

INEQUALITY IN DIVORCE MEDIATION—REASONS, MANIFESTATIONS AND WAYS TO AVOID IT. LESSONS FOR LITHUANIA.

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Abstract

Lithuania is one of those EU countries in which the divorce rate is the highest. Furthermore, large-scale emigration led to the dissolution of many families and made divorces more problematic due to their international aspect. Taking into consideration the psychological aspects of a divorce, it is necessary to make it as little painful as possible, particularly for children. All this reflects the need for divorce mediation—reducing the negative consequences of divorce. However, divorce mediation may cause certain inequalities between men and women and therefore it is necessary to create proper conditions of conducting divorce mediation in order to avoid them.

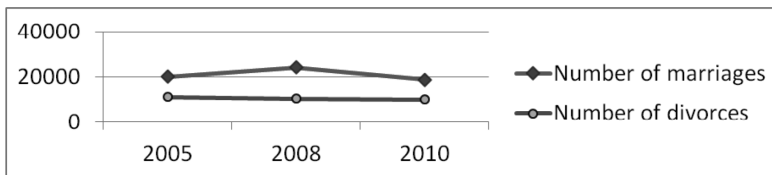
The article analyses some aspects of inequality between women and men in divorce mediation: main reasons for inequalities, the way situation of women and men in marital conflicts influences divorce mediation, role of mediator in suppressing inequalities between the parties. The article underlines necessity of implementation of divorce mediation in Lithuania under a few conditions: proper trainings for mediators in order to provide them with necessary skills to diagnose and suppress inequalities as well as proper inclusion of child welfare into mediation.

Key words: Divorce mediation, domestic violence, unequal bargaining power, imbalance of powers in a divorce situation, child custody.

Introduction

In 2010 in Lithuania about 10 thousand married couples got divorced while only 19 thousand got married.¹

Chart 1: Dynamics of marriage and divorce rates in Lithuania since 2005 (overall number of divorces)



Source: Lietuvos Statistikos Departamentas (Lithuania's Department of Statistics)

As it can be seen from the chart above, for last couple of years the number of divorces in Lithuania has stayed rather high despite varying number of marriages. The percentage of marriages in Lithuania is one of the highest in the European Union.² Worth mentioning is that on average per day in 2010 in Lithuania 51 persons got married, 27 persons got divorced, 14 immigrated and 228 emigrated. Among those people there are many married women and men who left their spouses in Lithuania and emigrated, out of those a meaningful number started new relationships in their new places of living, which, very often, ended in a divorce. It is worth mentioning that about a half of those who emigrated left their children back home—this made the latter “social orphans” (Lietuvos socialinių tyrimų centras, [Lithuanian Centre for Social Research] 2010). Bearing in mind that there were about 3329000 inhabitants in this country in 2010, the above shown statistics seem to show a serious problem—not only of demographic but also of socio-psychological nature. Why? First of all, divorce is a difficult psychological experience both for divorcing couples as well as for their children (Root 2010, Gailienė 1998), however, parents usually divorce with a hope to make their lives better while children stay with a feeling of disappointment and underpinned self-confidence (Root 2010). This leads to further problems for children of divorced couples (particularly of couples where one of the divorced parents bore fault), namely to difficulties in creating trust-based social relations and to troubles

¹ Data collected by Lietuvos Statistikos Departamentas (Lithuania's Department of Statistics), 2010.

² In Lithuania, Belgium and the Czech Republic the divorce rates in 2010 were the highest in the EU (EU-ROSTAT 2010).

in leading satisfactory family life (Root 2010). Secondly, the above mentioned “social orphans” are usually children left outside the legal system providing for securing children’s rights since their parents’ legal and/or economic situation are usually unclear and/or very difficult to change.

In order to avoid negative socio-psychological as well as legal aspects of divorces in Lithuania it is necessary either to make an effort to prevent divorces or to introduce divorce mediation which mitigates negative consequences of divorce for everyone (Stoner 2009).

Litigation does not always seem to ensure satisfaction or at least to enable avoiding dissatisfaction (particularly psychological) in a divorce situation since it bases on adversarial principle and, very often, on proving one of the party’s fault (Jacob 1988, Friedman 1984, Brinig 1995).³ Furthermore, Lithuanian society is lacking trust in institutions of the legal system, which causes in certain dissatisfaction with these institutions and their activities.⁴ Divorce mediation is one of the least intrusive interventions into a divorce dispute—definitely less intrusive than litigation involving advocates and judges. Furthermore, in divorce disputes including international aspects, mediation is not only more efficient (spouses may quickly and comfortably solve their dispute) but also cheaper for the legal system (it does not include costs of international cooperation of courts, translation costs etc.) and for the parties involved. According to the Council of Europe, “mediation eliminates causes of conflicts arising in families, helps to improve communication between family members and significantly reduces negative consequences of breaking family ties” (Recommendation No. R 98). Directive of the European Parliament and the Council on mediation in civil matters (Directive 2008/52/EC 2008), embracing also divorce matters, points out that “agreements resulting from mediation are more likely to be complied with voluntarily and are more likely to preserve an amicable and sustainable relationship between the parties. These benefits become even more pronounced in situations displaying cross-border elements.” (Directive 2008/52/EC 2008).

The above mentioned arguments give an evidence of suitability of mediation for both Lithuanian legal system as well as Lithuanian society and therefore it is difficult to believe that this means of dispute resolution is hardly known in this country. Indeed, some efforts of implementing mediation in general into the Lithuanian legal system, e.g. court-related mediation pilot project, establishment of the Department of Mediation at Mykolas Romeris University in Vilnius or introducing in 2008 the law

³ Numerous lawyers and mediators underline the question of “fault” in divorce cases as an extremely problematic one. There is a strong movement towards suppressing the institute of fault in divorce cases out of family law (with some exceptions, e.g. violence or child abuse). The no-fault divorce movement began in 1969 and took until 1985 before it fully matured in the United States.

⁴ The Gallup Institute presented results of a survey regarding the level of trust in various elements of functioning of a democratic state in Lithuania (conducted in 2011). According to these results, Lithuanians trust the army and religious organizations the most (accordingly 63% and 61% of the respondents). The legal system deserved trust of only 20% of the respondents (similar level of trust was shown towards honest elections in Lithuania—22% and state government—18%). In comparison, about 68% of Finnish respondents and about 42% of Polish respondents trust their legal systems (IQ, 2012).

implementing the mediation directive are meaningful steps towards creating space for divorce mediation in Lithuania, however, they do not seem to be sufficient to convince Lithuanian society to believe in mediation and use it. Some of the reasons for it may be: a) rather big acceptance for conflicts in Lithuanian society in general, resulting from long communist experience under soviet authority (Bartuškaitė, Žilys 2011), b) fear that confidentiality, impartiality and neutrality will not be secured (Kaminskienė 2010), c) general lack of awareness and information about mediation, d) fear of lawyers that they would lose their clients or even their jobs because of mediators, e) fear that mediation will not secure equality between divorcing spouses to the extent the court procedure does (Kaminskienė 2010). The latter problem, not only in Lithuanian context but also generally, is the axis of this article.

Indeed, the problem of possible inequalities between divorcing parties is underlined quite often in the literature as one of few reasons why divorce mediation idea may be underpinned (Kelly 1995, Newmark, Hawell, Salem 2005, Frances Richard 2009, Kaminskienė 2010). Therefore it is necessary to clear the most important aspects of inequalities in divorce mediation and point out their meaning for implementation of divorce mediation in Lithuania.

The main thesis of this article is that divorce mediation does not necessarily have to be unequal (in favour of men), however, it is necessary that three conditions are fulfilled: 1) divorce stops being perceived as a win-lose situation by the society and by parties, 2) mediator is a professional in the field of psychology, however, knows well family law and knows how to recognize family violence, 3) whenever children are involved in a divorce conflict, child's welfare is understood as child's right to keep good relations with both parents. In Lithuania, where divorce mediation is not well-known yet, it is important that, when it appears in legal system and social life, it is based on professional attitude of mediators and on society's proper understanding of child's welfare after parent's divorce. As for now, both above mentioned questions seem to be problematic, particularly in the context of child care most often given by the court to the mothers (Gudaitė, Kalpokienė 2004).

The statistical data the article begun with, however, show clearly the need for divorce mediation in Lithuania and it seems that its quick development in this country is just a matter of time. If balance of parties in divorce mediation is not provided systematically at all possible levels (individual—of mediators, local—of mediation institutions and central—of the authorities responsible for divorce mediation), the society may acquire trust towards this means of conflict resolution really slowly or even become reluctant towards it. Therefore, this article contributes to pointing out some problems that may be related with conducting divorce mediation (related to inequality between the parties) and ways of overcoming them.

Specifically, the article is aimed at pointing out the main reasons for inequality between men and women in mediation, analyzing the way inequalities manifest in mediation process and finding ways to avoid them not only generally but also taking into consideration Lithuanian legal and social context.

Analysis in the article is based on such scientific methods as: summary analysis (used to summarize literature), assessment analysis, analysis of empirical research and data, analysis of legal acts, e. g. Recommendations of Council of Europe, historical and systemic analysis to point out background and legal situation of divorce mediation and some aspects of its development.

1. Reasons for inequality of women and men in family conflicts

“The fundamental premise that must be understood in order to analyze the impact of the use of mediation in family law is that women are less powerful than men in this society. Generally women are economically dependent on the men in their families, both during childbearing years and when they are in the work force earning only three-fifths of what their male counterparts can” (Lefcourt 1984, Rosenberg 1991).⁵ The quotation mentioned above does not seem to fully fit the situation in 2012 when women’s rights in the Western world are respected more than ever before, however, there are numerous evidences of discrimination of women in modern societies, particularly from financial point of view.⁶ It is very often forgotten in debates devoted to divorce mediation, that an important aspect of inequality of the parties is their financial situation. Money influences both nature of divorce conflicts and divorce mediation more than expected (Mieñkowska 2004). From this point of view, Lithuanian society which is one of the poorest in the European Union, does not seem to create comfortable conditions for fair and comfortable amicable dispute resolutions in divorce matters—it rather faces tough fights of the spouses for limited financial resources to provide their children with bright future. Of course it must be underlined that the above mentioned situation is not always the case and there are numerous divorce situations in which money is not the decisive factor of the conflict intensity.

Since the pay gap of about 20% between women and men (EUROSTAT, 2010a) is the case also in Lithuania (as it is in other EU societies), the problem of financial inequality becomes a serious circumstance of divorce disputes. This circumstance is strongly taken into consideration by courts while taking decisions regarding child maintenance, therefore it should also be taken into consideration by mediators.

An important aspect of spouse inequality in family conflicts is women’s aversion towards risk. The fact that women are more risk averse than men may strongly endanger fairness and equity of decisions taken by conflicting spouses while getting divorced. Research of Rosenberg and Cochran resulted in a few empirical evidences of women’s reluctance towards taking risk, which lead to choosing mediation instead of litigation no matter the circumstances (when there is a risk that a positive result of litigation would not be guaranteed for women) (Cochran 1985, Brinig 1995). In some

⁵ Lefcourt’s opinion was strongly opposed by Rosenberg.

⁶ The most striking aspect of this inequality is a so-called pay gap reaching on the average about 20% (difference between levels of remuneration of women and men—in favour of the latter).

situation this may lead to choosing mediation instead of litigation even in those cases in which women are aware of their weaknesses (fear of their spouses, less negotiation skills, more desperation in defending child welfare, worse financial situation etc.).

Regarding mediation process itself, women's risk aversion may lead to accepting unwanted conditions of final agreement if there is a risk of upsetting the husband and experiencing his aggressive reaction after failed mediation. Therefore mediator's psychological skills and fluency in recognizing any situation of fear of the spouse or exaggerated humility of one spouse towards another are crucial. It is of a great importance to notice that the risk aversion of women may be strengthened by their fear of losing child custody, therefore this aspect should be taken into particular consideration by divorce mediators.

Another important aspect of differences between men and women leading towards inequality in conflict situations is women's altruism. The best definition of altruism in this context seems to be the one describing it as "care for another" (Brinig 1995). If we tried to describe altruism in economic terms, the altruist would be described as someone who "takes the other's utility or happiness into account, so that the other's utility is an extension of the altruist's own" (Seater 1993). Psychological experiments based on the prisoner's dilemma brought numerous evidences of women's more altruistic attitude towards relationships than men's, they also shown that men generally expect more generous offers towards them than women (Eckel Grossman 1994). This may be related to various aspects of women's roles in the society. Women are usually expected to show more care for the family (for the others) than men, furthermore, women are required to be more "soft" and "delicate" towards the others and this may cause lenient treatment of women in society. Since this "caring" and "soft" role has always been put on women, they internalized it and in a vast majority of cases they do perceive themselves as those who should be more "caring," more "soft" and "delicate." Of course the above mentioned situation influences the way women act in a conflict situation and, let's be honest, it influences it in a negative way. As more "soft" and "caring" women may more often become victims of "tough" and "requiring" men used to generosity of women towards them. In negotiating conditions of divorces, women might become "defeated" by men if they care for "the family" more than their male spouses. Furthermore, to keep good relations with their spouses women might devote more than men, which requires particular awareness of divorce mediators since mediation is the most future-oriented means of conflict resolution.

The above mentioned reasons for inequality of women and men in conflicts, obviously, do not exhaust the full list of such reasons. They point out, though, a few important aspects of possible perception of mediation as an unequal process leading to unequal results. This perception, very often ungrounded or based on only partially true information, may underpin divorce mediation as such and therefore it should be "fixed" by providing the society with information on how properly and professionally conducted mediation looks like and how mediators are qualified to conduct mediation in the proper way.

Divorce situation is a stressor for all individuals involved—no matter if it is women or men. The problem of perception of a divorce situation is not as gender-based as it

could be expected. Both women and men in a conflict situation consider their personal interests and put them in the overall context of the divorce situation. Stereotypically, women should pursue their particular interests less if the family interest, particularly children's interest, is undermined by this. In fact, despite the risk aversion and altruism, women are not always victims of their relationship (tie)-orientation, however, it is worth mentioning that if a woman does not succeed in keeping family together and fails in preserving her marriage from a divorce, she may perceive it as a loss and herself as a losing party. Furthermore, involvement of third parties in the divorce—family members, witnesses, lawyers—playing roles of allies in the conflict makes the situation even more clearly of a “win-lose” nature. Particularly attorneys representing divorce parties or their personal financial planners encourage them to perceive the situation as adversarial and fight for winning (Miller 2007). In Lithuania attorneys profit from spending hours on implementing strategy of fighting for their clients' victory in the court (they are paid usually for the time spent on the case and for visits in the court), therefore they are not particularly interested in quick achievement of divorce agreement. There is also no system of motivating attorneys or the parties themselves to use mediators' services, therefore it would be naive to believe that divorce mediation could be promoted by attorneys just because it is considered to be less harmful for the parties.⁷

The adversarial way of perceiving divorce situations lead divorcing couples to “sharpen” the conflict by underlining the other party's fault in order to gain more (child custody, property, maintenance etc.). Since women, as it was pointed out in the analysis above, are considered to be less competitive and more family-oriented, litigation enables them more efficient fight for their personal interests since they rely in this matter on their attorneys. In this context mediation does not seem to be the right measure to secure women's rights since parties themselves negotiate face to face and need to rely on their own attitudes towards their interests. Since men are tougher negotiators, mediation might, indeed, cause certain inequality between women and men in this regard.

The above-mentioned analysis should not lead to a conclusion that litigation provides women with a better opportunity to secure their interests than mediation. Rather the opposite, the typical “win-lose” attitude for litigation towards a divorce should rather be replaced by “win-win” expectation towards it and it is a mediator who should convince divorcing spouses to change their attitude towards a divorce. It is, however, also a mediator's duty to make sure that both parties have the same attitude. If one of the spouses stays extremely adversarial and the other perceives divorce mediation as a “win-win” opportunity, strong inequality between the parties may occur and the whole process may become unfair.

Some of the tools assuring fairness and equality of divorce mediation will be analyzed in further parts of this article.

⁷ Four attorneys interviewed by the author of this article in Lithuania claimed their support for mediation and were interested in finding out more about this process, however, they also underlined that it could be considered a big threat for their professional activities if mediators would overtake all divorce cases. Source: opinions collected among 4 attorneys of 2 law firms in Vilnius by author of the article (full description of interviews available upon request).

2. Specific skills of mediators in divorce matters

Recently there have been intensive debates on models of family mediation and divorce mediation as its specific type (Mieńkowska 2004, Folberg, Taylor 1984, Jensen Thomas 2009), however, hardly any of them leads to any other conclusion than the one that it is mediator who plays the biggest role in proper application of mediation style and tools. So there is no universal model of divorce mediation—its process is dependent on mediator. However, it is worth underlining that different mediation styles give mediators different possibilities of intervention into the divorce conflict. So when a mediator applies clear facilitative (Stulberg 1997)⁸ mediation in a divorce case when one of the parties is visibly vulnerable and scared, there is a threat that the weaker party will not defend her or his interests. On the other hand, fully evaluative (Riskin 1994)⁹ or direct mediation may cause certain psychological discomfort of the parties and lead to breaking good future-oriented relations despite achieving formal agreement between the spouses. Therefore the most important task of a mediator in a divorce situation is to choose the proper mediation style and diagnose parties' strengths and weaknesses.

One of the most problematic aspects of conducting divorce mediation for almost every mediator is an extreme inequality of the parties resulting from domestic violence. As can be seen on the basis of research results (Riskin 1994), around a half of all separating and divorcing couples have experienced physical abuse at least once during their marriage or residing together.

Some scholars claim that whenever domestic violence is involved in a divorce conflict, mediation is inappropriate, however, it does not seem to be the right point of view (Newmark, Hawell, Salem 2005).

Indeed, when we take into consideration the fact that any violence—of physical and psychical nature—causes damages in any relation and introduces fear and humble reactions by one of the spouses towards the other (usually women are victims of family violence) (Frances Richard 2009), it seems to be difficult to be overcome in the process of mediation. First of all, any such case requires specific legal knowledge enabling proper application of measures protecting the victim from any further attacks (Frances Richard 2009). Secondly, mediator needs to be proficient in psychology in order to properly support the victim (Lerman 1984). A professional mediator with both legal knowledge and specific psychological skills should always be able to recognize if domestic violence is involved into the divorce situation. How should mediator react when it becomes clear that domestic violence is involved? Specialists are divided on this matter (Folberg, Taylor 1984), however, it seems that the best would be to use facilitative style of mediating, however, with intense use of power equalizing tools

⁸ This mediation style prevents mediator from offering any solutions to the parties or from judging the solutions found by the divorcing spouses.

⁹ This mediation style gives mediators possibility of offering conflict solution proposals and evaluating solutions proposed by the parties.

(mostly psychological empowerment both during common sessions and during caucuses) and of BATNA.¹⁰ The meaning of BATNA could be a subject of a separate article, in this context it is, however, necessary to underline that the party who is a victim of domestic violence should be aware of his or her BATNA to gain sense of safety. In most of the cases knowing that there is an alternative—even if it is only litigation, supports domestic violence victims in expressing their interests (Frances Richard 2009).

Not only BATNA and psychological support are important during divorce mediation of a couple having experienced domestic violence. One mustn't forget that victims of domestic violence show very often a typical victim syndrome, which makes them even more vulnerable, even more lost and even more prone to violence than immediately after aggression attacks they experience. This puts a lot of responsibility on divorce mediators and requires particular effort in empowering victims no matter how "rational" and "forgiving" they seem to be towards their offenders during mediation process. An important role in this context play separate meetings with divorce mediation parties ("caucuses"), since they give a mediator an opportunity to strongly empower the weaker party and make the offender aware of his (or, in few cases her) responsibilities. In some cases domestic violence victims are unable to formulate their interests and to defend them during the process of mediation—then it is grounded that mediator conducts an evaluative or a direct mediation.

To end this part of the article it is worth mentioning that, what might sound surprising, more families having experienced family violence are satisfied with mediation than those without this kind of experience (Chandler 1990). These research results deprive opponents of divorce mediation of a part of their arguments underlining mediation's weakness in diagnosing family violence.

3. Child's welfare in divorce mediation

Usually a divorce is a traumatic experience for children unless they are not witnessing tensions related to it (Root 2010). The latter situation is, however, extremely rare. Since involvement of children in a divorce is an extremely broad topic, it is not going to be analyzed here in details. Important is that children's involvement usually makes women more prone to give up on their financial or property-related interests in order to be more involved in child custody. This may cause men's motivation to use children as tools in fight for the least possible financial losses associated to the divorce. From this point of view, Lithuania has already made a big step towards making divorce possibly equal for spouses of both sexes by establishing State Child Rights Protection and Adoption Service ("Vaiko teisių apsaugos ir įvaikinimo tarnyba") under the Ministry of Social Security and Labour. It seems that if the service (mainly its local branches) gets involved in mediation cases as it gets into litigation, children's involvement in divorce mediation cases may contribute to strengthening equality rather

¹⁰ Eng. Best Alternative to a Negotiated Agreement is one of the commonly used mediation tools.

than inequality. However, the above mentioned situation requires full awareness of the service of what divorce mediation process is and how it should be conducted in order to keep the ties between split family members no despite the divorce and no matter the pain related to it.

CONCLUSIONS

This article has examined certain aspects of inequality between women and men in divorce mediation. It pointed out the most important reasons for possible inequalities (financial situation, risk aversion, women's bigger altruism than men's), the way situation of women and men in marital conflicts influences divorce mediation (if a woman is a victim in a domestic violence situation, she usually requires strong empowerment during mediation) and the role of mediator in suppressing inequalities between divorce mediation parties (supportive role, role of therapist when necessary). It is extremely important that, while strengthening divorce mediation in Lithuanian legal and social system, mediators are required to have undergone psychological and legal trainings providing them with necessary tools to recognize and fight with inequalities in mediation. It is also necessary to properly secure children's welfare in a divorce situation.

The above mentioned conditions should be provided by Lithuanian authorities, namely by the Ministry of Justice, Ministry of Education and Ministry of Social Affairs and Labour. The latter should oblige necessary services (already existing, as "Vaiko teisių apsaugos ir įvaikinimo tarnyba") to provide support for mediators in any cases where mediators request for it. Ministry of Education should organize trainings both for mediators and services involved in mediation in order to provide high quality of mediators' work. Ministry of Justice should give financial and operational support to divorce mediation-related services in order to systemically solve the problems mentioned in the article.

The last recommendation would be that both state authorities and social partners in Lithuania should promote divorce mediation and set up its high quality standards and, by this, encourage the society and mediators to seek for perfection in this field.

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NELYGBĖ SKYRYBŲ MEDIACIJOJE – PRIEŽASTYS, RAIŠKA IR BŪDAI JOS IŠVENGTI. PAMOKOS LIETUVAI

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Santrauka

Skyrybos yra vienas iš skausmingiausių išgyvenimų žmogaus gyvenime. Skyrybos ypač stipriai paveikia besiskiriančių sutuoktinių vaikus. Kadangi teismo procesas dažniausiai neužtikrina šeimos gerų santykių ateityje (nepaisant bandymų sutaikyti šalis), mediacija atrodo labai tinkamas būdas padėti besiskiriantiems žmonėms išlaikyti gerus santykius. Deja, savanoriškas mediacijos procesas gali sudaryti sąlygas šalių nelygybei.

Straipsnyje analizuojami tam tikri moterų ir vyrų nelygios padėties skyrybų mediacijoje aspektai. Analizė apima galimas tokios nelygybės priežastis, nagrinėjama, kaip moterų ir vyrų padėtis skyrybų konflikte turi įtakos skyrybų mediacijai bei kaip užtikrinti tinkamą mediatoriaus vaidmenį užkertant kelią skyrybų mediacijos šalių nelygybei. Tarp svarbiausių vyrų ir moterų nelygybės mediacijos metu priežasčių yra: moterų nenoras rizikuoti, moterų didesnis nei vyrų altruizmas bei polinkis rūpintis kitais. Straipsnyje pabrėžiama, kad įgyvendinant skyrybų mediaciją Lietuvos teisinėje sistemoje ir socialinėje tikrovėje būtina laikytis keleto svarbiausių sąlygų, kad būtų galima išvengti moterų ir vyrų nelygaus traktavimo mediacijoje. Pagrindinės sąlygos yra: tinkami psichologiniai ir teisiniai mediatorių gebėjimai bei įgūdžiai, kurie padėtų diagnozuoti ir slopinti nelygybę skyrybų mediacijoje, taip pat tinkamas vaiko gerovės užtikrinimas. Mediatorius, diagnozavęs šalių nelygybę, turėtų turėti pakankamai žinių ir gebėjimų, kad padrąsintų silpnesnę šalį, sustiprintų jos pasitikėjimą savimi bei atitinkamai panaudotų BATNA (alternatyva mediacijos procesui).

Kadangi Lietuvoje skyrybų mediacija nelabai populiari (tiksliau būtų pasakyti, jog ji beveik netaikoma), labai svarbu, kad jos įvedimo į Lietuvos teisinę bei socialinę sistemą procese besiskiriančių šalių lygybė būtų kuo adekvačiau užtikrinta.

Reikšminiai žodžiai: skyrybų mediacija, šeiminis smurtas, nevienoda derybinė galia, šalių nelygybė skyrybų situacijoje, vaiko priežiūra.