

**Children of Embattled Divorce
The Ben J. Altheimer Symposium**

**UALR School of Law
September 17 & 18, 1999**

**Draft Essays for Publication in the
*University of Arkansas at Little Rock Law Review.***

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For further information contact:

Julie Peters Zamacona, Editor-in-Chief, (501) 324-9920

Odette Woods, Articles Editor, (501) 324-9918

Found, Cond.
Why they did it

The Qualifications of and Methods to be Used by Judges, Attorneys and Mental Health Professionals in High Conflict Child Custody Cases

Barry Bricklin, Ph.D.
Gail Elliot, Ph.D.

I. The perils and complexities of professional involvement in high conflict cases.

A. The number of areas in which professional education and/or training and/or experience is required is higher than for most fields. Two blue-ribbon committees listed no fewer than 14 areas of expertise they believed should be required just to work in “ordinary” child custody cases. High conflict cases demand even more specialized knowledge.

B. High conflict cases very frequently require the exact opposite in approach, attitude and methodology as do other clients and/or patients with whom mental health professionals (MHPs) typically work. Not only do standard health/mental health procedures often prove ineffective with high conflict cases, but can even defeat the possibility of progress. Further, MHPs must adopt positions their training has taught them to consider taboo, e.g., being confrontative, authoritarian, totally immune to the entreaties of often consciously well-meaning clients and attorneys, etc.

II. High conflict cases: effects and increasing incidence

A. Empirical research on the effects of post-divorce factors. Of all the studied variables, the negative effects on children of high conflict is the most clearly established.

B. High conflict cases are increasing due to:

1. The greater number of fathers seeking sole or joint custody;
2. Money is recognized by more people as a potent force;
3. Internet etc. allow a parent to discover a large number of ways to attack the other parent.

C. High conflict is already inevitable due to the adversarial nature of our legal system, and especially because that while divorce itself has become more “no-fault,” a parent-fitness model (or really “unfitness model”) still permeates the custody area, encouraging each parent to attempt to demolish the character of the other.

III. Qualifications of judges, attorneys and mental health professionals in high conflict cases

A. The general solution is to say that the more judges, attorneys and MHPs become aware of all of the post-divorce research literature as well as the exceedingly specialized knowledge and methodologies necessary to be effective in high conflict cases, the better.

B. Specifically, they should be familiar with the summary of research provided by Deirdre Rand on PAS and related phenomena as well as the post-divorce research specific to conflict between the parents.

C. They should be familiar with all of the many roles a MHP can assume in a highly contested case e.g., case coordinator, emergency stabilizer, reunification and recontact expert plus more. The field must move away from the limited number of alternatives in the “standard” clinical repertory e.g. individual and family psychotherapy.

D. They should be thoroughly familiar with the fact that the usual and standard clinical approaches e.g., (individual psychotherapy) in high conflict cases frequently achieve the exact opposite of what is intended: they make things not only worse but unresolvable.

↑ E. Here is a list of the areas in which two blue-ribbon committees suggested MHPs should have education and/or training and/or experience to be involved merely in child custody cases (let alone those of the high conflict variety): child development, functional and dysfunctional family dynamics, child psychopathology, adult psychopathology, effective parenting techniques and behaviors, the effects of divorce and remarriage on families, applicable

methods of psychological assessment, applicable state statutes and common laws, typical custody and visitation arrangements, ethical standards in child custody evaluations, life-span developmental psychology, mental retardation and developmental disabilities, child psychotherapy and behavior change, parent, family and school intervention.

F. Some states e.g., Arizona, have very specific criteria for MHPs who would serve the court in the role of a mental health expert (via education, training and experience).

IV. Procedures needed to establish accurate and custody-relevant diagnostic assessments in high conflict cases.

A. Diagnostic conclusions must not only be accurate, they must be relevant to the options that exist in high conflict custody cases. An evaluator should understand more than what parents know and how they behave and focus on the impact these things have on a given child i.e., be able to explicate the unique qualities of specific dyads. Further, the diagnostic categories assessed should include at least some childcare areas that can be immediately upgraded via will-power, training and/or short-term therapy. It is relatively useless to only discover personality traits that take years to remediate.

B. The entire professional network should understand that the most widely used assessment instrument—the interview—has many treacherous flaws (Ekman, 1992; Ekman & O’Sullivan, 1991; Grove & Meehl, 1996).

1. They should understand the huge number of variables (more than 15), that can affect the validity of interview data.

2. They should understand the research data that affects the assessment of witness credibility, not just of children, but of adults as well (e.g., Rossi, 1986, 1993; statement validity

analysis and criterion based content analysis; the difference between conclusionary and sense-based data; Ekman & O'Sullivan's "Who can catch a liar" work, 1991).

3. They should be aware of the need to use non-verbal indications of children's behaviors (Bricklin & Elliot, 1995). This would include Bricklin's NBOAI (not-based-on-actual-interaction indicators, which help pinpoint PAS scenarios).

* V. Procedures needed to create effective behavior change in high conflict cases

A. Many of the "authoritarian" and/or case coordinated procedures are summarized by Rand (1997). Another one is spelled out by Campbell & Harvey, (1997). The latter has an IEP structure.

B. Reframe (for battling parents) what "protecting their children" means, and how to achieve these goals (which often requires "changing the other parent") outside of the legal area i.e., to insist problems be addressed therapeutically, then monitored (see below).

C. The role of judicial sanctions.

D. The need to make full use of the roles of MHPs can play (Kenney & Vigil).

E. Need to put into effect the diagnostic difference between childcare skills that can be immediately upgraded from those that cannot.

F. Mediation; binding arbitration, etc.

VI. The need to design and implement effective monitoring strategies.

A. Creative solutions e.g., unannounced visits by relevant MHPs, etc.

B. The important need to elicit information from children in non-verbal, disguised ways that eliminate the "messenger" and other conflictual roles children are placed in.

C. The use of subtle motor-therapy strategies to upgrade parental self esteem (Bricklin & Elliot, 1998).

CHILD MALTREATMENT AND ENDANGERMENT IN THE CONTEXT OF DIVORCE

Kathleen Coulborn Faller, Ph.D.

Professor, School of Social Work

University of Michigan

The United States has the highest divorce rate in the world¹. Almost two thirds of United States first marriages end in divorce, and 65% of those divorces involve minor children². As a result divorce is a fact of life for more than a third of children in the United States³. Despite its frequency, research and mental health practice both indicate that divorce has long-term detrimental impacts on children, often representing the single most traumatic experience of their childhoods⁴.

Moreover, divorcing families may have problems in addition to dissolution. Such families may also maltreat and/or endanger their children. Illustrative is a recent study of the California Family Court in which 80% of divorcing families had problems such as child sexual abuse, child physical abuse, child neglect, substance abuse, domestic violence, and criminal activity, and most of the families had several of these problems⁵. Similarly, Johnston and Campbell in their study of 140 couples with custody disputes found three-fourths of them had histories of partner aggression, using the Conflict Tactics Scale to measure violence. Violence

¹ Shiono, Patricia & Quinn, Linda Sandham. (1994). Epidemiology of divorce In Future of Children. Spr. 15-23. Castro-Martin, Teresa & Bumpass, Larry. (1989). Recent trends and differentials in marital disruption. Demography, 26, 33-38.

² National Center for Health Statistics, (1999). Divorce Statistics. Centers for Disease Control, website http://www.cdc.gov/nchswww/products/pubs/pubd/mvsr/supp/44-43/mvs43_9s.htm.

³ Poliacoff, Jerome H., Greene, Cynthia L., & Smith, Laura. (1999). Parental alienation syndrome, Frye v Gardner in the Family Courts Commentator, 25(4).

⁴ e.g. Garrity, Carla B. & Baris, Mitchell. (1994). Caught in the middle. San Francisco: Jossey Bass. Hethrington, Mavis. (1993). An overview of the Virginia Longitudinal study of divorce and remarriage with a focus on early adolescence. Journal of Family Psychology, 7, 37-41. Wallerstein, Judith. Long-term effects of divorce on children: A review. (1991). Journal of the American Academy of Child and Adolescent Psychiatry, 30(3), 349-360.

⁵ Depner, Charlene E., Cannata, K.V., & Simon, M.B. (1991). Building a uniform statistical reporting system: A snapshot of California Family Court Services. Family and Conciliation Courts Review, 30, 185-206.

was often associated with alcohol use, and one class of violent parent was psychotic or paranoid⁶.

Further, because of concerns about the veracity of allegations of sexual abuse associated with divorce, the National Center on Child Abuse and Neglect (DHHS) provided funding for the

Association of Family and Conciliation Courts Research Unit to study this phenomenon.

Although the actual incidence of such allegations was quite low, occurring in less than 2% of the 9,000 custody disputes in the study, half of the allegations were deemed likely⁷. Other researchers have found higher proportions of allegations of sexual abuse in divorce to be valid, between about two-thirds to three-fourths⁸.

Nonetheless, the usual response of domestic relations courts to allegations of child endangerment and maltreatment in the context of divorce is to view them with skepticism, and, as a consequence, not to consider them in deciding custody and visitation⁹. There are at least four possible reasons for this reaction. One derives from the fact that prior to the 1970s, divorces were not granted without grounds¹⁰. As a result, couples could not obtain a divorce without alleging misbehavior by one or both individuals. The requirement of fault is believed to have led to tall tales. Thus, domestic relations court judges and their staff have historically experienced fabrication on the part of divorcing couples. Second, added to this legacy is concern that parents may make up allegations of bad behavior against one another in order to gain advantage in custody or property decisions. A third and related reason is the belief that parents' lawyers

⁶ Johnston, Janet R. & Campbell, L.E.G. (1993). A clinical typology of interpersonal violence in disputed custody divorces. American Journal of Orthopsychiatry, 63, 190-199. See also Johnston, Janet R. & Roseby, Vivienne. (1997). In the name of the child. New York: The Free Press.

⁷ Thoennes, Nancy & Tjaden, Patricia (1990). The extent, nature, and validity of sexual abuse allegations in custody/visitation disputes. Child abuse and neglect, 14:151-163.

⁸ Green, Arthur. (1986). True and false allegations of sexual abuse in child custody disputes. Journal of the American Academy of Child Psychiatry, 25:449-455. Jones, David & Seig, Anne. (1988). Child sexual abuse allegations in custody or visitation cases: A report of 20 cases. In Bruce Nicholson & Josephine Bulkley (Eds.), Sexual abuse allegations in custody and visitation cases. Washington, D.C.: American Bar Association. Paradise, Jan, Rostain, A., & Nathanson, M. (1988). Substantiation of sexual abuse charges when parents dispute custody or visitation. Pediatrics, 81(6):835-839. Faller, Kathleen Coulborn & DeVoe, Ellen. (1995). Allegations of Sexual Abuse in Divorce. Journal of Child Sexual Abuse, 4(4), 1-25.

⁹ Mason, Mary Ann. (1999). The custody wars. New York: Basic Books.

¹⁰ Mason, Mary Ann. (1999). The custody wars. New York: Basic Books.

encourage them to dredge up and perhaps exaggerate faults in their soon to be ex-partners.

Finally, the primary role of the domestic relations court is not to investigate wrong-doing on the part of divorcing parents. Their role is to divide families and settle property and custody disputes, and hopefully thereby to calm the situation down. If the domestic relations court were to take seriously and explore thoroughly an allegation of parental sexual abuse or drunken endangering of a child, this would enflame rather than assuage parental conflict.

The reactions of skepticism are not limited to judges and court staff. They may also be found among mental health and other professionals who encounter allegations of parental misbehavior in divorce. A psychiatrist, Richard Gardner, has constructed an entire theory, which he calls the Parental Alienation Syndrome, the basic tenet of which is that the vast majority of allegations of sexual abuse and other parental misbehavior in divorce are false, and has written about this in several books¹¹. Among other arguments he uses to support their lack of credibility is that the allegations are the product of *folie a deux*¹² between the accusing parent, who is the mother 90% of the time, and the child¹³. Many mental health experts conducting custody evaluations take Dr. Gardner's theories at face value, even though there is no empirical evidence to support them¹⁴. Thus, they assume allegations, especially those of sexual abuse, are false. Similarly, professionals mandated to investigate child maltreatment, child protection workers and law enforcement officers, may respond to cases involving separated, divorcing, and divorced

¹¹ Gardner, Richard. (1989). Differentiating between *bona fide* and fabricated allegations of sexual abuse of children. Journal of the American Academy of Matrimonial Lawyers. 5,1-25. Gardner, Richard. (1995). Protocols for the sex-abuse evaluation. Cresskill, N.J.: Creative Therapeutics. Gardner, Richard. (1987). The parental alienation syndrome and the differentiation between fabricated and genuine child sexual abuse. Cresskill, N.J.: Creative Therapeutics. Gardner, R. (1992). The parental alienation syndrome. Cresskill, N.J.: Creative Therapeutics. Gardner, R. (1992). True and false allegations of child sex abuse. Cresskill, N.J.: Creative Therapeutics.

¹² *Folie a deux* is a psychiatric condition in which a dominant individual (e.g. mother) has a delusion (e.g. that the father has sexually abused the child), and the submissive individual (e.g. child) comes to share that delusion.

¹³ Gardner, Richard. (1995). Protocols for the sex-abuse evaluation. Cresskill, N.J.: Creative Therapeutics. Gardner, Richard. (1992). The parental alienation syndrome. Cresskill, N.J.: Creative Therapeutics. Gardner, R. (1992). True and false allegations of child sex abuse. Cresskill, N.J.: Creative Therapeutics.

spouses with a preconception that they are "grudge reports". Illustrative is a study by McGraw and Smith, who re-examined 18 allegations of sexual abuse in divorce reported to child protective services, 16 of which had been denied, and found only three appeared to be false¹⁵.

I will argue that available research indicates correlations between divorce and other problems that may be harmful to children¹⁶. Thus, allegations of child maltreatment and endangerment, regardless of the context in which they occur, should be taken seriously and investigated thoroughly.

At the same time, professionals need to adhere to clear definitions and not overreach. In some instances, divergent parenting styles or behaviors and beliefs that have no effect on children are inappropriately defined as child maltreatment and endangerment. It is also important to assess whether child maltreatment and endangerment are chronic or transitory, in the latter instance arising from the emotional or situational circumstances of divorce.

In this article I will propose definitions for child maltreatment and endangerment and then will describe procedures for evaluating such concerns when they occur in the context of divorce.

Definitions

In order to for child maltreatment and endangerment to be considered in decisions of custody and visitation, it must satisfy three conditions.

1. There must be an identifiable parental behavior.
2. There must be harm or potential harm to the child.
3. There must be documentation of the parental behavior and potential or actual harm to the child.

¹⁴ Faller, Kathleen Coulborn. (1998). The Parental Alienation Syndrome, What Is It And What Data Support It? Child Maltreatment, 3 (2), 100-115. Poliacoff, Jerome H., Greene, Cynthia L., & Smith, Laura. (1999) Parental alienation syndrome, Frye v Gardner in the Family Courts Commentator, 25(4).

¹⁵ McGraw, J. Melbourne. & Smith, Holly. (1992). Child sexual abuse allegations amidst divorce and custody proceedings: Refining the validation process. Journal of Child Sexual Abuse, 1(1), 49-62.

¹⁶ E.g. Bienenfeld, Florence. Child custody mediation. New York: Science and Behavior Books. Depner, C.E., Cannata, K.V., & Simon, M.B. Building a uniform statistical reporting system: A snapshot of

INSERT TABLE 1 HERE

Table 1 defines a spectrum of parental behaviors, possible harms to children, and potential strategies for documentation. The list in Table 1 is non-exhaustive, as to all three components, in that it only includes the most common parental behaviors, harms or potential harms, and sources of documentation.

With regard to parental behaviors, society considers sexual abuse harmful regardless of whether there are any manifest effects in the child. In contrast, physical abuse, neglect, and emotional maltreatment are extreme ends of continua of acceptable parental behavior. For example, corporal punishment, failure to provide optimally for children because of limited resources, and scolding children are parental behaviors that would not generally be considered harmful. A particular type of emotional maltreatment that is found in some divorces is one or both parents using the child as a pawn in their battle. A parent may attempt to get the child to take his/her side, may vilify the other parent, may use child custody or visitation as leverage in a property settlement, or may use the child as a spy^{17,18}.

In part, the endangerment behaviors are harmful because they may result in physical, sexual, or emotional abuse or neglect of the child¹⁹. However, because endangerment behaviors do not necessarily result in harm to the child, it is important to demonstrate in an individual case

California Family Court Services. Family and Conciliation Courts Review, 30, 185-206. 1992. Mason, M.A. The custody wars. New York: Basic Books. 1999.

¹⁷ Group for the Advancement of Psychiatry, Committee of the Family. Divorce child custody, and the family. P. 64. San Francisco: Jossey-Bass, 1981. Johnston, Janet R. & Roseby, Vivienne. In the name of the child. New York: The Free Press, 1997. Mason, M.A. The custody wars. New York: Basic Books. 1999.

¹⁸ Using a child as a pawn encompasses more behaviors than parental alienation. Parental alienation does occur in divorce, but should be differentiated from Gardner's "Parental Alienation Syndrome".

¹⁹ Bland, R., & Orn, H. (1986). Family violence and psychiatric disorder. Canadian Journal of Psychiatry. 31, 129-137. Campbell, Jacqueline & Lewandowski, L. (1997). Mental and physical effects of intimate partner violence on women and children. Psychiatric Clinics of North America. 20(2), 353-374. Chaffin, Mark, Kelleher, K., & Hollenberg, J. (1996). Onset of physical abuse and neglect: Psychiatric, substance abuse, and social risk factors from prospective community data. Child Abuse and Neglect. 20(3), 191-203. Ries, R. (1994). Assessment and Treatment of Patients with Coexisting Mental Illness and Alcohol and other Drug Abuse. Wash., D.C.: USDHHS, SAMHSA. Wang, Ching-Tung, & Daro, Deborah. (1998). Current Trends in Child Abuse Reporting and Fatalities. Chicago: National Committee to Prevent Child Abuse.

that they do. For example, a parent may have a major psychiatric illness, such as manic-depression, but consistently take his/her medication and behave as a model parent²⁰. In contrast, a manic depressive parent who does not take medication may spend all the family's money, resulting in physical neglect, or may associate with unsavory individuals, who exploit the parent and children.

In many instances, documentation of the relationship between parental behavior and harm to the child is complicated because the child's symptoms can derive from a range of causes, or the child has multiple symptoms, which cannot be linked to discrete parental behaviors. In addition, although some parental behaviors can be linked to specific harms, the behavior may also have more generic effects. For example, children who are used as pawns in divorce may specifically suffer from divided loyalties, but they may also feel anxious and act out. Similarly, a range of possible parental acts could be responsible for the child's condition. For instance, a boy may become aggressive as a consequence of being physically abused, sexually abused, or observing domestic violence. Finally, it is necessary to differentiate the impact of parents' acts from the effects of divorce.

As the column suggesting sources of documentation indicates, gathering information about parental behavior and harm to children may be undertaken using a variety of strategies. Sometimes this information is based upon direct observation. For example, an evaluator observes the parent physically or psychologically abuse the child in the waiting room. Sometimes this knowledge comes from parental admission. For instance, the father reports he accidentally slapped his daughter in the face when she attempted to protect her mother from his slaps. In other situations, evaluators gather the information from past records, for example hospital or criminal records, child protective services or police reports. The child, professionals involved with the

²⁰ Group for the Advancement of Psychiatry, Committee of the Family. Divorce child custody, and the family. P. 93. San Francisco: Jossey-Bass, 1981. Mowbray, Carol, Oyserman, Daphna, Zemencuk, & Ross, S. (1995). Motherhood for women with serious mental illness. American Journal of Orthopsychiatry. 21-38.

child, and other interested parties may also supply documentation. The child is the one person who consistently has first hand knowledge. Evaluators may rely upon information from non-professionals who were present during the event, or in whom the child confided. However, because these individuals may have aligned with one parent or the other, professionals with relationships with the child, may be more reliable sources of documentation. Finally, there will be situations in which research on the impact of that parental behavior, or theoretical understanding of the impact can provide support. For example, in a situation where a young child is inviting adults to engage in intercourse, the evaluator can be confident, based on research, that the child has been sexually abused²¹, although mere knowledge of the child's behavior does not tell the evaluator who the offender is.

Evaluation of child custody/visitation cases involving allegations of child maltreatment and endangerment

When there are custody disputes and allegations of child maltreatment or endangerment, accusations of parental behavior problems must be addressed before decisions can be made about custody and/or visitation. It is not appropriate to overlook these accusations and proceed with a traditional custody evaluation. I have been involved in divorce cases in which evaluators have opined that it makes no difference whether or not an allegation of child abuse is true or false. In part, they express that opinion because it is difficult to determine the likelihood of these allegations. Despite the challenge entailed in assessing these allegations, doing so is vital for making decisions in children's best interest.

²¹ Friedrich, William. (1993). Sexual victimization and sexual behavior in children. Child abuse and neglect, 17(1), 59-66. Friedrich, William, Berliner, Lucy, Butler, Judith, Cohen, Judith, Damon, Linda & Shafram, C. (1996a). Child Sexual behavior: An update with the CSBI-3. APSAC Advisor, 9(4), 13-14. Friedrich, William, Berliner, Lucy, Butler, Judith, Cohen, Judith, Damon, Linda, & Shafram, C. (1996b, July). Normative sexual behaviors: CSBI-3. Paper presented at Trauma and memory: An International Research Conference. Durham, N.H. Friedrich, William, Grambsch, P., Broughton, D., Kuiper, J. & Beilke, R. (1991). Normative sexual behavior in children. Pediatrics, 88(3), 256-46.

The recommendations for evaluation in this article will diverge in some respects from an traditional custody evaluation, in which there are minimal concerns about parental behavior problems. In an article of this length, the evaluation process cannot be discussed in detail. Rather, I will highlight and illustrate strategies and techniques that assist evaluators in gathering information about parental behavior and harm to children.

The following topics will be discussed: 1. using a team approach, 2. seeing the child as a central source of information, 3. reviewing past records, 4. interviewing professionals currently or previously involved with the family, 5. interviewing persons who are important in the child's life, 6. conducting a thorough evaluation of both parents, and 7. the inadvisability of employing parent-child interactions.

Use a team approach. Although use of a single evaluator is more efficient, use of a team has a number of advantages that outweigh efficiency. First, a team decreases the danger of individual bias and enhances the pursuit of a range of explanations for concerns about child maltreatment or endangerment. Evaluators are often unaware of their biases, which can derive from gender, class, professional training, past professional experience, and personal history²². Second, using a team distributes the work among several people, allowing for more thorough exploration of information and its sources. Evaluations of this sort require extensive data gathering. If a single professional is responsible, working on a single case can totally consume the evaluator's time or alternatively the evaluation may, of necessity, extend over several months. Third, the use of a team avoids placing responsibility for conclusions about the parental problems and recommendations about custody/visitation on a single evaluator. Having these responsibilities can be very onerous and result in burnout.²³

I have found having professionals from more than one discipline is advantageous. It is useful to have a lawyer and a physician on the team, although they may not have direct client contact. Although social workers, psychologists, and psychiatrists are all mental health professionals, they have different training, possess somewhat different areas of expertise, and can address different issues in a single case. For example, psychologists have specific expertise in psychological testing, and psychiatrists have extensive knowledge in mental illness and the effects of psychotropic medications. At the same time, psychologists and psychiatrists may not be as attune to environmental issues as social workers, nor as aware of services available to families.

Team composition should reflect expertise in the spectrum of child maltreatment and endangerment. Professionals with knowledge of physical injury, child sexual abuse, substance

²² Bricklin, Barry. The custody evaluation handbook: Research-based solutions and applications. Bristol, PA.: Brunner/Mazel, 1995. Jackson, Helene & Nuttall, Richard. (1997). Childhood abuse: Effects on clinicians' personal and professional lives. Newbury Park: Sage. Stahl, P. M. Conducting child custody evaluations. Newbury Park, CA.: Sage, 1994.

²³ See also Group for the Advancement of Psychiatry, Committee of the Family. Divorcem child custody, and the family. P. 127. San Francisco: Jossey-Bass, 1981

abuse, mental illness, and domestic violence should serve as team members or consultants.

Evaluators should know how to screen for child maltreatment and endangerment, but may need to make referrals for more in depth assessments of these and other problems.

I recommend one evaluator whose role is to interview and assess the child. When there are several children, the same evaluator need not see all children. However, if there are different evaluators for different children, he/she should not be the parents' evaluator. Another evaluator should have responsibility for interviewing both parents. In our Clinic the roles of interviewer and psychological tester are separate ones. Thus, the parents have contact with at least two evaluators.

It is also useful to have professionals with various levels of skill on the team. Pairing skilled, experienced team members with trainees or less skilled professionals can serve several purposes. It can be a mechanism for training. Work can be distributed so that tasks requiring less skill, for example summarizing relevant information from case records and phoning collateral contacts, can be done by less skilled team members. Less skilled members may draft reports that are then reviewed and revised by senior team members.

It is also very useful to have professionals of both genders on the team. Some family members may be more comfortable or forthcoming with a male or female evaluator. Having both male and female perspectives when forming conclusions and making recommendations can add balance. However, it is important to assure the opinions of female and male team members are given equal weight.

Consider the child central to the evaluation process. One of the ironies of child custody evaluations is that often the child has a small or no voice in the process²⁴. Some evaluators focus their efforts on the functioning of the parents. Others use the parent's interaction with the child as the method of determining who is the most appropriate parent.

²⁴ Garrity, Carla B. & Baris, Mitchell. Caught in the middle. San Francisco: Jossey Bass, 1994. Johnston, Janet R. & Roseby, Vivienne. In the name of the child. New York: The Free Press, 1997. Mason, M.A. The custody wars. New York: Basic Books. 1999.

Although, as already noted, the child is the one person who consistently has first hand knowledge about possible child maltreatment or endangerment, often with these approaches to custody evaluation, the child is never asked. Children are not questioned because evaluators think children's responses are untrustworthy. Evaluators are concerned children may have been programmed, by one parent or the other, or by someone else. They are also worried children will provide "social desirability" responses. That is, the child will try to provide the answer he/she thinks the evaluator wants to hear, or a young child will fabricate a response when he/she does not understand the question or doesn't know the answer. Alternatively, they think questioning children will put undue pressure on them in an already pressured situation.

Although there is no way to guarantee children's information will be accurate, there are strategies evaluators can use that can increase their confidence in findings from children. Evaluators faced with the choice between allowing a child to be mistreated and placing some pressure on a child by asking about parental behavior, should chose the latter.

To minimize pressure and enhance candidness, it may be useful to have the child brought to the evaluation by someone other than a parent and hopefully someone who is not an advocate for either parent. This might be the child's therapist, teacher, guardian *ad litem*, or a child protection worker.

Evaluators should adopt a questioning style that gathers information from the child rather than presenting information to the child to be either confirmed or disconfirmed. Questions should be open-ended but focused. (Appendix 1 provides examples of open-ended but focused questions about child maltreatment and endangerment.) The evaluator begins with the most open-ended question focused on a particular topic, and asks more close-ended questions about the topic as needed. For example, instead of asking "Do you like your mom?" The interviewer asks questions such as:

"Tell me all about your mom."

"What's your mom like?"

"What kinds of things do you do with you mom?"

"What do you like about your mom?"

"What don't you like about your mom?"

"What does you mom do when you misbehave?"

"What does she punish you for?"

"How many time a week do you get punished?"

"What do you think about how she punishes you?"

The evaluator should ask similar questions about all people who are important in the child's life. I suggest asking about people whose behavior is not a concern, for example siblings or grandparents, before asking about parents. It is especially important to ask a comparable series of questions about both parents. If the parents have new partners, questions should be asked about them as well.

Evaluators can ask about concerning behavior, but initially without identifying the actor.

For example:

"Do people in your family drink alcohol (booze)?"

"What do they drink?"

"Do different people drink different kinds of alcohol?"

"Tell me what each one drinks."

"How much does your mom drink?"

"How much does your dad drink?"

"How does you mom act when she drinks?"

"How does our dad act when he drinks?"

"Can they take care of you when they are drinking?"

Another strategy is to focus a child's attention on a topic, by asking a question that requires a yes/no response, but follow an affirmative response with open-ended questions. For example:

“Do you ever feel that you have to choose between your mom and dad?”

If the child's responds yes, “Tell me all about that.”

“Is there anything else you can think of about that?”

“And then what happened?”

“Is there another time you can remember when you had to choose?”

“Tell me about that time?”

“What do you think about being caught in the middle between your mom and dad?”

Exploring the child's functioning and feelings less directly, for example through psychological testing, doll house or other play, and drawings is also useful. However, evaluators should not rely solely on themes and findings provided using these methods to conclude the child has been maltreated or endangered. The evaluator needs an explicit statement from the child to this effect or other supporting data.

Review past mental health, legal, and school records. Evaluators should request all records that might shed light on the allegations of maltreatment and endangerment. Parents and sometimes their attorneys will want to restrict evaluators' access to this information. Useful responses are to explain to these individuals that the evaluator's report will reflect that access to material has been restricted, and that conclusions could change during testimony if the evaluator is made aware of heretofore unknown material.

Research indicates that when issues of child maltreatment and endangerment come up in divorce, the issues may have been raised previously and addressed²⁵. Although evaluators should take a fresh look at allegations, they also need to be aware of past history. Often the history of the concerns, including how they were first disclosed can help evaluators understand the nature of the allegations, before they may have been contaminated by investigation. In addition, a review of

²⁵ Faller, Kathleen Coulborn & DeVoe, Ellen. (1995). Allegations of Sexual Abuse in Divorce. Journal of Child Sexual Abuse, 4(4),1-25. Thoennes, N. & Tjaden, P. (1990). The extent, nature, and validity of sexual abuse allegations in custody/visitation disputes. Child abuse and neglect. 14:151-163.

records, for example criminal records or past court records, will allow evaluators to check the accounts of evaluation participants against the case history. Past records can also be helpful in determining whether the family's functioning during divorce is representative of their normal functioning. Parents and children may be very symptomatic and dysfunctional during divorce, but have functioned much better in the past, suggesting current dysfunction is temporary.

Interview professionals currently or previously involved with the family. In addition to reviewing records, evaluators should talk to professionals who are currently or were previously involved with the family. To do this evaluators need to obtain releases of information from the parents.

There are several reasons for speaking directly with these professionals. First, specific questions may arise from reviewing their records. Second, some professionals record only minimal or merely conclusory information and need to be asked to elaborate or explain. Third, the professional's records may not shed light on evaluators' questions. For example, records may be structured to satisfy requirements for insurance coverage. Therefore, evaluators may need to ask directly about issues related to maltreatment or endangerment. Finally, usually records are at least a few weeks old when the evaluator receives them, and relevant events may have taken place in the meantime.

Interview persons who are important in the child's life. Many professionals ask parents to provide them with references who can speak to their parenting abilities. While this practice assures that each parent has at least three people who will vouch for him/her, that is almost all that can be said for it. In rare instances, a parent will recommend a reference who provides negative information about him/her, which needs to be taken seriously.

A superior strategy is to gather information from individuals who are important in the child's life. These people can be the child's relatives, teacher, babysitter, scout leader, or therapist. With older children, with the child's permission, it may be appropriate to talk to the child's friends.

Thorough parent assessment. Parents should be both interviewed and administered a standard battery of psychological tests. Neither interview nor test data will guarantee that evaluators arrive at an accurate picture of the parent, but using both approaches increases the likelihood of an accurate assessment.

Expect to spend two or more hours interviewing each parent. It is best to allow for two interviews and to stagger the parent interviews so that information and inconsistencies from each parent can be pursued with the other. Although evaluators should cover topics customarily covered in custody evaluations, they should focus on parental behaviors of concern, when issues of maltreatment or endangerment have been raised. Evaluators need not be reluctant or defensive about inquiry related to these issues. They can normalize this inquiry by stating that all parents are asked about such issues when they come for assessment.

Just as evaluators should ask children open-ended, but focused questions, they should do so with parents. Adults are less suggestible than children, but they are more vulnerable to impression management. In addition, interviewers are advised to pose lots of questions about areas of concern and ask parents to elaborate. For example, an evaluator should not be satisfied with a parent's statement that he/she is "just a social drinker." Questions, such as the following, should be asked:

"How old were you when you had your first drink?"

"Tell me all about that time."

"What is the most you ever drank?"

"Tell me all about that time."

"What are the reasons why you drink?"

"Do you ever drink by yourself?"

"Does it take more alcohol than it used to for you to feel it?"

"How much?"

"Do you act differently when you've had a drink than not?"

“How?”

“Was there ever a time you couldn’t quite remember what happened when you had been drinking?”

“Tell me about that.”

“Has anyone ever been concerned about your drinking?”

“Tell me about that.”

“Have you ever tried to change your drinking habits?”

“How did that work out?”

“Has your drinking ever interfered with your parenting, work?”

“How?”

“Have you ever had treatment for your drinking?”

“Tell me about that.”

Similar questioning needs to be undertaken related to each area of parental functioning about which evaluators have concerns.

When there are concerns about abuse or neglect, indirect inquiry can also be useful. For example, the evaluator asks the parent about child care responsibilities, rules in the household, chores the child is required to complete, and what happens if rules are not followed or chores completed. A series of questions should also be asked about discipline techniques. For example:

“What do you do when (child) misbehaves?”

“How often does (child) get punished?”

“What does (child) get punished for?”

“Does it work?”

“What other punishments do you use?”

“Was there ever a time when you had to use physical discipline?”

“Tell me about that.”

“Was there ever a time you hit (child)?”

"What did (child) do?"

"Where did you hit (child)?"

"What did you hit (child) with?"

"Did it leave a mark? How long did the mark last?"

"What's the worst thing (child) ever did?"

"What did you do when (child) did that?"

"Tell me about the last time you had to discipline (child)?"

"What did (child) do that made him/her need punishment?"

"How did (child) react to the discipline?"

"What discipline methods does your partner use?"

"Do you and your partner ever disagree over discipline?"

"Tell me about that."

To understand the parent's relationship with the child, questions that are parallel to those asked of the child about the parent can be enlightening. For example:

"Tell me about (child)."

"What is (child) like?"

"Can you describe (child)?"

"What do you like about (child)?"

"Are there any things you don't like about (child)?"

"Are there things you and (child) do together?"

"What are they?"

"If you could change (child), how would you change him/her?"

"What do you like the most about (child)?"

"What do you like least about (child)?"

Although psychological tests specific for custody evaluations have been developed, they have not been normed²⁶. Moreover, they do not address issues of child maltreatment and endangerment. I recommend a standard battery of tests, including some measure of intelligence, the MMPI-2, the Rorschach using Exner scoring, the TAT, Draw a Person, and the Early Memories Test. This combination of objective and projective tests can provide evaluators an assessment of overall functioning and may speak to concerns about maltreatment and endangering.

To generate an understanding of the parent, evaluators integrate the interview data, the test findings, and data from other sources..

Beware of relying on parent-child interactions. Many child custody evaluators believe that the essential information for deciding who is the best parent can be derived from observing the parent and child together. For both ethical and practical reasons, I caution against this practice when there is an outstanding issue of maltreatment or endangerment.

Ethical concerns derive from the potential impact on the child of putting him/her in the room with the accused parent. When the evaluator fosters such an encounter in cases of maltreatment or endangerment, this provides implicit support for the parental behavior. In addition, children, who have been and made disclosures of maltreatment or endangerment, may experience an interview with the suspected parent as a betrayal, especially if the parent is allowed to challenge the child's disclosures or the evaluator raises the child's disclosures in the parent-child interview²⁷. If the child has not been forthcoming with the evaluator when there are behaviors to disclose, a parent-child interview likely will reinforce the child's reluctance to trust adults.

²⁶ Ackerman, Marc. Clinician's guide to custody evaluations. 1995. Bricklin, Barry. The custody evaluation handbook: Research-based solutions and applications. Bristol, PA.: Brunner/Mazel, 1995.

²⁷ Faller, Kathleen Coulborn, Froning, Mary, & Lipovsky, Julia. (1991). The Parent-Child Interview, Use in Evaluating Child Allegations of Sexual Abuse by the Parent. American Journal of Orthopsychiatry, 61(4), 552-557.

From a practical perspective, there is no empirically based evidence that evaluators or other clinicians can accurately differentiate an abusive from an appropriate parent-child relationship²⁸. In addition, evaluators should be mindful of the artificiality of the observational session and the effect of having a clinician present or nearby during this session²⁹. Moreover, abusive behavior is a low frequency behavior and not likely to occur when parent and child are being observed³⁰. Of course if it does, the finding is very compelling. Subtle behaviors that occur during parent-child sessions which some clinicians use as proxies for abusive behavior³¹ have not been empirically demonstrated to be indicative of abuse.

Conclusion

In divorce, when child maltreatment or endangerment are suspected, these allegations must be addressed prior to issues of custody and visitation. Evaluators who overlook issues of child safety and child well-being do not act in children's best interest.

An evaluation should involve a careful review of all past records, evaluations of all children in the family, evaluations of parents and interviews with any new partners, contacts with professionals who are or have worked with the family, and contacts with professionals and non-professionals who have important roles in the child's life. Not all information is equal and some information should be afforded more weight than other information. However, it is especially important that children have a voice.

²⁸ Deitrich-MacLean, G., & Walden, T. (1988). Distinguishing teaching interactions of physically abusive from nonabusive parent-child dyads. Child Abuse and Neglect: The International Journal, 12(4): 469-480.
 Starr, Raymond. 1987. Clinical judgment of abuse-proneness based upon parent-child interactions. Child Abuse and Neglect: The International Journal, 11:87-92.

²⁹ Bricklin, Barry. The custody evaluation handbook: Research-based solutions and applications. Bristol, PA.: Brunner/Mazel, 1995.

³⁰ Faller, Kathleen Coulborn, Froning, Mary & Lipovsky, Julia. (1991). The Parent-Child Interview, Use in Evaluating Child Allegations of Sexual Abuse by the Parent. American Journal of Orthopsychiatry, 61(4), 552-557.

³¹ Haynes-Seman, Clare & Baumgarten, David. (1994) Children speak for themselves. New York: Brunner/Mazel.

An effective mechanism for sharing information, making decisions, and arriving at recommendations is a meeting. This meeting usually requires three or four hours and should include the evaluators, their consultants, and other relevant professionals.

Table 1

Parental behavior	Harm or potential harm to the child	Documentation
<u>MALTREATMENT</u>		
Physical abuse		
Hit, slap, kick, beat up, hit with an instrument, shake, burn, choke Immerse to drown or burn	Physical injury: bruise, cut, broken bone burn, other mark Scars or other sequelae Psychological trauma Child behavior problems (aggression)	Observation of abuse Observation of child's condition Professional's report (e.g. physician) Child's report Statement of others Parent's admission
Neglect		
Failure to provide food, shelter, clothing, medical care, child care Lack of adequate supervision, exposing child to danger Allowing others to abuse the child	Hunger, FTT, small for age, illness, poorly clothed, dirty Actual or potential physical harm Psychological trauma Physical injury, sexual abuse	Observation of event Observation of child's condition Professional's report (e.g. CPS worker) Child's report Theory or research based prof. opinion Statement of others Parent's admission
Sexual abuse		
Non-contact activity Exposure, voyeurism, sexual talk, allowing the child to watch pornography or sexual acts Fondling of private parts Penetration Anal, vaginal, oral, with penis, finger, object	Psychological trauma Child re-enactments Child advanced sexual knowledge Physical trauma	Child's report Observation of child's response to suspect Professional's report (e.g. psychologist) Theory or research -based professional opinion Statement of others Parent's admission
Emotional maltreatment		
Spurning Terrorizing	Psychological trauma Anxiety, fears	Observation of parental behavior & child's response (e.g. by evaluator)

Vilifying
Scapegoating,
Using child as pawn (e.g. in divorce)

Role reversal
Corruption
Failure to set limits

ENDANGERMENT
Domestic violence

Substance abuse

Mental health problems

Criminal activity & norm violation

Low self esteem
Divided loyalties

Feeling responsible, parental child
Anti-social beliefs/behavior
Lack of self control
Physical harm

Physical harm (caught in crossfire)
Neglect of child
Psychological trauma
Sex role beliefs
Parental absence (e.g. shelter, jail)

Physical neglect of child
Physical abuse of child
Psychological trauma
Parental absence (e.g. hospitalized, jailed)

Physical neglect of child
Physical abuse of child
Psychological trauma
Parental absence (hospitalized)

Child behavior problems
Child anti-social behavior
Parental absence (incarcerated)

Professional's report (e.g. child's therapist)
Child's report
Observer's report professional
Theory or research –based opinion
Statement of others
Parent's admission

Victim's (i.e. mother's) condition
Victim's (i.e. mother's) report
Professional's report (e.g. child's therapist)
Child's report
Observer's report
Assailant's report

Professional's report (e.g. CPS, substance
abuse specialist
Child's report
Observer's report
Substance user's report

Professional's report (e.g. psychiatrist)
Child's report
Observer's report
Mentally ill parent's report

Professional's report (e.g. court worker)
Child's report
Criminal record
Parent's admission

Appendix 1 QUESTIONS FOR CHILDREN ABOUT CHILD MALTREATMENT AND ENDANGERMENT

Questions about child maltreatment

1. Care questions—possible neglect

Who takes care of you?
How do they do it?
Who puts you to bed?
What time?
Who cooks?
What meals do you eat?
Are there any times when there's no food?
When --- isn't there, who takes care of you?
Are there times you baby-sit for/take care of yourself?
Is there someone you can call?
How long are you alone?
Are there any younger kids you look out for?
Can you tell me about the last time you took care of yourself?
Who helps you get dressed?
Who sees you get to school?

2. Environment questions—possible neglect

Tell me what your house is like.
Is it cleaner, not as clean, or the same as your friend's home?
Where do you sleep?
Where do others sleep?
Do you have a bed?
Who cleans?
Where do the animals go to the bathroom?
Who does the laundry?

3. People questions—possible maltreatment or endangerment

Tell me about ----.
What is ---- like?
Are there things you and ---- do together?
Do you do things alone with ----?
Are there things you like about ----?
What?
Are there any things you don't like about ----?
What?
Are there any things ---- does to you that you don't like?
Does ---- ever hurt you in any way?
How?

4. Discipline—possible physical abuse

What happens when you (your brother) misbehaves?
Are there any other ways they treat you when you misbehave?
What ways do they punish at your (mom's, dad's) house?
When they spank, do they use a hand or something else?
What does that feel like?
How long does it hurt?
About how many times a week do you get whipped?
What for?
Does it ever leave a mark?
What does the mark look like?

Usually how long does it take before it goes away?
Do your parents ever disagree about how you get punished?
Did you ever have to go to the doctor because of a punishment?

5. Injuries or scars—possible physical abuse or neglect

If the interviewer notes the child has an injury or scar, especially more than one, injuries or scars on non-accidental injury sites, and on different parts of the child's body the interviewer should ask the child about it.

How did you get hurt?
If the explanation does not fit the injury,
Are you sure that's how it happened?
What did ---- do when you got hurt?
Did anyone take you to the doctor when you got hurt?
What did the doctor say?
What did the doctor do?

6. Body parts—possible sexual abuse

There are many ways to ask about possible sexual abuse. One is by asking focused questions about the private body parts. This is usually done by asking part of general body parts inventory using anatomical dolls or anatomical drawings?

a. Questions related to the penis, when abuse by a male

What do you call this part? (using the child's name for the penis in further questioning)
Who has one?
What is it for?
Is it ever used for anything else besides peeing?
Did you ever see one?
Whose?
When?
What was he doing?
Did you ever see it any other time?
Did you ever have to do anything to one?
Did anyone ever do anything to you with one?
How did he do that?

b. Questions related to the vagina, when victim is a female

What do you call this part? (use child's term)
Who has one?
Do you have one?
Did anything ever happen to yours?
Did you ever get hurt there?
How?
Did anyone ever do anything to your (vagina)?
What did they do?
Who was it?
What did ---- use when ---- did it?
Was it on top of your clothing or underneath?
Was it on the outside of your (vagina) or inside?
Do you remember what it felt like?

7. Emotional maltreatment questions

Does anyone ever praise you?
Who?
What for?
How often?
Do you think you are treated the same as other kids in the

family or different? Worse or better?

How are you treated?

When you have problems, who can you talk to?

When you are really upset, what does your (mom, dad) do?

Does anyone ever yell at you or call you names?

Can you tell me about that?

Are there ever times when grown-ups tell you to break the law?

Can you tell me about that?

Do scary things ever happen at your house?

Can you tell me about them?

Does anyone ever threaten you?

Can you tell me about that?

Do you think grown-ups ever ask you to do things that are too hard?

Can you tell me about that?

Do you ever feel you have to choose between one parent or the other?

Questions about endangering behaviors:

1. Family violence

What do people do in your family when they disagree?

Do your mom and dad have disagreements?

Tell me about that.

Do they ever have fights?

What do they fight about?

How do they fight?

Do they just yell or do they ever hit?

Does anyone ever get hurt?

How many times have people gotten hurt?

Does anyone ever have to go to the doctor/hospital?

Do any kids ever get hurt when they are fighting?

Does anyone in your family have a gun or knife?

Who?

What can you tell me about (gun or knife)?

2. Substance abuse

Does anyone at your house ever drink alcohol?

Does anyone at your house ever drink beer?

Does anyone at your house ever drink whisky?

How many times a week does ----- drink?

How does ---- act when he/she drinks?

Does ---- ever fall down?

Tell me about that.

How does ---- take care of you when she's drinking?

Does she ever just fall asleep?

Then what happens?

Does ---- ever get mad?

Does ---- ever go to the bar?

How often?

Does ---- ever hurt anyone when they drink?

Does ---- ever drive a car when ---- has been drinking?

Did ---- ever have an accident?

Did ---- ever have to go to the hospital or to a counselor for drinking?

Are there any drugs at your house?

Do you know which ones?

Who uses them?
What happens when they use them?
Do you know how they get them?
Where does the money for them come from?
Do you know?
Did ---- ever get sick from drugs?
Then what happened?
Did ---- ever have to go to the hospital?
Do you know how old you were when ---- started using drugs?
Do you know how many times a day/week ---- has to have the drug?

3. Prostitution

Do you know those men that come to your house?
How do those men treat you mom?
What do you do when they are there?
Does ---- ever give your mom money?
Do you know what for?
What does your mom do when she goes out?
Does anyone baby-sit for you when she's out?

4. Criminal activity

Does --- ever get in trouble with the police?
What for?
Did the police ever come to your house?
What for?
Did ---- ever get arrested?
Did ---- ever have to go to jail?
Did ---- ever have to go to court?
Did anybody in your house ever steal anything?
What?
What happened next?
Does ---- ever get in fights?
When?
Where?
Who with?

5. Mental illness

Does anyone in you family act strange?
Does ---- ever act strange/crazy?
What does ---- do?
Can she take care of you when she's acting strange?
What do you do when ---- is like that?
Did ---- ever have to go to the hospital for that?
Does ---- take medicine to keep from acting strange?
Does ---- ever not take the medicine?
What happens then?

Robert L. Halon, Ph.D.
1155 Marsh Street,
San Luis Obispo, Ca 93401

(805) 544-5870
FAX 544-5872

DRAFT OF

THE COMPREHENSIVE CHILD CUSTODY EVALUATION REVISITED

TEN YEARS LATER

Robert L. Halon, Ph.D.

I. Introduction

"The Comprehensive Child Custody Evaluation", published almost ten years ago, highlighted two important issues: the immutable distinction between Science on the one side, and The Law and parenting on the other, and the troublesome pressures exerted on mental health professionals who accept the challenges of working in the child custody forensic arena. (1) In summarizing the results of his research into the quality of clinicians' judgments, Garb states (2):

"The research findings reviewed in this book put severe limitations on what forensic clinicians can ethically state in a court. First, and foremost, expert witnesses should not defend their testimony by saying that their statements are based on clinical experience. It is difficult to learn from experience, because accurate feedback is frequently

unavailable and because the cognitive processes of clinicians are not always optimal. Instead of giving their clinically based opinions, expert witnesses should inform the court about relevant research." (p. 246, emphasis added)

Garb's conclusions are not new. Meehl sounded warnings along those lines in the early 1950's, contending that the results of testing with the Minnesota Multiphasic Personality Inventory were more accurate than was clinical judgment (3). A long line of research since has consistently come to the same conclusion. Such conclusions arose out of solid, legitimate research conducted within a methodology about which clinicians often appear to pay little attention. Not too long ago the membership of the American Psychological Association contemplated splitting along lines that differentiated clinicians from their more scientifically-grounded colleagues in research and the academy.

Although the research findings were not related to child custody specifically, it is especially pertinent to expert's intervening in child custody cases. Accurate feed-back about one's predictions is the sine qua non to the advancement of knowledge in any field of investigation. Yet, reflection informs that in child custody cases it is not possible to obtain accurate feedback. Once a custody arrangement is implemented, the principals'

adaptations and assimilations to those arrangements modify the environment, forever precluding meaningful comparison to alternatives that once existed.

Family members each impose their own share of influence into the paradigm that is any family arrangement, which seems especially true of younger children, who are not yet set in virtually any of their perceptions or ways.

Under the heading, "What is an Expert? A Critique of Clinicians as Experts", Quinsey et al repeat a contention written 50 years ago by McCormick: (4, p. 187):

"To warrant the use of expert testimony, then, two elements are required. First the subject of the inference must be so distinctly related to some science, profession, business or occupation as to be beyond the ken of the average layman, and, second, the witness must have such skill, knowledge, or experience in that field or calling as to make it appear that his opinion or inference will probably aid the trier in his search for truth." (5)

Section 1.04 of the Ethical Standards of Psychologists, entitled "Boundaries of Competence", states,

"(a) psychologists provide services, teach and conduct research only within the boundaries of their competence, based on their education, training, supervised experience, or

appropriate professional experience."

The best of education, training and experience do not qualify mental health professionals to know or decide what is or should be **valuable** to other people. Therefore, what possible expert competence can they have to decide such things? The intent of this current essay is to emphasize the point that mental health experts cease to function as scientists when they decide for themselves what constitutes the "best interests" and when they make specific recommendations for custody arrangements for other people's families. Instead, they impose their own values and attitudes upon the children and the families, in danger of functioning as social engineers. In the light of overwhelmingly consistent evidence, this admonition is offered: When serving as a mental health expert be a scientist rather than a parent, trier of fact, or hybrid. Do what scientists do rather than what parents and triers do. Be objective, propositional, and parsimonious, the qualities that permit Psychology and Medicine to number themselves among the disciplines of Science, and which allow mental health professionals to be qualified as "experts".

II. Significance versus Importance

Deciding or establishing value is precisely what Science and Medicine do not do. Science and Medicine speak of "significance" (comparisons), not of

"importance" (norms, values). In the same way, the job descriptions of parents and triers of fact on the one side, and psychologists and physicians, on the other, are not equivalent. In the absence of direction from those having the right and the responsibility to give that direction, there must exist an objective means for the identification of the specific variables around which the evaluations will be conducted or, at least, for determining how those variables will be identified.

The closer the mental health evaluators' premises and conclusions are to reflections of value, the easier and more appropriate it is for others to take rightful issue with their so-called "expert" opinions. Mental health professionals who render opinions about what constitutes the "best interests" of other people's children, and/or make specific recommendations about child custody arrangements, wade into treacherous waters. Stakes are so high in child custody cases that even experts who rigidly adhere to the methods of science in their processes, and in drawing their conclusions, are subject to sometimes vicious attacks upon their credibility by those who do not like their conclusions. Experts who do not confine their interventions to the role of scientist are left without a formidable ally when under such attacks. They are left to explain, among other things, how their conclusions are not just

speculation, and how they were not pivotally influenced by their own subjectivity.

Science is not normative. It is, of course, precisely designed not to be. For families it is the parents (or guardians ad litem) and The Courts who are qualified and responsible for establishing norms. Scientists, therefore mental health professionals, should function just as do travel consultants in the Automobile Club. AAA has a map to just about everywhere, but, they haven't the foggiest notion where one **should** go. Tell a AAA consultant of the destination, then, maps are provided, usually with more than one route to getting there. In the same way, mental health experts cannot validly intervene until they are informed of the values cherished for **this** child, for this family, and their relative importance to this child. Once mental health experts are informed of those destinations, so to speak, they are in positions to turn to their maps, the tools of and the information from their trades, in suggesting ways to get there.

Few clinicians would consider establishing values for clients who voluntarily present at their offices. Certainly travellers would be quite taken back, at least, if the AAA consultant informed them that the consultant will be the one to decide where the travellers are going. Travellers,

parents, Courts, and guardian ad litem, are the only ones qualified to decide such destinations for people. Once informed of the destination, however, the mental health expert might be able to point the ways. Mental health experts can contribute a great deal of information to the process of determining custody arrangements. However, they cannot legitimately decide for themselves what is of value to the family, and they cannot legitimately point to a specific custody arrangement with which that family might then have to live. Having variables specified in advance of examining them is not a novel idea in Science. All objective research and intervention begins that way. It is exactly what is expected in every forensic arena. In clinics and offices doctors first want to know the patient's version of what ails them, and what the patient might want to do about it. In child custody cases the variables that focus the evaluative investigation for the mental health expert is a legal term called "best interests" of the children. However, the legal definitions of "best interests" are usually not specific enough to serve as focus for the mental health expert's evaluation. Statutes, case law and Appellate decisions typically state only broad categories of what constitutes legal best interests of a child: "health, safety, and welfare of the child"; "the nature and amount of contact with both parents"; "stable custody

arrangements"; "an end to litigation"; "preserving the child's established mode of living"; "nature and amount of time with both parents"; "no change in custody", etc. Typically, parents who are considered to have been physically abusive to the children and/or to the other parent, and those who show evidence of interfering with the relationship between the children and the other parent are considered less able to provide for whatever those best interests are thought to be.

Providing evidence to address the more clear-cut of those "best interests" does not take the expertise of mental health professionals. For all but the most clear-cut of those definitions, however, there are numerous competing interpretations. Except for laws proscribing certain ways of handling children, and those specifying to what children are entitled, what constitutes psychological and emotional "health, safety and welfare of the child" is subject of considerable controversy. In virtually every conflicted custody case there is a heated difference of opinion as to what qualifies as providing for this child's "health, safety and welfare". It seems that everyone has their own versions.

Even if the legal concepts were directly related to psychological and emotional correlates, they would still be of little assistance to the mental

health evaluators. If nothing else, someone would have to place them into a hierarchy of importance for this family before the mental health expert could scientifically intervene; everything about a family and custody situation is relative. Furthermore, there are no direct correlates between the legal concepts and the information in Science, nor in the field of mental health in particular. Hence, mental health experts are required to operationalize legal language into specific factors that can be legitimately examined using scientific methodology and the tools of the mental health trades. How is "nature" in "nature and amount of contact" to be defined. What is the optimal balance between quantity and quality, and how is quality defined? At a more basic level, no one has ever shown that they know what is in anyone else's ultimate best interests. Nowhere is there evidence to support the notion that the ultimate quality of one's life is **determined** by the kinds of parenting or parents, or family arrangements, they had. This writer has sometimes mused on what an evaluator would do in a custody case with the Mozart's.

In its "Guidelines for Child Custody Evaluations in Divorce Proceedings", the American Psychological Association states,

"The goal of the guidelines is to promote proficiency in using psychological expertise in conducting child custody

evaluations." (6)

But there can be no such proficiency when mental health evaluators specify for themselves what constitutes the "best interests" of the children. Rather, proficiency begins only when "best interests" are determined by those actually authorized and qualified to define them: in a pinch, virtually anyone except the mental health evaluators themselves.

In the same way that objective intervention must begin with variables specified in advance of the research, the recommendations arising from the evaluator's conclusions must take the form of propositions. In child custody cases that means framing one's recommendations in a way that makes selection and implementation dependent upon the parents and/or The Court's deciding the relative importance of the values to which the propositions are tied. Yet, as Quinsey et al note,

"Depending on how it was determined, in practice, that something was "beyond the ken of the average layperson" and how it could be determined that the requisite skill, knowledge, or experience was actually present, this hurdle seems a very low one indeed. Ironically, there is evidence that triers (i.e., judges) actually want testimony from mental health professionals for just those legal questions about which mental health professionals are least expert." (pp.

187-188, *emphasis added*). (4)

Evaluators are repeatedly asked to make specific recommendations in child custody cases. However, in making specific recommendations for custody arrangements, mental health experts necessarily abandon the very objectivity that qualifies them as "experts", just as they do when they themselves specify the best interests of other people's children. In doing either the mental health expert usurps the sacred prerogatives that lie solely within the province of qualified norm makers. Most parents, and many attorneys (for different reasons), appear to simply assume that the expert is qualified and able to identify best interests. Parents and attorneys come by the assumption honestly when mental health professionals accept such charges, thereby implying by their agreement that they have knowledge they cannot possibly have.

In child custody conflicts requiring appointment of mental health evaluators it is seldom that both parents or their attorneys will agree with the evaluator's findings; no matter who chose the issues that were to be focal to the evaluation. To the contrary, heated disagreement is the norm: For one thing, conflict over which parent is actually to blame for breaking up the family metastasizes as does cancer into other parts of the organism. When the

conflict threatens the parents' relationships with their children, blame becomes also contagious. Interventionists often find themselves the focus of blame. For another, everyone's parental values are as good as or better than anyone else's, and there is no legitimate argument to the contrary. For another thing, attorneys are legally and ethically mandated to serve only their clients will sometimes be the first to raise dissent to the evaluator's methods and conclusions. Attorneys are formidable allies in justifying the parents' views of reality, of what constitutes the "best interests" of the child, and of their client's abilities to best provide for those best interests. Even if parents and attorneys initially claimed to be unable to identify what constituted "best interests", rest assured that one side will be convinced that whatever the evaluator chose was absolutely wrong.

This writer is often met with disfavor when he declares his lack of expertise for determining "best interests", when he declares his need to have those values defined by someone other than the writer himself, and when he informs that he will provide his recommendations in the form of propositions. Complaints are often that the clients cannot financially afford it. The complaint is reality-based. It can take quite a bit of time in conjoint interview to directly establish the evaluator's neutrality, and to obtain from

parents (and their attorneys if present) descriptions of the best interests of the children. Furthermore, offering propositional custody recommendations, rather than specifics, also raises costs. Propositions typically provide something favorable to both sides, while specific recommendations usually give one side little to go on. Money is often saved when parents believe their side is already lost because of the evaluator's recommendation. Hence, they are less apt to push for trial. Nonetheless, making propositional recommendations for custody is scientific, placing the responsibility for choosing which of the destinations (values) and which roads for getting there (the alternative arrangements) solidly where it legitimately belongs: with the parents and, in their failure to do agree, with the sound discretion of the Trial Court.

Every expert in this field has long since developed empathy for the way divorce and custody battles debilitate finances. However reasonable the complaints may be, they do not thereby provide the experts with skills and authority they cannot have. Hence, the choice is rather simple: either objectively specify "best interests" to begin with or there can be no "expert" evaluation by a mental health professional. Costs can be the experts' concerns only when the principals and expert agree beforehand on the limits

imposed upon the expert and upon the scope of the evaluation. When financial limitations exist, it is necessary to have even more than "best interests" specified in advance. Attorneys are adept at attempting to discredit experts by pointing out how the experts did not do an adequate job.

Courts must reach decisions based on evidence that makes its way into the record. Therefore, testimony from evaluators about specific recommendations based in either the evaluator's view of what constitutes "best interests", or made without directly mentioning "best interests", is likely to provide incomplete evidence, even distorted. On the other hand, propositional recommendations provide the triers with a wide range of cogent, objective, evidence. For example, say the mental health expert has interpreted the data base to mean that the child exhibits a high degree of positive emotional attachment to father. Father's psychological profile suggests that he is not all that reliable or consistent in terms of taking care of everyday stuff. He seems more laissez faire, adventurous, and somewhat impulsive. Father believes that "kids are better at fending for themselves than most adults realize". At the same time, the mother, to whom the child is also positively emotionally attached but to what appears to be a significantly lesser degree than the child is to father, has a psychological profile suggesting that she is highly

practical, consistent, and organized. She does take care of every day business, in a rather staid and conventional way, not nearly as adventurously as does father. She believes that children must be well supervised and directed. Mother also has the track-record to go along with her profile and stated beliefs. Both parents are psychologically and emotionally stable, neither reveal the slightest sign of psychological or emotional dysfunction. How can a mental health expert legitimately decide for that child and those parents which of the parents represents the best full-time placement for that child? How can a mental health expert legitimately decide whether the attachment pattern or the practical consistency is of ultimate best interests to this child and those parents? Propositions, on the other hand, are what scientists are qualified to make: "If The Judge considers attachment patterns to be more important, then, here is what the data have to say." "If the Judge considers it more important for the child to reside in a more conventional home that provides more hands-on supervision, then, here is what the data have to say."

None of this, of course, is new. In Science only exploratory research legitimately begins with the researchers themselves subjectively choosing the variables they will then examine. At its most informative, results of

exploratory research suggest directions for additional, and more controlled, research. In controlled research, the stuff from which scientific knowledge is thought to advance, the variables are objectively selected by other than the person who will do the research, and/or by the flags raised in previous research. A moment's reflection on the persuasive influence of social, political, and financial pressures informs that objectivity in research and evaluations cannot exist without such controls.

Every Court-ordered custody arrangement is necessarily an experiment. One for which there can be no meaningful feed-back. Because decisions must be made about custody arrangements does not mean the final decision was actually the best of the available options. But, there will never be an opportunity to assess what would have happened under any of the alternative arrangements whose roads were open until the final decision was made. Even if we could assess the utility of each option, which we cannot, children are dynamic not static forces, they are active and interactive, not robots. Everyone, perhaps especially children, appear to have an instinct to foster their own view of things and the environment. As the Existentialists say, the nature of human consciousness is that it believes anything it wants to believe. Every person will accommodate, assimilate and modify any arrangement in which they are

placed. Implementation of any arrangement will necessarily influence and shape the dynamics of any subsequent arrangement. Child custody arrangements are therefore an experiment that is absent the controls and feed-back available in virtually every other kind of scientific research. Once the family sets foot on one road all others vanish. There will never be subsequent opportunity to go back and try the roads not travelled because everyone and the roads are in some ways changed irreversibly by the first step on the road taken. That is why, if for no other reason, those who must live with the arrangements should decide upon them. And, when they are unable to agree, those qualified to establish such norms, i.e., the Trial Courts, must make them.

It is relatively simple to interpret the Court's order "conduct a psychological evaluation of this person". Mental health experts can turn directly to existing tools and standards for doing so, coming to rather standard conclusions pointed to by the database. "Conduct a child custody evaluation" has no similar straight forward interpretation. What specifically is "a child custody evaluation"? Except for the relatively new sexually violent predator laws, which appear to be producing a metamorphosis of criminality into psychopathology without a shred of scientific or medical justification, a standard interview and administration of a battery of

commonly used formal instruments can be expected to provide very similar information regardless of which doctor does the evaluation. There are, by now, a fairly extensive array of instruments thought to be useful in evaluating child custody issues. However, before any such procedure or instruments can be applied in a child custody case one must know what issues are focal to this family.

III. Identifying and Establishing the Focal issues

A valid strategy for objectively selecting the focal issues is one that sets out the means for selecting the focal issues, if not the issues themselves, before the evaluative process begins. A variety of tactics fit the bill as being "objective". The Trial Judge specifies the focal issues. The parents agree on what those will be. If the parents and their attorneys cannot or will not agree on the focal issues, then the guardian ad litem can specify them. The parents can each specify their versions, then the evaluator can explore both. The Court order, or the instructions from the parents and the attorneys can, when certain conditions are met, place the task of selecting the focal issues at the discretion of the evaluator. Those "certain conditions" are met prior to actually selecting the focal factors: i.e., the evaluators inform everyone involved that when evaluators choose the focus they

necessarily introduce their subjectivity into that process and, therefore, might focus on issues that are of importance to the evaluator but not necessarily important to the parents, the attorneys or The Court. The evaluator also explains that textbooks do not contain information that directly transforms parental values, interests or goals, or legal language into specific focal issues nor psychological correlates. That, in the absence of direction from the parents, the attorneys or The Court, the most scientific thing the evaluator can do is to conduct exploratory interviews and analyses. Then return to the parents and attorneys and provide them with the evaluator's ideas of what the "best interests" might be, from amongst which parents and/or the attorneys can then choose.

This writer has considered taking the position that he will not, under any circumstances, decide for himself what the focal issues will be. But, he hasn't yet gone that far. Instead, when all else fails to yield direction from those with authority to give that direction, he obtains from the parents their complaints and compliments, their versions of various potential arrangements and what each foresees as likely positive and negative consequences of the alternatives they described. On the whole, parents disclose their values in their complaints and compliments toward each other. This writer selects from

those descriptions what he considers best addresses the parents' values and goals and the children's needs. Then, before starting the evaluative process, he obtains agreement from the parents and their attorneys (and guardian ad litem if there is one) concerning the writer's suggestions. The evaluative process is not begun until the focal issues are agreed upon by both parents or the guardian ad litem (and their attorneys if they desire to participate). Ten years ago it was the writer's opinion that he should also obtain The Court's agreement. However, it has become obvious that Court's themselves rarely specify the content of the arguments The Courts will hear, leaving it to the attorneys to present their version of the issues.

If the writer still does not obtain agreement on the focal issues in that way, then he informs the parents and attorneys that he will choose the focal issues from the body of information that exists in the professional literature (7). He begins the evaluation when the parents agree to the focal issues. The evaluator informs that, even after an objective evaluation and interpretation of those variables and their interrelationships, he cannot be said to have actually provided information that guarantees the "best interests" of the children have been addressed, and that ultimately, if they fail to agree, it will be the Trial Court who estimates and predicts best interests from all the

information presented to The Court.

Regardless of how the focal issues are chosen, there three additional tasks to complete before the evaluation begins: translate the common (&/or legal) language within which the focal issues are stated into the professional language of best fit; estimate the extent to which each of the cited focal factors can be legitimately investigated using the tools of the mental health trades; then if indicated, inform the parents, the attorneys, and/or The Court as to the limits of the evaluators' (and the professional literature's) ability to directly answer the questions posed by those issues.

In the original paper, this writer described a "lengthy "Terms, Conditions and Agreements for Custody Evaluations" that he used. However, a highly seasoned Judge quickly informed this evaluator that the evaluator was not free to form an agreement or contract with anyone; the evaluator's contract was with The Judge who appointed him to the case. The writer, therefore, no longer creates contracts with the clients in Court-ordered cases, but still obtains their "informed consent". Unless there are clear contraindications to doing so, the writer holds the initial session conjointly with both parents and, unless the attorneys specifically inform the writer that they do not desire to attend, with them as well. At that first session, whether attended

by the attorneys or not, this writer explains the limits of his abilities, seeks from the parents their versions of the focal issues, then, obtains the parents' agreement on both the focal issues and the and the scope of the evaluation. If The Court's order, or the guardian ad litem for the child, specified the focal issues, then, the evaluator explains those issues to the parents and their attorneys so that they will have the opportunity to decide whether or not they want to participate in an evaluation with that scope and focus. Experts do not appear mandated to conduct evaluations if the parents do not wish to participate. It is this writer's habit to not ask "why when a parent declines to participate. The evaluator informs The Court only that one of the parents, or both, declined to participate, and requests The Court's guidance. If The Court then specifically orders the evaluator to conduct the evaluation, the evaluator notifies the parents and their attorneys that he intends to obey the Court's order unless the evaluator himself believes that he might not be able to remain objective. It is up to the attorneys to deal with the Court and their clients about such issues.

IV. General Guidelines

First, establish and maintain rigid neutrality. The best way this writer has found to do so is to hold his first contacts with the principals and/or

their attorneys conjointly. Second, hold no ex parte contacts with the attorneys. The only exception to this rule being that the writer will speak to the child's guardian ad litem when he is unable to obtain agreement about an important factor involved in the evaluation. However, it is stated at the outset that the examiner will speak to the guardian ad litem under those conditions. Information supplied to the examiner during the evaluation is in writing, courtesy-copied to the other attorney(s). Except under conditions warranting mandatory reporting, everything that the evaluator has to say about the case is said to all the attorneys and both parents at the same time unless made impossible by the participants. Sometimes an attorney and/or a parent declines to participate and/or is unable to do so. When that happens they will authorize the examiner to speak with the others without them. The evaluator's report, verbal or written, is provided to both sides at the same time. Third, hold no case preparation nor consults with only one attorney unless the other(s) state specifically that they do not want to participate AND the examiner considers a one-attorney preparation vital for protecting the children. Attorneys representing the parent who seems favored by the evaluator's report will often want to confer with the evaluator in preparing the case for trial. They will also seem to have a very understanding and

supportive ear for the evaluator's insightful recommendations. Don't do it.

Remain absolutely neutral. Do nothing whatever that anyone could perceive as biased. Even when arriving at the courthouse, hold conferences only with both attorneys present.

Fourth, before submitting final conclusions, and unless there is stark evidence that one of the parents is not fit to parent the child, the evaluator strives to have the parents themselves decide upon the future custody of the child. Fifth, "publicize" as little information about the parents' "psychological" profiles and histories as is necessary to support the evaluator's conclusions. Information about the parent's hypothesized "psychological profiles" are fertile fields for the growth of self-righteous justifications between the parents. Therefore, parents interested are informed that the test results will be provided to qualified professionals designated by the parents to receive them. For a time, when parents expressed an interest in learning more about the hypothesized profiles produced by the testing, this writer invited them back to his office for the purpose. However, it became increasingly apparent that doing so might be perceived by the other parent as a sign that the evaluator was biased. Sometimes an attorney will insist that he/she wants this examiner to explain the test

results to their client. When that happens this writer informs the other side of the request, and obtains their permission for the writer to meet with the other parent. It is also this writer's habit to explain to the parents the negative impact a written report can have; e.g., it will publicize their personal lives. He also explains to the parents that, while the evaluator desires to protect their privacy as much as is possible, a written report requires that the evaluator fully support the choice of focus, every conclusion and the recommendations. This may often mean writing information in a document that will become a public record and might be discussed in open Court; information that the parents might have preferred was not made known to others.

Sixth, do not take comfort from the praise of parents and attorneys, and do not take umbrage at their attacks. Indulging either easily erodes objectivity. Rigidly resist any invitation to become defensive or comforted. Seventh, strongly encourage the parents to agree and decide themselves on the custody of their children. Explain the foreseeable pitfalls to having strangers involved in the process, making such profound decisions concerning their futures. Provide a forum for agreement to be reached between the parents themselves.

V. Final Comments

The "comprehensive" in comprehensive child custody evaluation refers to the comprehensiveness with which the evaluation is structured and the focal issues are addressed. It does not mean that every conceivable issue one could raise about parenting and/or children will be addressed. Finally, it seems a very serious oversight to spend large amounts of taxpayers money to provide mental health intervention for criminals and youths caught up in the criminal justice system, while not nearly as much is spent on the young children who are caught up, through no fault of their own, in these terrible life-molding family conflicts. We spend the money more on those least likely to benefit, while spending virtually nothing on the very children who are able to benefit most.

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CONTENTIOUS DIVORCE: THE ROCKY PATH TO THE CHILD'S BEST INTERESTS

Michael S. Jellinek, M.D., Chief, Child Psychiatry Service,
Massachusetts General Hospital; Professor of Psychiatry and
of Pediatrics, Harvard Medical School

Kate Erwin, M.D. Director, Court Evaluation Service, Erich
Lindemann Mental Health Center; Instructor in Psychiatry,
Harvard Medical School

Alexa Bagnell, M.D., Second Year Resident in Psychiatry,
Massachusetts General Hospital; Clinical Fellow, Harvard
Medical School

Defining the best interests of the child sounds deceptively easy. All of us have seen a happy, thriving child relating to loving parents. There is an ease of attachment evident in each person's eyes and a gentle dance of touch and kindness. Yet despite libraries dedicated to quantifying intelligence, behavior and psychiatric disorders, no article or study was found that clearly defines criteria used by courts to make custody decisions and how those criteria relate to future outcome. The data does not exist for routine, much less for contentious divorces. Why is there no research to guide us? We have no methodology that quantifies parameters such as attachment, affection, identity, or intimacy. We have no approach that can take into account the many factors that change year to year and even less so over 10, 20, or 30 years. We are just beginning to define adult personality and have no good measures of severity of character or personality disorders.

What is clear from many articles is that professionals dedicated to resolving custody issues have a wide range of strongly held feelings about what is best for children based on their own experiences, upbringing, culture and religious beliefs as well as professional training. Beyond the evaluator's beliefs and subjectivity a child's needs develop and change over time. What may be in the best interest of a child at age 2 may change at age 7, and again at 12 or 16. Combining the developmental and temporal factors with changing circumstances, siblings, economics, a host of other factors (See Table 1), and finally adding to the mix the fallout of contentious parents, makes applying the "best interest" principle a frustrating task. In this paper we will review the historical roots, developmental theory of the best interest standard, focus on psychological elements that often motivate contentious divorces, and then make some recommendations concerning child custody determination.

Historical Perspective:

Over the last 500 years, child custody decisions have varied in response to the evolving perspectives of our society, culture and laws*. Despite what we have learned about child development, the concerns reflected in an 1850 treatise still hold today:

"the state of the law relating to the custody of the persons of infants is not very satisfactory...there prevails an uncertainty in the application of the law, as it exists, to the difficult cases which frequently arise in connection with the disposal of minor children."**

From Ancient Roman through early nineteenth century English common law, the father was given absolute authority over his children*** since children were defined as property, and the father owned or managed all of the family assets. In the nineteenth century the English courts began

*McDermott, J.F., Jr., Tseng, W., Char, W.F., & Fukunaga, C.S. (1978), Child Custody Decision Making, Am Acad of Child Psychiatry, p.104-116.

**Forsyth, W. (1850), Cases of Difference Between Parents or Guardians. Philadelphia: T& JW Johnson.

***Derdeyn AP, Child custody contests in historical perspective. Am J Psychiatry 133:1369-1376, 1976

to assume jurisdiction over the welfare of children under the doctrine of *parens patriae*, that the crown would safeguard those with no other protector. Percy Shelley was one of the first men in Britain to lose custody of his children in 1817 because of his vicious and immoral atheistic beliefs. In 1839, the Talfourd Act stated that courts could determine custody of infants under 7 years. Despite these changes, throughout the 1800s there were few exceptions to the doctrine that the father's rights were superior to those of the mother. In the United States, in 1881, a court in Arkansas held,

"It is one of the cardinal principles of nature and of law that, as against strangers, the father, however poor and humble, if able to support the child in his own life style, and of good moral character, cannot, without the most shocking injustice, be deprived of the privilege by anyone whatever, however brilliant the advantage he may offer. It is not enough to consider the interests of the child alone."*

*Verser v Ford, 37 Ark 27 (Ark 1881) from Derdeyn AP, (1976), Child Custody Contests in Historical Perspective, Am J Psychiatry, p. 1370.

The connection between custody and financial support was most explicit in an 1883 case, "a father is not liable for the support of his minor child, after the custody of the child has been given to the mother by a decree of this court."*

In the late 19th century, a mother's right to custody was acknowledged with regard to younger children and was known as the "tender years presumption".** "The claim of a mother during the early years of an infant's life to the care of her child is to be preferred to that of the father."*** However, the period of maternal care was short

*Brow v Brightman, 136 Mass 187 (Mass 1883)

**Fidler BJ, Saunders E, Freedman E, Hood E (1989) Joint Custody: historical, legal and clinical perspectives with emphasis on the situation in Canada, Can J Psych; 34:561-568.

***Commonwealth ex rel Hart v Hart, 14 Phila Rep 352 (Pa 1880), p. 357

and seen as a temporary placement until the child was old enough to be in the father's custody.

In the early 20th century the Guardianship of Infants Act in 1925 made the mother and father equal with respect to custody of their children. Courts soon preferred mothers as the custodial parent, particularly for younger children.

Women's increasing rights, economic capability and the prevailing understanding of child development supported this trend favoring women as custodial parents. By the 1960's, mothers were awarded custody in 90% of contested cases with the father typically required to provide financial support.*

Some of the strength of the women's movement paradoxically weakened the maternal advantage regarding custody. A larger percentage of mothers were working out of the home facilitated by the increasing use of day care.** A

*Deredyn AP (1976) Child Custody Contests in Historical Perspective, Am J Psychiatry, 133;1372.

**Derdyn AP, Scott E (1984) Joint custody: A critical analysis and appraisal. Am J Orthopsychiatry, 54:199-209.

trend toward balancing the rights of both parents, and prioritizing the child's well being led to "the best interest" principle (A phrase coined by Justice Benjamin Cardozo in 1925). The Uniform Marriage and Divorce Act passed in 1974* asked the courts to consider virtually all of the criteria in Table 1.**

The goal was to favor neither parent, "requiring judges to exercise ever-increasing freedom in each custody decision."*** Although the "best interests of the child" was the prevailing legal text for custody in all states, courts varied widely in this interpretation and implementation.****

* McDermott JF, Tseng W, Char WF, Fukunaga CS (1978), Child Custody Decision Making, Am Acad Child Psychiatry, p. 105

** Weiner BA (1985) An Overview of Child Custody Laws, Hospital and Comm Psych. 36:838-843

***Deredyn AP. (1976) Child custody contests in historical perspective, Am J Psychiatry. 133:1374

****Summary of the Practice Parameters for Child Custody Evaluations (1997). J Am Acad Child Adoles Psychiatry, p. 1784-1787.

Goldstein, Solnit, and Freud in 1973, published Beyond the Best Interests of the Child* that defined the critical role of the "psychological parent" as the person whose daily relationship with the child provides love, care, and protection. Their guidelines for child placement included:

1. The decision regarding placement must be swift, final and unconditional.
2. Sole custody must be given to one parent.
3. Limit court intervention to only one question: Who among the competing adults should bring up the child?

These distinguished authors saw the severe impact of never ending discord and hostility; therefore in contentious divorces, Goldstein et al recommended that "the best interests of the child" standard be superseded by the "least detrimental alternative".

*Goldstein J, Solnit AJ, Goldstein S, Freud A. The best interests of the child: The least detrimental alternative. New York: The Free Press, 1996.

Rather than focusing on "best interest" or "least detrimental," in practice many states have a legislative bias towards joint custody. It was hoped that joint custody would reverse a growing trend of paternal abandonment and encourage fathers to both stay involved and maintain financial support of their children. Joint legal custody allows the courts latitude "...to assure minor children of frequent and continuing contact with both parents..to encourage parents to share the rights and responsibilities of child-rearing."* California was the first state to establish a legal presumption in favor of joint legal custody, thus giving judges the power to order joint custody despite the objections of one parent.** Research suggests

*Derdyn AP, Scott E (1984). Joint custody: a critical analysis and appraisal, Am J Orthopsychiatry. 54:201.
California Civil Code, Section 4600

**Frankel SA (1985). Joint custody awards and children: A theoretical framework and some practical considerations. Psychiatry. 48:318-328.

there are four major factors to make joint custody successful:

1. Commitment to the arrangement.
2. Flexible sharing of responsibilities.
3. Parents' mutual support.
4. Agreement on the implicit rules of the system.*

Often all of these factors were not in place and instead joint custody was used to avoid facing what seemed to be never ending litigation. Thus joint custody decision may cement rather than resolve chronic hostility and condemn the child to living with two tense, angry parents indefinitely.

At either end of the continuum, decisions are relatively easy. For well functioning, harmonious and child oriented parents, joint physical and legal custody maintains ongoing, frequent contact with both parents and increases financial stability. With a severely impaired parent (e.g., cocaine addiction), sole custody is usually the least

*Abarbanel A. (1979). Shared parenting after separation and divorce: A study of joint custody, Am J Orthopsychiatry. 49: 320-329.

detrimental solution. But what to do in contentious divorce when neither parent is functioning optimally? What are the benefits of a best interest standard; what are the risks of not choosing the least detrimental alternative?

Epidemiology:

There were an estimated 10,000 divorces in 1867 (0.3 per 1000 population), compared with 913,000 divorces (4 per 1000 population) in 1997.* Currently in the United States about half of marriages end in divorce with annually about one million children experiencing their parents' divorce. About 50-60% of children born in the 1990's will live at some point in single-parent families typically headed by mothers.** Approximately 10% of these divorces involve custody litigation.

*Derdeyn AP. (1976) Child custody contests in historical perspective. Am J Psychiatry. 133: 12:1374

**Kaplan HI, Sadock BJ (1995). Comprehensive Textbook of Psychiatry, 6th Edition. Baltimore: Williams & Wilkins, p. 1608.

Most men and women will remarry, but divorces are about 10% more frequent in remarriages and there is about 50% higher rate of divorce in remarriages with children from another marriage. One out of every ten children will experience at least two divorces of their residential parent before turning 16.

THE "BEST INTERESTS" OF THE CHILD: UNDERLYING PRINCIPLES OF ATTACHMENT AND DEVELOPMENT

Attachment is a biological and emotional lifeline rooted in hunger, touch, vision, smell and in coping with distress or danger. The parent nurtures the hunger, eases the distress and comforts with gentle holding. The baby begins to trust the world as a safe and benevolent place. As the baby grows into toddlerhood, we see the two year old clinging to his parent's knees, scoot off to look at a new toy, then quickly return to 'home base.' Ideally the parent 'matures' along with the child, supporting the child's emerging autonomy while keeping the child safely within age

appropriate boundaries from crossing a street, to choosing after-school activities, and eventually applying for a job or college.

Attachment brings meaning to the communication of values. By responding to the baby's cry the caregiver demonstrates, repeatedly, that the baby is worthy of being heard, cared for, and comforted (the opposite of neglected and the wellspring of self-esteem). Repeated success at comforting shows that caregivers, and eventually the child, can be effective in positively influencing the environment ("something can be done about something").* Self-esteem, trust, and a sense of efficacy are the core attributes to later healthy personality development, the capacity for attachment to parents, and for intimacy with others in the future. Although early infancy focuses on one caregiver, as

*D.W. Winnicott, The depressive position in normal emotional development. British J of Medical Psychology, 28:89-100, 1955.

the child grows, both parents soon become increasingly relevant to an evolving identity, social role, and values.

Clinical experience with abused and neglected children has demonstrated the consequence of disrupting or distorting attachment. Children who have lost a parent are at higher risk for depression, life long fear of relationships, and a persistent sense of abandonment.* Many children who are abused, neglected or used by a parent suffer with a low self-esteem, an entrenched sense that the world is not safe, and an impaired capacity for intimacy. Being used by a parent can be overt as in a sexual or criminal use, or more subtle as in a psychological use. Parents use their child to cope, for example, with a sense of loneliness. Instead of allowing the child age appropriate autonomy, they are over protective and keep the child as a companion. This over protection is presented as good parenting, but is

*McLeod, J.D., Childhood Parental Loss and Adult Depression, Journal of Health and Social Behavior, 1991, Vol 32 (3): 205-220.

motivated by the need to use the child in place of mature, adult relationships. To the child, being used is experienced as being valued not for who you are, but for the purpose you serve. "I am good because I keep my mother company" or "I am valued only when I tell my father the bad things he needs to hear about my mother."

It should not be assumed that children can only make attachments to a psychological parent who is loving, nurturing, and invested in the child. Many abused and used children, dreading real or emotional abandonment, try over and over to make an abusing or using parent love them or work ceaselessly to convince the parent that they are really 'good', worthy, and should not be rejected. The child needs to see the parents as good and loving; a used or abused child's clinging supports a distorted form of attachment. This desperate, short-term effort to please an abusive or using parent makes it difficult for judges and trained

clinicians to assess the child's genuine wishes and best interest.

BEST INTERESTS IN THE FACE OF DISCORD

For most people divorce is experienced as failure. The dissolution of a marriage can be experienced as a personal injury to our dearly held sense that we are smart, in control, and successful at what we do. Regardless of how psychologically healthy the parents may be or how mutual the decision to separate, each spouse feels the grief and loss of their mate, lifestyle and marital dreams. There are those, who, for reason of upbringing or temperament, are especially vulnerable to these injuries and find the sense of loss intolerable. Inevitably there is anger over these losses and that anger may be magnified and hard to control. Beyond the loss of the marriage itself, losing any status as a parent compounds this "injury." Over months most divorce related issues begin to resolve (with sadness replacing some

of the anger) by discussion and negotiations, but for some parents each step of the process fuels further rage and bitterness. Often these contentious divorces focus on (1) money, a relatively easy issue to define, quantify and apportion, and (2) custody which, because it is subjective, can become epic in scale draining vast emotional and financial resources, sometimes to the point of ruin. As part of warding off massive anger and anxiety, these parents experience an absolute need to get "back on top" and "win."

In some circumstances custody disputes are understandable attempts by an emotionally mature parent to protect a child from the emotional or physical danger of a disingenuous, neglectful or dangerous parent. However, more often parents rigidly entrenched in a custody battle suffer from character or personality disorders which are defined as a serious, often lifelong distortion in an individual's understanding and approach to inner feelings and to the feelings of others. It is thought that early experiences of

unempathic parenting, years of needs not being met, and a biological/temperamental vulnerability combine to create deep feelings of emptiness and rage that are consciously experienced as overwhelming anxiety, depression, anger, and inadequacy. Rather than remembering the many disappointing, angry and lonely moments of their own early childhood, these parents will feel this anger directed to their divorcing spouse, employer or attorney, or a general feeling of anxiety. Character disorder will distort relationships so that inner longings, the persistent wish to fulfill early childhood's needs, will dictate the choice of spouse. A need for nurturance may be expressed in marrying a dependent spouse. This spouse's clinging behavior and inability to separate will be initially interpreted as providing companionship and adoration; however rather than fulfilling expectations of nurturance, soon these dependency needs become a draining demand for constant attention. Rather than getting, the spouse feels burdened constantly. For

individuals with character disorders, losses in later life again trigger unconscious, unbearable anxiety. Since there are little built-in reserves of self-esteem or trust from early childhood, patterns of distortion such as blaming others, dependency, self-importance or exploitation have to be used to limit overwhelming anxiety and depression. The more meaningful the loss (spouse, child custody), the more rigid and necessary the distortion. (Table 2 lists the major features of character disorder and Table 3 lists major subtypes). With the decision to divorce, the wish to regain control and anger offer fertile ground for extended legal battles. The contentious divorce process itself becomes a partial replacement for the loss of the marriage and a distraction from inner, painful feelings. The other spouse's viewpoints or wishes are an anathema to be devalued. Every dollar of expense is another loss. Every hour of custody is worth the most bitter contest. The child who may have been used by one or both parents in the

marriage now becomes even more relevant as an object or pawn to be used in the divorce. Having lost both parents "to the war", the child is alone and turns to a sibling if available, manifests their own anger by provocative misbehavior, or turns inward towards preoccupation and depression to ride out the long storm. The child, now facing the demands of both parents and exposure to constant fighting, may question his personal worth, and, if vulnerable, develop defenses in the direction of an incipient personality disorder. In the context of a custody dispute, character disordered parents can not 'hear' the advice of their attorney, or may be taken advantage of by the attorney's zeal or greed. These ways of coping, by fighting and controlling, are not volitional. The quality and extent of distortion is variable although in its most severe form, character disorders are intractable.

How do we deal with contentious divorces where one or both parents have personality disorders? Where a father is arrogant and exploitative? Where a mother is dependent and has been in the "victim" role throughout the marriage. The father demands joint legal and physical custody as being in the best interests of their 3 and 7 year old children; the mother has decided that this is where and when she draws the line. She knows the father has never invested much time in child rearing, and is certain that such a shared arrangement is grounded completely in her husband's need to control and, thus, is detrimental to the children. Each parent is rigidly bound to their position and does everything in their power to undermine the temporary order and their spouse's standing in the eyes of their children and the court. Despite six figure incomes, every dollar for children's clothing or activity fees is used to get more money or custody time. The circumstances vary and are as numerous as the number of contentious divorces. What if a mother is

more severely impaired, but the child is quite young and the father may be a critical balance to the mother's use of the child? Each of these parents is willing to spend thousands of dollars, even the child's college fund, in what they have defined as the child's best interest. However, meeting the child's "best interest" may need elements of both parents (because of and despite their distortions), in a mix that changes over time and varies by the child's gender, intellectual needs, age, etc. Maybe neither parent alone will make as good a choice of medical care, religious training, or school programs as both together. Maybe at 15 when facing a difficult decision, a boy will need his father's guidance and approval or his mother's, or a blend of both. At age 6 he may need the stability of one home being favored in a visitation decision, at age 14, another.

RECOMMENDATIONS

What is a reasonable approach when the guidance of best interest or least detrimental do not easily apply? When the least detrimental is still too detrimental or not sufficiently in the best interests, reasonable people pause and are reluctant to make such potentially adverse, long-term decisions. The core value that makes imposing the least detrimental alternative so attractive is that it sets a structure that largely limits the discord. At least one parent has full legal authority to care for the child. The benefits of ending the discord are felt to outweigh the potential loss of the other parent's positive influence and whatever harm may derive from the custodial parent's personality.

Why is structure so important in contentious divorces and how could it best be achieved using "the best interest" principle? Structure serves as a boundary for the behavior of people with personality disorders. If someone is a

dependent personality, without structure, they will continuously search to meet their need and be unable to separate from their child since unconsciously they fear that they will be unbearably lonely and are not secure that they will see their child again. A structure of consistent, reasonably frequent physical visitation, assured telephone access and guaranteed sanctions for lateness or manipulation of the visitation schedule, if enforced by an accessible authority, is a structure that contains the deep-seated anxiety of loneliness and permanent loss. The parent feels reassured and this core anxiety eases to allow the parent to function with much less need to distort. A similar structure can contain an exploitive, powerful or arrogant parent by assuring limits on verbal intrusions or abuse as well as any violation of agreements. For the child this structure is designed to optimize the elements each parent offers and to limit those tensions based on personality disorders. A court appointed Guardian-ad-Litem can

potentially provide this structure with the following guidelines:

1. Expertise - The family should be assigned to a judge recognized for training and extensive experience in adjudicating contentious divorces. Use of a mental health professional, preferably at the doctoral or child psychiatric level of training, with experience in divorce, treatment of character disorders and child development. Parallel expertise if the court appoints legal counsel for the child;
2. Consistency - Continuing the custody team with some limitation on changes (especially rotation of the judge off the case, strategic use of delays, or filing of motions to disrupt the team). Use of regularly scheduled, required status conferences to update the court and, pre-planning (schedules, major decisions) to prevent disputes;
3. Time - A developmental time frame that acknowledges the likelihood that the team may need to stay active for several

years and available even longer as circumstances changes.

The focus of reviews and recommendations should be the child's optimum functioning and the need for periodic (at least annual) review;

4. Limit Setting - A fundamental part of the structure to contain character issues is limit setting at every level:

A. The Guardian ad Litem (GAL) has to have a detailed understanding of each parent's character to know which demands or criticism are likely grounded in reality or distortion. The GAL's authority, judicial support, consistency, and good judgment regarding detailed limit setting is the structure that allows each parent the opportunity to express their love and parenting unfettered by distortion. The GAL has additional limit setting techniques available including psychological testing and treatment for one or both parents, asking the court to assign costs or set up accessible funds for the child's needs, and

altering visitation schedules as needed to protect the child from unreasonable behavior.

Especially early in the process, the most structured well intentioned plan will be sabotaged (excuses such as a traffic jam, cell phone problems, plane could not land, etc.). It may be necessary for the GAL to be available within hours or less, reasonable, fair but firm. Usually limits have to be very rigid in the beginning of the process and can be more reasonable once the team structure has been consistent and in place for a sustained period;

B. The lawyers have the difficult task of balancing the parent's appropriate right for legal advocacy with setting limits on tactics or positions that are rooted in characteriological distortions and anger then the child's best interest;

C. The court has to protect everyone's rights and follow accepted procedures without encouraging motions

that are hostile or misguided. The court can use assigning of costs and instructions from the bench to set clear limits. The judge needs to have confidence in the GAL, set limits on the parties as necessary, and encourage resolution of any issue as soon as possible. For example, tactics to win economic settlements often spill over into custody or visitation arguments or tensions regarding paying for after-school or summer activities. Every effort should be made to finalize and set clear guidelines on the financial settlement to as soon as possible and thus allow an unencumbered focus on the custody issues;

5. Cooperation and Respect - The judge, lawyers, and mental health clinician become a structure that reflects the pre-divorce, marital family and the childhood families of each parent. This team also is known to the child directly through evaluation visits or alluded to by their parents. Thus, the team serves a role modeling and protective

function for the contentious parents and children. Any member of the team may become enmeshed in a distortion that then divides the team. The more anger and confusion, the more attention and time is spent with the parent, the less they have to face the sadness of the losses of spouse and full time parenting. At these moments, the team may be replaying the dynamics of the divorce. Everyone has the responsibility to step back, recall the past reasonableness and experience of the other team members, and restore harmony.

CONCLUSION

Although we have come a long way from considering a child as the father's sole property and responsibility, determining a child's best interest in the storm of a contentious is fraught with risk. No path is obvious or safe. The combined efforts of well intentioned, reasonable, and informed professionals are needed to facilitate the best

of what the parents can offer using the structure provided

by the court.

TABLE 1**MAJOR FACTORS RELEVANT TO CUSTODY DETERMINATION**

Parental Functioning, Competency, Physical and Mental Health

Child Functioning and Needs (Child's personality, age, school, activities, family and peer relationships, living arrangements, health needs, child care, siblings, extended family, etc.)

Child Preference (if possible to discern with reasonable clarity)

Economic Considerations (Quality of environment, safety opportunities, etc.)

Geography (Limits of joint physical custody, practicalities regarding transportation, stability of employment, etc.)

Table 2***Features of Character Disorders in Parents**

Enduring Distortion of Self-Image (Low, Grandiose)
Difficulty Sustaining Intimacy, Relating to Others
Passivity, Difficulty Initiating or Completing Task
Rigid, Distorted Perspective of Life Events,
Impaired Functioning
All or Nothing Approach
Inability to Resolve or Adjust to Loss

* Jellinek MS, Ablon S. Character disorders in adolescence.
IN: Comprehensive Adolescent Health Care, 2nd Ed, SB
Friedman, M Fisher, SK Schonberg, EM Alderman (Eds). St.
Louis, MO: Quality Medical Pubs., 1997, pp. 911-920.

Table 3***Character Disorder: Subtypes**

Paranoid Personality Disorder - A pattern of distrust and suspiciousness such that others' motives are interpreted as malevolent

Schizoid Personality Disorder - A pattern of detachment from social relationships and a restricted range of emotional expression

Antisocial Personality Disorder - A pattern of disregard for, and violation of, the rights of others. Often aggressive, irresponsible

Borderline Personality Disorder - A pattern of instability in interpersonal relationships, self-image, and affects, and marked impulsivity. Marked, intense anger; feelings of emptiness

Histrionic Personality Disorder - A pattern of excessive emotionality and attention seeking. Self dramatizing

Narcissistic Personality Disorder - A pattern of grandiosity, need for admiration, and lack of empathy. Envious, arrogant, exploitative

Dependent Personality Disorder - A pattern of submissive and clinging behavior related to an excessive need to be taken care of

Obsessive-Compulsive Personality Disorder - A pattern of preoccupation with orderliness, perfectionism, and control

*American Psychiatric Association: Diagnostic and statistical manual of mental disorders, ed. 4., Washington, D.C., 1994, American Psychiatric Association.

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Building Multidisciplinary Professional Partnerships with the Court on Behalf of High-Conflict Divorcing Families and Their Children: Who Needs What Kind of Help? ¹

Janet R. Johnston, Ph.D. ²

Historical Background

During the last third of the twentieth century, the United States has led many other western countries in radical legal changes that have aimed to make the process of marital dissolution less acrimonious and the outcomes of divorce both gender neutral and more protective of the interests of children.³ Throughout the United States, coincident with rapidly rising rates of divorce (to a record high of about one in two marriages⁴) between 1969 and 1985, “no fault” divorce laws replaced the previous onerous ones that required divorcing parties to establish who had violated the marital contract. Alimony and marital property rules changed dramatically around the country, ensuring a more equitable distribution of family assets between

¹ Paper presented at the conference “Children of Embattled Divorce Symposium,” sponsored by the University of Arkansas at Little Rock School of Law, September 17-18, 1999. Parts of this paper are adapted from J. R. Johnston and V. Roseby (1997), *In the Name of the Child: A Developmental Approach to Understanding and Helping Children of High Conflict and Violent Divorce*, New York, Free Press (chapter 9, reproduced with permission of the authors).

² Associate Professor, Administration of Justice Department, San Jose State University, San Jose, California, and Executive Director, Judith Wallerstein Center for the Family in Transition, Corte Madera, California.

³ Maccoby, E. E., & Mnookin, R. H. (1992). *Dividing the child: Social & legal dilemmas of custody*. Cambridge, MA: Harvard University Press; Weitzman, L. J. (1985). *The divorce revolution: The unexpected social and economic consequences for women and children in America*. NY: Free Press..

⁴ As a consequence of this extraordinarily high divorce rate and the unprecedented numbers of children of unwed parents, 60% of all children now spend some time in a single-head-of-household family. These children experience multiple changes in their residential living arrangements and parenting during their growing-up years (Furstenberg, Jr., F. F. (1994). History and current status of divorce in the United States, *The Future of Children*, 4, 29-43; Glick, P. C. (1988). The role of divorce in the changing family structure: Trends and variations, in S. A. Wolchik, and P. Varody (Eds.), *Children of divorce: Empirical perspectives on adjustment* (pp. 3-34). New York, Gardner Press; Hernandez, D. J. (1988). Demographic trends and the living arrangements of children, in E. M. Hetherington and J. D. Arasteh (Eds.), *Impact of divorce, single parenting & stepparenting on children* (pp. 3-22). Hillsdale, NJ: Lawrence Erlbaum Associates.

men and women. During the same period, the “tender years doctrine” dictating that the custody of young children should normally go to the mother was replaced with the “best interests of the child” standard for determining which parent should be legally and physically responsible for the care of children following divorce. Joint custody preferences or presumptions were subsequently introduced in many states.⁵ During the 1980s, California led the country in these and other legal reforms, most notable of which was the introduction of custody mediation to facilitate the private resolution of disputes. During the 1990s, parenting education swept the country. This involved efforts to empower divorcing families by providing them with information on the process of divorce and the needs of their children to have frequent, continuing and conflict-free access to both parents.

Despite these radical historical changes, we are currently confronted with distressing levels of frustration, anger, alienation and cynicism from divorcing parents and children about their experience with family courts and about the professionals who work in this field.⁶ Despite the widespread provision of mediation services, approximately one fourth to one third of divorcing couples report high degrees of hostility and discord over the daily care of their children many years after the separation.⁷ Only about one tenth of all separating couples with children resort to extended litigation, court hearings and trial.⁸ However, this relatively small sub-group of

⁵ Kline-Pruett, M., & Hoganbruen, K. (1998). Joint custody and shared parenting, in K. D. Pruett and M. Kline-Pruett (Eds.), *Child and Adolescent Psychiatric Clinics of North America: Child Custody* (1988, pp.273-294).

⁶ Kline-Pruett, M. (1998) Children's views of lawyers, judges and family court counselors. An interview study of a Connecticut study of divorcing parents and young children. Paper presented at the conference “New Ways of Helping Children and Parents through Divorce,” jointly sponsored by the Judith Wallerstein Center for the Family in Transition and the University of California Extension, Santa Cruz, November 20-22, 1988, Quail Lodge, Carmel Valley, California.

⁷ Maccoby & Mnookin, 1992, op. cit.; Wallerstein, J. S., & Kelly, J. B. (1980). *Surviving the breakup: How children and parents cope with divorce*, New York, Basic Books.

⁸ Maccoby & Mnookin, 1992, op. cit. These data are from California, which has been in the forefront of divorce reform, and where mediation has been mandated state-wide for custody and visitation matters since 1981.

the divorcing population consumes a disproportionate share of the court's precious resources, with fairly dismal outcomes using the traditional adversarial legal system.⁹ Moreover, this sub-group tends to engage in protracted and repeated litigation. Outside the courts, the unremitting hostility and chaos can shadow the entire growing-up years of the children. This means that an accumulating sub-group of children are being caught up in these family situations. In fact, over the span of the past two decades in the U.S., it has been estimated that a critical mass of highly-conflicted divorcing families (with 2 million children) are passing in and out of a revolving court door.¹⁰

Salient Features of High-Conflict Litigating Families

The family environments of chronic custody disputes are characterized by the parents' mutual distrust, fear, anger, projection of blame onto the ex-partner, refusal to cooperate and communicate, allegations of abuse and sabotage of each other's parenting and time with the child.¹¹ The extent to which parents' negative views and behaviors are realistic responses to the other parent's violent, neglectful or substance-abusing behavior is difficult to determine. Some of the children involved clearly meet the criteria for an abused child, justifying their protection by the state. More often, when such allegations are investigated by child protective services, they are

⁹ Those who fail to settle in mediation use more than twice the hours of family court service staff. They also presumably consume the major portion of judges' time. Duryee, M. (1992), Mandatory court mediation: Demographic summary and consumer evaluation of one court service, *Family & Conciliation Courts Review*, 30, 260-267.

¹⁰ Johnston, J. R., & Roseby, V. (1997). *In the name of the child: A developmental approach to understanding and helping children of conflicted and violent divorce*, New York, Free Press.

¹¹ Interestingly, no demographic descriptors (income, education, ethnicity) distinguish the high-conflict group from the large majority of divorcing families. Although parents of younger children and those with larger families tend to experience more conflict, no other characteristics of family composition appear to predict who will be in high conflict (Maccoby & Mnookin, 1992, op. cit.). Instead, it is pervasive distrust about the other parent's ability to care for their child adequately and discrepant perspectives about parenting practices that generally typify the couples who are disputatious both inside and outside the court (Depner, C. E., Cannata, K. V., & Simon, M. B. [1992], Building a uniform statistical reporting system: A snapshot of California's family court services. *Family & Conciliation Courts Review*, 30, 185-206).

frequently dismissed by overworked staff as being either indicators of interparental spite, not able to be proven, or insufficiently serious to require state intervention. Clinical histories indicate that many of these families were dysfunctional long before the couple separated, and their children have been chronically subjected to ongoing marital conflict and the erratic, emotionally abusive care of personality-disordered and emotionally troubled parents. Studies indicate that domestic violence of varying severity is a feature of about three fourths of these families; concerns about child molest and abuse are a feature of a substantial minority of the families (in about one tenth and three tenths, respectively).¹²

More commonly, however, the extremely negative views parents have of one another are exaggerated and emanate from one spouse's humiliation at the rejection inherent in the divorce itself. The couple's enmeshment derives from their inability to separate and realistically grieve the loss of the marriage relationship. Traumatic separations, by which a divorcing partner's sense of trust and shared reality has been precipitously betrayed and shattered, have resulted in negatively revised views of one another that are often unwittingly confirmed by others within their split social world of new partners, kin and even professionals.¹³ Unable to settle their disputes with one another, these vulnerable people are then forced to enter the traditional legal system, which greatly increases their anxiety and defensiveness, and further undermines their parental competence. In the spirit of an adversarial culture, divorcing couples seek vindication through litigation by polarizing their respective positions and blaming the other parent.

¹² Johnston, J. R. (1994). High-conflict divorce. *The Future of Children*, 4, 165-182; Johnston, J. R. (1996). *Prevention of parent or family abduction of children through early identification of risk factors, Stage I, Part B*. Final Report to the Office of Juvenile Justice & Delinquency Prevention, Department of Justice, Washington, D.C.

¹³ Johnston, J. R., & Campbell, L. E. G. (1988). *Impasses of divorce: The dynamics and resolution of family conflict*. NY: Free Press.

In effect, the task of establishing fault in marital dissolution has not been abolished; rather it has shifted from the divorce to the custody arena. The battles fought over children in separating families are, in some part, a reflection of custody laws that are the product of the larger societal war between men and women at this historical juncture. The problem is that children have neither a legal nor a political voice in the family battles and the larger gender wars that are fought in their name.¹⁴ Yet they are the ones most adversely impacted.

The Need for Interdisciplinary Partnerships with the Court

The beginning of the twenty-first century finds the legal and mental health communities struggling to deepen and refine a truly revolutionary approach to helping families with separation and divorce, with the realization that it must involve a paradigm shift from an adversarial to a collaborative approach in family law. This collaborative approach suggests a fundamental redefinition of the role of family court, and it requires new multi-disciplinary partnerships between the courts and attorneys, mediators and mental health professionals, in order to arrive at viable solutions.¹⁵ Having worked with and researched this population of embattled divorce for two decades, it is our thesis that the outcome of the divorce has very much to do with how the stormy waters of the divorce transition are navigated, and what kind of help or hindrance these vulnerable persons get from others during the process.¹⁶ In particular, family courts, attorneys, custody evaluators, counselors and therapists can act in ways that inadvertently contribute to

¹⁴ Mason, M. A. (1999). *The custody wars*. New York, Basic Books.

¹⁵ This approach is compatible with that of therapeutic jurisprudence which seeks to apply social science to examine the impact of laws on the mental and physical health of the people they affect and to propose changes in laws and procedures accordingly. Wexler, D. B. (1990). *Therapeutic jurisprudence: The law as a therapeutic agent*, Durham, NC: Carolina Academic Press; Winick, B. J. (1997). *Therapeutic jurisprudence applied: Essays in mental health law*, Durham, NC: Carolina Academic Press.

¹⁶ Johnston & Campbell (1988) op. cit.; Johnston & Roseby, (1997) op. cit.

family impasses; whereas, by intervening in more effective ways, these same helping professionals can play a critical role in resolving custody disputes.

This paper is intended to help summarize our collective experience in this endeavor.

Specifically, it will first note how traditional professional roles and ethical constraints have contributed to rather than resolved family conflict and hurt children. Second, it will describe how moving from an adversarial to a collaborative approach in family matters requires a corresponding shift in perspectives and functions among these helping professionals and a rethinking of ethical obligations. Third, it will review the range of new dispute resolution programs, those which are alternatives to litigation, that have been emerging around the country. Specifically, the purpose is to outline the essential elements of each type of service and propose criteria as to which families need what kind of service and when.

Rethinking the Role of Family Court in Divorce Matters

There are a number of assumptions about the traditional role of family courts in conflicted custody matters that need to be questioned. First, family courts have primarily been used to make decisions for divorcing couples who cannot make their own. This assumes that the court has greater wisdom or some special knowledge about what is best for children. Second, family courts which make repeated decisions for some highly conflicted families have been induced to act *in loco parentis*. This assumes the court has the capacity to oversee the day-to-day care of children. Third, the custody litigation process has customarily determined which parent is the better parent, which implies that the other parent is of secondary, inferior status.¹⁷ This assumes that it is appropriate for separating parents to be publicly scrutinized and held to a

¹⁷ McWhinney, R. L. (1995). The "winner-loser syndrome: Changing fashions in the determination of child custody. *Family & Conciliation Courts Review*, 33, 297-307.

higher standard of accountability than those in non-disputing divorces and intact families.¹⁸

Fourth, judges have been asked to pass judgment on family dilemmas that other professionals and the community-at-large have failed to resolve: the cases attorneys have failed to negotiate, or that mediators have failed to settle, and the people that counselors and therapists have failed to help. This assumes that judges are equipped to resolve the most difficult, the most complex of all family problems. (In the face of this onerous burden, it should be no surprise that family court assignments for judges are unpopular, often avoided, and usually staffed by rotating assignments to prevent burn-out.)

If we take a multi-disciplinary partnership approach, none of these functions should be primarily the court's responsibility. Rather, within the authority vested in it by law (specifically the best interests of the child), and respecting that families are entitled to the least intrusive court intervention, the new role of the family court can be one of leadership in bringing the issues, the parties and their helpers to the table to address four constructive questions that invite collaborative problem-solving:

1. How can this fractured family coordinate its resources and care for the children after the parents' separation?
2. How can we protect, reconstitute and restore the positive parts of parent-child and family relationships wherever possible?
3. How can these parents make ongoing cooperative decisions throughout their children's growing-up years?

¹⁸ The standard for determining parental incompetence in divorcing families should be the same as that determining abuse and neglect in dependency court.

4. What help will these parents need from the community to raise their children?¹⁹

Note that this reframing of the court's primary function entails a proactive rather than a reactive stance. To accomplish the task, family court procedures will need to be revised to allow for more judicial case-management.²⁰ This includes a range of possibilities: direct calendaring of cases to help ensure that one judge follows a case over time; judicial initiation of status and settlement conferences with options for telephone conferencing to expedite the decision-making process; judicial authority to require mental health and legal professionals to work collaboratively including having disputing experts confer prior to giving their testimony; and a timely judicial review of progress whenever a succession of temporary orders is needed to settle the case.

It is essential that courts be experienced by families as supportive—rather than confusing or divisive, as is too often the case—and that provisions be made for communication between courts and consolidating actions arising in different courts. The development of unified family courts is the principal way of achieving this goal.²¹ Further, to build a cadre of effective bench officers, the special expertise of family judges needs to be acknowledged by providing specialized training opportunities and incentives for career advancement within family court.

These and many other reforms are necessary if the court is to provide leadership in a

¹⁹ Shear, L. E. (1998), From competition to complementarity: Legal issues and their clinical implications in custody, in K. D. Pruett and M. Kline-Pruett (Eds.), *Child and Adolescent Psychiatric Clinics of North America: Child Custody*, 1998, pp. 311-334; Wallerstein, J. S. (1991), Tailoring the intervention to the child in the separating and divorced family, *Family & Conciliation Courts Review*, 29(4), 448-459. This approach is also consistent with the emphasis upon developing a parenting plan, rather than deciding who is the better parent (Tompkins, R. [1995], Parenting plans: A concept whose time has come, *Family & Conciliation Courts Review*, 33, 286-297).

²⁰ King, D. B. (1993), Accentuate the positive -- Eliminate the negative, *Family & Conciliation Courts Review*, 31, 9-28; King, D. B. (1997), Judicious interventions, *Family Advocate*, 19, 22-24; La Mar, K. (1996), Judicially hosted settlement conferences in domestic relations cases, *Family & Conciliation Courts Review*, 34, 219-228.

²¹ The numerous reform efforts around the U.S. and other countries to produce Unified Family Courts are aimed to produce a court system that is more rational and responsive to family problems, see e.g. Kaye, J. S., & Lippman, J., 1998, New York State unified court system: Family justice program, *Family & Conciliation Courts Review*, 33.

collaborative approach. Even so, the court, by itself, cannot provide answers to what a divorcing family needs. In partnership with the court, each of the helping professions must reorient its focus to these same primary goals.

The Role of Attorneys in Escalating Conflict and the Need for Shifting Roles²²

Traditionally, the family law attorney's role has been to initiate action from a purely partisan perspective, to strategically maneuver the presentation of evidence and evoke statutes and case law in order to win the client's case. Attorneys contribute to rather than resolve disputes when they are wedded solely to their advocacy role within an adversarial judicial system.²³ Advising the client not to talk to the other spouse, making extreme demands to increase the bargaining advantage, and filing motions that characterize the other parent in a negative light, are all typical examples. Needing to show evidence of neglect, abuse, physical violence, or emotional or mental incompetence in order to win their client's case, attorneys produce emotionally charged documents that become a public record of charges and counter-charges, citing—often out of context—the unhappy incidents and separation-engendered desperate behaviors of the emotionally vulnerable parties. The consequent public shame, guilt and fury at being so one-sidedly represented motivates the other party's compelling need to set the record straight in costly litigation. Invariably, attorneys cite their advocacy role to rationalize and justify their intractable adversarial stance. A typical example:

Following four years of litigation and a full custody evaluation regarding the mother's right to move away to the east coast, which clearly questioned the

213-239.

²² Mosten, F. S. (1995). Emerging roles of the family lawyer: A challenge for the courts. *Family & Conciliation Courts Review*, 33, 213-239.

²³ Weinstein, J. (1997). And never the twain shall meet: The best interests of children and the adversary system. *University of Miami Law Review*, 52, 79-176.

mother's parenting capacity compared to the father's, Mrs. K's attorney insisted on pursuing a custody trial, subjecting nine-year-old Jacob to a stressful interview with the judge. In response to the therapist's pleas on behalf of the child, the attorney answered, "I hear your concerns, but my only responsibility is to my client." He then proceeded to argue the case on a technical point, subjecting the family to six more months of costly litigation. The boy attempted to maintain a tenuous loyalty to both parents, became confused, and began to lie profusely, telling each parent what he/she wanted to hear. Of course, this justified the mother's custody suit. Fifteen years later, Jacob is still stung by the fact that his mother blamed him for the legal expenses she incurred "on his behalf" when she found out he had lied.

The new collaborative approach by lawyers assumes that clients are profoundly interested in the effect of one parent's "victory" on the lives of their children, and it assumes a need for an ongoing, working relationship with the other spouse/parent. From this collaborative perspective, the family attorney's role involves counseling each client fully on their rights and responsibilities as a parent and as a co-parent, and exploring deeply the ramifications of all of their actions on the welfare of the children. Attorneys can then responsibly and ethically advocate their clients' more clearly defined and deeply explored interests.²⁴ When both attorneys pursue these goals in concert, creative win-win solutions are more likely to be generated.

Further, attorneys play a vital role in guarding against the dangers inherent in a collaborative approach that could become collusive. There is a potential threat for new

²⁴ Pedrone, N. (1998). Lawyer's duty to discuss alternative dispute resolution in the best interests of children. *Family & Conciliation Courts Review*, 36, 65-89.

collaborative models of alternative dispute resolution to compromise clients' civil liberties by subjecting families to unwarranted intrusiveness by outside agencies, including the vagaries and biases of an over-zealous mental health approach. Family attorneys are needed to draft creative but unambiguous stipulations and court orders with sufficient detail to, first, protect their client's civil rights, and, second, to provide the kinds of external structures and constraints that allow families fragmented by ongoing conflict to proceed with some semblance of order and safety.

The Role of Mental Health Counselors in Fueling Conflict and the Need for Shifting Roles

Traditionally, therapists, who see only one of the parties to the divorce conflict, can encourage uncompromising stands, reify distorted views of the other parent, write recommendations, and even testify on behalf of their adult client with little or no understanding of the child's needs, the other parent's position, or the couple and family dynamics. Furthermore, too often therapists are willing to begin treatment of a child in a custody dispute at the request of only one parent, and with no authority from the court.²⁵

During their turbulent separation, Mrs. P sought help from a psychiatrist who at first characterized her as "chronically depressed, suicidal, and rejecting of the child." Mrs. P soon became very dependent upon her psychiatrist. In attempts to stabilize her labile emotional states and shifting views of the world, he quickly helped her feel better by agreeing with her views that her husband was indeed "ruthless, manipulative and possibly sociopathic." In actuality, he had never met the father. Moreover, in an attempt to help the mother with her parenting, he began treatment of the child. The father became extremely defensive and then

²⁵ Johnston & Campbell (1988) op. cit.

irate about the psychiatrist's treatment of his child without his consent. He wrote belligerent letters to the psychiatrist, threatening a malpractice suit. The psychiatrist then testified against the father before the judge and reported the father's threats as evidence in his testimony.

Traditionally, mental health professionals who undertake therapy with parents and children pursue their investigation into the emotional lives of their clients in isolation from the legal decision-making process. Under the rationale of client confidentiality, they work behind closed doors, too often oblivious to the fact that divorcing families are further fragmented by competing demands from professionals with access to different information, different perspectives and different agendas. This has resulted in situations, for example, where a child who refuses to visit a father is viewed by the mother's mental health consultant as having been "sexually molested" and by the father's therapist as a child who is suffering from "parent alienation syndrome." Attempting any intervention to effect a reconciliation of such a child with the father is doomed, because the parents are intractably wedded to the views of their supportive advocates, and they will wage court battles or even abduct their children with absolute moral conviction of their rectitude.²⁶

Contrary to popular belief, parents in entrenched custody disputes are not characteristically aggressive, hostile or spiteful people. Psychological testing of parents in high-conflict divorce and custody evaluations indicates that, as a group, these people are interpersonally sensitive and hypervigilant to criticism. They often lack a firm approach to

²⁶ Johnston, J. R., & Girdner, L. K. (1998). Early identification of parents at risk for custody violations and prevention of child abductions. *Family & Conciliation Courts Review*, 36, 392-909.

solving problems, reason idiosyncratically and tend to cognitively simplify their world.²⁷ This makes them especially vulnerable to conflicting views of professionals and a legal system that polarizes positions around blame and fault finding. The worst possible scenarios occur in those high-profile cases where the parents' mental health and legal professionals squabble among themselves about the case, playing out the parental dispute in a community or court arena.

Within a collaborative paradigm such as we are suggesting, mental health counselors view it as their ethical obligation to triage and coordinate with other involved professionals in working with separating and divorced families. This approach necessitates reaching consensus about clinical goals, prognosis and intervention strategies, ensures that clients are spending their money and emotional energy in the most effective ways, and promotes healing for both the child and the family. A mental health counselor who undertakes therapy with any part of a divorcing family has the responsibility to rethink issues of confidentiality and lines of communication right from the outset (by obtaining appropriate parental permission), lest the intervention inadvertently harm rather than help. Furthermore, when differences of opinion arise, each individual professional has an ethical responsibility to initiate contact with the other professionals involved to resolve differences. If this is not possible, the intervention of choice is to call a strategy conference with all players of the disputing network, preferably before their respective positions have hardened. In these kinds of cases, the court should have the authority to bring the parties to

²⁷ Ehrenberg, M. F., Hunter, M. A., & Elterman, M. F. (1996), Shared parenting agreements after marital separation: The roles of empathy & narcissism. *Journal of Consulting & Clinical Psychology*, 64(4), 808-818; Hoppe, C. F., & Kenney, L. M. (1994, August). A Rorschach study of the psychological characteristics of parents engaged in child custody/visitation disputes (paper presented at the 102nd Annual Convention of the American Psychological Association, Los Angeles); Walters, M. G., Lee, M. S., & Olesen, N. (1995, March). Rorschach findings about parenting capacities of parents in protracted custody disputes (paper presented at The Society for Personality Assessment, Atlanta, GA).

the negotiating table. This meeting can be used to design a strategy for case management or resolution and is often the first order of business in a custody dispute that appears out of control.

How Custody Evaluators Can Help or Hinder the Process

Custody evaluations are a source of inordinate stress and shame for many vulnerable parents. Despite the fact that during the past decade, a number of professional organizations have developed standards of practice for custody evaluations,²⁸ further thought needs to be given to how they are conducted. Within a litigation-conscious arena, evaluators may become more focused upon establishing their technical expertise and protecting their own professional reputations than upon the needs of the family.²⁹ This can result in inappropriately exhaustive and intrusive negatively-biased assessments and reports. Among the possible negative influences of mental health professionals are written evaluations of the parents during the upheaval of the separation that explain the situation solely in terms of the individual psychopathology of the spouses. Psychodiagnostic terms, such as "paranoid, alcoholic, narcissistic, sociopathic, violent, or battered woman's syndrome," reduce the explanation of complex marital dynamics to the psychological or moral capacities of the individual parents, clearly pathologizing and blaming one of the parties. These evaluative declarations, and many psychological tests that are used to support them, are often not clearly related to each parent's ability to care for the child.³⁰

Moreover, such psychodiagnostic terms have special technical meanings within the mental health

²⁸ American Psychological Association (APA) (1992). Ethical principles of psychologists & codes of conduct, *American Psychologist*, 47, 1597-1611; American Psychological Association (APA) (1994), Guidelines for child custody evaluations in divorce proceedings, *American Psychologist*, 49, 677-680; Association of Family & Conciliation Courts (AFCC) (1995), *Model standards of practice for custody evaluations*, Madison, WI; Gould (1998) op. cit.; Herman, S. P., et al., (1997), Practice parameters for child custody evaluation, *Journal of the American Academy of Child & Adolescent Psychiatry*, 36, 57-69.

²⁹ In fact, as forensic experts, custody evaluators are primarily servants of the court (Gould, J. [1998], *Conducting scientifically crafted child evaluations*, Thousand Oaks, CA: Sage).

³⁰ Hysjulien, C., Wood, B., & Benjamin, G. A. H. (1994). Child custody evaluations: A review of methods used in

professions. When used in public or in court, they become pejorative labels strategically employed to degrade or destroy the reputation of one parent and "win" custody for the other. When made known to the divorcing spouses and their legal counsels, these authoritative declarations as to the character of each parent serve to solidify already negative, polarized views, which then become "written in stone," ensuring that the dispute will continue.

An alternative, conflict-reducing approach requires custody evaluators to pay more attention to prescribing how the family can resolve its impasse, the ways in which children can have access to the positive contributions of each parent, and how the children's development can be protected, rather than assessing who is and who is not emotionally disturbed, and who is and who is not "the better parent."³¹

To ensure that all parties have similar expectations and to avoid unnecessary intrusiveness and cost, it is helpful for the court to define a specific scope and purpose for the evaluation.³² In many instances, custody evaluations can focus on particular issues (for example, which school the child should attend), and only where necessary does it need to encompass a complete family study involving psychological testing of all members, school and home visits, substance abuse assessments, child abuse and molestation investigations.

Procedures for appointing evaluators, and for re-evaluations when a custody report is contested, need to be carefully considered so as not to subject the child and family to the inordinate stress of multiple assessments. Evaluators can serve the child most effectively if they are impartial experts appointed by the court, or by stipulation of the parties, and if they are

litigation and alternative dispute resolution. *Family & Conciliation Courts Review*, 32, 466-489.

³¹ Roseby, V. (1995). Uses of psychological testing in a child-focused approach to child custody evaluations. *Family Law Quarterly*, 29, 97-110.

³² Gould (1998) op. cit.

provided with access to all family members. If the custody report is contested, a second evaluator appointed in the same manner should not expect to re-evaluate the family directly; rather he or she should review the procedures, findings and recommendations of the first evaluator to determine whether they conform to professional standards, ethics and scientific rigor.³³ If an update on the custody evaluation is needed, it follows that in the interests of continuity of care and cost-effectiveness, the first evaluator should be re-appointed unless there is indication that standards of practice were initially violated.³⁴

Explicit prior arrangements should be made regarding the manner in which the final custody report will be disseminated and reviewed, if the family is to make good use of this information. Optimally such an arrangement should be made in writing and signed by both parties and their attorneys. Allowing parents to hear the contents of a report from his or her attorney, in chambers, or in court, rather than in privacy with the evaluator, reinforces the win/lose mentality of the litigation, and is most likely to exacerbate the parents' sense of shame and helplessness. On the other hand, having the opportunity to review the report with its author offers a greater potential for diffusing the conflict and ensuring that the parents really hear what the report has to say about the needs of the child over the short and long term.³⁵

Alternative Programs to Litigation: Who Needs What Kind of Help and When?

If we agree that conflicted custody cases are, in part, exacerbated and entrenched by

³³ See note 28. Scientifically acceptable procedures for interviewing and protocols for investigating alleged child abuse have also been developed to guide practice. Brown, T., Fredrico, M., Hewitt, L., & Sheehan, R. (1998), Problems and solutions in the management of child abuse allegations in custody and access disputes in the family court, *Family & Conciliation Courts Review*, 36, 431-443; Ceci, S. J., & Bruck, M. (1995), *Jeopardy in the courtroom: A scientific analysis of children's testimony*. Washington, DC: American Psychological Association.

³⁴ Stahl, P. (1996). Second opinions: An ethical and professional process for reviewing child custody evaluations. *Family & Conciliation Courts Review*, 34, 386-395.

³⁵ Roseby, V. (1995). op. cit.

traditional adversarial proceedings and by inappropriate responses from mental health professionals, important social policy questions then arise as to what is needed in terms of a more responsive system of legal and mental health care for separating and divorced families in our courts and communities. A procedural system that has been evolving in many jurisdictions, albeit piecemeal, comprises a spectrum of services which begin with preventive measures that are minimally intrusive and designed for the broadest population of families—such as divorce orientation, parenting education, mediation and collaborative law. Those who fail to settle through these means are referred to other, progressively more intrusive treatment interventions that wed mental health interventions to the social control mechanisms of the courts—such as therapeutic interventions, custody evaluations, ongoing coparenting counseling, arbitration or special masters, and various kinds of supervised visitation.³⁶

This procedural organization rests on the principle that family courts should provide the least intrusive intervention into the private life of families that is sufficient for them to care for their children. While it is an improvement over a one-service-fits-all approach to divorcing families, many court staff and administrators are questioning whether the progressive steps model is the optimal solution. Do some families have to fail successively at each level of service until they get the kind of help they really need? Are there more efficient and less painful ways of matching families to the most effective kind of service? A different approach is to consider the array of services listed above as alternatives that can be made available with access governed by appropriateness of fit for the particular family situation.

³⁶ Howe III, W., & McKnight, M. (1995). Oregon Task Force on Family Law: A new system to resolve family conflict. *Family & Conciliation Courts Review*, 33, 173-181.

The balance of this paper briefly defines each service and proposes some criteria for who benefits from each kind of service, and for whom each is contraindicated. It is important to note that the proposed criteria are mostly based upon observation and deduction, and in most cases not upon systematic research. By proposing a preliminary set of guidelines for the use (and misuse) of the range of these new dispute resolution forums, we hope to stir some debate which will contribute to a more discriminating articulation of professional roles and ethics in these new models of interdisciplinary practice.

Divorce Orientation/General Educational Programs

Separating parents embarking on divorce need easy access to preliminary information about legal procedures and the psychological process of divorce, custody options and legal rights of parents, the general needs of children for conflict-free access to both parents, ways to identify special issues like domestic violence, and the availability of services in the local community. Furthermore, if they are to make informed choices among the spectrum of alternatives in charting their course, separating parents as well as their professional advisors, courts, and community agencies need some guidance as to what services best match whose needs. This broad population needs to be educated by good publicly available information through various media such as books, videos, television and brief informational classes.³⁷

Evaluation of general divorce education programs is in its infancy.³⁸ Available data indicate high consumer satisfaction and increased knowledge and skills, but findings are mixed

³⁷ The vast majority of educational programs for divorcing families are from 2-4 hours' duration and are probably more aptly described as divorce orientation. Geasler, M. J., & Blaisure, K. R. (1999), The 1998 nationwide survey of court-connected divorce education programs, *Family & Conciliation Courts Review*, 37, 36-63; Blaisure, K. R., & Geasler, M. J. (1996). Results of a survey of court-connected parent education, *Family & Conciliation Courts Review*, 34, 23-40; Schepard, A. (1993). Educating divorcing and separating parents, *University of Michigan Journal of Law Reform*, 27, 133-227.

³⁸ Geasler & Blaisure, 1999, op. cit.

as to the extent to which this translates into better child and parent adjustment, or reduced conflict and litigation.³⁹ The social policy question of whether these programs should be mandated has been strongly debated. More thought needs to be given as to when parents in crisis are amenable to education about their children and when such information is ineffective, or will be misconstrued and used in the service of furthering parental disputes.

Specialized Educational Programs

There is growing awareness that one size does not fit all in approaches to parenting education. For instance, there is a need for special educational programs for never-married parents.⁴⁰ some of whom may have never lived together or established any kind of working coparenting relationship. Many parents have new partners and extended kin who play extensive roles in the child rearing. There is also a pressing need to adapt parent educational programs to meet the needs of various ethnic groups,⁴¹ where language barriers and different cultural conceptions about family and child rearing make divorce adjustment different from that in North American Caucasian families and at variance with presumptions in U.S. laws about what kinds of custody arrangements are in the best interests of children.

³⁹ Arbuthnot, J., & Gordon, D. A. (1996), Does mandatory divorce education for parents work?, *Family & Conciliation Courts Review*, 34, 60-81; Arbuthnot, J., Kramer, K. M., & Gordon, D. A. (1997), Patterns of relitigation following divorce education, *Family & Conciliation Courts Review*, 35, 269-279; Gray, C., Verdick, M. J., Smith, E. D., & Freed, K. (1997), Making it work: An evaluation of a court-mandated parenting workshop for divorcing families, *Family & Conciliation Courts Review*, 35, 280-292; Kramer, L., & Kowal, A. (1998), Long-term follow-up of a court-based intervention for divorcing parents, *Family & Conciliation Courts Review*, 36, 452-465; Pearson, J. (1996). Child access projects: An evaluation of four access demonstration projects funded by the Federal Office of Child Support Enforcement, *The Center for Policy Research*, Denver, CO 80218.

⁴⁰ Raisner, J. L. (1997). Family mediation and never-married parents. *Family & Conciliation Courts Review*, 35, 90-101.

⁴¹ Schwartz, M. S. (1996). Bringing PEACE to the Latino community: Implementing a parent education program. *Family & Conciliation Courts Review*, 34, 93-111; Zegarra, G. (1998), Educando a la familia Latina: Ideas for making parent education programs accessible to the Latino community, *Family & Conciliation Courts Review*, 36, 281-293.

While divorce adjustment groups for adults have long been recognized as naturally supportive and cost-effective ways of helping, group interventions for children of divorce, where peer support helps to normalize painful and confusing experiences, have been relatively slower to develop.⁴² Divorcing families need special information about the developmental needs of children of all ages, but most especially about the needs of infants and young children. A young child's sense of security, trust and social-emotional development can be derailed during these critical early years by chaotic and inconsistent parenting styles.⁴³

High-conflict, violent and chronically litigating families need specialized educational programs. These are currently being developed in a number of jurisdictions following the recognition that general divorce information for this sub-group is either insufficient, ineffective or simply inappropriate. In cases of domestic violence, general divorce education that encourages parental cooperation and communication may actually be dangerous for victims who are often subject to ongoing manipulation and control by the abusive partner after separation.⁴⁴ Cognitive-behavioral or skill-based approaches that teach effective communication and problem solving, and attempts to heighten parents' empathic awareness of the children's plight in conflicted custody, are the most important and effective components of these programs.⁴⁵ How to develop separate, "parallel" parenting arrangements governed by an explicit court order rather than attempting a cooperative coparenting relationship should be taught. In addition, some of these

⁴² Bolen, R. (1993). Kids turn: Helping kids cope with divorce. *Family & Conciliation Courts Review*, 31, 249-254; DiBias, L. (1996). Some programs for children. *Family & Conciliation Courts Review*, 34, 112-129; Petersen, V., & Steinman, S. B. (1994). Helping children succeed after divorce: A court-mandated educational program for divorcing parents. *Family & Conciliation Courts Review*, 32, 10-26.

⁴³ Johnston & Roseby (1997) op. cit.

⁴⁴ Fuhrman, G. S. W., McGill, J., & O'Connell, M. E. (1999). Parent education's second generation. *Family & Conciliation Courts Review*, 37, 24-35.

⁴⁵ Kramer, K. M., Arbuthnot, J., Gordon, D. A., Rousis, N. J., & Hoza, J. (1998). Effects of skill-based versus information-based educational programs on domestic violence and parental communication. *Family & Conciliation*

classes explain laws regarding the rights of both parents to custody and access, contempt proceedings, protection from domestic violence, management of abduction risk, criteria for child protective agencies to take action, and grounds for supervised visitation.⁴⁶

These specialized educational programs are appropriate for families who lack general knowledge about the laws and procedures of family and dependency courts, those who are overly dependent upon litigation to make parenting decisions, and those who are deficient in communication and problem-solving skills.⁴⁷ However, providing this range of information to all divorcing families is unnecessary and possibly alarming for the majority of them. Such programs are also probably inappropriate in situations requiring state intervention to protect victims: cases of serious allegations of child abuse, domestic violence, substance abuse, mental illness. And they are questionable for those character-disordered parents who tend to use educational information to further a strategic advantage in litigation.

Affordable Legal Services and Collaborative Law

There is a growing need for affordable legal consultation to help the large majority of divorcing families make the transition through separation and divorce. Large numbers of parents are now entering family courts without legal representation.⁴⁸ This raises the level of frustration and confusion for clients and court personnel alike. Moreover, it creates inefficiencies in court administration, and presents many ethical dilemmas for judges dealing with litigants who are

Courts Review, 36, 9-31.

⁴⁶ Kibler, S., Sanchez, E., & Baker-Jackson, M. (1994). Pre-contempt/contemnors group diversion counseling program: A program to address parental frustration of custody and visitation orders. *Family & Conciliation Courts Review*, 32, 62-71.

⁴⁷ See Johnston, J. R. (1999). *Developing and testing group interventions for families at impasse* (Final Report to the State-Wide Office of Family Court Services, AOC, Judicial Council of California, San Francisco) for a comparative evaluation of two court-sponsored programs for high-conflict families, the Contemnors' Educational Program of Los Angeles Conciliation Court and the Group Mediation Program of Alameda Family Court Services.

⁴⁸ Mosten, F. S. (1997). Unbundling legal services: What you need to know before taking the leap. *Oregon State Bar*

trying to represent themselves without knowledge of the law, due process, court rules or procedures. One response to this emerging, serious problem has been the “unbundling and rebundling” of legal services in an attempt to provide specific kinds of legal counsel at affordable rates with less than full legal representation. Safeguards for clients who receive partial or limited counsel and appropriate liability protection for the professionals involved need to be clearly specified in these cases.⁴⁹

The innovative practice of collaborative law is the most recent forum for dispute resolution as an alternative to litigation. In collaborative law, the parties and their attorneys commence the legal process of divorce by stipulating to complete, honest and open disclosure of all information, whether requested or not, and to engage in informal discussions and conferences for the purposes of reaching a settlement on all issues, with assurance that the process cannot be subverted in order to pursue traditional litigation.⁵⁰ All consultants retained by the parties (accountants, therapists and appraisers) are likewise directed to work in a cooperative manner. While specific issues of stalemate may be resolved by a pre-appointed arbitrator, the hallmark of this process is that litigation using collaborative lawyers is not an option, nor are the work products of this process available to any other attorneys who may litigate.

Because this dispute resolution method is so new, there is little systematic information about its outcomes. Unlike mediation, collaborative law benefits parties where there is a need to retain the advocacy role of each attorney. This is especially important to protect against imbalances of power between the parties.⁵¹ Collaborative law motivates creative “win-win”

Bulletin, 57, 10-16.

⁴⁹ Ibid.

⁵⁰ Tesler, P. H. (1996). Collaborative law: A new approach to family law ADR. *Conflict Management*, 2, 12-17.

⁵¹ Grillo, T. (1991). The mediation alternative: Process dangers for women. *Yale Law Journal*, 100(April), 1545-1610.

solutions, and decreases the high costs of formal fact finding, depositions, preparation of briefs, filing of motions, etc. However, these new practices demand the highest ethical standards of practice; consequently, some of the corresponding risks are lack of scrutiny and accountability when informal legal procedures are used, and the cost of starting again from scratch in court if they are unsuccessful. There are also concerns about inequities in the administration of justice by developing separate tiers or private levels of justice for people who can afford collaborative law, compared to those who use the public forum of the courts. For these reasons, in cases where there is distrust between the legal advocates, inability of the attorneys to maintain appropriate client control, or serious concerns about abuse and exploitation, the parties may be better protected in family court.

Mediation

Brief, confidential mediation is fairly widely available in the U.S., both publicly and privately. This forum uses a neutral third party to help parents develop custody and visitation plans (in most public settings) and both financial and child custody settlements (in the case of many private providers). Mediation focuses on problem resolution of specific issues and does not involve psychological counseling and therapy. In California, about 20-30% of the total population of separating families file in court to resolve their disputes over the care and custody of their children and are mandated to use this kind of brief mediation.⁵² This kind of issue-focused mediation resolves fully one-half to two-thirds of all custody and access disputes that enter into court.⁵³ This solidly researched “success rate” of mediation supports the philosophy

⁵² Maccoby & Mnookin, 1992, op. cit.

⁵³ Depner, C. E., Cannata, K., & Ricci, I. (1994), Client evaluations of mediation services: The impact of case characteristics & mediation service models, *Family & Conciliation Courts Review*, 32, 306-325; Depner, C. E., Cannata, K., & Ricci, I. (1995), Report 4: Mediated agreements on child custody & visitation: 1991 California family court services snapshot study, *Family & Conciliation Courts Review*, 33, 87-109; Emery, R. E. (1994),

that most couples have the capacity to re-order their lives in a private, confidential setting, according to their personal preferences, with the relatively limited help of a mediator who focuses on concrete issues.

The primary indications for a successful outcome in mediation are parents, who with the mediator's help, demonstrate the capacity to contain their emotional distress and focus on their children's issues. Mediating parents who can behave somewhat rationally with each other and who have a history of parental cooperation tend to have more successful outcomes. Despite high levels of anger and conflict, these individuals can more easily distinguish their children's needs from their own, and tend to acknowledge, if sometimes begrudgingly, the value of the other parent in the children's lives. It is generally asserted that brief mediation of divorce disputes, especially if offered early on, is an effective preventive measure, and mediation is the intervention of choice for tailoring access schedules to fit the specific individual needs of children and families. On the other hand, mediation is inappropriate where there are serious concerns about abuse, violence, and mental illness. In such cases, some kind of non-confidential screening and assessment is needed with a follow-up custody evaluation if warranted.

Custody Evaluation

Custody evaluations involve fact-finding by a qualified mental health professional and a written report with recommendations presented to court. Although extremely effective in producing settlements and aiding judicial decisions (85-90% settle), such stipulations/court orders are twice as likely to be relitigated compared to those that are settled voluntarily.⁵⁴

Renegotiating family relationships: Divorce, child custody & mediation, NY: Guilford Press; Kelly, J. B. (1996), A decade of divorce mediation research: Some answers and questions, *Family & Conciliation Courts Review*, 34, 373-385; Maccoby & Mnookin, 1992, op. cit..

⁵⁴ Ash, P., & Guyer, M. J. (1986a). Child psychiatry and the law: The functions of psychiatric evaluation in contested custody and visitation cases, *Journal of the American Academy of Child Psychiatry*, 25, 554-561; Ash, P.,

Custody evaluations are also very costly, and they do not help with ongoing coparenting problems. To date, custody evaluations have generally been the standard option when families are unable to settle through mediation and attorney negotiation. A collaborative approach, however, questions whether a custody evaluation is the optimal way of using family resources when mediation fails.

Where parents have extremely discrepant views of their child's needs, a confidential child-focused psychological assessment may suffice.⁵⁵ Often an objective assessment of the child's needs can be the basis for further mediation, counseling or a recommended settlement. Formal custody evaluations can then be reserved for serious allegations of child abuse, neglect and molest, as well as contested claims of parental psychopathology, substance abuse or domestic violence. If these allegations are substantiated, the court will need to impose a protective custody arrangement and a plan for monitoring it. Note that where the facts are not really in dispute, serious family or individual dysfunction need not be evaluated further.

Therapeutic Intervention

This type of intervention (also called family "impasse-mediation") involves a combination of confidential counseling and mediation to resolve the psychological and family problems that contribute to chronic disputes or stalemates in reaching a custody settlement.⁵⁶ This intervention is undertaken by child and family therapists who are also experienced divorce

& Guyer, M. J. (1986b), Relitigation after contested custody and visitation evaluations, *Bulletin of the American Academy of Psychiatry and the Law*, 14, 323-330; Hauser, B. B. (1985), Custody in dispute: Legal and psychological profiles of contesting families, *Journal of the American Academy of Child Psychiatry*, 24, 575-582.

⁵⁵ Mosten, F. S. (1992). Confidential mini-evaluation. *Family & Conciliation Courts Review*, 30, 373-384.

⁵⁶ Families can be seen individually or in groups of 5-8 other families. Children are always included in the intervention which is usually relatively brief (25-40 hours). Johnston & Campbell (1988), op. cit.; McDonough, H., Radovanovic, H., Stein, L., Sagar, A., & Hood, E. (1995), *For kids' sake: A treatment program for high-conflict separated families (Parents' group manual)*, Family Court Clinic, Clarke Institute of Psychiatry, 250 College Street, Toronto, Ontario, M5T 1R8 Canada. This model of service has also been adapted and used within Alameda County

mediators. They begin by taking a history of the parental disputes, identifying the family dynamics that have created the impasse, and then seeking to understand how the parental conflict is affecting the children. This information is used in brief, strategic therapeutic interventions and counseling with the family members, the goal being to develop psychologically sound child access plans and to help the parents through the emotional divorce. Unlike issue-focused mediation, the completion of a custody and access agreement is not seen as an end in itself. The attorney's role is to set up the treatment contract, translate the agreements reached into court orders, and take unresolved issues back to another dispute-resolution forum.

A series of studies have indicated that about two thirds of cases that have failed brief issue-focused mediation have been successful using these therapeutic interventions, i.e. they are able to be settle and stay out of court over a two-four-year period.⁵⁷ Specifically, this type of intervention is useful when emotional issues intrude and disrupt the regular mediation or attorney negotiations. Such emotional turmoil can emanate from acute reactions to the humiliation and loss inherent in the divorce, from a recent traumatic separation experience, or when parents are so preoccupied with their own pain that they cannot respond to their children's acute distress. Family "impasse mediation" is also the method of choice when there is "tribal warfare"—that is, where new partners, extended kin and professionals become embroiled in the dispute. However, this forum is not appropriate for serious allegations of abuse and, although helpful, it is insufficient for cases where there is serious parental character pathology.

Family Court Services (Johnston, 1999, op. cit.).

⁵⁷ Johnston & Campbell, 1988, op. cit.; Johnston, J. R. (1993), *Developing preventive interventions for children of severe family conflict and violence: A comparison of three models* (Technical Report of the Center for the Family in Transition, Corte Madera, CA); Johnston, J. R. (1998), *Prevention of parent or family abduction of children through early identification of risk factors. Stage II, Part B* (Final Report to the Office of Juvenile Justice & Delinquency

Co-Parenting Coordination and Arbitration

Co-parenting coordination is a service for separated and divorced families who need ongoing help coordinating parenting and responding flexibly to the needs of their children throughout their developmental changes, and sometimes throughout their entire growing-up years. It may be needed as a longer-term extension to therapeutic intervention, or it may be instituted after a custody evaluation in order to help families implement and monitor a parenting plan. Co-parenting counselors are generally mental health professionals who use primarily counseling and mediation techniques, but do not arbitrate. They may or may not testify in court. The use of co-parenting arbitrators (variously called special masters, wise persons, or custody commissioners), on the other hand, involves the appointment, by stipulation of the parties, of an mental health or legal professional who is experienced in custody matters, to manage ongoing conflict and help parents make timely decisions for their children over the long term. Occasionally such decisions may be challenged in court, at which time the arbitrator may have to testify.⁵⁸

There are many variations but, broadly, there are two main types of co-parenting arbitrators: one where he or she acts solely as arbitrator and is called in to settle an issue only when the parents and their other helpers cannot reach settlement; and the other where the arbitrator acts as the parenting coordinator and mediator, and in addition has arbitration powers when the couple reach stalemate. Various arguments can be made in favor of each type, the principal one being that whereas the first type (pure arbitration) avoids dual roles, the second type (the use of arbitration as a last resort) is more efficient.

Prevention, Department of Justice, Washington, DC).

⁵⁸ Zibbell, R. A. (1995). The mental health professional as arbitrator in post-divorce child-oriented conflict. *Family*

A detailed stipulation/court order needs to be prepared by the attorneys to address the terms of appointment, including how the co-parenting coordinator or arbitrator is to be chosen and how he or she will be terminated, domains of decision-making, methods of conflict resolution to be used, procedures for bringing an issue to him/her, permissible lines of communication with all parties (family members, children, collaterals and other professionals), payment for services, rules for when decisions should be made as court orders, and procedures for challenging an arbitrated decision in court.

Following almost a decade of development of this service, co-parental arbitration has emerged as an important adjunct to family courts in a number of jurisdictions. Although preliminary outcome data indicate dramatic decreases in relitigation and moderate levels of consumer satisfaction when these kinds of arbitration are used,⁵⁹ there are no studies to date which systematically evaluate their effectiveness in other ways (e.g. cost, benefit to children, decrease in disputing, improvement in co-parental and parent-child relationships). With the rapidly expanding use of this powerful and potentially intrusive intervention, there are rising concerns about ethical standards, procedural guidelines, training, and licensing requirements for this new professional practice.

It is generally believed that co-parenting arbitrators are appropriate for chronic litigants and entrenched custody conflicts emanating from serious psychopathology and personality disorders in parents who have parenting deficits. They can be used to monitor potentially abusive situations involving domestic violence and intermittent mental illness of a parent. They can also

& *Conciliation Courts Review*, 33, 462-471.

⁵⁹ Johnston, T. (1994). Summary of research on the decrease of court involvement after the appointment of a special master (paper presented at the Special Masters Training Conference, Palo Alto, CA; Vick, M. H., & Backerman, R. (1996, March). Mediation/Arbitration: Surveys of professionals & clients (paper presented at the Boulder Interdisciplinary Committee on Child Custody, Boulder, CO).

be used for children who are very young or who have special medical needs, where parents cannot communicate sufficiently to coordinate the care of the child in a timely manner.

However, appointing an arbitrator is not appropriate as a routine response for difficult, high-conflict cases where the family crisis is acute but temporary. The process should not be used where custody and access plans have not been established by the court, in the first place, nor for major changes of custody and other circumstances. Nor is it appropriate for cases that need a thorough investigation of abuse claims. Most important, it is not appropriate in cases where the professionals are squabbling among themselves. It is unfair to burden families with the cost and complication of another professional in their lives when those currently involved in the case cannot agree on its direction.

Supervised Visitation and Monitored Exchange

The purpose of supervised access is to provide a protected setting for parent-child contact with a neutral third person monitoring the contact or exchange of the child between parents.⁶⁰ A court order dictates the requirements for visit supervision. This specialized service, generally staffed by trained volunteers under the direction of a professional coordinator, has grown rapidly across the U.S. and internationally during the past decade.⁶¹ It is appropriately used where a victim-parent and child are at risk because of ongoing high-conflict and threat of domestic

⁶⁰ Clement, D. A. (1998). A compelling need for mandated use of supervised visitation programs, *Family & Conciliation Courts Review*, 36, 294-316; Straus, R., & Alda, E. (1994). Supervised child access: The evolution of a social service, *Family & Conciliation Courts Review*, 32, 230-247; Standards and guidelines for supervised visitation network practice (1998), *Family & Conciliation Courts Review*, 108-135.

⁶¹ Large scale descriptive evaluations of supervised services have been conducted in Australia, Canada and the U.S. Abramovitch, R., Jenkins, J., & Peterson-Badali, M. (1994), *Evaluation of the supervised access pilot project: Final report*. Toronto, Canada, Ministry of the Attorney-General Policy Development Division.; Pearson, J., & Thoennes, N. (1997). *Supervised visitation: A portrait of programs and clients*. Center for Policy Research, 1720 Emerson St., Denver, CO 80218; Strategic Partners Pty. Ltd. (1998). *Contact services in Australia: Research and evaluation project year one report*, Attorney-General's Department, Barton ACT 2600. Very few program evaluations are available (e.g. Lee, D., Shaughnessy, J. J., & Bankes, J. K. (1995). Impact of expedited visitation services, a court program that enforces access. *Family & Conciliation Courts Review*, 33, 495-505).

violence. This kind of protected setting is also needed for parent-child contact when the child is at high risk because of a parent's mental illness, substance abuse problems, history of emotional, physical abuse or molest, or there is a threat of child abduction.

Supervised access should not be a dispositional alternative when an indigent family cannot afford other types of services.⁶² For example, it is inappropriate to use supervised visitation as a replacement for an evaluation of serious allegations of abuse, or in lieu of more costly therapeutic counseling for the child or parent. Although it can be used as a short-term neutral setting for parent-child contact during a chaotic or traumatic parental separation, or while an investigation is being undertaken, it is unfair to subject a parent to supervised visitation, when allegations are unfounded, in order to quiet the fears of the accusing parent. On the other hand, it is also wrong to use supervised visitation to ensure an abusive parent's right of access to the child when the child is chronically uncomfortable and distressed by that access.⁶³

It is becoming apparent that a continuum of different kinds of affordable, and specialized access services are needed in court-community partnerships in order to help parent-child relationships in the high-conflict families:

- Re-connection/Re-Unification Assistance for non-custodial parents, mostly unmarried fathers, who have never been involved or who have been absent for a long period to become reacquainted with their young children in a comfortable, nurturing environment. In addition to some didactic instruction, it involves gradual introduction of the child to the parent and in-vivo demonstration of ways of relating to the child in a developmentally appropriate way.

⁶² Pearson, J., & Thoennes, N. (1996). Supervised visitation: Survey of service providers. *The Center for Policy Research*, Denver, CO 80218.

⁶³ Johnston, J. R., & Straus, R. B. (1999) Traumatized children in supervised visitation: What do they need? *Family & Conciliation Courts Review*, 37, 135-158.

- Parenting and Co-parenting in Domestic Violence Families. Currently domestic violence perpetrator and victim programs deal with the dynamics of abusive relationships in separate forums but touch little or not at all on parenting and co-parenting issues. Safe protocols for parental communication in domestic violence cases need to be developed to prevent the abusive parent from continuing to exercise control and manipulation of the victim, especially protocols that allow “parallel” rather than cooperative parenting. Children who have been damaged by witnessing family violence also need special help to deal with the residual, symptoms of post-traumatic stress disorder⁶⁴ and dysfunctional adaptation to chronic trauma.⁶⁵
- Therapeutic Supervision involves family intervention by a qualified professional counselor in cases where there has been a major violation of the child’s trust in the non-custodial parent (following abuse, abandonment, unsubstantiated molest allegations), or where an alienated child refuses to visit the rejected parent (in part because of the custodial parent’s actions). A number of experienced clinicians have expertise with therapeutic supervision, and systematic, theory-based approaches are currently being developed.⁶⁶

The Need for Coordination Between Community Services and Courts

In conclusion, and most important as we review the range of newly developed and revised services for our present-day separating and divorced families, especially those more extensive interventions designed for the high-conflict or embattled sub-group, we must be aware that with sophistication and differentiation of services that can better fit the multiple needs of

⁶⁴ Pynoos, R. S., & Eth, S. (1986). Witness to violence: The child interview. *Journal of the American Academy of Child & Adolescent Psychiatry*, 25, 306-319.

⁶⁵ Roseby, V., & Johnston, J. R. (1997). *High-conflict, violent and separating families: A group treatment manual for school-age children*. New York: Free Press.

⁶⁶ Duryee, M. A. (1999). *A model for therapeutic supervised visitation and a proposal for a family-community court*. Final Report to Family Court Services, County of Alameda, 1221 Oak St., Room 250, Oakland, CA 94612. Telephone (510) 272-6030.

these families, there is a corresponding need for coordination of these services with one another and with the court. The more intransigent conflict-ridden families are likely to be more troubled by indications of domestic violence, child neglect, molest and abuse, parental substance abuse, mental health problems, and child abduction. The family court's interventions must be closely orchestrated with interventions provided by community-based services: psychological and parenting counseling, substance abuse monitoring and treatment, batterers' treatment programs and victims' advocacy, and mental health services.

Case management protocols and time lines must be devised to coordinate, monitor and follow-up on progress for the case plans that have been ordered by the family court for many of these most troubled families and high-risk children. Otherwise, our interventions run the risk of further fragmenting vulnerable families rather than helping them, permitting families to fall through the cracks between different services, or leaving families forever suspended in the never-never land of an intrusive state intervention.

**The Guardian Ad Litem in Custody and Conflict Cases:
Investigator, Champion and Referee?**
by Dana E. Prescott

I. Introduction of a Futurist

The topic of this portion of the Symposium relates to the role of the guardian ad litem in highly conflicted custody cases. A dry analysis of the current state of law concerning guardians ad litem did not seem terribly interesting nor does it help the evolve creative solutions for the future. As professionals of every interest and experience, we can be certain that patterns are evolving within in the boundaries of the judicial system as it is driven by the sheer volume and intensity of conflict in modern parenting relationships.¹ For these reasons, it seemed more interesting to try to predict the future by casting an eye at the present: will the guardian ad litem be Investigator, Champion and Referee for children?²

In his famous book Future Shock,³ Alvin Toffler offer a futurist's appraisal of war and peace, family and foe, social growth and cultural stress. Unlike a fortune teller who only needs the spirits in the room to make a prediction, a futurist by definition gathers contemporaneous scientific, economic, technological, philosophical, religious and cultural

¹ Andrew Schepard, Parental Conflict Prevention Programs and The Unified Family Court: A Public Health Perspective, 32 Fam.L.Q. 95, 98 (1998).

² See Clark v. Alexander, 953 P.2d 145, 152 (Wyo. 1998) (the guardian ad litem's role "has been characterized as investigator, monitor and champion for the child").

³ Alvin Toffler, Future Shock (1970). [hereafter "Toffler, Future Shock"].

many fields of study, our Futurist begins with data culled from every area of study and seeks patterns by observing the contemporary environment in which parents conduct combat - the judicial system⁸ - for the purpose of predicting the role of the guardian ad litem in the courts of the future.

Toffler's admonition, of course, remains true when embarking on a path that tries to predict "facts" in a time of the "greatly accelerated rate of change in society."⁹ In "dealing with the future, at least for the purpose at hand, it is more important to be imaginative and insightful than to be one hundred percent 'right.' Theories do not have to be 'right' to be enormously useful. Even error has its uses."¹⁰ So what patterns are visible to the Futurist concerning the intervention of the judicial system in custody cases?

First, serial marriage,¹¹ non-marriage, divorce, separation, child protective proceedings, juvenile criminal proceedings, domestic violence and the general dislocation of children for economic, familial, or cultural reasons will remain unabated for the foreseeable future.¹² As Toffler wrote thirty years ago: "The family has been called the

Monday July 26, 1999 p. A15.

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Guardians ad litem and judges always do well to remember the "Heisenberg Indeterminacy Principle: 'The instrument of observation must be taken into account in the measurement of the object as well as in the determination of its position.' ..." Id. at 330.

⁹ Toffler, Future Shock, supra note 3 at 11.

¹⁰ Id. at 6.

¹¹

Thirty years ago, Toffler wrote that "serial marriage — a pattern of successive temporary marriages — is cut to order for the Age of Transience in which all man's relationships, all his ties with the environment shrink in duration." Id. at 252.

¹²

See generally Parenting Our Children: In The Best Interests of The Nation, A Report

'giant shock absorber' of society — the place to which the bruised and battered individual returns after doing battle with the world, the one stable point in an increasingly flux-filled environment. As the super-industrial revolution unfolds this "shock absorber" will come in for some shocks of its' own."¹³ The continuation of this familial shock, and the ensuing chaos, thereby impacts rates of psychotherapy and medical treatment, academic and employment failure, a lack of commitment to the existing political structure, and, more profoundly, the relationship between generations that traditionally transmitted the moral and ethical core of any successful society.

Second, courts will continue to be the vessel into which all of this chaos is poured. By necessity, the courts will evolve as more of a social agency than a separate constitutional branch of government charged with the issuance of judgments within the traditional boundaries of the "Law."¹⁴ Despite the claim that courts of equity have the flexibility to create unique, individualized "justice", judges often decide cases within what

to the President and Congress submitted by the U.S. Commission on Child and Family Welfare 11-12 (1996) ("High rates of separation and divorce, as well as births to unmarried parents, have led to over a quarter of the Nation's children living with only one parent."); America's Children at Risk: A National Agenda for Legal Action: A Report of the ABA Presidential Working Group on the Unmet Legal Needs of Children and Their Families (1993).

¹³ Toffler, Future Shock, *supra* note 3 at 238.

¹⁴

This trend may be found most particularly in the domestic violence area and juvenile courts. A parallel evolution is occurring as public school systems are forced to act as *parens patriae*. See Linda D. Elrod, Restructuring Schools as Families: Report of a Conference, 28 Fam.L.Q. 347 (1994); Mark P. Gergen, A Priest Responds to the Bean Counters: Leo Katz on Evasion, Blackmail, Fraud, and Kindred Puzzles of the Law, 22 Law & Soc. Inq. 879 (1997) ("Consequentialists, or bean counters, believe that the law should maximize human happiness, human welfare, or wealth.").

feminist scholars term a dialectic or binary logic: good/bad, best interests/detrimental interests, cooperation/interference, abuse/non-abuse or other pairings of this sort.¹⁵

Thirdly, the movement to make the courts “user friendly” has successfully convinced people that lawyers make “it” worse (whatever “it” may be).¹⁶ Usually, however, this institutional narcissism is driven by administrators at the appellate level and not trial judges who must cope daily with the onslaught of highly emotional case loads; most especially the explosion of private protection from abuse and harassment cases between private individuals. Consequently, the percentage of pro se litigants on one or both sides

¹⁵

See James A. Winders, Gender, Theory, and The Canon 44-47 (1991).

¹⁶

Ignoring the gender specific, the Maine Supreme Judicial Court's reasoning concerning the role of lawyers is no less meritorious today than a hundred years ago:

An order of men, honorable, enlightened, learned in the law and skilled in legal procedure, is essential to the beneficent administration of justice. The aid of such men is now practically indispensable to the orderly, accurate and equitable, determination and adjustment of legal rights and duties. While the right of every person to conduct his own litigation should be scrupulously respected, he should not be discouraged, but rather encouraged, in early seeking the assistance or advice of a good lawyer upon any question of legal right. In order that the lawyer may properly perform his important function, he should be fully informed of all facts possibly bearing upon the question. The person consulting a lawyer should be encouraged to communicate all such facts, without fear that his statements may be possibly used against him. For these reasons, the rule above stated should be construed liberally in favor of those seeking legal advice. It does not apply, of course, where it is sought to find a way to violate some law.

Wade v. Ridley, 87 Me. 365, 373 (1895).

of a family law case is increasing and the advent of forms, the Internet and abrogation of unauthorized practice of law rules, means this trend will continue.¹⁷

In the absence of lawyers, judges will need access to parenting education courses, mediators, guardians ad litem, therapists, and social workers within the court system.¹⁸ In practice, this reorganization of the courts to directly deliver social services to consumers rather than judgments based upon actual evidence, increases the need for more sensitive consideration of how the courts are going to facilitate these services, especially the protection of victims of domestic abuse/violence.¹⁹ Leaving aside budget limitations and political conflicts, successful delivery assumes a generation of professional service providers who can master the techniques of handling conflicts between parents without sufficient emotional, intellectual, and ethical/moral moorings to make non-selfish decisions for their baby. Judges cannot waive a wand that will suddenly imbue parents with a sense of honor, dignity, tact, cooperation, understanding and other traits that seemingly played a role in the negotiation and cooperation (it used to be called courtship) necessary to conceive a child. In words three decades old and eerily accurate:

¹⁷ The statistical data is compiled in Robert B. Yegge, Divorce Litigants Without Lawyers, 28 Fam.L.Q. 407 (1994).

¹⁸ Some of these issues are discussed in Forrest S. Mosten, Unbundling of Legal Services and The Family Lawyer, 28 Fam.L. Q. 421 (1994).

¹⁹ A fascinating article on this topic is Linda G. Miles, On The Other Side of Silence: Affective Lawyering for Intimate Abuse, 81 Cornell L.Rev. 1225, 1254 (1996) ("To address the emotional and doctrinal complexities and demands of particularized justice, some feminist theorists have proposed an agenda which adopts so-called relational notions of justice, that is systems which recognize social interaction and intimate relations as their cornerstone.").

As the present system cracks and the super-industrial revolutions rolls over us, as the armies of juvenile delinquents swell, as hundreds of thousands of youngsters flee their homes, and students rampage at universities in all the technosocieties, we can expect vociferous demands for an end to parental dilettantism.²⁰

The conundrum for the courts is what to do with those private decisionmakers (the lawful parents) who abdicate, by malfeasance or nonfeasance, the privilege to exercise parental authority by engaging in a level of chronic conflict that damages children from generation to generation.²¹ The presence of one or two chaotic parents fosters longer, more risky dissolution proceedings and a greater potential for post-judgment conflict for children.

This rather bleak picture is not helped by the court-system which is ill-equipped to perform such a function because it lacks the resources and funding to be social service agency and its constitutional and statutory traditions place ethical and legal limitations on its ability to make judgments that require micromanagement of people's lives. Even the most experienced trial judge has to follow rules of evidence and procedures that are necessary to the conduct of constitutionally valid trials.

²⁰ Toffler, Future Shock, supra note 3 at 243.

²¹

The notion of multigenerational patterns of child abuse is somewhat controversial but even assessing factors like poverty and stress, it is difficult not to accept the notion that "certain constellations of family and/or personality variables" increases the probability of parenting failure. See II The Handbook of Family Psychology and Therapy 910-28 (Luciano L'Abate ed. 1985). See also Marjory D. Fields, The Impact of Spouse Abuse on Children and its Relevance in Custody and Visitation Decisions in New York State, 3 Cornell L.J. & Pub. Pol'y. 221, 231 (1994) ("the tendency of child witness to model violent behavior is well established").

A fourth element for our Futurist arrives from the American Bar Association's most recent efforts to alter the legal profession as a profession by recommending the eradication of the rule that bars lawyers and non-lawyers from splitting fees and practicing together.²² The rather unfulfilling debate concerning the "unauthorized practice of law" in many states²³ is already a losing proposition even as the flood gates open. If the American Bar

²² See John Gibeaut, Practice Debate Heats Up, 85 A.B.A.L.J. 14 (1999); James Podgere, Ethics in 2000 and Beyond, 85 A.B.A.L.J. 96 (1999).

²³ For purposes of consumer protection, the most difficult task confronting legislatures and bar associations nationwide is defining non-lawyer practices and the tiers of services that could be provided to consumers by non-lawyers without the risk of unethical, negligent, or fraudulent representation. During the 1990's the public has been promised actual legal, or law-related, services by individuals or business entities in exchange for money. In other words, these services charge a fee for the legal document preparation of wills, trusts, divorces, bankruptcies, workers' compensation, and social security claims. Many of these "document" services involve potential or pending court or administrative proceedings in which two or more parties (whether spouses or a debtor and creditor or injured worker and insurer) must navigate the tension that erupts in litigation. Because the forms generated by these services necessarily define the legal rights and duties of the parties to each other (and third parties) the forms cannot be completed without legal advice defining, for example, marital or non-marital property, or whether a debt is dischargeable in bankruptcy. Once completed, these forms, often signed under oath, constitute admissions by a party that may waive forever the right to contest a fact or make a legal argument.

In several recent cases, courts have defined the unauthorized practice of law within the boundary of the ethical and legal duties of the professionally trained lawyer and the obligations of trust and confidentiality owed the consumer. See Statewide Grievance Committee v. Patton, 683 A.2d 1359, 1361 (Conn. 1996) (held that a business known as Docuprep of New England was practicing law. The practical approach is to consider each set of facts and determine whether it falls within the fair intendment of the term that requires in many aspects a high degree of legal skill and great capacity for adaptation to difficult and complex situations: "It is important to the welfare of the public that these manifold customary functions [of practicing law] be performed by persons possessed of adequate learning and skill and of sound moral character, acting at all times under the heavy trust obligation to clients which rests upon all attorneys."); The Attorney Grievance Commission v. Hallmon, 681 A.2d 510, 514 (Md. 1996) ("this court has always found it difficult to craft an all encompassing definition of the practice of law," but that the focus of the inquiry should be "on whether the activity in question required legal knowledge and skill

Association becomes the Anyone Bar Association, ethical dilemmas will be eliminated and lawyers can play a dual role, defined solely by court appointment.²⁴ As Toffler intimated in the context of technology, the "high velocity of change"²⁵ may be found in modern courtrooms where domestic violence advocates, government social workers, and others appear in "trial" roles and prosecute or assist pro se litigants so as to balance, with some legitimacy given the history of ignoring such power imbalances, the scales of advocacy. Justice will be administered without the nuisance of advocacy by lawyers.²⁶ When these developments are complete, and the court system is a social service agency, some

in order to apply legal principles and precedent.").

²⁴

A compendium of the ethical standards as they now exist may be found in Representing Children: Standards for Attorneys and Guardians ad litem in Custody or Visitation Proceedings, 13 J. Am. Acad.M.Law. 1 (1995); Proposed Standards of Practice for Lawyers Who Represent Children in Abuse of Neglect Cases, 29 Fam.L.Q. 375 (1995). The "purpose of appointing counsel for a minor child in a dissolution action is to insure independent representation of the child's interest and such representation must be entrusted to the professional judgment of appointed counsel within the usual constraints applicable to such representation." Knock v. Knock, 621 A.2d 267, 275-76 (1993). For an applicable discussion, see Symposium: "Should The Family be Represented as an Entity?" in Stevens H. Hobbs, Family Matters: Nonwaivable Conflicts of Interest in Family Law, 22 Seattle U.L.Rev. 57 (1998). And for another view, see Martin Guggenheim, Reconsidering The Need for Counsel for Children in Custody, Visitation and Child Protection Proceedings, 29 Loy.U. Ohio L.J. 209 (1998).

²⁵

Toffler, Future Shock, supra note 3 at 428. Despite ongoing government and corporate efforts, the Internet and its world-wide capacity to share information (and much misinformation) makes it doubtful that lawyers and judges can prevent the dilution of the legal profession; especially if the guild decides to dismantle itself.

²⁶

A discussion of the traditional roles of lawyers, including contested litigation, may be found in Mitchell S. G. Klein, Law, Courts, and Policy 72-77 (1984).

assume that representation of clients at the courthouse will fall to the more genteel tactics of non-lawyers.²⁷

The fifth element is the traditional role of the guardian ad litem and the increased need for those services. Over the years, states have permitted guardians ad litem to be attorneys, therapists, or other professionals in private custody cases, with the duties ranging from advocates to investigators.²⁸ Under the court order appointing the guardian ad litem, she is empowered with the right, obligation, and duty to make recommendations to the court concerning the best interests of the children. This delegation is for the purpose of assisting the court to act in the best interests of the child as a “wise, affectionate and careful parent.”²⁹ The trial court should clearly define the duties of the guardian ad litem at the time of appointment so as to minimize confusion as to whether that duty is “pure

²⁷

There are undoubtedly those within the legal profession who will argue that this is a good thing and that lawyers simply clutter up the pristine delivery of justice at the courthouse. This is not usually the view of trial judges who have to walk through the morass of angry folks bounding into the courthouse for a solution to their family conflicts. Forest S. Mosten, Unbundling Legal Services and The Family Lawyer, 28 Fam.L.Q. at 435 (“The legal and procedural barriers to pro se representation have been compounded by attitudes of both bench and bar.”). Appellate courts often write opinions stating that pro se litigants are to be treated the same as a party represented by a lawyer. See Richards v. Bruce, 691 A.2d 1223, 1225 (Me. 1997) (“We have long recognized the principle that pro se litigants are held to the same standards as represented litigants. ... Neither civil nor criminal litigants are afforded any special consideration because of their pro se status.”).

²⁸

An excellent summary of the history may be found in Ann M. Haralambie, The Child's Attorney: A Guide to Representing Children in Custody, Adoption, and Protection Cases 1-14 (1993). The skill to advocate for children is not a function of a particular license or education; though licensing is a legitimate check on unethical behaviors and education is a legitimate tool for acquiring insight and recognizing biases.

²⁹ See Cyr v. Cyr, 432 A.2d 793, 796 (Me. 1981) (“to choose the greater of two goods is admittedly easier than to identify the lesser of two evils.”).

representation, pure investigation, or a combination."³⁰ Once the investigation is completed and the guardian ad litem issues her report, a hearing is necessary because the trial court is entitled to accept or reject the findings and conclusions after reviewing the qualifications, intelligence, scope of investigation, and validity of the conclusions.³¹ Ignoring specific titles such as attorney ad litem³² rather than guardian ad litem, judges appoint guardians ad litem, or separate counsel for the guardian ad litem, or still separate counsel for the child, or some other combination, with attendant ethical dilemmas.³³ What is our Futurist's conclusion from the mixture of these elements?

In the future the titles and professions will not matter. The guardian ad litem will act as an investigator and prepare a report for the parents, the court, and her child-client. If the parties cannot settle, the guardian ad litem, who is an advocate for the child,³⁴ will then

³⁰ See e.g. Leary v. Leary, 627 A.2d 30, 36-37 (Md. App. 1993).

³¹ See Doubleday v. Doubleday, 537 A.2d 525, 526-27 (N.H. 1988).

³²

E.g. Newman v. Newman, 663 A.2d 980 (Conn. 1995); Dawson v. Garcia, 666 S.W.2d 254 (Tex. App. 1989) no writ.

³³

See Schult v. Schult, 699 A.2d 1134 (Conn. 1997) (attorney for child may advocate different position than that recommended by guardian ad litem). See generally, Bruce A. Green, Lawyers as Non-lawyers in Child-Custody and Visitation Cases: Questions From the "Legal Ethics" Perspective, 73 Ind.L.J. 665 (1998).

³⁴

In Ireland v. Ireland, 717 A.2d 676 (Conn. 1998), the Connecticut Supreme Court emphasized that the child's attorney is an attorney, advocating on behalf of a client; and is not to be a witness. Id. at 688. Justice Katz concluded by stating:

An attorney for the child should not express to the court, in advance of trial, his or her opinion as to the best interests of the child, particularly when that opinion is at the heart of the ultimate issue in the case. An attorney for the child should

serve as a referee whose job it is to render binding decisions for the child in lieu of the parents' decisionmaking authority when there is chronic conflict.³⁵ The guardian ad litem's duty runs to the court and the needs of the child and the court will define the scope of the duties based upon the factual matrix necessitated by parental misconduct.³⁶ In those circumstances in which there is a possibility of a learning curve by a parent that indicates a potential to modify behavior necessary to protect the child then that is all for the better. In circumstances in which this capacity is minimal then the parents decisionmaking authority will be curbed or abrogated.³⁷ Although each parent may have a constitutional and statutory right to participate in raising their children, biology does not create a

participate in legal proceedings by submitting trial briefs, questioning witnesses, giving oral argument, and, generally, by functioning in a manner similar to an attorney for an unimpaired adult. The proper forum and method for communication of his or her opinion is during final argument.

Id. at 689.

³⁵

At least one author might find our futurist misguided. See Raven C. Lidman, The Guardian ad litem in Child Custody Cases: The Contours of Our Judicial System Stretched Beyond Recognition, 6 Geo. Mason L.Rev. 255 (1998).

³⁶

See Gerber v. Peters, 584 A.2d 605, 607 (Me. 1990) (the author was the attorney for the plaintiff-father).

³⁷

For an analysis of this argument, see Roy T. Stucky, Guardians Ad Litem As Surrogate Parents: Implications For Role Identification And Confidentiality, 64 Fordham L.Rev. 1785 (1986) ("A guardian is a person lawfully invested with the power, and charged with the duty of taking care of the person and managing the property and rights of another person, who, for defect of age, understanding, or self-control, is considered incapable of administering his own affairs. ... A guardian ad litem is a special guardian appointed by the court in which a particular litigation is pending to represent an infant, ward or unborn person in that particular litigation, and the status of guardian ad litem exists only in that specific litigation in which the appointment occurs.").

circumstance in which a right to adult conflict is a moral imperative that debases the rights of the child.³⁸ The guardian ad litem, wearing the role and robe, will constitute the font of decisionmaking for this group of parents. Thus, the evolution of the guardian ad litem's duty will be from investigator to champion to referee. It is the role of referee, however, that will fundamentally alter the landscape.³⁹

II. What If The Futurist Is Wrong?

It is best to begin with self-criticism so that the flaws in our Futurist's reasoning are exposed early. An evolving body of literature by feminist scholars concerning post-modernism and deconstruction as it relates to history, philosophy, religion, and especially law (as defined by the making of judgments within the judicial system), leads to the uncomfortable notion that my arguments are built on fallacies as a function of my ignorance of that field of study. I am also troubled by a category of study that may make these predictions stereotypical, or stated another way, ignore a method of examining family

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Interesting arguments that track this analysis may be found in Hildy Mauzerall, Patricia Young & Debra Alsaker-Burke, Protecting the Children of High Conflicts Divorce: An Analysis of the Idaho Bench/Bar Committee to Protect Children of High Conflict Divorce's Report to the Idaho Supreme Court, 33 Idaho L.Rev. 291 (1997) (evaluates child psychology and child development research and recommends protocol for judges, which includes providing judges access to mental health professionals, training judges, parents, and family law practitioners in fundamentals of child development, guidelines for determining custody and visitation in violent parent cases); James A. Twaite & Anya K. Luchow, Custodial Arrangements and Parental Conflict Following Divorce: The Impact on Children's Adjustment, 24 J. Psychiatry & L. 53 (1996) (research regarding impact of various post-divorce custodial arrangements on children and concludes: level of parental conflict rather than custodial arrangement is more significant factor).

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But see In re Marriage of Lloyd, 55 Cal. App. 4th 216, 64 Cal. Rptr. 37 (Ct. App. 1997) (court lacked authority to appoint guardian ad litem to represent children in hearings and to make orders in post-dissolution proceeding to modify custody absent parties' consent to reference).

decisionmaking structures and traditions that are unrepresentative of a large portion of American society.⁴⁰ My recent readings have created a rumbling dissonance with the positions I have advocated in the past concerning methods for protecting the rights of children, including the role of the guardian ad litem as advocate. More annoying, the criteria for identifying cases that require judicial triage may be accurate but the solution, always in the nature of the exercise of power dominated by “patriarchal thought”⁴¹ may miss something more fundamental or unique as a means of protecting children.⁴²

Family dislocation and its management may be a function of some dialectic more comprehensive and insightful than has been written. My concern is that the traditional view of litigation and the role of guardians ad litem in the context of high conflict cases may be read solely in the masculine context of conflict and its form of resolution.⁴³ Thus, as our

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A sensitive discussion of this topic may be found in Cynthia R. Mabry, African Americans “Are Not Carbon Copies” of White Americans — the Role of African American Culture in Mediation of Family Disputes, 13 Ohio St. J. on Disp. Resol. 405 (1998).

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Winders, Gender, Theory and The Canon, supra, note ____ at 146.

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There are many available articles and books, but at the risk of selective citation, I will acknowledge a few that have influenced this article. See James A. Winders, Gender, Theory, and the Canon (1991); Nancy A. Weston, The Fate, Violence, and Rhetoric of Contemporary Legal Thought: Reflections on the Amherst Series, The Loss of Truth and Law, 22 Law and Soc. Inquiry 733 (1997); Linda Mills, On The Other Side of Silence: Affective Lawyering for Intimate Abuse, 81 Corn.L.Rev. 1225 (1996); Ann Coughlin, Excusing Women, 82 Cal.L.Rev.1 (1994).

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A favorite example concerns the relationship of judges in appellate courts: a “Justice who is willing to make all the modifications suggested by his colleagues is liable to find he has fathered an amorphous mass of doughy sentences rather than a strong statement of law. Holmes once complained to Sir Frederick Pollack about his fellow Justices, that the boys generally cut one of the testicles on “most of the opinions he circulated.” Walter F. Murphy, Elements of Judicial Strategy 24 (1964).

Futurist constructs a judicial system for children there is a place for criticism of a binary logic of individual/society, inside/outside and the impact (not just on Marxist theory) of the relationship between the judicial system and "public/private dichotomies that provide the focus of much recent feminist social theory."⁴⁴

A second area of concern is the influence on the judicial system and the role of the guardian ad litem of the aura of science that has permeated the system, and inevitably impacted the courtroom and children. The United States Supreme Court has struggled with the application of expert testimony to trials in Daubert v. Merrill Dow Pharmaceuticals, Inc.⁴⁵ and its most recent decision in Kumho Tire Co. Ltd. v. Carmichael,⁴⁶ as to what constitutes an expert witness and then what constitutes science (or what constitutes science and then what constitutes an expert witness though two different things). In this "gate keeping role", trial judges now must assess the methodology and reliability of expert witnesses.

In family law, the difficulties are not so much with medical testimony but the behavioral science professions and the relationship between such a "science" and its

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Winders, Gender Theory, and The Canon, supra note ____ at 68.

⁴⁵ 509 U.S. (1993). See Marc J. Ackerman & Melissa C. Ackerman, Child Custody Evaluation Practices: A 1996 Survey of Psychologists, 30 Fam.L.Q. 565 (1996). The authors note the development of ethical guidelines for the conduct of child custody evaluations. See American Psychological Association, Guidelines for Child Custody Evaluations in Divorce Proceedings, 49 Am.Psychol. 677 (1994); Association of Family and Conciliation Courts, Model Standards of Practice for Child Custody Evaluation, 32 Fam. Conciliation Cts. 504 (1994).

⁴⁶ 119 S.Ct. 1167 (1999). David W. Shuman, What Should We Permit Mental Health Professionals to Say About "The Best Interests of Children"?: An Essay on Common Sense, Daubert and The Rules of Evidence, 31 Fam.L.Q. 551, 552 (1997).

relevancy to the best interests of children. Whatever the profession of the guardian ad litem, when an opinion is to be given, recent literature notes the absence of “empirical research performed to guide mental health professionals in the evaluation process.” As one critic has stated:

Common sense demands judicial scrutiny of all experts' professional status and expertise. Whether assessing the admissibility or the weight of a mental health professional's proffered expert testimony about the best interests of the child or any other expert testimony, it is sensible to consider conjunctively both the qualifications of the expert and the validity of the methods and procedures underlying the expert's opinions. Standing alone, neither assures that the resulting testimony is worth of belief.⁴⁷

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Daniel W. Shuman, What Should We Permit Mental Health Professionals To Say About “The Best Interests of the Child”? An Essay on Common Sense, Daubert, and The Rule of Evidence, 31 Fam.L.Q. 551, 552 (1997). See Chambers v. Stern, ___ S.W.2d ___ (Ark. 1999) (a therapist appointed by a court to evaluate and provide treatment to a family during a custody case may be liable for malpractice if he operates outside the scope of a court's order); Marc J. Ackerman & Melissa C. Ackerman, Child Custody Evaluation Practices: A 1996 Survey of Psychologists, 30 Fam.L.Q. 565 (1996). The authors note the development of ethical guidelines for the conduct of child custody evaluations. See American Psychological Association, Guidelines for Child Custody Evaluation in Divorce Proceedings, 49 Am. Psychol. 677 (1994); Association of Family and Conciliation Courts, Model Standards of Practice for Child Custody Evaluations, 32 Fam. Conciliation Cts. 504 (1994). The increase in custody litigation has created an increase in lawsuits that have evolved a body of immunity law. See e.g. Fleming v. Asbill, 43 S.E.2d 751 (S.C. 1997) (guardian ad litem in private custody proceeding is not acting on behalf of the court and is therefore not a state employee entitled to governmental immunity but is entitled to common law immunity for acts performed within the scope of the appointment to protect the guardian from disgruntled parents); Berndt v. Molepske, 565 N.W.2d 549 (Wis. Ct. App. 1997) (guardian ad litem is entitled to quasi judicial immunity as acts are intimately tied to the judicial process); Delcourt v. Silverman, 919 S.W.2d 777 (Tex. App. 1996) (psychologist and guardian ad litem is integral part of the judicial system and entitled to absolute judicial immunity for acts performed within the bounds of the court appointment.). See generally Holly Marie McIntyre, Casenote, Fleming v. Asbill, South Carolina Guardian ad litem not Immune from Civil Liability, 29 Creighton L.Rev. 1711 (1996).

Science in the form of psychoanalysis or psychology as a “field” is “thoroughly interdisciplinary, regardless of territorial imperatives of either psychology or psychiatry, which latter institution has kept psychoanalysis well domesticated in the United States.”⁴⁸ In this sense, I am struck with the possibility that the laws and conventions that govern our interpretations of science and the law, and the mixed role of guardians ad litem who recommend or render judgments based upon facts as applied to the “science of behavior,” may miss an opportunity to expand and open the historical and intellectual analysis from a male-centered dialectic of conflict resolution/advocacy to a broader paradigm. But for lack of a more creative solution (and more knowledge on my part), the Futurist ducks this brief foray and examines the more conventional future shock unblemished by intellectual dissonance.

III. The Futurist is Right – The Guardian ad litem as Referee

The future role of the guardian ad litem as the empowered decisionmaker must be understood in the context of current traditions of judicial decisionmaking in family law matters. The most significant obligation facing the legal system at the turn of the century is the preservation of this current generation of children in the context (and chaos) of a parental choice to cause litigation. Whether a child protective proceeding, protection from abuse or harassment action, or divorce or unmarried allocation of parental rights and responsibilities, the obligation to render a judgment concerning children is placed before a judge. The preservation of this category of children by the judicial system presents the

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Winders, Gender, Theory, and The Canon, *supra* note ____ at 97. See generally Evelyn Fox Keller, Reflections on Gender in Science (1985).

troubling, and often irreconcilable, process of identifying the parent who has a capacity to acquire and maintain parenting skills within a referent time frame and imposition of a consequence that is protective of the best interests of children when such skills are lacking.

There is no “science” that can provide an answer for judges. The process of judging will always be one of personal character and honor, common sense and intuition, and statutory pronouncements framed by constitutional duty.⁴⁹ Even if judges accept that there is a science for the interpretation of human behavior at the particular moment of observation, there is no science of human behavior that can predict future behavior toward children. At best, past behavior (facts) discloses a range of possible future paths from which a judge selects the more probable outcome. This leaves the “Law”, in the guise of a judge, to make a “judgment” (legal determination) as to the “best interests of a child” based upon selective historical events proffered through the perception of parents feuding in court.

In every state, such a judgment requires an allocation of parental rights and responsibilities defined by a litany of factors common to most jurisdictions: age, intellectual talents or special needs of a child, duration and adequacy of parenting arrangements, stability of future living arrangements, a child’s adjustment to home, school and community, and the existence of domestic violence. Applying these factors as imposed by common law or legislature, a judge assesses the facts and renders a judgment in the form of a court

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Among the most famous descriptions of this process is Benjamin N. Cardozo, The Nature of the Judicial Process (1921), which remains a worthwhile read because it frames the contours for an understanding of the exercise of judicial authority.

order.⁵⁰ Traditionally, however, there is no mechanism, in actions involving private parties, for ongoing observation and decisionmaking to secure the best interests of a child when a judge determines that the parents are collectively incapable (intellectually, emotionally, psychologically) of parenting.⁵¹

The imposition of governmental supervision over private parenting decisions after entry of a judgment raises the legitimate specter of a potential abuse of power to the detriment children and parental authority. Nevertheless, when the judicial authority to allocate rights and responsibilities is invoked by feuding parents, the court must impose an ongoing and enforceable standard of parental responsibility because the State (government) is acting as an arbiter (*parens patriae*) for children. The recurring danger to children over the past few decades is the mantra that any parent is curable of any irrational or characterological impairments. Upon the invocation of a parental choice to litigate, a finding of the inability to provide safe and stable care for a child should not be rewarded by an absence of legal accountability.⁵² The conundrum known to any judge is that a

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The list of factors that eventually became Maine's definition of best interests under 19-A Me. Rev. Stat. Ann. §1653 (1999) is common to many states. See Costigan v. Costigan, 418 A.2d 1144, 1146 (Me. 1980).

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In child protective proceedings brought by the State, the court must hold a judicial review until termination of parental rights occurs. E.g. In re Alexander D., 1998 Me. 207, 716 A.2d 222.

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The distinction between the role of science in determining legal culpability and the law's invocation of punishment irrespective of "mental soundness" has a long history. See R. Roger Smith, Trial By Medicine: Insanity and Responsibility in Victorian Trials 106 (1981) ("Medicine says a man may be insane and irresponsible, and yet know right and wrong; law says a knowledge of right and wrong is the test of both soundness of mind and

judgment in equity that maintains and orders existing relationships, whether business injunctions or parental rights orders, is futile without the capacity to enforce that judgment.⁵³

The repeatedly recalcitrant will defy any remedy that is not swift of consequence.

Parental rights and responsibilities determinations are serious enough to afford an opportunity to be a successful parent. But if education or time cannot graft conscience or character then a child's right to security must be given legal primacy when parents select the court to make such a judgment. If chronic conflict between parents, or the ongoing emotional or psychological disability of a parent, is a function of behaviors that are incurable within a period of time defined by the ability of the child to survive that conflict, how is the court to impose a judgment concerning "best interests" that fulfills its duty to the child if the court finds that the parents' behaviors are, more probably than not, going to continue? It is (again) important to expose and reject the giddy optimism of the modern false science⁵⁴ that requires the judiciary to act as a cuckold for a mixture of law and

responsibility to the law. Medicine says, restrain and cure the insane and imbecile offender against the law; law says, hang, imprison, whip, hunger him, and treats medical art with contempt.")

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As Justice Holmes commented: "In determining whether a court of equity can take jurisdiction, one of the first questions is what it can do to enforce any order that it may make." Giles v. Harris, 189 U.S. 475, 487(1903). For a valuable discussion of judicial power and strategy for decisionmaking see Walter F. Murphy, Elements of Judicial Strategy (1964).

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I have discussed these elements of "science" in The Hydra Hypothesis: The Minefield of Allegations of Abuse, Chronic Interference and The Needs of Children (1997). My use of features, some to point out the absurdity of oversimplification (such as "mother-dominated" for those falsely accused of abuse) argues for an outcome based analysis of children's needs within the judicial system. In time, the term "hypothesis" (or "syndrome" for that matter) is probably better replaced by the term "paradigm" when describing the

science that assumes that if anything positive can occur, given an infinite range of possibilities, only the most overt cruelty warrants the loss of parental rights and responsibilities.

Post-conception responsibility for parental chaos⁵⁵, and its affect upon the best interests of a child, requires development of a paradigm that allows the court to frame a judgment by applying legal factors common to every case but flexible enough to consider the unique factual variables of each family pattern. There are two specific features that are linked: level of parental achievement (L) and time (Tx). "L" is defined by the list of best interests factors applied by courts to the facts. A judge must evaluate "Tx" on a case-by-case basis because parents enter the judicial system at various stages of stress, chaos, and characterological disorders. "P" is defined as the point when "L" and "Tx" intersect. Each curve on the graph can then be defined by the coordinates of "L" and "Tx" and the resulting categories of "Flatliners", "Tweeners", "Advanced Learning Curvers", and "Learners."⁵⁶

judicial process.

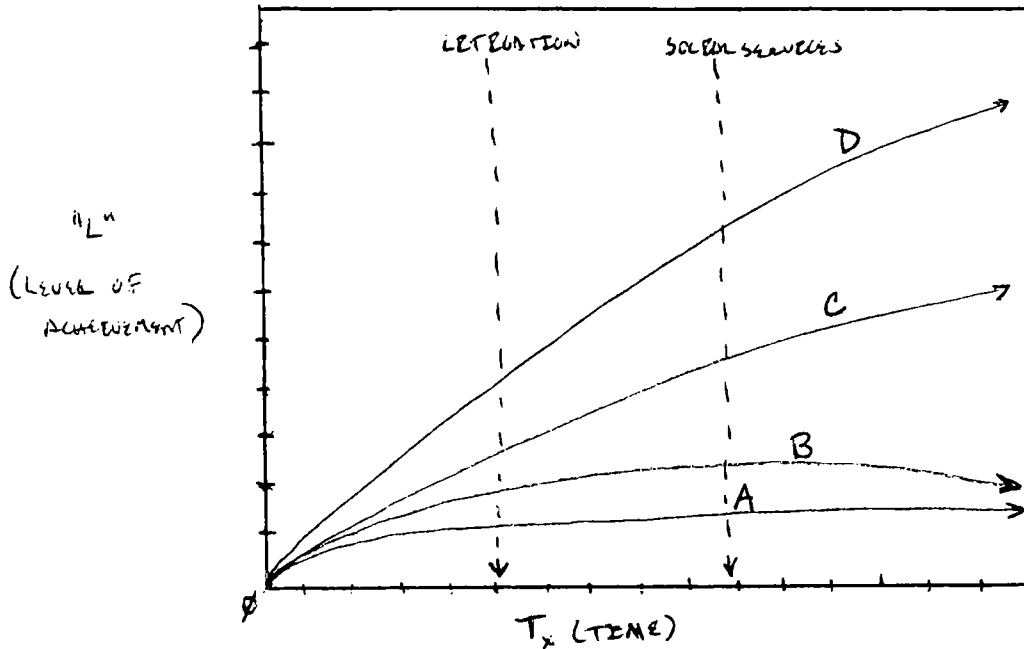
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In physics, the modern distinction is between complicated systems, "like computer chips or snowflakes," and complex systems that "are more spontaneous, more disorderly, more alone than that" and the adaptability of "chaos" theory that explains spontaneous, self-organizing dynamics of the world. See M. Mitchell Waldrop, The Emerging Science At the Edge of Order and Chaos 11-13, 131-32 (1992).

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These terms are not mine. Several years ago at a Resources for Divorced Families retreat in Bethel, speakers used these phrases and the terms stuck with me. I cannot, however, attribute the phrases to any individual after this many years.

FIGURE I



For "Flatliners" (Category A) hopelessness is a prevailing concept irrespective of Tx. Not everyone can be rescued within the childhood of a child. The capacity of a child to be healthy is a closed period of a few years when the incentive to work, the moral spirit to connect with the community, and the desire for intellectual and vocational achievement can be instilled. Flatliners will essentially fail even the lowest rung: a lack of empathy for the child's pain or discomfort, whether emotional, physical or psychological, and chronic lifestyle disarray often coupled with substance abuse.

Category B are the "Tweeners": the parents whose capacity to learn (L) reflects incremental improvements in parenting skills (cooperation, responsibility, safety, non-violence) if and when there is the spotlight of supervision or sanction. This parent may not improve for a sustained period of time (i.e. irrespective of Tx) but may regress to Flatliner status once the spotlight or spigot of resources are turned off. The dilemma is whether

the community is willing to donate sufficient resources because this parent is salvageable only with ongoing supervision.

Category C is the "Advanced Learning Curver." This parent learns faster than Category B but the potential for a flatlining fallback is less. For example, work ethic, counseling, a trip to Kids First, and voluntary participation in mediation or parenting workshops, may indicate an objective capacity to alter past behaviors and to sustain that improvement over time.

Category D are the "Learners": the parent who often finds him or herself with little confidence or role models but possesses the integrity and insight sufficient to subsume selfish needs, withdraw from personal combat that imperils a child, and seek educational and therapeutic resources. These parents are educable; knowledge will matter; their lives will adapt and organize and, thereby, hold the potential to dissolve turbulence.

This paradigm provides a very limited framework for plotting the most complex of human relationships. There is no parental perfection. It is the willingness to learn and adapt, applied to time in the context of a child's needs and welfare, that defines success for a parent-child relationship in any category. Science cannot predict the impact of trauma or behavioral changes, or the sheer chance that random molecules of the mind will coalesce into parenting skills without the benefit of a hospitable environment.⁵⁷ There is always the chance that a Flatliner can get it right: much like there is always a chance that

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The nature versus nurture debate has a raft of literature. Clarence Darrow argued decades ago that "Endless discussions have been devoted to the relative importance of heredity and environment in human conduct. This is a fruitless task. In a sense, each one is of supreme importance in the outcome of a life." Clarence Darrow, Crime It's Cause and Treatment 38-39 (1922).

a rabbit typing on a keyboard will produce Judge Frank's Law and The Modern Mind. The most subjective and fungible variable is "Time" — which is a euphemism for opportunity. In a private custody case, how long is a parent willing to put a child at risk for his or her own needs? How long will it take a parent to resolve conflicts or overcome a psychological or characterological disorder?

Everything about the allocation of parental rights and responsibilities within the judicial system is about the process of merging hundreds of available facts against the stitching of the law to yield such a judgment.⁵⁸ What professionals do know is that children cannot survive an onslaught that is perpetual. The military learned long ago that adults can only survive the mental stress of combat for a few months at a time. Yet in custody cases children, not adults, are required to delay or defer the possibility of a healthy childhood for years on the hope that one or both parents are educable.

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Parents do not lose responsibility for their children by the filing of a divorce action, but his or her choices may abdicate that responsibility to the court. The problem is that there is a sizable portion of the population that can only privately order their rights with the threat of consequences i.e. litigation. If you remove the consequences you will find the meaning of real chaos for children. The parents who so often require DHS involvement in child protective proceedings are not the usual litigants in divorce. But for state intervention these parents would exercise the "traditional authority" to beat, burn, and neglect children. Anyway, divorce is only a small part of family law conflict today as described by Professor Glendon in her seminal work The Transformation of Family Law: State, Law, and Family in The United States and Western Europe (1989). The effort to transform marriage and divorce into a clerical matter in other countries is not novel. Id. at 156-57. For a couple of interesting articles on this topic, see Barbara Holland, The Long Good-Bye, Smithsonian 87 (March 1998); Francine Russo, Can The Government Prevent Divorce?, The Atlantic Monthly 28 (October 1997).

For the judicial system, the management of parental chaos collides with what Judge Jerome Frank in his seminal work, Law and The Modern Mind, describes as the "childish desire" to find the "Infallible Judge, the Maker of definite rules of conduct. He knows precisely what is right and what is wrong and, as head of the family, sits in judgment and punishes misdeeds."⁵⁹ This "childish longing is an important element in the explanation of the absurdly unrealistic notion that law is, or can be made, entirely certain and definitely predictable."⁶⁰ To reduce the myth that there is judge-made process that can provide a cure for parental chaos, the legal system must abandon the conspiracy of "stork-fibs about how law is born and cease even hinting that perhaps there is some truth in Peter Pan legends of a juristic happy hunting ground in a land of legal absolutes."⁶¹

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Jerome Frank, Law and The Human Mind 18 (1930). Judge Frank was writing in the early stages of the development of child psychology so his Father-Judge metaphor is out-dated and oversimplified. Nevertheless, his argument that there is a paradox when demanding more "cosmic certainty" from law than biology, is still a fair analysis of this "childish" quest for an omnipotent ruler over chaos. Id. at 14-21.

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Id. at 18, 244.

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This Peter Pan metaphor extends, most dangerously, to who search, in the name of efficiency and statistical joy, for a mechanism that will remove family chaos from the courts. There is a public relations advantage to this tactic because lawyers are an easy target for blame but it is sadly lacking in the mature judgment of professionals who should know better. A famous physicist reflecting on his childhood was reminded by his mother (a lawyer in post-World War I England) of a quotation from the play The Self-Tormentor by the African Slave Terintius: "Homosum: humani nil a ne alienum puto. I am human and I let nothing human be alien to me." See Freeman Dyson, Disturbing the Universe 15 (1979). This creed has value to those who have confused the need for humane decisionmaking (judgment) with a greater sensitivity for a statistically efficient process that serves media relations.

An excellent example of parental chaos, and the parameters of judicial discretion to resolve parental disputes about children, may be found in Rodrigue v. Brewer, 667 A.2d 605 (Me. 1995). In Rodrigue, two parents: (1) had a baby after a brief “courtship” and marriage, (2) could not act as mature adults to “separate themselves from their marital conflict,” (3) decided to separate and live in Quebec City, Quebec and Belfast, Maine and (4) were still found by the testimony of professionals to be “caring, loving and capable people who desire to parent” but “the intense conflict between them substantially impairs their ability to cooperate in that parenting.”⁶² It is this type of excuse-making for parents that makes it easy for judges to disregard conclusions by other professions. Shoving aside the bunk that these are “caring and loving” parents is easy enough. There is no fact, described within the Rodrigue decision, that shows any parental capacity in the future to separate selfish needs from the child’s right to be free from conflict.

The majority affirmed the trial court’s allocation of parental rights and responsibilities on an alternating four week schedule. Justice Rudman’s dissent superbly captures the essence of the boundaries for judicial discretion in child custody cases better than any decision in recent history. Justice Rudman began with the premise that in “the words of Justice Cardozo the court is not a ‘mere arbiter between two adult adversaries; simply reacting to the evidence that they may see fit to adduce in support of their respective positions.’”⁶³ This means that even if the trial court has authority to impose a judgment, the exercise of discretion is not proper if there is no evidentiary basis for doing so or the

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Rodrigue v. Brewer 667 A.2d at 607.

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Id. at 608 (Rudman, J., dissenting).

judgment is contrary to the evidence. The only evidence common to all the expert witnesses in Rodrigue was that the parents' behavior during the divorce proved, more probably than not, that there would be no cooperation in the future. (One of the psychologists is cited as having actually asserted that there "must be no shared responsibility, she said, but neither should either parent be given 'most' authority."⁶⁴).

Neatly fitting within the topic of this paper, however, an expert in Rodrigue suggested that in the short run the ultimate parenting power should not reside with either parent but with a "guardianship of some sort or some third party."⁶⁵ One parent actually appealed the denial of that suggestion, to which the Law Court held that: even "assuming that the court had the authority to suspend parental rights, see 19 M.R.S.A. §752(6),⁶⁶ neither parent was economically able to afford the services of a "third parent".⁶⁷

Ordinarily, a trial court cannot micromanage the future decisionmaking process in the absence of jeopardy. For example, the mere allocation in Rodrigue by the trial court of authority to decide education to one parent and religious decisions to the other parent does little to resolve the conflict. Allocation of a power to one parent is not concomitant with a termination of the power to object to the other parent. Such an allocation may create a presumption of authority and shift the burden to the parent without the power to

⁶⁴ Rodrigue v. Brewer, 667 A.2d at 610 (Rudman, J. dissenting).

⁶⁵ Rodrigue v. Brewer, 667 A.2d at 607.

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19 Me. Rev. Stat. Ann. §752(6) is now 19-A Me. Rev. Stat. Ann. §953(2)(C) and grants the trial court authority to award custody to a third party when there is jeopardy.

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Rodrigue v. Brewer, 667 A.2d at 607.

prove an abuse of that authority but it is not an absolute grant of authority to act unreasonably or in the extreme. As Justice Rudman concluded: "The court's strain to effect a kind of legal equipoise is palpable,"⁶⁸ but by such a judgment the parents "who universally have been determined to be incapable of resolving their conflicts" are impelled into "certain conflict."⁶⁹

The question presented, therefore, is what remedies are appropriately available, within constitutional proscriptions, for the preservation of the rights of the best interests of children when parents are "impelled" into certain and chronic conflict and the delay and expense of litigation is potentially harmful to a child? The answer to this question depends upon the extent to which a legislature may delegate to the judiciary, as a co-equal branch of government, the authority to appoint a non-constitutional judicial officer to exercise judicial authority to order parental rights and responsibilities.⁷⁰

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Id. at 610 (Rudman, J. dissenting).

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Id. at 610-11 (Rudman, J. dissenting).

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See Ruisi v. Thieriot, 57 Cal. App. 4th 1197, 62 Cal. Rptr. 2d 766 (Cal. App. 1st Dist. 1993) (court's delegation of authority must be grounded in statutory and constitutional authority). In Baril v. Baril, 354 A.2d 392, 395 (Me. 1976), the court summarized the state of the law in Maine: "it is well-settled in Maine that the jurisdiction and authority of the divorce court in matters of divorce and incidental relief such as orders for custody, support and counsel fees, are exclusively derived from the provisions of the statute. Jurisdiction over divorce is purely statutory and every power exercised by the court with reference to it must be found in the statutes or it does not exist."

IV. Guardian ad Litem Referees in Chronic Conflict Cases: When and How?

In 1995, the Maine Legislature adopted 19-A Me. Rev. Stat. Ann. §252 (1999), which confers express authority upon the court to appoint a referee in family law matters:

1. Appointment of Referee. The court may appoint a referee in any proceeding for paternity, divorce, judicial separation or modification of existing judgments brought under this Title:
 - A. When the parties agree the case may be tried before a referee; or
 - B. Upon motion demonstrating exceptional circumstances that require a referee.
2. Payment for Service. Payment for the services of the referees is the responsibility of the parties, as ordered by the court. If the court finds that either or both of the parties are indigent, the court may pay the reasonable costs and expenses of the referee.
3. Appointment of Referees. If all parties waive the right to object to acceptance of the referee's report, the court shall immediately enter judgment on the referee's report without a further hearing.

The enactment of §252 is similar to efforts in many other states as well to provide flexible alternative methods of dispute resolution for families like mediation.⁷¹ Under

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The preference for mediation as a means for "mutually agreed solutions, rather than the public acrimony of an adversarial proceeding, are viewed as less destructive to family relationships, particularly parent-child ties." See Mary Pat Treuthart, In Harm's Way? Family Mediation and The Role of the Attorney Advocate, Golden Gate U. L. Rev. 717 (1992). In Squires v. Inhabitants of The City of Augusta, 153 A.2d 80 (Me. 1959) the Court noted in the context of an evidentiary hearing that judges "are not necessarily ignorant in court of what everybody else and they themselves out of court, are familiar with; and, there is no reason why they should pretend to be more ignorant or unobserving than the rest of mankind." *Id.* at 109 (quotation omitted). As aptly applied to matters of children, a "court is not precluded from bringing to bear and applying to the problem that sound common sense which is derived from living in a world populated by human beings, and the observations and knowledge of their actions and reactions in and to situations encountered in the conduct of human affairs." *Id.*

§252(1), the court may refer interim issues, or a piece of an entire case, with the trial court reserving jurisdiction over the remainder of the case. But in other states, there are strict limitations on the authority to refer matters related to custody.⁷² The consensual use of §252(1)(A) is self-explanatory. There have already been various experiments of this kind in Maine and elsewhere employing lawyers and other professionals as referees to allocate parental rights and responsibilities.⁷³ If, however, one or both parties refuse to consent, the court may still appoint a referee in some jurisdictions upon a finding of “exceptional circumstances.” Although without definition, the term exceptional circumstances may include “sufficiently technical, complex and difficult” factual and legal issues.⁷⁴

It is the nexus between the best interests of children and the inability of parents to separate themselves from conflict that provides the “technical, complex and difficult”

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See Van Dine v. Gyuriska, 713 A.2d 1104, 1005 (Pa. 1998) (father was entitled to de novo hearing before judge on custody as civil procedure rule did not allow appointment of master to hear final custody case but only partial custody or visitation); Bell v. Bell, 307 So.2d 911 (Pa. Dist. Ct. App. 1975) (no authority to refer custody matter).

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Even when parties consent to custody arbitration, appellate courts in other states have struggled to encourage the parental choice to arbitrate as against the court's traditional responsibility to protect the best interests of children. E.g. Dick v. Dick, 534 N.W. 2d 185 (Mich. Ct. App. 1995) (arbitration decision regarding child custody may not be overturned without fraud, duress or procedural defect); M.F.M. v. J.O.M., 889 S.W. 2d 944 (Mo. Ct. App. 1995) (only a judge may hear issues regarding child custody); Glauber v. Glauber, 192 A.D.2d 94 (N.Y. App. Div. 1993) (child custody arbitration agreements should not be enforced). See generally, Christine Albans, Comment, Binding Arbitration: A Proper Forum For Child Custody, 14 J. Am. Acad. of Matr. Law. 419 (1997).

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But see Carlson v. Carlson, 497 P.2d 1006 (Colo. 1972) (masters should not be appointed as a routine matter in divorce cases when the issues are not complex and the facts are not complicated); Hedberg v. Wallingford, 379 A.2d 126 (Me. 1977) (boundary dispute).

circumstances for appointment of a guardian ad litem as a referee in family law matters. The flexibility to appoint professionals with special expertise to conduct trials regarding parental rights and responsibilities may be defined by a cluster of events commonly seen in litigation:

1. The need for ongoing and swift supervision and decisionmaking when the conflict is escalating or continuous.⁷⁵
2. Stability for the school year is at risk because of the filing of a late motion or a lack of available trial time.
3. Modification of an existing order to protect a child from a residence that is harmful.⁷⁶
4. Relocation cases in which the move (or moves) are without adequate notice and opportunity to for study and court hearings.
5. The court determines that the child has an independent right to a hearing on a unique medical, educational, or psychological issue.

There is valid hesitation concerning the broad use of referees if only because private judging could subsume the constitutional and statutory responsibility of appointed judges. The statutory authority to appoint a referee is, however, qualitatively different than the creation of a court-system-within-a-court-system. The referee is a case specific exercise of an exceptional statutory power to protect children who are at risk from parents who, for

⁷⁵ Among all professionals there is agreement that chronic conflict harms children. See Eleanor E. Malcolm & Robert H. Mnookin, Dividing The Child: Social and Legal Dilemmas of Custody (1992). But see M.F.M. v J.O.M., 889 S.W.2d 944 (Mo. Ct. App. 1995) (error to refer father's motion to modify custody to master where exceptional condition alleged was calendar congestion but refusal to reverse because parties in turmoil for two years).

⁷⁶ Cf. Mary D. v Watt, 438 S.E.2d 521 (W.Va. 1992) (grounds for "expeditious hearing" and referral to family law master may include allegations of sexual abuse).

a cluster of factors, are incapable of making any rational decision jointly or in which a particular area of expertise makes a referee appropriate and necessary.⁷⁷ Thus, the selective appointment of a referee for “exceptional circumstances” is not the unfettered delegation of constitutional authority invoking the constitutional problem of separation-of-powers.⁷⁸

Moreover, finances should not be a bar to this remedy when exceptional circumstances exist. If a party is indigent, the court can pay the costs of the referee.⁷⁹ The father in Rodrigue, for example, had enough resources to pursue two Ph.D.'s - get a

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See e.g. Ruisi v. Thieriot, 53 Cal. App. 4th 487, 62 Cal. Rptr. 766 (Cal. App. 1 Dist. 1997) (In family law matters, especially where parties are unable to curb their animosity toward each other, trial court may well find it advantageous to designate separate forum to resolve parties' differences; however, authority of trial court to do so is constrained by basic constitutional principle that judicial power may not be delegated).

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The “non-delegation doctrine” holds that a legislature cannot confer upon another branch of government (or administrative body) legislative power absent meaningful standards; though “the line of demarcation between a legitimate and an illegitimate delegation of legislative power is often quite dim.” When it is not “feasible to supply precise standards without frustrating the purposes of the particular legislation” the presence of adequate procedural safeguards to protect an “abuse of discretion by those to whom the power to delegate compensates substantially for the want of precise guidelines and may be properly considered in resolving the constitutionality of the delegation of power.” See State v. Boynton, 379 A.2d 994, 995 (Me. 1977).

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The impact of public funding for referees in Maine has yet to find a reported decision. The Maine Legislature, however, quite properly recognized its duty to make these services available to everyone without economic discrimination. See Harrington v. Harrington, 269 A.2d 310, 313-315 (Me. 1970) (“Court procedures, at the trial level or in appellate review, even though the result of statutory requirement, which in and of themselves invidiously discriminate between rich and poor, impair guarantees of equal justice which the Constitution was designed to protect. This is equally so in civil litigation as in criminal prosecutions. An indigent litigant may have more at stake in a civil case than in a criminal case. Furthermore, equal access to the civil courts was among the Fourteenth Amendment's primary objectives.”).

job. There is no indication that either of the parents could not work a second job during the off-month to afford protection for a child that their own behavior puts at risk. Justice Rudman's sympathies for restrictions on the trial judges' discretion because of the parents' economic constraints was necessary only because the trial judge tolerated the parents' willingness to expend resources on themselves, litigation, and multiple experts at the expense of their child's future interests. The trial judge has authority to compel priority for the child's interests over the parents choice to torment that child in selfish conflict. In short, the capacity to pay for services required for the child is different than the desire to work for a child that warring factions elected to conceive. Indeed, the basic facts in Rodrigue represent the type of "exceptional circumstances" that warrants appointment of a guardian ad litem acting as a referee to exercise "intelligent discretion in framing just relief."⁸⁰ In circumstances concerning children, the need for specificity in an order appointing anyone is particularly important because the court should define the "exceptional circumstances" that give rise to the reference, the scope of the factfinding and the area for decision, and what issues the court is retaining jurisdiction to decide after reference.

There is always a danger that any paradigm is unrealistic or an oversimplification that does not help to determine when, or if, a parent can shed the negative characteristics of selfishness and rage that harm children and adopt the positive qualities of empathy and self-awareness that give a child a chance of future success. Parental chaos inevitably

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Adams v. Alley, 340 A.2d 201, 206 (Me. 1975) (reference by agreement; the court is not bound to draw a line on the basis of a distinction between law and equity though tradition runs against the exercise of equity discretion by someone other than an equity justice). The term arbitrator is used in some jurisdictions.

leads to a higher potential for children with psychological, intellectual, and moral dysfunction to the detriment of themselves and the community. Frustration with a lack of clarity in concept should not obviate the need to jumpstart the dialogue.

The authority of the judiciary to delegate authority or itself to impose a judgment cannot offer much of a remedy to a child when a parent is willing to engage in conflict without limitation or quarter. Thus, the availability of a guardian ad litem as referee to parents of all economic strata, is an important protection for children caught in conflict without recourse. A referee with special expertise in matters of parent/child relationships may ameliorate the harm that ongoing indecision or conflict can cause children. The delegated authority to render judgment immediately and to direct its implementation (and in emergencies, request contempt enforcement by the supervising court) provides children with an ongoing degree of protection otherwise unavailable through ordinary court processes.

The availability of such services has, in my experience, the added advantage of meaningful resolution of disputes by agreement because there is no forum shopping, judgments are likely to have a consistency of theory and sanction, and knowledge of predictable and immediate results will yield a greater willingness to compromise and reform behavior. Stated another way, the appropriate delegation of authority makes it more difficult to engage in conflict without the consequence of a loss of access or decisionmaking authority. Although far from a perfect foil, children will better benefit from the availability of a resource that includes the flexible involvement of therapists, guardians ad litem and educators who can assist the decisionmaking process.

V. The Rights of Children Within the Constitution

Assuming authority to delegate and the power to act by a referee/master/guardian ad litem, the right to representation and a timely (speedy) hearing for children caught in chronic conflict raises a critical issue that bears attention.⁸¹ Today the guardian ad litem serves at the statutory or common law discretion of the judge to play an intermediate (and often indeterminate) role by ferreting out information, gathering evidence, and making recommendations that are intended to protect and foster the best interest of the children. Guardians ad litem are traditionally given latitude not ordinarily given lawyers representing parents, but the "trade-off" is that a guardian ad litem bears a more complex and multifaceted obligation to his client/children and the court.⁸²

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This section is a shortened version of arguments that appear in Dana E. Prescott, The Hydra Hypothesis: The Minefield of Allegations of Abuse, Chronic Interference, and The Needs of Children Chs. X-XII (1997) and Dana E. Prescott, The Liability of Lawyers as Guardians ad Litem: The Best Defense is a Good Offense, 11 J.Am. Acad.Mat. Law 65 (1993)

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See Oosterhous by Short v. Short, 730 F. Supp. 1037 (D.Colo. 1990) ("Indeed, the need for an independent guardian ad litem is particularly compelling in custody issues. Often, parents are pitted against one another in an intensely personal and militant clash. Innocent children may be pawns in the conflict. To safeguard the best interests of the children, however, the guardian's judgment must remain impartial, unaltered by the intimidating wrath and litigious penchant of disgruntled parents. The fear of liability to one of the parent's can warp judgment that is crucial to vigilant loyalty for what is best for the child; the guardian's focus must not be diverted to appeasement of antagonistic parents."); Gerber v. Peters, 584 A.2d 604, 607 (Me. 1990) ("An attorney-client relationship between the appointed guardian ad litem and a parent is not created by the court's appointment or by a provision that the parents be responsible for the payment of the guardian's fees. In a divorce action the court has the sole and continuing authority to determine parental rights and responsibilities with respect to a minor child of the parties, and is invested with broad discretion in making this determination. The duty of a court appointed guardian ad litem over a minor child in a divorce case is to the court, the scope of that duty lies within the parameters of the order of appointment.").

The duty of any guardian ad litem or advocate for children has its greatest aegis in preventing delay. The most irritating aspect of family law is that criminals receive a right to a "speedy trial" but children wait in line for justice:

One issue which counsel for the children must closely watch is the matter of delay in the resolution of custody. While substantive protection is important, so detrimental is delay in the disposition of the child that counsel must vigorously press the court in order to avoid it. This is at least equal in importance to the right of a "speedy trial" guaranteed in criminal procedures, for time is often even of more critical importance to children than it is for adults. Vigorous counsel and an alert judge must see that it is not lost.⁸³

Over the years, I have argued in court (and elsewhere) that the extension of "personhood" under the Fourteenth Amendment ("no State shall deprive any *person* of life, liberty, or property, without due process of law; nor deny to any *person* within its jurisdiction the equal protection of the laws") to children in school, juvenile and abortion cases deflated any arguments that the impact of custody warfare on children is entitled to less constitutional protection. The presumption that parents, by dint of an umbilical cord, will act to foster the best interests of their children is extinguished today by the sheer volume of intra-familial dysfunction and dislocation.

Thus, any concern with the intrusion of government in family matters as a matter of constitutional propriety cannot obscure the fact that the volume and depth of family law

⁸³ Catherine M. Brooks, When A Child Needs A Lawyer, 23 Creighton L.Rev. 757, 772 (1990) ("The appointment of a guardian ad litem, pragmatically speaking, is a response by the court to its perception that the child's due process rights need to be protected by independent representation."); Tara Lea Muhlhauser, From "Best" to "Better": The Interests of Children and The Role of a Guardian Ad Litem, 66 N.D.L.Rev. 633, 638-39 (1990) ("The most frequent characteristics of the role of guardian ad litem are that of investigator, champion, an monitor.").

litigation today encourages such government intrusion into any case involving a decision related to the custody of children. In that sense, the necessity for government interference in the family occurs only because of the abdication of individual responsibility. For all the public relations debate concerning "access to justice" or "equal justice," courts and legislatures should be more conscious that justice for children still depends upon the economic or aerobic capacity of the parents to litigate. The only possible solution is recognition of a constitutional requirement of due process for children in civil family law matters: *when the court finds that there is risk that the child's relationship to a parent will be unjustifiably harmed or that the child's present and future safety and well-being are jeopardized by conflict, there is a right to independent representation for the child.*

In Ingraham v. Wright,⁸⁴ the United States Supreme Court concluded that: "In any deliberate infliction of corporal punishment on a child who is retained for that purpose, there is some risk that the intrusion on the child's liberty will be unjustified and therefore unlawful. In these circumstances the child has a strong interest in procedural safeguards that minimize the risk of wrongful punishment and provide for the resolution of undisputed questions of justification." In custody litigation, the utter absence of procedural safeguards for the child, unlike the principal's office in Ingraham, means that children often risk much more than "wrongful punishment." The point is not the *quality* of due process for children but its availability at all as a minimum constitutional safeguard in custody cases run amuck. In Ingraham, and other cases, the Court has held that due process is a "flexible" concept tailored to the specifics of each circumstance, with the only clear mandate the right to be

⁸⁴ 430 U.S. 651, 653 (1977).

heard at a meaningful time and in a meaningful manner.⁸⁵ As applied to children, this argument should be consistent with the Court's rejection, over the past fifty years, of early American law which adopted the eighteenth-century English common law view that children were to be regarded as chattels of the family and wards of the government.⁸⁶ But only if children are "persons" for constitutional purposes.

In juvenile proceedings involving potential criminal sanctions, the Supreme Court, in its seminal decision in In re: Gault⁸⁷ refused to afford juveniles all the procedural guarantees granted adults but concluded that juvenile delinquency hearings must measure up to the essentials of due process and fair treatment, including the right to counsel (court-appointed or privately retained) and to participate in the trial process. In this fashion, In re: Gault⁸⁸ and later In re: Winship⁸⁹ recognized the fundamental interests of a child to his or her liberty: "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."⁹⁰ Although concerning itself only with criminal cases, the Court used strong language to

⁸⁵ Matthews v. Eldridge, 424 U.S. 319, 322 (1976); Gross v. Lopez, 419 U.S. 565 (1975) (school supervisors).

⁸⁶ Andrew S. Watson, The Children of Armageddon: Problems of Custody Following Divorce, 21 Syr.L.Rev. 55, 56 (1977); 1 James Kent, Commentaries on American Law, (14th ed. Oliver Wendell Holmes, ed., Little Brown 1873); Tinker v. Des Moines Sch. Dist., 393 U.S. 503 (1969) (protecting right of children to wear a black armband to protest Vietnam War); Brown v. Board of Education, 349 U.S. 294 (1955) (recognizing that all children have the right to an equal education).

⁸⁷ 387 U.S. 1 (1967).

⁸⁸ 387 U.S. 1 (1967).

⁸⁹ 397 U.S. 358 (1970).

⁹⁰ In re: Gault, 387 U.S. 1 (1967); see also Wisconsin v. Yoder, 406 U.S. 205, 243-45 (1972) (Douglas, J. dissenting) (cases cited therein).

extend due process rights to minors: "It would be extraordinary if our Constitution did not require the procedural regularity an the exercise of care implied in the phrase 'due process.' Under our Constitution, the condition of being a boy does not justify a kangaroo court."⁹¹ Justice Fortas in In re: Gault based his decision partly on Haley v. Ohio,⁹² a criminal case involving the admissibility of a confession by a fifteen-year-old boy in which the Court held that "neither man or child can be allowed to stand condemned by methods which flout constitutional requirements of due process of law."

From the particulars of school to the law of abortion, a majority of the Court has professed little reluctance to sever the rights of minors from the traditional rights of parents. In Planned Parenthood of Central Missouri v. Danforth,⁹³ which concerned whether minors must receive consent from parents before obtaining an abortion, the Supreme Court accorded the constitutional right of privacy to minors with strong words: "Constitutional rights do not mature and come into being magical only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights." In this abortion decision, the Court adopted language that could equally apply, at least to older children, in divorce and custody: "if the child can establish that she is mature and understand the nature and consequences of her decision, courts should not allow the opposing view of parents to interfere with the minor's pursuit of a legal claim." If the Court is willing to protect, from parental authority, the possibility of a veto over

⁹¹ Id. At 27-28.

⁹² 332 U.S. 596, 601 (1948).

⁹³ 428 U.S. 52, 74 (1976).

a minor child's undertaking an abortion, then what is less intrusive than the right to participate constructively in a custody or abuse case?

Nonetheless, on a case-by-case (or situation-by-situation) basis, it is difficult to recognize a consistent theme in the area of procedural due process (or substantive due process for that matter) when applied to children. Some would argue that Danforth, and the latter case of Billotti v. Baird (*Billotti III*),⁹⁴ merely suggests the "proposition that the privacy of children includes the right to make independent decisions, or alternatively, the right to have decisions made in their best interests."⁹⁵

The application of the same qualitative reasoning in a custody proceeding should mean that, as a matter of constitutional right, a child, as a *person* subject to the parens patriae (ward) authority of the court, is entitled to a guardian ad litem (or an advocate) to assure the child's independent right to a fair trial. In parental termination cases, the Court has protected, as a constitutional matter, the concept of privacy so that the *parents' rights* required proof of abuse or neglect by clear and convincing evidence.⁹⁶ In an interesting but rarely examined dissent in Santusky, then Justice Rehnquist wrote:

On the other side of the termination proceedings are the often countervailing interests of the child. A stable, loving homelife

⁹⁴ 443 U.S. 622 (1979).

⁹⁵ Harvey Wingo & Sharon N. Freytag, Decisions Within The Family: A Clash of Constitutional Rights, 67 Iowa L.Rev. 401, 431-32 (1982). This article addressed many of the Court's decisions that I do not discuss. For example, in Parkham v. J.R., 442 U.S. 584 (1979), the Court held that the parental right to commit a child to a mental hospital did not require an advocacy hearing either before or after commitment. The Court's assessment of when parental judgment is less risky to a child reveals an interesting set of values.

⁹⁶ Santusky v. Kramer, 455 U.S. 745, 758 (1982).

is essential to a child's physical, emotional and spiritual well being. It requires no citation of authority to assert that children who are abused in their youth generally face extraordinary problems developing into responsible, productive citizens. The same can be said of children who, though not physically or emotionally abused, are passed from one foster home to another with no consistency of love, trust or discipline.⁹⁷

There is no logical reason to confer a right to due process for minors (of whatever quality) in every other fateful event in life except the trauma of a custody case.⁹⁸ The question is the application of Haley, Santusky, In re: Gault, Danforth, and their progeny to a child's "right" to be free from a parent engaged in chronic conflict. To deny an independent right to representation and advocacy in the form of a guardian ad litem is to deny children a voice in their futures. However depressing, American society cannot ignore the overwhelming failure of parental responsibility the last two decades, nor should courts ignore decades of constitutional precedent applicable to the rights and needs of children.

The well-spring from this body of law (even if inadvertent) has yielded an argument for independent representation of the child in the state courts outside the criminal and civil rights arena. The Maine Supreme Court in Miller v. Miller⁹⁹ held, in a unanimous decision written by Justice Kermit Lipez,¹⁰⁰ on report of an interlocutory order granting the motion

⁹⁷ Id. at 789 (Rehnquist, J. dissenting).

⁹⁸ See Miller v. Miller, 677 A.2d 64 (Me. 1996) (holding that child, as a minor, has no right to hire an attorney without court approval, but the right to a guardian ad litem may have constitutional implications).

⁹⁹ 677 A.2d 64 (Me. 1996).

¹⁰⁰ Justice Lipez is now a judge of the First Circuit Court of Appeals. The author was the lawyer for the Guardian ad litem on brief and at oral argument in Miller.

of three minor children to intervene as parties in a divorce action between the parents that minor children could not contract for legal services except by court consent and that the appointment of a guardian ad litem fulfilled that right.¹⁰¹ The litigation concerned three children, ages 14, 11 and 9, and their preferences. The mother was unhappy with the result of the recommendations of the guardian ad litem and the psychological evaluations. The children reportedly contacted a lawyer to undertake representation and filed the motion to intervene through this lawyer. The trial court granted the motion. After entering an order pending divorce, the court gave primary residence to the father and the mother appealed.

The Court held that under the common law, children have a right to sue and be sued but do not possess the requisite legal capacity to participate in litigation in their own names. Thus, the children did not have a right to contract for their own attorney but only to appear through a guardian ad litem or next friend who is merely a nominal party to the litigation as the child is the real party in interest.¹⁰² Addressing the right to independent counsel, the court held that although:

The law imposes procedural limitations on children, it does so to protect their interests. In the realm of divorce and other family litigation, this protective purpose finds expression in the best interests standard. In Maine, as in a multitude of other states which have adopted the best interests standard, courts faced with the task of rearranging parental rights and responsibilities must strive for an outcome that will maximize the best interests of children. ... The standard protects children who lack the ability because of youth, inexperience, and immaturity to protect themselves. The protective purpose of

¹⁰¹ Id. at 65.

¹⁰² Id. at 67.

this standard is also important in analyzing the constitutional claim of the Miller children.¹⁰³

The children also argued that they had a constitutional due process guarantee under the Fourteenth Amendment of the United States Constitution as they had a significant liberty interest in the outcome of the parents' divorce because of the custody issues involved. The children conceded at oral argument that if they were successful at intervention it could influence property, alimony and child support bargains. But the children still argued that these interests are "not and cannot be met by the guardian ad litem, who is duty bound to represent their best interests as she sees them. They emphasized that the guardian ad litem's recommendations on custody are directly contrary to their wishes."¹⁰⁴

The court rejected the proposition that the absence of advocacy increased the likelihood of an erroneous deprivation of a custodial interest. The preference of the child is only one factor that the court must consider.¹⁰⁵ As the court succinctly held:

Exclusion of children as parties in the divorce of their parents, and the related possibility that there will be no forceful advocacy for the custodial preference of the children, does not increase the risk of erroneous custody determinations that disserve the best interests of children. The guardian ad litem is already an advocate for the best interests of the children and all of its complex dimensions. The narrow focus of an attorney for the children, who would be obligated to carry out their preferences regardless of the wisdom of such a course, might

¹⁰³ Id.

¹⁰⁴ Id. at 69. It is noteworthy, however, that not all of the children shared those preferences as reflected in the record. Id. at n.9.

¹⁰⁵ Id. at 69.

well increase the likelihood of a custody determination that is not in the best interests of the children.¹⁰⁶

Addressing the constitutional argument on this premise, the court noted that the state does have a substantial interest in the divorce proceeding and that the divorce litigation would be exponentially complicated by the involvement of the children as parties, including a substantial additional financial burden on both the parents and the court system.¹⁰⁷ Even with this intent, however, the proposition is by no means undisputed that the United States Supreme Court has established a liberty interest in children of divorcing parents to voice their preferences on custody. But the court concluded that it had no occasion in this case to say whether children have a constitutional right in the outcome of the divorce of their parents because procedural due process was satisfied by the appointment of a guardian ad litem.¹⁰⁸

¹⁰⁶ Id. at 70.

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Id. See Newman v. Newman, 663 A.2d 980, 987 (Conn. 1995) (affording the minor children in a dissolution action an unrestricted right to appeal orders regarding the support carries with it significant risks of widening the fissures in an already sorely tried family, and of imposing burdens on a non-custodial parent and the legal system that may well outweigh the potential benefits. ... Treating the children as parties might well force them to choose sides and thus threaten to exacerbate their already heavy emotional burden, and would add a level of participation - even if only symbolic in most cases - that is inconsistent with a wise attempt to shield them as much as reasonably possible from the legal aspects of their parents' conflicts.)

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Id. Under current ethical rules, the lawyer may assume a certain level of competency by the child to make the expression of those wishes clear and rational. See e.g. Joshua K. v. Nancy K., 549 N.W.2d 494 (Wis. Ct. App. 1986). Of course, the more modern role of the guardian ad litem has also evolved into an expectation by parties frequently (as well as lawyers and the judges) that the guardian ad litem will also serve a role as mediator and try to bring about a resolution that does not require the writing of a report or litigation. See generally Loretta W. Moore, Lawyer Mediators: Meeting The Ethical Challenges, 30 Fam.L.Q. 679 (1996). Interestingly, the author holds a duty on the

In another case, the due process implications arose from another angle. In Van Schaik v. Van Schaik,¹⁰⁹ the court held that the statutory authority to appoint counsel to represent a child with respect to custody, visitation and support did not include the authority to seek replevin for property such as a bicycle.¹¹⁰ In this case, the child's counsel tried to delete sections of the report in order to protect the child and the court held (quite properly) that this was a violation of due process for the parent:

these reports consist largely of hearsay declarations - often double - or triple-level - hearsay -as well as opinions of various social workers, medical or paramedical personnel, psychologists, teachers, and the like which may or may not have a reasonable basis. Statements contained in a custody investigation report have no special indicia from reliability. They are generally not under oath and often emanate from people have overt or covert bias. In many instances, the statements represent subjective feelings and perceptions rather than objective observations or empiric data. Their usefulness to the court is only as strong as their reliability, and that requires that they be subject to challenge in essentially the same manner as any other critical evidence. ... 'Due process' encompasses that principle that requires that if a court bases its custody decision, even in part, on an independent report, the parties - or their attorneys - must be given the opportunity to examine the report and must be allowed the opportunity to cross-examine the investigator and to produce outside witnesses to establish any inaccuracies the report may contain.

mediator to protect the best interests of the child but in response to the rhetorical question as to how far the mediator should go to protect the child some standards require the mediator to assess the needs and interests of the child involved in the controversy and authorize the mediator to interview the child. In this situation, the mediator should "strive to integrate the best interests of the child with the parent's circumstances, rights, and responsibilities. The mediator should use his or her best effort to assist the parents in reaching a sound agreement." Id. At 718 quoting Cal. Fam. Med. Code, §26(f)(1)(12996).

¹⁰⁹ 603 A.2d 908 (Md. App. 1992).

¹¹⁰ Id. At 12-13.

However sensitive the material may be, a party has the right to know what evidence is being considered by the court in judging his cause. A custody case can no more be tried and decided upon secret ex parte evidence than any other proceeding.¹¹¹

In Auclair v. Auclair,¹¹² the Court of Special Appeals, citing Miller, rejected the right to intervene as a matter of right on behalf of the children but held that neither the children's mother nor her attorney would be able to adequately represent the children's interest in the parents' divorce and child custody action as she had a conflict of interest in acting on the children's behalf and the loyalty of the mother's attorney was owed to the mother.¹¹³ This essentially means that although there was no matter of right to intervene the matter of discretion in their intervention an attorney to act as the child's guardian thereby merging some of those duties: "the child's guardian ad litem functions as an agent or arm of the

¹¹¹ Id. quoting Denningham v. Denningham, 49 Md. App. 328, 335-37, 431 A.2d 755 (Md. 1981) cert. denied, 291 Md. 773 (1981), cert. denied 455 U.S. 990 (1982).

¹¹² 730 A.2d 1260 (Md. Ct. Sec. App. 1999). In an important case, the Maine Supreme Court held that a guardian ad litem who was sued was entitled to indemnification for attorneys' fees as a government employee under Maine's Tort Claims Act. See Kennedy v. State, 730 A.2d 1251, 1999 Me. 85.

¹¹³ Id. See Newman v. Newman, 663 A.2d 950, 987-88 (Conn. 1995) (court was concerned about creating conflict in the attorney's role by confusing the role of counsel for a child with the role of a guardian ad litem or next friend. The child's attorney is an advocate for the child, the guardian ad litem is a representative of the child's best interests. As an advocate, the attorney should honor the strongly articulated preference regarding taking an appeal if a child is old enough to express a reasonable preference; the attorney might decide that, despite such a child's present wishes, the contrary course of action would be in the child's long-term best interests, psychologically or financially.

court, to which it owes its principal duty of allegiance and not strictly as legal counsel to a child client.”¹¹⁴

The court then responded to the discrepancy between the child’s right to express a preference and the duty to the court by holding that minor children who are represented by a guardian ad litem in their parents’ divorce and child custody action were not entitled to intervene as a matter of right, as the guardian adequately represented the child’s interests because guardian was obligated to represent children’s best interests, even if the children do not agree with guardian’s best interests recommendations. Although the court held that minor children represented by a guardian ad litem in their parents’ divorce and child custody were not entitled to additional representation, the children could speak with private counsel.¹¹⁵ The ultimate decision did not, however, deal with the issue of constitutional right touched upon in the Miller decision.

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In Vermont, the court has held the guardian ad litem is an independent parental advisor or advocate “whose goals should be shaped by the child’s best interests.” In essence, “the guardian acts as a buffer between the child and the adversarial nature of our judicial process.” Interestingly in Gilbert, the Vermont Supreme Court held that a stipulation to admit the report of a guardian ad litem into evidence was unenforceable until after the parties had the opportunity to read the report. Gilbert v. Gilbert. 664 A.2d 239, 241 (Vt. 1995).

¹¹⁵

Id. at 1171-73. The case did raise the interesting issue of whether the private attorney who was contacted by the children breached the rules of professional conduct by communicating with the guardian ad litem’s “clients” and the court held that in those circumstances she did not because the children were intelligent, mature being just shy of young adulthood and the function of private counsel was solely to disseminate information to the children but that would be a close call on other circumstances for private counsel embarking on such a path if contacted by one of the parents. Id. at 1175-77.

VI. Aftermath

The sheer volume of chronic conflict cases over the past twenty years is depressing. Traditionally, most reported decisions are found in the appellate courts and those cases represent only a fractional portion of the 1-2% of all civil filings that actually go to trial for judgment. If the appellate decisions nationally are representative of the willingness of thousands of parents to engage in the emotional and financial expense of litigation, what can be the situation in the home for children under such compression? The facts in many of these cases certainly reflect an unfortunate and detrimental level of conflict.

And these reported decisions do not reflect what many of us know is the energy and expertise required in thousands of more cases to prevent the trial and remove or limit the conflict. But the creative solutions of the past generation have not slowed the rate of custody litigation. There are those who will attribute higher levels of conflict to more joint custody awards or the more active involvement of fathers than in the past (or stated another way – fewer fathers walking away, willingly or not, from parental responsibility). Toffler is probably more correct in that the loss of stability for individuals within the family as the “great shock absorber” of society combined with serial relationships, increases the sheer volume of players in a child’s life and with that volume conflict is more probable.

As physical scientists explore the realms of chaos and complexity theory, it may find a home in family law. The “transcience” of relationships means that parents are introducing many more emotional, psychological, sexual, moral, behavioral and cultural variables into the daily matrix of a child’s life. Even if conflict between those variables is inevitable, a parent’s inability or unwillingness to act as a “shock absorber” for his or her will yield more litigation. Selfishness and narcissism are not pretty traits and when

confronted in a swirling bulk it is difficult to educate parents and protect children concurrently within the current ethical, financial and constitutional limitations of the judicial system.

Thus, our Futurist finds noticeable and remarkable patterns which yield a paradigmatic shift in the role of the guardian ad litem for the future. When parental conflict is unyielding, a guardian ad litem will be appointed for the family with the authority to investigate, champion, and referee.¹¹⁶ What this means for a presumption of privacy within the family and how the evolution of due process rights for children in custody cases will impact historical parent-child relationships which traditionally empowered parents to act for their children remains to be seen. But there is a cost: as parents forfeit authority, its dispersion to third parties and their children will profoundly influence a pattern of family life that has remained consistent over hundreds of years.

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There will be a right to appeal but the right to appeal arbitration or references is much narrower than the right to appeal in a non-jury trial. See e.g. Swenton v. Swenton, ___ S.E.2d ___ (S.C. App. 1999) (where husband and wife agreed to arbitrate financial issues, family court cannot review for "fairness").

PREVENTION STRATEGIES TO PROTECT PROFESSIONALS AND FAMILIES INVOLVED IN HIGH-CONFLICT DIVORCE

Thomas E. Schacht
James H. Quillen College of Medicine
East Tennessee State University

DRAFT

Recently, while consulting with an attorney on the defense of a multiple-murderer, I noticed a pistol inside the counselor's opened desk drawer. I commented empathically about the potential for feeling unsafe when dealing with violent criminals, but the attorney replied that his concerns lay elsewhere -- the gun was for his divorce cases.

Park ranger's advice to anxious campers about how to protect themselves if confronted by a bear:

"There are two schools of thought. One says you should stand perfectly still, avoiding eye contact, until the bear goes away. Other experts say the opposite -- you should run the bear off by screaming and jumping and waving your arms. In my long years of wilderness experience, I've determined that both schools are right about half the time ... it mostly depends on the bear." Anon.

I. INTRODUCTION

Standard clinical nomenclature parses prevention efforts into primary, secondary, and tertiary levels. With respect to divorce, a *primary prevention* perspective seeks to minimize the onset of new cases of divorce, by methods to reduce causes and risk factors for divorce to enhance the capacity of families to fulfill their roles and endure adversity without resorting to divorce. A *secondary prevention* perspective assumes that a divorce is inevitable, but seeks to reduce the intensity or shorten the duration of a conflict by emphasizing methods for early identification and prompt intervention. Typical procedures include mechanisms for crisis intervention, public education, and increased availability of support services. *Tertiary prevention* assumes that a high-conflict condition exists. The goal is to institute aggressive measures to limit the morbidity, mortality, and residual impairment which may result.

This paper identifies some potential prevention strategies for the protection of families and professionals who are enmeshed in the events of a high-conflict divorce.

II. EPIDEMIOLOGICAL SCOPE OF DIVORCE CONFLICT

The United States has the highest divorce rate in the world (United Nations, 1992). According to the U.S. Bureau of the Census, the fastest growing marital status category is that of divorced persons. The number of currently divorced adults quadrupled from 4.3 million in 1970 to 17.4 million in 1994, and the percentage of divorced adults in this same period climbed from 3% to 9% of the population (U.S. Bureau of the Census, 1996). Although most social phenomena have multiple causes, some scholars argue that this increase is due especially to the proliferation of no-fault divorce laws (Nakonezny, Schull, & Rodgers, 1995).

Divorce is associated with elevated risk for a range of psychological and physical ills in spouses and children. Post-divorce economic adversity is common, particularly in the case of women (cf. Amato & Keith, 1991; Kitson & Morgan, 1991; Waite, 1995). Psychological and developmental risks of divorce are well-documented and tend to increase with the severity of interparental interpersonal conflict (Camera & Resnick, 1988; Cherlin et al. 1998; Wallerstein, 1991; Johnston & Roseby, 1997). Psychological impairments to children arising from divorce may persist into adulthood, setting the stage for a transgenerational repetition of family dysfunction and psychopathology (cf. Widom, 1999). Children of high-conflict divorce may lose a parental relationship entirely and may spend substantial periods of time without adult supervision, which increases the risk of delinquency, school failure, teenage pregnancy, violence, and substance use (cf. Resnick et al. 1997).

Spousal contributions to conflict

Divorcing spouses are often expected to divide property equitably and to negotiate, collaborate, and cooperate over the long-haul in a post-divorce relationship with respect to their children (Maccoby & Mnookin, 1992, p. 2; Emery, 1988, p. 109).¹ Despite the existence of some benign outcomes, the so-called good divorce is an oxymoron. For a variety of reasons which may operate at all levels of the biopsychosocial hierarchy, the context of divorce often brings out the worst in spouses, their children, and the professionals who work with them. Intense hostility and/or bitter legal conflict accompany and often prolong the divorcing process in up to one third of cases (Maccoby & Mnookin, 1992, p. 141; Masheter, 1991; Johnston & Roseby, 1997, p. 4). In these intensely conflicted cases one or more parties conduct themselves in ways which are not merely aggravating, obnoxious, or mean, but rather which pose various palpable dangers – psychological, financial, legal, and even physical – to family members, professionals, and even uninvolved bystanders.

A recent national media headline (Tresniowski, et al., Vol. 51, #5, 02-08-99, p. 65) used the

¹In fact, most divorcing couples do handle this challenge and manage to negotiate their own circumstances and consummate a divorce without requiring formal custody evaluation or court adjudication.

phrase “As nasty as it gets” to describe the divorce and custody battle of a billionaire and his multi-millionaire ex-wife, both of whom – as one might expect – are used to getting their own way. Both parties have alleged physical abuse by the other. In proceedings to increase his \$12,000 per month child support payments, the billionaire husband testified that it costs \$3.00 per day to feed his daughter. The ex-wife has gone through five teams of lawyers. A court-appointed psychiatrist has produced an 800 page report, which has been condemned by the ex-wife, who charges improper influence of the physician by her husband during a lunch at his estate. Combined professional fees for the parties are estimated to be several million dollars, with no end in sight.

Of course, spectacular courtroom battles between wealthy individuals are not “as nasty as it gets.” The full range of risks includes physical, legal, and financial harm as well as psychological damage. The most extreme risks include physical injury or death, mental illness, bankruptcy and impoverishment, limitation or outright loss of professional licensure, and incarceration.

High-conflict divorce is a major social, economic, and public health problem, as well as a source of legal and interpersonal woe. Conflict may be expressed in behavior designed to humiliate, punish, or avenge (such as self-destructively expending assets on attorneys to prevent the spouse from gaining them; physically injuring oneself to support a claim of spousal abuse; fabricating claims of sexual abuse of children; seeking to legally change a child’s name in order to erase any connection to the father). In addition to targeting each other directly, divorcing parents may transform a child into a relationship weapon by engaging in patterns of behavior designed to destroy the child’s psychological connection the other parent.² Fighting may serve as a distraction

²Examples of such alienating behavior include:

- Minimizing the importance of contact and relationship with the other parent.
- Excessively rigid boundaries: rudeness, refusal to speak to or inability to tolerate the presence of the other parent, even at events important to the child; refusal to allow the other parent near the home for drop-off and pick-up visitations.
- No encouragement for visits with the other parent.
- No concern for missed visits, and lack of empathy for child’s distress at missed visits.
- No positive interest in the child’s activities or experiences during visits.
- Granting autonomy to the point of apparent indifference (“it’s up to you, I don’t care.”)
- Overt expressions of dislike of visitation (Ok, visit, but you know how I feel about it...)
- Refusal to discuss anything about the other parent (“I don’t want to hear about...”) or selective willingness to only discuss negative matters.
- Innuendo and accusations against the other parent, including statements that are false.
- Portraying the child as an actual or potential victim of the other parents’ behavior.
- Demanding that a child keep secrets from the other parent.
- Destruction of gifts or memorabilia of the other parent,
- Promoting loyalty conflicts (such as by offering an opportunity for a desired activity that conflicts with scheduled visitation)

from the pain of divorce and may help to sever residual bonds of attachment and affection. Conflict agendas may also underlie behavior which is based on an extremely narrow and rigid view of the spouse or of marital relationships in general (such as may be found in cases of so-called parent-alienation, or which may occur when parents harbor extreme belief systems or belong to cult-like groups). Conflict agendas may sometimes be related to psychopathology in one or both spouses, particularly severe personality disorders, but also including a range of other conditions. Systematic epidemiological data are unavailable. Alternatively, in some cases an apparent emotional agenda is a sham, adopted in cold-blood solely for the purpose of gaining strategic advantage or tormenting the partner. Ideological agendas may stem from various philosophical, religious, or cultural origins, which can lend a fervid aura of righteousness to otherwise personal issues of divorce and child custody (cf. Chesler, 1986).

Individuals involved in high-conflict divorces are not generally known for their listening skills, or for their ability to adopt a balanced, objective, and realistic outlook. Divorcing spouses may vacillate, causing the attorney to waste time preparing for a court battle that the client ultimately is not willing to undertake. Some clients instruct their attorney to fight every issue to the last, while making irrational demands that insure no settlement or agreement is possible. Goldstein (1999) cites the case of a paternity defendant seeking to escape child support obligations who was "appalled that the court had saddled him with fatherhood based on a mere 99.86 genetic probability. Why couldn't the courts see that there was a 0.14 percent chance that the father was someone else?"

Professional contributions to conflict

There is a country saying that if a small town has only one lawyer, he will starve, but if a second attorney sets up shop, they will both prosper. The same may be said about other professionals who may be drawn into a "battle of the experts" by custody litigators. It is undeniable that divorce is an industry which supports numerous professionals and that these individuals may benefit from divorce conflict. Accordingly, the professional involved in family law proceedings is at risk for being seen as, or for becoming, a vulture who creates or promotes stress and then profits from it. Indeed, there are some empirical data suggesting that involvement of lawyers is associated with different requests from divorcing partners and with different divorce outcomes (Maccoby & Mnookin, , p. 108 ff).

The number of lawyers in the United States has nearly tripled since 1970 (Ritchie, 1998). Similar increases have occurred in the numbers of mental health professionals. As a result of this expanded professional community, it is more common that opposing attorneys or experts will be relative strangers. The psychological principle of projection thrives on the ambiguity of anonymity. Thus, it is easier to misattribute base motives and misunderstand another professional who exists as little more than a name at the bottom of a document. Sheer economic competition fuels conflict. Managed care restrictions have caused many mental health professionals to consider adding forensic work to their professional repertoire. In some jurisdictions (Florida), aggressive attorneys in search of billable hours prowl courthouses in

search of divorcing clients. When a divorce action is filed, the attorney immediately contacts the spouse and offers representation. In some cases, the “Dear Potential Client” contact from the attorney offering services represents the first notice to an individual that his/her spouse is seeking a divorce. The letters reportedly range from tasteful queries on professional letterhead to lurid solicitations. This activity is sufficiently lucrative to lawyers that third-party businesses now compile and disseminate names on a daily basis for a fee (National Post, 1999).

Some lawyers and organizations have set up Internet web sites offering “how to” advice for individuals contemplating or engaged in divorce. While some of these sites offer information about how to preserve low-conflict relationships, how collaborate in a divorce, how to benefit from mediation, or what to reasonably expect from your attorney, others offer shrill political manifestos, serve as organs for trumpeting mens’ rights or feminist ideologies, or hawk frank terrorist manuals for marital warfare.³ Consider the published advice of a divorce attorney to women contemplating divorce on the subject of “Finding a psychologist to testify against your husband” (Pistotnik, 1996, pp. 161 ff.):

“To ensure that you win your divorce, you will need a psychologist who will act as a counselor, friend, expert, and sword...Seek counseling early in the game to establish the long-term counseling that is needed. If you see the psychologist for only a short period of time, the court will place much less credence in his or her opinion...psychological experts are no different from the experts discussed in the preceding chapter. They will sell their professional opinions and testify for one side or the other...Even if you had an affair with a younger man, spent all of your husband’s money on presents for your boyfriend, and are entirely at fault, you need a psychologist who will say that your behavior was acceptable and justified. A good psychologist will go to the grave backing up your case...Find the psychologist whose clients have won the most money in their divorces. That reputation is a good indicator of the psychologist’s ability to help you...Remember, battered wife syndrome can be induced by verbal abuse. Surely your husband as verbally abused you at some point in your life. Perhaps he told you that you were fat or stupid, or attacked you in some other manner. The psychologist can pinpoint these attacks and arrive at a reasonable diagnosis...Do not reveal your real plan to the psychologist...Don’t let the psychologist know what you are up to. Rehearse your plan only to yourself. Persuade the psychologist to believe in your case, and make him think that every single fact you give him is a fact he can use as your advocate. Most psychologists want to believe their patients; there is a strong tendency in mental-health counselors to believe the assertions of a patient until they are disproved. Still, never let down your guard, even if questioned by your psychologist.”

Pistotnik also advised divorcing women to entrap their husbands by inviting them into

³ For example, see <<http://www.collaborativedivorce.com>>, <<http://www.divorcewar.com>>, <<http://www.divorce-without-war.com>>, <<http://www.divorcereform.org>>, and <<http://www.smartmarriages.com/divorce>>.

counseling sessions, where the husband's weaknesses, misbehavior, substance abuse, etc. are openly discussed. Since the patient-therapist relationship is with the wife, the husband is not entitled to any privilege, and the therapist can testify about these statements in court.

Professional standards dictate roles which emphasize reduction of conflict and action in the best interests of the child.⁴ However, under the pressures of the situation and rationalized under the guise of therapeutic zeal or vigorous advocacy, some health professionals lose objectivity and some attorneys apply "hardball" or "scorched earth" tactics⁵ against spousal opponents (Ritchie, 1998). Examples of such tactics include deliberate efforts to wear down and provoke opponents with repetitive legal motions, abusive discovery, tactics to obstruct and delay proceedings, and other procedural steps to churn the litigation mill and inflate the opponents legal fees to impossible proportions; concealment or misrepresentation of assets or other relevant facts; character assassination; employment of unethical or "hired gun" experts; and deliberate distortions, mistruths, and false allegations of substance addiction, promiscuity, or abuse as a foundation for unjustified demands for restraining orders and severely restricted visitation. At worst professionals may become perpetrators of psychological or economic violence upon clients who may be too ignorant, confused, impoverished, or exhausted to defend themselves.⁶ In turn, as parties to the conflict, professionals are at risk for suffering any of the physical, psychological, or legal assaults that spouses may inflict upon each other. The scope of these risks is broad and

⁴American Academy of Matrimonial Lawyers, Standards of Conduct in Family Law Litigation, full text available at <<http://www.aaml.org/boundsof.htm>> ; American Psychological Association, (1994) Guidelines for child custody evaluations in divorce proceedings; American Psychological Association Committee on Professional Practice and Standards (1998) Guidelines for psychological evaluations in child protection matters.; American Academy of Child and Adolescent Psychiatry (1997) Summary of practice parameters for child custody evaluations.

⁵ The term "scorched earth" is attributed to the strategy of burning everything in sight to achieve a military objective.

⁶ Bilson and Mnookin [94 Col. L. Rev. 509 (1994)] distinguish effective legal representation from mere obnoxiousness and warn of the risks when attorneys identify with their clients' exaggerated conflictual goals:

"Those lawyers who believe that 'scorched earth' tactics are key to success in matrimonial litigation justify their 'win at any cost' behavior on the basis of zealous advocacy on the client's behalf. In some cases this approach intimidates or wears down the opponent, resulting in victory for the offensively aggressive (and aggressively offensive) lawyer. More often, however, such tactics simply cause delay and divisiveness, increase expense, and waste judicial resources. Enlightened lawyers hold the view that courteous behavior is not a sign of weakness but is consistent with forceful and effective advocacy."

limited mostly by the creativity, scruples, and resources of the individual launching the attack.

Abuse allegations. Professionals are often called upon to perform evaluations in the context of allegations of abuse of children, adults, or both. There is a common belief that false abuse allegations may be commonly raised in custody disputes, as part of an effort for one parent to gain leverage over the opposing spouse or to undermine the child's relationship with the other parent (Gardner, 1987; Green, 1986).⁷ This belief is supported, in part, by observations that in cases of suspected abuse, there is a high frequency of custody dispute (Jones & McGraw, 1987). It is not surprising that custody disputes would occur in circumstances involving sexual abuse. The reverse question is not automatically answerable in the affirmative. That is, the fact that custody disputes occur in cases of sexual abuse does not mean that the sexual abuse allegations were caused by the custody dispute. However, it is not clear to what extent the apparent occurrence of sexual abuse allegations in custody disputes reflects particular dynamics of the custody situation, or whether this is simply part of a broader demographic trend toward higher rates of abuse reporting. For data on this question, it is necessary to examine the question by looking at unselected cases of custody dispute. Recent empirical study of a large sample of consecutive family court cases for an entire year suggests that the base rate incidence of alleged sexual abuse may be as low as 2% of contested custody cases and less than 1% of all family court cases (McIntosh & Prinz, 1993).⁸ However, these statistics do not speak to the correlated issues of how frequently allegations may be false or of how often this issue may be raised and settled informally, which results in the issue never being litigated or appearing in court documents.

Every state now has a law requiring the reporting of suspected child abuse, although professional knowledge and compliance with these laws is inconsistent. Some professionals, caught up in the throes of a high-conflict divorce situation, appear to forget that such laws typically provide immunity from liability only for disclosures that are made under limited circumstances specified by the statute (such as reports made directly to police, human service authorities, juvenile courts, etc.) One study of a large sample of psychologists found that "protecting the child" was rated more highly than "upholding the law" as a determinant of whether to report suspected abuse (Kalichman & Brosig, 1993). These professionals may confuse the professional duty to testify in accordance with the best interests of the child, which does not authorize breach of confidentiality, with the legal duty to report suspected abuse. Unauthorized testimony in a divorce action, even when given in response to allegations of abuse or neglect, is not covered by immunity provisions of reporting statutes. Thus, a recent New Jersey case found a psychologist liable for damages to a former patient, whom she had counseled along with her husband for five

⁷In a particularly nasty variation on this theme, the accusing parent attempts to gild the accusation with a professional aura, by raising their concerns with a treating clinician, knowing that the clinician will then have a legal duty to report the matter to appropriate investigative authorities.

⁸ Adding allegations of physical abuse increased the rate of allegations to 8% in contested cases and 3% overall.

years prior to a divorce, after the psychologist testified against the mother in a custody hearing, believing that her testimony was based on the "best interests" of the child (*Runyon v Smith*, 1999).

Violence. In light of our recent national preoccupation with the activities of mass murderers, the prospect of violence is particularly salient. Violence in a divorce may be an expression of overwhelming psychological disturbance or it may be a calculated behavior designed to accomplish an instrumental goal. Mazur and Michalek (1998) argue that the conflict associated with divorce causes an increase in male testosterone levels, which in turn escalates aggressive tendencies and increases the risk of relationship violence. Regardless of cause, the potential for physical, psychological, and economic violence before, during, or after legal proceedings arouses fear that does not spare judges, court staff, attorneys, witnesses, and families (Molvig, 1997).⁹ Harassment, intimidation, slander, exploitation, theft, fraud, character assassination, false accusation, abduction, stalking, physical, psychological, and sexual abuse, and murder or murder-suicide are among the forms of violence that may occur in the context of high-conflict divorce.

Estimates of the prevalence of physical violence in divorcing couples range as high as 75% (Johnston & Campbell, 1993a,b; Camera & Resnick, 1988). Professionals may be direct targets or may be harmed as the incidental victims of violence directed at their clients. While there are general data regarding assaults on clinical professionals, no breakdowns exist which identify the role of divorce as a precipitating or contextual factor.¹⁰ Anecdotally, the Boston Globe in 1995 reported on the deaths of two Massachusetts divorce attorneys murdered by their client's husbands, and noted similar murders and violent attacks in Florida, Chicago, New York, and St. Louis. The American Bar Association conducted an unscientific fax survey of nearly 1500 of its Family Law Section members regarding their experiences with client-related violence. Of the 253 responding attorneys, 60% indicated that they had been threatened by and 9% had been victims of violence by opposing counsel's client. There is apparently less danger from one's own clients, as only 17% had been threatened by their own clients and 3% had been victims of violence perpetrated by their own client. Only 35% of the sample indicated they had never been threatened or victimized by anyone in the course of their family law practices. Although the majority (74%) of surveyed attorneys indicated they had taken no special precautions to ensure their safety, some individuals described methods for managing the perceived risk of violence, including carrying firearms and hiding a golf club behind the office door (McCurry, 1998).

Malpractice / ethics. In addition to the potential for violence, professionals also face the threat of

⁹This type of conflict has been colloquially labeled "tribal warfare," reflecting the processes by which the emotional contagion of a marital conflict spreads to include significant others, extended kin, neighbors, attorneys, mental health professionals, and even judges.

¹⁰ For example, about 1.6% of physicians were victims of non-fatal workplace violence in the period 1992-1996. However, there are apparently no data indicating the extent to which the context of divorce contributed to these assaults (AMA News, 02-01-99).

lawsuit for malpractice or of complaints to professional ethics committees and licensing boards. In the current managed care climate, adverse impacts to credentials may also result in de-selection from managed care panels, which can destroy the economic viability of a professional practice. Published data on ethics complaints indicate that involvement with child custody poses a significant professional risk. In the most recent ten year period for which statistics have been compiled by the ethics committee of the American Psychological Association (1988-1998), child custody disputes have been the single most common context for complaints of inappropriate professional practice.¹¹

III. PREVENTION STRATEGIES

General / Financing

The number of children in the United States who live in poverty is a national embarrassment. Social and health services to children and families, particularly those in poor and rural areas, are woefully underfunded. For those individuals who have health insurance, marital and parenting problems are commonly excluded from benefit coverage, unless an individual is identified as the patient and given a psychopathological diagnosis. In addition to the currently available funding mechanisms, additional measures may include:

[a] Universal health insurance for children would remove payments for health care as an issue in divorce. This would also remove any incentive that parents may have to identify their children as disabled in order to obtain funds for health care through the social security disability system.

[b] Insurance reform should require inclusion of clinical services to couples and families. Health-insurance policies which limit mental health services to individuals should be discouraged by appropriate legal means. Families should be allowed to pool the insurance benefit limits of all their individual members for the purpose of receiving family services. In light of overwhelming evidence that divorce is a significant public health problem, mental health services arising out of the context of divorce should be brought under a statutory *per se* determination of "medical necessity" under managed-care plans (which have tended to use such determinations as a specious pretext for engineering overall reductions in care; Leslie & Rosenheck, 1999).

[c] The states' interest in the harm associated with divorce justifies a tax on divorce. All property settlements in divorces could be subject to an estate tax, proceeds of which are dedicated to a Children's Trust Fund in each state. The tax should be graduated and should have a generous exemption to insure that it does not inadvertently harm those it is intended to help. Consideration should be given to allowing a substantial deduction for assets placed into irrevocable trust for

¹¹Yearly statistical reports of the APA Ethics Committee are published in the annual archival issue of *American Psychologist*, usually in July or August. Each report includes a table which, among other facts, enumerates the numbers of cases arising in the context of custody disputes.

the appropriate benefit of minor children. Concealment or fraudulent transfer of assets to avoid the tax or to deprive a spouse of a fair settlement should be criminalized, similar to income tax offenses.

[d] Current systems for encouraging child support payments include such measures as withholding driver's licenses or tax refunds. I suggest that state or federal governments should explore the possibility of treating an interruption in the flow of child support payments as an insurable risk.¹² Just as farmers can purchase crop disaster insurance, and residents of low-lying areas can purchase flood insurance, spouses should be able to purchase child-support payment insurance from the government in reasonable amounts. Such an insurance system would deprive the nonpaying spouse of an opportunity to pursue conflict with the ex-partner by manipulating support payments. In the event of default, recourse to the nonpaying spouse would be through the government insurance entity. Enforcement is thus separated from the dynamics of the conflicted relationship.

[e] Viewing children as if they were property seems to be an attitude of one or both spouses in some high-conflict divorce situations, and may be encouraged by attorneys who offer to trade custody or visitation privileges for other concessions or prerogatives. The legal tactic of trading custody concessions for money sets a stage for future resentment and does not prepare a couple for collaboration around future child-rearing tasks. Furthermore, it is morally offensive. Article 35. United Nations Convention on the Rights of the Child, 1989, holds: "*States...shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.*" Consistent with this principle, legal measures should be taken to protect children from becoming commodities in the fund-raising aspects of a divorce.¹³ Consideration should be given to criminalizing any form of divorce bargaining that trades child custody or visitation for property or money as a violation of a child's right not to be the subject of a financial transaction and on the moral theory that such bargaining represents an offensive vestige of the limited view of human rights that once tolerated slavery.

Primary Prevention

Primary prevention seeks to minimize the onset of new cases of divorce, by methods to reduce causes and risk factors for divorce to enhance the capacity of families to fulfill their roles and

¹²"*States...shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the State...and from abroad.*" Article 27(4). United Nations Convention on the Rights of the Child, 1989.

¹³Such bargaining may have deep cultural roots. In the United States, the relationship between parental rights and property law stems from English common law which supported the functioning of the family as an agrarian unit by assigning to parents the right to the services of their minor children (Nurcombe & Partlett, 1994, p. 42).

endure adversity without resorting to divorce. A primary prevention might advocate measures such as the following:

[a] *Family-life education.* Federal support should be offered for development and implementation of curricula for education in the basics of parenting, interpersonal relationships, and domestic safety in the K-12 curriculum of every public school. We teach children how to be safe from strangers and how to avoid drugs and sexually transmitted diseases, but we are not as effective in helping them prepare for the role of parenting, or in helping them know what to do if they are caught in the middle of a domestic violence crossfire.

[b] *Family support services.* Every parent, married or not, should have access to a comprehensive spectrum of family support and divorce-prevention programs. Parent-training and consultation with parenting specialists should be available free of charge, as a form of life-long public education, to be accessed on relatively short-notice in most communities.

[c] *Premarital education.* Following the suggestion of Clark (1996), in order to obtain a marriage license without proof of premarital education, a couple should endure a delay and pay a higher license fee, proceeds of which might go to a state Children's Trust Fund. Stanley et al. (1995) demonstrated that, as compared to controls, couples who participate in a Prevention and Relationship Enhancement Program (PREP) show significant improvement in conflict management, maintain higher levels of marital satisfaction, lower levels of aggression, and a lower divorce/separation rate five years after completing the program. Such demonstrably effective premarital education should be provided free of charge through adult education programs located in public schools.

[d] *Specialized marriage contracts.* Louisiana's 1997 covenant marriage option should be carefully studied and, if warranted by outcome data, should be considered for adoption in other states. This legal structure allows couples to choose between a standard marriage contract permitting no-fault divorce after a six month separation and a "covenant marriage" that permits divorce only under condition of fault or after a marital separation of more than two years. Couples who choose a covenant marriage must also obtain premarital counseling (Spaht, 1998).

Secondary Prevention

A secondary prevention perspective assumes that a divorce has occurred or is inevitable, but seeks to reduce the frequency, intensity or duration of conflict by emphasizing methods for early identification and prompt intervention. Typical procedures include mechanisms for crisis intervention, public education, and increased availability of support services.

[a] *Support for child care.* Year-round schooling integrated with after-school child-care. The typical 180 day school year in the United States is among shortest among developed countries in the world. In addition to educational inefficiency, this also results in a waste of expensive infrastructure, because school buildings sit idle for months at a time. Too many children have

nothing to do for long periods because of a school system whose schedule is a vestige of an agrarian economy in which children needed to be free during the growing season to work on the farm. Families stressed by the demands of single parenting and working hard to meet the financial burdens of sustaining two households would benefit from an extended school year with integrated after-school child-care in every community.

[b] *Pre-divorce parenting education.* The requirement of some jurisdictions, such as Connecticut and Utah, that all divorcing couples participate in parenting education (Mooney, Knox & Schacht, 2000) should be more widely evaluated with a national program of pilot projects, followed by outcome studies and wholesale adoption of effective programs.

[c] *Alternative dispute resolution.* The formality, expense, and adversarial procedures of litigation may accelerate conflict. However, the legal system may not always recognize iatrogenesis. If a little bit of litigation does not solve a problem, too often the solution is often more litigation. Reduction of family conflict and reduction of litigation are clearly in best interests of children and families. For this reason, development and testing of effective alternative dispute resolution methods (cf. Johnston & Roseby, 1997) should become a national priority. Some data suggest that children of mediated divorces may adjust better than children of litigated divorces (Marlow & Sauber, 1990). Unfortunately, the meaning of these data is unclear, because of the potential for selection bias. The nation needs the equivalent of clinical trials, similar to those conducted by the National Institute of Mental Health on treatments for mental disorders, to evaluate which alternative dispute methods and systems are safe and effective for which families under which circumstances.

[d] *Reduce childrens' involvement in parental divorce proceedings.* Childrens' involvement in parental divorce proceedings is fraught with the potential for psychologically destructive loyalty conflict. Thus, a secondary benefit of alternative dispute resolution is that it permits children to be excluded from involvement in divorce proceedings. However, when divorce litigation is inevitable, children may become involved as witnesses in their parents's divorces, particularly as they become older (Crosby-Currie, 1996).. All 50 states allow consideration of children's wishes in custody determination, sometimes codified in the list of statutory factors included in a "best interests" determination, and failure of a judge to interview children of appropriate age regarding their wishes is potentially reversible error. Mental health professionals, either treating clinicians or custody evaluators, often act as proxies for childrens' testimony. The potential for children's statements to become fuel for a family conflict can be reduced if rules of procedure explicitly permit interviews to be conducted in chambers, without presence of parents' counsel or parents, but perhaps attended by a guardian ad litem and perhaps assisted by a court's mental health expert. Further benefit to children would accrue if the court did not keep a transcript or recording of the childrens' statements, or if such a record is kept, it is placed under seal and all parties are instructed by the court not to question the child about his/her statements. Absence of a record precludes use of the statements in further litigation and also may inhibit adult retaliation against children.

[e] *Infrastructure improvements to reduce conflict opportunity.* “Good fences make good neighbors.” Basic infrastructure improvements should be instituted to reduce opportunities for harmful conflict. Every community that has a public school should also have a center where safe, supervised visitation, waiting, and transfer can be accomplished, without the necessity for contact between conflicted parents. Every courthouse ~~does not~~^{should} have adequate security measures, including reasonable controls on access through secured checkpoints, weapon detection technology, secure office settings, and adequate numbers of uniformed bailiffs. Secured and separate waiting rooms can be helpful in putting distance between warring parties. Nothing is gained by a court schedule and physical arrangement that makes adversarial parties share the same waiting space, or that puts everyone with a domestic violence injunction hearing in the same courtroom or same hallway waiting area at the same time. In severe cases, victims of domestic violence may be intimidated or overwhelmed by mere eye contact with the perpetrator. The option of a closed-circuit TV appearance may be useful in some extreme situations. Court calendars should be managed as efficiently as possible. Reduced waiting times can be helpful in managing tensions that contribute to anger and violence.

[f] *Therapeutic jurisprudence.* Divorce may occur in the context of a host of other severe family dysfunctions that implicate various divisions of the legal system. For example, in addition to the divorce proceeding, a spouse may face an assault and battery charge in criminal court and a child may respond to the divorce stress with behavior that results in referral to juvenile court. Although families are functional psychological units, the legal system tends to see all these issues as separate. A mechanism for consolidation of cases, particularly if this could be accomplished in a system of specialized multi-disciplinary courts, would allow one specially trained judge to see the progression of the family and to approach the problem with sensitivity to family issues.

One mechanism for accomplishing this goal would be to create truly specialized courts, analogous to the mental health courts that have been established in Broward County, Florida and King County, Washington for management of misdemeanor criminal defendants with mental illnesses. Cases volunteering for these courts benefit from improved processing time, improved access to mental health services, and (hopefully) lower rates of recidivism. These benefits derive from the legal equivalent or continuity of care by a multidisciplinary team which includes judicial, legal, and mental health professionals who follow a case from beginning to end. The program is designed to coordinate services prior to, during, and after adjudication.¹⁴ Congressman Ted Strickland (Ohio) has recently proposed a federal legislation to support a pilot program to further develop and evaluate this concept.

The expertise and balance embodied in such a multidisciplinary court should allow an improved

¹⁴ Cayce & Burrell, 1999; see also Plumb, G. & Lindley, M. (1990) Humanizing child custody disputes: The family's team. Springfield, Ill.: Charles C. Thomas.

execution of the “best interests” standard.¹⁵ The “best interests” standard is laudable, but vague and in custody litigation it may become a license for warring parties to claim that virtually anything is relevant to a determination of custody. It is also a double-edged sword for the judiciary, which allows exercise of wisdom particularized to the facts of a given case, but also opens the door to error, bias, or to frank abuse of discretion. At worst, the latitude inherent in the best interests standard may allow a biased expert or judge to tyrannize or unfairly punish a marital litigant from behind the shield of the court’s immunity. A multidisciplinary team should be better able to resist the idiosyncratic personalized reactions¹⁶ that may be evoked by outrageous and provocative behavior on the part of litigating spouses. A team should be able to better define the desired scope of a best interests evaluation in a particular case, allowing experts to more efficiently target their efforts to relevant as opposed to peripheral issues.

Tertiary Prevention

Tertiary prevention assumes that a high-conflict condition exists. The goal is to institute aggressive measures to limit the morbidity, mortality, and residual harm which may result.

[a] *Stalking* Stalking and “obsessional relational intrusion” represent the dark side of close relationships (Cupach & Spitzberg, 1998; Schwartz-Watts, Morgan, & Barnes, 1997). High-conflict divorce offers a fertile environment for these behaviors, including the opportunity for false claims of victimization (cf. Pathe, Mullen, & Purcell, 1999). Stalking activities may include various forms of following, harassment, or intrusive communication, some motivated by distorted experiences of attachment or attraction, and others motivated by desire to harm, including the making of credible threats which place the stalked individual in fear of death or personal injury, or actual assault. Stalkers may show up at the residence, school, or work-place of their victims. A majority of stalkers may be mentally ill, and ordinary legal measures alone, such as restraining orders, may be ineffective (Mullen, Pathe, Purcell, & Stuart, 1999).

In view of the additional harm that may accrue to children, consideration should be given to amending anti-stalking statutes to make stalking an ex-spouse, his/her new family, or non-custodial children a potential aggravating factor in sentencing proceedings.

[b] *Abusive marital litigation*. Get serious about application of sanctions for repeated and abusive litigation (which in itself may be a tool for stalking). Courts should be more diligent in identifying unwarranted or frivolous motions or litigation, and should be more consistent in imposing sanctions for such conduct. Consideration should be given to developing a mechanism

¹⁵“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.” Article 3, United Nations Convention on the Rights of the Child, 1989

¹⁶ Also termed “countertransference” in the mental health literature.

that would allow a custody decree to be finalized in such a manner that the issue could only be re-opened by the state, upon appropriate motion of child protection authorities.¹⁷ The proposed Model Relocation Act adopted by the American Academy of Matrimonial Lawyers includes an example of sanction provisions (§ 409 “Sanctions for unwarranted or frivolous proposal to or objection to relocation of a child”).¹⁸ However, many sanctions may be of limited value in cases where the perpetrating spouse has adopted a kamikaze attitude and views sanctions as a self-destructive variation on the theme of “suicide by cop.” Courts should also take seriously the criminal nature of introducing false complaints of abuse into litigation, or of coaching a child to malingering. Analogy may be drawn to a recent case of first impression, *U.S. v. Greer*¹⁹ which upheld an upward sentencing departure / penalty enhancement for a criminal defendant who had malingered during a competency examination.

[c] *Abduction*. Eliminate reluctance to prosecute parents for abduction under harsh kidnapping statutes by insuring the availability of alternative offenses such as “custodial interference” (see TN statute) that do not force a court to impose an unreasonably harsh penalty. In addition to standard measures such as supervised visitations, confiscating passports, and fingerprinting children, it is time to explore possible application of the advances of high-tech supervision of probationers and parolees to parents judged to be at high risk for abducting their children. For example, a mother at risk for abducting her children could be required to wear a device that will locate her position at all times during visitation via a global positioning link with a satellite and will prompt a law enforcement response if she strays outside prescribed boundaries.²⁰

[d] *Violence*. Unfortunately, spousal violence has historically been treated less seriously than violence against strangers. The criminal implications of chronic spousal violence are too often either ignored or are diagnosed and diverted into the mental health system, where effective treatment may be more a myth than a reality (Jacobson & Gottman, 1998).

Existing legal mechanisms for protection of families from chronic domestic violence may benefit

¹⁷Perhaps it should be as difficult to initiate and obtain a post-divorce change of legal custody as it is for the state to terminate parental rights? Under the current system, the relatively liberal opportunity for an aggrieved non-custodial parent to initiate an action for change of custody sometimes transforms spouses into perpetual litigators.

¹⁸Available at <<http://www.aaml.org/Model%20Relocation%20Act.htm>>

¹⁹*U.S. v. Greer*, 158 F.3d 228 5th Cir. 1998

²⁰With appropriate cooperation from law enforcement authorities, it might also be possible for children afraid of abduction by a parent to voluntarily wear such devices during visits as a form of reassurance that they can always be located by the other parent. Such devices may also be useful as a tool to monitor the location of stalkers on parole or probation and to insure compliance with no-contact orders.

from the addition of further options. In particular, Estes (1998)²¹ has outlined a case for extending the Supreme Court's recent *Kansas v. Hendricks*²² decision to the civil commitment of a narrow class of psychopathic repeat domestic abusers. In *Hendricks*, the court upheld Kansas' Sexually Violent Predators Act²³ which provided for involuntary civil commitment of persons convicted of sexually-motivated violent offenses who suffer from a mental abnormality or personality disorder which makes them likely to engage in such acts in the future unless confined in a secure facility. This decision expands the power of states to confine individuals on the basis of dangerousness associated with a broader definition of mental disorder or abnormality than has typically been employed in previous statutes. To extend the principles of *Hendricks* to civil commitment of psychopathic batterers, appropriate enabling legislation would be necessary. To meet the objections of critics of *Hendricks*, any such statute should meet the following conditions: [1] the statute should clearly describe the mental abnormalities which provide a threshold for application; [2] the statute should require scientifically valid predictors of future dangerousness (cf. Quinsey et.al. 1998)²⁴; and [3] some form of treatment should be provided throughout the period of confinement.

Another highly controversial option involves setting temporary limits on the procreation of chronic domestic offenders. An Oregon Appellate Court recently upheld a condition of probation which ordered a man convicted of abusing his wife and child not to father any more children until completion of drug treatment and anger management programs.²⁵ On appeal the defendant asserted this infringed impermissibly upon his fundamental right to procreate and was imposed improperly due to absence of a "less restrictive means analysis." The appeals court upheld this infringement, noting the establishment of a compelling state interest and the time limited nature of the restriction.

[e] *Litigation or complaints against professionals.*

Expert testimony from mental health and economic professionals is common in litigated divorces. Experts testifying in child custody proceedings are bound to make at least one party unhappy, and may achieve this result with both parents. Consequently, it is not uncommon for parents dissatisfied with an expert opinion to shift their aim from the ex-spouse to the expert.

²¹Estes, D. (1998) *Kansas v. Hendricks* as a paradigm for civil commitment of repeat domestic violence offenders. *Thomas Jefferson Law Review*, 20(1), 167.

²²*Kansas v. Hendricks*, 117 S. Ct. 2072 (1997)

²³KAN. STAT. ANN. § 59-29a01 through 59-29a13 (1994)

²⁴Quinsey, V., Harris, G., Rice, M. & Cormier, C. (1998) *Violent offenders: Appraising and managing risk*. Washington, D.C. :American Psychological Association Press

²⁵*State of Oregon v. Kline*, 155 Ore. App. 96, 1998

One proposed defense against this threat is the extension of judicial immunity to the testifying expert.²⁶ While this may prevent litigation, under the current system it does not halt administrative proceedings resulting from complaints to professional ethics committees and state licensing bodies.

Any proposal to offer wholesale immunity to testifying experts must be weighed against the associated loss of accountability. For example, application of a blanket immunity in the following situation would have allowed a gross malfeasance to escape accountability:

A mental health professional evaluated a child on request of a state human services agency, based on concerns expressed by the child's out-of-state non-custodial father, who was enmeshed in a long-term severely conflicted relationship with the child's mother. In the course of evaluating the child, the professional spent about fifteen minutes interviewing the mother about the child's behavior. Subsequently, the father sued for change of custody and the professional was called as a witness. He testified that the mother was unfit, solely because she was in treatment for an affective disorder which, at one time, had required hospitalization. The expert totally discounted the fact that the mother was presently enrolled in a full-time college program, earning excellent grades, and was living with a very supportive and competent extended family. Based on the expert testimony, the court ordered the child taken into the temporary custody of the state. The testifying expert, who operated a for-profit foster care program at his residence, subsequently arranged for the child to be placed in his home, where the mother's supervised visitation was subject to fees for "therapy."

A superior alternative may be to develop statutory structures which link expert immunity to desired behavior on the part of experts and which provide some measure of liability divorcing parties for unfounded allegations. Elements of such a system might include the following:

1. Each state would establish a Custody Evaluation Board or Commission to set standards for experts involved in custody evaluations. These boards would be similar to existing agencies in some states which set standards for evaluation and treatment of sex offenders.²⁷ Ideally the boards would draw major guidance from the work of professional organizations which have already published guidelines for professional involvement in child custody and child abuse cases.²⁸

2. Experts who are suitably qualified, who are licensed in the state in which the proceedings are

²⁶ For example, see *Howard v Drapkin*, 271 Cal. Rptr. 893, 222 Cal. App. 3d 843 (Cal. App. 2 Dist. 1990).

²⁷ See Tennessee, Texas statutes.

²⁸ See note 4 *supra*

held²⁹, and who have no history of a treating relationship³⁰ with any of the parties would be eligible for court-appointment to provide assistance in custody disputes.

3. Judicial immunity would be extended only to those who are truly the court's experts – i.e. selected and appointed by the judge to advise the court. Experts who provide services to the court which represent a good faith effort to conform to the guidelines of the board or commission would be immune from criminal or civil liability, as well as from actions against their state licenses. Experts hired by litigants and testimony from treating clinicians would not be eligible for immunity. Expert testimony from litigants would be ineligible for immunity.³¹ A judge does

²⁹When high conflict is combined with affluence, experts may be imported from venues distant from the jurisdiction in which the divorce is being adjudicated. Custody evaluations require extensive and ideally longitudinal contact with the family. Recommendations may also benefit from familiarity with local support systems and resources. For these reasons, a local expert may have a logistical advantage that cannot be duplicated by the traveling expert, who, of necessity, may not be able to generate as thorough a foundation for his/her opinion. Traveling experts may also be more likely to be "hired guns," who must travel to work because their biased testimony has exhausted their credibility in their home venue. Experts who are invited to travel to a state in which they are not licensed to perform an assessment or to offer testimony should beware that adverse professional and legal consequences, including civil and criminal liability, denial of liability insurance coverage, or professional disciplinary action, may result from failure to address local practice and licensure requirements. Merely obtaining the litigants' consent to an examination, including a statement that no doctor-patient relationship is being created, will not immunize the professional, as these requirements are not contractually based, but rest in the state's power to regulate professional practice for the well-being of its citizens (Simon & Shuman, 1999).

³⁰The fundamental incompatibility of the roles of treating clinician and forensic expert is set forth in two seminal papers: [1] Strasburger, L., Gutheil, T. & Brodsky, A. (1997) On wearing two hats: Role conflict in serving both as psychotherapy and expert witness. American Journal of Psychiatry, 154, 448-456. [2] Greenberg, S. & Shuman, D. (1997) Irreconcilable conflict between therapeutic and forensic roles. Professional Psychology: Research and Practice, 28, 50-57.

³¹In a dramatic illustration of the disturbed boundaries typical of high-conflict divorce, one recent case examined the acceptability of a "do it yourself" approach to expert testimony. In *State v One Marlin Rifle* (725 A.2d 144, 319 N.J. Super.359 (App. Div. 1999) a husband in the process of a divorce was forced to forfeit his weapons after his wife filed a charge of domestic violence against him. The charge was based purely on telephone calls during which he expressed his desire for contact with and custody of his daughter. His estranged wife, a registered nurse, attempted to offer expert testimony regarding her husband's mental condition based on the fact that he had once taken an antidepressant medication. The court reportedly excluded testimony due to lack of requisite medical qualifications, implying that she could have offered expert testimony against her spouse had she demonstrated sufficient knowledge and experience.

not accept money from either side in a dispute. If an expert accepts money for services rendered to a litigant, there should be some mechanism of accountability.

4. Since professional ethics codes generally acknowledge that state law takes precedence, and since the Custody Evaluation Board guidelines would be developed to be compatible with professional standards, it will be difficult to develop an ethical complaint against a professional who conforms to the guidelines of his/her state. For this reason any party, except a judge, who makes a complaint to a professional ethics committee against a professional who has otherwise established immunity should be liable to the professional for damages in the event the ethics complaint results in a formal investigation and is later determined to be unfounded..

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**From Fault Finding to Conflict Management to Differential Diagnosis and Treatment:
Judicial Administration of High Conflict Divorce Cases Involving Children**

by

Andrew Schepard*

* Professor, Hofstra University School of Law. Director, Center for Children, Families and the Law of Hofstra University and North Shore-Long Island Jewish Health Systems. Editor, *Family and Conciliation Courts Review*. Founder, Parent Education and Custody Effectiveness (P.E.A.C.E.), a court-affiliated education program for divorcing and separating families. Reporter for the DRAFT MODEL STANDARDS OF PRACTICE FOR DIVORCE AND FAMILY MEDIATORS, 38 FAM. & CONCILIATION CTS. REV. (2000) (publication forthcoming) (Symposium on Standards of Practice convened by the Association of Family and Conciliation Courts) (Symposium includes numerous national groups interested in family mediation, including the Family Law Section of the American Bar Association, the Academy of Family Mediators and the Society for Professionals in Dispute Resolution, are part of the Symposium).

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I. **Introduction**

Differentiating “high conflict” divorce cases involving children for carefully structured interdisciplinary case management is the next logical step in the transformation of the role of the courts in divorce and custody disputes in the last half of the twentieth century. In that period family courts hearing divorce related custody cases have redefined themselves as conflict managers rather than fault finders. The sole custody system has been modified by substantive law standards which heavily weigh a child’s interest in a continuing relationship with both parents after divorce into the ultimate custody determination. Mediation and parent education have replaced the adversarial trial as the basic tool of custody dispute resolution.

In essence, courts and legislatures have come to recognize that for the adults and especially the children involved divorce is a process of redefining relationships over a long period of time, not a single event that can be determined by a court order awarding custody to the “better” parent. In the 1950's and 60's, courts conceived of a custody dispute much like a will contest. The parents’ marriage, like the decedent, was dead. Parents, like the heirs, were, in dispute about the distribution of one of the assets of the estate – their children. The court’s job,

circa 1950, was, after trial, to determine which heir/parent was more worthy of custody “rights.”

The goal of the proceeding was a one time determination which created stability in the distribution of the asset. The winner was, however, largely predetermined by gender biased substantive standards that eliminated the indeterminacy of the “best interests” test, especially the “tender years” presumption. Once the court distributed custody, its role in facilitating the ongoing process of reorganizing the family relationships was over, except for enforcement or modification of its initial award, tasks also accomplished through adversary process.

This vision of the court’s role in divorce and custody disputes could not, however, survive the advent of mass “no fault divorce,” the associated increase in judicial caseloads, and, most significantly, the increasing evidence that the child’s well-being after divorce generally requires relationships with both parents. Adversary procedure and the sole custody award are, today, a backdrop for court affiliated dispute resolution processes that encourage parental cooperation and self-determination of post-divorce parenting plans.

In today’s transformed court systems custody trials are few and far between. The role of the court in custody disputes has become analogous to that of a bankruptcy court supervising the

reorganization of a potentially viable business which declares bankruptcy. The court's aim is for the stakeholder parents to recognize their common interests in the future of their children and voluntarily agree on a plan for post-divorce reorganization. The court uses education and dispute resolution processes that facilitate voluntary agreement to achieve that goal. The court ratifies parties' agreements and decides issues that the parents cannot decide themselves.

The transformed custody system better serves the needs of parents and children in divorcing families than its adversarially-oriented, winner take all predecessor. The transformation, however, is not complete. The next stage in the continuing evolution of the judicial role in divorce related custody disputes is to recognize that not all such disputes are the same. High conflict divorce and custody cases -- cases involving repeated relitigation, allegations of family violence, child abduction or drug or substance abuse -- require special treatment. Courts need to refine the processes of education and mediation used to facilitate parental cooperation after divorce to account for the risks to physical and emotional safety to parents and children in high conflict cases. More broadly, courts need differential case management plans for high conflict cases. These plans should recognize the need to protect

physical safety of vulnerable family members, the devastating effects witnessing or being the victim of violence may have on children reduces the possibility of post-divorce parental cooperation. They should also recognize high conflict cases as an occasion to create and expedited and highly structured decision-making process appropriate to the risks involved. In short, while keeping sight of the progress that has been made in moving from fault finder to conflict manager in custody cases, courts need to come to terms with the fact that some divorce related disputes pose a greater threat to parents and children than others and develop a coherent "triage" plan for them.

The first part of this Comment is a condensed history from my perspective of the evolution of the judicial role in divorce and custody cases from a fault finder to conflict manager over the last fifty years. The second part of this Comment describes the need for and the mechanisms of a plan for judicial management of high conflict divorce-related custody disputes. It first summarizes some available data on high conflict divorces. It then describes a high conflict family, a composite drawn from actual cases. Next, the Comment identifies several of the core principles that should govern how that family is treated by the judicial system -- court

unification, differential diagnosis, and structured case management. It tries to draw these principles together into a "flow chart" for judicial management of high conflict cases which an interdisciplinary group I am a part of has developed.

II. From Fault Finder to Conflict Manager

The transformation in the judiciary's role from a fault finder to conflict manager occurred in roughly two phases, the first between approximately 1950 and 1980 and the second between 1980 and 1999. Before describing it, however, it is important to note that the transformation is far from operationally complete. Rather, it is a transformation of ideas that different states have implemented with different levels of enthusiasm. As will be seen, California has been at the forefront of change, but other states like Oregon, Washington and New Jersey are also far along. My own State of New York, in contrast, supports a more adversarial child custody dispute

resolution system. New York does not mandate mediation of custody disputes,¹ does not have

¹ The first comprehensive statutory proposal for mediation of child custody disputes in New York grew out of a 1985 study by the New York State Law Revision Commission for which Professor Linda Silberman of New York University Law School and I were co-consultants. See *Recommendations of the Law Revision Commission to the 1985 Legislature Relating to the Child Custody Decision-Making Process*, 19 COLUM. J. L. & SOC. PROBS 105 (1985). The Legislature did not enact the proposal in the face of opposition from the matrimonial bar and womens' lawyers groups.

legislation or court rules authorizing courts to require attendance at parent education programs², and does not mention the need for a child to have relationships with both parents following divorce in its custody statute.³

It is also important to note that the transformation from fault finder to conflict manager paralleled a period of great instability in American family life as reflected in official divorce

² New York does, of course, have parent education programs, the most prominent of which is P.E.A.C.E. (Parent Education and Custody Effectiveness) of which I am one of the founders. See Andrew Schepard, *War and P.E.A.C.E.: A Preliminary Report and a Model Statute on an Interdisciplinary Educational Program for Divorcing and Separating Parents*, 27 U. MICH. J. L. REF. 155 (1993) [hereinafter Schepard, *War and P.E.A.C.E.*]. Judicial referrals to parent education programs in New York, however, are not presently authorized by court rules or legislation. New York's Office of Court Administration has introduced legislation to remedy the situation. Senate Bill 587-B, 1999-2000 Regular Session, Legislature of the State of New York (Jan. 6, 1999). Arkansas, in contrast, has recently joined the 44 other states that have enacted court rules authorizing courts to require parents to attend education programs as part of the divorce process. 1999 Ark. Acts 704 (enacted Mar. 18, 1999). See Debra A. Clement, *1998 Nationwide Survey of the Legal Status of Parent Education*, 37 FAM. & CONCILIATION CTS. REV. 219, 221 (1998) for a state-by-state listing.

³ The only specific factor that the court must consider in a child custody dispute in New York is an allegation of domestic violence. See N.Y. Dom. Rel. Law § 240.1(a) (McKinney's 1999). In contrast, Arkansas recently amended its child custody standards to require the court to consider the child's need for frequent and continuing contact with both parents *and* proven allegations of domestic violence in making a custody order. ARK CODE ANN. § 9-13-101 (a)-(b) (Michie). See IRA ELLMAN, PAUL KURTZ & ELIZABETH SCOTT, FAMILY LAW 672-73 (3d ed. 1998) for a selection of statutory provisions relating to joint custody [hereinafter ELLMAN, KURTZ & SCOTT]. After comprehensive study, a Special Joint Committee on Joint Custody and Access of the Canadian Parliament recently proposed that "[t]he willingness and ability of each of the parties to facilitate and encourage a close and continuing relationship between the child and the other parent" be added as a factor for courts to consider in their multi-factored child custody analysis, along with "any proven history of family violence" perpetrated by an applicant. SPECIAL JOINT COMMITTEE ON CHILD CUSTODY AND ACCESS OF THE PARLIAMENT OF CANADA, REPORT: FOR THE SAKE OF THE CHILDREN 45 (1998) [hereinafter CANADIAN PARLIAMENT CUSTODY REPORT].

statistics and the social attitudes toward divorce that lie beneath them. Between 1950 and 1999, the number of children annually involved in divorce climbed from approximately 6.1 per thousand to 16.8 per thousand ⁴ (which translates to about 1,005,000 per year), a fundamental change in the way many children experience growing up in American society.⁵ Sixty-five percent of divorcing couples have minor children. An increase in divorce rates during the early years of marriage has also resulted in a higher proportion of divorces occurring among parents with young children.⁶ The divorce rate recently declined slightly and is presently at the lowest annual rate in two decades (4.3 per 1,000 population).⁷ This recent decline, however, must be measured against a 67% increase in the divorce rate between 1970 and 1990.⁸ At least 40% of today's young adult

⁴ ELLMAN, KURTZ & SCOTT, *supra* note 3, at 240.

⁵ See Andrew Schepard, *Parental Conflict Prevention Programs and the Unified Family Court*, 32 FAM. L. Q. 95, 98-100 (1998) [hereinafter Schepard, *Conflict Prevention Programs*].

⁶ *Children and Divorce*, *supra* note 6, at 5.

⁷ *Births, Marriages, Divorces and Deaths for 1996*, 45 MONTHLY VITAL STATISTICS REPORT, No.12, (Centers for Disease Control and Prevention/National Center for Health Statistics July 17, 1997).

⁸ UNITED STATES COMMISSION ON CHILD AND FAMILY WELFARE, PARENTING OUR CHILDREN: IN THE BEST INTERESTS OF THE NATION. A REPORT TO THE PRESIDENT AND CONGRESS 12 (1996).

women are likely to divorce sometime in their lives.⁹

The increase in divorces affecting children parallels an increase in related court filings.

While statistics with precisely identical dates are not available, the number of divorce and custody related disputes filed in state courts has increased enormously. Custody and visitation disputes are today the second largest category of family -related disputes in the New York court system (child support is the first).¹⁰ According to the National Center for State Courts,

“[d]omestic relations cases are the largest and fastest-growing of state court civil caseloads. In 1995, 25 percent of total civil filings, more than 4.9 million, were domestic relations cases. The total number of domestic relations cases increased 4.1 percent since 1994 and 70 percent since 1984.”¹¹ Divorces registered an 8% increase since 1988 while custody cases increased 43%.¹² To

⁹ *Children and Divorce: Overview and Analysis* in 4 THE FUTURE OF CHILDREN: CHILDREN AND DIVORCE 5 (Center for the Future of Children of the Packard Foundation ed. 1994).

¹⁰ Judith S. Kaye & Jonathan Lippman, *New York State Unified Court System Family Justice Program*, 36 FAM. & CONCILIATION CTS. REV. 144, 145 (1998) (The authors are the Chief Judge and the Chief Administrator of the Courts of the State of New York).

¹¹ BRIAN J. OSTROM & NEIL B. KAUDER, EXAMINING THE WORK OF STATE COURTS, 1995: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT 39 (1996).

¹² *Id.* at 40. It is also important to note that a large percentage of the increase in custody cases are disputes between parents who were never married. Even though the divorce rate has stabilized in recent years, the number of custody disputes reaching court has grown, largely

some extent, the transformation from fault finder to conflict manager can be viewed as a method of coping with an exponentially increased workload in a time of limited resources rather than a philosophical shift. The operational result, however, is the same no matter what the reasons are for it.

A. Phase I: No Fault Divorce and the Sole Custody System

Until the second half of the twentieth century, only virtuous spouses could get divorces and “[t]he divorce laws of every state assumed an adversary proceeding between spouses in which the plaintiff had to prove the defendant’s ‘fault’.”¹³ Ironically, the no fault divorce revolution began in California in the 1960's as an effort to preserve marriages and reduce divorce. Liberalized grounds for divorce were, in the conception of the no-fault divorce revolution’s designers, tied to the creation of an expert family court one of whose goals was to scrupulously examine whether couples did indeed have “irreconcilable differences” and to reconcile as many

because of the increase in disputes between never married parents. *See* Schepard, *Conflict Prevention Programs*, *supra* note 5, 32 FAM. L. Q. at 100.

¹³ ELLMAN, KURTZ & SCOTT, *supra* note 3, at 191.

couples as possible.¹⁴ Politics and budgetary limitations, however, intervened, and only one half of the plan was ever implemented. The family court was never created while the liberalized grounds for divorce were. The result was what my colleague J. Herbie DiFonzo has called “the triumph of naked divorce” -- “no fault divorce on demand.”¹⁵

The no-fault divorce revolution was not, however, linked to changes in thinking about the court’s role in the child custody dispute resolution process. Even after no-fault divorce, custody courts awarded sole custody to one parent after a highly adversarial trial. The result was that while fault was de-emphasized in the grounds for divorce, it remained one of the dominant themes in custody determinations resulting from its fallout for children.

The ostensible substantive standard for custody determinations was the indeterminate “best interests of the child” test. What the court really did, however, was make a determination which of the contestants was the “better parent” and award all custody rights to her leaving the other parent legally marginalized with “visitation.” The justification for the sole custody award

¹⁴ See MAX RHEINSTEIN, MARRIAGE, STABILITY, DIVORCE AND THE LAW 373-81 (1972)

¹⁵ J. HERBIE DIFONZO, BENEATH THE FAULT LINE: THE POPULAR AND LEGAL CULTURE OF DIVORCE IN TWENTIETH CENTURY AMERICA 145, 170 (1997).

was to create “stability” for the child and the legal system by identifying a “primary parent” in the hope of ending future disputes.

In actual operation the “tender years” doctrine filled in the indeterminacy of the “best interests” test in most cases involving younger children – mother won unless she was unfit.

Custody trials were thus relatively rare because most of the time the outcome was preordained.

When they occurred, however, custody trials were intense acts of adversarial battle involving counter accusations of fault that usually would have qualified as grounds for divorce under the repealed regime.

The gender discrimination revolution that began in the 1970's, however, drew the tender years doctrine into constitutional question.¹⁶ Most states eliminated it in name if not necessarily in operation. Fathers began to perceive they had a chance to win a custody dispute and began to assert “rights” to the custody of their children in larger numbers. The courts were faced with more disputes to resolve at the same time they lost their lodestone doctrine for reducing

¹⁶ See Andrew Schepard, *Taking Children Seriously: Promoting Cooperative Custody After Divorce*, 64 TEX. L. REV. 687, 669-702 (1985) (historical overview of the development of child custody standards). [hereinafter Schepard, *Taking Children Seriously*].

uncertainty in decision-making.

Into the breach rode mental health experts who sought to fill the gap with gender neutral standards based on their expertise in assessing the child's best emotional interests. The most notable attempt was Goldstein, Freud and Solnit's "psychological parent" test.¹⁷ Goldstein, Freud and Solnit urged courts to, above all, create emotional stability for children caught between warring parents by making a final and decisive determination of custody rights to one parent or the other. In this respect their goal was the same as the fault-based/tender years doctrine system but their test was phrased in mental health concepts. Working from a psychoanalytic framework, Goldstein, Freud and Solnit defined the task for divorce courts in resolving child custody disputes as identifying the single parent with whom the child had primary psychological relationships. Stability of the child's emotional relationship with that parent was so important to Goldstein, Freud and Solnit that they advocated granting the psychological parent the power to preclude the other parent from even visiting fear it would cause emotional conflict for the child.

The "psychological parent" test appropriately focused courts on the emotional meaning

¹⁷ JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD (1973)

for the child of custody decisions and the importance of stability in the child's emotional life amid the turmoil of family reorganization. Goldstein, Freud and Solnit, however, formulated their standard based largely on clinical observations of children in foster care, children who had no secure attachments with a single adult. The search for a single psychological parent test is a quite different and more difficult task to accomplish in a divorce related custody dispute, which occurs on a background of a child's emotional relationships with both parents. The child of divorce usually has two, not one, "psychological parents."¹⁸

Setting the court's task as identification of the child's single "psychological parent," moreover, did nothing to change the adversarial framework in which the custody inquiry was conducted; it simply gave the parents more to argue about. The custody trial remained a "winner take all" contest, albeit one enriched with the often conflicting testimony of mental health experts. Parents vigorously disputed which of them had closer emotional bonds with their child

¹⁸ See Schepard *Taking Children Seriously*, *supra* note 16, 64 TEX. L. REV. at 710-715 for a discussion of the limitations of the sole "psychological parent" test in a divorce and custody context.

while also contesting which was more morally fit to parent.¹⁹

Stability for the child through adversarial process and sole custody was the major goal of the custody court until approximately 1980. As late as 1978, in considering whether a court should award joint custody in what we all would agree is a high conflict divorce case,²⁰ the New York Court of Appeals (its highest court) stated that “[d]ivorce dissolves the family as well as the marriage, a reality that may not be ignored.”²¹ The court’s role thus was to preside over a family dissolution, not its reorganization.

¹⁹A graphic illustration of how adversarial divorce related custody cases with mental health experts were in the 1970’s is the transcript of the custody hearing in *Rose v. Rose* extensively excerpted in JUDITH AREEN, FAMILY LAW: CASES AND MATERIALS 488-574 (4th ed. 1999). Partisan witnesses and experts for each side repeat accusations of parental incompetence and infidelity and grandparent meddling worthy of a daytime soap opera. Goldstein himself testifies on behalf of the father without interviewing any of the parties, or the child. It suffices to note that the *Rose* parents, their expert witnesses and their lawyers were also in deep dispute about whether mother or the father was the child’s “psychological parent.” Mother had the closest relationship with the child until she attempted suicide. Father -- and most significantly, the paternal grandmother -- took over care of the child during the mother’s recovery period. Much of the transcript is devoted to attempts by each side to bolster evidence of the child’s psychological attachment to it and to minimize the child’s psychological attachment to the other. The only conclusion one can draw from the transcript on this point is the not unsurprising one that the child had psychological attachments to both sides and their extended families.

²⁰ *Braiman v. Braiman*, 44 N.Y.2d 584, 378 N.E.2d 1019, 407 N.Y.S.2d 449 (1978) (case resulted from a custody modification brought by father two years after a separation agreement was entered into giving mother custody; mother accused father of gambling and physical abusiveness while father accused mother of sexual promiscuity; after award of joint custody in lower court father denied mother visitation in violation of court orders; mother disappeared for a period of time).

²¹ *Id.* at 44 N.Y.2d at 591, 378 N.E.2d at 1021, 407 N.Y.S.2d at 452.

B. Phase II: Joint Custody, Mediation and Parent Education

Serious rethinking of the judicial role in custody disputes began when evidence began to accumulate that for the child, divorce may be the dissolution of a marriage, but is certainly not the dissolution of the family. Research suggested that divorce was not, as had been optimistically assumed, a benefit for most children, but potentially the beginning of a downhill spiral for some with serious emotional, educational and economic consequences. Research also began to establish that, rather than needing a stable relationship with a single psychological parent, children of divorce generally had important emotional relationships with both parents before divorce and benefitted if such relationships continued after divorce.²²

These findings strengthened the resolve of fathers to seek custody, particularly after the demise of the tender years doctrine. It also caused a substantive and procedural transformation of the child custody dispute resolution process.

²² A major landmark in the evolution of thinking about the effects of divorce on children was the publication of the first longitudinal study of fifty families experiencing divorce in Marin County, California. JUDITH WALLERSTEIN & JOAN KELLY, *SURVIVING THE BREAK-UP: HOW PARENTS AND CHILDREN COPE WITH DIVORCE* (1980). Other social science researchers also made major contributions to our understanding of the problem. *See* Schepard, *Taking Children Seriously*, *supra* note 16, 64 TEX. L. REV. at 703-08 for a summary of the empirical literature through the middle of the 1980's. For an updated summary, *see* Schepard, *Conflict Prevention Programs*, *supra* note 5, 32 FAM. L. Q. at 96-105.

The change in substantive legal doctrine was what two commentators have called a “small revolution . . . in child custody law” -- enactment of joint custody or “friendly parent” provisions of various levels of operational effect and a radical break with the sole custody framework.²³ Maintaining relationships with both parents after divorce became as important a goal of public policy as providing “stability” for the child. Beginning in the late 1970's many courts authorized joint custody using their common law powers. Additionally, the number of states authorizing joint custody by statute increased enormously, from three in 1978 to an overwhelming majority today.²⁴

The joint custody revolution required a rethinking of the role of the court in divorce related custody disputes. The role had to be broader than simply declaring the marriage dead and distributing the assets with a final order. Research and experience established that maintaining post divorce parent child relationships was a process of adjustment rather than a single event. Parental conflict could ebb and flow over time, as could the quality of a child's relationship with

²³ Elizabeth Scott & Andre Derdeyn, *Rethinking Joint Custody*, 45 OHIO ST. L. J. 455, 455 (1984).

²⁴ ELLMAN, KURTZ & SCOTT, *supra* note 3, at 673.

each parent. To serve the child's interest in maintaining relationships with both parents after divorce, courts thus had to help parents manage their conflict over time. Symbolizing the beginnings of the need to move in a new direction, the New Jersey Supreme Court specifically rejected the New York Court of Appeal's notion that "divorce dissolves the family as well as the marriage. Both the legislation and the case law of this state are designed to encourage parent-child interaction following divorce. This policy is based on the best interests of the child and not on any notion of parental rights."²⁵

From the early 1980's on, then, the critical question for judicial administration became how courts could implement the policy of continued contact with both face in the face of increasing custody caseloads without being overwhelmed. At about the same time as the joint custody movement gathered steam, courts became more and more interested in "alternative" methods of dispute resolution, "a reference to the use of these processes in place of litigation."²⁶

The landmark national event in the development of ADR was the 1976 Pound Conference

²⁵ Beck v. Beck, 86 N.J. 480, 488, n. 3, 432 A.2d 63, 66 n.3 (1981).

²⁶ STEPHEN GOLDBERG, FRANK SANDER & NANCY RODGERS, DISPUTE RESOLUTION: NEGOTIATION, MEDIATION AND OTHER PROCESSES 7 (3d ed. 1999).

sponsored by the American Bar Association at which leading judges and lawyers expressed deep concern about expense and delay in the justice system in all cases. Professor Frank Sander, Reporter for the Pound Conference's follow-up task force, projected an influential alternate vision of the court as not simply "a courthouse but a dispute resolution center where the greivant, with the aid of a screening clerk, would be directed to the process (or sequence of processes) most appropriate to a particular type of case."²⁷ ADR processes – particularly mediation – were thought to be better for litigants with who had to have continuing relationships after the trial was over, as it emphasized their common interests rather than what divided them.

The ADR revolution was a natural partner of the joint custody revolution. Parents were encouraged to have continuing relationships for the benefit of their children, but those relationships could not help but be irretrievably poisoned by the adversarial procedure of the courtroom. Custody disputes required not just a "courthouse, but a dispute resolution center."

The new custody dispute resolution system received it most visible expression when

²⁷ *Id. citing* Frank Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111 (1976)

California mandated mediation of child custody disputes in 1980.²⁸ Many states followed California's lead. A 1995 count by the National Center for State Courts estimated that 200 court-connected programs existed in 38 states, with 33 states having court rules or statutes mandating mediation in child custody disputes.²⁹

Despite opposition and problems along the way³⁰, mediation has proved itself generally well-suited for the emerging role of dispute resolution forum of choice for encouraging a child's

²⁸ See Susan C. Kuhn, *Mandatory Mediation: California Civil Code Section 4607*, 33 EMORY L. REV. 733 (1984). The mandatory mediation statute was originally enacted as part of the California Civil Code. Cal. Civ. Code §4607 (West 1983). Today, it is part of the California Family Code. Cal. Fam. Code § 3170-3171 (West 1999).

²⁹ Peter Salem & Ann L. Milne, *Making Mediation Work in a Domestic Violence Case*, 17 FAM. AD. 34 (1995).

³⁰ Some suggested, for example, that mediation is not in the best interests of women because they have fewer resources and are more likely to make compromises for the sake of their children than men and thus are easy targets for unscrupulous manipulation. See Penelope Eileen Bryant, *Reclaiming Professionalism: The Lawyer's Role in Divorce Mediation*, 28 FAM. L. Q. 177 (1994). There are case histories to support such concern (as there are case histories of women being traumatized by the litigation process and unscrupulous lawyers) but little systematic empirical evidence that women fare worse in mediation than litigation or negotiations in the adversarial system. In most studies, men and women express approximately equal satisfaction with mediation as a dispute resolution process. Furthermore, women report that mediation is helpful to them in "standing up" to their spouses, and rated themselves more capable and knowledgeable as a result of participation in mediation. See Joan B. Kelly, *A Decade of Divorce Mediation Research*, 34 FAM. & CONCILIATION CTS. REV. 373, 377-78 (1996) (describing numerous studies).

relationship with both parents following divorce.³¹ It is generally confidential, so parents' negative statements about each other do not reach the public forum of a court and their families' friends and neighbors. Mediation offers parents the possibility of self-determination, the ability to voluntarily formulate their own post divorce parenting plan rather than have a court impose one on them. Many states offer it at low or no cost to parents, saving both their resources and the courts.

Mediation of child custody disputes generally results in greater consumer satisfaction, less expense and better parent-child and parent-parent relationships compared to adversary litigation. This is not a surprising finding, given parents' general views of their experience in family courts. Parents often feel that after the litigation process starts, it quickly caroms out of control. Decisions are made for them -- by lawyers and judges and custody evaluators -- rather than by them. A national commission recently reported survey results in which 50-70 percent of parents characterized the legal system to be "impersonal, intimidating and intrusive."³² The

³¹ See Andrew Schepard, *Supporting Parent-Clients in Mediation of Child Custody Disputes*, 10 PRAC. LITIGATOR 7 (1999).

³² See UNITED STATES COMMISSION ON CHILD AND FAMILY WELFARE, *supra* note 8, at 38-39.

Oregon Task Force on Family Law, a legislatively authorized interdisciplinary reform group,³³

recently wrote after extensive public hearings on that State's divorce system:

The public is disgusted with the adversarial model of managing divorce. They are voting with their feet. The increasing trend of pro se filings is accelerating . . . Many pro se litigants can afford lawyers. They do not seek the legal representation they need because they fear that to consult a lawyer would be to "shake hands with the tar baby." They fear getting sucked into a vortex of conflict.

Lawyers, judges, mental health professionals and others involved in the divorce process are also frustrated. Lawyers and judges see the messes created as ill-informed pro se litigants attempt to perform their own legal surgery. All professionals recognize the need for a process to manage and control the raw emotions triggered by a divorce.³⁴

Mediation looks very good in contrast. Studies report that mediation parents reach resolution of their disputes more quickly than litigation parents, taking less than half the time and less cost to produce a parenting plan. Even mediation parents who fail to reach agreement are more likely to settle prior to trial than litigation parents. Mediated agreements also tend to be

³³ Working in tandem with the Future of the Courts Committee, the Oregon Legislature established the bipartisan interdisciplinary Task Force on Family Law which can well serve as a model for other states considering divorce and custody reform. See William Howe III & Maureen McNight, *Oregon Task Force on Family Law: A New System to Resolve Family Law Conflicts*, 33 FAM. & CONCILIATION CTS. REV. 173 (1995). See also Schepard, *Conflict Prevention Programs*, *supra* note 5, 32 FAM. L. Q. at 124-26 for a description of the Task Force and its work in rethinking the adversarial system of divorce.

³⁴ WILLIAM J. HOWE, III, OREGON TASK FORCE ON FAMILY LAW: A STATUS REPORT 6-7 (1996).

more specific and detailed than those negotiated by attorneys alone.³⁵ Studies also report that mediated agreements result in higher rates of children's contact with both parents following divorce and higher rates of compliance with parenting plans and child support agreements compared to agreements reached by negotiations in the shadow of the adversarial process.³⁶

More recently, mediation has been joined by court-affiliated parent education programs as a judicial tool for facilitating a child's relationship with both parents after divorce.³⁷ Court-affiliated programs typically educate parents about the legal process of divorce and separation, the impact of divorce on the adults involved and, most important, the impact of divorce on their children and how parents can make the transitions easier for them by reducing their conflict.³⁸ Parents and judges have been quite enthusiastic about educational programs, and there is some

³⁵ See Kelly, *supra* note 30, 34 FAM. & CONCILIATION CTS. REV. at 373 (short summary of research results with citations).

³⁶ See Peter Dillon & Robert Emery, *Divorce Mediation and Resolution of Child Custody Disputes: Long Term Effects*, 66 AM. J. OF ORTHOPSYCHIATRY 131 (1996).

³⁷ See Schepard, *War and P.E.A.C.E.*, *supra* note 2, and Schepard, *Conflict Prevention Programs*, *supra* note 5.

³⁸ See Margie J. Geasler & Karen R. Blaisure, *1998 Nationwide Survey of Court-Connected Divorce Education Programs*, 37 FAM. & CONCILIATION CTS. REV. 36 (1998).

evidence that parental attitudes and behavior improve as a result of attendance.³⁹ A recent survey computed a 180% increase in such programs between 1994 and 1998.⁴⁰ Forty-five (45) states as of this writing have enacted legislation or court rules authorizing courts to require parents to attend such programs.⁴¹

Phase two of the transformation of the court's role thus successfully broke the stranglehold of the sole custody system and adversary procedure on the child custody dispute resolution process. Courts, in effect, recognized that for children, reorganizing parental relationships after divorce is an ongoing process, not a single event and created dispute resolution forums and associated programs to support involvement of both parents after divorce. The court hearing became the dispute resolver of last resort; education, mediation and other alternatives to litigation become the primary forum for parents in contention about their children.

III. The Next Phase: Differential Diagnosis and Treatment of High Conflict Divorce

³⁹ See Schepard, *Conflict Prevention Programs*, *supra* note 5, 32 FAM. L. Q. at 118-21 for a summary of research findings.

⁴⁰ See Geasler & Blaisure, *supra* note 38.

⁴¹ See *supra* note 2 and sources cited therein.

A. **The Scope and Dimensions of the Problem**

The next phase of development for the child custody dispute resolution is to recognize that all divorce-related custody disputes are not equal and to adapt the philosophy and procedures that facilitate involvement of both parents after divorce to accommodate that realization. Most parents adjust to the transitions of divorce and separation after a reasonable time; a small, but highly significant percentage do not. For them and their children the reorientation of divorce is an ongoing crisis. Divorce related custody disputes which involve the interrelated problems of violence, drug and alcohol abuse and repetitive conflicts pose a greater threat to children and parents involved and take up more scarce judicial resources than less conflictual parental disputes. Recognition that such cases require special treatment and targeted programs is thus a necessary part of a family court's plan for Differentiated Case Management (DCM) – the “premise that cases are not all alike and the amount and type of court intervention will vary from case to case. Under this model . . . a case is assessed at its filing stage for its level of complexity and management needs and placed on an appropriate ‘track’. Firm deadlines and time frames are

established according to the case classification⁴².”

We cannot pinpoint the exact number of such highly conflicted divorce related custody cases. Research suggests that a relatively small number of parents continue in very high conflict over family reorganization for a number of years.⁴³ Constance Ahrons found such parents (whom she labeled "Angry Associates") to be 25 percent of her sample of the divorcing population.⁴⁴ Janet Johnston and Vivian Roseby estimate that “about one fourth of all divorcing couples with children have considerable difficulty completing the legal divorce without extensive litigation” and about one fifth of families relitigate custody issues after divorce.⁴⁵ A recent empirical study of five court systems found that 16% of divorcing families who had children had

⁴² Kaye & Lippman, *supra* note 10, 36 FAM. & CONCILIATION CTS. REV.at 163.

⁴³ Michael E. Lamb, et.al., *The Effects of Divorce and Custody Arrangements on Children's Behavior, Development, and Adjustment*, 35 FAM. & CONCILIATION CTS. REV. 393, 396 (1997) (consensus statement by experts in psychology, law and social welfare convened under the auspices of the National Institute of Child Health and Human Development).

⁴⁴ CONSTANCE AHRONS, *THE GOOD DIVORCE* 56 (1994).

⁴⁵ JANET R. JOHNSTON & VIVIENNE ROSEBY, *IN THE NAME OF THE CHILD: A DEVELOPMENTAL APPROACH TO UNDERSTANDING AND HELPING CHILDREN OF CONFLICTED AND VIOLENT DIVORCE* 4 (1997) [hereinafter JOHNSTON & ROSEBY].

been to court for another family-related matter during the previous five years.⁴⁶ Other estimates are 5%-10% of the total population of divorcing and separating parents.⁴⁷

While they are a minority of divorces involving parents, these high conflict cases require a significant amount of attention from the court system. By anyone's definition, for example, a child custody disputes involving allegations of child abuse and neglect by one parent or the other qualifies as "high conflict." A recent study of such cases in the Australian Family Court sheds some light on both the prevalence and on the intractable nature of these highly conflicted families.⁴⁸ The Australian research team carefully tracked allegations of child abuse of all kinds - physical, sexual and neglect -- in a sample of 200 custody and visitation cases in Canberra, Australia's national capital and a small city, and in Melbourne, Australia's second largest city.

⁴⁶ H. Ted Rubin, *The Nature of the Court Today*, in 6 THE FUTURE OF CHILDREN: THE JUVENILE COURT 43 (Center for the Future of Children of the Packard Foundation ed. 1996).

⁴⁷ Lamb, *supra* note 43, at 396; Janet R. Johnston, *Developing and Testing a Group Intervention for Families at Impasse* in CONGRESS PROCEEDINGS OF THE THIRD INTERNATIONAL CONGRESS ON PARENT EDUCATION PROGRAMS 5 (Association of Family and Conciliation Courts ed. 1997) (Executive summary of a forthcoming Report to the California Judicial Conference).

⁴⁸ Thea Brown, et. al., *Problems in the Management of Child Abuse Allegations in Custody and Access Disputes in the Family Court*, 36 FAM. & CONCILIATION CTS. REV. 431 (October, 1998). The researchers are academic and practicing social workers who participate in the Australian Family Courts' Family Violence and Family Court Research Program.

While custody and access disputes with child abuse allegations were only a small percentage of total family related court filings, the researchers found they were particularly troublesome subjects for judicial management. Such cases have what might be called “staying power” on the court docket -- “the child abuse cases stayed in the court; they did not drop out [settle] or become resolved as frequently as other custody and access cases.”⁴⁹ Thus, though small in number, custody and visitation disputes involving child abuse allegations took an especially large amount of the time and effort of judges and court personnel.

The researchers also found that the families in whose custody and visitation dispute the child abuse allegations were made shared some of the same socioeconomic characteristics of others families in their geographic areas, including race and ethnicity. But the abuse and neglect allegation families also had different characteristics indicating that serious family problems were at the root of their dispute -- their unemployment rates were higher, they had higher rates of criminal convictions, substance abuse and partner to partner violence. Many of them were known to child protective services before the custody dispute was filed.

⁴⁹ *Id.* at 433.

The Australian researchers also tested a perception widely shared by judges and lawyers in emotionally laden custody and access disputes with child abuse allegations everywhere. Many professionals involved in such cases believe that the allegations are presumptively false, simply a nuclear weapon in the ongoing divorce and custody wars. The Australian data did not, however, support that perception. The researchers studied a subset of 30 cases and found the same rate of false allegations as those reported to the Australian child protective services in traditional child abuse and neglect cases --only 9%. They also noted that a different study of 50 custody and access cases the previous year came to the same conclusion.

Allegations of domestic violence too are a symptom of a high conflict custody case. We do know something about the prevalence of domestic violence and its effects on children. Domestic violence directed toward women is one of the most frequently reported crimes in the United States: estimates report that a beating takes place every 18 seconds. As many as two million women every year are seriously physically abused by their partners.⁵⁰ The available

⁵⁰ Katherine M. Reihing, *Protecting Victims of Domestic Violence and Their Children After Divorce: The American Law Institute's Model*, 37 FAM.& CONCILIATION CTS. REV. 393, 393 (1999).

research shows a significant connection between partner and child abuse and maltreatment, though estimates of the exact correlation vary widely.⁵¹

In addition, there is strong data that suggests children are powerfully affected by being exposed to violence even if they are themselves not actual victims. A review of recent research on the subject concludes: "Children who have witnessed domestic violence present a variety of emotional factors, sense a lack of control over their life circumstances, and experience feelings of hopelessness and helplessness. Children from violent families may experience depression, anxiety, and an increase in somatic complaints or they may externalize their distress through aggression and delinquency."⁵² Perhaps most significantly, children exposed to violence and high conflict, "bear an acutely heightened risk of repeating the cycle of conflicted and abusive relationships as they grow up and try to form families of their own."⁵³

⁵¹ See Claire Dalton, *When Paradigms Collide: Protecting Battered Parents and Their Children in the Family Court System*, 37 FAM.& CONCILIATION CTS. REV. 273, 285-86 (1999); Catherine Ayoub et. al., *Emotional Distress in Children of High-Conflict Divorce: The Impact of Marital Conflict and Violence*, 37 FAM.& CONCILIATION CTS. REV. 297, 300 (1999).

⁵² Joseph C. McGill et. al., *Visitation and Domestic Violence: A Clinical Model of Family Assessment and Access Planning*, 37 FAM.& CONCILIATION CTS. REV. 315, 320 (1999).

⁵³ JOHNSTON & ROSEBY, *supra* note 45, at 5.

Finally, while we cannot pinpoint the relationship with precision, research suggests that substance abuse and mental illness are important factors in some high conflict families, as they seem to have a relationship to the incidence of family violence. Drug and alcohol use and abuse seem, for example, to be associated with particularly violent forms of wife battering.⁵⁴ Substance abuse and mental illness also seem to reduce the ability of some parents to care for children.⁵⁵

High conflict divorce cases thus pose a special challenge to family courts because of the need to protect the safety of family members, their multiple levels of social distress and, above all, because of their lasting effects on children. As one respected family violence research team recently stated: “those of us who assist the courts in the resolution of custody and visitation disputes should be aware of the damage that continued conflict could cause the children involved. As a result, encouraging a more aggressive mandate for conflict reduction because one central goal in the court process. The best interests standard must be informed by the cumulative negative impact of these factors and their weight in examining emotional well-being during the

⁵⁴ JOHNSTON & ROSEBY, *supra* note 45, at 29.

⁵⁵ Ayoub et. al., *supra* note 51, 37 FAM.& CONCILIATION CTS. REV. at 300, 309-10.

process of decision making for children of acrimonious divorce.”⁵⁶

B. Integrating Violence Sensitivity into Parent Education and Mediation

A first and important step for court systems to help the children and parents in high conflict families is to adopt existing education and dispute resolution programs to their existence. Indeed, mediation programs and parent education programs are beginning to adopt their theory and techniques to recognize the need for differential treatment of high conflict families.⁵⁷

For too long, the domestic violence community and the mediation and parent education community viewed each other as adversaries -- domestic violence advocates seeking to protect victims from abusers through separation while the court connected service providers promoted cooperative parenting between the same couple for the benefit of the child. Much of the problem may be that while both groups use the term “domestic violence” they may be talking about different social phenomena. As the model interdisciplinary team of psychologist Geri Fuhrmann, social worker Joseph McGill and law professor Mary O’Connell recently suggested, the

⁵⁶ Ayoub et. al., *supra* note 51, 37 FAM.& CONCILIATION CTS. REV. at 311.

⁵⁷ See Jennifer Maxwell, *Mandatory Mediation of Custody in the Face of Domestic Violence: Suggestions for Courts and Mediators*, 37 FAM. & CONCILIATION CTS. REV. 335 (1999).

mediation and parent education community may think of domestic violence more as "conflict-instigated violence . . . physical violence used as a tool of conflict resolution."⁵⁸ The domestic violence community is built around a very different kind of domestic violence -- "control instigated " a largely male phenomena where the aggressor's goal is to dominate the partner and the violence is part of a larger and planned pattern of domination.⁵⁹

Conflict instigated violence is not admirable and has serious negative consequences for children and parents. But it may not be as dangerous for both parents to have a continuing relationship with the children requiring parental contact as when control instigated violence is the problem. Perpetrators of conflict instigated violence may be able to learn to resolve conflict more peacefully than those who use violence as part of a pattern of control. Control instigated violence seems far more based in deeply rooted character and personality traits that are far less amenable to positive intervention.

In any event, the scope and meaning of domestic violence in the context of divorce and

⁵⁸ Geri Fuhrmann, et. al., *Parent Education's Second Generation: Integrating Violence Sensitivity*, 37 FAM. & CONCILIATION CTS. REV. 24, 26 (1999).

⁵⁹ *Id.*

custody disputes is and should be a subject of serious discussion between domestic violence advocates and the family court community charged with maintaining a relationship between children and parents after divorce and separation.⁶⁰ The dialogue is beginning to have an effect. To cite two examples. Court-affiliated parent education programs are beginning to recognize the need to integrate understanding of family violence into their programs and to modify their message from “parents should cooperate for the benefit of the children” to “parents should cooperate if it is safe for parents and children to do so.”⁶¹ [The mediation community is in the process of revising its standards of practice for family and divorce mediation to recognize that mediators should be trained to recognize families in which violence exists and to shape the mediation process to insure safety for victims and children.⁶²] This realization requires compromise on both sides. The domestic violence community has to recognize some cases

⁶⁰ Compare Dalton, *supra* note 51, 37 FAM.& CONCILIATION CTS. REV. at 273 with Janet Johnston, [title], 37 FAM.& CONCILIATION CTS. REV. (1999).

⁶¹ Geri Fuhrmann, et. al., *supra* note 58, 37 FAM. & CONCILIATION CTS. REV. at 26.

⁶² DRAFT MODEL STANDARDS OF PRACTICE FOR DIVORCE AND FAMILY MEDIATORS STANDARD IX, X & XI, 38 FAM. & CONCILIATION CTS. REV. (2000) (publication forthcoming) (Symposium on Standards of Practice convened by the Association of Family and Conciliation Courts) (Draft Standards resulting from Symposium of numerous national family mediation groups).

involving physical violence may be aided by mediation while the mediation community has to recognize that its traditional role of neutrality must be reexamined when one of the parents is a victim of control instigated violence. /

C. **A Plan for Differential Case Management**

Improvement of conflict resolution processes and services is not, however, a comprehensive plan for DCM that creates a custody dispute resolution system to serve the needs of both cooperative and highly conflicted parents. Such a plan must create a procedure to identify high conflict parents for expedited treatment.⁶³ It must also provide them with services that show promise of helping their children while protecting their legal rights and not overly burdening the reasonably cooperative majority of divorcing parents whose children do not need extensive state intervention for their protection.⁶⁴

⁶³ See Brown et. al. *supra* note 48, 36 FAM. & CONCILIATION CTS. REV. at 440-41 for a DCM plan for custody cases involving allegations of child abuse.

⁶⁴ The need for sophisticated judicial planning to serve these multiple goals was recently emphasized by a Special Joint Committee on Child Custody and Access of the Canadian Parliament which conducted a comprehensive study of Canada's child custody dispute resolution system. The Committee's recommendations on high conflict divorce recognize the fundamental problem: "the desire ... to improve the legal system's response to high-conflict divorces, without imposing any harmful restrictions on the co-operative majority." The Special Committee strongly recommended creation of "a mechanism for screening out high-conflict divorces and treating them in a different stream. This would recognize the potential harm to children whose

Developing a comprehensive plan for a differential child custody dispute resolution process is a daunting task. It requires interdisciplinary dialogue and much more space than can be given in this Comment. It may be helpful, however, to begin to sketch what such a system might look like and extend an invitation to the courts, lawyers, the mental health community and all those concerned with children to comment and improve upon it.

Imagining a hypothetical high conflict family:

D. **The Nelson Family**

Harriet Nelson is a dentist and Ozzie a police captain. They have been married for 19 years. They have three children: David a boy, 10, and Ricki a girl, 8. Tension in the house is palpable since Ozzie discovered Harriet is having an affair with a former mutual friend. The affair began after Ozzie's harsh and repeated criticism of Harriet for abusing prescription drugs. The two have violent incidents which arise out of disagreements between them. The violence is sometimes

parents continue their conflict far beyond a reasonable adjustment period. The system should identify these families in order to provide protection for their children, who are at greater risk than most children of divorce. Once families are identified, their files should be "red tagged" or flagged in some other way, so that decision makers do not make determinations about parenting arrangements without knowing the full details of the case and the families history." CANADIAN CUSTODY REPORT, *supra* note 3, at 73-74.

initiated by Ozzie, sometimes by Harriet, but Ozzie always prevails by physically dominating Harriet without any permanent serious injury to her. David and Rikki have witnessed parental violence. Ozzie hit David when David tried to break up a fight between his parents. Both children express a great love for both parents. Rikki is withdrawn, depressed and has spoken of suicide, problems piled on top of a learning disability. David is very protective of his mother while Rikki is not obviously aligned with either parent. Mutual orders of protection are outstanding against both Ozzie and Harriet. Harriet files for divorce from Ozzie and seeks sole custody of the children. Ozzie is adamant he will not lose his children to Harriet.

What principles should determine how the legal system processes the Nelson's dispute?

~~1.~~ 1. **Unified Treatment**

All legal issues arising out of the Nelson family's situation should be determined by a single judge, aided by a single social services team, both of whom have full information about the previous court proceedings. The same judge who decides who should have temporary custody of David and Rikki should also decide: whether orders of protection are made permanent; if Ozzie or Harriet should move out; whether supervised visitation is necessary; whether Rikki

needs hospitalization (if Ozzie and Harriet don't agree); interim support payments; and the schedule for the families' forensic evaluations. Otherwise, the Nelsons will suffer what Professor Catherine Ross has labeled "the failure of fragmentation"⁶⁵ – different judges, each with a piece of jurisdiction over the Nelsons, issuing conflicting orders, conflicting schedules for court-related events, and multiple court appearances without any benefit to David and Rikki.

Managing the process of resolving high conflict divorce cases involving children requires that the court take charge of the family and put it on a rational track toward resolution. The Nelsons must get the message that they are responsible to a higher authority than themselves for their behavior, an authority who puts the interests of their children first. That responsibility cannot be delegated to court supporting services. Ozzie and Harriet must have the right to have access to the court to insure their legal rights are protected and the court must ultimately be responsible for the quality of services delivered by its affiliated programs and professionals.⁶⁶

⁶⁵ Catherine Ross, *The Failure of Fragmentation: The Promise of a System of Unified Family Courts*, 32 FAM. L. Q. 3 (1998).

⁶⁶ See Andrew Schepard, *Law and Children: Introduction to Unified Family Courts*, N.Y. L.J. Apr. 16, 1997 at 3 (describing history and rationale of unified family courts movement). For a comprehensive discussion of unified family courts, see Barbara Babb, *Fashioning an Interdisciplinary Framework for Court Reform in Family Law: A Blueprint to Construct a Unified Family Court*, 70 S. CAL. L. REV. 1 (1998).

2. Screening and Differential Diagnosis

Identification of high conflict families is an essential prerequisite to DCM of their dispute. Screening the Nelson family for violence, substance abuse and the risk of harm to self, is the single greatest need and the single greatest problem that the custody dispute resolution system faces.⁶⁷

Many victims of domestic violence are, for example, reluctant to disclose experiences of domestic abuse because of fear for their own or their children's safety or economic dependence on the batterer. Skilled interviewers of children are vital. In addition, valid and reliable criteria for differentiating between types of family violence are hard to come by. In the hypothetical situation, for example, it seems to be that the violence between Ozzie and Harriet is conflict rather than control instigated and potentially more amenable to therapeutic interventions. But it is hard to reach that conclusion with any degree of confidence given what is at stake in making that determination.

Ultimately, any screening process will have to rely heavily on the judgement of the

⁶⁷ See Reihing, *supra* note 50, 37 FAM. & CONCILIATION CTS. REV. at 403-04.

learn about the legal process, and what they and their parents are experiencing.⁶⁸ Harriet may need treatment for substance abuse. The Nelsons might be required to attend an education program for high conflict families⁶⁹ and, if safe, participate in mediation to develop a parenting plan for David and Rikki. If conflict continues endlessly, a special master may be appointed to supervise the families' transitions during divorce and separation.⁷⁰ As a matter of fundamental fairness, each parent must have the right to contest any of the team's recommendations at a hearing before the judge.

What is more important, however, than the specific services that the Nelsons experience is that the process of dispute resolution does not drag along and that the Nelsons follow through on what they are ordered to do. Children must feel that the state through its court system is looking out for their interests. Children have a unique sense of time; a day can seem like a month

⁶⁸ See Trecia DiBias, *Some Programs for Children*, 34 FAM. & CONCILIATION CTS. REV. 112 (1996).

⁶⁹ See Hugh McIsaac & Charlotte Finn, *Parents Beyond Conflict: A Cognitive Restructuring Model for High-Conflict Families in Divorce*, 37 FAM. & CONCILIATION CTS. REV. 74 (1999) (describing such a program in Multnomah County Circuit Court in Portland, Oregon).

⁷⁰ See Andrew Schepard, *Law and Children: Managing Parents in High Conflict: Special Masters in High Conflict Custody Cases*, N.Y. L.J., Sept. 17, 1997 at 3.

professionals that undertake it, informed by a shared flow of research results from similar programs in other states. The absence of confident guidelines for screening suggests that the process should be undertaken by a multi disciplinary team of mental health professionals and legally trained personnel to insure that different perspectives enter into it. The absence of confident guidelines also suggests the importance of amassing experience in pilot programs and carefully analyzing it before permanent policy judgments are made.

3. **Multiple Dispute Resolution Options and Expedited Case Management**

The Nelsons' will benefit if the court and its support staff have a rich variety of options to call on to help control their conflict and shield their children from harm. The screening team should be responsible for developing a short and long term dispute resolution plan for the Nelsons for approval by the court before implementation. The plan must assure safety of all involved, perhaps recommending that the court order one of the parents "move out" of the marital residence. The plan may recommend supervised visitation, the appointment of a lawyer for the child (called a law guardian in New York) and an expedited forensic evaluation. Therapy for the children may be helpful, as might an educational program for them in which they can

and a month a year depending on their developmental stage. Dispute resolution should take place in accordance with the child's sense of time, not the adults. In addition, the imposition and enforcement of time deadlines will help convince the Nelsons that the court system is serious about protecting their children.⁷¹

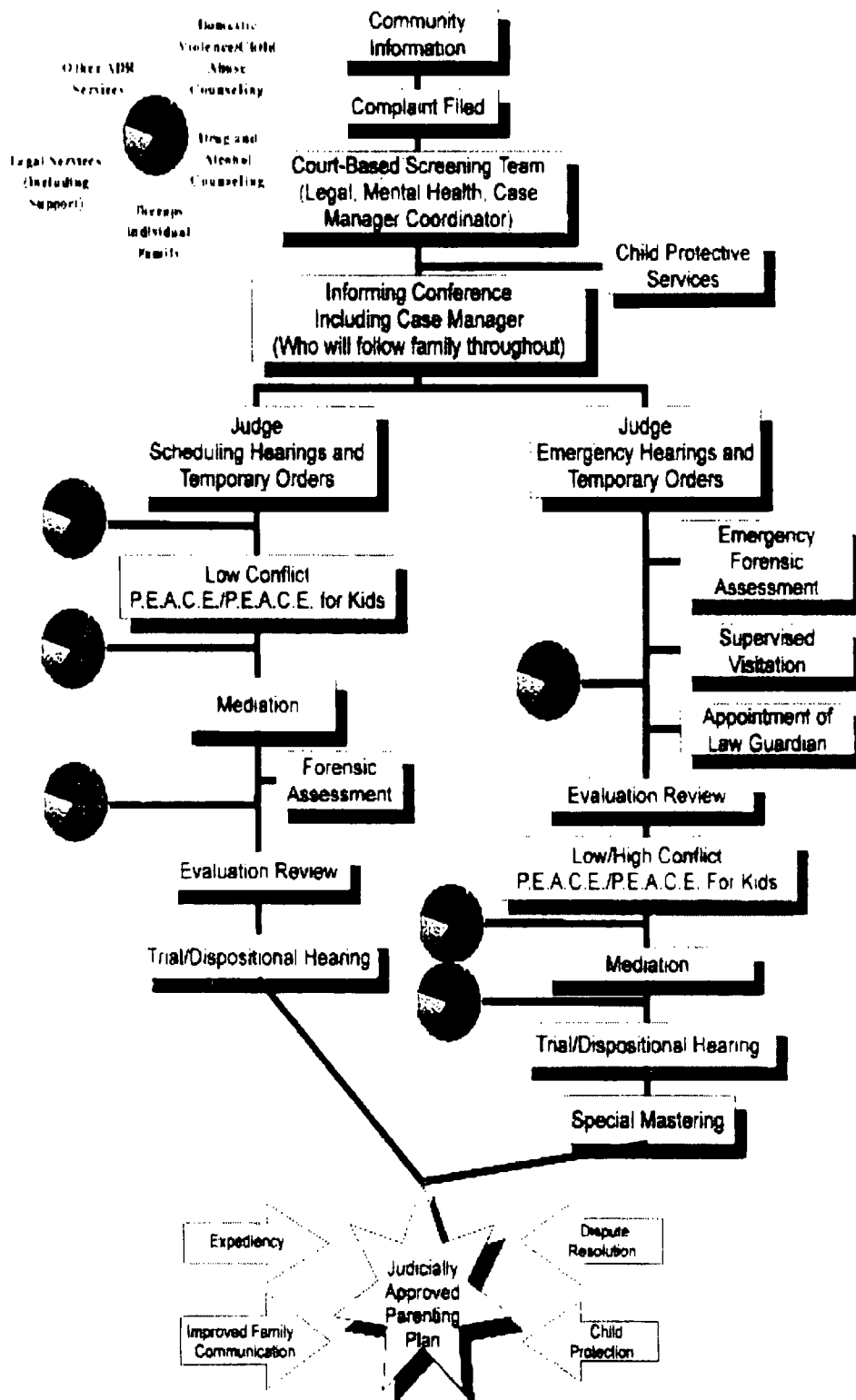
The court must be responsible for keeping the dispute resolution process moving for high conflict families; the goal of expedition is simply too important to Rikki and David to leave the progress of the case in the discretion of the Nelsons or their lawyers. One way to insure that the dispute resolution plan moves forward is for the court to appoint a case manager to supervise its implementation. The case manager could be responsible for regular conferences with the Nelsons and their lawyers to insure that deadlines are met and to inform the court and the screening team if they are not. The case manager could also be a contact point for the Nelsons and their counsel for contacting the court and for information about what comes next.

All in all, it is the court's responsibility to create a rational, expeditious plan for resolution of the Nelson's dispute drawing on the advice of an interdisciplinary team and on a

⁷¹ See Schepard, *Taking Children Seriously*, *supra* note 16, 64 TEX. L. REV. at 773-74.

wide variety of options tailored for high conflict families. Graphically, the process might look something like that described in the chart that follows.⁷² Each court will, of course, have to create its own flow chart for high conflict cases that incorporates the resources available for such families in its local community. The critical point is that a court must have one.

⁷² The flow chart was developed as part of a proposal for a unified family court pilot project in Nassau County (Long Island), New York sponsored by the Center for Children, Families and the Law of Hofstra University, North Shore-Long Island Jewish Health Systems and the Educational Assistance Corporation. My interdisciplinary collaborators in its development are Drs. Sandra Kaplan, Alan Cohen and Rinat Green of North Shore-LI J, Dr. Paul Meller of Hofstra's Psychology Department, and Lance Elder, Robyn Schneider and Elayne Greenberg of EAC to whom I am extremely grateful. Joi Kafka-Kolhagen, Hofstra Law School class of 1999, also played a significant role in the development of the flow chart. The views expressed herein, however, are my own.



Flowchart for Judicial Management of High and Low Conflict Cases

IV. Conclusion

The last fifty years have been a time of transformation for courts hearing divorce-related custody disputes. Courts have moved permanently beyond the stage where their sole function is to award sole custody to the better parent. Today's family court is in the business of conflict management for the benefit of the child. Much progress has been made in adopting the child custody dispute resolution system to the needs of both children and parents through the wide spread implementation of mediation and parent education.

As Chief Judge Vanderbilt's stated, however, "judicial reform is no sport for the short-winded or for lawyers who are afraid of temporary defeat."⁷³ The custody dispute resolution system's collective challenge for the next Millennium is to encourage the majority of parents who can cooperate for the benefit of their children to do so while creating an expedited and structured process for higher conflict families who need stronger interventions. Meeting that challenge will be expensive, and will require a process of trial and error and education of the

⁷³ Arthur T. Vanderbilt, *Introduction* in MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION xix (Arthur T. Vanderbilt ed. 1949). Vanderbilt continued: "Rather, we must recall the sound advice given by General Jan Smuts to the students at Oxford" "When enlisted in a good cause, never surrender, for you can never tell what morning reinforcements in flashing armor will come marching over the hilltop." *Id.*

bench, bar and mental health community. The result, however, will be a system that targets scarce resources to families that really need help and, above all, provides substance to the claim that the court protects the best interests of the child in high conflict custody cases.

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Battered Child Syndrome:
Is it a Paradigm for a Child of Embattled Divorce

H. Patrick Stern

Michael W. Mellon

Beth O. Butler

Suzanne E. Stroh

Nicholas Long

Jerry G. Jones

Department of Pediatrics, University of Arkansas for Medical Sciences and Arkansas Children's
Hospital

Please correspond with and send request for reprints to H. Patrick Stern, Arkansas Children's
Hospital, 1120 Marshall Street, Little Rock, AR 72202. Business number (501)320-1016, Fax
number (501) 320-3437.

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Abstract

High conflict divorce is related to greater risks of adverse emotional, cognitive, and physical affects for children than low conflict divorce. The battered-child syndrome was used as a paradigm in which criteria were defined to help identify children of high conflict divorce who may experience psychological abuse. Criteria were defined by parental behavior. Nine major and ten minor criteria were combined in three ways, one with a temporal component to raise the suspicion of psychological abuse. The authors then applied the criteria to ten high and ten low conflict divorce cases. All ten cases of high conflict divorce met at least one of the three definitions while none of the cases of low conflict divorce did. We conclude the battered-child syndrome offers a potentially beneficial paradigm for children of high conflict divorce. The development of an objective method of describing parental behaviors associated with high conflict divorce which may lead to psychological abuse of children may assist professionals in identifying and meeting the needs of these high risk children. Highlighting the hostile family and legal environments which exist in these cases may help protect professionals who attempt to serve the children. Using multifactorial criteria with a temporal component may help further refine the approach to raise the suspicion of psychological abuse of children. Further research is needed to clarify the criteria.

Battered Child Syndrome:

Is it a Paradigm for a Child of Embattled Divorce

The concept of the battered-child syndrome resulted from an evolution of scholarly work exploring unexplained physical injuries of children (Kempe, Silverman, Steele, Droegemueller and Silver, 1962). The first paper relating fractures of long bones to subdural hematomas in children was published by Caffey (1946). Silverman (1953) published a paper on intentional infliction of injuries to children. In 1955 Wooley and Evans blasted the medical profession for not accepting that injuries were being committed willfully to children (Radbill, 1980). Kempe published his research on child abuse during the 1950s (Radbill, 1980).

Kempe et al. (1962) in their classic article reframed society's concept of physical abuse of children. The authors cautioned "there is reluctance on the part of many physicians to accept the radiologic signs as indications of repetitive trauma and possible abuse." Fortunately Kempe and others' work in identifying the battered-child syndrome led to a tremendous increase in professional recognition and treatment of the physical abuse of children.

This article will review the impact of divorce on children, especially in high conflict families, and present some key historical developments leading to the present management of child abuse. Using the battered-child syndrome as a paradigm, clinical criteria which raise the suspicion of psychological abuse will be proposed for the child of embattled divorce. The potential for improvement of the care of children in high conflict divorce will be discussed.

The Relevance of Child Abuse to Parental Divorce

As the epidemic of divorce evolves in the United States, the experiences which some children of divorce encounter (e.g., exposure to intense interparental conflict) could meet the definition of psychological abuse. Unfortunately, our society may have become desensitized to

the repetitive emotional trauma some children experience and accept it as part of the normal divorce experience. Historically there have been numerous examples of accepted adult behaviors within many cultures which retrospectively are considered child abuse. Examples include swaddling, abandonment, apprenticeship, and infanticide (Robin, 1982). Acts now considered sexual abuse such as castration, sexual decoration rights, childhood prostitution, pederasty, and sadomasochism have also been accepted historically (Radbill, 1980).

Although the concept of the "best interest of the child" in divorce litigation was first written in a court decision in the United States in 1881 and reaffirmed in 1925 (Derdeyn, 1976), historically laws alone have not protected children from abuse. Professionals and professional organizations have provided the impetus for reforming societal standards. It was not until Kempe became chairman of the Program Committee of the American Academy of Pediatrics and established a conference in 1961 with the emotive title "Battered-Child Syndrome" that model child abuse laws were adopted by every state in the country (Radbill, 1980). Otto and Melton (1990) concluded: "Although most states passed specific maltreatment laws by the early 1920s, it was not until publication of a 1962 article describing the 'Battered-Child Syndrome' that legislators and health care professionals paid considerable attention to the problem of child abuse and neglect."

The Impact of Divorce on Children

The annual United States divorce rate has risen dramatically since the advent of recording divorce statistics in 1870 (Emery, 1988). Currently, more than one million marriages disintegrate each year (Wegman, 1994). It is estimated that 60% of all divorces will involve children, with more African-American children than white children (75% versus 38%) experiencing divorce prior to age 18 (Bumpass, 1984).

Children involved in a separation or divorce of their parents have been reported to suffer psychological maltreatment. Klosinski (1993) proposed four ways in which this happens: one parent trying to ally with the child against the other parent, using a child to meet a parent's needs, abducting a child, or parents physically abusing each other in front of the child. Although O' Hagen (1995) makes a distinction between psychological and emotional abuse, for purposes of this paper the definition of psychological abuse proposed by the American Professional Society on the Abuse of Children (APSAC, 1995) will be used - "a repeated pattern of caregiver behavior or extreme incident(s) that conveys to children that they are worthless, flawed, unloved, unwanted and endangered, or are only of value in meeting others' needs." Psychological maltreatment is further clarified to occur as acts of commission or omission, and can occur alone without the co-occurrence of physical or sexual abuse, or neglect (APSAC, 1995). Psychological maltreatment also "produces both acute and long term negative effects" and is "deplorable regardless of the degree to which a child is damaged by them or is coping with them" (APSAC, 1995). A child being psychologically abused may not show any symptoms from the abuse. A "painful divorce" is cited as an example of an incident which can lead to psychological maltreatment (APSAC, 1995).

Children of divorce can display a constellation of symptoms which may be emotional, cognitive, or physical. Emotional symptoms include fighting, stealing, running away, drug use, promiscuity, declining school achievement, withdrawal, depression, emotional lability, ADD and ADHD symptoms, and self blame (Anable, 1991). Cognitive symptoms can include changes in memory, recognition, perception, attention, imagination, and moral development (O'Hagan, 1995). Physical symptoms reported in adults include increased complaints of headaches, back aches, nonspecific pain, increased use of inpatient and outpatient health care, increased

medication use, exacerbation of existing disease, more difficulty in controlling diabetes, and an increased incidence of accidents (Renshaw, 1994). Symptoms may begin predivorce or emerge years after the divorce (Amato & Keith, 1991).

Amato and Keith (1991) contributed significantly to our understanding of the effects of divorce on children in their meta-analysis of 92 studies from the divorce outcome literature involving more than 13,000 children. They concluded that the average effect of divorce on children across measures of well-being (i.e., school achievement, conduct, self-concept, relations with parents, etc.) was modest, yet significant. Conduct and the relationship between children and their fathers were most adversely affected. Emery (1995) interpreted these modest adverse effects as evidence for the resiliency of children of divorce but acknowledged the significant costs in terms of high levels of situational distress and bad memories lasting for a lifetime. Emery (1988) has also pointed out the significant adverse economic impact of divorce on children and the custodial parent, usually the mother.

Johnston (1994) describes divorce conflict as having three dimensions. These include the domain of conflict, tactics used in conflict expression, and attitudinal or emotional states exhibited. Families are distinguished as having typical or high levels of conflict based on the duration and developing patterns of conflict expression. Conflict is expected to be higher immediately prior to separation and the final divorce decree. High conflict divorce is defined when disagreement about different domains, such as finances, custody, child rearing or property, continues intractably, and when parents attempt to resolve conflicts by using tactics such as verbal aggression, physical coercion, and recurrent litigation. Johnston (1994) notes high conflict divorce may suggest preexisting individual and family psychopathology.

Further analysis of the divorce literature by Amato and Keith (1991), selecting for high

conflict families and the subsequent effect on functioning of children of divorce, identified ongoing and intense conflict as the most reliable finding leading to adverse outcomes. On the same measures of well-being, the negative effects increased three to four times. Other authors have provided convergent evidence in their qualitative reviews of the literature involving high conflict divorced families and the effects on children which were consistent with the findings of Amato and Keith (1991) (Emery, 1982; Emery, 1988; Grych and Fincham, 1990).

As the battered-child syndrome was noted to be "a significant cause of childhood disability and death" (Kempe et al., 1962), studies involving families embroiled in high conflict divorce also describe worrisome effects on the children's functioning (Johnston, Kline & Tschann, 1989). Many of these children became highly distressed with severe somatic complaints upon witnessing parental conflict, developed many externalizing behaviors such as increased aggression and heightened depression with prolonged exposure to their parents' conflict, and demonstrated maladaptive ways of coping in their interpersonal relationships (Johnston et al., 1989). Further, Radovanovic (1993) indicated that high levels of parental conflict were related to severe behavior problems and diminished competence in children on standardized self-report measures. Overwhelming evidence indicates that much of the negative impact of divorce on children is related to conflictual parental interactions. Emery (1988) has concluded that future research should focus not on whether there is an adverse effect of high conflict divorce, but on identifying the causal mechanism.

Since about 50% of marriages are now ending in divorce, most people including those who read this article have experienced divorce in their immediate family or by a member of their close extended family. The impact of divorce and the way in which an individual copes with the stress varies from person to person. A common stress necessitates the majority of people

cope with it successfully for society to survive. This may result in a frequent stress being perceived as a normal component of life. The danger of a common stress is that it may desensitize individuals and society to the infrequent occurrence of serious emotional trauma inflicted on some children. Professionals serving children of divorce will likely be reluctant to accept behavioral signs as indications of repetitive emotional trauma and possible psychological abuse, just as Kempe et al. (1962) noted regarding the radiologic signs of physical abuse. This article attempts to identify a small subset of children of divorce who appear to have experienced psychological abuse. These children need to be identified rather than avoided so their special needs can be better served.

Definition of Child of Embattled Divorce

Kempe et al. (1962) presented two case reports to exemplify the clinical manifestations of the battered-child syndrome in their classic paper. Utilizing case reports from the authors' clinical work, APSAC's (1995) definition of psychological abuse, the risk to children of high conflict divorce, and the history of child abuse, the authors' postulated criteria suggesting psychological abuse affecting children of high conflict divorce. High conflict divorce was defined as intractable conflict involving multiple domains in which a parent(s) uses inappropriate measures to resolve the conflict. (Johnston, 1994).

The initial step in defining the clinical manifestations involved the authors' clinical team, including a behavioral pediatrician, psychologist, psychiatric social worker, and nurse practitioner, listing by consensus the hostile behaviors of parents engaged in high conflict divorce cases, without reviewing any individual case (see Table 1). This team provides care for many divorcing or divorced families who are self-referred or referred by other

Insert Table I about here

professionals including physicians and attorneys; some of the evaluations are court ordered. It was noted that adult psychiatric evaluations of parents in a high conflict divorce often revealed at least one parent has had a psychiatric disorder such as depression, narcissism, paranoid schizophrenia, or sociopathy which may have promoted conflict. Psychiatric disorders of the perpetrators of the battered-child syndrome were also reported by Kempe et al. (1962).

Hostile actions were attempted toward professionals treating physically or sexually abused children before good faith reporting laws were passed. Particularly in high conflict cases in which the authors have had long term involvement, the professional team has likewise experienced numerous hostile actions directed toward one or more individuals. Team members have been threatened with physical, emotional and professional harm. Clinical work has been accused of being biased and misrepresented to other professionals and families. Complaints have been filed to the state licensing board, the National Institute of Health, the hospital medical director, and chairman of the department. Malpractice suits have been filed primarily by parents who are not attorneys. Every complaint and suit which has been reviewed has been dismissed. Parents with economic means have refused to pay bills or not allowed insurance to make payment, or criticized therapy when children were achieving therapeutic goals. The hostile action was usually preceded by support from that parent and occurred after a recommendation was made contrary to the parent's wishes. Review of other literature (American Academy of Pediatrics, 1994; Goldzband, 1992; Halon, 1990) and informal discussions with other professionals serving children in high conflict divorce suggest the team experiences are typical

in exemplifying challenges in caring for these children.

The clinical criteria were defined based on the behaviors of both parents and/or stepparents during a separation or divorce which raise the suspicion of psychological abuse of their children. In addition to Klosinski's (1993) proposals, additional behaviors were selected by reviewing the authors' high conflict divorce cases in which the children were displaying symptoms of psychological stress or placed under severe, chronic stress because of the hostility of the parents and/or stepparents. The adult behaviors usually endangered the children physically or emotionally, or used the children to fulfill needs of that parent. As a result, the child felt endangered, worthless, flawed, unloved and/or unwanted. The behaviors of parents and/or stepparents are listed as major criteria (see Table 2) and minor criteria (see Table 3). The major criteria are more purposeful, active behaviors which constitute a greater immediate

Insert Table 2 about here

Insert Table 3 about here

threat to the physical or emotional well-being of another person, especially the child. By consensus the team proposed that psychological abuse be considered when either five major behaviors existed at any time, three major and four minor behaviors existed at any time, or six minor behaviors persisted for more than six months, although any given behavior did not have to continue for that full period of time. This was done so raising the suspicion of psychological abuse would result from more worrisome behaviors while acknowledging less worrisome

behaviors afflicted on children especially over time can have deleterious affects. The major and minor criteria should not relate to a parent if the behavior is court ordered.

Summary of Case Reports

In order to determine if the authors' cases would fit the criteria proposed for raising the suspicion of psychological abuse, the authors' surveyed their own divorce cases. Initially all divorce cases for whom long term care had been provided were listed. Ten cases were selected by consensus of the team which appeared to exemplify high conflict divorce as defined by Johnston (1994), and ten divorce cases were selected because they lacked high conflict. The average length of time medical care was provided for high conflict cases was 31 months (range 17 to 59) and for low conflict cases was 50 months (range 9 to 117). In all of these cases the major stressor causing the children's presenting symptoms appeared to be divorce related. Presenting symptoms of children in both high and low conflict cases were comparable and similar to those previously reported (APSAC, 1995; Anable, 1991; O'Hagan, 1995). Emotional symptoms such as anxiety, withdrawal, regressive behavior, pseudo-maturity, and sleep problems occurred. Cognitive symptoms included inattentiveness and school failure. Physical symptoms included enuresis, encopresis, and an increase in atopic symptoms. Families in which kidnapping occurred were excluded by chance, although this has occurred in at least 3 of the authors' cases. Chart reviews were then conducted.

Using the proposed definitions (i.e., five major, three major and four minor, or six minor persisting more than six months) to determine if the authors' cases would fit, the ten cases which clinically appeared to have high conflict met at least one of the three proposed definitions, while the ten cases that did not seem to have high conflict did not meet any one of the definitions (see Table 4). The high conflict cases averaged a frequency of over six major criteria and minor

Insert Table 4 about here

criteria while the low conflict cases averaged a frequency of 1 1/2 major criteria and two minor criteria. The frequency of the major criteria in high conflict cases ranged from four to nine, while the frequency in low conflict cases ranged from zero to three. The frequency of the minor criteria in high conflict cases ranged from four to eight, while the frequency in low conflict cases ranged from zero to four. Nine of the ten high conflict cases met the definition of five major behaviors at any time, all ten cases met the definition of three major and four minor criteria at any time, and five of the cases met the definition of six minor behaviors persisting over a period of six months. None of the ten cases selected which did not appear to have high conflict met any one of the three ways in which the definitions were defined.

Each high conflict case included the major criteria of recurrent court hearings, an adult with an active psychiatric disorder likely to promote high conflict behaviors, and concrete objective evidence of a parent purposely trying to turn a child against another parent or use a child to meet a parent's needs. Minor criteria which were found in each high conflict case included a legally contested initial divorce, indirect evidence of a parent trying to turn a child against another parent or use a child to meet a parent's needs, and a parent refusing to engage in the evaluation or therapy or trying to interfere with the child receiving therapy when the need had been identified. No major or minor criteria applied to all ten low conflict cases, although having indirect evidence of a parent trying to turn a child against another parent or use a child to meet a parent's needs was found in nine out of ten cases.

Discussion

As the epidemic of divorce continues in the United States, children are frequently being subjected to significant stress which at times is severe. Children involved in high conflict divorce are more likely to develop symptoms than children in low conflict divorce (Amato and Keith, 1991; Emery, 1982; Emery, 1989; Grych and Fincham, 1990). The adversarial nature of the legal system may catalyze hostile behaviors in a parent with an aggressive personality and financial means who believes these actions will fulfill the individual's goals in the divorce at the expense of the children. This environment has created circumstances which may lead to the psychological abuse of some children in high conflict divorce by making them feel worthless, flawed, unloved, unwanted or endangered, or that their only value is to meet parental needs.

Although in theory the "best interest of the child" should guide the courts in focusing on the needs of children, in reality this frequently does not occur. It was found that 50% of judges do not use the "best interest of the child" in their decision making at all, and it was only one of the top five things considered by the remaining judges (Felner et al., 1985). More often, the judicial system focuses on parental rights rather than on the needs of children who in many court proceedings may have no rights at all (Schaefer, 1992). Laws to protect children from physical abuse were not effective until a national conference on physical abuse was held and Kempe's et al. (1962) classic article was published. Similar events are likely needed for the "best interest of the child" laws to be enforced.

The battered-child syndrome and other aspects of the evolution of society's approach to child abuse can be used as a paradigm which may help guide management of children of high conflict divorce. The history of child abuse makes it clear that at one point in time a society may condone behavior which retrospectively is considered child abuse. Reconceptualizing

common practices from being acceptable to being harmful was required for physical and sexual abuse of children to be addressed. Physical and sexual abuse laws alone did not insure that children were protected by the legal or medical systems; likewise the "best interest of the child" standard which now exists is not always used in divorce litigation. The persistence of unacceptable parental behavior may make that behavior abusive, especially in psychological maltreatment of children. Naming and defining a syndrome, required reporting supported by legal sanctions, and legal immunity from civil liability for good faith reporting had to occur before physical and sexual child abuse began to be routinely addressed. Finally, advocacy for children by a prominent, credible, national organization, the American Academy of Pediatrics, was needed to lead the country to serve children who were being abused. The history of child abuse, especially the work leading to the definition of the battered-child syndrome, can be used as a guide to serve children being psychologically abused in high conflict divorce.

The presenting symptoms of children in high conflict divorce were not used to define the criteria. Parental behavior alone can define psychological abuse which does not require a coincident maladaptive behavioral response of the child (APSAC, 1995). Maladaptive behavior may not be evident in a child who has been physically or sexually abused, and a sexually abused child does not always have physical findings. Thus parental behaviors alone were used to define the criteria.

The authors did not find a difference in the kind of symptoms the children in the reviewed cases had in high and low conflict divorce. No attempt was made to rate the magnitude of symptoms. Differences in symptoms may not exist because children presenting for evaluation and treatment in low conflict families had greater symptoms than children in other low conflict families making them indistinguishable from children in high conflict families.

Although researchers indicate a greater risk of symptoms occurring in children in high conflict families (Amato and Keith, 1991; Emery, 1982; Emery, 1989; Grych and Fincham, 1990), more vulnerable children in low conflict families may manifest similar symptoms. Children stressed by high conflict divorce may use coping mechanisms and not show distinguishing symptoms while experiencing psychological abuse (APSAC, 1995), but have a "sleeper effect" in later life (Wallerstein, 1987) not found in children struggling in low conflict divorce. The lack of finding different symptoms in children presenting in high and low conflict cases likely reflects children display a limited range of symptoms regardless of the stress with which they are struggling.

Multiple questions can be asked about the proposed criteria to raise the suspicion of psychological abuse of a child in high conflict divorce. First, the authors have not empirically validated the defining criteria. One major criterion, kidnapping, was not found in any of the selected cases. Another major criterion and multiple minor criteria were also found in relatively equal numbers of high and low conflict families. A criterion may not be detected because of the relatively small number of cases the authors reviewed. Other criteria may occur in similar frequency in high and low conflict divorce, but may still help identify a suspicion of psychological abuse as a common sign like bruising may help identify possible physical abuse. As occurred with the battered-child syndrome, this paper is a preliminary report based on case studies intended to stimulate awareness in professionals about when to begin to raise the suspicion of psychological abuse of children in divorce, but the criteria do not diagnose it. Clearly the proposal is only one of the steps needed to further define the psychological maltreatment of children involved in high conflict divorce. Research to determine the validity of the proposed criteria, consideration of further criteria, and refinement of the proposed

definitions are needed.

Concern can also be raised that COEDS will add a large number of cases to an already overburdened child protection system. A hostile parent in a divorce may report the divorcing spouse for a suspicion of abuse inappropriately. Professionals may be reluctant to report suspected psychological abuse of children of divorce because of lack of objective physical findings. Although these are valid issues with which the child protective system already grapples today, defining criterion to raise suspicion of psychological abuse in high conflict divorce should not be avoided because of challenges serving children within the present system. Professionals in the medical, legal, social, and mental health systems should focus on serving the "best interest of the child" in divorce, especially when high conflict exists.

No systematic study could be found and no attempt was made in this paper to determine what percentage of divorces are high conflict. Although high conflict divorce has been quoted as being as common as 6 to 10 percent of divorcing parents (Solnit, Schowalter and Norhaus, 1995), the defining criteria would likely identify a much smaller percentage.

Just as the battered-child syndrome did not diagnose physical abuse, parental behaviors which meet the criteria do not by themselves indicate a child is being psychologically abused. The proposed definition is intended to alert professionals to look for the criteria of suspected psychological abuse in selected children experiencing the divorce of their parents. The professional should also consider all available information regarding the child and family. If a reasonable suspicion develops using APSAC's (1995) definition of psychological abuse, suspected child abuse should be reported to the mandated agency under the laws of the state. Following reporting, a multi-disciplinary team of professionals working in conjunction with appropriate agencies should be responsible for determining if the child has been psychologically

abused. Using the multifactorial definition which may include a temporal component to raise the suspicion, such as the format used in the Diagnostic and Statistical Manual of Mental Disorders - IV (DSM-IV; American Psychiatric Association, 1994) should increase the likelihood suspected abuse exists when a report is made, rather than using a single criteria as Klosinski (1993) proposed. A more structured, detailed definition than proposed for the battered-child syndrome is likely needed because psychological abuse is based on behavior rather than tangible physical findings making courts more reluctant to acknowledge its existence.

In contrast to the advocacy position taken by the American Academy of Pediatrics regarding child abuse, the Academy of Pediatrics has assumed a different position relating to children of high conflict divorce. The American Academy of Pediatrics' position statement "The Pediatrician's Role in Helping Children of Families Deal with Separation and Divorce" (1994) includes the following sentence regarding "contentious situations" which in this paper is called high conflict divorce. "In complex legal situations, the pediatrician should consult with his or her own attorney" (American Academy of Pediatrics, 1994). The statement does not clarify why an attorney is recommended but highlights an environment that has likely made many professionals reluctant to become involved in the psychosocial care of children of divorce. Goldzband (1992) may have clarified the need for an attorney when he wrote the following about divorcing parents who state their support of the "best interest of the child:" "Those statements are usually outright lies. Of course, each parent really wants me to side with him or her. My loyalty to the child is fine, they each reason, as long as it is loyalty to their side." Halon (1990) clarifies that the typical role of an attorney in a divorce case when a client does not agree with the professional's conclusions and recommendations is to be "vicious" and "come at you with their best shot." He concludes this "often makes custody work threatening and not worth the

effort." A hostile attack can discourage further treatment of these families which may result in a professional abandoning children who are in great need of help. If this occurs, the hostility of that parent will be successful in compromising the well-being of the children, likely perpetuating what had occurred in the predivorce family. Clearly, the professional who attempts to care for children involved in high conflict divorce can also become a target of the hostility which may lead to psychological abuse of the child.

The adversarial nature of the legal system combined with a high conflict divorce with two parents having diametrically opposed positions each of whom want the professional on their side appears to be the basis of the recommendation of the Academy of Pediatrics that pediatricians consult with his or her own attorney in contentious situations. Consulting an attorney promotes the adversarial process rather than keeping the focus on the "best interest of the child." This is not a practical solution because of the monetary and time costs which result for the professional. Kempe's et al. (1962) observation that physicians were reluctant to report physical abuse may have kept that disorder from being addressed if legal immunity for professionals had not become the law of the land. Since professionals would have legal immunity under existing laws of the state for good faith reporting of suspected psychological abuse in high conflict divorce, they should be able to maintain the position as true child advocates in these cases. Although legal immunity based on present statutes would not extend to treatment of children of divorce, the necessity for legal immunity for good faith reporting may help reframe high conflict divorce into the hostile legal environment which exists. This may be particularly important for professionals treating children of high conflict divorce because legal proceedings typically occur in civil court which may be more adversarial than juvenile court should be. Frivolous attempts by a hostile parent to improperly manipulate a system, such as attacking the professional, will

more likely be recognized for the true intent of that parent. Furthermore, the involvement of a multi-disciplinary professional team and appropriate agencies required to evaluate and treat abused children makes it more difficult to isolate one professional as a target for harassment.

Conclusion

The battered-child syndrome appears to offer a useful paradigm for the child of embattled divorce. Scholarly articles and a national meeting are likely needed to define criteria and to draw professional attention to a small subset of children involved in high conflict divorcing families who are at high risk for psychological abuse. Defining criteria to aid in identifying these children should accomplish a number of positive outcomes. This subset of children in high conflict divorce will be reframed conceptually from children being stressed by divorce alone to children being stressed by psychological abuse and divorce. It will help clarify what may be an unrecognized form of psychological abuse of children which requires reporting by professionals. Existing systems, including medical, mental health, legal and social services, need to be mobilized to help identify and serve children of divorce who are experiencing psychological abuse. Mobilizing these resources should reduce the psychological and physical morbidity and the physical mortality of children of divorce. Both federal and state laws grant immunity for good faith reporting of child abuse. Reporting child abuse should lead to the involvement of a multi-disciplinary team and other systems in the care of the abused children. This should help ensure professionals are better protected from legal harassment in their attempts to care for children of high conflict divorce. The high frequency of divorce, the hostility which may be directed at professionals and the fact that psychological abuse is defined behaviorally should not desensitize professionals from identifying this small but needy group of children entangled in high conflict divorce. The child of embattled divorce definitions which use a DSM-IV format

may help further clarify the approach to raise the suspicion of psychological abuse of children which many professionals believe is the central issue in all forms of child abuse. Defining further criteria should also promote research of this form of psychological maltreatment of children.

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Table 1

Hostile Behaviors

- Multiple contested court hearings for custody, visitation, alimony and/or child support
- Placing children in physical danger, e.g. driving recklessly, smoking marijuana, unsafe use of weapons, driving three wheelers, unsafe living conditions, leaving a child with unsafe caregiver
- Physical and sexual abuse of children pre-divorce and post-divorce, and physical assault of adults
- Conscious attempts of parent to turn children against other parent and stepparent
- Parent continues to verbally attack other parent in therapy and cannot be redirected by therapist
- Parent kidnaps children
- Parent stalks and harasses the other parent and children
- Parent threatens physical and/or emotional violence to other parent
- Parent frequently has children late and/or unavailable for visitation
- Parent consistently does not pay alimony and/or child support when able to afford payment
- Parent bars contact of other parent with children while in his/her care

Table 2

Major Criteria

1. A parent initiates recurrent court hearings especially to contest custody, visitation, and/or finances.
2. A parent engages in dangerous behavior that threatens the physical safety of the child, e.g. driving recklessly, abusing drugs in child's presence, unsafe living conditions, driving three wheelers, leaving child with unsafe caregivers, unsafe use of weapons, lack of supervision, etc.
3. A parent has an active psychiatric disorder likely to promote high conflict behavior, especially a diagnosis such as narcissism, paranoia, and/or sociopathy.
4. A parent has a history of physical and/or sexual abuse and/or violent behavior which occurred before or after the divorce.
5. There is concrete objective evidence of a parent trying to purposely turn a child against another parent, stepparent or sibling, or use a child to meet a parent's needs, e.g. spy, parentification, etc.
6. A parent attempts to manipulate a professional or system to meet their personal goals related to the divorce, e.g. tries to influence a judge illegally, files frivolous complaint to a medical or judicial board, raises false allegation of abuse, etc.
7. A parent in the evaluation or therapy continues to attack the other parent or stepparent and is unable to focus on the process at hand in spite of consistent redirection by a therapist.
8. A parent kidnaps a child.
9. A parent harasses or stalks other family members, and/or gets another person to do so.

Table 3

Minor Criteria

1. Parents unable to settle their divorce without a court hearing.
2. A parent threatens physical and/or emotional violence to other family members.
3. There is indirect evidence of a parent trying to turn a child against another parent, stepparent, or sibling, or use a child to meet a parent's need, e.g. spy, parentification, etc.
4. A parent refuses to engage in an evaluation or therapy, or tries to interfere with a child having therapy when its need has been identified.
5. A parent consistently has a child unavailable or significantly late for the exchange at visitation.
6. A parent refuses to allow a child to take possessions to the other parent's home which may be a gift from that parent.
7. A parent does not give the other parent access to the child or him/herself by refusing to provide a phone number, an address, or to return calls.
8. A parent does not pay alimony or child support or meet other financial responsibilities when having the ability to do so.
9. A parent threatens to abandon a child if the parent does not get what he/she wants.
10. A parent threatens to do physical, emotional, or professional harm or verbally harasses the professional staff.

Table 4

Summary of Divorce Cases

MAJOR CRITERIA			MINOR CRITERIA		
Number	High Conflict	Low Conflict	Number	High Conflict	Low Conflict
	(n=10)	(n=10)		(n=10)	(n=10)
1	10	2	1	10	5
2	5	4	2	7	0
3	10	3	3	10	9
4	8	3	4	10	3
5	10	0	5	3	1
6	6	0	6	5	2
7	6	2	7	6	0
8	0	0	8	2	1
9	7	0	9	1	1
			10	7	0
Average=6.8/case		Average=1.4/case	Average=6.1/case		Average=2.1/case
Range (4 to 9)		Range (0 to 3)	Range (4 to 8)		Range (0 to 4)

*This table summarizes the frequency of the major and minor criteria found in the ten high conflict and ten low conflict cases from the authors' clinical work. Cases were selected based on team consensus of whether high or low conflict appeared to exist. The numbers for the major and minor criteria correspond to the numbers listed in Table 2 and Table 3. The range is the total number of criteria for each family leading to the results in the column.