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Mediation in the Singapore Family Justice Courts: Examining the mandatory mediation model under the judge-led approach

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Mediation in the Singapore Family Justice Courts: Examining the Mandatory Mediation Model under the Judge-Led Approach

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Abstract: *In order to reduce acrimony and the adversarial quality of family litigation, the Singapore family justice framework went through an overhaul in 2014. Chief among the changes was the creation of the Family Justice Rules ("FJR") unique to the newly constituted Family Justice Courts. The FJR are meant to reflect a new judicial philosophy for family law disputes, with a "judge-led" approach mandated by Rule 22 of the FJR. As part of the directions a court may give in the exercise of this "judge-led" approach, Rule 22(3)(a) introduces a new, express power for the court to direct that parties attend mediation or counselling. This paper seeks to examine the impact of the judge-led approach on mediation in the Family Justice Courts. How and when is the judge to exercise the power under Rule 22(3)(a) to mandate mediation or counselling? What would the relevant factors for consideration be? Is the judge the best person to make the call? What would be the role of counsel in assisting the judge to make this decision? Drawing from academic literature and practices in other jurisdictions, this paper makes recommendations to guide family judges in exercising their power under Rule 22(3)(a) and considers future areas for research.*

I. Introduction

Singapore established unified Family Justice Courts (the "FJC") supported by their own Family Justice Rules ("FJR") in 2014, after a comprehensive review by the Committee for Family Justice ("the Committee"), which was established by the government in 2013 to conceptualise a different justice framework to better assist families in resolving their disputes. The Committee's objectives were to: (a) protect and support the family as the basic unit of Singapore society; (b) ensure that the interests of the child are protected; (c) effectively and fairly resolve family conflicts; (d) reduce the emotional burden, time and cost of resolving family disputes; and (e) increase access to family justice for all.[1]

One of the key recommendations the Committee made was to strengthen the court's powers in

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[1] Committee for Family Justice, "Recommendations of the Committee for Family Justice on the Framework of the Family Justice System", *Ministry of Law*, July 4, 2014, p 4.

the resolution of family disputes by introducing a new "judge-led" approach that empowered the court to direct parties to appropriate family support services. This resulted in Rule 22(3)(*a*) of the FJR, which provides that in adopting a judge-led approach, the court may give directions "that the party or parties to the proceedings attend mediation or counselling or participate in such family support programme or activity as the Court thinks fit". In a departure from the position in relation to civil proceedings in Singapore, where the court is not granted express powers to direct that parties participate in mediation but may consider any unreasonable refusal to mediate in making orders as to costs, Rule 22(3)(*a*) gives the court in family proceedings a unique authority.

Little is stated about how the broad discretion to mandate mediation is to be exercised, what the relevant factors for the judge's consideration may be, and what the roles of the judge and counsel are.[2] Drawing from academic literature and practices in other jurisdictions, this paper comments on these issues and makes recommendations to guide family judges in exercising their Rule 22(3)(a) power in family proceedings.

II. Impact of the Judge-led approach in the Family Justice Courts

Despite Rule 22(3)(a) seeming like a game-changer, on the ground, it may not have had that significant an impact in the FJC. This is because a shift in the family dispute resolution culture away from a traditional adversarial model towards a more cooperative, conciliatory and child-focused model, with mediation and counselling as key features, had already taken place gradually over the years.[3]

What Chief Justice Sundaresh Menon called the "first foundations"[4] for such an approach were laid when the Family and Juvenile Justice Division was established under the then Subordinate

[2] Family Justice Courts Practice Directions, para 11, states that in child-related proceedings, the parties "will … be directed to attend mediation and/or counselling, whichever is appropriate"; and in non-child related proceedings, "the Registrar or Judge may direct parties to attend mediation and/or counselling, whichever is appropriate".

[3] Kevin Ng and Sim Khadijah Mohammed, "Alternative Dispute Resolution in the Family Justice Courts" in Valerie Thean JC and Foo Siew Fong (eds) *Law and Practice of Family Law in Singapore* (Sweet & Maxwell, 2016), pp 501–502.

[4] Chief Justice Sundaresh Menon, "The Future of Family Justice: International and Multi-Disciplinary Pathways" *Singapore Law Gazette*, November 2016, p 13.

Courts of Singapore in 1995,[5] where judges and a court support group comprising mediators, social workers and counsellors worked together to create a less-confrontational forum for dispute resolution.[6] The Women's Charter was then amended in 1996 to allow the court to "give consideration to the possibility of a harmonious resolution of the matter" and, to that end, "with the consent of the parties", refer them for mediation.[7] A failure to comply with a direction or advice to mediate would not constitute a contempt of court.[8]

In the mid-1990s to mid-2000s, mediation for family matters were conducted on an ad hoc basis by judicial officers, court interpreters, volunteer mediators and paid mediators.[9] In 2006, a Family Relations Centre ("FRC") staffed by judge-mediators was established to provide "holistic, legal, relational and therapeutic solutions to divorcing couples in custody, matrimonial property and other ancillary matters" with the aim of "transforming the culture of family breakdowns from one of acrimony to one of cooperation".[10] That year, the resolution rates of cases mediated at FRC was 88 percent and the resolution rates for individual disputes relating to issues such as custody, care and control, and maintenance were between 91 percent and 98 percent, prompting the FJC to make the FRC a central feature of the justice system.[11]

More mediation initiatives swiftly followed. In 2007, Maintenance Mediation Chambers ("MMC") utilising trained staff mediators and volunteer mediators were formed to handle pre-divorce spousal and child maintenance cases, and both the pre- and post-divorce enforcement of maintenance. Unlike the voluntary FRC scheme, MMC mediations are part of the life-cycle of maintenance applications unless there are exceptional reasons why mediation is not appropriate.[12] This feature brings MMC mediations quite close to mandatory mediations,

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[5] The Subordinate Courts of Singapore were renamed the State Courts of Singapore in 2014.
[6] Doris Lai, "The Family Court of Singapore" [1995] SJLS 655, p 658.
[7] Women's Charter (Cap 353, 2009 Rev Ed), s 50(1).
[8] Women's Charter (Cap 353, 2009 Rev Ed), s 50(3).
[9] Kevin Ng, "Family Mediation: The Perspective of the Family Justice Courts" in Danny McFadden and George Lim. SC (eds) *Mediation in Singapore: A Practical Guide* (Sweet & Maxwell, 2017), p 344.
[10] Former Chief Justice Chan Sek Keong, "15th Subordinate Courts Workplan 2006/2007, Keynote Address: Justice @ The Subordinate Courts: The New Phases of Justice" (May 18, 2006), available online at: https://www.statecourts.gov.sg/Resources/Documents/Resources_2006_Annual%20WP_Keynote%20Address_by%20CJ.pdf (accessed January 30, 2018), para 10.
[11] Former Chief Justice Chan Sek Keong, "16th Subordinate Courts Workplan 2007/2008, Keynote Address: Justice @ The Subordinate Courts: The Next Phase" (April 27, 2007), available online at: https://www.supremecourt.gov.sg/docs/default-source/default-document-library/media-room/subcts-wkplan-speech.pdf (accessed January 30, 2018), para 38.
[12] Ng and Sim, "Alternative Dispute Resolution in the Family Justice Courts" in *Law and Practice of Family Law in Singapore* (2016), p 505.

especially in the Singapore context where most parties would not question what they perceive as court processes that they must go through.[13] Early results from MMC mediations were positive, indicating a resolution rate of 89 percent; the MMC also provided a platform to bring in voluntary bodies to assist the parties to meet their other needs.[14]

In 2011, the Women's Charter was further amended to give the court the power, where there were children at the time of the divorce, to order that the parties and their children attend mediation or counselling or both if doing so was in their interests.[15] In the event of non-compliance, the court could make such further orders as it thought fit, including staying the proceedings until parties attended the mediation or counselling specified or ordering costs against the party who failed to comply.[16] This marked the first introduction of mandatory mediation. With this mandate, the Child Focused Resolution Centre ("CFRC"), with judge-mediators and in-house social science professionals was created to carry out the counselling and mediation programs ordered by the court.[17]

The CFRC process involves, first, a conference being held where an assistant registrar and family counsellor meet with parties and their lawyers to assess the type of services the parties need. Typically, the assistant registrar will introduce the court counsellor, explain the counsellor's role and the purpose of the programme, and clarify the issues in contention to see if differences can be narrowed.[18] Once the assistant registrar assesses the case to be suitable, he or she will direct that counselling and mediation be carried out, with the counselling program taking place immediately after the conference is completed, starting with an intake and assessment session.[19] Subsequent sessions can be arranged between the parties and the counsellor. A mediation date before a judge-mediator will also be issued (where parties and their lawyers are expected to attend) although there is also the option of co-mediation for more complex and high-conflict cases where a counsellor or psychologist team will be included.[20]

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[13] Adrian Loke, "Mediation in the Singapore Family Court" (1999) 11 SAcLJ 189, 198.
[14] Former Chief Justice Chan, "16th Subordinate Courts Workplan 2007/2008, Keynote Address: Justice @ The Subordinate Courts: The Next Phase" (April 27, 2007), para 42.
[15] Women's Charter (Cap 353, 2009 Rev Ed), s 50(3A) and (3B).
[16] Women's Charter (Cap 353, 2009 Rev Ed), s 50(3D) and (3E).
[17] Ng, "Family Mediation: The Perspective of the Family Justice Courts" in *Mediation in Singapore: A Practical Guide* (2017), p 345.
[18] Ng and Sim, "Alternative Dispute Resolution in the Family Justice Courts" in *Law and Practice of Family Law in Singapore* (2016), p 521.
[19] Ibid, pp 521–522.
[20] Ibid, pp 522–523.

Evidently, the Singapore judiciary strongly believes in the use of mediation and counselling as "appropriate" dispute resolution in family proceedings.[21] With the establishment of the FJC in 2014, the FRC, CFRC, MMC and Counselling and Psychological Services ("CAPS"), which is the social science arm of the FJC, have been combined to form the Family Dispute Resolution ("FDR") Division.[22] The FDR allows for synergy between all the programs, utilising a multi-disciplinary model that combines the judicial and legal expertise as well as mediation skill sets of judge-mediators with the social science expertise of CAPS officers.[23] The FDR mediation and counselling process closely follows the CFRC process described earlier. Since October 2015, the FDR has its own premises housing its divorce and child-related services, separate from the FJC building.

The responses to mediation in the courts have been positive. About 83 percent of cases referred to the FRC from 2003 to 2013 were settled following mediation.[24] In 2012, qualitative feedback collected by the CFRC contained very encouraging comments from parents who expressed appreciation for the mediation and counselling initiatives.[25] There does not seem to have been significant changes in terms of settlement rates brought about by the establishment of the FJC, which reported that more than 75 percent of the cases handled by the FDR came to a mediated resolution either fully or partially, and that under the CFRC programme, custody, care and control, access and other child-related issues have been settled close to 90 percent of the time.[26]

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[21] See Sundaresh Menon, "Building Sustainable Mediation Programmes" [2015] Asian Journal of Mediation 1, 4–5: "It is plainly counter-intuitive to think that we would take the most intimate human relationship, namely, the family relationship, knowing that it is already strained if not fractured, and subject it to an adversarial process with lawyers who see themselves as fighters ... we need to shift our thinking and see ADR not as an alternative to traditional court systems and processes but ... "appropriate" dispute resolution."

[22] Ng, "Family Mediation: The Perspective of the Family Justice Courts" in *Mediation in Singapore: A Practical Guide* (2017), p 356.

[23] Ibid, p 357.

[24] Ibid, p 354.

[25] Some comments are cited in Ng, "Family Mediation: The Perspective of the Family Justice Courts" in *Mediation in Singapore: A Practical Guide* (2017), p 365, as follows:

> This is a very good session. At least I know where I can get help managing the child after the divorce … it helps in giving an idea on how to minimise the trauma of the child in a divorce.
>
> We appreciate the Court's new initiative in providing divorced couples to address their co-parenting roles. Our emotions were high at the beginning stage and we need the most help to sort out our ancillary matters, which includes child custody.
>
> The CFRC Conference helped me save legal costs …

[26] Ng, "Family Mediation: The Perspective of the Family Justice Courts" in *Mediation in Singapore: A Practical Guide* (2017), p 365.

More detailed statistics would shed more light on the impact of mandatory mediation, including information on the time taken for a case to reach mediation, the duration of mediation, the way the participants behave at the mediation, their satisfaction with the process and the mediator, and whether there are types of cases that have benefitted (or suffered) in terms of party satisfaction or settlement rates. Nevertheless, given the gradual adjustments that have been made since 1995, it can probably be said that the introduction of Rule 22(3)(a) did not bring about any sea change in the use of mediation and counselling, but was a natural next step in the evolution of family justice in Singapore. It also formalised and re-organised the court structures and resources so that the tools of mediation and counselling may be more effectively and efficiently used. Now that mediation at the FJC has truly come into its own, it is timely to consider introducing more transparency in the courts' use of and decisions surrounding mediation, including how and when the Rule 22(3)(a) power to mandate mediation should be exercised.

III. Relevant factors for consideration before mandating mediation

Research has shown that satisfaction ratings for mediation are usually high and that participants generally perceive the mediation process and its outcomes as "fair".[27] Importantly, 93 percent of family mediation clients in one study said they would use mediation again.[28] Another benefit of mediating family disputes is that mediated agreements can contain terms that are better understood by the parties who have produced them, reducing confusion and diminishing the need for subsequent court action.[29] One commentator has observed that the success or failure of family disputes hinges on: (1) parties' post judgment/settlement satisfaction with the process; and (2) the amount of involvement/input in that process by the participants.[30] Mediation seems to be the best option to achieve these goals given the many benefits it offers

[27] Carol J King, "Burdening Access to Justice: The Cost of Divorce Mediation on the Cheap" (1999) 73 St John's L Rev 375, 376; Jeanne A. Clement and Andrew I Schwebel, "A Research Agenda for Divorce Mediation: The Creation of Second Order Knowledge to Inform Legal Policy" 9 Ohio St J on Disp Resol 95, 98–99; Craig A McEwen and Richard J Maiman, "Small Claims Mediation in Maine: An Empirical Assessment", (1981) 33 Me L Rev 237, 256–260.
[28] Jay Folberg, "Mediation of Child Custody Disputes" (1985) 19 Colum JL & Soc Probs 413, 424.
[29] Joyce Hauser, *Good Divorces, Bad Divorces: A Case for Divorce Mediation* (University Press of America, Maryland, 1995) p 25; Peter A Dillon and Robert E Emery, "Divorce Mediation and Resolution of Child Custody Disputes: Long Term Effects" (1996) 66 Am J of Orthopsychiatry 131, 132–133.
[30] King, "Burdening Access to Justice: The Cost of Divorce Mediation on the Cheap" (1999) 73 St John's L Rev 375, 440–441.

participants as well as its allowance for a high level of involvement.[31]

However, it may be argued that certain categories of cases are unsuitable for mediation because they would not serve to meet the psychological needs of the parties or produce the reasonably fair, sustainable outcomes one would expect.[32] This section addresses four of these categories: (a) family violence; (b) power imbalance; (c) disputes involving children; and (d) unwilling parties.

a. Family violence

The most common exclusion from mediation in other jurisdictions is family violence. One commentator poignantly argues that "it is imperative that victims of domestic violence, who are able to escape their abusers and file for divorce, be kept safe by the legal system" and not be "forced into face-to-face mediation with the person from whom they are fleeing".[33] In the UK, an exception to mandated attendance at a mediation awareness session is where a prospective applicant claims in the relevant form that there is evidence of domestic violence or that a child is the subject of a child protection plan or related enquiries.[34] Colorado similarly does not refer to mediation cases where there is an allegation of abuse and a statement that one is unwilling to mediate.[35] In a similar vein, the Australia Family Law Act states as an exception to mandatory mediation a situation where "the court is satisfied that there are reasonable grounds to believe that: (i) there has been abuse of the child by one of the parties to the proceedings; (ii) there would be a risk of abuse of the child if there were to be a delay in applying for the order; (iii) there has been family violence by one of the parties to the proceedings; or (iv) there is a risk of family violence by one of the parties to the proceedings".[36]

However, Ohio takes a different approach by allowing the court to order mediation even if one parent has been convicted of domestic violence as long as mediation is still in the parties' "best

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[31] Bill Ezzell, "Inside the Minds of America's Family Law Courts: The Psychology of Mediation versus Litigation in Domestic Disputes" (2001) 25 Law & Psychol Rev 119, 130.
[32] Debbie Ong, "Mediation" in *The Art of Family Lawyering*, 1st edn (Law Society of Singapore: 2005), p 157.
[33] Laurel Wheeler, "Mandatory Family Mediation and Domestic Violence" (2002) 26 S Ill U LJ 559, 562.
[34] UK Family Procedure Rules, Part 3.8(1), (2).
[35] Colo Rev Stat Ann § 132-222-311 (West: 2001). In *Pearson v Dist Ct*, 924 P2d 512, 516 (Colo 1996), the Colorado Supreme Court stated that "the plain and obvious statutory language forbids a court from ordering mediation where a party claims physical and psychological abuse."
[36] Australia Family Law Act, s 60I(9)(b).

interest".[37] The broad discretionary approach in Singapore is similar to Ohio as there is no legislative restriction on referring cases to mediation where there is family violence. Nevertheless, the FJC Practice Directions contemplate that mandatory mediation may not be in the interest of the parties concerned where family violence has been committed or where child protection services are involved in the case.[38]

Should the FJC adopt an approach where risk of family violence excludes a case from mediation? The chief downside to a blanket rule is that a significant proportion of family cases could be excluded from mediation and its benefits. In the US, violence is a feature of 50 to 80 percent of the conjugal relationships that dissolve before death[39] and of 50 to 60 percent of those relationships that come to mediation.[40] In Australia, approximately 25 percent of referrals to family mediation are screened out due to domestic violence.[41] A 2010 survey done in Singapore demonstrates that family violence is a pressing issue although not as prevalent as in the US or Australia, with just over 6 percent of women with a current or former partner experiencing at least one form of violence by a partner in their adult lifetime.[42] Family service centres in Singapore have also reported an increase in family violence cases over the years.[43]

Although violence can severely impede the victim's ability to assert her rights and interests against the perpetrator,[44] not all cases of violence are the same.[45] Mediation will not be appropriate when a party is unable to safely advocate for his or her needs and interests or

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[37] Ronald B Adrine and Alexandria M Ruden, *Ohio Domestic Violence Law* (West: 2000) § 14, 23.
[38] Family Justice Courts Practice Directions, para 12(10).
[39] Jessica Pearson, "Mediating When Domestic Violence Is a Factor: Policies and Practices in Court Based Divorce Mediation Programs" (1997) 14 Mediation Quarterly 319, 320; Joan B Kelly, "Family Mediation Research: Is There Empirical Support for the Field?" (2004) 22 Conflict Resolution Quarterly 3, 9; Desmond Ellis, "Divorce and the Family Court: What Can Be Done about Domestic Violence?" (2008) 46 Family Court Review 531, 531.
[40] Robin H Ballard et al, "Factors Affecting the Outcome of Divorce and Paternity Mediations" (2011) 49 Family Court Review 16, 17; Amy Holtzworth-Munroe, "Controversies in Divorce Mediation and Intimate Partner Violence: A Focus on the Children" (2011) 16 Aggression and Violent Behavior 319, 319.
[41] Helen Rhoades, "Mandatory Mediation of Family Disputes: Reflections from Australia" (2010) 32 J Soc Wel & Fam L 183, 184.
[42] Bridgitte Bouhours et al, "International Violence Against Women Survey: Final Report on Singapore" (June 1, 2014) available online at: https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID2337291_code357575.pdf?abstractid=2337291&mirid=1&type=2 (accessed January 30, 2018), p 16.
[43] Janice Tai, "Breaking the Silence on Family Violence" *The Straits Times* (17 November 2016), available online at: http://www.straitstimes.com/singapore/breaking-the-silence-on-family-violence (accessed January 30, 2018).
[44] Noel Semple, "Mandatory Family Mediation and the Settlement Mission: A Feminist Critique" (2012) 24 Can J Women & L 207, 216–217.
[45] Lydia Belzer, "Domestic Abuse and Divorce Mediation: Suggestions for a Safer Process" (2003) 5 Loy J Pub Int L 37, 44.

anyone's safety may be endangered because of mediation".[46] However, one study has found that a history of violence does not affect a party's ability to achieve her goals in mediation.[47] Another that abuse victims who were excluded from mediation "often viewed the abuse as irrelevant to the current case because it happened in the past or because the abuse was seen as minor or infrequent".[48] Notably, litigation is not necessarily a superior alternative. A related statistic from another study found that "physical, verbal, and emotional abuse was greatly reduced among mediated cases as compared to litigated cases".[49]

Nancy Ver Steegh suggests that a more empowering response is to encourage domestic violence victims themselves to make informed choices about whether mediation is appropriate and that the following decision-making path may be helpful: (1) identifying intimate partner violence; (2) understanding its characteristics; (3) determining its implications; (4) considering the real options available to parties; and (5) making a decision.[50] The mediation process can further be adapted to screen for abuse[51] and to respond sensitively to the needs of the parties and safety issues.[52] It is also important to bear in mind that if one were to screen out family violence cases from mediation, then the alternative resolution scheme that the case is being channelled into should actually offer a safer alternative.[53]

Thus, a blanket exclusion is not recommended for judges considering whether to exercise their Rule 22(3)(a) power in cases of suspected or proven family violence. They could instead

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[46] Marilou Giovannucci and Karen Largent, "Association of Family and Conciliation Court Guidelines for Child Protection Mediation" (2013) 51(4) Family Court Review 605, 642.
[47] Desmond Ellis and Laurie Wight, "Theorizing Power in Divorce Negotiations: Implications for Practice" (1998) 15 Mediation Quarterly 227.
[48] Alaska Judicial Council, "Alaska Child Visitation Mediation Pilot Project" (Anchorage, AK: Alaska Judicial Council, 1992).
[49] Peter Salem and Ann L Milne, "Making mediation work in a domestic violence case" (1995) 17 Family Advocate 17, 34.
[50] Nancy Ver Steegh, Gabrielle Davis and Loretta Frederick, "Look before you Leap: Court System Triage of Family Law Cases Involving Intimate Partner Violence" (2012) 95 Marq L Rev 955, 969.
[51] Linda K Girdner, "Mediation Triage: Screening for Spouse Abuse in Divorce Mediation" (1990) 7 Mediation Quarterly 365 suggests that in separate sessions with each spouse, a mediator can use a Conflict Assessment Protocol to ask probing questions about: (1) decision making, conflict, and anger within the relationship; and (2) specific abusive behaviours. For other screening tools, see Desmond Ellis and Noreen Stuckless, "Domestic Violence, DOVE, and Divorce Mediation" (2006) 44 Family Court Review 658; Amy Holtzworth-Munroe et al, "The Mediator's Assessment of Safety Issues and Concerns (MASIC): A Screening Interview for Intimate Partner Violence and Abuse Available in the Public Domain" (2010) 48 Family Court Review 646.
[52] Online mediation may be considered for domestic violence cases. Dafna Lavi, "Till Death Do Us Part: Online Mediation As an Answer to Divorce Cases Involving Violence" (2015) 16(2) NC J L & Tech 253, 256.
[53] Desmond Ellis, "The Family Court-Based Stepping Stones Model of Triage: Some Concerns about Safety, Process, and Objectives" (2015) 53 Family Court Review 650.

encourage the victim to make an informed choice about whether mediation is appropriate, with the assistance of CAPS officers.[54] Where the victim chooses not to participate in mediation, then the court ought to ensure that the alternative is suitably safe for the victim and can secure the protection required by the victim. The FDR is well-positioned to put this decision-making process in place given the close working relationship that the assistant registrars, judge-mediators and counsellors enjoy.

b. Power imbalance

Related to family violence, although not to be equated with it as each can vary independently,[55] is severe enough power imbalance.[56]This exception to mandatory mediation has found its way into various pieces of legislation, including the Australia Family Law Act, s 60I(9)(e) of which excludes situations where a party "is unable to participate effectively … (whether because of an incapacity of some kind … or for some other reason)". In contrast, the 16th Judicial Circuit of Illinois recognises various "impairments" that would make attaining the goals of mediation all but impossible, including a "limited capacity to advocate effectively in pursuit of safe and fair agreements" which could be due to a host of factors, such as intimidation or mental illness.[57] The court is given general discretion as to whether or not to order mediation but is obliged to screen for those cases that are "inappropriate for mediation".

In considering whether severe power imbalance should except a case from mandatory mediation, the court ought to look out for a broad range of warning indicators such as signs of mental or physical incapacity to negotiate (whether brought about through mental illness, substance abuse, or otherwise) and coercive controlling behaviour by one party over another. One study has shown that coercive control may be without accompanying violence and may be a more efficient and accurate signal of relationship distress in a mediation sample.[58] The

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[54] Judges, psychologists and mediators can collaborate and recommend a proper course of conduct to the victim and once a victim has been informed of that recommendation, in addition to all other options available to her, she must decide the fate of her case. Aimee Davis, "Mediating Cases Involving Domestic Violence: Solution or Setback?" (2007) 8 Cardozo J Confl Res 253, 278–279.

[55] Ellis, "The Family Court-Based Stepping Stones Model of Triage: Some Concerns about Safety, Process, and Objectives" (2015) 53 Family Court Review 650, 653.

[56] Marian Roberts, *Mediation in Family Disputes: Principles of Practice* (Ashgate Publishing Ltd, 2008), p 179; Ilan G Gewurz, "(Re)Designing mediation to address the nuances of power imbalance" (2001) Conflict Resolution Quarterly, 19(2), 135–162; Joan B Kelly, "Power imbalance in divorce and interpersonal mediation: Assessment and intervention" (1995) 13(2) Mediation Quarterly 85.

[57] Ill R 16CIR R 15.22 (West, 2000).

[58] Connie JA Beck and Chitra Raghavan, "Intimate Partner Abuse Screening in Custody Mediation: The Importance of Assessing Coercive Control" (2010) 48 Fam Cr Rev 555, 562.

court should also ensure that an assessment is done by a counsellor using an appropriate screening tool.[59]

Nevertheless, the mere presence of a power imbalance, even a severe one, need not necessarily lead to an exception being made. It has been argued that the dynamics of power in a dispute greatly depend on context; and that mediation, with an adept mediator, can use power creatively, transforming a dispute into joint decision and avoiding the negative consequences of power imbalance while offering safeguards to power abuse.[60] In the judge-led model of mediation in the FJC, judge-mediators use facilitative techniques to allow parties leeway to explore options that work best for them, but also use evaluative tools to ensure that the eventual settlement is not unfair to either party in the context of the prevailing legal position.[61] Thus, the judge-mediator is able to offer some balance to the power difference between the parties. Additionally, before mediation, there is usually an FDR conference to ascertain the services that the parties will require, which could include counselling and co-mediation involving both a judge-mediator and a counsellor. Counselling is usually completed before the mediation and the counsellor can flag any concerns to the judge-mediator.[62] Accordingly, in this context, it is recommended that the threshold for avoiding mediation due to a power imbalance ought to be a very high one.

c. Disputes involving children

Child custody disputes may arguably be better suited to litigation than mediation because litigation is a better fact-finding tool and it is of critical importance in child custody disputes to see a clear and accurate picture of the family.[63] However, mediation for custody disputes is commonplace[64] and understandably so, as research shows that children are damaged in many ways when they are exposed to high levels of parental conflict, including when they are

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[59] Ibid.
[60] Jordi Agusti-Panareda, "Power Imbalances in Mediation: Questioning Some Common Assumptions" (2004) 59(2) Disp Res J 24, 30–31.
[61] Ng, "Family Mediation: The Perspective of the Family Justice Courts" in *Mediation in Singapore: A Practical Guide* (2017), p 361.
[62] Ng and Sim, "Alternative Dispute Resolution in the Family Justice Courts" in *Law and Practice of Family Law in Singapore* (2016), p 522.
[63] Ezzell, "Inside the Minds of America's Family Law Courts: The Psychology of Mediation versus Litigation in Domestic Disputes" (2001) 25 Law & Psychol Rev 119.
[64] Jessica J Sauer, "Mediating Child Custody Disputes for High Conflict Couples: Structuring Mediation to Accommodate the Needs & Desires of Litigious Parents" [2007] 7(3) Pepperdine Disp Res LJ 501, 507–508.

involved in protracted custody litigation between their parents.[65] Although there are some mixed results, a large number of studies show that mediation of child custody disputes compared with adversarial settlement produce more agreements that are less likely to result in re-litigation.[66] One interesting study demonstrates that in comparison with those who litigated, non-resident parents who mediated were more involved in multiple areas of their children's lives, maintained more contact with their children, and had a greater influence in co-parenting 12 years after the resolution of their custody disputes.[67]

The FJC model of mediation is designed to deal with high conflict situations and bears many of the characteristics that have been recommended for structuring mediation programs for child custody disputes.[68] First, participants are educated about the mediation process and emotionally prepared for it through the FDR conference and counselling intake and assessment session. Second, the judge-mediator is a neutral, skilled mediator who can set firm rules for any direct interaction between the parties and is trained to use filters to control communication between the parties, for example, using private caucuses and maximising lawyer involvement. Third, the CFRC programme makes the best interests of the child the focus of dispute resolution and a decision will be made after the counselling intake and assessment session about how the children will be involved in the mediation or counselling process. A child inclusive dispute resolution process was also introduced in 2015 which involves, at the first stage, a consultation with the child, and at the second stage, a feedback conversation with the parents.[69] The therapeutic value of this process is supported by empirical evidence.[70]

For these reasons, it is suggested that there is no need to re-examine the present mandatory mediation and counselling model in the FJC for family disputes involving children, although the judge should still be wary of circumstances that may make mandatory mediation incompatible with the best interests of the child.

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[65] Barry Bricklin and Gail Elliot, "Qualifications of and Techniques to be Used by Judges, Attorneys, and Mental Health Professionals who Deal with Children in High Conflict Divorce Cases" (2000) 22 U Ark Little Rock L Rev 501, 502–504.
[66] Margaret Severson et al, "Judicial Efficiencies in Child Custody Disputes: Comparing Mediated and Litigated Outcomes" (2004) 40 J Divorce & Remarriage 23, 25–27.
[67] Robert Emery et al, "Child Custody Mediation and Litigation: Custody, Contact, and Coparenting 12 Years After Initial Dispute Resolution" (2001) 69(2) J Consulting and Clinical Psych 323.
[68] Sauer, "Mediating Child Custody Disputes for High Conflict Couples: Structuring Mediation to Accommodate the Needs & Desires of Litigious Parents" [2007] 7(3) Pepperdine Disp Res LJ 501, 521–533.
[69] Ng, "Family Mediation: The Perspective of the Family Justice Courts" in *Mediation in Singapore: A Practical Guide* (2017), p 372.
[70] Felicity Bell et al, "Outcomes of Child-Inclusive Mediation" (2013) 27 Int'l JL Pol & Fam 116, 139.

d. Unwilling parties

The unwillingness of parties may be an important consideration because research has shown that informed consent to mediation gives parties ownership of their dispute, is associated with fairness, justice and human dignity values, and is also linked to sustainability and commitment to honour one's promise.[71] Nevertheless, empirical studies on whether mandatory mediation results in a difference in settlement rates as compared with voluntary mediation do not strongly point one way or the other.[72] This may suggest that the initial unwillingness of parties to mediate does not have a significant impact on a mediation being successful in achieving settlement.

There may, however, be exceptional situations involving "truly unwilling parties" for which the English Court of Appeal in *Halsey v Milton Keynes General NHS Trust*[73] observed that compulsory referral would "achieve nothing except to add to the costs to be borne by the parties, possibly postpone the time when the court determines the dispute and damage the perceived effectiveness of the ADR process".[74] The UK Family Procedure Rules reflect this attitude towards compulsory referral, and one of the exemptions from attending a mandatory mediation information session is previous attendance at one such meeting in the prior 4 months.

In contrast, the Australia Family Law Act does not exempt cases where family dispute resolution has been attempted before but focuses more on demonstrated intransigence. The threshold is set quite high as the following requirements must be fulfilled: (1) a previous application was made in relation to the same child-related issue; (2) an order was made for that issue within a 12 month period from the application; (3) the application relates to a contravention of the order by a person; and (4) "the court is satisfied that there are reasonable grounds to believe that the person has behaved in a way that shows a serious disregard for his or her obligations under the order".[75]

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[71] Jacqueline Nolan-Haley, "Mediation: The Best and Worst of Times" (2014) 16 Cardozo J Conflict Resol 731.
[72] Roselle L Wissler, "Court Connected Mediation in General Civil Cases: What We Know from Empirical Research" (2002) 17 Ohio St J Disp Res 641, 676; Dorcas Quek, "Mandatory Mediation: An Oxymoron? Examining the Feasibility of Implementing a Court-Mandated Mediation Program" (2010) Cardozo J Conflict Resol 479, 486.
[73] [2004] EWCA (Civ) 576.
[74] Ibid, para 10.
[75] Family Law Act 1975 (Cth), s 60I(9)(c).

The UK approach arguably sets the threshold too low, whereas the Australian approach is too restrictive. A more nuanced approach would factor in the reasons for the unwillingness to participate in mediation, consider whether any emotional issues underlying that unwillingness can be dealt with through counselling or other therapeutic interventions, before determining whether mediation should be proceeded with. It is suggested that the FJC could adopt such an approach given the inter-disciplinary resources available to parties at the FDR.

In summary, I agree with one commentator that "the court should avail itself of the option of ordering parties to attend mandatory mediation as much as possible",[76] but that this should be qualified by the overriding concern for the safety of the family, particularly vulnerable children.

IV. The judge as the best person to make the call

Related to the issue of who should make the call as to the suitability of a case for mediation is the triage debate in the US. This debate was crystallised in an article by Peter Salem,[77] who urged the courts to rethink their reliance on mandatory mediation in family cases in favour of a triage approach, which would identify the cases most and least likely to benefit from mediation.[78] For example, one model of triage that has been used in Connecticut employs a screen that included questions addressing the level of conflict, communication and cooperation, complexity of issues and level of dangerousness; preliminary results suggest increased agreement rates, reduced rates of return for a second service, a reduced number of child-related motions, and an overall decrease in the number of services parties had to rely on the court for.[79] However, Salem received substantial push back from many who worried that triaging cases would work against the efforts to establish mediation in the courts and who saw mediation as itself containing a triage component so that the process could be stopped or modified as appropriate.[80]

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[76] Ivan Cheong, "Practice and Procedure in Relation to Children" in *Law and Practice of Family Law in Singapore* (Sweet & Maxwell: 2016), p 302.
[77] Peter Salem, "The Emergence of Triage in Family Court Services: The Beginning of the End for Mandatory Mediation" (2009) 47(3) Family Court Review 371.
[78] Bernie Mayer, "Mediation: 50 Years of Creative Conflict" (2013) 51(1) Family Court Review 34, 38.
[79] Salem, "The Emergence of Triage in Family Court Services: The Beginning of the End for Mandatory Mediation" (2009) 47(3) Family Court Review 371, 383.
[80] Hugh McIsaac, "A Response to Peter Salem's Article 'The Emergence of Triage in Family Court Services: Beginning of the End for Mandatory Mediation'" 48(1) Family Court Review 190, 193.

This debate can probably never be resolved one way or another as the opposing views are based on different understandings about the mediation process and its function. Nevertheless, the concerns of both camps can be met with the model presently used in the FJC. The FDR conference and the counselling intake and assessment session immediately following play a triage function that allows the court to allocate its resources appropriately. Depending on the circumstances of the case, there may be counselling, mediation or co-mediation, or a combination of these services. Nevertheless, the fact that mediation is mandatory, ensures that the process of mediation remains relevant and resorted to most of the time.

Whether or not the judge is the best person to make the call as to whether an exception to mandatory mediation should be made does not seem to be the right question to ask in the light of the discussion above. If a judge is properly informed and equipped with the resources to consider the relevant factors whether through training or through collaboration with other professionals, the question then becomes, "why not the judge?". In the FJC, judges are trained mediators. Their familiarity with the strengths and weaknesses of adjudication and mediation combined with their ability to obtain advice from CAPS officers enables them to decide on whether there are any exceptional circumstances where mandatory mediation should be avoided. Further, in a family justice model where mediation is viewed as one of the services that a court offers, having the judge decide seems like a sensible course and ensures that the judge takes responsibility for the appropriate dispute resolution of a case – whether it is through adjudication, mediation or counselling – bearing in mind the resources at the court's disposal.

This was also the view of the Committee for Family Justice. While the Committee considered feedback from a public consultation exercise that the court should only be able to encourage or suggest to parties that they should avail themselves of the relevant services, the Committee opined that "the court is in the best position to determine the type of assistance that is appropriate for the parties in each case and should be empowered accordingly to ensure that parties avail themselves of the available support services".[81]

V. Role of counsel

[81] Committee for Family Justice, "Recommendations of the Committee for Family Justice on the Framework of the Family Justice System", *Ministry of Law*, July 4, 2014, pp 35–36.

The role of counsel in family mediation is critical in many ways but this discussion focuses on the lawyer's role in the court's decision to mandate mediation. Lawyers are usually the parties' first port of call when family disputes arise. A study in Scotland found that around 80 percent of parties who attend mediation have already consulted a solicitor at the point of referral.[82] Accordingly, they play a vital role in advising their clients about the suitability of various dispute resolution options and preparing them for the process. [83] The FJC and the Law Society have launched a consultation exercise for modifications to professional conduct rules that will, amongst others, make clear that lawyers are required to advise clients about alternative ways to settle disputes.[84]

In order to advise their clients on the appropriate course of action, lawyers need to be attuned to any safety risks and have a better understanding of their client's situation. This could be achieved through familiarising lawyers with screening tools that will enable them to detect abuse or coercive controlling behaviours.[85] In addition to the most suitable dispute resolution process, lawyers must also consider when that process should be engaged. Research has shown that the parties stand to derive greater benefits if they are introduced to mediation immediately, with the highest level of crisis being when the couples separate rather than during divorce.[86] Lisa Parkinson argues that there is ample evidence from the history of counselling in Australia and the experience of other jurisdictions that the earlier parents can be involved in negotiating a compromise to their dispute, the more likely it is that the dispute will be resolved.[87] One study also suggests that clients find negotiations via solicitors and collaborative law more helpful than post-litigation mediation.[88] The information gathered by the CFRC through their 2012 survey supports this position, with the results showing that: (a) 95 percent of participants felt it would have been helpful if they had spoken to a counsellor or professional about their

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[82] Jane Lewis, *The Role of Mediation in Family Disputes in Scotland*, Legal Studies Research Findings No 23 (Scottish Office Edinburgh 1999) 1.

[83] Including pre-litigation processes like conflict prevention and post-litigation conflict resolution. Forrest S Mosten and Lara Traum, "The Family Lawyer's Role in Preventive Legal and Conflict Wellness" (2017) 55(1) Family Court Review 26; Penelope Eileen Bryan, "Reclaiming Professionalism: The Lawyer's Role in Divorce Mediation" (1994) 28 Fam LQ 177, 207–209.

[84] KC Vijayan, "Ethics code for family lawyers" *The Straits Times* (February 23, 2017), available online at: http://www.straitstimes.com/singapore/ethics-code-for-family-lawyers (accessed January 30, 2018).

[85] Wheeler, "Mandatory Family Mediation and Domestic Violence" (2002) 26 S Ill U LJ 559, 572.

[86] Lisa Parkinson, "Gateways to Mediation" [2010] Fam Law 867

[87] Lisa Parkinson, "Keeping in contact: family relationship centres in Australia" (2006) 18 Child & Fam L Q 57, 170.

[88] Anne Barlow et al, "Mapping Paths to Family Justice - a national picture of findings on out of court family dispute resolution" [2013] Fam Law 306.

children before the start of divorce proceedings; (b) 83 percent said it would have been better if they had information on their children's issues before the start of divorce proceedings; (c) 94 percent commented that it would have been beneficial if they had a programme like the CFRC to settle children's issues before the start of divorce proceedings; and (d) the majority of parents appear to want, or wish they had more assistance and information about issues relating to their children before they started the divorce proceedings, and also wanted to try to resolve matters before divorce proceedings started.[89] Being aware of the different dispute resolution methods and when they are most effective will help lawyers address their clients' needs better.

If mediation is the most suitable form of dispute resolution for their client, then lawyers must ensure that the clients are sufficiently prepared to participate in the mediation, for example, by obtaining and reviewing basic financial information and documents, explaining to their clients what legal rights and entitlements they have, and jointly developing negotiation tactics and strategies with the client.[90] Lawyers should also be familiar with the rules governing the mediation process and to know the applicable standards of appropriate conduct for mediators.[91]

If there are risk factors present that may make mediation unsuitable, lawyers should ensure that these are brought to the attention of the Judge and the assigned counsellor and make a recommendation to the court as to the suitability of mediation, perhaps justifying to the court why an exception should be made. This will help the judge make a better-informed decision.

Collaboration between lawyers and mediators is important to ensure that a holistic approach is taken to resolving the parties' disputes, with each playing clearly defined but complementary roles.[92]

VI. Concluding recommendations

The FJC are to be commended in taking an inter-disciplinary approach towards dispute resolution. Now that the legislative framework and infrastructure for a unified family court has been established, the next step is to enhance transparency by making clear the policy and

[89] Ng, "Family Mediation: The Perspective of the Family Justice Courts" in *Mediation in Singapore: A Practical Guide* (2017), pp 365–366.
[90] Bryan, "Reclaiming Professionalism: The Lawyer's Role in Divorce Mediation" (1994) 28 Fam LQ 177, 218.
[91] Carolyn R Hills, "Family Court Mediation: A Practical View" (2010) 1 J Alternative Disp Resol 6, 7–8.
[92] Rhoades, "Mandatory Mediation of Family Disputes: Reflections from Australia" (2010) 32 Journal of Social Welfare and Family Law 183, 190–192.

approach of the courts in decision-making regarding mediation and counselling. This will help lawyers better advice their clients and the parties to be better prepared for what awaits them in the courts.

Second, as a well-regarded family practitioner in Singapore has argued, it may be better if mediation takes place outside the court at the earliest signs of a dispute.[93] The mission of the FJC is to make justice accessible to families and this could happen even outside the courts. It is therefore recommended that the FJC consider how to promote access to information about pre-litigation solutions and work with external agencies to provide comprehensive solutions. One positive initiative is the mandatory parenting programme that came into effect in January 2017, which requires divorcing parties with children who do not have an agreement in relation to a parenting plan and other divorce issues to attend a two-hour consultation to help them understand the financial challenges of divorce, how divorce impacts living arrangements, child custody and access, and the importance of co-parenting and having a parenting plan, before they can file for a divorce.[94] More than 95 percent of the participants reported that they were more aware of the impact of divorce on their children in terms of financial, housing and practical needs post-separation, and the same percentage also agreed on the need to prioritise their children's interest over their own.[95]

Finally, to do what it does even better, it is hoped that just as the FJC has partnered with social science professionals and counsellors, it will partner with academics and researchers to better track court and mediation experiences to develop a system that is best suited for the local context.

[93] Rajan Chettiar, "Private Mediation – the Better Way to Resolve Family Disputes" [2016] Asian JM 38.
[94] "Mandatory Parenting Programme", Ministry of Social and Family Development website, https://www.msf.gov.sg/Divorce-Support/Pages/Mandatory-Parenting-Programme.aspx (accessed January 30, 2018).
[95] "Mandatory Parenting Programme extended to divorcing parents with older children" *Channel News Asia* (January 9, 2018), available online at: https://www.channelnewsasia.com/news/singapore/mandatory-parenting-programme-extended-to-divorcing-parents-with-9845512 (accessed January 30, 2018).