

Scaling Up Safety for the Sake of Self-Determination: Exploring Options to Mediation and Cases of Family Violence in Singapore

By Khoo May Ann Esther

I. Introduction

The issue of whether mediation is appropriate in cases where family violence has occurred is a question that continues to vex academics and practitioners today.¹ At first glance, mediation is the ideal option for family disputes since it reduces undue acrimony in the divorce process and emphasises communication between the parties.² However, when tensions escalate, issues of physical or emotional abuse could arise.³ The psychological effects that ensue could create power imbalances between spouses in the mediation process. This paper questions whether mediation is suited for cases where family violence has transpired. If so, what can be done *within* the mediation process to address any limitations that may arise?

A. Mandatory mediation

In Singapore, Section 50(3A) of the Women's Charter⁴ prescribes mandatory mediation for couples that have filed for divorce, who have at least one child under 21 years of age.⁵ This court-based mediation process⁶ is conducted by a Judge-Mediator at the Child Focused

Resolution Centre (“CFRC”).⁷ In Singapore, mandatory mediation may well have been instituted as a “temporary expedient”⁸ to give couples the chance to experience the benefits of mediation. Indeed, as Chief Justice Sundaresh Menon observed, mediation helps “parents appreciate the consequences of their actions on their children, with encouraging results”.⁹

B. Family violence

However, the mediation process may not be suited for cases where spousal abuse has occurred.¹⁰ Indeed, where it is not in the interest of the child or the parent to go through the mediation process, the Court has the discretion to exempt parties from it.¹¹ While the Women’s Charter does not elaborate on what “in the interest” of the child or parent constitutes, it is highly likely that this extends to situations where the couple has had a history of family violence.

For this paper, “family violence” is defined as a pattern of coercive or controlling behaviour within an intimate relationship that changes in its dynamics.¹² This definition goes beyond the definition of family violence under Section 64 of the Women’s Charter, which predominantly focuses on the physical aspect of family violence. The purpose is to acknowledge that family violence transcends physical altercations. It could include elements of sexual, psychological and emotional abuse.¹³

More importantly, the psychological effects of family violence on an abused spouse may spillover into the mediation process. This may create power disparities that could adversely affect the outcome of the mediation. For example, one critical finding of the International Violence Against Women Survey (“IVAWS”) was that out of all the surveyed women who had been abused by their current partners, “half were injured and 44.4% feared for their lives”.¹⁴ Thus, if abused spouses were required to attend mediation, this could raise safety concerns and questions regarding their ability to negotiate on a level playing field with the abuser.

As spousal abuse remains one of the most prevalent forms of family violence in Singapore,¹⁵ its potential effect on the mediation process deserves a second glance. Part I examines the benefits and detriments of mediation in cases where family violence has occurred. Part II explores how safeguards can be enhanced within the mediation process to address these limitations.

II. Mediation and family violence

A. *Incompatibility of mediation with family violence cases?*

When family violence enters the picture, the main contention is that an abused spouse should *not* be forced to go for mediation because he or she is unlikely to come to the mediation table on an equal playing field.¹⁶ At minimum, mediation brings the abused spouse face-to-face with the abuser.¹⁷ Opponents argue that the presence of an abusive spouse will inevitably create a power imbalance between the parties.¹⁸ The promise of a safe environment cannot “erase the effects” of psychological fear.¹⁹ In extreme cases, an abuser may also intimidate the abused spouse with verbal or non-verbal threats.²⁰ This may be difficult for a mediator to root out, especially where he or she has not been alerted to any history of domestic abuse between the spouses.²¹ As a result, the abused spouse may not speak up for his or her own needs.²² Further, the abused spouse may feel compelled to acquiesce to the abusive spouse’s demands out of fear of future physical, psychological or financial harm.²³

If this materialises during the mediation, the criticism is that any settlement that subsequently arises is ultimately untenable because it lacks willing consent on the part of the abused spouse.²⁴ Moreover, where the abused spouse is a litigant-in-person who has not had the benefit of legal advice, the inequality between the parties may be particularly pronounced.²⁵

Second, the mediation process may exacerbate rather than alleviate the detrimental effects of a power imbalance in the family context. For example, one observation is that mediators encourage parties not to “blame each other”²⁶ or dredge up past faults. However, critics argue that this characteristic of mediation is inappropriate in cases of family violence because it discounts the severity of domestic abuse.²⁷ If a mediator skims over issues of domestic violence to focus on achieving a settlement, this sends a signal to the abused spouse that his or her safety is not important.²⁸

B. *Potential benefits of mediation*

Despite these criticisms, there are valid reasons to support the continued viability of mediation. Practically, spouses in abusive relationships will have to interact with each other in the long term, especially where children are involved.²⁹

Although opponents argue that the forward-looking nature of mediation is a disadvantage in cases of family violence,³⁰ they overlook two scenarios. First, a mediator's ability to help parties focus on generating options can be perceived as an advantage in helping parties anticipate and deal with any future violence that may occur.³¹ Second, a mediator does not necessarily have to "discount" or "overlook" the history of domestic abuse. Instead, he or she may be able to reframe issues to help the abuser understand how the abused spouse may feel as a result of violence.

Moreover, mediation is still a preferred option to litigation.³² Indeed, the adversarial nature of litigation may encourage abusive spouses to deny their abusive behaviour with its point-to-point allegations and counter-claims.³³ In contrast, mediation increases the likelihood of spouses responding constructively to issues of family violence, especially where they feel they are being heard and treated fairly.³⁴

As it stands, empirical evidence only shows correlations between mandatory mediation and the danger of coercion within the mediation process.³⁵ In contrast, other studies demonstrate that couples that went for mediation experienced a decrease in the incidence of family violence.³⁶ Ultimately, current research studies are too complex to rely on any one generalisation or group study to affirmatively show that mediation should not be an option in cases where family violence has occurred.

III. Finding a safer haven?

Nevertheless, what can be done to address the problem of power imbalances in family violence cases?

A. Extreme end

(1) Blanket exemption

In the extreme, opponents have proposed imposing blanket exclusions on mediating all abusive relationships.³⁷ However, a blanket prohibition has its limitations. First, "family violence" is incapable of precise delimitation. Different spouses may respond differently to different inflections

of “abuse”. For instance, one spouse may be traumatised by repeated snide remarks while another may remain unaffected by a one-off physical altercation.

Adopting the mantra of, “it is better to be safe rather than sorry” is undesirable. As shown above, there remain benefits to mediation even in cases of family violence. The problem would not be resolved by ruling mediation out entirely.³⁸ This would throw the baby out with the bathwater. Ultimately, family violence may be understood as occurring on a spectrum,³⁹ ranging from repeated abuse to one-off violence.⁴⁰ Depending on the frequency and severity of the abuse,⁴¹ this may or may not raise a red flag before the mediation commences.

Instead, what is important is the need to temper the mediation process *meaningfully* to promote the safety of abused spouses while enhancing self-determination. The focus should be on assisting parties to mediate on a fairer playing field⁴² rather than denying them the opportunity of mediation.

B. Middle ground

(1) Screening process

As mentioned above, mediation in Singapore may not be mandatory in cases where it is not in the interest of the parent or child. However, it is not clear what constitutes “in the interest” or how cases are screened.

One option is to screen cases whenever allegations of abuse arise.⁴³ This screening is done pre-mediation to filter out disputes that may not be suitable for mediation.⁴⁴ The objective is to ensure that an abused spouse is not forced to face the abuser and that his or her consent to mediation is not given merely to placate the abuser.⁴⁵

However, one drawback is that such a screening process lends itself to abuse. For instance, this could open up the floodgates to spouses falsely alleging abuse in order to avoid mediation.⁴⁶ There may be further inaccuracies in the screening process if the Court, mediator or administrator lacks proper training in identifying spousal abuse.⁴⁷ Identifying violence may well be an “art rather than a science”⁴⁸ that cannot yield consistent outcomes.⁴⁹

To resolve this problem, one practitioner has suggested that if a party is able to show that a Personal Protection Order (“PPO”) has been issued to him or her, this provides a good litmus test to segregate genuine complaints from bare allegations in Singapore.⁵⁰

However, this has its difficulties. First, it presumes that abused spouses will be forthcoming about their history of abuse.⁵¹ However, according to IVAWS, violence is seldom reported in Singapore, especially if committed by an intimate partner.⁵² Second, many abused spouses may be in denial about domestic violence.⁵³ In support, attachment theory posits that abused spouses develop “anxious-avoidant attachments”.⁵⁴ This means that abused spouses tend to deny abuse to defend their abusers. Third, the abused spouse may have no incentive to disclose any spousal abuse because they are afraid of retaliation.⁵⁵ Moreover, many may shun the stigma of being labelled a “battered wife” or an “abused husband”.⁵⁶ Therefore, requiring a PPO may be too formalistic to adequately assess whether a dispute is suitable for mediation or not.

(2) *Opting in and out*

Nonetheless, when a case of family violence has been accurately identified, this paper submits that the option of mediation should not automatically be wrested out of an abused spouse’s hands. In this regard, an opt in or opt out procedure is preferred. In support, scholars argue that an abused spouse should be given the opportunity to engage in mediation if he or she wants to do so, provided the relevant safeguards are in place.⁵⁷ Safeguards include ensuring an abused spouse understands the issues of unfairness that may arise if they pursue mediation. The rationale is that abused spouses know their situation best.⁵⁸ They should retain the autonomy to make their own decisions.⁵⁹

(3) *Mediation process*

If an abused spouse has opted to go for mediation, the flexibility of the mediation process could be harnessed to help parties share their interests and enhance their autonomy.⁶⁰ It could also equalise the power imbalance.⁶¹

For example, a private caucus could be used as a tool to help parties express themselves freely.⁶² The mediator can assure the abused spouse that each private session is confidential.⁶³ This could encourage abused spouses to give the mediator direct feedback on their needs, safety concerns and fears.⁶⁴ However, one limitation of a private session is that it may simply be too short to meaningfully uncover the full magnitude of the history of abuse between the parties. Other options include shuttle mediation, where the abused spouse does not have to confront the abuser.⁶⁵ Additionally, co-mediation, where a male and a female mediator are present, could be explored to level any perception of gender bias.

(4) Mediator

Other tools the mediator could use *within* the mediation process include limiting the talk-time between the parties to ensure the abusive spouse does not dominate the conversation.⁶⁶ As mentioned above, the mediator can also reframe issues to help parties understand the implications of violent behaviour.

More importantly, a mediator could put all these skills in context by gaining insight into how other fields address the issue of family violence. At minimum, such “cross-disciplinary training”⁶⁷ can assist him in detecting, *a priori*, how family violence may play out within the mediation process.⁶⁸

However, there still remains a lack of clarity on what kind of coursework or training is required to help mediators deal with issues of family violence within the mediation process.⁶⁹ Towards this end, this paper submits that a cue can be taken from the evidence-based Signs of Safety⁷⁰ framework. In essence, this framework was developed to help child-protection officers “bring together a seeming disjunction between a problem and solution”⁷¹ when evaluating cases of child abuse and neglect.

The simplest way to understand this framework is by asking the following three questions:⁷²

- What are we worried about? (Past harm, future danger and complicating factors)
- What is currently working well? (Existing strengths within the family)
- What needs to happen? (Future safety)

SIGNS OF SAFETY ASSESSMENT AND PLANNING FORM	
PAST CONCERNS	SAFETY/STRENGTHS
<i>Jack and Jane have a history of violence Jane is taking medication for depression</i>	<i>Jane wants someone to talk to regarding her sadness/anger, and sees this as a cause of the problem Jane's immediate safety is assured since she is living with her sister Jack describes an incident where he was angry with Jane, but did not hit her</i>
WHAT CAN HAPPEN?	
FAMILY GOALS	
<i>Jack has expressed interest in going for parenting sessions/anger management course</i>	
IMMEDIATE PROGRESS	
<i>Jane can continue her regular visits with her psychiatrist</i>	

Figure 1. Adaptation of the Signs of Safety assessment and planning form.⁷³

Through Figure 1 (shown above), this paper offers a proposal on how the Signs of Safety framework could be adopted in the mediation setting. Take a scenario where “Jack” and “Jane” have been open with the mediator about their history of family violence. The mediator could then engage the parties by helping them visually map out their prior concerns and focus on their strengths.

While the assessment looks simple, it is beneficial in helping parties simultaneously explore their past concerns while inquiring into their strengths.⁷⁴ It retains a forward-looking approach without overlooking the couple’s history of family violence.

Further, it is useful in the option generation stage to comprehensively incorporate other sources of help⁷⁵ within the table such as Jane’s psychiatrist and extended family (sister). Depending on the case, this could also include Jane and Jack’s lawyers, child protection officers or Child Representatives, without going into complex legal jargon or social science theories.

It is also interesting to note that the Signs of Safety framework echoes the aspirations of the facilitative model of mediation. It is premised on the understanding that “parents and children are the most crucial people” to

assess their own situation and that “the best chances of change arise” when everyone is engaged.⁷⁶

Moreover, the framework avoids visual bias, as it does not segregate the abusive spouse and the abused spouse according to their names. Instead, it acknowledges that both have strengths and weaknesses. To capitalise on this “visual” impact, this writer has also tweaked the original Signs of Safety framework by reframing its original header of “Harm” to “Past Concerns” to neutralise the language.

By introducing a social work perspective, this paper hopes to provide a useful starting point to spark discussion on what can practically be done *within* the mediation process to rectify power imbalances in cases of spousal abuse in Singapore.

(5) *Mediation-advocate*

Notwithstanding, if a mediator finds one party to be uncooperative or a power imbalance to be too strong, he could terminate the mediation.⁷⁷ The question then arises as to what constitutes “too strong”.⁷⁸ A possible way to avoid this problem is to require the presence of a mediation-advocate for both spouses.⁷⁹ This should not be a problem in Singapore since counsel are expected to be present during each mediation session at the CFRC.⁸⁰

However, this is subject to a qualification. It would be counter-productive if the mediation-advocate adopts a positional bargaining stance during the mediation.⁸¹ On the flipside, if the mediation-advocate could adopt a collaborative approach to mediation, this could have the two-fold benefit of enhancing the bargaining power of an abused spouse while protecting his or her interests.⁸²

Moreover, pre-mediation preparation between the mediation-advocate and the abused spouse would be highly beneficial.⁸³ The mediation-advocate should assure abused clients that they are not legally obliged to sign agreements, even if they feel pressured to do so.⁸⁴ Ideally, if the mediation-advocate is familiar with handling family violence and the mediation process, the Signs of Safety framework could be used to run through interests and options with the abused spouse beforehand. Other ways the mediation-advocate could enhance the option-generation stage

include explaining the implications of agreeing to certain percentages of asset division and the differences in structuring child custody arrangements to ensure the client understands how his or her interests can be met.⁸⁵

C. Future frontiers

(1) Online mediation

Finally, the e-Mediation⁸⁶ model has been gaining traction amongst academics as a potential answer to power asymmetry in family violence cases. This model has been proposed as a complementary model to orthodox mediation.⁸⁷ Thus, where traditional mediation may prove unfeasible, e-Mediation could be resorted to. This may be useful in cases where extreme family violence has occurred, to the effect that parties can still tap on the benefits of the mediation process without resorting to litigation.⁸⁸

Procedurally, e-Mediation is similar to the traditional mediation process.⁸⁹ It is briefly described as follows. First, the parties will agree to basic rules with the mediator. Then, the mediator will examine the background documents supplied by each party. Next, he will present a proposal to the parties based on the issues he has gleaned from the background documents. After this, the parties will respond by presenting their own solutions to the dispute, which the mediator will synthesise into a revised proposal that reflects the needs of both parties. Thereafter, the parties will give their feedback, and this process repeats. If a settlement is reached, the mediator will conclude with a forum to clarify whether the outcome accords with what the parties have agreed to. Like the traditional mediation process, it is not binding and parties are free to turn to the Court to resolve their disputes at any time.⁹⁰

(2) Feasibility?

The prime advantage of e-Mediation for family violence cases is that parties do not need to physically meet.⁹¹ In extreme cases, this greatly minimises any opportunity for physical injury.⁹² Moreover, as online communication is based on written texts, it eliminates coercive body

language, tones and other non-verbal hints that may affect the abused spouse.⁹³ Proponents of e-Mediation also argue that it helps to enhance self-determination and self-empowerment for the abused spouse because the process can help the spouse feel less afraid while talking to the abuser.⁹⁴ In turn, this could facilitate practical discussion, allowing parties to feel confident and calmer.⁹⁵ Additionally, this form of “asynchronous”⁹⁶ communication allows parties to reflect carefully on what they are agreeing to rather than rushing into an agreement. Practically, e-Mediation could also save costs and travelling time.

Nonetheless, e-Mediation is no silver bullet. For one, written messages cannot capture the richness of face-to-face interaction.⁹⁷ It could also lead to misunderstandings.⁹⁸ Participants, who are not adept at social media, may not be able to convey positivity, which could go toward rebuilding the relationship in the traditional mediation context. Furthermore, there are confidentiality issues in conducting mediation through an online medium. Moreover, mediators will also need the requisite training to effectively communicate on a virtual platform⁹⁹ and identify hostile textual communications. It is also easy for a mediator to lose control of the parties in a virtual chatroom¹⁰⁰ due to the nature of instant messaging.

Nonetheless, as e-Mediation continues to develop, it may one day become a unique tool in addressing the problems of mediation in cases of family violence. It should not be discounted but seen as an innovative way to enhance the suite of mediation options available in Singapore.

IV. Conclusion

Exploring mediation in the context of family violence sheds interesting insights into the type of cases that do not lend themselves easily to the format of mediation.¹⁰¹ In this regard, the flexible nature of the mediation process could be tweaked to help parties negotiate on a level playing field. While there may be no one-size-fits-all approach, this paper hopes to raise some options to address the issue of family violence within the mediation process. By enhancing safeguards in the mediation process and treating abused victims with sensitivity, it is hoped that a sweet spot may one day be found between safety and self-determination.