

## Chapter eight

# family Mediation and a therapeutic Approach

### LEARNING OBJECTIVES

Upon successful completion of this chapter, you will be able to:

- Describe how mediation may be applied to various forms of family conflict.
- Identify ways in which legal, psychological, and cultural issues need to be taken into account in family mediation processes.
- Use premediation and caucusing to assess clients, prepare them for mediation, address power and safety issues, and work with their attorneys.
- Incorporate therapeutic strategies and skills from family systems therapy, rational-emotive behavior therapy, narrative therapy, and solution-focused therapy into family mediation processes.
- Determine whether and how to involve children in mediation processes.

In this chapter, we focus on mediating conflict among family members, with particular focus on mediation in separation and divorce situations. This chapter embraces a broad definition of family, including people related by blood, marriage, guardianship, and adoption, as well as people who view themselves as family because they live together, share bonds of intimacy, love one another, or accept responsibility for the care of one another. When working with families, mediators may use a broad range of approaches, including the interest-based, settlement-focused, and transformative models described in earlier chapters. This chapter highlights a therapeutic approach to mediation, not because it is the only or best approach for working with families, but rather because it is an approach that was developed specifically for family mediation.<sup>1</sup> While other models of mediation may be used with families, therapeutic mediation (TpM) deals with particular family dynamics, including the strengths, vulnerabilities,

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<sup>1</sup> Therapeutic mediation approaches have also been used in nonfamily contexts such as victim-offender mediation (Halleivi, 2011); however, these models are not as well developed as therapeutic family mediation.

roles, rules, norms, transitional challenges, and interactive nature of families (Emery, 2011). Whereas a settlement-focused approach emphasizes legal rights and responsibilities of family members, for instance, a TpM focuses on their wishes, needs, roles, and functions as family members. TpM addresses psychological, emotional, and relational issues in order to improve interactions and family functioning (Moore, 2014). TpM helps clients process feelings such as hurt, anger, and frustration. TpM also helps clients renegotiate their relationships, including the rules, roles, and boundaries that govern their family interactions (Irving & Benjamin, 2002/2012). In other words, therapeutic mediators help families manage the turbulence of change (L. Parkinson, 2011), nourishing and relaunching relationships beyond their ruptures instigated by separation (Molgora, Ranieri, & Tamanca, 2014). TpM shares certain strategies with transformative mediation; for instance, both approaches allow for storytelling, validation, relationship healing, and empowering clients to make their own decisions. Therapeutic mediators also use a number of strategies that extend beyond the transformative model: assessing clients, providing individual sessions to help clients address underlying emotional and psychological issues that are affecting each client's ability to mediate, setting ground rules to ensure that parties feel safe, and making use of specific therapeutic techniques within the mediation process. In contrast to transformative mediators, therapeutic mediators tend to take greater control over the mediation process. Therapeutic mediators believe that clients would replicate dysfunctional patterns or communication if mediators simply allow them to determine how to interact during mediation (Kjøs, Tjersland, & Roen, 2014). Therapeutic mediators acknowledge their influence on clients, including the mediation process and their decisions (Fong, 2015). Whereas most mediation models focus on the future, TpM recognizes that it may be important to help clients deal with the past before they can move onto the future. When clients are experiencing acute grief, loss, or anger, they may have difficulty contemplating the future and reconstructing their lives (Emery, 2011).

A mediator could explain TpM to separating clients as follows:

*Separation can be a very challenging time. It is a time of transition and sometimes, great turbulence. It is also a time when parents need to make important decisions about their children, their finances, and their own futures. Mediation is designed to help you construct good decisions for your children and for yourselves. I am not here as a judge or as an attorney, but rather as someone who can help you explore what has been going on and what arrangements you would like to make for the future. If you have been experiencing sadness, anger, frustration, or hurt, we can use mediation to work through these feelings. If you are frustrated with the conflict in your relationship, we can use mediation to learn new ways of communicating, managing conflict, and transforming your relationship. I am here to listen. I am here to offer support. I am here to help you move forward with your lives.*

TpM is most often used by mediators with backgrounds in psychology, social work, family counseling, or mental health. They possess the training, knowledge, and skills to apply specialized therapeutic techniques in a competent manner (Emery, Rowen, & Dinescu, 2014). One of the debates about TpM relates to the boundary between therapy and TpM. Mediators are not supposed to engage in dual relationships with parties, so it would be unethical for a mediator to act as a therapist for the same clients (Association of Family and Conciliation Courts, 2000). Proponents of TpM suggest therapeutic mediators provide mediation in a therapeutic manner, but do not cross the boundary into providing

*The greatest thing in family life is to take a hint when a hint is intended—and not to take a hint when a hint isn't intended.*

—Robert Frost

therapy (Irving & Benjamin, 2002/2012). The main critique of this approach is that the blending of roles may be confusing to clients (E. Katz, 2007). If the mediator delves into relationship or psychological issues from a therapeutic perspective, then could one client exploit the vulnerabilities exposed by the other party during the negotiation and problem-solving stages of mediation? If the mediator is assessing the clients from a therapeutic perspective, could this lead to mediator biases in helping the parties come to agreement? As you read this chapter and engage in the role-plays, consider what it means to be a therapeutic mediator, as well as how to define the appropriate boundaries between TpM and therapy.

In some forms of family mediation, mediators with mental health backgrounds comediate with mediators who have legal, financial, or accounting backgrounds. This allows the mediator with the mental health background to focus on relational issues (e.g., how a child will be co-parented by divorcing parents), while allowing the other mediator to focus on issues of a financial nature (e.g., child support, spousal support, tax and estate planning, and division of property).

This chapter begins with an overview of how mediation may be used in a range of family contexts (Malek & Burgess, 2013). The following section explores specific areas of knowledge that are particularly important for mediation in the context of separation and divorce. The third section describes TpM strategies that may be used in individual meetings with clients and their attorneys. The balance of the chapter describes specific therapeutic models and strategies that can be incorporated in TpM with families, as well as ways to engage children in the mediation process. This family mediation chapter does not delve into the general phases of the mediation process, as this information has already been covered in prior chapters.

## CONTEXTS FOR FAMILY MEDIATION

Mediation has been shown to be helpful in a range of family conflict situations, including separation, divorce, marital conflict, prenuptial arrangements, parent–youth conflict, child protection issues, elder care and guardianship, end-of-life decision making, family business disputes, and estate planning. As this list suggests, family conflict often arises in the context of life transitions such as marriage, separation, death, and movement through adolescence and other stages of the family life cycle. Mediation can be used to help families manage the instability, anxiety, and stress that often accompanies such changes (L. Parkinson, 2011). It can also help families renegotiate their roles and relationships within the family as these transitions occur (Irving & Benjamin, 1995). Note that a divorced family is still a family (Emery, 2011), even though the rules, roles, and relationships may have changed.

### **Separation and Divorce**

The term *family mediation* is mostly commonly associated with mediation for families going through separation and divorce. During separation, families are faced with a number of legal, relational, and emotional tasks and challenges (Taylor, 2010). Legal issues include custody, visitation, child support, alimony, division of family property, and possession of the marital home. *Custody* has two dimensions: *Legal custody* refers to which party(ies) will have the legal authority and responsibility to make major decisions for the children (e.g., education, religion, health decisions); *physical custody* refers to where the children will reside (e.g., primary residence with mother or father). Joint legal custody signifies that both parents will share responsibility for making major decisions. Sole legal custody refers to one parent having responsibility. *Visitation* denotes how time will be shared with the nonresident

parent.<sup>2</sup> Visitation rights also include access to information about the child's health, education, religious upbringing, and other information. Australia, California, and a number of other jurisdictions have replaced legal terms such as custody and visitation with more family friendly terms such as family responsibilities, time sharing, and parenting plans (Emery et al., 2014). This language is intended to promote collaboration and focus on the needs of the child, removing connotations of child custody as a parental right for which each parent needs to fight (Singer, 2014). *Child support* refers to the financial obligations of the non-resident parent to pay for the needs of the child. *Alimony* indicates the financial obligations of a higher-earning person to provide period support payments to a former spouse to help pay for the former spouse's needs.<sup>3</sup> *Division of property* refers to how the former spouses will split their assets, including their home, bank accounts, investments, retirement savings, and personal property. *Possession of the matrimonial home* means the resident spouse continues to live in the family home with the children until a specified time, for instance, when they reach the age of majority or graduate from college.

Dealing with the legal tasks upon separation and divorce is complicated by relational and emotional issues (Nichols, 2013). The parties are transitioning from their former roles as spouses and parents living together as an intact family to their new roles as separated spouses and co-parents living apart. They may be experiencing an array of emotions, ranging from heightened anger, anxiety, and frustration to hurt, disappointment, and loss. Although parties may also experience relief, freedom, and happiness, there is generally some period of dealing with more challenging emotions. Positive readjustment typically takes 2 to 3 years following separation (Cleak, Schofield, & Bickerdike, 2014). Family mediation is designed to help parties manage the legal, relational, and emotional issues that arise in the separation process. Specifically, mediation has been found to help separating families

- develop clear, detailed, personalized, and balanced arrangements that promote the well-being of all parties following divorce,
- follow through on agreements without needing to go to court (thus, reducing legal costs),
- reduce parental conflict and enhance parental collaboration, and
- enhance involvement of the nonresident parent (often the father) following divorce (Baitar et al., 2013; Emery et al., 2014; Lowenstein, 2009; Molgora et al., 2014; Pruett, Ebling, & Cowan, 2013).

The research evidence is mixed, at best, on whether mediation contributes to the long-term emotional and psychological well-being of the children and parents (Emery, 2011; Pruett et al., 2013). One of the strongest predictors of post-separation adjustment for children is the level of conflict between their parents. So, to the extent that mediation can lower conflict, children should benefit. Certainly, there are many factors affecting the outcomes of family mediation, including which model of mediation is used, the experience and skills of the mediator, and the level of conflict at the time the parties enter mediation (Lowenstein, 2009). Research evaluating the effectiveness of mediation often compares the experiences

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<sup>2</sup> *Resident parent* refers to the parent with whom the children have their primary residence. Sometimes, this parent is called the custodial parent. The other parent may be called a *nonresident parent* or *noncustodial parent*. Unfortunately, these labels have negative connotations, suggesting the custodial parent "has possession" of the child, or the nonresident parent is somehow less important than the other parent. In practice, it is preferable to use the parents' names (e.g., Mary, Frank, Mom, Dad) rather than these labels.

<sup>3</sup> The paying spouse could also pay a one-time lump sum in lieu of ongoing support payments.

of parties going through mediation with parties going through court. The financial and emotional costs of going through a polarizing court trial are typically much higher than those in mediation (Lowenstein, 2009). It is important to note, however, that relatively few separation and divorce cases make it to the trial stage. Most often, attorneys help the parties negotiate a solution (Ferguson, 2013). Also, administrative judges in the family court system may facilitate agreement through settlement conferences.

Although family mediation frequently comprises parents who were married or lived together, family mediation could include parents who have never married or lived together. Family mediation may also involve same-gender couples, stepparents, grandparents, siblings, and other family members seeking custody or visitation (Emery et al., 2014). In addition, parties seeking custody or access may include surrogate mothers, egg donors, sperm donors, and family members with no genetic ties (DiFonzo & Stern, 2013).

The legal and psychological issues may vary depending on who is involved in the mediation process. In some jurisdictions, for instance, grandparents have no legal right to access or visitation, though it may be in the child's best interest for grandparents to have some role in their lives. Similarly, a stepparent who helps raise a child but has not legally adopted him may be at a legal disadvantage in relation to the biological parents' rights. Mediators may include people in the mediation process whether they have custodial or visitation rights recognized by relevant family laws. Mediation may be based on interests and relationships rather than that extend beyond basic legal rights.

### **Marital Conflict**

Whereas divorce mediation is designed to help couples separate, mediation of marital conflict can be used to help couples remain together (E. Katz, 2007). When couples seek assistance for marital relations, they typically employ marriage therapists rather than mediators. Such therapists may use mediative strategies (i.e., as emergent mediators rather than as formal mediators). Consider a couple that disagrees about how to raise their children, particularly in terms of setting limits and enforcing them through various forms of discipline. A marriage therapist could teach the couple conflict resolution skills and model them by helping them negotiate more effectively. For instance, the mediator could help them use I-statements and listen to each other's views about parenting. The mediator could also help them identify underlying interests: "When all is said and done, what are the most important lessons that you want your children to learn?" Blending a mediative approach in therapy, family counselors can help couples reflect on their emotional experiences, develop insights, strengthen their spousal relationship, improve communications, and manage particular conflicts more effectively (Baitar, Buysse, Brondeel, De Mol, & Rober, 2012). A mediative approach to marital therapy acknowledges conflict is a normal part of marriage. The purpose of the mediative interventions is not to eliminate conflict, but rather to transform the way that couples engage with it. Mediation approaches can strengthen the couple's capacity for decision making, helping them appreciate each other and their reducing stress in dealing with conflict (Folger et al., 2010).

### **Prenuptial and Cohabitation Arrangements**

Couples may use prenuptial or cohabitation agreements to make decisions about child custody, visitation, support, alimony, and division of property in the event of separation or divorce. A primary advantage of entering such an agreement prior to or during marriage is that the parties have a positive, loving relationship. They are not experiencing the stress, anger, frustration, hurt, or sense of loss that frequently accompanies separation. By

dealing with important decisions while relations are good, couples can pre-empt or minimize future conflict. About 3 percent of American couples have a prenuptial agreement (Kennedy, 2014). Requests for prenuptial agreements are often initiated by a spouse with higher wealth or income, wanting to protect his or her assets, or ensuring that any personal or family business is not put at risk by the possibility of divorce. Couples who do not marry may decide to enter cohabitation agreements because the laws do not provide them with the same protections that legally married spouses have. Although both prenuptial and cohabitation agreements can be legally enforceable, they may be challenged on a number of bases. First, a contract may be nullified due to coercion, misrepresentation, fraud, or withholding information. Prenuptial and cohabitation agreements are more likely to be enforced if each spouse or partner has independent legal advice. Independent legal advice ensures that both parties understand the legal ramifications of the agreement, as well as their rights under the law (Kennedy, 2014). Further, courts are not bound by the terms of a prenuptial or cohabitation agreement in relation to child custody, visitation, and support. The court may consider the terms of any agreement, but ultimately, a court's decision is based on the child's best interests. Prenuptial and cohabitation agreements may be useful even if certain terms are not legally enforceable. Ideally, both spouses feel the agreement is just and balanced, making them more likely to abide by the agreement without challenging it in court.

Although spouses can enter prenuptial and cohabitation agreements without the aid of a mediator, mediators can help clients work through emotionally challenges and ensure that they are considering all relevant issues and choices. Consider how you might feel if your fiancé simply presented you with a prenuptial agreement, just days before your wedding, and said that you needed to sign it. Mediators can help clients process feelings about the prenuptial agreement, gaining insight into their questions, fears, and motivations. Mediators can provide a process that is collaborative, avoiding adversarial dispositions that might accompany lawyer-led negotiations. Mediators can also make sure that both clients feel the process is fair and that both have sufficient input into the agreement, reducing the chances that one spouse will challenge the enforceability of the agreement. Mediators can help clients develop agreements on sensitive family matters that are not intended to be enforceable in court, for instance, how many children they plan to have, how they will share responsibility for childcare, where they will live, and how they will communicate with deal with their in-laws. Some couples use prenuptial agreements to identify how they will use social media and to limit what they may post online (to ensure privacy).

### **Parent–Youth Conflict**

Mediation can be used to help families manage intergenerational issues including parent–youth conflicts. Adolescence is often a challenging period of transition for families. As children mature into adolescents and young adults, their needs and expectations change. Parents may have difficulties managing these changes, particularly with respect to issues such as curfews, house rules, chores, school attendance, homework, choice of friends, dating, and drug and alcohol use. Mediation can be used to help parents and youths renegotiate their family roles, rules, and expectations. Mediation is particularly helpful in enhancing communication and supporting family decision making (Eisele, 2003). Mediators can help parents and adolescents express their concerns without blame or contempt, as well as teaching them methods of listening, validating each other's concerns, and creative problem solving. Consider, for instance, a youth who rebels against having a 9 pm curfew on the weekends. When the mediator explores whether the issue is just about the “right time” for a curfew, the family discovers that the underlying issues relate to trust and safety. By focusing on these issues, they can identify ways that the youth foster trust and the parents

can ensure their child's safety. For instance, the youth might agree to maintain cellphone contact and allow the parents to *check in* with periodic text messages. Some parent–youth mediation programs derive referrals from the juvenile justice system; rather than prosecuting youths for juvenile delinquency or status offenses,<sup>4</sup> the police, judges, or probation officers refer parents and youths to mediation to resolve issues within the family milieu (Bush, Hershman, Thaler, & Vitkovich, 2009).

### Child Protection Issues

In child protection mediation,<sup>5</sup> parents, children, child protection workers, and other stakeholders may be brought together to deal with alleged or substantiated child protection issues. The purpose of child protection mediation is not to determine whether abuse, neglect, or abandonment has occurred, but rather to develop a plan to ensure that children's safety, stability, and welfare are protected into the future (Aguiniga et al., 2015). Conflicts may arise at various levels. Initially, conflict between the parents and child protection worker may center on disputes about whether certain forms of maltreatment have occurred, or what is necessary to prevent future maltreatment. When child protection allegations are raised, parents often feel defensive. Child protection mediation can be used to help engage parents and protection workers, building trust, de-emphasizing blame, focusing on the future, and fostering collaboration (Giovannucci & Largent, 2013). Conflict may also arise between the parents and foster parents or group home workers, including disputes over how and when the parents may communicate or meet with their children while they are in care. Children may have concerns about their treatment while in care (quality of care and placement stability), as well as questions about how they may be reunited with their parents. Children's voices may be brought into the mediation process directly, or through the aid of an advocate such as a guardian ad litem or court-appointed special advocate.

Research suggests child protection mediation offers a number of benefits, such as

- empowering parents and children with an opportunity to be heard in a fair and balanced process;
- resolving cases without the need to go to court, facilitating permanency planning in a timelier manner and reducing adversarial relations between families and the child protection system;
- engaging parents, extended family members, friends, and community services to participate more fully in the planning and care of children in need of protection; and
- improving parental compliance with treatment plans (Giovannucci & Largent, 2013).

The benefits of mediation vary with the model of mediation used. Whereas a settlement-oriented model focuses on settling cases so they do not need to go to court, therapeutic and transformative models focus on enhancing communication and fostering better working relationships between families and the child protection system. Mediation helps level the power differential, as child protection workers may be less likely to exert power with the presence of a neutral third party. During mediation, mediators can ask protection workers to use clear language to explain agency rules, parent rights, and options for resolving

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<sup>4</sup> Juvenile delinquency offenses are criminal charges, such as theft or assault, which may be made against people of all ages. Status offenses are noncriminal charges, such as breaching curfew or missing school, which can only be made against minors (people under age 18).

<sup>5</sup> Child protection mediation is sometimes called dependency mediation.

cases (Patterson, 2009). Mediators can also help parents and protection workers develop and articulate creative treatment plans focusing on the child's best interests. Note that the concept of confidentiality is different in child protection mediation than in other contexts, given the potential vulnerability of the children. Protection workers are mandated to protect children from maltreatment, so they may need to act on information learned in the mediation process. Thus, parents know that information shared in mediation could be used in future court proceedings. Still, the mediator encourages both parties to share information in mediation, as open communication in mediation may prevent cases from having to go to court. To the extent that the parties trust each other in mediation, they can actually safeguard the privacy of the family.

### **Elder Care and Guardianship**

Elder care and guardianship mediation may be used when family members have concerns about an elder's mental and physical abilities to care for herself (Wall & Spira, 2012). Ideally, the elder person has mental capacity at the time of mediation and the family can jointly plan for the elder person's future care in a non-crisis situation. Often, however, the elder's mental capacity is in question or a crisis situation has arisen, for instance, the elder has fallen and broken a hip, and family members are having a conflict regarding who is responsible and how they will care for her. If the elder has mental capacity, the elder can represent herself (with or without the aid of an attorney). If the elder has diminished mental capacity, then an advocate may participate on the elder's behalf. Issues that may be handled in mediation include decisions about healthcare, end-of-life decision making,<sup>6</sup> funeral planning, financial concerns, estate planning, religious preferences, living arrangements, driving and transportation, and allegations of elder abuse or neglect (Barry, 2015; Braun, 2012; Bagshaw, Adams, Zannettino, & Wendt, 2015). Families may have conflicts over whether an elder family member needs guardianship, as well as what form of guardianship or care the elder needs (Wall & Spira, 2012). Although guardianship mediation is often initiated because of legal issues, such as who will be legally responsible to make decisions for the elder person (Murphy & Rubinson, 2009), mediation may also deal with the underlying causes of family conflict (e.g., sibling rivalry, financial stress, elder abuse, or differences in values). Elder care mediation could also include professional or paraprofessional caregivers, particularly when there are concerns about the quality of institutional or homecare providers. Premediation is particularly important in elder care cases, as the mediator needs to determine whether the elder person has cognitive or social challenges that necessitate having an advocate or other accommodations to the mediation process. If there is conflict over whether the elder person has sufficient decision-making capacity, the mediator could refer the clients to a mental health specialist to provide a cognitive capacity assessment (Barry, 2015). Further, the mediator should assess whether mediation can be offered in a safe and fair manner, given the potential for issues such as elder abuse and coercion (Bagshaw et al., 2015; Braun, 2012). In addition to ensuring the elder person has an advocate, mediators can enhance participation of elders by slowing down the process, holding sessions during a time of day when the elder is best able to participate, ensuring the elder person understands the process, and providing individual sessions to allow that elder to express concerns that may be difficult to discuss in joint sessions.

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<sup>6</sup> For instance, decisions about whether the elder will be maintained on feeding tubes, respiratory aids, or other life supports, as well as decisions about the timing and manner of dying (in jurisdictions that permit euthanasia) (Barsky, 2010; Braun, 2012).

Potential advantages of elder mediation include

- empowering elders and family members to make decisions for themselves rather than giving this responsibility to courts;
- reducing family conflict;
- teaching elders, family members, and care providers how to resolve problems jointly;
- developing individualized plans to meet the needs and interests of the elders, family members, and care providers;
- resolving issues in a less costly and more collaborative manner than in courts (Bagshaw et al., 2015; A. Crampton, 2013).

### **End-of-Life**

End-of-life mediation can be particularly challenging because it raises a complex combination of legal, ethical, moral, religious, and emotional issues (Murphy & Rubinson, 2009). Consider a family that is demanding a particular surgical treatment for an elder parent; the physicians, hospital ethics committee, and insurance company are refusing to comply with their wishes because they view treatment as “futile.” Given religious beliefs and emotional issues, family members may not be ready to accede to medical advice. They feel compelled to do everything they can to help their parent survive. Given constraints of what is possible medically and legally, the choices may be more limited than in other contexts of mediation. Under these circumstances, the greatest value of mediation may be in its capacity to facilitate understanding, respect, and closure, rather than to facilitate creative problem solving (Bierlein, 2007). Thus, mediation may have a therapeutic effect, helping family members come to terms with the patient’s condition and what may or may not be medically possible. Mediation may also be used to help family members consider quality-of-life issues, including palliative care, rather than simply focusing on whether to provide curative or life-sustaining treatment (Barsky, 2010).

### **Family Business Disputes and Estate Planning**

In terms of family business disputes and estate planning, mediation can be used in both preventative and responsive manners. As a preventative process, mediation can bring family members together to discuss what they would like to see happen in the event of a particular person’s death, for instance, the primary owner or manager of the family business, or elder parents who own a vacation home, jewelry, and other property that could become the focus of a dispute after they pass away. Mediators may invite parties to consult with attorneys, financial advisors, or accountants to help them make good decisions from legal, business, and tax perspectives. Many people do not like talking about or planning for death, whether it is their own death or the death of a family member. However, using mediation to make succession plans for a family business or to determine what should happen to significant family property can pre-empt conflict, strengthen family relationships, and foster a smooth transition of management and ownership of family businesses (Baker, Lutringer, & Caras, 2015). Mediation can also help ensure that the intent of a person who creates a will is preserved (P. Fisher, 2010). If family members are involved in estate planning and understand the intent of the testator, then they are more likely to follow the will, rather than challenge it. When helping clients determine whether they want to mediate estate planning issues, you might ask them, “When you are thinking about what you’d like your children to inherit, do you want to leave them a messy conflict that they need to manage while they are still in mourning, or would you rather provide them a fair, well-planned transition that promotes

good will and peaceful family relations?” Mediators can also help clients draft ethical wills, statements about the morals, values, or blessings that they want to pass along to their children (Aging with Dignity, n.d.).

If families experience conflict after the testator has died, mediation can be used to help family members resolve issues without going to court (Shell, 2013). Sometimes, the terms of a will are general or unclear (e.g., “personal property to be divided equally”). Other times, a family member may question whether the terms of a will were changed under coercion or without sufficient mental capacity of the testator. Conflicts may also occur between co-executors of the estate as they make decisions about division of the property or how to invest and preserve it. Mediation saves families the costs of going to court, while also affording them a process to help manage the emotional issues arising after the loss of a loved one. When dealing with estate issues, adult siblings may re-enact sibling rivalries from when they were young children. Disputes often arise over matters that have more symbolic value rather than financial worth (Shell, 2013). Mediators can help parties reflect on the values and beliefs that their parents wanted to pass along, beyond the specific items and financial value of their parents’ estate. One of mediation’s key advantages is that families can deal with their issues in a confidential forum, avoiding the embarrassment of a public court hearing and preventing business competitors from learning private information about the family business (Murphy & Rubinson, 2009).

### **SUBSTANTIVE KNOWLEDGE BASE FOR FAMILY MEDIATORS**

In some contexts of practice, mediators do not necessarily require knowledge of the substantive issues they are mediating. For instance, a community mediator who is handling a neighbor–neighbor dispute over a barking dog does not need an intimate knowledge of what causes dogs to bark or what laws govern this type of dispute. The mediator needs to be an expert in the mediation process rather than the substance of the dispute. If the parties require information about the cause of barking or the laws pertaining to nuisance and noise ordinances, the mediator can help them gain access to this information. In divorce and other realms of family mediation, however, knowledge of substantive information pertaining to the conflict is very important. Given the vital legal ramifications of divorce, child protection, juvenile justice, and other forms of family mediation, mediators should know about the legal frameworks in which these conflicts arise and can be resolved. Consider a mediator who facilitates an agreement whereby the parents trade visitation time with the child for lower child support payments. This agreement may not be in the child’s best interests and could be overturned by the courts. Although mediators are not responsible for providing legal advice, it would be helpful for the mediator to know enough about the legal framework to raise questions, invite the parents to access legal advice, or help them determine whether their proposed agreement is in the child’s best interests. Similarly, it is helpful for mediators to have some knowledge about the emotional issues that parents experience during the separation process. Although mediators do not provide therapy, it would be therapeutic for mediators to demonstrate understanding about the issues that the parents are facing and to provide information about ways that other separating families have dealt with such issues.

The types and depth of information needed by family mediators depend on the model of mediation they are using. Evaluative mediators who intend to provide families with evaluations of how a judge would determine spousal support, for instance, would require thorough knowledge of the legislation, regulations, case law, and relevant precedents regarding spousal support. For an interest-based mediator helping families develop a parenting plan, it would be valuable to know creative parenting options that other families have used. For therapeutic mediators, it would be particularly helpful to have a working knowledge of family systems, patterns of family

communication, and power dynamics within families. Transformative mediators use a client-centered approach, meaning that they trust clients to be experts in their own lives and empower them to make their own decisions. Rather than providing information or expertise to families, they may assist families in gathering information that they wish to have. Thus, it may be helpful for transformative mediators to know trustworthy sources of information.

In most jurisdictions, there is no absolute requirement for a person to be licensed or accredited in order to provide family mediation. However, accreditation is generally required for mediators who want to handle court-referred mediations. Further, most attorneys will not refer clients to mediation unless the mediator is accredited by a state-recognized authority. Each jurisdiction has its own laws defining competence and qualifications to be an accredited family mediator (e.g., the number of hours of training time, supervised practice, and, sometimes, proof of competence through testing or video-recorded role-plays). Standard II-A of the Association of Family and Conciliation Courts (2000) Model Standards of Practice for Family and Divorce Mediation<sup>7</sup> identifies three areas of substantive knowledge required for family mediators:

- knowledge of family law
- knowledge of the effect of family conflict on parents, children, and other participants, including knowledge of child development, domestic abuse, and child abuse and neglect
- knowledge of the impact of culture and diversity

The following sections provide examples of knowledge pertaining to each of these substantive areas. If you intend to practice as an accredited family mediator, you will need to fulfill the requirements of your state's accreditation laws, which typically includes more in-depth training in each of these substantive areas. People with legal backgrounds may already be familiar with family laws. People with social work and mental health backgrounds may already be familiar with many of the psychosocial and cultural issues pertaining to separation and divorce.

### **Legal Frameworks: Laws and Processes/Systems**

This section provides an overview of laws that are pertinent to family mediators. Because laws vary from state to state (and may be amended from time to time), it is important to receive training specific to your jurisdiction and to engage in continuing education to ensure that your knowledge is kept up to date. As noted earlier, family laws cover child custody, visitation, child support, alimony, division of property, and possession of the marital home. Family mediators should also be cognizant of child protection laws, particularly the duty to report reasonable suspicions of child abuse or neglect. In addition, mediators should be aware of laws protecting the confidentiality and privilege of mediation and related processes (Simon & Willick, 2016). In general, laws governing court-referred mediation establish privilege, meaning that information shared in mediation cannot be used in future court processes. These provisions are designed to encourage clients to be open and honest in mediation, without fear that anything they share can be used in court (i.e., the mediator

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<sup>7</sup> Note that the Association of Family and Conciliation Courts (2000), Family Mediation Canada (n.d.), Conflict Resolution Education Connection (n.d.), and Academy of Professional Family Mediators (2014) are voluntary professional associations. Their codes of ethics, professional guidelines, or standards of practice are not legally required for all practitioners, although states and provinces may incorporate these or similar provisions into their regulatory laws.

may not be compelled to testify in court unless all parties waive their right to privilege). Family mediators should also define confidentiality and its limits in the agreement to mediate, so the parties are clearly informed about these expectations. If there are no laws protecting the privilege (for instance, because the case is not court-referred or because the mediator is not accredited), then confidentiality provisions in the agreement to mediate may protect the privacy of the information shared by parties in mediation; however, courts could overrule the confidentiality provisions in such contracts.

The family laws in most jurisdictions suggest that decisions about child custody and visitation should be made on the basis of the child's best interests (Murphy & Rubinson, 2009). Family laws typically identify factors to be considered when determining the best interests of the child, for instance, the child's age and developmental needs, each parent's capacity to provide for these needs, the child's wishes (depending on the age and ability of the child to express preferences), the length of time the child has lived in a stable environment, domestic violence, the emotional ties between the child and each parent, and the willingness of the parent to encourage the child to maintain a close relationship with the other parent. The statutes do not prioritize the factors, leaving judges with broad discretion on how to apply them. For a listing of family law statutes and comparisons between states, see the American Bar Association (n.d.) website ([http://www.americanbar.org/groups/family\\_law/resources/family\\_law\\_in\\_the\\_50\\_states.html](http://www.americanbar.org/groups/family_law/resources/family_law_in_the_50_states.html)). Courts may also consider additional factors not specifically listed in the legislation. Some statutes identify particular factors that may not be considered, for instance, prohibitions against assuming maternal or paternal preference, or prohibitions against determining best interests based on the socioeconomic status of either parent. If parents are focusing on their own needs and interests, mediators may invite them to focus on the best interests of the child, including the factors that the laws say should be considered. Mediators can also help family members reframe custody and visitation as parenting plans, focusing on practical issues such as who will be responsible for making which decisions, where will the child's primary residence be, and how will the parents share time with the child (Singer, 2014). Table 8.1 includes a comprehensive list of topics that may be included in parenting plans. Some courts have particular formats and topics that need to be included in parenting plans. For further information on parenting plan topics and formats, see the Association of Family and Conciliation Courts website (<http://www.afccnet.org/Resource-Center/Resources-for-Professionals>).

1. Child's primary Residence	2. time-sharing schedule (regular)
3. primary Decision-Making Responsibility (for education, health, religion, after-school activities, summer activities, etc.)	4. time-sharing (holidays, vacations, birthdays, and other special occasions)
5. Authorized Caregivers (extended family, babysitters, other)	6. parenting guidelines (curfews, house rules, expectations of child, manner of discipline)
7. Communication between parents	8. Access to Information about Child
9. Authorization for travel with Child	10. Addressing special Needs of Child
11. Dealing with emergency situations	12. Addressing Changes (and preferred methods of resolving conflict)

Although some jurisdictions give preference to joint custody (Brinig, Frederich, & Drozd, 2014), custodial decisions should ultimately be made on the basis of each child's particular needs and the parents' abilities to meet these needs. If parents seem to have unreasonable expectations about joint or sole custody, mediators could refer them to their attorneys for advice about whether a court would be more likely to order joint or sole custody. For instance, in high-conflict situations, judges may be reluctant to order joint legal custody because such an arrangement could increase the conflict and put the child at greater psychological risk. When a child has been living primarily with one parent for an extended period, judges may be reluctant to upset the status quo. To avoid taking sides, mediators can refer clients to their attorneys, rather than directly providing this information to the clients. Mediators also need to be careful that they are not overstepping their professional roles by providing legal advice. Mediators may invite families to consider creative options for parenting plans; for instance, one parent may assume primary responsibility for healthcare, the other parent may assume primary responsibility for education and after-school activities, and they may share responsibility for religious upbringing.

When cases go to court, judges often identify which parent or parents will have custody and which parent will have visitation, without going into a detailed parenting plan. Mediation allows parents to go into greater detail, covering topics such as how the parents will share holidays and special occasions with the child, guidelines for household chores and bedtimes, dietary issues, details for dropping off or picking up the child from the other parent, strategies for parental communication, and values or morals that the parents agree to model for the children. Parents can be very creative in their parenting plans.

Most jurisdictions have child support guidelines that define minimum child support payments; parents may agree to higher amounts depending on the child's needs and the parents' priorities (Ehrlich, 2013). Mediators may ask the parties (with the assistance of their attorneys) to share financial information and make child support calculations. Mediators should be aware of the formulas used to calculate support payments. Some state's guidelines calculate support based on the nonresident parent's income; others calculate support based on a sharing of both parent's income. Calculations can be complicated by factors such as shared physical custody, childcare costs, nonstandard medical costs, costs of post-secondary education, and tax considerations (e.g., which parent may claim a dependency exemption or child tax credit). Various statutes also define circumstances in which courts may deviate from the usual formulas for child support (e.g., higher payments to support a child with special needs). For a link to the guidelines in your state, see the National Conference of State Legislatures (2016) website (<http://www.ncsl.org/research/human-services/guideline-models-by-state.aspx>). If a mediator does not have a firm grasp of child support guidelines, then it may be better to have the clients' lawyers negotiate this issue. In addition to child support payments, parents may agree to pay directly for particular items (e.g., winter clothes, summer camp, or dental insurance). Child support payments are typically easier to enforce, as wages can be garnished if the nonresident parent falls behind on support payments. Some mediators encourage parents to mediate based on a "cost-sharing approach" rather than based on the parents' incomes. Under this approach, the parents develop a budget for the child's needs and then determine how each parent will contribute to the child's needs. By framing child support in terms of the child's needs, the problem-solving process fosters greater parental cooperation (Murphy & Rubinson, 2009). Parents who collaborate well could establish a child's checking account, where both parents contribute to the account each month and each parent has authority to use money from that account for expenses directly related to the child's needs. The child's budget could be reviewed periodically to ensure that the account has sufficient funds and that the child's needs are being met. Although a court

could overturn a child support agreement that offers lower support than that required under the state's child support guidelines, a court may be hesitant to do so if both parents are content with the agreement. After all, aren't the parents in the best position to determine what is in the child's best interests?

The purpose of alimony is to balance the difference in earning capacities between divorcing spouses, particularly where one spouse has given up earning capacity to care for the children and family during the marriage. Determining alimony or spousal support can be even more complicated than calculating child support. Courts determine alimony based on a number of factors, for instance, the income levels of each spouse, the length of time they were married, education, employability, the earning capacity of each spouse, the age and health of each spouse, tax consequences, contributions of each spouse to the marriage, the standard of living established during the marriage, and the income, financial resources, and expenses of each spouse (including housing, food, healthcare, etc.) (Ehrlich, 2013). The weighting of these factors is not prescribed by law, giving judges broad discretion in determining alimony. Unfortunately, this broad discretion leads to lack of coherence and predictability of alimony decisions. The statutes and court decisions governing spousal support vary from state to state. For instance, some states still allow marital fault to be considered. Although online alimony calculators can be used to estimate support, courts (and families) are not bound by these estimates.

Mediators who help clients with alimony issues may start by having each client complete budgets and financial disclosure statements, often with the assistance of their attorneys. Mediators can emphasize that alimony agreements may be overturned if either spouse does not fully and accurately disclose their income and other financial information (business interests, investments, properties, etc.). Some states have limitations on the number of years that alimony can be ordered. These limitations may be based on the length of the marriage and, or the earning capacity of the receiving spouse. Sometimes, a portion of alimony is provided to "rehabilitate" the receiving spouse, supplying additional financial support so the spouse can receive education, retraining, or certification to increase earning capacity. If a spouse stayed home during marriage to care for young children, alimony may be provided to ensure that this arrangement can continue until the children no longer require a stay-at-home parent. If a spouse remarries, alimony may stop, although this depends on the type of alimony (for instance, rehabilitative alimony may continue to allow the spouse complete retraining or education). Most often, alimony is paid on a periodic basis, for instance, monthly or biweekly to mirror the schedule by which paying spouse receives his salary. Some clients agree to a one-time, lump-sum payment in lieu of periodic support. A one-time payment allows the parties to put the issue of spousal support to rest; if either spouse's employment or financial needs change, they do not have a right to renegotiate spousal support. Although some states allow marital fault (infidelity, abuse, and other causes of marital breakdown) to be considered, there is a trend toward not considering marital fault as a criterion for alimony. Where family laws do allow fault to be considered, mediators can focus the parties on their financial needs and ability to pay, moving them away from the blame game and a debate over who was responsible for the divorce. Mediators should note that some jurisdictions do not recognize common law marriage, civil unions, or domestic partnerships, so nonmarried partners may not be entitled to alimony or spousal support (Ehrlich, 2013).

*Division of family property* laws also vary. Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin use a community property approach, whereby all property and debts acquired during marriage are divided equally (50-50) regardless of who holds legal title or ownership of the property during marriage. Property and debts acquired by each person prior to marriage or after the date of separation remain

with that person. If a person owns a business or stocks coming into the marriage, the increase in value during the marriage would be divided equally. Inheritances received during marriage are also excluded from division. For states without community property laws, property is divided equitably rather than equally (Ehrlich, 2013). When determining what is fair or equitable, courts may consider factors such as the financial contributions of each spouse, the value of a spouse staying home to care for the children and family, and the earning capacity of each spouse. Although a court may decide that a 50-50 split is fair, an equitable distribution could range to a 60-40 or even a 70-30 split.

Generally, courts cannot consider adultery, domestic violence, or other so-called marital misconduct when determining division of property (Ehrlich, 2013). Family laws typically require full disclosure of each party's assets, debts, and income. If a spouse tries to hide assets or inflate debts, the court may take such factors into consideration when determining an appropriate division of property. Spouses may decide how to divide their family property as they wish, regardless of what the family law statutes say; whereas courts retain the right to alter child custody and support to meet the child's best interests, courts usually defer to agreements on division of property (unless there is evidence of coercion, fraud, or financial misrepresentations). Identifying which property is subject to division may require legal advice. In addition, valuing property may require assistance from property appraisers, business valuers, and actuaries (e.g., to calculate the value of social security, pensions, insurance, or other complex investments). Often, family mediators with mental health backgrounds focus on parenting and relational issues, leaving the financial issues to professionals with legal and/or financial backgrounds.

Generally, the resident (or custodial) parent has a right to stay in the marital home with the children until they reach the age of majority. When parents separate, they face additional costs related to having to maintain two homes rather than one. Keeping the matrimonial home may not be financially feasible, so the parents may need to consider selling the matrimonial home and moving into less expensive housing (Ehrlich, 2013). Mediators can help families with creative solutions, for instance, renting the basement to help pay for housing expenses, living together with extended family members (permanently or temporarily), or waiting to sell the matrimonial home until market prices improve. While financial factors need to be considered, mediators can also help parents focus on their child's best interests, for instance, being able to remain in the same neighborhood to minimize the disruptions of divorce (allowing the child to remain in the same school and get together with neighborhood friends). One of the most challenging situations arises when the resident parent wants to move away with the child. There may be very good reasons for the parent's wish to move; however, moving makes it more challenging for the nonresident parent to have meaningful time together with the child. Again, mediators can help parents develop creative solutions, for instance, using video conferencing for the nonresident parent to do homework or read to the child (LaMarca, 2012), using holidays and vacations to enhance the time shared by the child and nonresident parent, and focusing on the quality of time together rather than just the amount of time.

When spouses petition for divorce they are typically required to submit a parenting plan and, or meet with a mediator to help them develop one (Arizona Supreme Court, 2009). Courts require decisions on custody and access prior to granting final orders for divorce. Some families may need temporary court orders or agreements before they are able to reach a more permanent solution. When mediators help clients develop agreements, the clients may need to consult their attorneys to determine whether the attorneys should draft a legally binding separation agreement, or whether the terms of the mediated agreement should be incorporated into a court order. While separation agreements and court orders are both legally enforceable, there may be legal advantages to one approach versus

the other (e.g., the relative ease of enforcing a court order for child support if one spouse falls behind on payments).

When filing for divorce, spouses identify their grounds for divorce. In states that allow fault-based grounds, they may identify adultery, abuse, or other specified marital misconduct as the reason for divorce. In most states, spouses can declare “irreconcilable differences” as the grounds for divorce (Ehrlich, 2013). Using non-fault grounds for divorce removes stigma and blame, encouraging spouses to focus on a positive post-divorce relationship as coparents rather than remaining stuck in past problems. Once a divorce decree is granted, the divorce is final. Division of property cannot be revisited unless there is proof of fraud, misrepresentation, or coercion. Custody, visitation, child support, and spousal support can be reviewed by the court, particularly when there are *material changes* in circumstances. For child custody, material changes could include one parent developing a substance use disorder, or the child experiencing severe anxiety as a result of ongoing conflict between the parents. In relation to child support, the child might need orthodontic work or other medical attention. In terms of spousal support, one party might lose a job or get married. Mediation may be a useful alternative for helping parties deal with post-divorce issues and changes. Sometimes, parties can make changes without having to return to court; if they need to return to court, mediators can help them develop terms that could be submitted to the judge for an order on consent of the parties.

At all stages of mediation, mediators should ensure that clients have access to independent legal advice. To avoid conflicts of interest, mediators should not refer clients to particular attorneys, although they can help them access attorneys through lawyer referral services or lists of mediation-friendly attorneys (e.g., attorneys who are certified to practice collaborative law). Sometimes, clients cannot afford attorneys, so mediators could provide information about legal aid or sliding fee services (if available). If clients refuse legal advice and want to act on their own behalf (“pro se”), mediators should document that they suggested legal advice and have the client sign a section of the agreement to mediate, indicating they declined to have legal advice. Unfortunately, many people forgo legal advice simply because they cannot afford legal fees and cannot access free legal services (Murphy & Rubinson, 2009). In some instances, the issues in mediation may not require legal advice—for instance, if the parties are negotiating a cooperative parenting plan. If there are complex legal issues, such as division of property where there is a complicated estate, mediators may decide not to mediate unless both parties have legal counsel.

In addition to laws governing separation and divorce, mediators should consider administrative rules governing mediation in their state. For cases referred by the court, there may be a limit on the number of sessions, limits on the issues that may be addressed in mediation (parenting issues vs. financial), information that the mediator must share with the parties during the orientation to mediation, and particular forms that the mediator must use (e.g., financial disclosure forms, agreement to mediate, or final agreement forms).

## Psychosocial Issues

Mediators benefit from having a sound understanding of psychosocial issues that parents and children experience during the processes of separation and divorce. When people marry, their entire identity becomes invested in their roles as husband and wife. As wedding vows typically express, marriage is about love, honor, and mutual responsibility for the rest of their lives. When marriages start to falter or fail, spouses often feel a mix of guilt, depression, distress, and intimacy issues (Frisby, Booth-Butterfield, Dillow, Martin, & Weber, 2012). Stress may be exacerbated by issues such as drug and alcohol problems, financial troubles, domestic violence, or infidelity. There are a broad range of reactions to divorce,

with some spouses experiencing a sense of freedom, growth, resilience, and relief. Other spouses have much greater difficulty moving on. The experience of divorce may lead to lower self-esteem and confidence, anxiety and mistrust around relationships, preoccupation with what others think, and heightened anger or depression (Frisby et al., 2012). By understanding the various experiences that divorcing spouses experience, mediators can tune in and offer empathy. Therapeutic mediators may also use therapeutic techniques (as described in the “Therapeutic Strategies and Skills” section) to assist spouses with post-separation adjustment issues. They may also help clients renegotiate their relationships as co-parents rather than as spouses.

While a full exploration of psychosocial issues related to divorce is beyond the scope of this chapter, the following sections highlight psychosocial issues related to the best interests of the child, high-conflict divorce situations, and community resources and supports.<sup>8</sup>

### ***Best Interests of the Child***

Judges, mental health professionals, child custody evaluators, social scientists, and other experts have long struggled with how to define and assess what is in a child’s best interests. Each child is unique. The circumstances of separation, divorce, and the parents are also unique. Accordingly, it would be naïve to think that there is one best parenting plan or set of arrangements for all children following separation and divorce. Still, it is helpful for mediators to be familiar with the typical challenges and opportunities for children who are dealing with their parents’ divorce, not to play expert and tell parents what to do, but rather to help the mediator raise questions that the parents may consider as they construct a parenting plan designed to meet the best interests of their child. Mediators view parents as experts in their own lives, including the capacity to know what is best for their child.

Research suggests that a key predictor of a child’s post-separation adjustment is the level of conflict between the parents (Allen, 2014; Viry, 2014). When children are exposed to high interparent conflict they are more likely to experience anxiety and other emotional problems, difficulty establishing positive relationships, troubles at school, and conflict with the law. Prolonged exposure to high conflict may also lead to medical concerns including hypertension, heart disease, and infectious diseases (Allen, 2014). Thus, mediators may invite parents to consider parenting plans that reduce levels of conflict, particularly where there has been a history of high conflict. Consider an agreement where the child primarily resides with mom and has “liberal access and time with dad.” If parents can collaborate easily, this open-ended, flexible form of time-sharing can work well. However, it may be too vague for parents who continue to have high levels of distrust, anger, and conflict. They may benefit from a more detailed, fixed plan, specifying the days and times that each parent will spend with the child. For some families, it may be helpful to have a plan that details exactly where, when, and how the child will go from one parent to the other, providing parents with clear expectations and reducing the risk of further conflict (for detailed sample plans, see Arizona Supreme Court, 2009).

Research suggests that meaningful involvement of both parents with a child contributes to the child’s well-being following divorce (Allen, 2014). Having the support of two parents has a number of potential advantages: The child is able to maintain the social and emotional bonds with each parent (fostering positive attachment and trust); both parents share in responsibilities and role modeling for the child; if one parent dies or is incapacitated, the other parent is available to provide continuity of care; and the nonresident spouse

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<sup>8</sup> For further information on the psychosocial processes of divorce and relationship dissolution, see Emery (2011) or Fine and Harvey (2005).

may be more likely to comply with child support payments. If parents are able to coparent in a cohesive manner, then it is also helpful for both parents to live close to one another (Viry, 2014). Physical proximity permits the child to travel more easily between parents, while continuing to maintain relationships with peers, neighbors, school, and after-school activities.

Given the value of having both parents involved in the child's life, some family law professionals and social scientists favor joint legal and physical custody, with both parents sharing decision making responsibility and with the child spending generous, meaningful time with both parents (Allen, 2014). Mediators need to remain neutral on the issues of joint custody and time-sharing arrangements, allowing the clients to decide what is best for their child. As noted earlier, the best interests of the child depends on the particular circumstances of the family and child. If there is a high level of interparent conflict, if there is a pattern of domestic violence (Brinig et al., 2014), if one parent has a significant mental illness (Deutch & Clyman, 2016), or if the child has difficulty with transitions, then it might be in the child's best interests to live primarily with one parent and to have that parent be responsible for major parenting decisions (Allen, 2014; McIntosh, Pruett, & Kelly, 2014; Vanassche, Sodermans, Matthijs, & Swicegood, 2013).

Mediators can help parents consider their child's developmental needs when determining parenting plans. The period from birth to 3 years old is particularly important in terms of children developing positive attachment, parent-child bonds that affect children's ability to develop relationships throughout their lifetime (L. Parkinson, 2011). To promote attachment, young children need regular, frequent time with the relevant caregiver(s). Children also need to feel safe with each parent, free from stress and interparent conflict. Attachment can be supported by having regular routines for meals, sleep, play, and other activities (McIntosh et al., 2014). Parents need to allow children to explore and develop independence, as well as being present to nurture, support, and comfort the children as needed.

Regardless of how decision making and primary residence are decided, mediators could have the parents consider the following guidelines in support of the child's best interests:

- Both parents will speak respectfully of one another in the presence of the child.
- Both parents will support the child's connections with family, friends, and school.
- Both parents will work through conflicts privately, ensuring the child is not caught in the middle of the conflict.

Rather than dictate such terms to the parents, mediators may present questions or possible language, empowering them to develop language and arrangements that meet their child's needs.

### ***High-Conflict Divorces and Alienated Children***

High-conflict divorces are marked by distrust, anger, resentment, unreasonableness, and vengefulness (O. Cohen & Levite, 2012; Eddy, 2014c). Whereas most divorcing couples adapt reasonably well within 2 or 3 years following separation, high-conflict couples continue to engage in problematic behaviors and interactions well beyond this time frame; in fact, the conflict may intensify over time. Although high-conflict divorces may comprise about 8 to 12 percent of cases filed in family court, they consume an inordinate amount of the court's time and resources. (Fieldstone & Coates, 2014). High-conflict couples can be very litigious, spending hundreds of thousands of dollars on legal fees, custody evaluations, and court-related expenses. Even after the court has made its "final" decision, parents may continue to wage war and relitigate issues. Parents may fight over seemingly trivial issues,

such as small amounts of time with the child or slight changes in the other person's income (Fieldstone & Coates, 2014). In high-conflict divorces, one or both parents may have a significant personality disorder, for instance, borderline or narcissistic personality disorder (Eddy, 2014c). People with such disorders can be very insecure, sensitive to criticism, controlling, and manipulative. They tend to have all or nothing thinking. They often have difficulty managing their emotions. They may make false allegations of spousal assault or child abuse. They may act in ways that are harmful to the child, just to punish or spite their former spouse. Given such behaviors and dynamics, it may be very challenging for mediators to remain nonjudgmental and unbiased—particularly when one parent's behavior and demeanor seems particularly offensive. Although the mediator may feel sorry for one spouse or sad for the child, the mediator needs to focus on helping the entire family system without taking sides.

Understanding the nature of high-conflict divorces and personality disorders can provide mediators insight into strategies that may be helpful for high-conflict clients and their children. It may be unrealistic to expect high-conflict clients to suddenly become empathic, forgiving, and collaborative. Although perfect solutions may not be possible, mediators can help parents reduce conflict and potential harm to the child. When clients are stuck in defensive thinking and preoccupied with the other's misdeeds, mediators may need to be relatively directive while also remaining attentive, empathic, supportive, and nonthreatening. Rather than allowing clients to berate and brand each other with allegations, mediators can provide a structure that promotes calm, reasoned discussion about the future. When one client responds to an allegation in a defensive manner, the mediator might say, "You don't need to defend yourself. You're fine." If a client keeps rehashing the past, the mediator could suggest, "Mediation doesn't help us correct what has happened. Let's focus on your proposals for what to do now." When a client blames the mediator for lack of progress in mediation, the mediator could respond, "Yes, there could be more progress. What can you do to help everyone move forward on the issues?" (Eddy, 2014c). If one parent threatens to move across the country to spite the other, the mediator could empathize, "It sounds like you're very angry. How can we try to put all that energy into doing what is best for your son?" It is crucial for mediators to remain centered, mindful of their reactions to the clients' emotions and behaviors.

Although coparenting with a high level of cooperation may be ideal for some children (Molgora et al., 2014), *shared parenting* plans may be counterproductive in high-conflict situations (McIntosh et al., 2014). As an alternative, mediators could offer a *parallel parenting* approach in which each parent has specific expectations and responsibilities, completely independent of the other parent's expectations and responsibilities (Arizona Supreme Court, 2009). For instance, one parent could be responsible for arranging summer camp, while the other is responsible for taking care of medical and dental appointments. Rather than one parent picking up the child from the other, parents may pick up the child from school, day-care, after-school activities, or other neutral locations. Parallel parenting helps clients disengage, as they do not need to consult with each other, minimizing the need for communication or joint action. It also minimizes exposure of children to interparent conflict. Parents may agree to communicate only through emails or text messages, unless there is a true emergency situation requiring face-to-face or voice communication. Parallel parenting plans are highly structured and detailed (C. Jones, Chappel, & Shaffer, 2014). Compliance with such plans may be monitored by a parenting coordinator, a helping professional whose job is to help parents follow a court order or separation agreement (Coates, 2015).

*Child alienation* arises when one parent speaks poorly of the other parent and acts in manner that discourages the child from spending time with the other parent

(von Boch-Galhau, 2013). The alienating parent encourages the child to believe that the other parent is mean, neglectful, abusive, alcoholic, immoral, dangerous, or otherwise reprehensible, even though these criticisms are not true and are not based on the child's actual experience of the other parent. In situations where the child's fear, anger, or rejection of a parent is caused by actual experiences of abuse or other negative interactions, the child is considered "estranged" rather than "alienated" (Olesen & Drodz, 2008). Allegations of child maltreatment or abuse must be taken seriously; however, some clients may initiate false allegations to make life more difficult for the other parent. To ensure proper assessment of alienation versus estrangement, therapists and forensic mental health professionals may need to assess the cause of a child's anger or rejection of a parent. A useful tool for assessing alienation is the Alienation Child Custody Questionnaire (Olesen & Drodz, 2008).

An alienated child may reject all contact with the other parent; alternatively, the child may continue to spend time with the other parent, but experience high levels of anxiety. Given the negative impact of alienating behaviors, they could be viewed as a form of emotional abuse requiring child protection interventions (Lowenstein, 2011).

Alienating parents may or may not be aware that they are harming their child's relationship with the other parent. Alienating parents may convey themselves as innocent victims who need the unwavering support of the child. The alienating parent is often the resident parent, who has more time with the child and may want to limit access to the other parent. Alienating behaviors may include making it difficult for the nonresident parent to spend time with the child, for instance, scheduling out-of-town travel on significant dates such as the child's or nonresident parent's birthdays. Although some legal and mental health professionals believe that "parent alienation syndrome" should be recognized as a distinct mental disorder (von Boch-Galhau, 2013), it has not been recognized by the American Psychiatric Association (2014) and it remains controversial (Viljoen & van Rensburg, 2014). Whether or not it is a diagnosable syndrome, mediators should be aware of alienating behaviors and their negative psychological effects on children (Lowenstein, 2009). Children see themselves as the product of both parents; when a parent derides the other parent, the child's self-esteem is eroded. Mediators could help parents gain insight into the effects of alienating behaviors on their child ("How do you think your daughter feels when you call her mother a depraved whore?"). Although alienating behaviors can turn a child against the other parent, they can also make the child feel poorly about the alienating parent, as well as the child herself. Some children cope with alienating behaviors by supporting each parent when in the presence of that parent. Thus, a child might tell her mother that her father is careless and self-centered, as that is what her mother wants to hear; at the same time, the child might tell her father that her mother is an emotional wreck because that is what her father wants to hear.

When one parent makes allegations of child abuse or other forms of maltreatment, mediators do not need to assess whether these allegations are founded. The mediator's role is NOT to assess child protection issues. Rather, if a mediator has a reasonable suspicion of child abuse or neglect, the mediator is mandated by child protection laws to report those suspicions to child protection authorities. Unfortunately, reporting a child protection issue may lead to concerns about the mediator's neutrality, possibly leading to disengagement by one or both parents. To avoid this problem, mediators could ask the parent raising child protection concerns to make the report to child protection authorities. If the initial allegation is not a true child protection concern, the parent may recant the allegation and refuse to make the report. If the alleging parent does not agree to call protective services and the mediator believes she has a legal duty to report, the mediator may inform the child protection agency that one parent raised these allegations, and not make any comments about the

reasonableness of the suspicions. In this manner, the mediator fulfills a legal duty to report, but avoids losing neutrality since the mediator is not assessing the allegation.

If the parent or mediator does make a report, mediation could be suspended until the child protection agency has completed its assessment. If the allegations are unfounded, then mediation can resume without involvement of the child protection system. If allegations are founded, then the mediator and clients will need to determine whether it is appropriate to proceed with family mediation. In some situations, the immediate need for child protection intervention takes precedence over mediating separation and divorce issues between the parents. Also, in some high-conflict situations, parents are so invested in the fight that they prefer litigation and adversarial processes to mediation; they perceive no incentive in resolving their conflicts in an amicable manner (Howieson, 2011).

### ***Community Supports, Resources, and Supplemental Services***

Mediators should be aware of supports and resources that may be helpful for clients going through divorce. To promote client empowerment and self-determination, mediators should provide information or access to information, rather than giving specific recommendations. Thus, if a client wants legal advice but does not know where to start, the mediator could provide the client with information about a lawyer referral service, or perhaps with a listing of lawyers who specialize in family law and collaborative law. If a client were interested in therapy, the mediator could provide the names of four therapists and invite the client to speak with each of them before deciding which to engage. Other local services that mediators should know include

- evidence-based parenting education, family transition, or coparenting intervention programs (individual counseling, couple counseling, facilitated groups, self-help groups, online programs) (Prescott, 2014; Pruett et al., 2013);
- parenting coordinators (e.g., Coates, 2015; <http://www.parentingcoordinationcentral.com>);
- parenting coaches or consultants (Fieldstone & Coates, 2014);
- custody and parenting plan evaluators (Lund, 2015);
- supervised visitation and parent reconnection programs (Fieldstone & Coates, 2014);
- crisis hotlines for domestic violence, homicidal ideation, and suicidal ideation;
- child protection services (for abuse and neglect);
- child counseling and therapy;
- recreational programs;
- child support enforcement programs;
- guardian ad litem or child advocacy programs;
- legal aid (for clients who need assistance with legal fees);
- business and property appraisers;
- family law arbitrators (Ferguson, 2013); and
- tax and financial advisors.

Family mediators may also provide clients with information about books, pamphlets, and online resources for parents and children (e.g., click on resources for families at <http://www.afccnet.org>). These resources may include stories, guidelines, and suggestions, as well as information about parenting plans. Online and computer-based applications include digital calendars to facilitate time-sharing, expense calculators and logs, child support calculators, and message boards to facilitate interparent communication. Fee-based programs, such as Our Family Wizard (<https://www.ourfamilywizard.com>), provide a range of online services to support families through separation and divorce. Mediators can help families

determine which, if any, online and electronic services would be helpful for their particular circumstances. Some clients might find that electronic communication helps them avoid miscommunication and ensure that the tone of their communication is respectful; others may find that electronic communication exacerbates their conflict.

In addition to professional resources, mediators should be aware of nonprofessional supports that may be available. Extended family and friends may be helpful in a variety of ways: providing parents with alternate childcare and respite, providing moral support and concern, and helping clients move on with their lives after separation. Treating clients as experts in their own lives, mediators can explore a broad range of possible resources and support systems with clients, allowing them to make decisions about whether and how to access these supports.

### **Cultural Diversity Issues**

Culture, ethnicity, race, religion, sexual orientation, gender identity and expression, disability, socioeconomic status, and other aspects of cultural diversity affect the way that families experience separation and divorce. Accordingly, mediators should be aware and responsive to diversity issues. This section provides examples of diversity issues to illustrate a range of situations in which mediators need to be attentive to client diversity. In practice, mediators may need the assistance of cultural interpreters, diversity trainings, or culture-specific readings to help them navigate diversity issues with a particular client system (Barsky et al., 1996).

According to Catholic tradition, marriage is forever and divorce is not permitted. A Catholic couple might consider separation without plans for divorce; alternatively, they might seek annulment of their marriage. A mediator working with such a family could inquire about their plans regarding divorce. Rather than assuming they would never consider divorce, the mediator could ask about their plans and how they fit with their religious beliefs and feelings associated with these beliefs. Simply because the clients identify as Catholic does not necessarily mean that they are not considering divorce. If the clients would like to have religious guidance, the mediator could invite their priest into the mediation process (with both clients' permission).

While family mediation often involves the mother and father, mediators should be open to involvement of other family members in light of the diversity of family structures and dynamics. In some cultures, children are often raised by grandparents or other extended family members (L. Parkinson, 2011). Even when children are raised primarily by the parents, grandparents or other elders may have a say in major decisions for the children or otherwise share in parental responsibilities. According to some cultural norms, women defer to their husbands, making it difficult for them to be assertive in family mediation; female clients may wish to have a brother or other male representative participate in mediation in order to ensure that the process is fair (Barsky et al., 1996). Rather than assuming what is best for clients from a particular culture, mediators should explore cultural dynamics and help the clients determine how mediation should be structured to meet their unique needs.

Gender issues may arise in relation to how men and women are socialized to deal with conflict. Women may be more amenable to discussing emotions, whereas men are socialized to focus on task-related problems to be solved (L. Parkinson, 2011). During mediation, men may state their position and find logical reasons to support it. In contrast, women may respond based on interpersonal obligations and the importance of maintaining good relationships (Poitras & Raines, 2013). To bridge such differences, mediators could meet separately with each party. For instance, if one party needs time and space for emotional expression, and other party wants to be task focused and finds discussing feelings to be a

waste of time, the mediator could meet individually to start with each client's preferred way of dealing with conflict. The mediator can then help each party explore alternate ways of dealing with the conflict. For instance, if the father initially avoids talking about emotions, the mediator could help him understand how expression of emotions may be helpful to CR process.

In families where women are the primary caregivers and nurturers, they may be expected to continue to this role after separation. Although families may decide to continue their pre-separation division of responsibilities, mediators can help them explore whether a different sharing may be in the child's best interests.

When working with same-sex couples, mediators should be attuned to the unique challenges faced by gay and lesbian parents (Barsky, 2016; Moscatti, 2015). For instance, one parent may be in the closet (very discreet about her sexuality), whereas the other is out. Alternatively, both clients may lack support of family members who reject them because of religious beliefs about their sexuality. Same-sex couples may also face legal impediments, for instance, laws that favor the biological parent's rights over the other parent's rights (Murphy & Rubinson, 2009). Once again, rather than making assumptions that these concerns apply to all same-sex couples, mediators need to assess the dynamics and issues for each client situation.

Among African American families, the rate of fathers who do not participate in their children's upbringing is significantly higher than for many other groups (Gaskin-Butler et al., 2015). Among couples who have never married (regardless of race or ethnicity), there are also higher rates of poverty, higher rates of nonresident fathers who are not involved with their children's lives, and higher rates of nonresident fathers do not pay child support (Maldonado, 2014; Pearson, 2015). Whereas mediation is often looked upon as a method of helping couples separate, mediation could be used as a method of engaging fathers in their children's lives (Gaskin-Butler et al., 2015). In situations where the parents never lived together and the father had little involvement with the children, clients may use mediation to promote coparenting and ensure that fathers do not drift away from their children's lives. If a father does not know how to feed, bathe, or diaper a baby, the parenting plan could include plans for how the father will learn such skills (e.g., with help from the mother, from a counseling program, or from grandparents). Mediators could also refer clients to psycho-educational programs designed to improve coparenting and the involvement of fathers in their children's lives (Pearson, 2015).<sup>9</sup> Mediators can help clients explore the potential benefits of greater involvement by the father: to share in the emotional and financial support of the children, to provide the mother with respite in caring for the children, to provide a positive male role model, or to allow the mother time for employment outside the home. Ultimately, however, mediators should respect family decisions for the father to have limited or no involvement with the children. After all, mediators view clients as experts in their own lives.

In blended families, parents may have different expectations about who is responsible for the emotional and financial support of stepchildren following separation. For instance, a mother may want to continue a relationship with her biological children, but not with her stepchildren. Mediators should avoid imposing opinions on the families, including whether they think stepparents are morally responsible for the care of their stepchildren. However, mediators could help parents explore the impacts of their choices on the

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<sup>9</sup> Although Pearson (2015) and other researchers note the positive potential impact of greater father involvement, the consequences for children may depend on the nature of the father's involvement (particularly in situations with family violence).

children, including their children's potential interests in maintaining relationships with their stepsiblings. Mediators may also refer clients to their attorneys for advice on whether they have legal rights and obligations (e.g., time-sharing, financial support) regarding their stepchildren.

Socioeconomic issues also play a big role in post-separation planning. For parents who have the means to support their children through college, there may be an expectation that they do so. For parents without such means, child support may terminate when the children reach the age of majority. For residential parents who are receiving welfare, there may be disincentives from seeking child support from the nonresidential parent. Residential parents could lose welfare payments, Medicaid, or other entitlements; even if they are entitled to child support, they may have more difficulty collecting such support, particularly if the nonresidential parent does not have consistent employment or if the residential parent has concerns about domestic violence (i.e., the support money is not worth the risk of further violence). If the nonresidential parent is totally absent, the residential parent and children may have access to other benefits (e.g., scholarships for college education based on financial need). One or both parents may be embarrassed to discuss such issues, so mediators need to be sensitive to these issues and create a safe environment for parents to disclose them.

### **INDIVIDUAL SESSIONS: PREMEDIATION AND CAUCUSING**

One of the key differences between TpM and other models is the emphasis TpM places on meeting individually with clients, in premediation as well as in caucuses during the middle phases of the mediation process. Nontherapeutic mediators tend to limit or avoid individual meetings with clients, preferring to meet jointly and have clients work through their concerns together. Therapeutic mediators use individual meetings to assess the conflict situation, including individual factors that may be impeding effective management of the conflict. Individual sessions also provide mediators with an opportunity to provide each client with individualized help, using therapeutic techniques that may not be appropriate during joint sessions. One of the primary advantages of meeting individually is that clients may be more open to discussing certain issues without the other party present. A mediator may not learn about domestic violence or power issues, for instance, unless the mediator has an opportunity to meet privately with each client. The following sections explore how mediators may use individual meetings to assess the family's situation, to prepare clients for constructive participation in mediation, to help clients deal with power and violence issues, and to work with attorneys.

#### **Assessment**

During the premediation phase, therapeutic mediators meet individually with each parent<sup>10</sup> to gather information, assess the dynamics of their family and relationships, and formulate plans for proceeding with the next stages of the mediation process (Wall & Spira, 2012). Family mediators gather information to assess

- the ability of each party to communicate with each other;
- the intensity of the conflict and how the parties seek to resolve differences;
- the nature and extent of any violence between the parties;
- the extent to which the parties trust or distrust one another;

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<sup>10</sup> Meetings involving children are discussed toward the end of this chapter.

- the degree to which each party exhibits flexibility;
- the patterns of interaction between the parties and relevant systems (including social supports, sources of stress, and intergenerational patterns of dealing with conflict);
- the level of dependence or attachment between the parties in their relationship;
- whether the parties want to continue or terminate their former relationship (wishes and motivations);
- the extent to which the parties can focus on the future;
- the overall cognitive functioning of the parties (including how this may be affected by memory impairments, substance abuse, mental illness, or personality disorders);
- the ability of each party to perform social functions relevant to the dispute (e.g., parenting, work);
- the financial, social, and emotional resources of each party;
- cultural diversity issues that are relevant to the issues in conflict (including beliefs, values, norms, and myths);
- critical incidents that led the parties to their current situation;
- what motivated their request for mediation;
- whether and how they are using assistance from attorneys; and
- potential conflicts with third parties that may impinge on the mediation process (Holtzworth-Munroe, Beck, & Applegate, 2010; Irving & Benjamin, 2002/2012; Poitras & Raines, 2013).

To illustrate the assessment process in practice, consider the following scenario:

Patricia and Petr are the parents of 6-year-old Ceanna. Patricia has filed for divorce even though they are still living in the same house. Petr has moved into the basement. Upon the advice of his attorney, he refuses to leave the house. Ceanna has become very moody. She was suspended from school after initiating a fight with another child. The court referred Petr and Patricia to Munroe for mediation to deal with parenting issues and possession of the marital home.

Munroe decides to meet individually with each parent, giving him an opportunity to explain mediation and assess whether mediation is appropriate for Petr and Patricia. Having individual sessions provides the parents with an opportunity to vent their feelings and tell their stories without escalating conflict with the other party.<sup>11</sup> By allowing parents to recognize, express, validate, and experience their feelings, mediators can help them gain control (Emery, 2011). The premediation meetings also give Munroe an opportunity to offer individualized support. Munroe gives each parent considerable leeway to talk about the history of their relationship before focusing them on the present context of the conflict. He uses active listening skills to confirm that he is hearing their perspectives. He is careful to avoid responses indicating that he agrees or sides with either one.

Munroe discovers that both parents are articulate, assertive, and care deeply about Ceanna. Munroe can build upon these strengths during mediation. Petr and Patricia are also distrustful and frustrated with each other, giving rise to a moderately high level of conflict. Patricia says she asked Petr to leave when she discovered he was having an affair.

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<sup>11</sup> The downside of allowing the parties to vent in individual sessions is that they do not hear one another's stories. The mediator may learn information about one party that the mediator believes should be shared with the other. Accordingly, the mediator needs to let both parties know from the outset that the mediator will encourage them to share information with one another.

She also says Petr has a problem with alcohol and that he should not be left alone with Ceanna. Petr denies having an affair and says Patricia is fabricating the story about alcoholism because she is enraged about the “supposed affair.” Upon gathering this information, Munroe formulates the following tentative assessments:

- Both parents are competent to mediate. Although Patricia claims Petr has an alcohol problem, there were no signs of alcohol use when Munroe met with him. He was lucid and had no problems with memory or communication. Munroe did not assess whether he had an alcohol problem, as this is not a mediator’s function.
- Follow-up premediation sessions with each parent will be helpful. Although Patricia wants to divorce, Petr says he thinks the marriage can be saved. Follow-up sessions can help determine whether reconciliation is possible, and if not, then the mediator can help Petr deal with his ambivalence about ending the relationship and accept the reality of the separation. Patricia’s comments and behaviors reflect anger and hurt regarding her belief that Petr was having an affair. The follow-up session with her can be used to help her work through these issues.
- Munroe uses the Conflict Tactics Scale (Straus, Hamby, Boney-McCoy, & Sugarman, 1996) to assess for violence. Both clients disclose yelling. They report no history of physical violence, emotional manipulation, or financial control. Munroe decides that it is appropriate to mediate in joint sessions with Petr and Patricia. Given the high level of conflict and the tension of living separately within the same house, he notes that it is important to continue monitoring for safety issues.
- Initially, Patricia’s comment that Petr should not be alone with Ceanna raises the possibility of a child protection issue. When Munroe uses clarification questions to determine what Patricia meant, she does not indicate significant concerns regarding abuse or neglect. Patricia may have needed to vent her anger, as the allegations dissipated when her fury subsided.
- Munroe determines that although the parents care about Ceanna, they are not fully aware of how their conflict might be affecting her. Premediation may be useful in helping both parents explore how their conflict may be affecting Ceanna’s behavior at home and at school.

Throughout the assessment, Munroe focuses on each parent’s ability to mediate and how he may be able to help them mediate more effectively. He does not take sides. He does not evaluate what is in Ceanna’s best interests, including where Ceanna should live, how parenting time should be divided, or what types of arrangements Petr and Patricia should have around key parenting decisions.

Munroe is aware of a potential power imbalance given that Petr still believes there is a possibility of reconciliation. Petr says he wants to pacify Patricia, hoping he can mend their relationship by acceding to her wishes in mediation. Patricia is adamant that the separation is permanent; she is very assertive of her rights and shows no inclination to accommodate any of Petr’s concerns. Petr also comes from a culture that deals with conflict in a less direct manner than Patricia’s. Premediation gives Munroe an opportunity to rebalance power between the parties, so they can negotiate fairly and fully. For example, Munroe can offer to teach Petr assertiveness skills that are consistent with his cultural values. He can also coach Patricia on how to assert her needs without becoming aggressive. By assessing the clients’ dynamics, personalities, and motivations, the mediator is able to formulate an assessment and plan about how best to proceed with the mediation process (Turkat, 2012).

This section has highlighted a number of potential challenges to the mediation process, for instance, strong emotions, ambivalence about separating, distrust between clients,

and strongly entrenched positions (Poitras & Raines, 2013). Mediators should also assess potential strengths. By helping clients identify a positive period in their relationship, mediators can reinforce these strengths and foster hope. “It sounds like both of you struggled financially during the first few years of marriage; but you worked together and you provided a good home for Ceanna. This shows you have the potential to work together, even in tough times, for the good of your daughter.” Alternatively, Munroe might commend clients for traits demonstrated in mediation. “Patricia, you’ve shown a lot of perseverance. Your willingness work through difficult issues bodes well for mediation.” Given concerns about neutrality, it is often easier to commend parties individually rather than in joint meetings. Other potential strengths to reinforce include the presence of support systems, common values, optimism, humor, creativity, honesty, openness, perseverance, respectful communication, and other factors that can help them bridge differences and enhance their relationship moving forward (Billikopf, 2014; Moore, 2014).

### **Preparing Clients for Mediation**

For each challenge identified in the forgoing assessment, mediators can develop plans to prepare clients individually, helping them mediate more effectively when brought together. The following paragraphs illustrate strategies that mediators can use to help clients work through difficult emotions, to learn how to focus on the child rather than themselves, to extricate themselves from entrenched positions, and to enhance their mediation skills.

In terms of emotions, it is often the noninitiator of the separation who feels more sad, hurt, depressed, or hostile (Howieson, 2011). When Patricia initiated the separation, Petr’s first reaction was denial. “This isn’t really happening. We’ll work it out.” He is not ready to let go of his love for Patricia, or even entertain the thought that their marriage may be over. Munroe can help Petr process his feelings by demonstrating empathy. “Sounds like you were shocked that Patricia accused you of infidelity and asked you to move out.” By meeting individually, Munroe is able to show concern for Petr’s situation without triggering a defensive reaction from Patricia. Munroe maintains equidistance by providing similar empathy for Patricia’s situation when he meets with her. Mediators should be conscious of the use of time. As Munroe helps Petr work through his denial, he may go through other challenging reactions, such as anger, sadness, and grief (Emery, 2011). When people have experienced traumatic or turbulent events, they may benefit from time and space to allow for emotional healing (Mayer 2009). Although some issues need to be determined relatively quickly, time between sessions may allow for the parties to deal with despair and other emotions triggered by divorce (L. Parkinson, 2011). Mediators can also help parties reframe their emotions. When Patricia discusses how irate she was when she discovered Petr was having an affair, Munroe helps her see that, underneath the anger, she is feeling hurt. In a joint session, Patricia may not disclose how hurt she felt, not wanting to look weak to Petr. Discussing such emotions during caucus helps Patricia save face.

When parents feel angry or hurt, they often focus on their own wishes and interests. “Petr ruined our marriage and embarrassed me to all our friends. He should be punished.” Given the need to focus on the child’s best interests, individual sessions can be used to reorient parents from their own interests to the child’s. To facilitate insight, Munroe might ask, “How do you think your anger might get in the way of doing what is right for your daughter?” Although the mediator shows empathy and concern for Petr’s situation, he also raises Petr’s awareness of self-defeating behaviors. “Would you mind if I shared some of my observations about your interactions with Patricia? (pause for response) There are times when you stare at Patricia and she starts to raise her voice. I’m wondering if your intense eye contact is making her feel defensive.” By raising awareness of how anger affects his

nonverbal behavior, Petr can modify his eye contact and foster more positive interactions.<sup>12</sup> Note how the mediator shares an observation with the client. The mediator does not force opinions on the client, but asks for permission to share a hunch with him.

Alternatively, Munroe might focus Patricia on Ceanna's long-term well-being: "Ten years from now, what would you like Ceanna to say about how you handled the separation process and its impact on her?" Munroe could also discuss how the purpose of mediation is not to ascribe blame or impose punishment, but to help them rebuild a better life moving forward—for the parents and the child: "I understand you feel hurt. You feel like Petr has violated your trust. What is more important than your hurt, however, may be what you do with that hurt." Mediators can give clients permission to let go of feelings that may be impeding their ability to focus on their child's best interests, helping them express their pain and encouraging them to take responsibility for how they want to manage the energy from their emotions.

When clients are entrenched in certain positions, there appears to be no room for creative win-win conflict resolution, or even for compromise. Both clients insist they are right and do not want to back down (Poitras & Raines, 2013). Mediators can teach clients the value of interest-based, collaborative negotiations, including how they benefit the parents and the child. During individual meetings, mediators can also use reality testing with each client. "Petr, you said that you plan to remain in the marital home permanently. What do you think would happen if Patricia takes this issue to court for a judge to decide?" Munroe could refer Petr to speak with his attorney about possible and probable outcomes of going to court, including the costs that each party will bear. Munroe could explain the nature of cognitive bias:

*Would you like to learn about cognitive bias? It might help you let go of some of your frustrations. [Pause for response] One of the reasons that people become locked in conflict is because of cognitive bias. Cognitive bias is the natural tendency for people to look at facts and evidence that support their own point of view. People tend to dismiss facts that might support the other person's perspective. I catch myself doing this, so I have to remind myself to consider the situation from multiple perspectives.*

Explaining cognitive bias could open up a rational discussion of both pros and cons of living in the same house.

Another way to facilitate insight into the other parent's perspective is to apply the Golden Rule, "Do unto others as you would have them do unto you." If Patricia insists that Petr is not allowed to be with any girlfriends in the presence of Ceanna, the mediator could help her consider what Petr might demand in response. "So if you want to limit who Petr can be with when he spends time with Ceanna, would you also be prepared to let Petr limit who you can be with?" If this technique works, Patricia gains empathy for Petr's potential reaction, allowing her to rethink what she wants to ask him in the next joint session. This type of question entails some risk, as it could put Patricia on the defensive. Using it in the confines of an individual meeting, however, allows Patricia to process the issues without having to face Petr.

Mediators can facilitate insight into how conflict may have taken over their lives (Poitras & Raines, 2013). Patricia accuses Petr of being neglectful. Petr responds by saying that

<sup>12</sup> One of my clients was completely unaware that she was making faces and mimicking her former husband during joint sessions. During an individual session, we agreed that I would raise my writing pad to my chest to let her know that she was making faces, giving her an opportunity to correct her behavior.

Patricia is unreasonable. Each time one parent labels or lashes out at the other, the negative cycle of conflict continues. During individual meetings, mediators can ask parents to take a step back to consider their current cycle of conflict. “Patricia, what are some of the effects of the current conflicts between you and Petr? How have they affected you in relation to your sleep, your work, and your ability to care for Ceanna?” After highlighting the negative effects of conflict, mediators can help parents strategize how to start working toward a more positive relationship. “Petr, what are some things that Ceanna loves about her mother? How do you think Patricia would respond if you told her that you also appreciate these qualities?” This strategy reminds Petr that Patricia has many positive attributes. Rather than focusing on ill feelings toward Patricia, identifying positives gives Petr permission to have positive feelings about her. It also helps him find words to affirm Patricia and build bridges with her.

Individual meetings can be used to coach clients on how to use particular negotiation skills (Billikopf, 2014). If Petr were unsure how to respond to Patricia’s anger, for instance, Munroe could teach him how to acknowledge the anger without agreeing or disagreeing with Patricia’s stated cause for the anger. In other words, he can acknowledge Patricia’s anger at him without confessing infidelity. He could also simply listen without responding verbally, just remaining present. Munroe and Petr could role-play possible responses, so Petr can develop self-awareness and verbal skills to respond more effectively. If Patricia has trouble with brainstorming, Munroe could practice brainstorming with her, including options that meet Petr’s interests. Mediators can also teach clients the value of conciliatory gestures. When parents reach impasse over how to proceed, a positive gesture by one parent can lead to reciprocal responses from the other. During negotiations over timesharing, Patricia suggests, “Why don’t you spend Thanksgiving with Ceanna. I know it’s a very important holiday for you and your parents.” Although Patricia is not assured that Petr will respond in kind, this gesture could mark a key turning point in negotiations. Taking such risks can lead to further collaboration and enhanced trust. Mediators may find it easier to encourage the more reasonable client to make compromises. Mediators should be cautious about asking more of one client than the other, ensuring the mediation process is fair to both clients.

### **Power and Safety Issues**

Given the potential vulnerability of clients, mediators should use a standard screening protocol to assess for power and safety concerns from the outset of mediation; they should continue screening throughout mediation (e.g., C. Beck, O’Hara, Anderson, & Benjamin, 2013; Cleak et al., 2014; Holtzworth-Munroe et al., 2010). Initial screening may include an in-person interview, as well as a written or online questionnaire. Some clients may feel safer disclosing sensitive information via one medium or the other (Bingham, Beldin, & Dendinger, 2014). During the first meeting, mediators should establish rapport, using empathy, honesty, and compassion to help the client feel comfortable. Mediators need to know how to ask questions about violence and control in a nonthreatening, concerned manner (Bingham et al., 2014).

If mediation is inappropriate because of concerns of severe power imbalances or violence, it is preferable to identify these concerns as early as possible—both to safeguard clients from harm and to avoid wasting their time. One of the challenges in assessing power and violence issues is that clients may be reluctant to share information about these concerns (Rivera, Zeoli, & Sullivan, 2012). A person who is experiencing violence or duress, for instance, may feel too embarrassed to discuss it. Alternatively, that person may be afraid that the perpetrator of the violence may retaliate if the violence is exposed, posing possible threats to the survivor and to the children (Bingham et al., 2014). Survivors of abuse

report a range of feelings that make it difficult to disclose abuse: paranoia, shame, confusion, denial, and anger. They may also wonder what will happen if they disclose abuse: Will the mediator be able to help them, will the mediator retraumatize them by delving into the abuse, or will they be forced to go to court rather than avail themselves of mediation (Bingham et al., 2014)?

Mediators are more likely surface violence issues if they have intimate partner abuse training, including a structured protocol for screening and skills for asking questions in a nonthreatening manner (Holtzworth-Munroe et al., 2010). Although some mediators begin mediation with a joint meeting, beginning with separate meetings may be preferable because clients experiencing violence are more likely to disclose violence if the other person is not present (Olson, 2013). Mediators need to know what resources are available and how to refer clients if they do surface significant abuse concerns (Bingham et al., 2014). In some situations, there may be urgent safety concerns requiring immediate precautions and safety plans. In other situations, the client may have already taken appropriate precautions and the risks of further violence may have been ameliorated (e.g., no abuse has occurred since separation and the client no longer feels intimidated).

A complicating factor in assessing safety and power issues is that there are many different forms of violence. In some instances, mediation is clearly inappropriate because mediators cannot ensure safety and fairness. In other situations, mediation could be offered using a modified process and safeguards (Olson, 2013). Possible modifications include having mediation sessions with each parent in separate locations, escorting clients to and from their cars, having parties attend mediation with an attorney or other support person, and establishing firm ground rules at the outset, including which issues are nonnegotiable. When there is a history of intimate partner abuse, for instance, joint custody may be unacceptable to the extent that it increases risks of further violence and control (Brinig et al., 2014). Thus, mediation could focus on how the nonresident parent will be able to spend time with the child; issues such as the child's primary residence and parental decision making will be off the negotiation table. Another possible precondition to mediation is that the person causing the abuse agrees to participate in a treatment program to help him address these issues. Other issues to be excluded from mediation include determining whether the abuse occurred, trying to reconcile the couple, assessing fault, or determining punishment for past abuse (Milne, as cited in Murphy & Rubinson, 2009). If these issues need to be determined, then they need to be determined in forums other than mediation.

One of the more commonly used typologies of intimate partner abuse comprises five categories:

- *Coercive, controlling violence (CCV)* arises when someone uses escalating levels of physical and psychological force aimed at victim intimidation and control.
- *Violent resistance* arises when someone uses violence to self-protect against a partner using coercive violence.
- *Situational couple violence* arises when an unresolved disagreement spirals into a violent incident, but the violence is not part of a larger pattern of control.
- *Separation-instigated violence* first arises at the time of separation by someone with no history of coercive violence.
- *Mental health-driven violence* arises when violence stems from schizophrenia or other severe mental health issues. (Allen, 2014)

Although mediators should attend to risks associated with any form of violence, CCV is the category most likely to preclude mediation. CCV is sometimes called *intimate terrorism*, reflecting the fear, coercion, and control inherent in CCV (Olesen & Drodz, 2008).

Given the pattern, intensity, and impact of CCV, it would be difficult if not impossible for a mediator to ensure safety and fairness, even with modifications to the mediation process. For instance, if the mediator uses shuttle mediation, with the clients never meeting, the perpetrator of abuse can continue to instill fear and control (Olson, 2013). The client who has experienced abuse may acquiesce to the perpetrator's wishes to avoid the risk of retaliation (C. Beck et al., 2013). Further, the mediator might unwittingly expose the abuse survivor to further violence by encouraging her to be more assertive.

When a mediator assesses a history of violent resistance, situational couple violence, or separation-instigated resistance, mediation may be possible, depending on whether the parties can provide truly informed and voluntary consent. In these cases, the history of violence has been situational and there may be no pervasive dynamic of coercion and control. When assessing violence, it is important to focus on the impact and meaning to the survivor (Olesen & Drodz, 2008). In some situations, a single incident of violence could be so terrifying to the survivor that she continues to live under the perpetrator's coercion and control. In other situations, there could be several incidents of violence, but the survivor has taken steps to ensure her physical and psychological safety, exculpating herself from fear. The mediator could explore the possibility of mediation with the parties, with particular emphasis on managing concerns about safety, fairness, and freedom from coercion. If the perpetrator takes responsibility for his behavior and the victim is able to negotiate without fear of retribution or control, then mediation may be possible (Ver Steegh, as cited in Murphy & Rubinson, 2009). Some people who have experienced situational abuse may prefer mediation because alternatives, such as court, do not provide better safeguards (Olson, 2013). In cases where there is mental health-driven violence, it may be necessary to ensure that the mental health condition is under control before initiating mediation (e.g., the person is receiving medication and other mental health treatment and monitoring; or if there is an addiction issue, the person has been able to achieve a significant period of sobriety). There is rigorous debate among researchers and helping professionals concerning the appropriateness of mediation—even with modifications—if there is any history of violence (Semple, 2012). Some contend that mediators are incapable of redressing violence in a manner that ensures that mediation will be safe and fair (Rivera et al., 2012). Others contend that mediation's de-emphasis on discussing fault discourages victims from asserting their rights and encourages victims to see themselves as part of the problem (Grillo, as cited in Murphy & Rubinson, 2009). I believe that the appropriateness of mediation depends on the nature and extent of violence, the motivations and wishes of the clients, and the skills and knowledge of the mediator to handle such situations.

When assessing for violence, it is helpful to ask about the full spectrum of potential violence. Some people equate violence with physical and sexual violence, perhaps minimizing the significance of verbal and psychological abuse: yelling, using insulting language, imposing financial control, making threats to children or pets, destroying property, isolating, devaluing, belittling, and other controlling behaviors. Intimidation and abuse may also occur through social media and other electronic technology. *Cyberbullying* refers to the use of online technologies to harass, taunt, or humiliate. Cyberbullying may include co-opting the other person's online identities and posting embarrassing or intimidating information or images. Cyberbullying can be particularly troubling because perpetrators can use it anonymously. They can also reach large audiences, including friends, family, employers, and the public. *Cyberstalking* includes the use of spyware, video surveillance, or other electronic means to monitor and stalk the other person. Using an assessment tool designed to identify violence and control issues can help mediators assess a broad range of problematic behaviors, as well as the frequency and intensity of the violence (Holtzworth-Munroe et al., 2010; Straus et al., 1996).

A nonthreatening way to assess for power and control issues is to ask each client how decisions have been made in the past. “During marriage, how were decisions about family finances made?” or “How did you decide where your daughter would go to school?” The mediator can further explore areas of possible concern. For instance, if one client intentionally kept the other short of money, the mediator could ask additional questions to assess for financial control. Tools for assessing intimate partner violence include the Domestic Violence Evaluation (Drodz, 2007) and the Conflict Tactics Scale (Straus et al., 1996).

Mediators should note that abuse is not necessarily initiated by a man against a woman. Abuse can occur by a woman against a man, it can be reciprocal, or it can arise between couples of the same gender. Abuse also cuts across all socioeconomic, cultural, and religious groups (Olson, 2013).

Power imbalances may arise in situations without violence or abuse. For instance, one client may be much more assertive than the other. Premediation can be used to help the more assertive client avoid using power in an exploitive manner, or to teach assertiveness skills to less assertive client. Similarly, if one client has more power because of greater information, that client could be asked to share information with the other client. Although one client may have the capacity to use power to persuade the other, mediators may ask questions to facilitate insight into downsides of using undue pressure (e.g., although the other client may acquiesce during mediation, the agreement might unravel when the parties leave mediation; an agreement made under pressure may not be in the child’s best interests; and refraining from using power can foster better relationships as coparents). To the extent that the parties embrace collaborative, win-win negotiation, the negative potential of power imbalances can be minimized. In other words, the impact of power is lessened when mediators focus clients on open communication, gaining insights, and joint problem solving (Bollen, Verbeke, & Euwema, 2013). Additional means of power balancing include

- ensuring both clients have equal opportunity to speak;
- asking questions (during caucus) to facilitate insight into sources of power that a client may not have considered;
- helping parties formulate “yesable” options (e.g., if a less powerful parent offers a win-win option, the other parent may agree to it rather than pushing for a win-lose option);
- helping parties address negotiation weaknesses (e.g., if one party is very disorganized, a mediator could offer a referral to a counselor who can assist with this issue or a party who misunderstands legal issues could be referred to an attorney); and
- helping parties reassess their sources of power. The influence of power depends on perceptions. If one client is underestimating her power or overestimating the other’s power, then that gives greater influence to the other person (Moore, 2014).

### **Working with Attorneys**

Meeting separately with attorneys at the outset of mediation serves a number of purposes. First, attorneys may be able to help mediators identify violence or other issues that the mediator needs to consider from the outset. If mediation is clearly inappropriate, the mediator does not need to meet with the parties, thus reducing risks of harm. If mediation might be appropriate, mediators can take appropriate precautions, for instance, first meeting with the client who may have been experiencing abuse. Other purposes for meeting with attorneys include explaining mediation and discussing the most constructive roles that the attorney can play in the mediation process. Some attorneys are very knowledgeable and supportive of mediation; others are not. In either case, mediators can assess their knowledge and

motivation regarding mediation, answering any questions or concerns. Some attorneys are concerned their clients will inadvertently forfeit their rights during mediation, compromising on key issues. Mediators can review appropriate roles for attorneys, for instance, advising their clients during or in between mediation sessions. Mediators can also discuss the value of clients speaking for themselves, rather than having mediators speaking for them. Mediators may validate other important roles for attorneys,

- explaining the value of mediation to clients, instilling confidence in the mediation process;
- helping clients prepare for mediation (e.g., preparing financial or other information to facilitate negotiations);
- helping clients identify options for solution, including ways to resolve impasses;
- providing clients with advice about what might happen if the case goes to court, and helping them reconsider unrealistic positions (Howieson, 2011); and
- helping clients focus on the best interests of the children, rather than focusing on the past or trying to hurt the other party.

Mediators can validate attorneys' roles as strong advocates for their clients, while also noting the importance of collaboration in separation and divorce cases. Research suggests that clients are often more satisfied when attorneys focus on relationships rather than merely advocating for rights in an adversarial manner (Howieson, 2011). Although having a strong advocate may feel supportive, clients recognize that collaborative processes can result in greater fairness than adversarial ones. Mediation offers attorneys an opportunity to balance their advocacy role with a collaborative negotiation style designed to meet the best interests of the child, as well as the interests of both parents. Collaborative lawyering also provides clients with a greater say and sense of empowerment than the traditional adversarial model.

In situations where one or both clients have not hired attorneys represent them, mediators should explore their reasons. If clients do not see the value in hiring an attorney, the mediator could provide information about potential benefits (e.g., making sure clients understand their rights, guiding them through complex legal processes, advising clients how a judge would likely decide a case). If clients cannot afford legal fees, mediators could provide information about less expensive services. For instance, some attorneys offer "unbundled services," meaning that they will help with specific tasks such as drafting a separation agreement, but will allow clients to perform other tasks on their own (Greacen, 2014). Some jurisdictions offer free or subsidized legal information and services based on financial need (e.g., clinics staffed by law students). The ultimate decision about whether to hire an attorney should be left to the client, although the mediator should note in the agreement to mediate when a client chooses not to hire an attorney. Further, if one client has an attorney and the other client is self-represented ("pro se"), the mediator should consider how to manage possible power imbalances within the mediation process (e.g., asking an attorney to use plain language so the pro se client can understand what the attorney is saying).

### **THERAPEUTIC STRATEGIES AND SKILLS**

Therapeutic mediators draw from a range of practice theories to inform their work, often using their training and experience as therapists to edify their practice as mediators. Practice theories can help mediators conceptualize psychosocial processes that may assist clients in dealing with emotional, cognitive, and behavioral issues that may be impeding effective conflict resolution (including the ability to adapt to change). Although therapeutic

mediators are not providing therapy, *per se*, they may use strategies and skills from various therapeutic processes within their mediation processes. The following sections illustrate how elements of family systems therapy, rational emotive behavior therapy, narrative therapy, and solution-focused therapy can be used within mediation. You may also incorporate strategies and skills from other therapeutic processes into your model of mediation. As you work through this section, consider how to draw the line between mediation and therapy. Note that mediation is designed to help people manage or resolve conflict. Accordingly, when a therapeutic mediator incorporates strategies or skills from therapeutic processes, they should be used with a view to helping the clients deal more effectively with the conflict.

### **Family Systems Strategies and Skills**

Conceptualizing the family as a system recognizes that a family is not just the sum of individual family members. It is a unique entity with its own strengths, challenges, values, norms, and patterns of behavior (Eddy, 2014a). Family systems serve as a source of support for the people within the family, offering family members love, nurturing, guidance, structure, and a sense of tradition. Within each family there are a myriad of roles, such as father, mother, son, daughter, and grandparent. Different families define roles and responsibilities within families in different manners (Nichols, 2013). According to traditional gender-based norms, fathers may assume the role of financial breadwinner and mothers may assume the role as caretaker for minor children. However, such roles may be shared, reversed, or assumed by other family members (e.g., grandparents or parentified children). Family systems are composed of subsystems such as the couple subsystem, the mother-child subsystem, and the sibling subsystem. Systems and subsystems are structured by boundaries, invisible lines of demarcation that both separate people and define how they are connected (Minuchin, 1992). Thus, during marriage, the boundary around a couple subsystem represents the love, support, closeness, and tension between them, as well as the degree of interactions with other family subsystems and systems outside the family unit. In general, the most functional family boundaries are ones that are clear and flexible (Wall & Spira, 2012). When families have unclear, rigid, or enmeshed boundaries, it is more difficult for them to manage conflict and stress. When a couple separates, all family subsystems are disrupted. The roles, rules, boundaries, and relationships also change (Eddy, 2014a). A family system that was once in balance (homeostasis) may be thrown into turmoil as the family learns to adapt, cope with stress, and find a new equilibrium.

Therapeutic mediators help families renegotiate their roles, rules, boundaries, and relationships (Emery, 2011), easing the transition and helping family members let go of family dynamics that are no longer helpful for the separated family system. Therapeutic mediators also recognize that the nuclear family system operates within a broader social system, including extended family, friends, pets, employers, schools, and other systems. Thus, if grandparents or new partners are fueling the flames of the conflict, the mediator may need to bring them into the mediation process (L. Parkinson, 2011). Mediators may also help families access support to help them through transitions, for instance, a teacher who can aid a child or friends who can help clients implement their parenting plan. Simply having a dog present during mediation can foster more positive interactions between clients (Leaser, 2005).

The following discussion illustrates seven family systems strategies and skills that mediators may use to assist separating families: structural questions, strategic questions, circular questions, role-reversal questions, presuppositional questions, predicting the next step, and exception-oriented questions. Note that questions can include direct as well as implied questions. An implied question is made in the form of a statement that encourages

the client to respond as if it were a question. “I wonder whether you have thought about the costs of litigation,” for instance, encourages clients to respond about the costs of going to court, even though the mediator did not directly ask them to respond.

Consider a same-gender couple, Nadine and Ellyn, who have been referred to Mindy to mediate a custody dispute over their 3-year-old son, Sparta.

During marriage, Nadine stayed home to care for Sparta. Ellyn worked long hours, including frequent travel in her job as a publicist. Because Nadine was Sparta’s primary caregiver during marriage, she resents having to share Sparta with Ellyn. She also resents the notion that she has to return to work outside the home. When Sparta was born, both parents agreed that it was in his best interests for one parent to stay home to raise him. Nadine does not think she should have to maintain financial responsibility for Ellyn and wants to be more involved in Sparta’s life.

Mindy recognizes that, despite the separation, Nadine wants to maintain roles that existed during marriage. In contrast, Ellyn wants to make significant changes. Using a systems perspective, Mindy can help them explore alternate ways in which they can share roles and responsibilities. *Structural questions* are designed to challenge existing family norms, boundaries, and rules—in other words, the structure of their relationship (Minuchin, 1992). By exploring the functions of norms, for instance, mediators can facilitate insights and help families consider new norms or preferred ways of functioning. “Nadine, please help me understand why it was important for you to stay at home with Sparta when he was an infant? [pause for response] What are some of the changes in the family since you first made that decision? [pause] In what ways could the old rules use some updating to reflect your family’s new reality after the separation?” Alternatively, mediators help can use structural questions to help clients delineate new boundaries and establish a new equilibrium in the family. Assume Ellyn does not want Nadine to bring new partners into the family home, purportedly to protect Sparta from being exposed to undesirable characters. “Ellyn, when you lived with Nadine, the two of you agreed to a monogamous relationship. As a married couple, each of you had a say in how each other conducted themselves. Now that you are separated, what type of say, if any, should Nadine have over who you can date or see?” Mediators can help clients establish new boundaries and expectations by having them explore prior boundaries, including how they may not be desirable given the dissolution of the marriage. Note how clients could feel defensive in responding to strategic questions. Mediators should ask strategic questions in a gentle tone and manner, showing curiosity and concern rather than blame or condemnation. Although structural questions may influence client expectations and beliefs (Tomm, 1988), mediators need to respect client self-determination and allow them to draw their own conclusions.

*Strategic questions* are designed to help families correct problems in their interactions (Tomm, 1988). If a client is communicating in an ineffective manner, for instance, the mediator can draw the person’s attention to this concern. “Nadine, are you aware that you have been interrupting Ellyn? When this happens outside mediation, what happens next?” Using a question rather than making a statement invites the client to think about an issue, rather than telling her what to do. Mediators can also use questions to help clients reflect on problematic family patterns. “Have you noticed that each of you is saying what the other person should do rather than talking about what each of you could do to make things better for Sparta?” In this example, the mediator is able to identify issues in the relationship, rather than problems in one person’s behavior. It is easier for the mediator to maintain neutrality by mutualizing the issue and focusing on the relationship. In situations when the mediator focuses on one person’s behavior, the mediator needs to be

extra cautious about the tone of the question to avoid putting one client on the defensive. As with structural questions, strategic questions should be asked in a respectful, curious manner. The mediator may pose questions as a naïve observer, treating clients as experts in their own lives (Fong, 2015).

*Circular questions* are questions that invite clients to explore differences, relationships, interdependence, changes, or patterns (Fong, 2015). Whereas lineal questions imply a simple cause and effect relationship, circular questions embrace the interactive effects, reciprocity, and complex patterns within family systems (Nichols, 2013). In divorce situations, it is often useful to use circular questions to help clients reflect on how things have changed over time. “Before you married, you entered a prenuptial agreement stating that both of you would be responsible for your own finances in the event of separation. How have things changed since you entered that agreement?” Circular questions may also be used to help clients ponder the views of other family members, whether those family members are present (L. Parkinson, 2011). Mindy might ask, “If Sparta were here today, what do you think he would say about how he wants to share time with each of his moms?” or “Nadine, how do you think Ellyn feels about your wanting her to get a full-time job outside the home?” Circular questions may also be used to encourage clients to reflect on each other’s motivations. “Nadine, I’ve noticed that Ellyn keeps saying that Sparta needs a stable home. Why do you think she is saying that?” After Nadine responds, the mediator can check back with Ellyn to have her clarify her motivations. On the actual issue of stability, a child does need stability, but this is not a child’s only need. A child also needs to be able to adapt to change. And a child can benefit from the meaningful, ongoing support of both parents. The mediator does not need to provide this information in the form of statements, but rather, facilitate insight by asking questions and allowing the clients to fill in the details.

In conflict situations, clients often discuss what has not worked. Mediators may use circular questions to help clients talk about what might work. “You’ve said that it hasn’t been helpful to debate whether Ellyn should go back to work. The discussion is going around in circles. Let’s get out of this perpetual revolving door. What do you think might work?” Here, the mediator empowers the clients to think and act differently. Alternatively, the mediator could use circular questions to encourage openness and hope (Fong, 2015). “When Sparta was born, both of you were able to work together to organize your lives in a way that satisfied Sparta’s best interests. How can you reorganize your lives now, so you may once again collaborate for Sparta’s sake?” In this example, the mediator uses past positive patterns to promote hope and to overcome resistance to change.

*Role-reversal questions* invite one client to assume the other person’s position and consider that person’s perspectives (Mayer, 2009). Mindy might ask Nadine, “Assume you are in Ellyn’s situation. You have a job that requires a lot of travel and you have not been able to spend as much time with Sparta as you would have liked. Now, you are going through a separation process. How would you feel if you were told that you have no right to spend time with Sparta because you ignored him during the marriage?” Role-reversal questions invite clients to consider how the other person might hear, interpret, or respond to a situation from the other person’s point of view. Such questions facilitate insight and empathy, and may also facilitate recognition. In response to the forgoing question, Nadine might respond, “If I were Ellyn, I would be angry. I know she wants to spend more time with Sparta.” In high-conflict situations, clients may have a tendency to resist being put into the other person’s shoes. Nadine might say, “I don’t know what Ellyn’s thinking. She chose a certain career, so she needs to accept the consequences of her choices.” Using a motivational interviewing strategy, the mediator may simply roll with the resistance (W. Miller & Rollnick, 2012). Rather than insisting that Nadine look at the situation from Ellyn’s

perspective, Mindy could use paraphrase to validate Nadine's response and shift to another line of conversation.

*Presuppositional questions* assume that a certain type of change will occur, inviting clients to discuss how and when that change will take place. Mindy knows there is a high level of anger between Ellyn and Nadine. To promote a rebuilding of trust, Mindy asks a future-oriented question, "How will you know when it is time to let go of the anger and move on with your new lives?" The mediator could also frame a presuppositional question from the child's perspective. "How do you think Sparta's life will change when you've reached an agreement and put this conflict behind you?" The mediator stimulates a new way of thinking and interacting, inviting the parties to envision a more positive future from the child's perspective. The mediator does not dictate what agreement they will reach, allowing the parties to decide how they will move toward this positive outcome.

*Predicting the next step* is also a future-oriented strategy. The mediator states a hypothesis about how one client may want to react and then invites the client to build on that hypothesis. Ellyn and Nadine are arguing over whether Sparta should go to day-care or stay at home with Nadine. "Ellyn, it sounds as if you want feel that Sparta would benefit from interactions with other children in day-care, but Nadine thinks that you're ignoring her concerns about Sparta's need for stability. I sense that you're open to discussing Nadine's concerns. Would you like to offer some options that take Nadine's concerns *and yours* into account?" The mediator's intervention presupposes that Ellyn is willing to discuss Nadine's concern, while still allowing the client to agree or disagree.

*Exception-oriented questions* help clients move away from problems and focus on strengths and solutions. The mediator may ask questions to raise clients' awareness of times or instances when things are different from what they are projecting. If Ellyn and Nadine were discussing how much they distrust each other, Mindy might ask, "Can you think of a time when you were able to trust each other? What was that like?" If Nadine says that Sparta is always very clingy and does not want to spend time with Ellyn, Mindy might inquire, "I wonder if there have been certain times when Sparta is less clingy. Tell me about an occasion when Sparta wanted to spend time with Ellyn?"

While the questions in this section can be very helpful in stimulating new thoughts and patterns of behavior, they can also be risky. Clients could feel defensive or may perceive the mediator as being biased. As noted earlier, mediators need to use family systems questions in a respectful, balanced manner. They should not take sides or impose their beliefs on clients. When clients perceive the mediator is asking questions out of sincere concern, empathy, and hope for the clients, they are more likely to respond positively.

### **Rational Emotive Behavior Strategies and Skills**

Rational emotive behavior therapy (REBT) focuses on the relationship between experiences, thoughts, emotions, and behaviors (Moore, 2014). According to Albert Ellis, creator of REBT, a person's emotional reaction to a situation is affected by her thoughts about the situation (Ellis & Ellis, 2011). In some instances, people have irrational thoughts that lead to problematic emotional and behavioral responses. The role of the helping agent is to help clients overcome the tendency to think irrationally, thereby improving their emotional and behavioral responses to the situation (W. Ross, n.d.). Although REBT was developed for use by psychotherapists, its approach can be incorporated into the mediation process without becoming therapy, per se. In many conflict situations, clients have strong emotional reactions that make it difficult to manage the conflict. If mediators can help clients correct misperceptions, misattributions, overgeneralizations, or other problematic thought

patterns (as described in Chapter 2), they can help clients feel and respond more positively. To illustrate, consider the following situation:

Lois and Lemont lived together for 6 years. They have 2-year-old twins, Tasha and Tori. Although Lois wanted to get married throughout their cohabitation, Lemont kept delaying marriage, saying, “Who needs a marriage certificate to say that our love is forever?!” Recently, Lemont moved out of the house. Tasha has autism and Lemont was having difficulty dealing with her. Their pastor refers Lemont and Lois to Maris to mediate their separation. When Maris meets Lois for premediation, Lois presents as glum and brooding. She tells Maris, “I must be an idiot. I should have known he had problems with commitment. He never wanted to marry me and he was always more concerned with himself than anyone else. I’m so stupid.”

In this situation, Lois feels despondent because Lemont has moved out. Using REBT to conceptualize the situation, Maris notes that Lois’s emotional reaction is related to her thought processes in interpreting the situation. Lois feels depressed because she thinks she is stupid. She blames herself for not recognizing possible signs that Lemont was not truly committed to the marriage and family. She is beating herself up because she thinks she *should have known better*. Maris can help Lois challenge her irrational belief that she is stupid by raising questions to facilitate insight (W. Ross, n.d.). “Where is it written that you should have known that Lemont was going to leave you?” Maris can then help Lois develop more positive thought processes, helping her realize that she is a smart, caring person who wanted to make her relationship with Lemont work. Maris can help Lois see that even if she did miss some signs that Lemont was not committed to the relationship, she is still that smart, caring person. “Smart, caring people sometimes miss early warning signs about the trouble ahead.”

Lois may also be misattributing Lemont’s intent to hurt her by leaving. “He’s such a jerk. All he thinks about is himself. He has no concern for me or for the children. I’m not going to let him see Tori and Tasha. He deserves to suffer.” Lois feels hurt. The mediator can certainly start with the client by validating her pain and giving her permission to express her anger (L. Parkinson, 2011). Using REBT, however, Maris can also help Lois understand that Lemont may not have been trying to hurt her or the children. Maris could ask Lois about the various possible reasons behind Lemont’s decision to leave. With Lemont’s permission, Maris could also disclose the reasons he wanted to separate: his difficulty dealing with Tasha given her autism, stress in the marital relationship, and a belief that the children would be better if Lois and Lemont were living separately. Initially, Lois believes that love and family are forever. “Only a selfish or callous person would break up a family.” While her anger with Lemont is understandable, it could get in the way of moving on and building a better future for the family. If Maris can help her see that Lemont’s intent was not malicious, Lois may still harbor anger toward Lemont; however, she may also be able to approach coparenting in a more positive manner.

Another approach to confronting irrational beliefs is to ask questions about emergency situations (L. Parkinson, 2011). Assume Lois has been saying Lemont should have no further relationship with the twins. She believes it is not in their best interests. Lois wants nothing to do with Lemont. She never wants to talk with him again. The mediator could inquire, “What would happen if you died or if you were in an accident and couldn’t take care of Tori and Tasha?” Emergency questions help clients think about what matters most. Although she may not be totally happy with Lemont having a role in the children’s lives, she may realize that his involvement could serve positive purposes—particularly in emergency situations. Maris could help Lois understand that while it may be difficult to address

conflict with Lemont in the short term, dealing with the conflict now may be for everyone's benefit in the longer term (Mayer, 2009).

Maris may also assist Lemont with irrational beliefs. For instance, he may want to go to court because he thinks Lois is will never agree to anything he wants. He feels frustrated and vengeful. Two potentially irrational thoughts are embedded in Lemont's responses: He is assuming that Lois has no capacity to reach agreement with him, and he is assuming that court will lead to better outcomes than mediation. "I'm going to fight for my children. I don't care if it takes every cent I've got!" One way to facilitate insight is to surprise the client by agreeing with him (L. Parkinson, 2011). "Maybe it *would be better* for your children if you went to court and spent all your money on litigation rather than mediation." This response opens discussion about the pros and cons of going to court, and spending money on a fight.

Assume Lemont feels highly anxious about spending time alone with Tasha. "I don't know how to relate to my own daughter. I'm such a failure." In this situation, Lemont is not living up to his own expectations as a father. He has hidden his true reasons for separating from Lois because he feels ashamed and guilty. Left unabated, Lemont may continue to distance himself from Tasha. The mediator can help Lemont reassess his beliefs about what it means to be a good father. Lemont may come to realize that many fathers (and mothers) feel inept or lacking skill in some aspects of raising children. Good fathers do not run away. A good father recognizes when he needs help and he reaches out for that help. The mediator could help link Lemont with services that can help him learn more about parenting children with autism, as well as support groups that can offer mutual aid and moral support.

The preceding examples illustrate REBT strategies applied in individual sessions or caucuses. REBT analysis and strategies may also be used to help both clients deal with irrational thoughts in joint sessions. Assume Lemont and Lois have reached impasse over how to share time with their daughters. They feel frustrated and want to terminate mediation. They may be assuming there is no way out of the impasse even though they have not explored all the options. To provide insight into their situation, Maris could use metaphoric storytelling. "Imagine the two of you are in the middle of a maze. You do not know the way out of the maze. You keep going down the same paths and keep getting stuck. What's the best way to get out of the maze? [pause] How would arguing help you get out? [pause] Other than going down the same paths over and over, what could you do?" They could mark the paths they have tried to avoid simply repeating them. They could go over or under the barriers rather than just following the walls and turning back at each barrier. This metaphor could stimulate discussion about approaching the timesharing issue from different perspectives, using creative thinking, not giving up, and not simply going down the same dead-end paths.

The reality of divorce can be tough. Clients may be experiencing financial stress, rejection, loss, embarrassment, and other issues. Although the reality of the client's situation may be unpleasant, it may be unduly complicated by irrational thought processes leading to frustration with themselves, others, or their life situations. Mediators can use REBT to help clients overcome such frustrations by facilitating three types of unconditional acceptance:

1. Unconditional self-acceptance—"I am a fallible human being; I have my good points and my bad points."
2. Unconditional other-acceptance—"The people who treat me unfairly are no more worthy and no less worthy than any other human being."
3. Unconditional life-acceptance—"Life is not necessarily pleasant but it is never awful and it is nearly always bearable." (W. Ross, n.d.)

By facilitating such insights, mediators can help clients engage in conflict resolution more effectively.

### **Narrative Strategies and Skills**

Narrative therapy builds on social construction theory, which posits that there is no singular, objective reality but rather an array of realities that people construct through their language and storytelling (Berger & Luckman, 1967; Neimeyer, 2006). Stories capture the lived experiences of people, encapsulating feelings, thoughts, knowledge, memories, and understandings. Some stories that people tell are empowering, liberating, and inspirational. For instance, a divorcing couple could view themselves as turning a new page, appreciating the love and life they shared, and ready to move on with new energy and opportunities. Other stories are constraining, problem saturated, and blaming. For example, a separating couple tells a story of shattered dreams, loneliness, and acrimony. Storytelling is important in various models of mediation, as it allows clients to vent emotions, reflect on what has happened, and identify issues to discuss and problem-solve. Mediators can also use narrative strategies to help clients deconstruct and reconstruct their stories so they can manage conflict in a more positive manner (Winslade & Monk, 2008).

*Deconstruction* refers to analyzing narratives, exploring the symbolic meanings of their experiences and the stories they tell (White, 2011). When analyzing narratives, mediators may encourage clients to reflect on the ways that family, culture, media, and other social systems have affected their stories. Often, our stories are constrained by structural constraints or expectations. For instance, a client's story may be affected by laws, religious beliefs, and community norms that impose limits on what is appropriate or inappropriate behavior. Consider the messages that we receive regarding marriage and divorce. Wedding vows typically suggest that the bonds of marriage are forever. Each spouse makes public promises, for instance, to love, honor, and respect the other person for all the days of their lives. Within this context, the story of divorce may be expressed as a breach of vows, a failure, or a sign of dishonesty and irresponsibility. Although many people have images of divorce as nasty, devastating, or adversarial, divorce stories could also be framed as respectful, empowering, and collaborative experiences. Thus, to help parties deconstruct the meanings they attach to their narratives of marriage and divorce, a mediator might ask, "What are the stories that your family and cultural community have taught you about marriage and divorce," "What does divorce mean to you," and "How might these stories make it more difficult for people to go through divorce?" Deconstruction helps clients identify social forces that have shaped their perceptions, including how dominant narratives in society may be having a negative impact on their current experiences of separation and divorce (Winslade & Monk, 2008).

*Reconstruction* refers to the process of retelling stories in a manner that clients can see their conflict and future in a more positive light (White, 2011). "We've talked about the meaning of divorce that you learned from important people in your lives. If you were to start over and build the story of a 'good divorce,' what would a good divorce look like?" Rather than being destined to acrimony and strife, the clients can rewrite their divorce story to include acceptance, cooperation, and focusing on the child's best interests. The mediator does not try to engage parties in a search for objective truths, but rather an exploration of stories that remove the problems or constraints of their original narratives. When helping families rewrite their narratives, the mediator could help the family use positive reframes and metaphors in their stories (as described in the introduction to this module). Consider a family that describes itself as "at war" or "like a demolition derby." The mediator could help

them explore a narrative where, “we’re in this boat together” or “this family is a garden that needs to be nurtured.”<sup>13</sup>

The following situation will help illustrate additional applications of narrative strategies.

Three years after Hank’s first wife died, he married Winona. Winona embraced Hank’s infant daughter, Daisy, as her own. Winona and Hank were initially very happy together. Two years into the marriage, Winona decided to separate from Hank because he did not want more children. Having children was very important to Winona. Angered by Winona’s rejection of their marriage, Hank told Winona she would have no further contact with Daisy. “You are not Daisy’s real mother. You have no rights to custody or visitation.” Winona’s attorney referred them to Merv, a mediator who uses narrative mediation.

When Winona tells her story to Merv, it is saturated with problems. She views herself as an *innocent victim* and Hank as a *heartless traitor*. After all, she accepted his daughter as if she was her own child and now Hank is acting as if her relationship with Daisy was a meaningless sham. Winona also sees herself as a victim because Hank prevented her from having other children. Hank says he is the victim because Winona initiated the divorce. In Hank’s view, everything was fine until Winona started making demands about having more children and callously discarded the marriage when she did not get her way. Winona and Hank’s narratives are typical of many conflict stories in which each party paints the other side as evil or blameworthy (Winslade & Monk, 2008). Merv helps Winona and Hank unpack the assumptions and constraints embedded in their stories. “What does it mean to be a real parent?” and “What are the images that we’ve learned about stepparents, and how are they different from biological parents?” These questions open discussion about parents as people who love and support their children, as well as fairytales and images of stepparents as evil, jealous, and devious. To help Winona and Hank construct a new story, she frames her question from Daisy’s perspective. “What stories do you want Daisy to be able to tell her children about how she was raised, and what types of models that both of you were as parents?”

Often, the animosity or resentment between separating couples makes it difficult to think about a future with a more positive relationship. A narrative technique called “externalizing the problem” may be used to help clients separate the person from the problem. When clients ascribe evil, heartlessness, or other negative labels to each other, the mediator can help them externalize the problem by labeling a problem that exists outside the people, but has a negative impact on them. “If you were to describe a problem that makes it difficult to cooperate, what would you call that problem?” They might label the problem as Disappointment, Resentment, or Animosity. Merv could then inquire, “How would your lives be different if you could lock Animosity in a box and you didn’t have to deal with it anymore?” Externalizing the problem helps clients develop distance from contentious feelings and open their minds to the possibility of a more positive future (Billikopf, 2014). If one client labels the other as an alcoholic, the mediator could externalize the problem by asking, “How does Alcoholism make life challenging for the family?” Likewise, if a client is labeled as irresponsible, the mediator could ask, “What would the family look like if Irresponsibility took a vacation and never came back?”

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<sup>13</sup> In one case when I used this metaphor, a client suggested that we start by pulling out the nasty weeds—clearly alluding to the other party.

If clients are not focusing on the child, another method is to have the parents bring photographs of the child into the session. The mediator could then ask each parent to tell stories about the child, focusing on her talents, strengths, and positive attributes. Once the clients start focusing on the child, the mediator could ask, "Please describe a time when both of you were contributing to Daisy's happiness and well-being." The mediator could also invite discussion about constructive ways of dealing with conflict. "Let's talk about a time when you had a difference of opinion about how to be good parents to Daisy. How did you overcome your differences so you could do what was best for her?" By highlighting positive stories from the past, the mediator fosters conditions for the clients to create an alternate story moving forward.

Initially, Hank wants sole custody with Winona having no rights of visitation or access to Daisy. Merv might invite Hank and Winona to explore two different stories, one in which Winona disappeared from Daisy's life and one in which she continued to have a role. "Let's talk about the first option first. Hank, what would it be like to raise Daisy on your own? What are some of the good and some of the not-so-good things about being a single parent?" Merv could then help them explore stories in which Winona continues to maintain a relationship with Daisy. "Now, let's envision a future where both of you continue as coparents for Daisy. In an ideal situation, what would coparenting look like?" Winona or Hank may resist this discussion, noting that this is not the ideal situation. Merv could respond by validating their concerns, allowing them to talk about the potential problems, while also helping them imagine a more positive story. If they want to discuss a "realistic" story, they could construct a story that includes both good and not-so-good experiences (Mayer, 2009). Although they do not envision themselves as "best of friends," they could envision a more businesslike, respectful relationship as coparents. Narrative mediators can help clients focus on stories that facilitate more collaborative relationships, while validating that future conflict and challenges are to be expected. The preferred story moving ahead is not a relationship without conflict, but rather a relationship that deals well with differences (R. Fisher & Brown, 1988).

### **Solution-Focused Strategies and Skills**

Solution-focused therapy (SFT) is a strengths-based brief intervention designed to help people progress toward specific outcomes that will have positive impacts on their lives (P. De Jong & Berg, 2013; Institute for Solution-Focused Therapy, n.d.). Many strategies and skills from SFT fit naturally with an interest-based approach to mediation as they emphasize problem solving. However, they also have a therapeutic element as they build on the resilience and capacities of the clients, empowering them to continue to make positive changes in their lives beyond the formal intervention process. SFT strategies that can easily be incorporated into mediation include looking for previous solutions, looking for exceptions, validating what is working, inviting clients to do more of what is working, coping questions, miracle question, and scaling (P. De Jong & Berg, 2013; Ratner, George, & Iverson, 2012). To illustrate the use of these strategies, consider the following situation.

Grandma Ginny is 83 years old. She has been living on her own until recently, when she fell in her bathroom and broke her hip. She is recuperating in the hospital, anxiously awaiting discharge. Desiree, the discharge planner, schedules informal mediation with Grandma and her two adult children, Cyrus and Catriona. Given Grandma's broken hip and her early stage dementia, Cyrus and Catriona both realize that Grandma can no longer live alone. They cannot afford to place her in a nursing home. Neither child

wants to take Grandma into their home because a long history of “conflict and grief with Grandma.”

Adopting a solution-focused orientation, Desiree does not delve into the long history Grandma’s relationship with her children. She does not need to assess how the conflict started or why it seems to be acrimonious. Desiree can ask focused questions about the past, particularly in terms of *looking for previous solutions*. When people are stuck in conflict, they may not be aware that the solutions they seek may be ones they have used in the past. Thus, Desiree might inquire, “I know this is the first time that Grandma has had a serious accident and I know it’s hard to think of the best way to care for her now. I’m wondering if we could think about other situations when someone in the family had an accident or took ill. How did the family care for this loved one in his or her time of need?” Identifying previous solutions has two potential benefits. First, it may help the family identify a solution that they could use for the current situation. Secondly, it reinforces the family’s sense of self-efficacy; they have had the strength and resources to deal with difficult situations in the past, so they may realize they possess similar capacities to deal with the current situation.

When people are engaged in conflict, they may focus on the problems and negative aspects of the situation. The strategy of *looking for exceptions* helps families focus on possibilities and strengths rather than obstacles and weaknesses. Catriona and Cyrus say that they cannot be with Grandma for any extended length of time. Every time they spend more than a few hours together, they end up screaming and arguing. Desiree invites them to consider exceptions. “I understand that being together for more than a few hours has been frustrating. Can you think of a time when you spent time together and things were pretty good, perhaps even wonderful?” Cyrus and Catriona might recall a family trip, many years ago, when everyone did get along. There were no major fights and the whole family enjoyed themselves. Desiree can then help them build on this experience, exploring factors that made this occasion a positive exception. For instance, they were away from their homes and usual routines, they were touring the beautiful mountains, and they had one vital rule . . . if you’re getting upset or claustrophobic being cooped up with the family, take a walk. Initially, family members may not think that the exception has any relevance to the current situation. However, they may be able to build on that experience to help resolve the current conflict. Focusing on positive exceptions also fosters positive expectations and possibilities, which may facilitate option generation for mutual gain.

The strategy of *validating what is working* refers to complimenting clients for interacting in a positive manner or behaving in a manner that promotes effective resolution of the conflict. Grandma expresses embarrassment that neither of her children want to spend time with her. She feels rejected. Desiree might reframe the situation and offer a compliment. “Grandma, I hear that the respect and dedication of your children means a lot to you. I do want to commend all of you for coming today to make arrangements for Grandma’s health and well-being.” As a mediator, using validation can be tricky because it may affect neutrality. If the mediator commends a particular type of behavior, the mediator may be showing bias toward a particular person or solution. Commending all parties in a mutual manner or focusing on process issues is relatively safe. Commending one person for a particular action may be riskier. Assume Cyrus offers to take Grandma into his home for the summer months. If Desiree responds, “That’s a great offer, Cyrus,” Catriona might think Desiree is siding with him. One way to foster neutrality is through equidistance, that is, ensuring that the mediator balances support for one party with support for the other party. Thus, if Desiree compliments Cyrus, she should make sure she also compliments Catriona and Grandma—not necessarily at the same time, but ideally close in time. Validating what is

working supports progress and encourages people to continue to move ahead in a positive fashion.

*Inviting clients to do more of what is working* refers to identifying positive patterns of behavior and asking clients if they would like to continue that pattern. Thus, if Grandma, Cyrus, and Catriona start brainstorming creative solutions, the mediator could encourage them to continue. “We’ve talked about sending Grandma to a commune, having Catriona open a nursing home, and buying a motorhome so Cyrus and Grandma can tour the country together. What other creative options are there?” Once again, mediators should be careful with this strategy to avoid perceptions of bias. Assume they agreed to a short-term trial arrangement where Grandma lives with Cyrus and Catriona visits during the evenings to give Cyrus respite. When they return, Desiree might say, “The temporary arrangements seem to be working. Perhaps you could continue them.” If Desiree’s comments are based on her own assessment of what is working, then she is imposing her beliefs. Alternatively, Desiree could ask the clients what is working and help them build on the positives. “Let’s talk about what worked well over the past week. What have you learned and what can we build on to ensure positive living arrangements for Grandma over the longer term?” Helping clients identify what is working is more empowering, as they use their own insights to further the conflict resolution process.

*Coping questions* are similar to inviting clients to do more of what is working. Both strategies invite clients to reflect on the past in order to determine what would be beneficial for the future. Coping questions specifically ask clients to ponder strategies they have used to manage or cope with particular problems, conflicts, or stresses in their lives. Grandma Ginny and her family are struggling with how to deal with her memory loss. Desiree might explore their prior means of coping with this concern. “Having dementia can be stressful for the whole family. What are some ways that you’ve coped with this stress in the past?” Here the intent is not to fix or overcome the problem, but to identify ways to cope and adapt despite the problem. Catriona might respond, “Humor helps. Sometimes I tell myself that I’m lucky Grandma asks the same question over and over. I know my answer even before she’s finished the question.” Other coping strategies the mediator could help them identify include diversions (taking a walk), accessing help (talking to another family member), positive self-talk (I am patient and loving), and mindfulness (e.g., through meditation). The key is helping clients identify ways of coping that work for them.

Perhaps the most recognized technique from SFT is the *miracle question*. Essentially, the mediator (or other helping professional) invites clients to consider how things would be different if their lives magically transformed into an ideal situation (P. De Jong & Berg, 2013). Miracle questions inspire people to dream big and think outside the box. They also help people focus on what could be and what they might be able to do to build a better future. Desiree might query, “Imagine that you woke up tomorrow morning and, magically, the conflict we’ve been discussing would be no more. Everything would be perfect. How would your situation be different?” Alternatively, the miracle question might be phrased, “Assume you have a magic wand that you could wave and suddenly, the family’s situation would be perfect. What would this perfect situation look like?” Clients might describe a situation that is perfect, and also unattainable. Still, their responses may spur creative thinking and solutions. Assume Grandma responds, “I would be young and healthy.” Desiree could ask for details about being young and healthy. The family might discuss Grandma having independence, being free to move around that house and beyond, and regaining her memory. Rather than negotiating “who gets stuck with an old and infirm Grandma,” the discussion turns to how they can foster Grandma’s health, independence, and memory. Even though they do not have a machine that can turn back time, they can implement strategies to improve Grandma’s life situation ... as well as Catriona’s and Cyrus’s. They talk

about rehab services, occupational therapy, memory interventions, and modifications to their homes that can improve everyone's quality of life. Although the process begins with discussion of an unattainable miracle, it can lead to development of concrete, feasible solutions. Even baby steps toward the grand miracle may be worth the effort.

*Scaling questions* invite clients to operationalize their goals or preferred outcomes (Ratner et al., 2012). Assume the family's goal is to lower its level of conflict. Initially, the mediator may ask clients to quantify their current situation. "On a scale of 0 to 10, with 0 being no conflict, 5 being moderate conflict, and 10 being extremely high conflict, how would you rate the level of conflict in the family?" Different family members may have different ratings, which is fine. They may have different perceptions and they do not need to agree on "what is." The mediator could then ask family members to describe what it means to be at a certain rating. "You've rated family conflict as an 8. What are some examples or indicators that the conflict is at this level, as opposed to being at a level 10 or a level 5?" The clients might describe examples of arguments, avoidance, yelling, frustration, or other indicators. The mediator then turns the client's attention to the possibility of improvement. "How would you know whether the family was able to lower its level of conflict to a 7 or a 6? What would people notice as different in the family?" The family might describe a decrease in the intensity or frequency of conflict, or perhaps a slight increase in respect, problem solving, or listening. The mediator then invites the family to take one small step toward improvement. "What is something that each of you could do to help move this family toward a 7 or a 6?" Client goals should be individualized to the clients' situation. For instance, they may want to work toward better communication, improved collaboration, or resolving a particular conflict. In Grandma Ginny's situation, for instance, they might work toward a goal of Grandma's independence. Scaling questions help clients identify goals and develop strategies to work toward preferred outcomes. Although the stated goal may seem ideal and overwhelming, scaling helps clients partialize their ultimate goal into more readily achievable steps. As with other solution-focused strategies, scaling questions help people mobilize toward more positive situations, which may include resolution of conflict.

### **INVOLVING CHILDREN IN MEDIATION PROCESSES**

When working on parenting plans, the vast majority of mediators agree that it is appropriate for mediators to focus parents on the best interests of the child.<sup>14</sup> Mediators do not impose their view of what is best for the child, but rather, invite parents as experts in their own families to make this determination. Mediators hold disparate views, however, on the issues of whether and how the child's voice should be heard in the mediation process. Some mediators suggest children should generally be included in mediation, because divorcing parents have difficulty separating their own needs from those of the children (Lowenstein, 2009). Some mediators are open to bringing children into the mediation process, depending on the circumstances. Other mediators never meet with children. They may rely on the parents, child's lawyer, guardian ad litem, child's therapist, child consultant, or other professional to express the child's wishes (Ballard, Holtzworth-Munroe, Applegate, D'Onofrio, &

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<sup>14</sup> Some transformative mediators might argue that the clients are free to decide a parenting plan, without restriction, and that it is not the role of a mediator to focus them on the child's best interests. This view could be problematic in that some mediator codes of ethics and standards of practice require family mediators to focus clients on the child's best interests (Association of Family and Conciliation Courts, 2000, Standard 8). Also, if clients reach an agreement that is not in the child's best interests, then a vulnerable child will suffer.