ARTICLES

FAMILY MEDIATION AFTER *HENDERSHOTT*: THE CASE FOR UNIFORM DOMESTIC VIOLENCE SCREENING AND OPT-IN PROVISION IN MONTANA

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In Hendershott v. Westphal, *the Montana Supreme Court held that § 40–4–301(2) of the Montana Code Annotated absolutely bars mediation in family law cases involving domestic violence. Yet neither the Court nor the statute prescribes a method by which to screen for such cases. In this article, the author argues that a uniform, statewide screening method is the* only *way by which to implement this policy. The author also argues that* Hendershott *should be interpreted narrowly and Montana should allow parties to opt in to mediation and other forms of alternative dispute resolution. The Court's understanding of domestic violence is outdated: its opinion equates domestic violence with only one type of abuse—the stereotypical case involving a pattern of violent or potentially violent coercive control. Family law cases that do not involve such a pattern may be appropriate for mediation and alternative dispute resolution.*

I. Introduction

The use of mediation in family law cases involving domestic violence has long been controversial. Critics argue that mediation reprivatizes do-

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mestic violence and endangers women—overwhelmingly the victims of serious domestic abuse—because it is informal, neutral, and private. Many argue that domestic violence undermines the core premises of mediation, which envision a voluntary process involving parties who seek mutual understanding and bargain freely in their self-interest. In the wake of the women's rights movement in the 1970s, these and other related concerns led many states to bar mandatory mediation of family law cases involving domestic abuse. Montana joined this movement in 1993, enacting into law what is now Montana Code Annotated § 40–4–301(2), which prohibits trial courts from authorizing or permitting the continuation of mediation in cases in which there is reason to suspect physical, emotional, or sexual abuse.[1]

Just as scholars and practitioners in recent years have begun to question the propriety of mandatory policies depriving women of choice in domestic violence cases, the Montana Supreme Court interpreted § 40–4–301(2) to mean just that: an absolute bar. In a case of first impression, the Court held in *Hendershott v. Westphal*[2] that the statute "prohibits mediation in *all* family law matters if there is reason to suspect abuse."[3] The ruling is a welcome reaffirmation of Montana's stand against domestic violence, which here, as elsewhere, has reached crisis proportions.[4]

But *Hendershott* raises more questions than it solves. Neither the statute nor the Court says how an absolute bar should be implemented. For example, does the prohibition against "authoriz[ing] or permit[ting] continuation" of mediation[5] apply to all pending cases or only to those filed after *Hendershott*? Does the bar apply only to dissolution proceedings, or does it also apply to parenting proceedings, including those involving unmarried parties? Do trial courts have the duty, *sua sponte*, to investigate for abuse? Or must courts review cases only upon a party's allegation of domestic violence? Should the bar be applied differently if a party is proceeding *pro se*? And what, precisely, is prohibited? The statute uses the term "mediated negotiations."[6] The Montana Supreme Court, however, used that term interchangeably with "mediation" and "alternative dispute resolution"

1. Mont. Code Ann. § 40–4–301(2) (1993).

2. *Hendershott v. Westphal*, 253 P.3d 806 (Mont. 2011).

3. *Id.* at 810 (emphasis added).

4. *See e.g.* Mont. Dept. of Just., *Victim's Services: Domestic Violence*, https://doj.mt.gov/victims/domestic-violence/ (accessed June 28, 2012) ("Statewide crime data compiled by the Montana Board of Crime Control shows that the rate of domestic abuse in Montana has remained unacceptably high. The rate of domestic violence offenses reported to law enforcement in recent years has ranged from a high of 492 offenses for every 100,000 people in 1998, to 391 offenses per 100,000 in 2000. The rate for 2007 was 462 reported domestic violence offenses for every 100,000 people. Each year, approximately five out of every 1,000 Montanans are victims of reported cases of domestic violence—and that doesn't include those who don't seek help and suffer in silence.").

5. Mont. Code Ann. § 40–4–301(2) (2011).

6. *Id.*

("ADR").[7] Are all forms of ADR prohibited? If so, do these include settlement conferences, which, unlike the state's definition of mediation,[8] are evaluative in nature? And what quantum of evidence constitutes a "reason to suspect" abuse?[9] The Court held that the standard "was lower than probable cause and consistent with doctor and teacher standards for investigating abuse."[10] What specific standards should district courts adopt? Finally, what is "domestic violence"? Experts have long debated this question, and Montana law—indeed scholarly and common understanding—offers conflicting definitions.

How judges, attorneys, mediators, settlement masters, advocates, and litigants answer these questions will determine whether Montana makes good on the twin goals enshrined in § 40–4–301(2): addressing domestic violence and promoting ADR. In this article, I argue that without the statewide adoption of a uniform, systematic screening method, § 40–4–301(2) will continue to be ignored or, at best, unevenly and ineffectively implemented; this certainly had been the case until *Hendershott*, as I detail in Part II. As one commentator put it, without a screening method, the debate over whether cases involving domestic violence should be mediated "amounts to an exercise in futility."[11]

In light of recent scholarship on this issue, I also argue that *Hendershott* should be interpreted narrowly and domestic violence survivors be provided the choice to opt in to mediation. Domestic violence is not a unitary phenomenon. The dominant understanding of domestic violence as involving male batterers subjecting women to years of misogynistic physical, emotional, and sexual abuse is only one—and is in fact an uncommon—type of intimate partner violence. Most cases of domestic violence involve

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7. *Hendershott*, 253 P.3d at 810–811.

8. "Mediation means a private, confidential, informal dispute resolution process in which an impartial and neutral third person, the mediator, assists disputing parties to resolve their differences. In the mediation process, decisionmaking authority remains with the parties and the mediator does not have authority to compel a resolution or to render a judgment on any issue. A mediator may encourage and assist the parties to reach their own mutually acceptable settlement by facilitating an exchange of information between the parties, helping to clarify issues and interests, ensuring that relevant information is brought forth, and assisting the parties to voluntarily resolve their dispute." Mont. Code Ann. § 26–1–813.

9. Mont. Code Ann. § 40–4–301(2); *Hendershott*, 253 P.3d at 810.

10. *Hendershott*, 253 P.3d at 810–811.

11. Alexandria Zylstra, *Mediation and Domestic Violence: A Practical Screening Method for Mediators and Mediation Program Administrators*, 2001 J. Dis. Res. 253, 253 (2001). *See also* Alison E. Gerencser, *Family Mediation: Screening for Domestic Abuse*, 23 Fla. St. U. L. Rev. 43 (1995); Linda K. Girdner, *Mediation Triage: Screening for Spousal Abuse in Divorce Mediation*, 7 Med. Q. 365 (1990); Jennifer P. Maxwell, *Mandatory Mediation in the Face of DV: Suggestions for Courts and Mediators*, 37 Fam. and Conciliation Cts. Rev. 335 (1999); Linda C. Neilson & Michael Guravich, *Abuse Screening Criteria and Settlement Option Project Final Report*, Department of Justice, Fredericton, New Brunswick, Canada (1999).

what some scholars call "situational couple violence"[12] for which mediation—in particular evaluative mediation—may be appropriate.

I discuss these issues in four parts. In part II, I summarize the Court's opinion in *Hendershott*. In part III, I discuss a survey I conducted of Montana district court practices regarding their use of mediation in family law cases. In part IV, I return to the questions raised by *Hendershott* and outline general features of a model screening method. Finally, in part V, I make the case for an opt-in provision. I conclude by arguing that an absolute bar is founded upon an outdated concept of domestic violence and an idealized view of litigation. Instead of substituting the *State*'s own, rigid choice in such cases and limiting survivors' options, Montana instead should undertake a broad-based outreach and educational effort to train judges, court personnel, attorneys, mediators, settlement masters, advocates, and other professionals to assist survivors in making their own informed choices about dispute-resolution methods and fora.

II. *HENDERSHOTT V. WESTPHAL*

Heidi Hendershott and Jesse Westphal had been married eight years when Hendershott filed for dissolution.[13] Throughout the litigation on both her petitions for dissolution and for a parenting plan, Hendershott alleged that Westphal was physically and emotionally abusive. Supporting Hendershott's allegations were her testimony, an order of protection, Westphal's admission of controlling and manipulative behavior, and testimonies from five psychologists and counselors.[14]

The trial court dissolved the marriage in 2010 and subsequently approved a final parenting plan that included the following provision:

> If not resolvable between the parties themselves, disputes concerning issues addressed in this Plan, other than as to child support, shall be submitted to a mediator (e.g. counselor, attorney) agreed upon by both parties. Any mediation should be structured to avoid direct contact by the parties, either with separate sessions or submission in writing.[15]

Hendershott objected to this provision and appealed. On appeal, the Montana Supreme Court reversed, remanded, and ordered the district court to strike the provision, citing § 40–4–301(2), which provides:

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12. Joan Kelly & Michael Johnson, *Differentiation among Types of Intimate Partner Violence: Research Update and Implications for Interventions*, 46 Fam. Ct. Rev. 476 (2008); Michael Johnson, *A Typology of Domestic Violence* (Northeastern 2008); *see also* Michael Johnson & Kathleen Ferraro, *Research on Domestic Violence in the 1990s: Making Distinctions*, 62 J. of Marriage & Fam. 948 (2000).

13. *Hendershott*, 253 P.3d at 807.

14. *Id.* at 807, 809, 812.

15. *Id.* at 809.

> The court may not authorize or permit continuation of mediated negotiations if the court has reason to suspect that one of the parties or a child of a party has been physically, sexually, or emotionally abused by the other party.[16]

The Court held that § 40–4–301(2) is an "absolute bar" to mediation in cases where there is "reason to suspect" physical, emotional, or sexual abuse.[17] Rejecting the argument that mediation can be tailored to comply with the statute,[18] the Court reasoned that "the basic rules, assumptions, and goals of mediation are undermined in those particular cases when the parties have a history of domestic violence."[19] "Reason to suspect" is a "minimal standard," the Court held, "lower than probable cause and consistent with doctor and teacher standards for investigating abuse."[20] Reviewing the statute's legislative history, the Court found that it "does not require proof of abuse by clear and convincing evidence, a preponderance of the evidence, or even probable cause, but simply a 'reason to suspect.'"[21]

Among the pieces of evidence that Hendershott offered to show abuse, the Court relied on four to find such reasonable suspicion: Westphal's admission and trial testimony attesting to his controlling behavior; Hendershott's testimony; the district court's acknowledgment of the risk posed by direct contact between the parties (including the order of protection against Westphal); and testimonies from the five therapists and counselors who saw one or both of the parties (including testimony about post-traumatic stress disorder).[22]

In its opinion, the Court also held that district courts may require mediation even if only one or neither of the parties agrees. Hendershott had argued that § 40–4–301(1) empowered district courts to order mediation only when both parties consented.[23] The Court roundly rejected the argument, reasoning:

> The first sentence of the statute plainly gives the court authority to *require* mediation. In the alternative, a party may request mediation or both parties may *agree* to mediation. In the event mediation occurs by agreement of the parties, the court nonetheless may *require* attendance of certain persons at mediation.[24]

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16. *Id.* at 809–810; Mont. Code Ann. § 40–4–301(2).
17. *Hendershott*, 253 P.3d at 811.
18. *Id.*
19. *Id.*
20. *Id.* at 810–811.
21. *Id.* at 812.
22. *Id.* at 810–812.
23. *Hendershott*, 253 P.3d at 810.
24. *Id.* (emphasis in original).

As a threshold matter, therefore, district courts may *require* mediation in family law matters unless there is reason to suspect domestic abuse.[25]

III. Court-Connected Family Mediation in Montana

Shortly after the Court issued its opinion in *Hendershott*, I conducted a survey of how district courts across the state have been implementing § 40–4–301(2). In the fall of 2011, I asked each Montana district court judge to complete a questionnaire composed of four main questions: (1) whether s/he required cases to go to mediation; (2) if so, (a) what types of cases were so ordered and (b) the processes by which s/he did so, including how the cases were screened; (3) what measures the judge took to determine if there was domestic violence involved; and (4) whether his/her practice had changed or will change given the *Hendershott* decision.[26]

Thirty-three of Montana's 47 district court judges, representing 20 of the State's 22 judicial districts, responded.[27] I analyzed the responses in light of uniform and supplementary district court rules pertaining to mediation and ADR; 20 judicial districts—all but the 3rd and 15th Judicial Districts—have local supplementary rules.[28]

My analysis shows that trial court practices vary widely on these—and other, similar—questions. The responses, which I summarize below, make clear that guidance on each of the issues raised by *Hendershott*, and a standardized method by which to do so, are fundamental to operationalizing § 40–1–301(2).

Among my survey findings:

- *Most district courts require mediation.* Demonstrating the pervasive use of ADR in Montana, survey responses show that most district court

25. How a court-*ordered* mediation compromises its voluntariness—a cornerstone of the process—is the subject of heated debate. *See e.g.* Dorcas Quek, *Mandatory Mediation: An Oxymoron? Examining the Feasibility of Implementing a Court-Mandated Mediation Program*, 11 Cardozo J. Conflict Resol. 479, 481 (2010) (mandatory mediation a "glaring contradiction"). I sidestep this question here as domestic violence generally bars mediation in Montana, notwithstanding a party's objection. I leave for another day the question of whether it is sound policy for Montana to allow its courts to require mediation.

26. The questionnaire had a total of eight questions: "1. Please provide your name and your judicial district. 2. Do you require certain cases to go to mediation? 3. If so, please describe (a) the types of cases you order to mediation, and (b) the process by which you do so (for example, when and to whom). 4. Please describe how you screen family law cases (e.g. dissolution, parenting plans, etc.) for mediation. 5. What measures do you take to determine if there is domestic violence involved in the case? 6. Has this changed or will this process change since the *Hendershott* ruling? (*Hendershott v. Westphal*, 2011 MT 73). 7. If there is a more efficient and effective way to determine whether there is domestic violence involved in the case, would you be interested in trying it? 8. Do you have any other comments that might be helpful to this project?".

27. Unrepresented in the survey are the 9th and 18th Judicial Districts. A compilation of the responses is on file with the *Montana Law Review*.

28. *Montana Lawyers' Deskbook and Directory* 67 (St. Bar of Mont. 2012).

judges routinely order family law cases to either mediation or a settlement conference.[29] Of the 33 respondents, only five judges—sitting in the 13th, 15th, 17th, 20th, and 21st Judicial Districts—stated that they did not routinely do so.[30]

- *District courts both conflate and distinguish among the terms "mediation," "settlement conference," and "alternative dispute resolution."* In Montana, mediation is statutorily defined as a facilitative process "in which an impartial and neutral third person, the mediator, assists disputing parties to resolve their differences. In the mediation process, decisionmaking authority remains with the parties and the mediator does not have authority to compel a resolution *or to render a judgment on any issue*."[31] By contrast, a settlement conference is an evaluative process, in which a settlement master assesses and recommends terms of a settlement.[32] "Alternative dispute resolution" is a term that encompasses mediation, settlement conference, and other forms of dispute resolution, such as arbitration, judicial conciliation, early neutral evaluation, or mini-trial. Pursuant to their local rules, some district court judges adhere to these distinctions.[33] As one judge stated in his response, for example, "Of

29. As I discuss in the following bullet point and in Section IV.A.4, there are differences among judges, attorneys, mediators, and various rules as to whether a "settlement conference" is the same as "mediation."

30. One 13th Judicial District judge stated that he will "order [mediation] if requested unless there's a very good reason not to do so. Basically, I leave this to the good judgment of good attys." A 15th Judicial District judge stated that he orders cases to mediation on a "case by case basis, very fact dependent." A 17th Judicial District judge said he ordered mediation "occasionally—not always." The other two judges who do not routinely mandate mediation are in 20th and 21st Judicial Districts.

31. Mont. Code Ann. § 26–1–813(1) (emphasis added).

32. *Compare* Mont. 2d Jud. Dist. R. 36 ("Settlement Conferences") *with* Mont. 2d Jud. Dist. R. 37 ("Domestic Relations Mediation Program"); *see also* Mont. 6th Jud. Dist. R. 11 (distinguishing between settlement conference and mediation); Mont. 7th Jud. Dist. R. 22 (same; using term "settlement judge"); Mont. 10th Jud. Dist. R. 21 (same); Mont. 12th Jud. Dist. R. 12 (same). The term "settlement conference" is not defined by statute and is insufficiently defined by district court rules. The 14th Judicial District definition is typical: "Settlement Conference Defined. A settlement conference is a confidential meeting between the parties, attorneys, and the settlement judge/master with a view toward negotiating a settlement. Each party will submit to the settlement judge/master a confidential settlement statement containing a summary of their case and description of strengths and weaknesses on each side. The parties and their attorneys must be present unless excused by the settlement judge/master." Mont. 14th Jud. Dist. R. 21. Bar members seem to adhere to the distinction between mediation being a "facilitative" process and settlement conference being an "evaluative" one. There is, however, significant debate about whether or not this distinction is actually meaningful. *See e.g.* Jeffrey W. Stempel, *Beyond Formalism and False Dichotomies: The Need for Institutionalizing a Flexible Concept of the Mediator's Role*, 24 Fla. St. U. L. Rev. 949, 950 (1997) (discussing how "conceptual oversimplification" of evaluative versus facilitative is "[n]ot only . . . unwise and misleading, but . . . also may lead to government-sponsored unfairness when the mediation enterprise takes place under the auspices of court-compelled mediation").

33. *See e.g.* Mont. 13th Jud. Dist. R. 29 ("The Judge to whom a case is assigned shall consider . . . the advisability of requiring the parties to participate in a settlement conference or other alternative dispute resolution process including, but not limited to, mediation."); Mont. 14th Jud. Dist. R. 21 (distin-

course, settlement differs from mediation."[34] Others, however—again pursuant to their own local rules—equate them.[35]

- *District courts use a variety of standards to determine whether or not a case involves domestic violence.* District court judges use various standards by which to exclude domestic violence cases from mediation. These standards range from "no evidence,"[36] "some allegation,"[37] and "some evidence,"[38] to "reason to suspect"[39] and "substantial spousal abuse."[40] Those who require some support for the allegation in the record look to such documents as an order of protection or affidavit.[41]
- *District courts vary on how they screen for domestic violence.* District court judges also screen in different ways. Most judges require parties and attorneys to raise the issue.[42] As one judge stated, "I do not view it as my responsibility to prepare or present the case—that's the duty/obligation of parties and [attorneys]."[43] Another stated, "[I] would only be clued in if there was a [petition for a temporary order of protection] or some affidavit alleging [domestic violence]."[44] At least two judges do not screen at all.[45] Two others stated they do not have a policy.[46] Some

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guishing between mediation and settlement conference); Mont. 17th Jud. Dist. R. 21 (same); Mont. 22d Jud. Dist. R. 11 ("mediation conducted by a trained mediator may be substituted for a Master-supervised Settlement Conference").

34. 21st Judicial District judge.

35. *See e.g.* Mont. 8th Jud. Dist. R. 10 ("The [settlement] conference shall be a master or mediator-supervised settlement conference. . . . The parties will not subpoena or otherwise require . . . the settlement master's or *mediator's opinions* regarding the case.") (emphasis added); Mont. 9th Jud. Dist. R. 8 (same); Mont. 19th Jud. Dist. R. 48 (discussing "mediation conferences," in which "the parties . . . submit a confidential settlement memorandum to the mediator, setting forth all relevant matters that pertain to issues of liability and damages, as well as any unique issues or problems raised in the case"); Mont. 21st Jud. Dist. R. 11 (purposes of settlement conference are to, *inter alia*, "facilitate (but not coerce) settlement").

36. 4th Judicial District judge. Another 4th Judicial District judge stated, "If there is abuse, the victim does not meet with abuser[;] separate rooms."

37. 13th Judicial District judge.

38. 7th Judicial District judge.

39. 1st Judicial District judge.

40. 1st Judicial District judge.

41. 13th Judicial District judge. One 13th Judicial District judge cast doubt on any standard, questioning whether such allegations are even believable: "Many women (complainants) are skilled in exaggerating or even making up accusations."

42. 2d Judicial District judge; two 4th Judicial District judges; 5th Judicial District judge; 6th Judicial District judge; 7th Judicial District judge; two 13th Judicial District judges; 15th Judicial District judge; two 16th Judicial District judges; 20th Judicial District judge.

43. 13th Judicial District judge.

44. 13th Judicial District judge.

45. 13th Judicial District judge ("don't do any initial screening *per se*"); 11th Judicial District judge.

46. 10th Judicial District judge (no "set methodology"); 14th Judicial District judge ("no set policy").

appear to do it *sua sponte* by reviewing the pleadings[47] or other "information in [the] case file."[48] At least one examines "any testimony presented."[49] Only one judge relies on domestic violence advocates to notify the court if there is a "domestic violence issue," in which case that judge does not require mediation.[50] One judge has a two-step screening process for reviewing domestic violence allegations: a law clerk conducts an initial review, then the judge conducts a second review.[51]

- *District courts allow modified mediation practices*. District courts are clearly cognizant of the dangers of mediating cases involving domestic violence—a recognition reflected in most of the survey responses. Hence, like the trial court in *Hendershott*, some allow the process to be modified to address such concerns.[52]

It is clear from these responses that, at best, § 40–4–301(2) is unevenly implemented. At worst, it is ignored. It took 18 years for the Montana Supreme Court to interpret and reaffirm the statute's core purpose, which is to reconcile state domestic violence and ADR policy. In those intervening years, cases involving domestic violence have been—and, to this day, continue to be—mediated. This will continue to be the case without a uniform screening method, given the diversity of district court practices in this regard. A mandatory and systematic screening method, along with a broad outreach and educational effort, is the only way § 40–4–301(2) can be implemented effectively.

IV. Implementing an Absolute Bar: The Need for a Uniform Screening Method

What should a screening method look like? *Hendershott* does not say. Neither does the statute. Montana is not alone in its concern for addressing domestic violence, promoting ADR, and ensuring that mediation does not lead to further abuse of a domestic violence survivor. It is therefore useful to look to other states and model practices for guidance.

In this section, I return to the questions I posed at the beginning of this article and sketch the outlines of a model screening method based on Montana law and best practices locally and nationwide. As mentioned, § 40–4–301(2) embodies two important state policies: the prevention of do-

47. 3d Judicial District judge; 11th Judicial District judge; 17th Judicial District judge; 20th Judicial District judge; 22d Judicial District judge.

48. 1st Judicial District judge; 2d Judicial District judge; 12th Judicial District judge ("review of file").

49. 11th Judicial District judge.

50. 7th Judicial District judge.

51. 2d Judicial District judge.

52. 1st Judicial District judge; 4th Judicial District judge.

mestic violence and the promotion of ADR.[53] Sound implementation of the statute requires the careful balancing of these goals.

A. *Interpreting* Hendershott*: Six Unresolved Questions*

Hendershott raises six questions: (1) whether the absolute bar applies to all pending cases or only those after *Hendershott* was decided; (2) whether the absolute bar applies to both dissolution and parenting proceedings under Chapters 4 and 6, Title 40, of the Montana Code; (3) whether district courts have an affirmative duty to review all pending cases *sua sponte* or only upon the allegation of domestic abuse by a party (here, a related question is whether district courts have a special duty toward *pro se* litigants who are party to the majority of family law cases[54]); (4) whether mediation, as contemplated by § 40–4–301(2), includes all forms of ADR; (5) what quantum of evidence constitutes a "reason to suspect" abuse; and (6) what counts as "domestic violence." I discuss each of these questions in turn.

1. Hendershott *as applying to all pending cases*

The absolute bar applies to all cases pending in district court and not only to those filed after the Court's April 12, 2011, decision. Section 40–4–301(2) has been part of the Montana Code for almost 20 years; it is not a recently enacted statute, and it clearly applies to all dissolution cases filed since 1993. Moreover, the statute states explicitly that a district court "may not . . . permit [the] *continuation* of mediated negotiations."[55] The plain language of the statute therefore contemplates cases in which mediation is ongoing or has already been ordered.

The Court also recently settled the question of whether a court's interpretation of a statute applies retroactively. In *Dempsey v. Allstate*,[56] the Court held:

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53. In addition to promoting mediation in family law matters, Montana also promotes mediation in criminal proceedings. Mont. Code Ann. § 46–1–501; *see also* Mont. Code Ann. § 26–1–813 (defining mediation). Regarding domestic violence, the Montana Supreme Court has stated: "The purpose of domestic violence legislation 'is to protect victims from harm caused by the persons whose intimate physical relationship to the victim increases the danger of harm, either because the parties live in physical proximity or because the relationship is one whose intimacy may disable the victim from seeking protection.'" *State v. Ankeny*, 243 P.3d 391, 397 (Mont. 2010) (citing *Barnett v. Wiley*, 103 S.W.3d 17, 19 (Ky. 2003) (quoting Louise E. Graham & James E. Keller, 15 *Kentucky Practice: Domestic Relations Law*, § 5.1 at 107 (2d ed. West 1997))).

54. Edward M. Holt, *How to Treat "Fools": Exploring the Duties Owed to* Pro Se *Litigants in Civil Cases*, 25 J. Legal Prof. 167, 169 (2001).

55. Mont. Code Ann. § 40–4–301(2) (emphasis added).

56. *Dempsey v. Allstate*, 104 P.3d 483 (Mont. 2004).

> [A]ll civil decisions of this court apply retroactively to cases pending on direct review or not yet final, unless *all three* of the *Chevron* factors are satisfied. For reasons of finality we also conclude that the retroactive effect of a decision does not apply *ab initio*, that is, it does not apply to cases that became final or were settled prior to a decision's issuance.[57]

In *Chevron Oil Company v. Huson*,[58] the United States Supreme Court held:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."[59]

Hendershott clearly does not establish a new principle of law: the Montana Court based its interpretation of § 40–4–301(2) squarely on its plain language, legislative history, and purpose. On this basis alone, the *Chevron* non-retroactivity standard cannot be satisfied, as all three factors must be met to warrant prospective application. Beyond that, retrospective application will also undoubtedly further the purposes of the statute, which is to protect victims of domestic violence while otherwise promoting the use of ADR in family law cases. Finally, requiring parties to appear before a judge, as opposed to a mediator, could hardly be said to result in injustice or hardship. It seems clear, therefore, that district courts have the duty to review all pending and prospective cases to determine whether mediation is barred under § 40–4–301(2).

2. The absolute bar as applying to parenting proceedings under Chapter 6 of the Montana Code as well as dissolution proceedings under Chapter 4

Chapter 4 of the Montana Code Annotated governs dissolution proceedings while Chapter 6 governs unmarried parents. Section 40–4–301 confines a district court's power to require mediation "to a proceeding

57. *Id.* at 489 (emphasis added); *accord Flynn v. Mont. St. Fund*, 267 P.3d 23, 27–28 (Mont. 2011); *Stavenjord v. Mont. St. Fund*, 146 P.3d 724, 727 (Mont. 2006); *LaMere v. Farmers Ins. Exch.*, 265 P.3d 617, 621 (Mont. 2011).

58. *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971).

59. *Id.* at 106–107 (internal citations omitted).

under this chapter"[60]—that is, dissolution proceedings. The issue, then, is whether § 40–4–301(2) applies to parenting proceedings between unmarried couples.

Heidi Hendershott and Jesse Westphal were married,[61] so their petition was governed by Chapter 4. Nonetheless, the Court's opinion addressed parenting proceedings generally. Finding support for its interpretation of § 40–4–301(2) in the legislative history, the Court observed that § 40–4–234(4), which allows district courts to order mediation in determining a final parenting plan,

> was specifically added to encourage mediation because mediation is an effective approach to creating and enforcing parenting plans . . . . By allowing a court discretion to include a mediation provision in a parenting plan, the Legislature merely encouraged practitioners and courts to consider alternative dispute resolution for future conflicts.[62]

By relying on § 40–4–234, which sets forth final parenting plan criteria, in its reasoning, the Court by reference extends § 40–4–301(2)'s absolute bar to that statute, which applies to "*every* dissolution proceeding, proceeding for declaration of invalidity of marriage, parenting plan proceeding, or legal separation proceeding that involves a child."[63] Section 40–4–234 governs *all* parenting plan proceedings; Chapter 6 does not contain a separate parenting plan provision, nor does it have a separate mediation or ADR provision. Properly read, therefore, *Hendershott*'s absolute bar applies to proceedings brought under both Chapter 4 and Chapter 6—an interpretation that comports with Montana Supreme Court cases analogizing various statutes under these chapters.[64]

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60. Mont. Code Ann. § 40–4–301(1) ("The district court may at any time consider the advisability of requiring the parties to a proceeding under this chapter to participate in the mediation of the case.").

61. *Hendershott*, 253 P.3d at 807.

62. *Id.* at 811. *See also id.* at 810 (Section 40–4–234(4) "does not *require* a court to include an alternative dispute resolution provision in a parenting plan." (emphasis in original)); *id.* ("[W]e will harmonize statutes relating to the same subject in order to give effect to each statute . . . . We also presume the Legislature acts with deliberation and full knowledge of all existing laws on a subject." (internal citations omitted)).

63. Mont. Code Ann. § 40–4–234(1) (emphasis added). *See also* Mont. Code Ann. § 40–4–219(9) ("Except in cases of physical abuse or threat of physical abuse by one parent against the other parent or the child or when a parent has been convicted of a crime enumerated in subsection (8)(b), the court may, in its discretion, order the parties to participate in a dispute resolution process to assist in resolving any conflicts between the parties regarding amendment of the parenting plan. The dispute resolution process may include counseling or mediation by a specified person or agency, and court action.").

64. *See e.g. Schuman v. Bestrom*, 693 P.2d 536, 539 (Mont. 1985) (best interests of the child standard under §§ 40–6–116 and 40–4–212 "the same"); *State By & Through Dept. of Revenue ex rel. Sorenson v. Roske*, 745 P.2d 365, 367–368 (Mont. 1987) (district court within its discretion to use factors for calculating child support under § 40–4–204 even though they "vary slightly" from § 40–6–116 as "both statutes emphasize earning capacity as a yardstick for arriving at an equitable allocation of the child's expenses"); *but see In re Paternity of W.L.*, 855 P.2d 521, 524 (Mont. 1993) (Uniform Parentage Act, Mont. Code Ann. § 40–6–118, controls issue of future education and support, not § 40–4–208).

3. The district court's duty to investigate for abuse sua sponte *and special duty toward self-represented litigants*

Some states bar mediation if a party alleges domestic abuse. In Colorado and Hawaii, for example, courts cannot refer cases to mediation when one party claims she or he has been the victim of physical or psychological abuse by the other party.[65] Other states impose upon *trial courts* the duty to assess independently whether there is cause to bar mediation. Delaware, Florida, Iowa, and Kentucky are examples of states that engage in this latter practice.[66] The plain text of § 40–4–301(2) shows that the Montana Legislature chose the latter scheme. A "*court* may not authorize or permit continuation of mediation negotiations if *the court* has reason to suspect" domestic abuse.[67] While such reason to suspect can, of course, be raised by parties, unlike states that automatically bar mediation upon a party's allegation, Montana chose to provide district courts the power to assess independently whether any such allegations are credible. Without the affirmative duty to undertake such an assessment, such power would be meaningless. Arguably, therefore, district courts have the affirmative duty to investigate *sua sponte*.

The district courts' duty and role are central given the significant underreporting of domestic violence.[68] The "ability or willingness" of many victims to come forward with allegations of abuse is "questionable" at best.[69] Victims of domestic violence also tend to minimize abuse.[70] Indeed, many victims may not even consider certain behaviors as violent or abusive.[71] Because of the strong incentive to use mediation given the volume of family law cases pending in district courts, it is imperative that courts affirmatively undertake investigations to implement the statute effectively.[72]

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65. Colo. Rev. Stat. Ann. § 13–22–311 (2012); Haw. Rev. Stat. § 580–41.5 (2012); *see* Jane C. Murphy & Robert Rubinson, *Domestic Violence and Mediation: Responding to the Challenges of Crafting Effective Screens*, 39 Fam. L. Q. 53 (2005).

66. Del. Code Ann. tit. 13, § 711A (2012); Fla. Stat. § 44.102 (2012); Iowa Code §§ 598.7, 598.41 (2012); Ky. Rev. Stat. Ann. § 403.036 (2012).

67. Mont. Code Ann. § 40–4–301(2) (emphases added).

68. *See* Julie Kunce Field, *Screening for Domestic Violence: Meeting the Challenges of Identifying Domestic Relations Cases Involving Domestic Violence and Developing Strategies for Those Cases*, 39 Ct. Rev. 4, 6 (2002).

69. Murphy & Rubinson, *supra* n. 65, at 64.

70. Alana Dunnigan, *Restoring Power to the Powerless: The Need to Reform California's Mandatory Mediation for Victims of Domestic Violence*, 37 U.S.F. L. Rev. 1031, 1040 (2003) (citing Karla Fischer et al., *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 SMU L. Rev. 2117, 2141 (1993)).

71. Murphy & Rubinson, *supra* n. 65, at 64 (quoting Zylstra, *supra* n. 11, at 268).

72. *Id.* at 65.

That parties would underreport is particularly the case when they proceed without counsel.[73] *Pro se* litigants are "the single most important issue facing family courts today and the second most frequently cited problem by judges and court staff who process divorce cases."[74] Studies show that between 55 and 90 percent of family law cases involve at least one *pro se* party.[75] Recognizing this, Montana courts acknowledge that they owe a special duty toward self-represented litigants. For example, the Montana Supreme Court has repeatedly held that it provides "wide latitude to *pro se* litigants in their attempts to comply with the technicalities" of court procedure.[76] Given plain statutory language and courts' special duty toward self-represented litigants, I would argue that § 40–4–301(2) must be read to require district courts to investigate for domestic abuse *sua sponte*—even absent party allegation and especially in cases involving parties proceeding *pro se*.

4. Are all *forms of alternative dispute resolution barred?*

Section 40–4–301(2) uses the term "mediated negotiations."[77] In *Hendershott*, the Montana Supreme Court used two other terms—"mediation" and "alternative dispute resolution"[78]—and held that the statute "does not afford discretion to design a special mediation procedure."[79] The Court explicitly rejected the district court's approval of a parenting plan that contained such a procedure. As mentioned previously, that procedure provided that "[a]ny mediation . . . be structured to avoid direct contact by the par-

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73. *Id.* at 64.

74. Connie Beck et al., *Divorce Mediation With and Without Legal Representation: A Focus on Intimate Partner Violence and Abuse*, 48 Fam. Ct. Rev. 631, 632 (2010) (internal citations omitted).

75. *Id.* Despite these statistics, there is "almost no research" regarding the number of *pro se* litigants and domestic violence. *Id.*; *see also In re Marriage of Whyte & Couvillion*, 272 P.3d 102, 110 (Mont. 2012) (Baker, J., dissenting) (district courts "increasingly burdened" by *pro se* family law matters); *District Court Statistics*, http://courts.mt.gov/dcourt/stats/default.mcpx (accessed Nov. 6, 2012) (showing number of domestic relations cases annually); Beck et al., *supra* n. 74 (discussing vast number of *pro se* litigants in family law cases).

76. *Xu v. McLaughlin Research Inst. for Biomedical Sci., Inc.*, 119 P.3d 100, 104 (Mont. 2005); *accord CBI, Inc. v. McCrea*, 285 P.3d 429, 433 (Mont. 2012) (courts willing to relax some technical requirements for *pro se* litigants); *but see Greenup v. Russell*, 3 P.3d 124, 126 (Mont. 2000) ("While pro se litigants may be given a certain amount of latitude, that latitude cannot be so wide as to prejudice the other party, and it is reasonable to expect all litigants, including those acting pro se, to adhere to procedural rules.").

77. Mont. Code Ann. § 40–4–301(2).

78. *Hendershott*, 253 P.3d at 810 (section 40–4–302(4) "invokes the court's discretion to order mediation [but] does not *require* a court to include an alternative dispute resolution provision in a parenting plan" (emphasis in original)); *id.* at 811 (legislative history of § 40–4–301(2) "indicates that the Legislature . . . did not intend the law to require alternative dispute resolution provisions without regard to domestic abuse").

79. *Id.* at 812.

ties, either with separate sessions or submission in writing."[80] According to the Court, § 40–4–301(2) "explicitly prohibits courts in family law proceedings from authorizing or continuing *mediation of any kind* where there is reason to suspect emotional, physical, or sexual abuse. . . . *By the express language of § 40–4–301(2), MCA, alternative dispute resolution may not be mandated in this case*."[81] It appears, therefore, that *Hendershott* expanded the scope of the statute to prohibit not only mediation or "mediated negotiations" but *all* forms of ADR.

This reading finds support in various local district court rules conflating "mediation," "settlement conference," and "alternative dispute resolution." For example, Rule 12 of the 12th Judicial District defines "alternative dispute resolution" as "mediation" and "settlement conference."[82] In ADR parlance, settlement conferences are "evaluative" mediations whereas mediations are "facilitative" processes.[83] At least two other district courts also conflate these terms.[84] Yet another introduces a third term—"settlement facilitator"—which appears synonymous with "mediator" and "settlement master."[85]

But there is support for reading *Hendershott* narrowly. As mentioned previously, the Montana Code defines mediation strictly in facilitative terms. Section 26–1–813(1) defines "mediation" as:

> a private, confidential, informal dispute resolution process in which an impartial and neutral third person, the mediator, assists disputing parties to resolve their differences. In the mediation process, decisionmaking authority remains with the parties and the mediator does not have authority to compel a resolution *or to render a judgment on any issue*. A mediator may encourage and assist the parties to reach their own mutually acceptable settlement by facilitating an exchange of information between the parties, helping to clarify the issues and interests, ensuring that relevant information is brought forth, and assisting the parties to voluntarily resolve their dispute.[86]

This definition reflects an understanding of mediation as a neutrally facilitated process. By contrast, the general understanding of a settlement conference in Montana is one in which a settlement master evaluates and renders an opinion on parties' claims and defenses.[87] Various statutes and

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80. *Id.* at 809.

81. *Id.* at 812 (emphasis added).

82. Mont. 12th Jud. Dist. R. 12.

83. *See e.g.* Carrie Menkel-Meadow, Lela Porter Love & Andrea Kupfer Scheider, *Mediation: Practice, Policy, and Ethics* 389–396 (1st ed., Aspen 2006).

84. Mont. 5th Jud. Dist. R. 7 (conflating "settlement conference" and "mediation"); Mont. 9th Jud. Dist. R. 8 (conflating "settlement master" with "mediator").

85. Mont. 2d Jud. Dist. R. 37; *see also* Mont. 4th Jud. Dist. R. 9 (conflating "settlement conference" and "mediation").

86. Mont. Code Ann. § 26–1–813(1) (emphasis added).

87. *See e.g.* Mont. 2d Jud. Dist. R. 36 (providing that each party or counsel submit to settlement master a statement, *inter alia*, describing "strongest and weakest points in their case, both legal and

local district court rules abide by this distinction. For example, § 41–3–422(12), which empowers courts to authorize ADR in child abuse and neglect proceedings, provides that "alternative dispute resolution . . . may include a family group decision-making meeting, *mediation*, *or a settlement conference*."[88] Similarly, Rule 11 of the 6th Judicial District Court provides:

> A mediation conducted by a trained mediator may be substituted for a Master-supervised Settlement Conference upon agreement of the parties, or by order of the Court. The Clerk of District Court shall maintain a list of Court-approved Settlement Masters and Mediators.[89]

The Second Judicial District also has separate rules for "settlement conferences" and its "domestic relations mediation program."[90] Among other differences, these various statutes and district court rules provide that attorneys are required to attend settlement conferences but need not attend—and, indeed, may be excluded from attending—mediations.[91]

Given these conflicting understandings, there is room to interpret *Hendershott* as excluding settlement conferences, evaluative mediations, and other forms of ADR from the ambit of § 40–4–301(2). After all, settlement conferences are a well-settled part of pretrial litigation and perhaps not "alternative" in a strict sense. One also can argue that the process rejected by the Montana Supreme Court in *Hendershott*—characterized though it may have been by special procedures aimed at protecting Heidi Hendershott—was nonetheless facilitative in nature, or meant to be. An evaluative process arguably would protect—or at least would be more protective of—an abused spouse's interests. An evaluative mediator is "active, decisive, and involved"[92] in the evaluative mediation, which is:

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factual, and that of their opponents"). Again, Montana does not explicitly define "settlement conference." *See supra* n. 32.

88. Mont. Code Ann. § 41–3–422(12) (emphasis added).

89. Mont. 6th Jud. Dist. R. 11.

90. *See* Mont. 2d Jud. Dist. R. 36, 37. The 2d Judicial District specifies, too, that "settlement facilitators . . . serve as arms of the court." Mont. 2d Jud. Dist. R. 37(D). *See also* Mont. 6th Jud. Dist. R. 11 ("A mediation conducted by a trained mediator may be substituted for a Master-supervised Settlement Conference upon agreement of the parties, or by order of the Court. The Clerk of District Court shall maintain a list of Court-approved Settlement Masters and Mediators."); Mont. 7th Jud. Dist. R. 22 (distinguishing between "mediation" and "settlement conference"); Mont. 10th Jud. Dist. R. 21 (same; the 10th Judicial District defines "settlement conference" similarly to mediation with the difference that settlement conferences must be attended by counsel, can be facilitated by the presiding judge, and require the submission of a settlement brochure).

91. *Compare* Mont. 12th Jud. Dist. R. 12(b)(2) (parties and their attorneys "must be present" in settlement conference "unless excused by settlement judge/master"); Mont. 5th Jud. Dist. R. 7 ("[c]ounsel who will try the case . . . shall attend in person" settlement conference or mediation); *with* Mont. Code Ann. § 40–4–302(3) ("mediator may exclude attorneys from mediation sessions").

92. Mary Adkins, *Moving Out of the 1990s: An Argument for Updating Protocol on Divorce Mediation in Domestic Abuse Cases*, 22 Yale J.L. & Feminism 97, 104 (2010) (citing Leonard Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 Harv. Negot.

> an analytical process that focuses the mediator's attention to the substance of the conflict and what would be necessary in order to achieve a settlement. *It . . . assumes the mediator is capable not only of facilitating the mediation process but also making judgments about its content*.[93]

This is the observation made by Mary Adkins, who found in a recent study that most court-connected family mediations are evaluative.[94] Unlike the facilitative process that feminist critics initially feared would compromise women's interests and safety, most mediations that involve domestic violence today are focused on settlement, not mutual understanding or negotiation of the abuse (which, of course, is not negotiable).[95] Thus, the risks associated with mediating domestically violent situations are lessened in evaluative processes as conciliation is *not* the goal. Settlement conferences and other forms of evaluative ADR are arguably not what the *Hendershott* Court had in mind when it referred to domestic violence as undermining "the basic rules, assumptions, and goals of mediation."[96]

5. *The minimal reason to suspect standard*

According to the Montana Supreme Court, the "reason to suspect" standard for family law cases potentially involving domestic violence is "minimal": "lower than probable cause and consistent with doctor and teacher standards for investigating abuse."[97] In *Hendershott*, the Court found ample reason to suspect abuse. Its opinion catalogued a litany of evidence, including an order of protection against Westphal; Westphal's admission in writing and at trial of his controlling behavior; expert testimony attesting to Hendershott's post-traumatic stress disorder, social inhibition, low-self-esteem, stress, and anxiety; Westphal's anger, insensitivity and intolerance of others, and anecdotes consistent with those related by domestic violence victims; Hendershott's affidavit alleging "increasing levels" of physical and emotional abuse; Hendershott's frequent requests for police to be present during handoffs of the children; Hendershott's hiring of private, uniformed guards to oversee such handoffs; and Hendershott's testimony that the children had witnessed Westphal's behavior, were "timid and uncomfortable" after visiting with him, and other "problematic behavior," in-

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L. Rev. 7 (1996), as described in L. Randolph Lowry, *Evaluative Mediation in Divorce and Family Mediation*, in *Divorce and Family Mediation* 72, 73 (Jay Folberg, Ann L. Milne & Peter Salem, eds., Guilford Press 2004)).

93. Adkins, *supra* n. 92, at 104 (quoting Lowry, *supra* n. 92, at 73) (emphasis added).

94. *See* Adkins, *supra* n. 92.

95. *Id.* at 109–110.

96. *Hendershott*, 253 P.3d at 811.

97. *Id.* at 810–811 (citing Mont. S. Jud. Comm., *Executive Action on S.B. 117*, 53rd Reg. Sess. 2 (Jan. 25, 1993)).

cluding their justification for Westphal's abuse.[98] This volume of evidence clearly met the reason to suspect standard. But it also exceeded it. In other words, *Hendershott* does not tell us what is *minimally* required to trigger the absolute bar.

In Montana, as in other states, doctors, teachers, and other professionals are legally mandated to report child abuse and neglect if they have "reasonable cause to suspect" it.[99] This reporting requirement is evidently what the legislature and the Court had in mind when they crafted and interpreted, respectively, § 40–4–301(2)'s reason to suspect standard—although the Court's statement that the mediation standard is "consistent" with this reporting requirement raises the question of whether *Hendershott* formally adopts it.

In Montana, as elsewhere, the reason to suspect inquiry is broad and searching. For example, Montana medical providers are instructed to ask questions relating to not just physical but also emotional, sexual, and other forms of abuse. The Medical Provider Abuse Assessment Screen developed by the Montana Domestic Violence Fatality Review Commission instructs providers to inquire whether a patient is "afraid of their partner" or "afraid to go home."[100] It also asks whether the children had witnessed

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98. *Id.* at 807–809.

99. In addition to doctors and teachers, mandatory reporters include: a member of a hospital's staff engaged in the admission, examination, care, or treatment of persons; a nurse, osteopath, chiropractor, podiatrist, medical examiner, coroner, dentist, optometrist, or any other health or mental health professional; religious healers; school teachers, other school officials, and employees who work during regular school hours; a social worker, operator or employee of any registered or licensed day-care or substitute care facility, staff of a resource and referral grant program or of a child and adult food care program, or an operator or employee of a child-care facility; a foster care, residential, or institutional worker; a peace officer or other law enforcement official; a member of the clergy; a guardian ad litem or a court-appointed advocate who is authorized to investigate a report of alleged abuse or neglect; or an employee of an entity that contracts with the department to provide direct services to children. Mont. Code Ann. § 41–3–201. Incidentally, the reporting statutes do not require that professionals mandated to report abuse investigate whether such abuse has in fact occurred. *Gross v. Myers*, 748 P.2d 459, 461–462 (Mont. 1987). The reason to suspect standard comes from *Terry v. Ohio*, in which the U.S. Supreme Court held that a police officer may lawfully detain an individual if he reasonably suspects criminal activity. 392 U.S. 1, 30 (1968). The Court held that "in determining whether the officer acted reasonably in such circumstances, due weight must be given not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience." *Id.* at 27. This standard has since been extended to various civil contexts. *See e.g. Mends v. Dykstra*, 637 P.2d 502, 507 (Mont. 1981) (extending "reason to suspect" to constructive fraud); *Erickson v. State ex rel. Bd. of Med. Examiners*, 938 P.2d 625, 629 (Mont. 1997) (applying "reason to suspect" standard for initiating investigation of possible medical license suspension); *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012) (applying standard when evaluating agency's interpretation of ambiguous regulations); *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 374–375 (2009) (applying standard to school principal's search of student).

100. Montana Domestic Violence Fatality Review Commission, *Report to the Legislature* 14 (Mont. Dept. Just. Jan. 2007).

abuse and whether there is a gun in the home.[101] Similarly, Montana public school guidelines have checklists of physical and behavioral indicators of child psychological, emotional, physical, and sexual abuse. Among these indicators are not only "bruises and welts" but also:

> speech disorders, lags in physical development . . . blame or belittle the child, threaten the child, withhold affection . . . wary of physical contact with adults . . . become apprehensive when other children cry, demonstrates extremes in behavior (e.g., aggressiveness or withdrawal) . . . difficulty in walking or sitting . . . appear withdrawn . . . [and] seductiveness, provocative behavior.[102]

These state guidelines are consistent with national standards prescribed by the American Medical Association, American Academy of Pediatrics, Centers for Disease Control and Prevention ("CDC"), and other institutions.[103]

At the same time, the Montana Supreme Court has held that the reason to suspect standard "clearly must be a subjective" inquiry.[104] In affirming a clinical social worker's duty to report suspicion of child abuse, for example, the Court, in *Gross v. Myers*,[105] held that the:

> cause for suspicion must be based upon a perceived present real harm or a perceived present imminent risk of harm. This perception need not always be based entirely upon current, culpable acts of those responsible for the child. The primary purpose of the statute is the protection of the child. If [the social worker], in her professional opinion had reasonable cause to suspect that a child presently is threatened with harm, she must report, whether her suspicion is based upon past acts, present acts, or both.[106]

Gross v. Myers involved incidents of child sexual abuse that had occurred 16 years prior.[107] Thus, in Montana, the reason to suspect standard is met if a mandated reporter, "in her own reasonable judgment within the circumstances presented," believes that abuse "may" recur "even after long lapses of time."[108]

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101. *Id.*

102. Child and Family Services Division, *Montana School Guidelines for the Identification and Reporting of Child Abuse and Neglect* 12–19 (Mont. Dept. Pub. Health & Human Servs. 2012–2013).

103. Judith McFarlane et al., *Assessing for Abuse During Pregnancy*, 267 J. Am. Med. Assn. 3176 (1992); Nancy D. Kellogg, *Evaluation of Suspected Child Physical Abuse*, 119 J. Pediatrics 1232, 1241 (2007); Kathleen Basile, Marci Hertz & Sudie Back, *Intimate Partner Violence and Sexual Violence Victimization Assessment Instruments for Use in Healthcare Settings* version 1, 22–39 (Ctrs. for Disease Control & Prevention, Natl. Ctr. for Injury Prevention & Control 2007).

104. *Gross*, 748 P.2d at 461.

105. *Gross*, 748 P.2d 459.

106. *Id.* at 461.

107. *Id.* at 460.

108. *Id.* at 461. *See also Newville v. St., Dept. of Family Servs.*, 883 P.2d 793, 796–797, 807–808 (Mont. 1994) (reason to suspect standard met given, *inter alia*, trial testimony attesting to previous allegation of spousal and child abuse; testimony of two couples attesting to child beating; black marks on cheek; fixed stare; looking like a "zombie"; and officer testimony regarding bruises).

Federal criminal law is consistent in this regard. For example, the U.S. Supreme Court has observed that "the essence of all that has been written is that the totality of the circumstances—the whole picture—must be taken into account. Based upon that whole picture the [investigator] must have a particularized and objective basis for suspecting . . . ."[109] Following the U.S. Supreme Court's landmark 1968 decision in *Terry v. Ohio*,[110] the 11th Circuit observed that the standard is met when there is "articulably suspicious behavior. . . . [A] suspicion may be reasonable even though it rests substantially on the inability to give a credible explanation."[111] An investigator's suspicion can be a "'common-sense conclusio[n] about human behavior' upon which 'practical people,' . . . are entitled to rely."[112] "'[C]ommon sense and ordinary human experience,'" the U.S. Supreme Court has held, "'must govern over rigid criteria.'"[113]

It appears, therefore, that almost *any* evidence of abuse found after a broad, searching, and subjective inquiry of the totality of circumstances may be enough to meet *Hendershott*'s reason to suspect standard. For this reason, the key is proper training, which would check potential abuse of this minimal standard. That is, the courts and professionals upon whom courts rely—their staff, attorneys, mediators, settlement masters, social workers, psychologists, teachers, and law enforcement officers—must be trained to conduct a domestic violence assessment. Without such training, judges are ill-equipped to ascertain whether there is reason to suspect that a party is the victim of domestic violence.

6. "Domestic violence"

This leads to the question: what is "domestic violence"? If the reason to suspect inquiry is broad, searching, and subjective, and takes into account the totality of circumstances, what then should district courts be looking for? What suffices for a particularized, objective basis for suspecting domestic violence? In this subsection, I discuss the dominant understanding of domestic violence and argue that it is outdated. As such, it is inadequate and misleading and disserves survivors and their families. It is, however, the understanding that motivated the enactment of § 40–4–301(2) and the Court's opinion in *Hendershott*.

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109. *U.S. v. Cortez*, 449 U.S. 411, 417 (1981).

110. *Terry*, 392 U.S. 1.

111. *U.S. v. Mosquera-Ramirez*, 729 F.2d 1352, 1354 (11th Cir. 1984).

112. *U.S. v. Montoya de Hernandez*, 473 U.S. 531, 542 (1985); *N.J. v. T.L.O.*, 469 U.S. 325, 346 (1985) (citing *Cortez*, 449 U.S. at 418).

113. *Montoya de Hernandez*, 473 U.S. at 542–543 (internal citations omitted).

To begin with, the legal system and the social sciences differ on what constitutes domestic violence.[114] Legally, domestic violence is often understood as a discreet incident or incidents of violent behavior—or the threat of it. Montana law focuses primarily on physical violence. For example, the partner or family member assault ("PFMA") statute criminalizes bodily injury or the "reasonable apprehension" of it.[115] Administrative Rule 37.47.1001(2), which governs Montana's domestic violence protective services programs, uses a similar definition.[116] Indeed, *Hendershott* is laudable in acknowledging psychological violence, which one study has found to be the most frequently reported behavior in abusive relationships.[117]

Social scientists, on the other hand, agree that a *pattern* of abuse is key. Hence the classic definition of domestic violence is:

> a pattern of coercive behaviors to control one's partner through physical abuse, the threat of physical abuse, repeated psychological abuse, sexual assault, progressive social isolation, deprivation, intimidation, or economic coercion.[118]

Popularly understood, "domestic violence" is synonymous with this definition. When we think of domestic violence, we picture a male batterer and female victim or survivor. Some experts call these cases "intimate terrorism."[119] They involve "battered women"—first described by Lenore Walker in her seminal work, "The Battered Woman," in 1979—who exhibit signs of post-traumatic stress disorder and "learned helplessness."[120] Al-

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114. Nancy Ver Steegh, *Yes, No, and Maybe: Informed Decision Making about Divorce Mediation in the Presence of Domestic Violence*, 9 Wm. & Mary J. Women & L. 145, 151 (2003) (legal and social science definitions of domestic abuse conflict); *see also* Fran Danis & Shreya Bhandari, *Understanding Domestic Violence*, in *Domestic Violence: Intersectionality and Culturally Competent Practice* ch. 2, 30–31 (Columbia U. Press 2010) (suggesting that multifaceted, interdisciplinary nature of domestic violence study may never yield consensus on terminology).

115. Mont. Code Ann. § 45–5–206. Interestingly, this statute seems to limit its scope to opposite-sex partners. There is little data on same-sex domestic violence. This article therefore discusses primarily opposite-sex partnerships.

116. Admin R. Mont. 37.47.1001(2) (2012). *But see* Mont. Code Ann. § 39–51–2111(5) (unemployment benefits statute defining "domestic violence" as "physical, mental, or emotional abuse of an individual or the individual's child by a person with whom that individual or the individual's child lives or has recently lived").

117. Connie Beck, Michelle E. Walsh & Rose Weston, *Analysis of Mediation Agreements of Families Reporting Specific Types of Intimate Partner Abuse*, 47 Fam. Ct. Rev. 401 (2009).

118. Danis & Bhandari, *supra* n. 114, at 30; *accord* Susan Pollet, *Mediating Domestic Violence*, 77 N.Y. St. B.J. 42, 42 (2005); *see also* Lois Schwaeber, *Recognizing Domestic Violence: How to Know It When You See It and How to Provide Appropriate Representation*, in *Domestic Violence, Abuse, and Child Custody*, 2, 2–5 (Mo Therese Hannah & Barry Goldstein eds., Civ. Research Inst. 2010). In this article, I use the terms "domestic violence," "domestic abuse," and "intimate partner abuse/violence" interchangeably. *See* Danis & Bhandari, *supra* n. 114, at 30.

119. *See generally* Johnson, *A Typology of Domestic Violence*, *supra* n. 12.

120. Lenore Walker, *The Battered Woman* (Reprint ed., William Morrow Paperbacks 1980); *see also* Lenore Walker, *The Battered Woman's Syndrome* (3d ed., Springer 2009). For a succinct summary of

though the legislative record is silent on this issue,[121] it is safe to say that § 40–4–301(2)'s use of the term "physical, sexual, and emotional abuse" derives from this understanding. "In everyday speech and even in most social science discourse," scholars Michael P. Johnson and Kathleen J. Ferraro have observed, "'domestic violence' is about men beating women."[122] This can only be so given our limited understanding of domestic violence at the time the statute was enacted in 1993. Heidi Hendershott's and Jesse Westphal's relationship falls into this category, and it is the view that underlies much professional training in this area.[123]

We now know, however, that domestic violence is not a unitary phenomenon. In addition to intimate terrorism—or a pattern of coercive control—experts have identified four other types of domestic abuse: situational couple violence, self-defense, separation-instigated violence, and mutual violent control (violence between two coercive controlling partners).[124] Indeed, coercive controlling violence—the situation before the Court in *Hendershott*—is rare. More common—and distinct—are instances of situational couple violence. Researchers have found that situational couple violence is "the most common type of physical aggression" between married and cohabiting couples, is perpetrated both by both men and women,[125] and "is not embedded in a relationship-wide pattern of power, coercion, and control."[126] Unlike the misogynistic pattern of coercive, controlling violence, situational couple violence results from situations or arguments between couples who have a poor ability to manage conflict or anger—precisely the situations mediation is designed to address. While such cases must, of course, be taken seriously—they can be fatal—they "often involve[ ] minor forms of violence (pushing, shoving, grabbing, etc.) when

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"intimate terrorism," see Johnson, *A Typology of Domestic Violence*, *supra* n. 12, at 25–47. Johnson later renamed this type of domestic violence as "coercive controlling violence." *Id.* at 14.

121. Mont. H. Jud. Comm., *Hearing on H.B. 231*, 55th Reg. Sess. (Jan. 29, 1997).

122. Johnson & Ferraro, *supra* n. 12, at 948; *see also* Kelly & Johnson, *supra*. n. 12, at 478 ("for many in the field, domestic violence describes a coercive pattern of men's physical violence, intimidation, and control of their female partners (i.e., battering)"). *See generally* Johnson, *A Typology of Domestic Violence*, *supra* n. 12.

123. *See e.g*. American Bar Association Commission on Domestic Violence, *The Domestic Violence Civil Law Manual: Protection Orders & Family Law Cases* 3 (3d ed., Am. Bar Assn. 2007) (defining domestic violence as "a network of behaviors directed at achieving and maintaining power and control over an intimate partner"). This type of domestic violence has also been called one in which there is a "culture of battering." *See* Karla Fischer, Neil Vidmar & Rene Ellis, *The Culture of Battering and the Role of Meditation in Domestic Violence Cases*, 46 SMU L. Rev. 2117 (1993).

124. Kelly & Johnson, *supra*. n. 12, at 477; *see also* Ver Steegh, *supra* n. 114, at 151–152; Johnson, *A Typology of Domestic Violence*, *supra* n. 12; Susan Landrum, *The Ongoing Debate about Mediation in the Context of Domestic Violence*, 12 Cardozo J. Conflict Resol. 425, 430–434 (2011) (discussing types of domestic violence).

125. Kelly & Johnson, *supra* n. 12, at 485.

126. *Id.*

compared to [c]oercive [c]ontrolling [v]iolence and fear of the partner is not characteristic."[127] And while emotional abuse in these two types of situations may be similar, in the former it is "not accompanied by a chronic pattern of controlling, intimidating, or stalking behaviors."[128] This is a crucial distinction. One study found that the men involved in situational couple violence are no different from non-violent men in terms "of borderline or anti-social personalities or general violence outside the family."[129] Situational couple violence is also "less likely to escalate over time than [c]oercive [c]ontrolling [v]iolence, sometimes stops altogether, and is more likely to stop after separation."[130] Situational couple violence is not simply a minor version of coercive, controlling violence but a different phenomenon with different causes and consequences altogether.[131] These are critical distinctions as experts are quick to point out that these categories do not fall on a continuum but are rather distinct phenomena with attendant levels of violence.[132]

In determining whether there is reason to suspect physical, sexual, or emotional abuse barring mediation, therefore, the dominant conception of domestic violence is both over- and under-inclusive. A single violent incident—a slap, push or shove, for example, or threat of it—may qualify as abuse under the PFMA statute, § 40–4–301(2), and *Hendershott*. In such cases, as Michael Johnson and Evan Stark have argued, "violence cannot be reliably determined by incident-specific physically abusive or violent acts because the key component of any type of abusive relationship is fear-inducing control."[133] At the same time, the focus on a pattern of abuse—coercive controlling behavior—may leave out situational couple violence and other types of domestic abuse that can be quite serious and merit further judicial attention. This should not be surprising given the complexity of domestic abuse.[134] There is no "typical" domestic violence case. What is required is "sensitivity and sophistication in assessing individual circumstances."[135] District courts, in other words, must distinguish among different types of domestic abuse and, on a case-by-case basis, decide whether mediation is appropriate.

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127. *Id.* Kelly and Johnson do note, however, that situational couple violence can result in serious assault and injury. *Id.* at 486.

128. *Id.*

129. *Id.*

130. Kelly & Johnson, *supra* n. 12, at 486 (internal citations omitted).

131. *Id.* at 485.

132. *See generally id.*

133. Connie Beck & Chitra Raghavan, *Intimate Partner Abuse Screening in Custody Mediation*, 48 Fam. Ct. Rev. 555, 562 (2010).

134. Murphy & Rubinson, *supra* n. 65, at 58.

135. *Id.*

In sum, an analysis of six key questions posed by *Hendershott* show that: (1) *Hendershott* applies to all pending and future family law cases; (2) the absolute bar applies to both dissolution and parenting proceedings under Chapters 4 and 6, Title 40, of the Montana Code; (3) district courts have the duty to review cases *sua sponte*, with special consideration afforded *pro se* litigants; (4) the absolute bar may not apply to settlement conferences, evaluative mediations, and other forms of evaluative ADR; (5) the use of a reason to suspect standard requires training in domestic violence, in particular the ability to recognize and distinguish among different types of domestic abuse; and (6) courts must distinguish among different types of abuse and, on a case-by-case basis, determine which ones may be appropriate for mediation. In the following subsection, I sketch a model screening process that can operationalize these requirements.

B. A Model Screening Process

Practitioners, scholars, and advocates are unanimous in the belief that a systematic screening process is key to diagnosing and intervening in family situations involving domestic violence.[136] For example, the Model Standards of Practice for Family and Divorce Mediation, the result of a collaboration between the family law section of the American Bar Association, the Association of Family and Conciliation Courts, and American Law Institute call for screening.[137] However, these and other similar standards do not recommend a specific screening tool. There are many such tools. In this subsection, I tailor a composite screening process for Montana based on a number of common procedures.

1. Underreporting, collaboration, and the pervasive method

Two general points bear mention at the outset. First, a screening process must be pervasive. That is, screening for domestic violence must be the responsibility of *everyone* involved. For example, Georgia's guidelines mandate that screening be a shared responsibility among "the court, pro-

136. *Id.* at 53–55; Ver Steegh, *supra* n. 114, at 194 (mentioning Conflict Tactics Scale, Conflict Assessment Protocol, and Tolman Screening Model); *see generally* Beck & Raghavan, *supra* n. 133, at 555; Adkins, *supra* n. 92, at 108–109; Amy Holtzworth-Munroe, Connie Beck & Amy Applegate, *The Mediator's Assessment of Safety Issues and Concerns: A Screening Interview for Intimate Partner Violence and Abuse Available in the Public Domain*, 48 Fam. Ct. Rev. 646, 646 (2010); Robin H. Ballard, Amy Holtzworth-Munroe & Amy Applegate, *Detecting Intimate Partner Abuse in Family and Divorce Mediation: A Randomized Trial of Intimate Partner Violence Screening*, 17 Psychol. Pub. Pol'y & L. 241, 243, 246–247 (2011) (Conflict Tactics Scale and Relationship Behavior Rating Scale).

137. Murphy & Rubinson, *supra* n. 65 at 59–60; *see also* Landrum, *supra* n. 124, at 448–453; Ver Steegh, *supra* n. 114, at 194–195.

gram directors, attorneys, mediators, and the parties."[138] This means not just judges, lawyers, mediators, and settlement masters but also court clerks, law enforcement, volunteers, and others. A pervasive method, of course, contemplates collaboration among these individuals to ensure that domestic violence is detected and addressed. Dispute-resolution is only one among many needs of domestic violence survivors. The benefit of a pervasive, collaborative screening method is that it would allow for a multifaceted approach to a complex problem.

Second, judges, court personnel, attorneys, mediators, settlement masters, and advocates must take primary investigatory responsibility. Domestic violence is underreported.[139] Many domestic violence victims are ashamed of the abuse; indeed, many do not even realize that they are victims. Furthermore, many professionals—including mediators and settlement masters—continue to believe that domestic violence is not a frequently occurring problem.[140] In the survey I conducted, for example, one judge commented that "[m]any women (complainants) are skilled in exaggerating or even making up accusations."[141] This may be true in some cases, but *under-* not over-reporting is the problem.[142] The burden therefore cannot be only on parties to report.

2. *Screening for a pattern of coercive controlling violence*

As discussed above, the Montana Legislature seemed to have in mind male-perpetrated, coercive controlling violence exclusively when it barred mediation in cases involving physical, sexual, or emotional abuse. *Hendershott* provided an excellent opportunity for the Court to reaffirm this policy as it presented ample evidence of a husband's attempts to coercively control his wife. As the Court stated in explaining why mediation is inappropriate in situations involving such cases, "the basic rules, assumptions, and goals

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138. Boris Milter, *Georgia Delivers the Promise of Self-Determination*, 4 J. Marshall L.J. 203, 225 (2011); *see also* Rene Rimelspach, *Mediating Family Disputes in a World with Domestic Violence: How to Devise a Safe and Effective Court-Connected Mediation Program*, 17 Ohio St. J. on Disp. Resol. 95, 104 (2001) ("[s]creening for domestic violence . . . should be done throughout the mediation process"); Peter Salem & Billie Lee Dunford-Jackson, *Beyond Politics and Positions, a Call for Collaboration between Family Court and Domestic Violence Professionals*, 46 Fam. Ct. Rev. 437, 438 (2008); Betsy Tsai, *The Trend toward Specialized Domestic Violence Courts: Improvements on an Effective Innovation,* 68 Fordham L. Rev. 1285, 1316–1318 (2000) (calling for "coordinated community response" to domestic violence).

139. Lydia Belzer, *Domestic Abuse and Divorce Mediation: Suggestions for a Safer Process*, 5 Loy. J. Pub. Int. L. 37, 55–57 (2003).

140. Holtzworth-Munroe, Beck & Applegate, *supra* n. 136, at 646 (mediators "simply do not believe . . . that many of the parties they work with have experienced" domestic abuse).

141. 13th Judicial District judge.

142. Dunnigan, *supra* n. 70, at 1039–1040 ("The National Coalition Against Domestic Violence estimates that up to 90% of battered women never report their abuse.").

of mediation are undermined in those particular cases when the parties have a *history* of domestic violence."[143] *Hendershott* therefore can be read narrowly to mean excepting mediation *only* in cases involving patterns of violent or potentially violent coercive control.

Over the years, institutions, advocates, and courts nationwide have developed and used various screening methods that, among other assessments, measure coercive control.[144] For example, in 2006, the CDC gathered a compendium of assessment tools, "Measuring Intimate Partner Violence Victimization and Perpetration."[145] The American Bar Association Commission on Domestic Violence, too, in 2005 issued a tool for civil attorneys representing victims of domestic violence.[146] Various states in turn have translated these screening methods into protocols for determining whether or not mediation would be appropriate. Appended to this article, as Appendices A and B, are a summary of court practices nationwide and five screening instruments, respectively. The Mediator's Assessment of Safety Issues and Concerns ("MASIC") model, developed by Amy Holtzworth-Munroe, Connie J.A. Beck, and Amy G. Applegate,[147] is one we can easily adopt in Montana. Among other noteworthy features, the MASIC combines strengths of various instruments, providing for behaviorally and temporally specific questions, personal interviews of both parties, sensitivity to *pro se* parties, the assessment of multiple types of domestic violence, and options for the mediator's consideration.[148] Its designers intended it to be freely available to the public—i.e., cost-free.[149]

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143. *Hendershott*, 253 P.3d at 811 (emphasis added); *see also* Beck & Raghavan, *supra* n. 133, at 556–557 ("[I]t is in the mediation context that coercive control may be the *most* detrimental to victims. Central elements of a fair mediation process include non-coercive negotiations in front of a neutral third party to consensually develop agreements reflecting the needs of all family members." (internal citations omitted) (emphasis in original)).

144. *See e.g.* Ver Steegh, *supra* n. 114, at 194 (mentioning Conflict Tactics Scale, Conflict Assessment Protocol, and Tolman Screening Model); Beck & Raghavan, *supra* n. 133, at 557 ("Decision-Making Power" scale and "Domestic Violence Evaluation" ("DOVE")); Ballard, Holtzworth-Munroe & Applegate, *supra* n. 136, at 244–247 (Conflict Tactics Scale and Relationship Behavior Rating Scale); Chester Chance & Alison Gerencser, *Screening Family Mediation for Domestic Violence*, 70 Fla. B.J. 54, 54 (Apr. 1996) (Georgia screening method); *see also* Zylstra, *supra* n. 11, at 261, 271; Murphy & Rubinson, *supra* n. 65, at 71–81 (summarizing state screening methods); Holtzworth-Munroe, Beck & Applegate, *supra* n. 136, at 648–649. Few have been empirically tested, however. Beck & Raghavan, *supra* n. 133, at 557.

145. Martin Thompson, Kathleen Basile, Marci Hertz & Dylan Sitterle, *Measuring Intimate Partner Violence Victimization and Perpetration: A Compendium of Assessment Tools* (Ctrs. for Disease Control & Prevention, Natl. Ctr. for Injury Prevention & Control 2006).

146. American Bar Association Commission on Domestic Violence, *Tools for Attorneys to Screen for Domestic Violence* (Am. Bar Assn. 2005).

147. *See* Holtzworth-Munroe, Beck & Applegate, *supra* n. 136, at 646.

148. *Id.* at 649–650.

149. *Id.* at 649.

In addition to the substantive questions recommended by various instruments, experts call for the use of multiple methods, including a standardized questionnaire and confidential interviews of the parties, conducted separately. Domestic violence can be difficult to discern. As Michael Johnson observes:

> A *pattern* of power and control cannot . . . be identified by looking at violence in isolation or by looking at one incident. It can only be recognized from information about the use of multiple control tactics over time, allowing one to find out whether a perpetrator uses more than one of these tactics to control his or her partner, indicating an attempt to exercise general control.[150]

The use of multiple instruments makes it more likely that a pattern of coercive control would be diagnosed.[151] Personal interviews also provide the opportunity for trained screeners to observe bodily cues and explore the contexts and dynamics of specific relationships.[152] Coercive controlling violence is not just about physical aggression or even the quantity of it. As one scholar put it, "Abstracted from their social reality, the reports of abuse that result from [ ] quantitative scales lack a description of the relationship and family context in which the abusive behaviors are occurring."[153] Indeed, survivors comment that the physical abuse is not the worst of it. Again, the *Hendershott* Court should be commended for taking emotional abuse seriously. In diagnosing this type of domestic abuse, a *pattern* of coercive control—whether physical, emotional, sexual, or a combination of all three—is key.

a. Step one: records review

To diagnose for coercive controlling violence in Montana, district courts might use a screening process that begins, pre-petition, with advocates, attorneys, family law self-help centers, and concerned others.[154] These individuals can look for signs of abuse and advise victims to report them to the court. Once the petition for dissolution or a parenting plan is filed, court staff should review the pleadings and perform a criminal and civil records check to see if the parties have been involved in related pro-

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150. Johnson, *A Typology of Domestic Violence*, *supra* n. 12, at 8 (emphasis in original).

151. Ver Steegh, *supra* n. 114, at 194 (experts suggest more than one method of screening as domestic violence is difficult to discern and victims underreport).

152. *See* Kara Utzig, *Entering the Debate on Spousal Abuse Divorce Mediation: Safely Managing Divorce Mediation When Domestic Violence is Discovered*, 7 Buff. Women's L.J. 51, 62–63 (1999) (mediators should rely on nonverbal cues and other body language for evidence of intimidation and gross power disparities when screening); *see also* Landrum, *supra* n. 124, at 450–451 (of 80% of mediation programs that screen for domestic violence, half use only written questionnaires).

153. Fischer, Vidmar & Ellis, *supra* n. 123, at 2125.

154. See Murphy & Rubinson, *supra* n. 65, at 67–69 for one example of pre-filing and filing screening procedure.

ceedings, for example, a prosecution or conviction under the PFMA statute, an application for an order of protection, or prior or pending cases of child abuse and neglect. *All* family law cases should be screened. The court should also use the "sensitive data" form to see whether there is reason to suspect abuse.[155] The court may then offer mediation services if it finds no reason to suspect domestic abuse.

b. Step two: written questionnaire and personal interviews

If the court finds a reason to suspect domestic abuse after a review of the record, it should conduct a second level of review to confirm the initial finding. The district court should retain the services of a trained domestic violence advocate, who can administer a written questionnaire and conduct personal interviews. As set forth in the sample screening tools appended to this article (Appendix B), the questions should be behaviorally specific as general questions about assault or victimization have been found to be too insensitive to detect violence.[156] In the personal interviews, screeners should be methodical, rigorous, and flexible in how they ask questions.[157] They should interview the parties separately as questioning them about violence jointly is, of course, problematic. At the interviews, courts should allow third-party advocates to participate. In courts that hold parenting orientations, the presiding judge also should emphasize the need for a domestic violence assessment. The various instruments included in Appendix B provide a wealth of advice on how to conduct paper and in-person screening processes.

If a reason to suspect domestic violence is confirmed in this secondary process, the screener should determine whether or not the case involves a situation of coercive controlling violence. If so, mediation should be barred. If not, as I argue in subsection c and Section V below, they should be assessed further to determine whether mediation is appropriate.

c. Step three: case-by-case assessment of matters that do not involve coercive, controlling violence

As I discussed above, experts have identified five types of domestic violence: (1) coercive, controlling violence; (2) situational couple violence; (3) self-defense; (4) separation-instigated violence; and (5) mutual violent control.[158] As *Hendershott* affirms, cases that involve coercive, controlling

155. *See* Mont. 4th Jud. Dist. Ct., *Sensitive Data Form*, http://www.co.missoula.mt.us/distcourt/packetE/pdffiles/PacketE_SensitiveDataSheet.pdf (accessed Jan. 17, 2013).

156. Ballard, Holtzworth-Munroe & Applegate, *supra* n. 136, at 243, 256–257.

157. *See* Landrum, *supra* n. 124, at 449.

158. *See supra*, Sec. IV.A.6.

violence are inappropriate for mediation.[159] But situational couple violence, which constitutes the vast majority of cases, might be not only appropriate for mediation but also well-suited for it. Couples who resort to violence because of poor conflict-management skills could benefit greatly from mediation as mediation, by definition, models peaceful conflict resolution. Should the secondary screening demonstrate that a case does not involve coercive controlling violence, therefore, additional assessment should be administered to determine whether it may be appropriate for mediation.

d. Step four: the mediator's continuing responsibility to screen

Even after a case is referred to mediation, the screening process must continue. Because mediation can provide an important window into a couple's relational dynamics, mediators are in a unique position to diagnose domestic abuse. Coercive, controlling violence compromises the mediation process. Mediators therefore necessarily have to continue to monitor the process for signs of such behavior.

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Implementing the four-step screening process I just summarized will require extensive resources. This, of course, is a paramount concern, even in the best of circumstances. In the survey I conducted, several judges worried about the cost of implementing *Hendershott*.[160] Creating a screening process would mean training and retraining professionals involved in dissolution and parenting proceedings. It would require hiring new personnel and recruiting volunteers; new systems and workflows; greater judicial involvement and monitoring; and more. Cost very well may be the single biggest obstacle to implementing § 40–4–301(2).

Without an effective screening process, however, the absolute bar to mediation is meaningless or, worse, harmful, both to domestic violence survivors and the courts. Business as usual—here district courts' disregard of the statute and *Hendershott*—means continued victimization and revictimization of domestic violence survivors under judicial imprimatur. *Hendershott* provides us with the perfect opportunity to make a difference, that is, make good on § 40–4–301(2) by implementing it—work that involves outreach, education, training, infrastructure, systems, expertise, and funding. I believe that, as a community—as I have seen numerous times—we can band together to implement cost-effective measures that will promote the twin goals of stopping domestic violence and promoting ADR.

159. *Hendershott*, 253 P.3d at 812.

160. 11th, 17th, and 20th Judicial District judges. *See also* Landrum, *supra* n. 124, at 452 (mentioning scarcity of staff, spaces, and time to make effective use of extensive screening protocol).

V. The Case for an Opt-In Provision

"[I]f a mandatory policy is by its nature unresponsive to what an individual victim wants, how is it empowering her[?]"[161]

"Women who have been battered must be free to make choices that others disagree with or fail to understand."[162]

Given the relative rarity of coercive controlling violence and prevalence of situational couple violence, it is likely that many more of the latter cases are before the district courts. As I have discussed, these situations *are* about conflict. Parental conflict, as is widely known, is "one of the most consistent predictors of poor outcomes for children, in terms of mental and physical health and in many other areas."[163] This is the reason mediation has become *de rigeur* in family law cases. Unlike coercive controlling violence, situational couple violence is not embedded in a pattern of dominance and control. These are not situations characterized by a "culture of battering."[164] Indeed, situational couple violence "is initiated at similar rates by men and women."[165] In such cases, I would argue that Montana should afford parties the opportunity to opt in to mediation.

Like the mandatory arrest and "no-drop" prosecution of domestic abusers, the absolute bar to mediating family law cases involving domestic violence grew out of the concern for women's safety and the need to insist on domestic violence as a crime.[166] In particular, women's advocates were concerned that, because of its informality and neutrality, mediation would revictimize women and reprivatize domestic violence.[167] Well-intended though they may be, however, mandatory domestic violence policies do not work. For example, mandatory arrest policies have had mixed results. They deter future violence in some locations but not in others.[168] Worse, some evidence indicates that they contribute to *increases* in future violence and have troubling class and racial implications.[169] No-drop prosecutions lead similarly to so-called "victimless prosecution[s]," which disregard the

161. Adkins, *supra* n. 92, at 112.

162. Leigh Goodmark, *Autonomy Feminism: An Anti-Essentialist Critique of Mandatory Interventions in Domestic Violence Cases*, 37 Fla. St. U. L. Rev. 1, 27 (2009).

163. Beck et al., *supra* n. 74, at 631 (internal citations omitted).

164. *See* Fischer, Vidmar & Ellis, *supra* n. 123, at 2158.

165. Kelly & Johnson, *supra* n. 12; *see also* Johnson, *A Typology of Domestic Violence*, *supra* n. 12.

166. Adkins, *supra* n. 92, at 111–112 (summarizing mandatory arrest and no-drop prosecution policies, which, among other consequences: potentially increase incidences of physical abuse; introduce distinct violent interaction; and allow for evasion of state involvement altogether); Goodmark, *supra* n. 162, at 6–14 (summarizing mandatory arrest and no-drop prosecution policies); *id.* at 14–18 (summarizing arguments against mediating domestic violence cases).

167. Adkins, *supra* n. 92, at 101; Goodmark, *supra* n. 162, at 16.

168. Goodmark, *supra* n. 162, at 8.

169. *Id.* at 8–9.

wishes of victims who may have valid reasons for not pursuing court action.[170]

So too with mediation. An absolute bar to mediation may very well be appropriate in cases involving coercive controlling violence. But situational couple violence is another matter entirely. Here, victims are not necessarily unsafe or disadvantaged. In such cases, mediation, in particular evaluative mediation, may be quite appropriate. Evaluative mediations are not neutral. The Montana Supreme Court's generalized reference to the "the basic rules, assumptions, and goals" governing family mediation does not necessarily apply to evaluative processes.[171] Mediation's flexibility, in other words, allows for the sensitivity and sophistication necessary for appropriate intervention in such cases.

An absolute bar disempowers victims, particularly women, as it is premised on the view that domestic violence victims "can rarely, if ever, act autonomously."[172] As Leigh Goodmark has cogently argued, this view is based on "[d]ominance feminism," which:

> focuses on women's subordinated and victimized status and argues that the legal system can best serve those victims of violence by enforcing policies that ensure safety, regardless of what an individual woman's preference might be.[173]

"[M]aternalism," Goodmark argues, "is no better than paternalism in that it assumes that women who have been battered are incapable of considering the full range of possibilities and deprives them of the ability to make choices for themselves."[174] True empowerment, she continues, must mean more than "simply substituting advocates or the state for the abusive partner as the arbiter of choices for women who have been battered."[175] We must not only enable women to make choices but also "to define the options for [themselves], regardless of how others would evaluate those options."[176] More often than not, women—and men—who find themselves in abusive situations know best.

Finally, the mandatory bar against mediation is premised on an idealized view of litigation. Here, the presumptive comparison is between a mediated worst-case scenario and a litigated best-case scenario. In reality, there is no guarantee that judges or attorneys are more educated about domestic violence than mediators.[177] The courts can and do fail domestic vio-

170. *Id.* at 10–11 (internal citations omitted).
171. *Hendershott*, 253 P.3d at 811.
172. Goodmark, *supra* n. 162, at 28.
173. *Id.* at 4–5.
174. *Id.* at 29.
175. *Id.* at 31.
176. *Id.*
177. Zylstra, *supra* n. 11, at 258–259; Murphy & Rubinson, *supra* n. 65, at 61.

lence victims as well. Moreover, in family law cases, mediated and litigated processes are actually quite similar. In family matters, "judges behave managerially and mediators behave judicially."[178] And on topics such as supervised visitation and physical custody, mediation agreements between violent and nonviolent cases do not differ all that much.[179]

Let me be absolutely clear: what I am advocating is the opportunity for couples in instances of situational couple violence to opt in to an evaluative mediation process. In such a process, the goal is not the elimination of domestic violence, education of the batterer, or negotiation of the terms of the abuse; these issues are non-negotiable. Rather, the goal of mediation would be the settlement of child custody, support, visitation, and property issues. Both parties must agree, and the survivor, especially, must provide informed consent.[180] The mediation must be done by a mediator trained in family issues generally and domestic violence specifically. The goal, ultimately, is a case-by-case solution sensitive to the myriad dynamics of domestic violence.[181] "The objective of an evaluative mediation," as Mary Adkins writes, "is not mutual understanding but settlement."[182]

VI. Conclusion: The Need for Reform, Training, and Outreach

Hendershott is a welcome reaffirmation of Montana's stand against domestic violence: domestic violence is a public matter requiring serious judicial attention. Without a systematic screening method, however, courts are ill-equipped to disqualify cases for mediation. Montana needs a method that not only diagnoses for domestic violence, but also distinguishes among different types as many, if not most, cases would benefit from mediation. An absolute bar is not the solution. What is required is a broad-based outreach and educational effort that would support what I suspect mediators across the state are already doing: tailoring mediation to address the needs of domestic violence victims. Instead of denying victims the opportunity to mediate, we should train mediators to empower survivors who choose to mediate. Domestic violence survivors should be able to choose the dispute resolution process that best suits their unique situations.

To implement § 40–4–301(2) faithfully, Montana should:

- *Adopt a uniform statewide screening method.* Attached as Appendix C is a proposed uniform district court rule mandating one method.

178. Adkins, *supra* n. 92, at 119.

179. Ballard, Holtzworth-Munroe & Applegate, *supra* n. 136, at 242.

180. *See generally* Jacqueline Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking*, 74 Notre Dame L. Rev. 775 (1999).

181. Aimee Davis, *Mediating Cases Involving Domestic Violence: Solution or Setback?*, 8 Cardozo J. Conflict Resol. 253, 266–267 (2006).

182. Adkins, *supra* n. 92, at 109–110.

- *Amend the Montana Code and other state rules and regulations to conform with § 40–4–301(2) and* Hendershott. Attached as Appendix D is a list of such statutes and rules, and proposed amendments, to wit:
  - Montana Code Annotated § 40–4–219(9), which governs mediation of parenting plan amendments, to include sexual and emotional, in addition to physical, abuse.
  - Montana Code Annotated § 39–51–2111(5)(a), which governs unemployment benefits for domestic violence victims, to include sexual, in addition to physical, mental, or emotional abuse.
  - Montana Code Annotated § 40–4–302(3), which governs mediation proceedings, to limit the mediator's power to exclude attorneys in cases involving domestic violence.[183]
  - Administrative Rule 37.47.1001(2), which governs the battered spouses and domestic violence program, to include sexual and emotional, in addition to physical, abuse.
  - Montana Rule of Appellate Procedure 7(a), which governs the mandatory appellate mediation program, to exclude domestic violence cases from appellate mediation, unless victims provide informed consent.
- *Amend § 40–3–301(2) to include an opt-in provision.* Given the different types of domestic violence, Montana ought to provide parties with the opportunity to opt in to mediation—but only upon both parties' informed consent.[184]
- *Require family mediators and settlement masters to engage in continuing education about domestic violence.* Section 40–4–307, which governs mediator qualifications, should be amended to include training in domestic violence.
- *Adopt guidelines for mediators presiding over domestic violence cases.* The MASIC tool in Appendix B provides a workable start.
- *Require all judges, attorneys, and court personnel to undergo continuing education in domestic violence.* As scholars have found, detection of domestic violence is generally low until professionals are trained to screen for it in a systematic fashion.[185] In addition, implementing a reason to suspect standard would be impossible without training. All professionals involved in dissolution and parenting proceedings should have training in domestic violence.

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183. Scholars have expressed concerns about domestic violence survivors negotiating with their abusers without the aid of counsel or a support person. *See* Connie J.A. Beck & Lynda E. Frost, *Competence as an Element of "Mediation Readiness"*, 25 Conflict Res. Q. 255, 258 (2007).

184. *See generally* Nolan-Haley, *supra* n. 180, at 784–787; *see also* Mont. R. Prof. Conduct 1.2 (2011) (discussing informed consent between lawyer and client).

185. Ballard, Holtzworth-Munroe & Applegate, *supra* n. 136, at 243–244 (discussing trends in medicine and marital therapy).

- *Appoint an oversight committee and/or explicitly charge existing state groups with monitoring domestic violence and dispute-resolution* writ large. Ultimately, the choice of dispute-resolution forum and method is only one among many issues faced by domestic violence survivors. Montana ought to create a committee to oversee the implementation of § 40–4–301(2) and *Hendershott* or charge existing relevant state committees, commissions, or task forces with such a task. The charge should include how the effort can relate to Montana's overall strategy to eradicate domestic violence and promote ADR.

Hendershott provides us with the opportunity to fine-tune domestic violence and ADR policy. We should seize the moment.

APPENDICES[186]

Appendix A: State-by-state (including the District of Columbia) summary of domestic violence screening procedures

Appendix B: Sample screening tools (Tolman, Conflicts Tactics Scale, MASIC)

Appendix C: Proposed Uniform District Court screening rule

Appendix D: Proposed legislative and rule revisions

Appendix E: *Hendershott* survey summary

186. Appendices A through D are available on the *Montana Law Review*'s website: www.montanalawreview.com. Appendix E is on file with the *Montana Law Review*.