How Mediation Can Effectively Address the Male-Female Power Imbalance in Divorce

by Diane Neumann

Feminists have long cautioned women in "traditional" marriages against the use of mediation to resolve support and property issues in divorce. Their concern is that the great disparity in power between the more powerful, income-producing husband and the less powerful, caretaking wife results in the husband winning a greater share of the marital assets. Society must change, feminists insist, in order for a mediator to effectively address the imbalance. Divorce mediators, in contrast, explain that mediators can effectively address the power imbalance between such traditional divorcing spouses and that the mediation process can result in a fair settlement. The resolution of these two conflicting theories is the focus of this article.

“Women's advocates,” writes Carol LefCourt (1984), "view the trend toward the use of mediation [in divorce] with justified skepticism and suspicion" (p.7A-40). Feminists have been the most vocal and persuasive group in stating their concerns about women who use the mediation process to reach divorce settlements. As LefCourt notes, "An examination of mediation must focus on the impact of power, particularly gender-related power, on the process. The state of sexual politics in America today is such that, even in theory, mediation is not appropriate or desirable. Most women are not equal to their male partners in bargaining power and experience, or financial resources" (p.7A-40). Mediation, feminists assume, does not affect the existing power imbalance between men and women members of divorcing couples, with the result that the more powerful male spouse typically wins more than an equal share of the marital assets.
Mary Joe Frug (1988, p.1) described herself as a feminist: "For me, that word means that I am committed to two goals: (1) I hope to advance the position of women socially, economically, and in their personal relationships, and (2) I seek to undermine and undo the effect of gender on the lives of women and men." Andrea Dworkin (1976) argues that biological determinism is at the root of male supremacy ideology. Historically, she explains, men have prospered merely because of their gender. Being male gives one the ability to control females. Dworkin views the power of men as a class issue: because men belong to the privileged class, *each* man has power over *every* woman. Adrienne Rich (1976) explains that the superior power held by members of the male sex is created by society. She argues that the foundation of society must change before individual power dynamics between men and women can change. Without fundamental changes in society's sex roles and systems of power distribution, the male/female imbalance cannot be addressed. Rich argues that "Personal and social change is dependent on change in the patriarchal foundation of society, i.e., on a restructuring of power relations that have maintained the status quo" (p.243). Even this brief review of feminist theory helps to explain why feminists distrust the mediation process. Women's rights advocates hold that mediators cannot address the power differences between divorcing husbands and wives because a mediator is powerless to change the fundamental rules of patriarchal society.

Feminists admit that mediation may work when spouses have relatively equal degrees of power, but they insist the mediation is not appropriate when significant power differences define husband and wife. As Jessie Bernard (1989, p.143) notes, "the general structure of the traditional American family, where the husband-father is the provider and the wife-mother is the housewife, began to take shape early in the 19th century." Feminists point to the female spouse in a traditional couple as a classic example of women who are not appropriate for mediation. "The average woman," writes Schulman (1983, p.3) "is not equal to her husband in bargaining power."

Divorce mediators, though they acknowledge a power imbalance between their divorcing clients, claim that power dynamics change during divorce, indeed, that the divorce crisis itself creates a climate for change. The dynamics of the crisis enables the mediator to intervene in the couple's power dynamics to effectively help them reach a reasonably fair settlement.

As a divorce mediator, I believe that assessing and addressing power differences is central to the mediation process. The professional divorce mediator can, indeed must, be able to affect those imbalances in order to arrive at a fair and lasting agreement.

I have been a mediator and a committed proponent of divorce mediation for ten years. But I have been an ardent feminist even longer. To an outsider, my roles as a divorce mediator and as a feminist often appear mutually hostile and unbridgeable. But fellow mediators and feminists simply do not understand the basic realities of negotiation, divorce, gender, and power. In this article, I will describe how these two seemingly
diverse roles can be reconciled, how one can acknowledge power imbalance based primarily on gender, and yet, because of underlying dynamics of the divorce crisis, simultaneously intervene and adequately address the power imbalance between divorcing spouses.

Is There a Power Difference Between Traditional Divorcing Spouses?

What is power? Most of us define power as "the ability to get what one wants" (Parenti, 1978, p.4). John Haynes (1988, p.278), probably the most well-known mediator in the United States today, defines power as "control of or access to emotional, economic, and physical resources desired by the other person." Haynes believes that power is derived from the ability to influence the actions of others. I think most people would agree with these general definitions of power. But to really understand power, one needs a more specific definition. I believe that power has four defining features: (1) power is composed of many factors; (2) it is relative, situational, and shifting; (3) everyone has some degree of power; and (4) power is only effective when it is used. For divorce mediation I would add a fifth feature: not every power difference between spouses affects the mediation.

The first feature, that power is comprised of many factors, provides a foundation for the discussion that follows. It is important to recognize that power is one factor in the same way that blue eyes, a high IQ., or a voracious appetite is a single characteristic. Power arises from a complex interplay of myriad factors. The following ten factors all contribute to an individual's power:

1. Belief system - a belief that one is on the side of right.
2. Personality - the image one projects, how powerful one acts.
3. Self-esteem - the internalized image of oneself, how powerful one feels.
4. Gender - Western society grants men greater power than women.
5. Selfishness - consistently putting oneself before others is a form of power.
6. Force - willingness to use coercion or threats and the fear engendered in others is a form of power.
7. Income/assets - power increases with income and the accumulation of assets.
8. Knowledge - possessing information is a form of power.
9. Status or age - increased status confers increased power, and power usually increases with age.
10. Education - higher levels of education are associated with higher levels of power.

Second, power is relative, situational, and can shift. According to Haynes (1988, p.278) power is relational, "power does not reside with one partner all of the time." An individual has power only relative to another person. Power is also situational, which means that an individual has varying degrees of power in each of his or her roles. For
example, a woman typically differs in the degree of power she has in her roles as mother, wife, supervisor, and volunteer committee member, while a man may have varying degrees of power in his roles as father, husband, CEO, and member of the Elks club. Degrees of power shift according to circumstance. For example, at the workplace, the chief executive officer of the company has far more power than does his assistant. However, on a weekend trip to Maine, where both men participate in a white-water rafting trip, the CEO's greater power in relation to his assistant will not transfer to the new situation if the assistant is an expert white-water rafter and the CEO is on the rapids for the very first time.

Third, even if one person has more power than another, each person has some degree of power. The traditional couple displays power differences. Typically, a male spouse has greater power than his wife. But because women as a class have less power than men does not necessarily mean that a woman in mediation has no power, or too little power to engage in meaningful negotiations. She has some degree of power. A woman may feel that she has no power, yet she chooses the food her husband eats, decides how to prepare it, determines when to serve it, and later rules about whether to save the leftovers and what to do with them. Within a mediation context, at tax time, an unemployed wife may suddenly find herself in a powerful position when her husband requests her to sign the joint income tax form.

Fourth, degree of power, awareness of having power, and exercise of that power are three separate things. An individual who has power may or may not be aware that she or he has power, and may or may not use that power. More often than not, the individual must be aware of her or his power in order to use it, but this is not always the case. Mediators must remember that a client can be helped to use his or her power. An example may shed some light. During a mediation session with Greg and Judy, I began by providing background information concerning alimony. I then asked, "How do you each feel about paying or receiving alimony?" Greg quickly replied, "I won't pay it." I reframed his statement to "You prefer not to make alimony payments?" He nodded his head vigorously. I turned to Judy, who responded to my inquiring expression by replying, "Well, what can I say? You heard him say he won't pay alimony." I explained that Greg had stated his preference in response to my question, and then said, "What is your preference?" Judy then said, "Well, maybe I do want support from Greg." In this manner, a client can be helped to use the power that she has. Judy exercised the power that she had to state her choice for alimony. She was empowered by the mediator.

Fifth, not every power difference between spouses affects the divorce settlement. Often in divorce mediation I see couples in which one parent is especially concerned that a child continue to be brought up in a particular faith. That parent has a great degree of power regarding a specific issue, the religious upbringing of the child, but usually this kind of specific power imbalance does not affect other issues.
Many feminists have expressed the belief that the female spouse in a traditional couple has less power than the male spouse, and that this power imbalance remains unchanged during the mediation process, with the result that the women receive less than their fair share of assets, and so forth. Joanne Schulman (1983), a staff attorney with the National Center on Women and Family Law, cautions women against the use of mediation: "There are any number of factors which can create inequality between the parties. Overwhelmingly, they are factors which tend to favor men over women." She lists the following as garnering more power for men: greater income, greater career mobility, more knowledge of family finances, thinking that earnings or assets are "his," more experience at bargaining, and willingness to use power and control tactics.

Men as a class do have more power than women as a class, but some men have less power than some women. Studies of marital relationships are fairly consistent in indicating that husbands have greater power than their wives, though the research also indicates a change toward egalitarian marriage. The well-known 1960 Blood and Wolfe study on marriage concluded that "the roles of men and women have changed so much that husbands and wives are potential equals with the balances of power tipped sometimes one way, and sometimes the other" (p.88). A significant number of individuals, however, take issue with this conclusion. D. Gillespie (1971,p.457), a respected feminist researcher, writes that "the equalitarian marriage... is a myth." She recognizes that change is coming, but notes that society continues to have a significant number of traditional couples, where, by definition, the husband has substantially greater power than the wife. For the remainder of this article, I will focus on this traditional couple and on their ability to use the mediation process.

Therefore, in answer to my first question, "Is there a power imbalance between traditional divorcing spouses?" I would respond "Yes." The male spouse does have more power than the female spouse. How, then, can the mediation process result in a fair settlement for this couple?

**If a Power Imbalance Between Men and Women Exists, How Can Mediation Be Fair?**

Despite disparities in spousal power, divorce mediators can help clients reach fair agreements. The mediation process, the role of the mediator, and the nature of the divorce crisis itself combine to produce fair agreements.

*The Mediation Process.* The mediation process is a short-term, goal-oriented procedure based on the principle of informed decision making by each individual. A client in mediation must be able to listen, to understand information, and to make decisions. The goal is to reach a fair and mutually satisfactory settlement. Clients typically report that they feel that the process was fair (Kressel, 1985).
The mediation framework emphasizes a cooperative approach. The mediator usually ensures active participation by the clients by employing task-oriented tools. The mediator might use budgets, for example, to help clients understand finances as a step in the process of financial negotiations. When necessary, the mediation may involve other professionals, such as attorneys, tax and financial consultants, appraisers, and child psychologists.

The mediator creates a framework for the divorce negotiations. The mediation procedure allows the mediator to take steps to ensure reasonable equality. Davis and Salem (1984, p. 19) describe the mediator's "innate ability to address power imbalances." The structure of the mediation process allows the neutral mediator to balance spousal power by controlling the procedure, determining the course of the negotiations, and reaching the final settlement.

**Role of the Mediator.** The issue of power does not end with an examination of the clients' power. Analysis of the power dynamics within the mediation process must include examination of the mediator's power. Though the mediator is impartial, his or her impartiality should not be construed as a lack of power. The power of the court-appointed mediator is readily apparent: she or he clearly has the authority of the official court behind her or him. The power of the private mediator is not so apparent, but it is very real.

A mediator's power derives from his or her control of the entire process. This control manifests itself in nine ways:

1. Creating the ground rules.
2. Choosing the topic.
3. Deciding who may speak.
4. Controlling the length of time each person may speak.
5. Allowing and timing a person's response.
6. Determining which spouse may present a proposal to the other.
7. Presenting an interpretation of what the spouse said.
8. Ending the discussion.
9. Writing down the agreement.

Note that every element of power listed is controlled by the mediator. The mediator actually has the most power in the room.

The mediator must recognize the power dynamics between the clients in order to address the power imbalance between spouses. Clients express power in mediation in a number of ways. A basic indicator of power is nonverbal behavior, which is often more indicative of power than is verbal expression. Careful observation of nonverbal expression is an important key to assessing power disparity.
As a general rule, the spouse who frequently looks to the partner is the less powerful spouse. Specific indications of power are difficult to describe because often the same behavior, whether verbal or nonverbal, may indicate either power or the lack of power. For example, the spouse who proposes a division of assets would appear to have greater power, yet the spouse who says "No" to that proposal may also hold a significant degree of power. It is not unusual for entirely different behaviors to indicate the same degrees of power. Consider one client who is "talking" and one who is "silent." Each behavior may indicate power, or each may reflect powerlessness, depending on the particular circumstances. The silent individual may refrain from speaking because of a lack of interest or confidence in an area; in this case, silence indicates powerlessness. But an individual may remain silent because she is so sure of herself she feels no need to speak; in this case, silence indicates power.

Sometimes the signs of greater power are blatant, yet many times the exercise of significant power is subtle. If I order you to "Get me my coat" and you obey, I obviously have power over you. But if I do not order you to fetch my coat, and without a word or even a glance from me, you run and get me my coat, I probably have a greater degree of power over you. The mediator's recognition and assessment of the subtle indications of power are crucial to a successful mediation.

Effect of Crisis. Divorce, the experts agree, is a crisis. "Crisis" denotes severe instability, a world blown apart. The separation and divorce transition differs markedly from the relative stability of the intact marriage. As Yahm (1984, p.60) notes of divorcing clients, "the very structure of their lives is often undone." Two important aspects of divorce mark it as different and more stressful than other forms of life crisis. First, divorce is not a single event; it is a transitional process that begins before the actual points of physical separation or legal termination and ends long after both of those points. Second, divorce, unlike many other crises that are caused by external forces, is caused by behavior, by one or both of the spouses. Spouses can join together in an "us" against "them" stand in many crises, but divorce is a crisis that divides the spouses. What was a strength, the nature of a couple's relationship, now becomes a weakness.

The crisis of divorce affects the power balance between the spouses in two critical ways; first, the crisis directly impacts upon the interaction between the partners, and second, the crisis causes a change in the degree of power held by each individual spouse. As a result, each individual is more open to outside intervention. This means that the power dynamics between the spouses are more open to the mediator's interventions.

An example of crisis fostering change is evident in what I term the "moral" issues of power between spouses. Women, Gilligan (1982) discovered, differ from men in their moral development. Gilligan found that women's morality typically involves judgment of behavior according to the needs of others, while men's morality involves judgment of
behavior according to concern for rights. Men make their moral decisions based on the rights or interests of others, while women make their decisions based on the needs of others. Gilligan notes that "conventional feminine morality, because it endorses making decisions in terms of other's needs, functions to reduce women's power" (p.46).

I propose that the male/female difference in morality that Gilligan observed undergoes a major reversal during the divorce crisis. During the divorce transition, women are encouraged to satisfy their own needs, and not to make decisions according to the needs of their husbands. The desire to please the husband is neither expected nor encouraged by others; indeed, society now commands the wife to put aside her caretaking role and assume an adversarial role. Those who give advice to the divorcing, and there are many, are unanimous in warning that "divorce is war" (Trafford, 1982, p.43). Indeed, "aggressive behavior is encouraged by the country's legal system" (Trafford, 1982, p.96). Because of this change in expected behavior, the wife's established, relative powerlessness in relation to her husband can be transformed into relative powerfulness as she looks to her own self-interest. Meanwhile, the male spouse tends to cling more firmly to his moral standard, as the legal system supports the rights-based model. It is not a coincidence that our legal system is based on the male model of morality; indeed, feminists recognize and define our legal system as "male." And historically, of course, women have not fared well under the legal system (Weitzman, 1985).

Marital Role. In order to explore the effect of the crisis of the divorce upon the individual spouse, we must begin with an examination of the significance of the marital role. Barnett, Biener, and Baruch (1986, p.77) define role as "the rights, responsibilities and normatively prescribed behaviors expected of an individual in a given status or position." A role tells us how we should act toward someone. The importance of a role is determined by its importance to the individual. It is commonly assumed that the loss of the marital role for the wife is more profound than is the loss of the marital role for her husband. I do not believe that this difference is inevitable or even likely.

According to cultural myth, men run away from marriage, while women seek and thrive in a marital relationship. Thus, it is frequently concluded that the loss of the role of a wife is traumatic. Yet studies consistently show that married women experience more stress than married men or single women. Barnett and Grace (1987, p. 103) note that the role of wife is "often associated with psychological distress." However, the failure of the role to correlate highly with the well-being of a woman does not diminish the impact of the loss of her marital role. This contradiction, that the role of wife does not create well-being, and that the loss of this role is profoundly upsetting, has significant consequences for divorcing women.

Upon divorce, women in traditional marriages suffer a profound loss for three major reasons. First, society has conditioned women to believe that they cannot be a whole person without a man. Second, women feel more responsible for the marital relationship,
and therefore have a greater tendency to see divorce as a sign of personal failure. Third, women tend to have a stronger identification with the role of wife than men have with the role of husband. If the woman identifies more strongly with a role other than wife, such as worker or mother, her loss may not be as traumatic as when she sees herself primarily as a wife. A former client of mine, Theresa Rossi, had been a homemaker for thirty-two years prior to her divorce. On the day she returned from divorce court, she received a letter addressed to "Mrs. Frank Rossi." This incident caused her to remark, "That wasn't me anymore. I felt as if I didn't exist. If I'm not Mrs. Frank Rossi, then who am I?"

Society expects men to react differently than women to their loss of the marital role as husband. Cultural myth suggests that men do not invest much of themselves in marriage. A man's role as husband may not be central to his identification. Indeed, cultural myths would have us believe that the only important roles for men are work and earning money, rather than the role of husband. Yet married men experience less stress than unmarried men. Indeed, studies show that single men experience the greatest stress out of the four possible groups: married men, unmarried men, married women, and unmarried women. Bernard (1989, p.10) concludes that "Marriage is distinctly beneficial for the vast majority of husbands."

Joseph Pleck (1981) has done a considerable amount of research into male roles. He found that men's involvement in the family is increasing, and that "increased involvement in the family presents issues to men similar to those raised by increased participation in paid work for women." He notes that "men's family behavior is beginning to change" (p.9). Barnett and Grace (1987, p.113) found that "In contrast to the almost exclusive emphasis on men's work roles as determinate of male stress and well-being, the data from several studies suggest that men's family roles are very important and have significant direct and indirect effects on emotional and physical well-being." Recent studies indicate that the marital role is central to the mental and physical health of men. So what happens when that role ends? Barnett and Grace (1987, p.128) state that "loss of the marriage role will be more devastating for men than for women."

My own practice reveals that the spouse who suffers the most is almost always the spouse who is being left, regardless of gender. It is hard to measure such pain, and I have not found that one gender always or even primarily suffers greater loss or pain in divorce. A favorite book of mine, Crazy Times (1982), by Abigail Trafford, sums up the effect of a breakup for both men and women: "Divorce puts you right on the edge of sanity...You don't have to commit suicide or murder your spouse to know how crazy you feel" (p.41).

Redefinition of Self. Divorce disrupts the degree of power held by an individual. The primary impetus for this change is the divorce itself. The divorce crisis precipitates a sense of loss of identity, even by the spouse who initiates the end of the relationship. Within the emotional calamity, however, one can trace predictable patterns of emotional responses. Diane Vaughn, a sociologist and the author of Uncoupling (1986), provides a
valuable insight into this apparent contradiction of emotional calamity and predictable emotional patterns: "Uncoupling is perceived by those who experience it as woefully chaotic and disorderly. Yet, despite the dubious gifts of confusion, anger, sorrow and pain bestowed on both partners, there is an underlying order that appears across all experiences" (p.188).

Vaughn defines the central issue of uncoupling as the dilemma for each partner to define him or herself in the absence of the other person. The question each spouse must ask is, "Who am I?" Every divorcing individual seeks to redefine, or is forced to redefine, herself or himself. The magnitude of this personal struggle cannot be understated. Implicit in the redefinition of self is a breakdown of defenses and an openness to other ways of being. A personal crisis offers the opportunity for significant adult change. The individual change affects the interactions between the spouses, though one or both will usually try to reassert the established interactive spousal patterns. During the crisis, the spousal levels of power are in flux. Divorce creates a breakdown in the usual personality defenses. The clients' increased vulnerability allows the mediator to effectively use her or his power to strategically intervene in the power dynamics between them. In other words, the divorce crisis causes confusion about one's identity, and undermines one's usual personal defense system. But this confusion and lack of defenses actually works to help the mediator affect significant change.

**Power During Divorce.** During the crisis of separation and divorce, many of the broad categories of power become more narrowly focused and specific factors emerge by which one spouse gains additional degrees of power. During the divorce transition, more power is gained by the individual who:

1. Wants the divorce.
2. Does not want the divorce, and is willing to pay, emotionally and financially, to slow or stop the divorce.
3. Has legitimate power, which is each person's moral or cultural perception of who should have the power.
4. Has legal favor. In mediation jargon, this individual benefits from "the shadow of the law" (Mnookin and Kornhauser, 1979). This means that one spouse enjoys a more favorable impact cast by the laws, and that this has an effect upon the content of the negotiations. For example, the laws of divorce might apply more favorably to one partner in terms of child support, alimony, or property division.
5. Feels guilt concerning the termination of the marriage. Two common reasons for feelings of guilt are initiating the divorce and having an affair.
6. Makes promises or threats that the other spouse believes. The threat or promise may not necessarily concern an issue that is part of the settlement.
7. Develops the divorce settlement options or proposals.
8. Has a strong representative, such as a lawyer, and/or support people in his or her life.
In addition to these elements of power, three other major foundations of power, which, though continuously present, gain significant influence during the divorce process. First, whoever has the greater income and/or financial assets has a source of power. Second, whoever has greater knowledge of financial issues, especially if the issues are part of the negotiated settlement, can assert more power. Third, whoever has used, is using, or is threatening to use physical force or violence toward the other spouse has a source of power.

**Conclusion**
Divorce mediators recognize the degree of power held by their clients, assess the effect of the imbalance of power upon the negotiations, and employ techniques to intervene in the balance of power to provide a forum in which to have fair negotiations. A divorce mediator can assist clients to reach a fair resolution because of a number of interwoven factors, but three are particularly important: the mediation process, the power of the mediator, and the effect of the divorce crisis. Significant power differences between male and female clients can be addressed within the mediation process because of the specifics of the situation. Significant power disparity between divorcing spouses is evident. Traditional couples do exist, but these divorcing spouses can still use the mediation process effectively. The patriarchal structure of society does not have to be abolished before a mediator can address the power dynamics of the divorcing couple, although such a dramatic change would make the mediator's job much easier. A professional mediator, because of the three conditions described in this article, can address the power imbalance in most divorcing couples sufficiently to allow the "magic" of mediation to occur.

But mediators do not perform miracles: they mediate. Mediation is a flexible process. Some people may choose to use mediation under difficult situations, as, for example, in domestic violence cases. The desire of the participants, the lack of alternative negotiation paths, and the needs and goals of the partners may cause clients to choose to mediate in spite of very difficult circumstances. Although I have seen much mediations succeed, the subject of domestic violence deserves more thought and time than this article allows.

I think that the final question skeptics are bound to ask is "What if the mediator fails to do his or her job?" The failure of a professional to do his or her job is always a serious problem, in the same way that the failure of a lawyer, therapist, appraiser, or tax consultant results in a serious problem for the client. We must make the profession of mediation accountable in the same manner as other professions. This process is already taking place; mediators at both the state and national levels are creating credentialing and licensing procedures that will make mediators accountable in the same way that other professionals are accountable.
What is important for me, as a mediator and as a feminist, is that mediation offers clients the opportunity to become empowered. Empowerment is immensely valuable for a divorcing individual, for it is the sense of competency and the ability to take control of our own life during the process of divorce that enables each person to successfully move ahead with her or his life.
Dedication

I took a summer course in family law at New England School of Law with Professor Mary Joe Frug. She was a brilliant and articulate feminist legal scholar who wrote and taught on women and the law. While discussing mediation, she expressed her concern that the mediation process cannot address power imbalance in divorcing couples, especially when the husband was clearly the more powerful spouse. We spent long and exciting hours examining the concerns of feminists, the power dynamics of traditional couples, and the mediation process which does allow for addressing power disparity. She encouraged me to write this article for Mediation Quarterly and reviewed my first draft. She knew that the article had been submitted, but I never had the chance to let her know it had been accepted for publication. On April 4, 1991, Mary Joe Frug was found brutally murdered three hundred yards from her home in Cambridge, Massachusetts.

Mary Joe Frug felt that a dialogue between feminists and mediators concerning the feasibility of mediation for women was important in light of the high divorce rate, the full spectrum of divorce-related problems, and the increased use of mediation. She thought that this article was another step in that direction.

I want to dedicate this article to Mary Joe and to thank her for her friendship and inspiration. She was a remarkable woman, and I miss her.
References
