/resources/resource/resource-center-on-domestic-violence-child-protection-and-custody.html.

² For a chart containing mandatory mediation by state, visit the NCJFCJ Chart: Custody Mediation Where Domestic Violence is Present, available at http://www.ncjfcj.org/sites/default/files/chart-mediation-dv-present.pdf.

³ National Intimate Partner and Sexual Violence Survey: 2015 Data Brief – Updated Release, available at https://www.cdc.gov/violenceprevention/pdf/2015data-brief508.pdf.

⁴ Applegate, A., Ballard, R., Beck, C., & Holtzworth-Munroe, A., *Detecting Intimate Partner Violence in Family and Divorce Mediation: A Randomized Trial of Intimate Partner Violence Screening*, Psychology, Public Policy, and Law, Vol. 17, No. 2, 243 (2011), available at https://pdfs.semanticscholar.org/2d70/c8bb34fda52cd48a4be8e8957990e3fc4115.pdf.

likely to encounter domestic violence in at least half of their cases. For this reason, the **Resource Center on Domestic Violence: Child Protection and Custody (RCDV:CPC)** has prepared this guide as a reference tool for mediators seeking to improve their practice on custody cases involving domestic violence. This publication is not intended as a substitute for thorough and ongoing training on domestic violence, but rather seeks to provide mediators with helpful links to existing literature and resources on this important topic.⁵



Understanding Domestic Violence

The **Model Standard of Conduct for Mediators** states that a "mediator shall mediate only when the mediator has the necessary competence to satisfy the reasonable expectations of the parties," and notes that training, experience, skills, and cultural awareness are often necessary for a mediator to attain such competence. The **Model Standards of Practice for Family and Divorce Mediation** also encourage family law mediators to obtain training and education, specifically identifying domestic abuse as an area worthy of closer study.

Actual mediator training requirements vary by state, with few states specifically requiring mediator training on domestic violence.⁸ Regardless of state requirements, all mediators handling domestic disputes should seek and obtain training on the dynamics of domestic violence and its impact on parenting and custody determinations.⁹ Mediators can obtain an introduction to the dynamics of domestic violence by viewing a

⁵ Although hyperlinks are provided for most of the resources cited in this document, individuals may also request printed copies of this or any other document contained herein by calling the RCDV:CPC at 1-800-52-PEACE, emailing a request to info@rcdvcpc.org.

org, or visiting our website at www.rcdvcpc.org.

⁶ Model Standard of Conduct for Mediators, available at https://www.americanbar.org/content/dam/aba/migrated/2011 build/dispute resolution/model standards conduct april2007.authcheckdam.pdf.

⁷ Model Standards of Practice for Family and Divorce Mediation, available at https://www.afccnet.org/Portals/0/PublicDocuments/CEFCP/ModelStandardsOfPracticeForFamilyAndDivorceMediation.pdf; see also Guidelines for Examining Intimate Partner Violence: A Supplement to the Model Standards of Practice for Child Custody Evaluation, available at https://www.afccnet.org/Portals/0/PublicDocuments/CEFCP/ModelStandardsOfPracticeForFamilyAndDivorceMediation.pdf; see also Guidelines for Examining Intimate Partner Violence: A Supplement to the Model Standards of Practice for Child Custody Evaluation, available at https://www.afccnet.org/Portals/0/Center%20For%20Examining%20Intimate%20Partner%20Violence.pdf.

⁸ For a list of requirements by state, see supra note 2.

⁹ Zylstra, A. Mediation and Domestic Violence: A Practical Screening Method for Mediators and Mediation Program Administrators, Journal of Dispute Resolution (2001), available at https://scholarship.law.missouri.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1391&context=jdr.

webinar prepared by the National Resource Center on Domestic Violence: **Domestic Violence: Understanding the Basics.** ¹⁰ Mediators are also encouraged to review a user manual prepared by the Children's Bureau in 2018, entitled **Child Protection in Families Experiencing Domestic Violence (2nd ed.).** ¹¹ Although the publication targets an audience of child welfare workers, its early chapters provide an excellent overview of the types of coercive controlling behaviors that are often seen in cases involving domestic violence, explore survivor and perpetrator behaviors as they relate to parenting, and debunk common myths that could impact mediator neutrality.

For information about how domestic violence directly impacts family law mediation, mediators can also consult an article entitled **Domestic Violence and Mediation: Concerns and Recommendations.**¹² This publication reviews the literature on mediating family law cases involving domestic violence, explains the different ways in which domestic violence may present itself in custody mediation, including common batterer and survivor behaviors, and provides practical suggestions for how to account for safety when mediating cases involving family violence.

In addition to these online tools, mediators may request tailored training and additional information about how domestic violence impacts custody cases and mediation in their own jurisdictions by contacting their local domestic violence program or state domestic violence coalition, the **Battered Women's Justice Project** (BWJP), or the **Association of Family and Conciliation Courts**. ¹³ In addition, mediators may contact the RCDV:CPC for tailored trainings or technical assistance by calling 1-800-52-PEACE, emailing a request to info@rcdvcpc.org, or visiting our website at www.rcdvcpc.org.

Screening for Domestic Violence

The **National Council of Juvenile and Family Court Judges' (NCJFCJ) Model Code on Domestic Violence and Family Violence** and the **Model Standards of Practice for Family and Divorce Mediation** both suggest that best practice includes routine and consistent screening for domestic violence in every case. ¹⁴ Individual screening should be done with each party before the mediation begins. Screening should be done in person and without the other party present. Screening should also continue throughout the mediation process. ¹⁵ Ongoing screening can help mediators identify situations in which the batterer is exerting power or

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¹⁰ Domestic Violence: Understanding the Basics, is available at http://vawnet.org/elearning/DVBasics/player.html.

¹¹ Selleck, K., Newman, J., & Gilmore, D. *Child Protection in Families Experiencing Domestic Violence (2nd ed.)*, U.S. Dept. of Health and Human Services, Children's Bureau Office on Child Abuse and Neglect (2018), available at https://www.childwelfare.gov/pubPDFs/domesticviolence2018.pdf.

¹² Vestal, A., Domestic Violence and Mediation: Concerns and Recommendations (2007), available at https://www.mediate.com/articles/vestalA3.cfm.

¹³ For a list of state domestic violence coalitions, see https://ncadv.org/state-coalitions. See also www.bwjp.org and https://ncadv.org/state-coalitions and www.bwjp.org and www.bwjp.org and www.bwjp.org and www.bwjp.org and wwww.bwjp.org and <a href="https://ncadv.o

¹⁴ Section 407 of the *Model Code on Domestic Violence and Family Violence* by the National Council of Juvenile and Family Court Judges (1994), available at http://www.ncjfcj.org/sites/default/files/modecode fin printable.pdf; see also Model Standards of Practice for Family and Divorce Mediation, supra note 7

control through verbal or physical cues or times in which a survivor appears to make sudden or unexpected accommodations. Screening can also help mediators identify which parenting plan outcomes will be safe for the family.

When screening for domestic violence, mediators should not limit their inquiry to acts of physical violence and should instead look for additional indicators of a pattern of coercion and control.¹⁶ To this end, mediators should constantly screen for coercive controlling behaviors of the type contained in the original **Power and Control Wheel** designed by the **Domestic Abuse Intervention Programs** and subsequent **Wheels Adapted from the Power and Control Wheel Model.**¹⁷

Practice Guides for Family Court Decision-Making in Domestic Abuse Related Child Custody Matters. This guide helps professionals understand how to screen for domestic violence, describe the nature and context of the abuse, understand the implications of the violence on parenting, and account for the violence when identifying possible parenting arrangements. With respect to screening, the tool provides practitioners with a list of sample screening questions that seek to recognize patterns of coercion and control that may impact the mediation process. The BWJP has also prepared Domestic Violence-Informed Child Custody Decision-Making Worksheets to help mediators track and synthesize this information.

In addition to the BWJP's tools and resources, mediators can consult the **Mediator's Assessment of Safety Issues and Concerns (MASIC): A Screening Interview for Intimate Partner Violence and Abuse Available in the Public Domain.**²⁰ This document reiterates the importance of screening for intimate partner violence in every case and introduces the MASIC screening tool for use by mediators.

Finally, a number of state-specific programs have also created screening protocols that address these important considerations. One protocol worth noting is the Michigan Supreme Court's **Domestic Violence**Screening Protocol for Mediators of Domestic Relations Conflicts.²¹ Like the BWJP model, this screening protocol looks for patterns of coercive control and seeks to determine whether it is possible to mediate a

¹⁶ Ver Steegh, N., Davis, G., & Frederick, L., Look Before You Leap: Court System Triage of Family Law Cases Involving Intimate Partner Violence, Marquette Law Review, Vol. 95, Issue 3, 972-79 (Spring 2012) http://www.afccnet.org/Portals/0/Look%20Before%20You%20Leap.pdf?ver=2013-08-21-071826-000.

¹⁷ The Duluth Model Power and Control Wheel, available at https://www.theduluthmodel.org/wheels. For links to power and control wheels adapted from the Duluth Power and Control Wheel, visit the National Center on Domestic and Sexual Violence at http://www.ncdsv.org/publications wheel.html.

¹⁸ Davis, G., Frederick, L., & Ver Steegh, N., *Practice Guides for Family Court Decision-Making in Domestic Abuse Related Child Custody Matters*, BWJP (2015), available at https://www.bwjp.org/assets/documents/pdfs/practice-guides-for-family-court-decision-making-ind.pdf.

¹⁹ See http://www.bwjp.org/resource-center/resource-results/child-custody-decision-making-worksheets.html.

²⁰ Holtzworth-Munroe, A., Beck, C., and Applegate, A., *The Mediator's Assessment of Safety Issues and Concerns (MASIC): A Screening Interview for Intimate Partner Violence and Abuse Available in the Public Domain*, Family Court Review 48(4:646-662 (October 2010), available at https://www.researchgate.net/publication/227667044 The Mediator's Assessment of Safety Issues and Concerns MASIC A Screening Interview for Intimate Partner Violence and Abuse Available in the Public Domain.

²¹ Domestic Violence Screening Protocol for Mediators of Domestic Relations Conflicts, available at http://courts.mi.gov/Administration/SCAO/Resources/Documents/standards/odr/Domestic%20Violence%20Screening%20Protocol%20for%20Mediators.pdf.

family dispute successfully despite the presence of domestic violence. Like the BWJP model, the Michigan protocol provides sample questions that may be helpful to mediators developing their own screening protocol.



Deciding Whether to Mediate

Mediators and survivors alike must ask themselves whether mediation is safe and appropriate for cases involving domestic violence. The NCJFCJ prepared a publication entitled **How to Navigate Custody Mediation in Cases Involving Domestic Violence: Self-Represented Litigants Series** to help inform survivors about the various considerations that they should take into account when deciding whether to mediate.²² Although the publication addresses an audience of survivors, custody mediators can likewise benefit from familiarizing themselves with the difficult decisions facing survivors who have been ordered or referred to mediation.

The BWJP's **Practice Guides for Family Court Decision-Making in Domestic Abuse Related Child Custody Matters** consider and discuss the implications of mediating a case after domestic violence has been identified through the eyes of the mediator.²³ In such cases, the BWJP recommends that mediators follow a five-step inquiry before deciding whether to mediate a case: (1) identify intimate partner violence; (2) understand its characteristics; (3) determine its implications; (4) consider the real options available to the parties; and (5) make a decision.²⁴ The publication also provides helpful guidance on how to make these assessments in individual cases.

²² How to Navigate Custody Mediation in Cases Involving Domestic Violence: Self-Represented Litigant Series, available at <u>www.</u>rcdvcpc.org.

²³ Davis, G., Frederick, L., & Ver Steegh, N., *Practice Guides for Family Court Decision-Making in Domestic Abuse Related Child Custody Matters*, BWJP (2015), available at http://www.bwjp.org/assets/documents/pdfs/practice-guides-for-family-court-decision-making-ind.pdf.

²⁴ For a visual diagram of these stages, see Ver Steegh, N., Davis, G., & Frederick, L., supra note 16.

Mediating When Domestic Violence is Present

Maintaining neutrality

The **Model Standard of Conduct for Mediators** requires mediators to maintain impartiality, explaining that mediators should decline to mediate if they are unable to conduct the proceedings in an impartial manner.²⁵ With respect to cases involving domestic violence, this means that mediators should not accept a case involving domestic violence if they are unable to act free from bias or judgment about batterers or survivors that could impact the outcome of the mediation. **Domestic Violence and Mediation: Concerns and Recommendation** aptly admonishes that "[m]ediators who are dealing with conflicted couples need to be aware of their own feelings about gender roles, power, and violence in order to perceive the issues objectively."²⁶

Although the research on mediator bias in cases involving domestic violence is scarce, emerging literature suggests that many factors influence mediator neutrality, including the mediator's unique personal, educational, and occupational backgrounds, as well as demographic variables such as gender.²⁷ At this time, discussions at the national level are taking a close look at how mediators can maintain neutrality in the process while simultaneously making it clear that they cannot and will not be neutral about violence or safety. Mediators across the country who are well versed in the dynamics of domestic violence consistently agree that mediators should express to the parties that violence is both wrong and non-negotiable, and should not try to avoid or side-step the issue under the guise of neutrality.

Ensuring informed and voluntary participation

Mediation operates on the principle of self-determination. For the mediation process to work, each party's participation must be well informed and voluntary. Participants must understand what mediation entails, what protections it affords, and the ways in which mediation could expose them to an increased risk of harm. Accordingly, the **Model Standards of Practice for Family and Divorce Mediation** set forth a list of topics that should be discussed with participants prior to every family mediation. According to these standards, mediators must clearly explain that any agreement reached by the parties must be consensual, that the mediator's role is one of an impartial facilitator, and that the mediator will not impose any agreement on the parties or provide legal advice, among a number of other important topics. This is particularly important for cases involving domestic violence, where survivors may feel pressured to reach an agreement that they are not comfortable with or that may not be safe for them or their children. It is also important that mediators make this clear in jurisdictions with mandatory mediation, as participants may not understand that a requirement to attend custody mediation is not synonymous with a requirement that they reach an agreement.

²⁵ Model Standards of Conduct for Mediators, supra note 6.

²⁶ Vestal, A., supra note 12.

²⁷ See Perrin, R.L., Overcoming Biased Views of Gender and Victimhood in Custody Evaluations When Domestic Violence is Alleged, American University Journal of Gender, Social Policy & the Law, Vol. 25, Issue 2 (2017), available at https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?referer=&https:edir=1&article=1694&context=jgspl; see also Sicafuse, L., supra note 1.

²⁸ Model Standards of Practice for Family and Divorce Mediation, supra note 7.



Accounting for safety

When the mediator and the parties all decide to proceed with mediation following proper screening, the mediator must then take steps to account for safety, both for the parties and for the mediator. **Domestic Violence and Mediation: Concerns and Recommendations**²⁹ offers practical suggestions for how to account for safety when mediating cases involving domestic violence, including but not limited to:

- Screening for domestic violence in every case;
- Utilizing shuttle or telephone mediation to keep the parties separate and free from coercion or abuse;
- Using large rooms with easy access to clearly marked exits when mediating jointly;
- Caucusing with the parties regularly;
- Having separate and safe waiting areas for the parties;
- Creating a safety plan with the victim before the mediation begins;
- Setting ground rules that restrict the topics discussed to those appropriate for mediation;
- Holding the mediation in a location with metal detectors and/or peace officers present, if possible;
- Staying alert for seemingly innocuous or non-verbal cues from the batterer that are intended to exert power or control;
- Using advanced mediation techniques and directed questions;
- Avoiding reframing, legitimizing, or minimizing the violence;
- Understanding victim and batterer behavior by obtaining appropriate training on domestic violence; and
- Staggering arrivals and departures to keep the survivor safe.

²⁹ Vestal, A. supra note 12.

Terminating the mediation

It is important for mediators to recognize that in many situations, success is not to be conflated with reaching an agreement. Where domestic violence is present, a successful mediation may simply recognize that consensual agreement is not possible, that the process is no longer safe, or that there are factors that require judicial discretion such that the case should be resolved through a court hearing or other process. When a mediator or the parties decide to terminate the mediation for any of these or other reasons, it is important to do so in a manner that does not jeopardize the safety of the parties. To this end, the Administrative Office of the Courts of Maine, in its **Policy and Procedure Manual: Court Alternative Dispute Resolution Services**, writes that the "decision not to proceed or to terminate a session should be announced as the mediator's own decision and should not, under any circumstances, be attributed to domestic abuse or to information revealed by any party. If necessary, the mediator should assist in planning a safe exit from the courthouse for the party who is the alleged victim of domestic abuse or expresses a concern for personal safety." Termination of this sort should never occur until the mediator has screened both parties, even if the mediator has already decided to terminate the mediation. This helps protect the survivor from being blamed for the decision not to mediate.

Reaching an agreement

When mediating custody cases involving domestic violence, mediators must recognize that unsafe agreements are, by their very terms, unfair.³¹ Thus, mediators should not allow proposals or agreements that they believe would jeopardize a person's safety. If a mediator has made the decision to mediate a custody case involving domestic violence, the mediator should seek to ensure that all final agreements contain safeguards that protect the children and the abused party from future violence. In its publication, **A Safer Approach to Decision-Making in Domestic Violence-Related Child Custody Disputes**, the BWJP recommends that mediators always ask whether the parents are able to "communicate in a direct, civil, constructive and child-focused manner," whether the abuser-parent is willing "to support the parental authority of the victim-parent," and whether the abuser will be able to "separate his role as parent from his role as partner."³²

In addition to reality-checking in caucus with the parties, mediators on cases involving domestic violence should always provide the parties with ample opportunities to consult with their attorney or a victim advocate before an agreement is reached and/or signed. Some court-based custody mediation programs offer a cool off period before the agreement is signed.³³ This gives survivors an opportunity to consult with an attorney or domestic violence advocate before the agreement becomes final. It also gives survivors a chance to back out of the agreement if they feel that the agreement resulted from abuser coercion during the mediation process but were unable to articulate that at the mediation itself.

³⁰ *Policy and Procedure Manual: Court Alternative dispute Resolution Services*, Maine Administrative Office of the Courts, July 2010, 21, available at http://www.courts.maine.gov/maine-courts/adr/pdf/Pol&Pro%20FINAL%201-14-11.pdf.

³¹ Mediation in Cases of Domestic Abuse, Helpful Option or Unacceptable Risk? The Final Report of the Domestic Abuse and Mediation Project, Coordinated by the Maine Court Mediation Services, January 1992, available for download at https://ncsc.contentdm.oclc.org/digital/collection/adr/id/55/.

³² Davis, G., A Safer Approach to Decision-Making in Domestic Violence-Related Child Custody Disputes, BWJP, available at http://www.bwjp.org/assets/safer-summary.pdf.

³³ One such court is the Second Judicial District Court of the State of Nevada, which offers parties to a custody mediation a twoweek period during which either party can file an objection if they no longer wish for the mediated agreement to become final.

Conclusions

Mediation will not be appropriate for many families who have experienced domestic violence. Nor is it possible to guarantee that all custody mediations will properly identify domestic violence, be free of coercion, adequately address all safety concerns, and meet all of the needs of victims and their children. Nevertheless, when mediation has been deemed appropriate after proper screening, mediators should do everything they can to provide a safe and fair mediation of every dispute that comes before them. To this end, mediators should constantly re-evaluate their methods, participate in advanced training on specialized topics such as domestic violence, and strive to provide a safe and meaningful experience for everybody involved.

If you would like to learn more about mediating cases involving domestic violence or to request technical assistance or tailored training on this or any other issue involving the intersection of domestic violence and custody or child protection, please contact the Resource Center on Domestic Violence: Child Protection and Custody at 1-800-52-PEACE or info@rcdvcpc.org, or visit our website at www.rcdvcpc.org.





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