

2001

# Reforming the System to Protect Children in High Conflict Custody Cases

Linda D. Elrod

Follow this and additional works at: <http://open.mitchellhamline.edu/wmlr>

## Recommended Citation

Elrod, Linda D. (2001) "Reforming the System to Protect Children in High Conflict Custody Cases," *William Mitchell Law Review*: Vol. 28: Iss. 2, Article 5.

Available at: <http://open.mitchellhamline.edu/wmlr/vol28/iss2/5>

This Article is brought to you for free and open access by the Law Reviews and Journals at Mitchell Hamline Open Access. It has been accepted for inclusion in William Mitchell Law Review by an authorized administrator of Mitchell Hamline Open Access. For more information, please contact [sean.felhofer@mitchellhamline.edu](mailto:sean.felhofer@mitchellhamline.edu).

© Mitchell Hamline School of Law

## REFORMING THE SYSTEM TO PROTECT CHILDREN IN HIGH CONFLICT CUSTODY CASES

Linda D. Elrod<sup>†</sup>

I.	INTRODUCTION .....	496
II.	IDENTIFYING THE HIGH CONFLICT CASE.....	500
	A. <i>The Role of the Adversary System</i> .....	501
	B. <i>The Best Interest Standard and Joint Custody</i> .....	505
	C. <i>Family Dysfunction - Personality Disorders, Alienation,         Domestic Violence</i> .....	509
III.	REFORMING THE SYSTEM .....	516
	A. <i>Redefining the “Best Interests” Standard</i> .....	518
	B. <i>Unified Family Courts</i> .....	519
	C. <i>Improving the Judiciary and Court Services</i> .....	521
	D. <i>The Role of Lawyers</i> .....	536
	E. <i>Experts - Mental Health Professionals</i> .....	540
IV.	CONCLUSION.....	545

I hope my mom and I hope my dad  
Will figure out why they get so mad  
I hear them scream . . . I hear them fight  
They say bad words that make me want to cry.  
I close my eyes when I go to bed  
I dream of angels who make me want to smile  
I feel better when I hear them say  
Everything will be wonderful someday.

I don't want to hear you say  
You both have grown in different ways . . .  
I don't want to meet your friend  
And I don't want to start over again  
I just want my life to be the same  
Just like it used to be.  
Somedays . . . I hate everything  
I hate everything; everyone and everything.  
So please don't tell me everything is wonderful now.<sup>1</sup>

---

<sup>†</sup> Distinguished Professor of Law, Washburn University School of Law, Editor of Family Law Quarterly and immediate past chair of American Bar Association Family Law Section. Special thanks to Amanda Bundren, Washburn Law Class of 2002, who ably assisted in research.

## I. INTRODUCTION

More children are involved in disputes over their custody than at any time in history.<sup>2</sup> Too many children can attest to the fact that they are affected by even the most amicable divorce, and by parental conflict, throughout their lives.<sup>3</sup> The more serious harm, however, comes not from the event of divorce itself but from parents whose chronic conflict traps children in a maelstrom of experiences and emotions that can erode the child's relationship with one or both parents. Qualitative and quantitative research

1. Art Alexakis, Everclear, *Wonderful*, on SONGS FROM AN AMERICAN MOVIE, VOL. 1: LEARNING HOW TO SMILE (Capitol Records, 2000).

2. See United States Census Bureau Statistical Abstract of the United States, Vital Statistics 75 (1999). Divorces increased 65% between 1984 and 1994 with 65% having minor children. The number of children whose parents divorce increased by 16% between 1970 (870,000) and 1990 (1,005,000) *Id.*; Centers for Disease Control, National Center for Health Statistics, Advance Report for Final Divorce Statistics, 1989 & 1990, available at [http://www.cdc.gov/nchs/products/pubs/pupbd/mvsr/supp/44-3/mvs43\\_9s.htm](http://www.cdc.gov/nchs/products/pubs/pupbd/mvsr/supp/44-3/mvs43_9s.htm) (last visited Feb. 16, 2001). See also Richard E. Behrman & Linda S. Quinn, *Children and Divorce: Overview and Analysis*, in 4(1) THE FUTURE OF CHILDREN: CHILDREN AND DIVORCE 1, 6 (1994) (stating that more than a quarter of all children of divorce are under age eighteen). See generally CHRISTINA M. LYON ET AL., EFFECTIVE SUPPORT SERVICES FOR CHILDREN AND YOUNG PEOPLE WHEN PARENTAL RELATIONSHIPS BREAK DOWN: A CHILD-CENTERED APPROACH 233 (University of Liverpool Center for the Study of the Child, The Family & The Law 1999) (noting in England and Wales, two thirds of divorcing couples have dependent children under age sixteen; an estimated 3.7 million children have experienced their parents' divorce) [hereinafter EFFECTIVE SUPPORT SERVICES].

3. See JUDITH S. WALLERSTEIN ET AL., THE UNEXPECTED LEGACY OF DIVORCE: A 25-YEAR LANDMARK STUDY Intro., 297-300 (2000) (stating that divorce is a cumulative experience for children and its impact increases over time); JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, SECOND CHANCES: MEN, WOMEN AND CHILDREN A DECADE AFTER DIVORCE 202-03 (1989) (demonstrating how divorce harms children's psychological development: "[i]t affects their entire growing up and certainly their attitudes as young adults, toward themselves and toward the adult world."); JUDITH S. WALLERSTEIN & JOAN B. KELLY, SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE 303-05 (1980) [hereinafter SURVIVING THE BREAKUP]. See also Paul R. Amato, *Life-Span Adjustment of Children to Their Parent's Divorce*, in 4(1) THE FUTURE OF CHILDREN: CHILDREN AND DIVORCE 143 (1994) (detailing how and why children of divorce exhibit more behavioral problems, more symptoms of psychological maladjustment, lower academic achievement, more social difficulties, and poorer self concepts among other things); Michael E. Lamb et al., *The Effects of Divorce and Custody Arrangements on Children's Behavior, Development, and Adjustment*, 35 FAM. & CONCL. CTS. REV. 393, 395-396 (1997) [hereinafter *The Effects of Divorce*] (arguing that children experience declines in economic circumstances, fear of abandonment by one or both parents, diminished capacity of parents to attend to child's needs, diminished contact with extended family and friends).

conducted over the past thirty years demonstrates that highly conflicted custody cases are detrimental to the development of children, resulting in perpetual emotional turmoil, depression, lower levels of financial support, and a higher risk of mental illness, substance abuse, educational failure, and parental alienation.<sup>4</sup> The level and intensity of parental conflict is now thought to be the most dominant factor in a child's post divorce adjustment and the single best predictor of a poor outcome.<sup>5</sup> Research shows that children exposed to violence and high levels of 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."<sup>6</sup>

When parents live with their children, they make daily decisions that are never examined by anyone, least of all a judge. The majority of separating parents, even in the middle of great emotional turmoil, enter into negotiated or mediated parenting agreements. When parents (married, unwed,<sup>7</sup> or same-sex,<sup>8</sup>) or

---

4. E. Mavis Hetherington, *Coping with Family Transitions: Winners, Losers and Survivors*, 60 CHILD DEV. 1, 11 (1989) (describing "losers" as children from homes with high levels of conflict, negative affect, and poor conflict resolution styles); Janet R. Johnston, *High-Conflict Divorce*, in 4(1) THE FUTURE OF CHILDREN: CHILDREN AND DIVORCE 165, 176 (1994) [hereinafter *High-Conflict Divorce*] (stating inter-parental conflict after divorce and the custodial parent's emotional distress are jointly predictive of an increase in problematic parent-child relationships and adjustment problems for children); Robert E. Emery, *Interparental Conflict and the Children of Discord and Divorce*, 92 PSYCHOL. BULL. 310, 310 (1982); Janet Johnston et al., *Ongoing Postdivorce Conflict in Families Contesting Custody: Effects on Children of Joint Custody and Frequent Access*, 59 AM. J. ORTHOPSYCHIATRY 576 (1989). See also EFFECTIVE SUPPORT SERVICES, *supra* note 2, at 11 (discussing conflict linked to greater social and behavior problems); ELIZABETH M. ELLIS, *DIVORCE WARS: INTERVENTIONS WITH FAMILIES IN CONFLICT*, Ch. 2 (2000) (summarizing research on families in conflict); Catherine C. Ayoub et al., *Emotional Distress in Children of High Conflict Divorce: The Impact of Marital Conflict and Violence*, 38 FAM. & CONCIL. CTS. REV. 297, 297 (1999); See generally Marsha Kline et al., *The Long Shadow of Marital Conflict*, 53 J. MARRIAGE & FAM. 297 (1991).

5. CARLA B. GARRITY & MITCHELL A. BARIS, *CAUGHT IN THE MIDDLE: PROTECTING THE CHILDREN OF HIGH-CONFLICT DIVORCE* 19 (1994) [hereinafter GARRITY & BARIS]; Paul R. Amato & Bruce Keith, *Parental Divorce and the Well-being of Children: A Meta-Analysis*, 110 PSYCHOL. BULL. 26, 27, 40 (1991).

6. JANET JOHNSTON & VIVIENNE ROSEBY, *IN THE NAME OF THE CHILD: A DEVELOPMENTAL APPROACH TO UNDERSTANDING AND HELPING CHILDREN OF CONFLICTED AND VIOLENT DIVORCE* 4, 5 (1997).

7. Thirty percent of children are born out of wedlock. See *Miller v. Mangus*, 893 P.2d 823, 827-828 (Idaho Ct. App. 1995) (granting unwed father custody of his fourteen year-old son and stating that this was in the child's best interest because the child's mother interfered with the father-son relationship).

8. See *LaChapelle v. Mitten*, 607 N.W. 2d 151, 156-57 (Minn. Ct. App. 2000)

grandparents<sup>9</sup> cannot agree, judges must make difficult decisions on parenting arrangements that will affect the child and the parties' relationships forever.<sup>10</sup> Although only a small number<sup>11</sup> of parents engage in a type of guerilla warfare,<sup>12</sup> litigating repeatedly for years after an initial custody award, they have a disproportionate

(holding both a lesbian partner and the gay sperm donor were allowed to petition for visitation with a child); *V.C. v. M.J.B.*, 748 A.2d 539, 546 (N.J. 2000) (setting out test for psychological parenthood for same sex partner to seek custody and visitation); *Rubano v. DiCenzo*, 759 A.2d 959, 961 (R.I. 2000) (holding family court could enforce parties' written agreement to allow former partner to have visitation with child).

9. See *In re N.Z.B.*, 779 So. 2d 508, 509-10 (Fla. Dist. Ct. App. 2000) (finding that mother and child had lived with grandmother for years but when mother died, father was entitled to custody); *In re Mehring*, 2001 WL 911420 at \*1 (Ill. App. Ct., Aug. 13, 2001).

10. *Ford v. Ford*, 371 U.S. 187, 193 (1962) (“[E]xperience has shown that the question of custody, so vital to a child’s happiness and well-being, frequently cannot be left to the discretion of parents. This is particularly true where . . . the estrangement of husband and wife beclouds parental judgment with emotion and prejudice.”).

11. See ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY* 100, 159 (1992) [hereinafter *DIVIDING THE CHILD*] (fewer than 25% of divorcing parents filed conflicting custody requests); Albert J. Solnit et al., *Best Interests of the Child in the Family and Community*, 42 *PEDIATRIC CLINIC N. AM.* 181, 184 (1995) (estimating 6-10% are high conflict); CONSTANCE AHRONS, *THE GOOD DIVORCE* 56 (1994) (25% are “angry associates”); JOHNSTON & ROSEBY, *supra* note 6, at 4 (up to one-fourth may be high conflict); *The Effects of Divorce*, *supra* note 3, at 396; OFFICE OF THE STATE COURT ADMINISTRATOR, OREGON JUDICIAL DEPARTMENT, *INTERVENTIONS FOR HIGH CONFLICT FAMILIES: A NATIONAL PERSPECTIVE 1* (1999) [hereinafter *INTERVENTIONS FOR HIGH CONFLICT*] (estimating 10% are high conflict); Deena L. Stacer & Fred A. Stemen, *Intervention for High Conflict Custody Cases*, 14 *AM. J. FAM. L.* 242-43 (2000) (estimating one fourth to one third are high conflict within two years of divorce). See also SPECIAL JOINT COMMITTEE OF THE PARLIAMENT OF CANADA, *REPORT ON CHILD CUSTODY AND ACCESS: FOR THE SAKE OF CHILDREN*, CH. 5 (1998) [hereinafter *THE CANADIAN REPORT*] (estimating between 10% and 20% are high conflict); Andrew Shepard, *Evolving Judicial Role in Child Custody Disputes: From Fault Finder to Conflict Manager to Differential Case Management*, 22 *U. ARK. LITTLE ROCK L. REV.* 395, 413-414 (2000) [hereinafter *Evolving Judicial Role*].

12. *In re Marriage of Mehring*, 2001 WL 911420, at \*1 (Ill. App. Ct. Aug. 13, 2001) (analogizing judges in high conflict custody cases to generals in war changing Clemenceau’s challenge that “War is much too serious to leave to the generals” to “families are too important to be left to the courts.”); Ralph J. Podell, *The “Why” Behind Appointing Guardians Ad Litem for Children in Divorce Proceedings*, 57 *MARQ. L. REV.* 103, 103 (1973) (describing the child as a “disenfranchised victim used as a pawn in a game of chess being played between its warring parents who frequently want the court to physically cut up and divide the child between them in the same manner that they have [done] emotionally.”). See MARY ANN MASON, *THE CUSTODY WARS: WHY CHILDREN ARE LOSING THE LEGAL BATTLE AND WHAT WE CAN DO ABOUT IT* 2 (1999).

impact on the legal system and do great harm to their children. An emotional dispute between two parents who profess love for a child can often turn into a courtroom battle with armies of lawyers, mental health professionals, doctors, and court service officers all professing to know the “right” answer for a child’s future. Children become the spoils of battle<sup>13</sup> and the court system is held hostage as these high conflict cases drain family, legal, court, and mental health resources and clog court dockets.<sup>14</sup>

The welfare of the children, rather than the “rights” of parents, should be the top priority in any parenting arrangement. Those who care about the future of children need to be proactive in developing innovative and comprehensive ways to reduce conflict<sup>15</sup> and deal more effectively with high conflict custody cases.<sup>16</sup> The second part of this article will define the characteristics of a high conflict case and the major contributing factors. Section three contains suggestions for reforming the system. Some reforms, like the unified family court, would require a substantial reworking of a state’s judicial system. Other proposals, however, involve changes that can be made in the existing system to provide services to parents embroiled in a custody dispute. Judges, lawyers, and mental health professionals are the principal professionals with the greatest power to influence the course of a custody case. These professionals can develop new collaborative models that will more effectively identify and resolve the vast majority of high-conflict custody cases.

---

13. MASON, *supra* note 12, at 11.

14. Wingspread Conferees, *High-Conflict Custody Cases: Reforming the System for Children*, 34 FAM. L. Q. 589 (2001) (Report and action plan of multi-disciplinary conference co-sponsored by the American Bar Association Family Law Section and the Johnson Foundation) [hereinafter *Wingspread Conference Report*]. See *Report of the Family Law Supreme Court Steering Committee*, 26 FLA. L. WEEKLY S287 at 1 n.3 (May 3, 2001) [hereinafter *Florida Family Law*] (stating family law cases made up over 40% of court filings and nearly 70% of reopenings). See *Lythgoe v. Guinn*, 884 P.2d 1085, 1086 (Alaska 1994) (parent who lost dispute sued court-appointed psychologist for negligence); *Lavit v. Superior Court*, 839 P.2d 1141, 1142-43 (Ariz. Ct. App.1992); *Duff v. Lewis*, 958 P.2d 82, 83 (Nev. 1998); *Mosley v. Figliuzzi*, 930 P.2d 1110, 1111-15 (Nev. 1997). See also *Mosley v. Nevada Com’n. On Judicial Discipline*, 22 P.3d 655, 657 (Nev. 2001) (judge called before disciplinary authority for conduct in his own custody case).

15. *Wingspread Conference Report*, *supra* note 14, at 590; *Evolving Judicial Role*, *supra* note 11, at 413-18 (summarizing additional studies).

16. See *Wingspread Conference Report*, *supra* note 14, at 590.

## II. IDENTIFYING THE HIGH CONFLICT CASE

Identifying the high conflict case is the first critical step in developing programs and targeting resources that protect children and help conflicted parents. An international group of lawyers, judges, child advocates, mediators, court services personnel and mental health professionals met to address the problems presented by high conflict cases at the Wingspread Conference Center in Racine, Wisconsin, in the fall of 2000.<sup>17</sup> The Wingspread conferees developed a broad working definition of the high conflict custody cases:

High-conflict custody cases are marked by a lack of trust between the parents, a high level of anger and a willingness to engage in repetitive litigation. High-conflict custody cases can emanate from any (or all) of the participants in a custody dispute—parents who have not managed their conflict responsibly; attorneys whose representation of their clients adds additional and unnecessary conflict to the proceedings; mental health professionals whose interaction with parents, children, attorneys or the court system exacerbates the conflict; or court systems in which procedures, delays or errors cause unfairness, frustration or facilitate the continuation of the conflict. High conflict cases can arise when parents, attorneys or mental health professionals become invested in the conflict or when parents are in a dysfunctional relationship, have mental disorders, are engaged in criminal or quasi-criminal conduct, substance abuse or there are allegations of domestic violence, or child abuse or neglect.<sup>18</sup>

Numerous reasons exist for high conflict—some systemic and some personal to the litigants. Among the systemic reasons are the adversarial legal system, the vague “best interest” of the child standard, the increasing frequency of joint custody awards requiring frequent interaction between the parents, and understaffed and under-funded court systems with insufficient resources to provide necessary services for litigants. The personal reasons for high conflict arise both from the context of the dispute and from the personalities of the individuals involved.

---

17. *Wingspread Conference Report*, *supra* note 14, at 589, 600 (listing attendees).

18. *Wingspread Conference Report*, *supra* note 14, at 590.

### A. *The Role of the Adversary System*

The adversarial system has proven to be poorly equipped to handle the complexities of interpersonal relations in the custody context. Unlike a tort action where the issue is liability and the litigants may never cross paths again, a divorce legally ends a relationship between people who may not have separated emotionally and who must continue to interact as long as there are minor children. The numerous legal issues involving custody, support and equitable distribution may not be as time consuming or complex as the underlying emotional issue of family dysfunction, drug abuse, domestic violence, or the psychological impact of learning a partner is unfaithful. The tort action examines facts of an event that occurred in the past while the custody issue attempts to make a prediction about the child's future well-being. Because of the complexities of human behavior, the same adversarial tools that work for discovering past events may not produce evidence sufficient to predict which parent will best meet the needs of a minor child. The win/lose framework encourages parents to find fault with each other rather than to cooperate. In an attempt to be in the best position to argue for stability, a parent may try to take or maintain possession of the child. In addition, the lawyer arguing for the client's position may espouse a position that could harm the child. When an attorney increases hostility between parents, their parenting ability often decreases. For example, advising clients not to talk to the other spouse, filing for protective orders to get a person out of the house when safety is not an issue and making extreme demands to increase the bargaining advantage only escalate conflict.<sup>19</sup>

In addition, unlike tort cases that end with a money judgment, issues regarding children remain modifiable throughout a child's minority, giving parents more opportunities to carry on a dispute. Allegations of domestic violence and child abuse,<sup>20</sup> which have risen dramatically in the past two decades, create further tensions. These allegations may require the provision and coordination of

---

19. See *G.S. v. T.S.*, 582 A.2d 467, 471 (Conn. App. Ct. 1990) (lawyer for a parent in a custody case owes no obligation to act in the best interest of the child); *Lamare v. Basbanes*, 636 N.E.2d 218, 219 (Mass. 1994) (holding lawyer for parent owed no duty of care to children represented by guardian ad litem).

20. See *Foster v. Foster*, 788 So.2d 779, 784 (Miss. Ct. App. 2000) (finding both parents had accused the other of child abuse at one time during a several year struggle over custody).



additional services and monitoring or coordination with other courts. Judges, untrained in the dynamics of divorce or child development, may assume either that the parties making allegations are unduly adversarial and fail to provide adequate protections for the child, or assume that every allegation is true, issuing tough protective orders that damage relationships between parents and children. The entire process becomes negative and expensive.<sup>21</sup>

As the volume of family law filings increased (70% between 1984 and 1995), the use of mental health professionals (mainly clinical psychologists) as expert witnesses grew from approximately 10% of cases in 1960 to over 30% in the 1990s.<sup>22</sup> Mental health professionals may be involved in a custody case either as therapists, custody or parent evaluators, providers of services to the family, or as witnesses in a case. Evidence indicates that when mental health professionals become part of a custody dispute, the parties may become more polarized and actually less likely to reach agreement.<sup>23</sup> A therapist who sees only one of the parties and then writes recommendations or treats a child at the request of only one parent without a court order contributes to the adversarial nature of the proceedings.<sup>24</sup> Some judges expect the mental health professional to give an opinion as to the ultimate issue of which

---

21. Janet Weinstein, *And Never the Twain Shall Meet: The Best Interests of the Children and the Adversary System*, 52 U. MIAMI L. REV. 79, 133 (1997) (“[L]itigation itself is often demeaning, as litigants attempt to exaggerate each other’s flaws . . . the process itself is disempowering as it forces the parties to place their fates in the hands of their attorneys and the court . . . the family’s resources are expended and depleted with no beneficial outcome for the child or parent.”).

22. Mary Ann Mason & Ann Quirk, *Are Mothers Losing Custody? Read My Lips: Trends in Judicial Decision-Making in Custody Disputes - 1920, 1960, 1990 and 1995*, 31 FAM. L. Q. 215, 231 (1997). See also MARTHA ALBERTSON FINEMAN, *THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM 148-51* (1991) (noting the mental health professional’s role in obtaining radical shifts in substantive policy as they became expert witnesses in divorce cases).

23. INTERVENTIONS FOR HIGH CONFLICT, *supra* note 11, at 17-18 (citing Janet R. Johnston, *Developing and Testing Group Interventions for Families at Impasse*, Final Report submitted to the Statewide Office of Family Court Services, Administrative Office of the Courts, Judicial Council of the State of California). See also ELLIS, *supra* note 4, at 119 (“Warring parties who come to mental health professionals for evaluation have expectations and agendas that are unique and unsettling. Each contestant is, by that time, highly emotionally and financially invested in his or her own position and in winning . . . They have lost all perspective.”).

24. Janet R. Johnston, *Building Multidisciplinary Professional Partnerships with the Court on Behalf of High-Conflict Divorcing Families and Their Children: Who Needs What Kind of Help?* 22 U. ARK. LITTLE ROCK L. REV. 453, 461 (2000) [hereinafter *Building Multidisciplinary Partnerships*].

parent should have primary residency, even though there may be no “scientific” basis for such an opinion.<sup>25</sup>

The use of lawyers, judges, mental health professionals and court service workers makes parents believe that professionals are increasingly in charge of what was once the family’s private life. The Oregon Task Force on Family Law summarized public dissatisfaction with the adversary process to resolve family disputes:

The divorce process in Oregon, as elsewhere, was broken and needed fixing. Lawyers, mediators, judges, counselors and citizens . . . agreed that the family court system was too confrontational to meet the human needs of most families undergoing divorce. The process was adversarial where it needn’t have been. All cases were prepared as if going to court, when only a small percentage actually did. The judicial system made the parties adversaries, although they had many common interests.

[T]he sheer volume of cases was causing the family court system to collapse. Too often, children were treated like property . . . . The combative atmosphere made it more difficult for divorcing couples to reach a settlement and develop a cooperative relationship once the divorce was final.<sup>26</sup>

Other states have made similar findings in the process of court reform.<sup>27</sup> One study found that 50-70% of parents characterized

---

25. See, e.g., GARY B. MELTON ET AL., PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS 329-30 (1st ed. 1987); Kirk Heilbrun, *Child Custody Evaluation: Critically Assessing Mental Health Experts and Psychological Tests*, 29 FAM. L. Q. 63, 64-66 (1995); Daniel W. Shuman, *What Should We Permit Mental Health Professionals to Say about “The Best Interest of the Child?” An Essay on Common Sense, Daubert, and the Rules of Evidence*, 31 FAM. L. Q. 551, 552-56 (1997). See also David B. Dolittle & Robin Deutsch, *Children and High Conflict Divorce: Theory, Research and Intervention*, in THE SCIENTIFIC BASIS OF CHILD CUSTODY DECISIONS 425, 435-37 (Robert M. Galatzer-Levy & Louis Kraus eds., 1999).

26. OREGON TASK FORCE ON FAMILY LAW, FINAL REPORT TO GOVERNOR JOHN A. KITZHABER AND THE OREGON LEGISLATIVE ASSEMBLY 2 (1997). See also 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, 173-81 (1995) (outlining recommendations for improving the system).

27. See, e.g., Hildy Mauzerall et al., *Protecting the Children of High Conflict 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, 303 (1991) [hereinafter *Idaho Report*]. See generally THE CANADIAN REPORT, *supra* note 11, at ch. 5; *Florida Family Law*, *supra* note 14.

the legal system as impersonal, intimidating and intrusive.<sup>28</sup> Parties, who appear *pro se* or *in propria persona* may file papers with substantive and procedural flaws, take an extraordinary amount of time trying to introduce irrelevant evidence, or otherwise slow the system by failing to comply with local court rules.<sup>29</sup>

Legal scholars and critics of the adversary system contend that the divorce process is time-consuming and expensive and that the parties are too adversarial and have inadequate referrals for nonjudicial resolution. In addition, lack of judicial training results in little or no attention to child-related issues.<sup>30</sup> While the adversary system may be essential to resolve sincere differences of opinion, to balance power in relationships, and to enforce orders on recalcitrant parties, the system has failed to protect the interests of children. The legal system has traditionally reacted to crises rather than being proactive in trying to prevent problems from arising. An English judge summarized the goals of the system as they relate to custody disputes:

The optimum result of a child dispute is that the parents should leave the court, knowing that there has been a careful and courteous hearing centered on the interests of the child, knowing that their respective cases have been firmly but fairly advanced, understanding if not accepting the reasons for the judge's decision, and still able to cooperate to maximize the child's welfare. If the legal process is such as to promote hostilities and aggravate existing resentments, the probable consequence is that the child, the parties, and their extended families will suffer in the future.<sup>31</sup>

---

28. Marsha Kline Pruett & Tamara D. Jackson, *The Lawyer's Role During the Divorce Process: Perceptions of Parents, Their Young Children and Their Attorneys*, 33 FAM. L. Q. 283, 294 (1999).

29. See *Florida Family Law*, *supra* note 14 (estimating 65% *pro se* at start of case); Robert B. Yegge, *Divorce Litigants Without Lawyers*, 28 FAM. L. Q. 407, 409 (1994) (indicating about 20% choose to appear on their own).

30. 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 38-39 (1996) [hereinafter PARENTING OUR CHILDREN]. See Jane C. Murphy, *Access to Legal Remedies: The Crisis in Family Law*, 8 BYU J. PUB. L. 123, 124 (1993); Patricia G. Barnes, *It May Take a Village . . . Or a Specialized Court to Address Family Problems*, A.B.A. J., Dec. 1996, at 22. For a scathing indictment of the adversarial system, see generally KAREN WINNER, *DIVORCED FROM JUSTICE: THE ABUSE OF WOMEN AND CHILDREN BY DIVORCE LAWYERS AND JUDGES* xix (1996).

31. David Harris & Maureen Roddy, *High Conflict Custody Cases: The English Experience*, A.B.A. Family Law Section Fall Meeting Compendium 964 (Oct. 2000).

### B. *The Best Interest Standard and Joint Custody*

During the 19<sup>th</sup> century, the law moved from a paternal presumption of custody to a maternal presumption. The maternal presumption was based on the theory that mothers should care for children of “tender years” and that unless the mother was unfit this was in the child’s best interest.<sup>32</sup> With the move toward gender equality,<sup>33</sup> more divorces of parties with young children, and the recognition of due process rights for unwed fathers,<sup>34</sup> the “best interests” standard became a duel over the relative merits of the competing parents.<sup>35</sup> The vague best interest standard lacks a child focus because it fails to take into consideration the child’s developmental stages or the child’s preference.<sup>36</sup> The standard offers no guidance as to what society thinks is best for a child,

---

32. See LINDA D. ELROD, CHILD CUSTODY PRACTICE AND PROCEDURE § 1:06 & § 4:05 (1993 & Supp. 2000) (describing the tender years doctrine). See also MARY ANN MASON, FROM FATHER’S PROPERTY TO CHILDREN’S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES ch. 4 (1994); Schepard, *Evolving Judicial Role*, *supra* note 11, at 400-02.

33. *Ort v. Ort*, 440 U.S. 268, 283 (1979) (holding unconstitutional statutes granting alimony exclusively to the wife). See also *Ex Parte Devine*, 398 So.2d 686, 696-97 (Ala. 1981) (finding that the tender years presumption is unconstitutional and the sex and age of the child are only two of the factors courts must consider). *But see* *Pusey v. Pusey*, 728 P.2d 117, 119-20 (Utah 1986) (rejecting the tender years presumption as unconstitutional).

34. See *Lehr v. Robertson*, 463 U.S. 248, 267-268 (1983) (according unwed parents different rights under the Equal Protection Clause when biological father had not established a custodial relationship); *Caban v. Mohammed*, 441 U.S. 380, 396 (1979) (finding statute allowing unwed mothers but not unwed fathers to block adoption unconstitutional); *Quilloin v. Walcott*, 434 U.S. 246, 255-56 (1978) (holding no Due Process violation when father, who had never sought custody, could not stop stepfather from adopting child); *Stanley v. Illinois*, 405 U.S. 645, 658 (1972) (finding that the Due Process and Equal Protection Clauses mandate hearings so that children of single fathers do not become wards of the state).

35. See Barbara Bennett Woodhouse, *Child Custody in the Age of Children’s Rights: The Search for a Just and Workable Standard*, 33 FAM. L. Q. 815, 820 (1999).

36. Numerous other articles discuss and criticize the “best interest of the child” standard at length. See, e.g., Robert H. Mnookin, *Child Custody Adjudication: Judicial Function in the Face of Indeterminacy*, 39 L. & CONTEMP. PROBS. 226 (1975) (arguing the courts lack capacity to determine which parent is “better” or to discern a child’s best interest; noting that a judicial determination of a subjective issue can actually harm children); Cheri L. Wood, *Childless Mothers? - The New Catch-22: You Can’t Have Your Kids and Work For Them Too*, 29 LOY. L.A. L. REV. 383, 401-402 (1995) (“[T] he indeterminate and speculative nature of custody decisions under current child custody law leaves the parties’ expectations up in the air—and without, in some cases, the prospect of settlement.”). See generally ELROD, *supra* note 32, Chapters 1 and 4.

leaving judges free to rely on their own values.<sup>37</sup> Dissatisfied with unfettered judicial discretion, legislatures attempted to limit discretion by enumerating factors for the judge to consider, many based on the factors outlined in the Uniform Marriage and Divorce Act.<sup>38</sup> Some legislatures added factors such as the “friendly parent”<sup>39</sup> provision and evidence of spousal abuse.<sup>40</sup> The wide variety of unweighted best interests factors often cancel each other out, making the result difficult to predict. Hoping the behavioral sciences could more objectively determine a child’s best interests, courts began relying on the questionable expertise of mental health professionals.<sup>41</sup> If one cannot predict the outcome and only one parent will “win,” parents are encouraged to engage in unnecessary litigation, to hire expensive experts for each, and to engage in strategic or manipulative behavior.<sup>42</sup> The standard thus

---

37. David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 481-82 (1984) (“Legislatures have failed to convey a collective social judgment about the right values.”). See also Joan B. Kelly, *The Best Interests of the Child: A Concept in Search of Meaning*, 35 FAM. & CONCILIATION CTS. REV. 377, 384 (1997) (stating that the lack of scientific knowledge by the decision maker may result in a custody decision based on personal experience and beliefs of the judge).

38. Unif. Marr. & Divorce Act § 402, 9A U. L. A. 288 (1979) addresses: (a) the wishes of the child’s parents; (b) the desires of the child; (c) the interaction and interrelationship of the child with parents, siblings and any other person who may significantly affect the child’s best interests; (d) the child’s adjustment to the child’s home, school and community; and (e) the mental and physical health of all parties. *Id.*

39. See, e.g., Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law: Redefining Families, Reforming Custody Jurisdiction, and Redefining Support Issues*, 34 FAM. L. Q. 607, 654, Chart 2 (2001). But see Lawrence v. Lawrence, 2001 WL 175621, at \*2 (Wash. Ct. App. 2001) (finding that the state legislature “has declined to determine that, as a matter of public policy, frequent and continuing contact with both parents is in the best interests of the child” and that the policy is not to reward or punish parents for their conduct).

40. Elrod & Spector, *supra* note 39, at 654 (finding that all fifty states require consideration of domestic violence in making custody decisions). See also Jack M. Dalglish, Jr., *Construction and Effect of Statutes Mandating Consideration of, or Creating Presumptions Regarding, Domestic Violence in Awarding Custody of Children*, 51 A.L.R. 5<sup>th</sup> 241 (1997). See generally William G. Austin, *Assessing Credibility in Allegation of Marital Violence in the High Conflict Custody Case*, 38 FAM. & CONCILIATION CTS. REV. 462, 464 (2000).

41. See Lois Weithorn & Thomas Grisso, *Psychological Evaluations in Divorce Custody: Problems, Principles, and Procedures*, in PSYCHOLOGY AND CHILD CUSTODY DETERMINATIONS 157, 160 (Lois Weithorn ed., 1987).

42. See Attorney Griev. Comm’n v. Kerpelman, 420 A.2d 940, 959-60 (Md. Ct. Spec. App. 1980) (disciplining attorney who advised a client to physically take the child from his estranged wife even though child was in her custody by virtue of a court order).

increases the likelihood of conflict and litigation between parents, which in turn, causes substantial psychological harm to the children.<sup>43</sup>

In the 1970s mental health professionals suggested that stability was in a child's best interest and that sole custody should be awarded to the "psychological" parent with whom the child has the primary attachment.<sup>44</sup> As mothers began working more hours and fathers sought custody, notions of gender equality affected parenting relationships. Legislatures made a public policy shift finding that it was in a child's best interest to maintain relationships with both parents after divorce.<sup>45</sup> As a result, the concept of joint custody emerged.<sup>46</sup> In 1978, only three states had statutes pertaining to custody issues, today joint custody is the most popular form of parenting arrangement.<sup>47</sup> Joint legal custody allows both parents to retain decision-making authority while joint physical custody implies that parents have equivalent roles and share time and responsibilities as equally as possible. Joint custody may be the ideal arrangement for well-functioning, flexible parents

---

43. See Mary Becker, *Maternal Feelings: Myth, Taboo and Child Custody*, 1 S. CAL. REV. L. & WOMEN'S STUD. 133, 175 (1992) (asserting that judges tend to apply the best interest standard in ways that are systematically biased against mothers who are sexually active, have less money than the father, lesbian, work outside the home, or marry a person of another race). See generally MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995); MASON, *supra* note 12.

44. JOSEPH GOLDSTEIN ET AL., *BEYOND THE BEST INTEREST OF THE CHILD* 37-38 (1973).

45. See *Beck v. Beck*, 432 A.2d 63, 66 (N.J. 1981) (encouraging parenting interaction after divorce is in the best interests of the child); MASON, *supra* note 32, at 964; Jo-Ellen Paradise, *The Disparity Between Men and Women in Custody Disputes: Is Joint Custody the Answer to Everyone's Problems?*, 72 ST. JOHN'S L. REV. 517, 567-68 (1998); see also Constance R. Ahrons, *Joint Custody Arrangements in the Postdivorce Family*, 3 J. DIVORCE 189, 189 (1980); Joyce A. Arditti, *Differences Between Fathers with Joint Custody and Noncustodial Fathers*, 62 AM. ORTHOPSYCHIATRIC ASS'N. 186 (1992); Irene M. Cohen, *Postdecree Litigation - Is Joint Custody to Blame?*, 36 FAM. & CONCILIATION CTS. REV. 41, 49 (1998); Susan Steinman, *Joint Custody: What We Know, What We Have Yet To Learn, and the Judicial and Legislative Implications*, 16 U.C.DAVIS. L. REV. 739, 746-47 (1983). See generally ISOLINA RICCI, *MOM'S HOUSE, DAD'S HOUSE* (2d ed. 1997).

46. See ELROD, *supra* note 32, at ch.5; MASON, *supra* note 32, at 123, 129.

47. See Woodhouse, *supra* note 35, at 825 (stating that judges seemed to have grown tired of the fighting in high conflict cases and saw joint custody as a compromise); *Evolving Judicial Role*, *supra* note 11, at 406-407. See also *Dodd v. Dodd*, 403 N.Y.S 2d 401, 402 (1978) ("Joint custody is an appealing concept. It permits the court to escape an agonizing choice, to keep from wounding the self-esteem of either parent and to avoid the appearance of discrimination between the sexes.").

who put their child's needs first and can effectively co-parent.<sup>48</sup> Joint custody can work for parents who can develop a good parallel parenting relationship that allows them to function well as parents for their children even if they cannot work together on other matters.

Joint custody, however, is not a panacea, especially if the parties do not agree to it.<sup>49</sup> Joint custody is not a cookie cutter solution to contested cases. The rate of relitigation for sole custody and joint custody in court-mandated arrangements is the same.<sup>50</sup> Children suffer more in conflicted joint custody arrangements.<sup>51</sup> Joint custody can harm the child if one parent is abusive, extremely rigid, or "emotionally undivorced" and manipulative to the other parent.<sup>52</sup> A presumption in favor of joint physical custody can result in the child being treated more like chattel, with time divided fifty/fifty, even with parents living in different states.<sup>53</sup> Research demonstrates that judges should not order joint legal nor

48. DIVIDING THE CHILD, *supra* note 11, at 277; FRANK F. FURSTENBERG, JR. & ANDREW CHERLIN, DIVIDED FAMILIES: WHAT HAPPENS TO CHILDREN WHEN PARENTS PART 20, 75-76 (1991). See *Barton v. Hirshberg*, 767 A.2d 874, 887 (Md. Ct. Spec. App. 2001) (stating that parents need not agree on all aspects of child rearing, "but their views must not be so widely divergent or so inflexibly maintained so as to forecast continued disagreement on important matters.").

49. See DIVIDING THE CHILD, *supra* note 11, at 159. (stating joint legal custody often merely relabels sole custody; joint physical custody often results in lower child support payments without a greater assumption of care by the paying parent). See generally FINEMAN, *supra* note 43.

50. Beverly W. Ferreiro, *Presumption of Joint Custody: A Family Policy Dilemma*, 39 FAM. REL. 420, 422 (1990); Gerald W. Hardcastle, *Joint Custody: A Family Court Judge's Perspective*, 32 FAM L.Q. 201, 209 (1998); Andrew Shepard, *Taking Children Seriously: Promoting Cooperative Custody After Divorce*, 64 TEX. L. REV. 687, 718 (1985). Relocation cases often result in relitigation of custody. See, e.g., *Tarry v. Mason*, 710 N.E.2d 215 (Ind. Ct. App. 1999) (mother's relocation); *Tibor v. Tibor*, 598 N.W.2d 480 (N.D. 1999); *Hoover (Letourneau) v. Hoover*, 764 A.2d 1192, 1194 (Vt. 2000).

51. DIANA MERCER & MARSHA KLINE PRUETT, YOUR DIVORCE ADVISOR 203 (2001). See G. Hardcastle, *supra* note 50, at 210-11; DIVIDING THE CHILD, *supra* note 11, at 34; Joyce A. Arditti & Debra Madden-Derdich, *Joint and Sole Custody Mothers: Implications for Research and Practice*, 78 FAM. SOC'Y: J. CONTEMP. HUM. SERVICES 36, 37 (1997); Jana B. Singer & William L. Reynolds, *A Dissent on Joint Custody*, 47 MD. L. REV. 497, 507 (1988).

52. Janet R. Johnston, *Children's Adjustment in Sole Custody Compared to Joint Custody Families and Principles for Custody Decision Making*, 33 FAM. & CONCILIATION CTS. REV. 415, 420 (1995). See Andre P. Derdeyn & Elizabeth Scott, *Joint Custody: A Critical Analysis and Appraisal*, 54 AM. J. ORTHOPSYCHIATRY 199, 202 (1984).

53. Woodhouse, *supra* note 35, at 825 (discussing *Fisher v. Fisher*, 535 A.2d 1163 (Pa. Super. Ct. 1988) (overturning custody award that would have required child to change schools every other year)).

physical custody in cases of domestic violence.<sup>54</sup> Recently, there has been a growing consensus that neither joint legal or physical custody should be imposed in high conflict cases.<sup>55</sup> Joint custody may “cement rather than resolve chronic hostility and condemn the child to living with two tense, angry parents indefinitely.”<sup>56</sup> Therefore, promoting parental cooperation in high conflict cases may not be in the child’s best interest and may not represent appropriate public policy.<sup>57</sup>

### C. *Family Dysfunction—Personality Disorders, Alienation, Domestic Violence*

For parents and children, divorce is a continuing process of adjustment while trying to regain a sense of normalcy. Most people perceive divorce as a failure or a rejection. Divorcing persons go through stages of grief similar to death of a loved one, experiencing emotions ranging from hurt, anger, grief, self-righteousness, guilt, jealousy, revenge, and vulnerability.<sup>58</sup> The majority of parents work through changing emotions and return to some semblance of normalcy within two to three years. For some,

---

54. Naomi R. Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VAND. L. REV. 1041, 1059-61 (1991) (batterers should not receive joint or sole custody of children); B. Rabin, *Violence Against Mothers Equals Violence Against Children: Understanding the Connections*, 58 ALBANY L. REV. 1109, 1112-13 (1995) (discussing the dangers of perpetuating the abuse cycle if children remain in abuser’s custody). See generally Mildred Pagelow, *Effects of Domestic Violence on Children and Their Consequences for Custody and Visitation Agreements*, 7 MEDIATION Q. 347, 353-55 (1990).

55. *Idaho Report*, *supra* note 27, at 317 (“Joint legal custody is not appropriate where there is ongoing high conflict . . .”); MERCER & PRUETT, *supra* note 51, at 203 (“[H]igh contact with both parents coupled with high conflict is not in children’s best interests. There is no ambiguity about this.”). See also *High-Conflict Divorce*, *supra* note 4, at 176 (“[A]n association between joint custody/frequent access and poorer child adjustment appears to be confined to divorces that are termed high-conflict.”).

56. H. Patrick Stern et al., *Battered-Child Syndrome: Is It a Paradigm for a Child of Embattled Divorce?*, 22 U. ARK. LITTLE ROCK L. REV. 335, 379 (2000). See *McCauley v. Schenkel*, 977 S.W.2d 45, 48-49 (Mo. Ct. App. 1998) (examining a situation in which a private school expelled children because of parents’ “constant, ongoing, severe tension and bickering.”).

57. *Evolving Judicial Role*, *supra* note 11, at 417-18.

58. See SHEILA KESSLER, *THE AMERICAN WAY OF DIVORCE: PRESCRIPTION FOR CHANGE* 19-44 (1975); Geoffrey Hamilton & Thomas S. Merrill, “*Why is My Client Nuts?*” *An Inquiry into the Psychodynamics of Divorce*, ABA Section of Family Law Annual Compendium C-1 (1993) (noting that the person initiating the divorce or separation passes through the stages faster because they have been thinking about ending the relationship longer).



however, the conflict lasts years or throughout their lives, entangling children in perpetual turmoil.<sup>59</sup> As a Canadian study noted, some couples “perpetuate their conflict regardless of developments in the lives of their children, their own remarriage and prohibitive legal expenses.”<sup>60</sup> Parents in chronic custody disputes often distrust each other, are afraid, angry, project blame onto the ex-partner, refuse to cooperate and communicate, make allegations of abuse, and sabotage each other’s parenting.<sup>61</sup> Many high conflict cases pose an even greater threat to children because there are additional problems of violence, substance abuse, mental illness or threats of abduction.<sup>62</sup>

### 1. *Personality Disorders*

Most parents involved in repeated litigation over custody have personality characteristics different from those parents who readily agree. Separating parents may feel shame and a vulnerability that turns their perceptions into “black and white” issues, i.e., I am good and my spouse is evil.<sup>63</sup> Some parents have a need to win, to be in charge or a need to maintain a semblance of the marital relationship.<sup>64</sup> Some of these parents, however, have serious personality characteristics that distort relationships and make them unable to tolerate negative emotions.<sup>65</sup>

---

59. UNEXPECTED LEGACY OF DIVORCE, *supra* note 3, at 297-300; see, e.g., *In re Marriage of Gordon-Hanks*, 10 P.3d 42, 44-45 (Kan. Ct. App. 2000) (finding that after ten years of parental squabbling over visitation, child support and custody, court appointed dispute resolution counseling, case manager recommended transfer of custody to father).

60. THE CANADIAN REPORT, *supra* note 11, at 73.

61. *Building Multidisciplinary Partnerships*, *supra* note 24, at 455-57.

62. Isolina Ricci & Charlene Depner, *New Frontiers in Family Court*, Speech Presented at Conflict and Cooperation in Families Conference (March 3-4, 2000) (providing the following statistics: 55% of contested custody cases had a current or previous domestic violence restraining order; 41% had a child who has witnessed violence; and 25% had been investigated by protective services).

63. JANET R. JOHNSTON & LINDA E. G. CAMPBELL, *IMPASSES OF DIVORCE: THE DYNAMICS AND RESOLUTION OF FAMILY CONFLICT* 52 (1988).

64. See, e.g., *Bologna v. Bologna*, 719 N.Y.S.2d 755, 756 (App. Div. 2001) (denying joint custody based on expert’s description of father as rigid personality . . . quality of “unyielding self” and self centeredness in that “what [he] wants is the most important . . . also has an inability to acknowledge the needs of others.”). See also ELROD, *CHILD CUSTODY PRACTICE AND PROCEDURE*, *supra* note 32, at § 6:26.

65. See Carl F. Hoppe, *Test Characteristics of Custody-Visitation Litigants: A Data-Based Description of Relationship Disorders*, in *EMPIRICAL APPROACHES TO CHILD CUSTODY DETERMINATION* (Stefan Podrygala ed., 1993) (identifying some of the

In most high-conflict families, one or both parents exhibit either narcissistic, obsessive-compulsive, histrionic, paranoid, psychotic or borderline personalities.<sup>66</sup> These parents chronically externalize any blame, possess little insight into their own role in the conflict, fail to understand the impact of the conflict on their children and routinely feel self-justified. The adversary system may exacerbate the negative behaviors of parents who possess the financial resources for extended litigation and who believe the court will eventually prove them “right.”

## 2. Alienation

Alienation cases are often manifested when a child refuses to visit a parent. As a Canadian study noted, a child’s wish not to have contact with a parent is a serious problem that should warrant immediate referral of the family for therapeutic intervention.<sup>67</sup> In addition to the confusion over definitions and causes of parental alienation, there is controversy over whether this is a diagnosable “syndrome.”<sup>68</sup> Cases involving alienation present a wide range of family dynamics; but, in any case, an alienated child is a symptom

---

features of character disorders as enduring distortion of self image (low or grandiose); difficulty sustaining intimacy and relating to others; passivity; difficulty initiating or completing tasks; rigid, consistent distorted perspective of life events; impaired functioning; an all or nothing approach; and inability to resolve or adjust to loss); Jeffery C. Siegel & Joseph S. Langford, *MMPI-2 Validity Scales and Suspected Parental Alienation Syndrome*, 16(4) AM. J. OF FORENSIC PSYCHOLOGY 4, at 5, 9 (1998); Philip M. Stahl, *Personality Traits of Parents And Developmental Needs of Children in High-Conflict Families*, 3 ACAD. CERT. FAM. LAW SPECIALISTS NEWSLETTER 8 (Winter 1999).

66. Stahl, *supra* note 65, at 8; AMERICAN PSYCHIATRIC ASSOCIATION: DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-IV) (4<sup>th</sup> ed 1994); T. MILLON, *DISORDERS OF PERSONALITY: DSM-IV AND BEYOND* (1996). *See also High Conflict Divorce*, *supra* note 4, at 169 (two thirds of 160 parents in study had personality disorders).

67. THE CANADIAN REPORT, *supra* note 11, at 74.

68. *See* David Darnell, *Parental Alienation: Not in the Best Interests of Children*, 75 N.D. L. REV. 323, 325-327 (1999); RICHARD A. GARDNER, *THE PARENTAL ALIENATION SYNDROME* (2d ed. 1998); Cheri L. Wood, *The Parental Alienation Syndrome: A Dangerous Aura of Reliability*, 27 LOYOLA L.A. L. REV. 1367, 1402-13 (1994); L.M. Kopetski, *Identifying Cases of Parent Alienation Syndrome - Part I*, 27(2) THE COLORADO LAWYER 65 (1998) (parental alienation may be a form of psycho-social pathology which is “exacerbated by legal procedures that coincide with and strengthen the pathological defenses alienating parents’ use”); L.M. Kopetski, *Identifying Cases of Parent Alienation Syndrome - Part II*, 27(3) THE COLORADO LAWYER 61 (1998) (alienating parents have narcissistic or paranoid orientation). *See also* ELLIS, *supra* note 4, at 205-233.

of a larger problem.<sup>69</sup> While a parent may attempt to alienate the child by actively blocking or interfering with the other parent's access or making direct or indirect attacks on the other parent such as false abuse allegations,<sup>70</sup> there may be other reasons for the alienation.

Deep-rooted problems exist when the child strongly prefers one parent and rejects or denigrates the other. An alienated child freely expresses *unreasonable* negative feelings towards a parent. There is often a sudden negative change in a former positive relationship between the absent parent and child and the child fears rejection or abandonment by the alienating parent. Children ages nine to thirteen appear to be the most susceptible to alienation.<sup>71</sup> Alienation and alignment may be a product of numerous factors, including the child's cognitive understanding of the parental dispute, unabated intense conflict for years, and the child's witnessing of hostility and physical violence.<sup>72</sup>

Divorces characterized by bitter and protracted legal proceedings, continued verbal and/or physical aggression after separation, unsubstantiated allegations and counter allegations of child abuse, neglect, or parental lack of interest are . . . more likely to potentiate alienation in the child.<sup>73</sup>

The intensity of the conflict over an extended period of time and polarization from extended family may create anguish, tension and anger, which the child tries to relieve by rejecting the "bad" parent.<sup>74</sup> In addition, alienation may indicate problems of substance abuse or domestic violence. Cases involving alienation need special, focused attention

69. See, e.g., *Schutz v. Schutz*, 581 So.2d 1290, 1292 (Fla. 1991) (recalling that trial court found that "the cause of the blind, brainwashed, bigoted belligerence of the children toward their father grew from the soil nurtured, watered and tilled by the mother."); *In re Marriage of Cobb*, 988 P.2d 272, 272 (Kan. Ct. App. 1999) (mother's repeated interference with the father's visitation since 1992 divorce in spite of subsequent court admonition to cooperate caused alienation of eight year old and was factor in changing custody to the father); *Begins v. Begins*, 721 A.2d 469, 472-73 (Vt. 1998) (finding that father alienated the children from their mother justified change of custody to her).

70. See generally GARDNER, *supra* note 68.

71. SURVIVING THE BREAKUP, *supra* note 3, at 77-80.

72. Joan B. Kelley & Janet R. Johnston, *The Alienated Child: A Reformulation of Parental Alienation Syndrome*, 39 FAM. CT. REV. 249, 255-256 (2001).

73. *Id.* at 256.

74. *Id.*

### 3. Domestic Violence

Any form of physical violence, intimidation or stalking indicates “high conflict” as does any form of verbal or nonverbal aggression, abuse, harassment or threats. Domestic violence of any kind, including psychological abuse,<sup>75</sup> can have dramatic and long-term detrimental effects on children.<sup>76</sup> Batterers may contest custody to punish, control or hurt their partners and their children. If judges and mental health professionals do not understand the dynamics of abuse and fail to take the threat seriously, the batterer may gain custody because the victim’s behavior may seem too passive or uncooperative.<sup>77</sup> Substance abuse

---

75. AMERICAN PROFESSIONAL SOCIETY ON THE ABUSE OF CHILDREN, PSYCHOLOGICAL EVALUATION OF SUSPECTED PSYCHOLOGICAL MALTREATMENT IN CHILDREN AND ADOLESCENTS, PRACTICE GUIDELINES (1995) (defining psychological abuse as “a repeated pattern of caregiver behavior or extreme incident(s) that conveys to children that they are worthless, flawed, unloved, unwanted, endangered, or are only of value in meeting another’s needs.”). See *Gould v. Gould*, 687 So.2d 685, 692 (La. Ct. App. 1997) (viewing father’s documentation of every minor injury and magnifying any mistake the mother made as well as coaching the children before a psychological examination “as placing exceptional stress on the children and [is] just as responsible, if not more so, for the reported problems than [the mother’s] conduct.”); *J.D. v. N.D.*, 652 N.Y.S.2d 468, 471 (N.Y. Fam. Ct. 1996) (“economic, verbal and sexual abuse, coupled with regular and frequent threats and intimidation, while more subtle in nature, are no less damaging than a physical blow.”). See generally Gunther Klosinski, *Psychological Maltreatment in the Context of Separation and Divorce*, 17 CHILD ABUSE & NEGLECT 557 (1993).

76. See Peter Jaffe, *Children of Domestic Violence: Special Challenges in Custody and Visitation Disputes*, in Nancy K.D. Lemon, *Domestic Violence and Children: Resolving Custody and Visitation Disputes*, A NATIONAL JUDICIAL CURRICULUM 19, 22 (1995) (stating that the majority of abusive husbands grew up in families where they witnessed their fathers abuse their mothers); Joy D. Osofsky, *The Impact of Violence on Children*, in 9(3) THE FUTURE OF CHILDREN: DOMESTIC VIOLENCE AND CHILDREN 33 (1999); 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). Children who witness domestic violence present a variety of emotional factors, sense a lack of control over their life circumstances and experience feelings of hopelessness and helplessness. *Id.*; Stern et al., *supra* note 56, at 336 (noting that children embroiled in high conflict cases may exhibit similar characteristics to a “battered child.”).

77. See *Hicks v. Hicks*, 733 So. 2d 1261, 1267 (La. Ct. App. 1999) (reversing joint custody with residence to father during school year to sole custody with mother and supervised visitation to father where evidence showed eight incidences of domestic violence); CHILDREN EXPOSED TO MARITAL VIOLENCE: THEORY, RESEARCH AND APPLIED ISSUES (George W. Holden et al., eds. 2000); Stephen E. Doyne et al., *Custody Disputes Involving Domestic Violence: Making Children’s Needs a Priority*, 50(2) JUV. & FAM. CT. J. 1 (1999); Leigh Goodmark, *Summary of Law Review Articles From Property to Personhood: What the Legal System*

problems may be present in abusive and high conflict situations.<sup>78</sup>

Domestic violence cases often involve abduction of children. A study of cases demanding the return of children pursuant to the Hague Convention on the Civil Aspects of International Child Abduction revealed that the majority of the abductors were women fleeing domestic violence.<sup>79</sup> Most international child abduction cases occur in cross cultural marriages that involve religious or cultural issues where the predictable parental acrimony is exacerbated by the tendencies of each parent to see little redeeming worth or value in the other parent and culture.<sup>80</sup> As in other high conflict cases, additional risk factors include (1) a history of alcohol or substance abuse; (2) a history of past criminal or antisocial activity; and (3) and character pathology or personality disorder.

#### 4. Allegations of Abuse

Some high conflict custody cases involve allegations of child abuse and neglect against one or both parents. Allegations are most likely to arise at the time of separation. The state, a juvenile court rather than the divorce court, and other players may be involved adding hearings and rulings. While there has been a tendency to discount abuse allegations made in the context of a

*Should Do for Children in Family Violence Cases*, 102 W. VA. L. REV. 237 (1999) (indicating batterers fighting for custody win seventy percent of the time); Lynne R. Kurtz, *Protecting New York's Children: An Argument for the Creation of a Rebuttable Presumption Against Awarding a Spouse Abuser Custody of a Child*, 60 ALBANY L. REV. 1345, 1350 (1997); 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 J. L. & PUB. POL'Y 221, 231 (1994) ("[T]he tendency of child witnesses to model violent behavior is well established.").

78. See *High Conflict Divorce*, *supra* note 4, at 169 (one-fourth of the 160 parents in study had substance abuse problems). See also Judy Howard, *Chronic Drug Users as Parents*, 43 HASTINGS L. J. 645, 652 (1992) (describing attributes of drug users).

79. Merle H. Weiner, *International Child Abduction and the Escape from Domestic Violence*, 69 FORDHAM L. REV. 593, 598 n. 20 (2000). In his article, Mr. Weiner recommends a total defense to the Hague Convention's remedy of return for battered women forced to flee and enactment of a procedure similar to Uniform Child Custody Jurisdiction and Enforcement Act for those who go to a foreign country, then flee to avoid domestic violence. This allows litigation in the country to which they fled and delays return until custody litigation is complete. *Id.* at 632.

80. Glen Skoler, *A Psychological Critique of International Child Custody and Abduction Law*, 32 FAM. L. Q. 557, 562-63 (1998) (noting the frequency and thoroughness with which abductors psychologically devalued the worth of the other parent).

custody dispute, research indicates that the majority of accusations are substantiated.<sup>81</sup> The fact that a party makes an allegation, regardless of its merit, is indicative of high conflict.<sup>82</sup>

### 5. Relocation Cases

Relocation is one of the most difficult of the high conflict issues because it pits the interests of a primary residential parent, relocating for educational or work opportunities, against the other parent who has a strong desire to maintain frequent and regular contact. The interests of the child may conflict with both. Because each case is fact sensitive and there are no uniform standards, the potential for conflict is great.<sup>83</sup> Polarized parents make legal arguments about the presumptions that courts should apply in deciding whether to allow a move. Such arguments inherently ignore the child's interests.<sup>84</sup> As one appellate court noted:

[A] child's development is not something with which courts should experiment and risk disruption. Although ideally a child would develop a close relationship with his loving and caring parents through an equal division of the parenting time, the ideal is difficult to achieve when . . . the child's parents elect to establish their homes in different communities. This problem is further

---

81. See ANN M. HARALAMBIE, CHILD SEXUAL ABUSE ALLEGATIONS IN CIVIL CASES: A GUIDE TO CUSTODY AND TORT ACTIONS 35 (1999) (less than 8% invalidated); Kathleen Coulborn Faller, *Child Maltreatment and Endangerment in the Context of Divorce*, 22 U. ARK. LITTLE ROCK L. REV. 429, 430-431 (2000) (vast majority of allegations validated). See *Symposium Issue: New Perspectives on Child Protection*, 34 FAM. L. Q. 301-552 (2000). When allegations are false, however, some courts have changed custody. See also *Young v. Young*, 628 N.Y.S.2d 957, 966 (N.Y. App. Div. 1995).

82. *Allen v. Farrow*, 611 N.Y.S.2d 859 (App. Div. 1994) (finding that even if abuse did not occur, adoptive father's inappropriately intense relationship with one child could only be resolved in a therapeutic setting and damaged relationship between the parents would require recovery).

83. See *In re Marriage of Burgess*, 913 P.2d 473 (Cal. 1996); *Tropea v. Tropea*, 665 N.E. 2d 145 (N.Y. 1996). See also Carol S. Bruch & Janet M. Bowermaster, *The Relocation of Children and Custodial Parents: Public Policy, Past and Present*, 30 FAM. L.Q. 245 (1996); Judith S. Wallerstein & Tony J. Tanke, *To Move or Not to Move: Psychological and Legal Considerations in the Relocation of Children Following Divorce*, 30 FAM. L.Q. 305 (1996); Kimberly K. Holtz, *Move-Away Custody Disputes: The Implications of Case By Case Analysis and the Need for Legislation*, 35 SANTA CLARA L. REV. 319 (1994). For legal and social science perspectives, see also *Special Issue on Relocation*, 10 J. AM. ACAD. MATRIMONIAL LAW. (1998).

84. See generally Janet Leach Richards, *Children's Rights v. Parents' Rights: A Proposed Solution to the Custodial Relocation Conundrum*, 29 N.M. L. REV. 245 (1999).

compounded by the friction that often develops between ex-spouses as they move on with their lives after their divorce. . . .

In ordering this change in custody the *trial court forgot that the paramount consideration in a child custody decision is the child's best interests, not those of his parents.*<sup>85</sup>

### 6. Religion

Religious differences, like cultural differences, can manifest themselves through high conflict following a divorce. These cases invoke constitutional issues of freedom of religion, establishment and the like.<sup>86</sup> The problems posed by cultural and religious issues are particularly difficult for judges because there is no consensus on how the system should deal with deeply seated difference in religion and culture.

## III. REFORMING THE SYSTEM

Families present high conflict in numerous ways; the key is that the courts need to treat all high conflict cases differently than they treat the majority of cases. High conflict families reveal a continuum of problems with contributing factors requiring a variety of interventions and approaches. The question is how to improve the legal system's response to these high conflict cases without unduly burdening the majority of parents who can amicably resolve parenting issues. Some think reform should focus on prevention programs;<sup>87</sup> others suggest "a fundamental rethinking and restructuring of the legal system" for family disputes;<sup>88</sup> and still others urge applying concepts of therapeutic

---

85. Winn v. Winn, 593 N.W.2d 662, 669-70 (Mich. Ct. App. 2000) (emphasis added).

86. See Kendall v. Kendall, 687 N.E.2d 1228 (Mass. 1997); Zummo v. Zummo, 574 A.2d 1130 (Pa. Super. Ct. 1990); *In re Marriage of Wang*, 896 P.2d 450 (Mont. 1995).

87. See Thomas E. Schacht, *Prevention Strategies to Protect Professionals and Families Involved in High-Conflict Divorce*, 22 U. ARK. LITTLE ROCK. L. REV. 565, 577-78 (2000) (identifying prevention programs as universal health insurance for children, parity for mental health services to family units, universal family-life education, increased access to family support services, increased marital education and increased study of specialized marriage contracts).

88. Susan L. Brooks, *A Family Systems Paradigm for Legal Decision Making Affecting Child Custody*, 6 CORNELL J. L. & PUB. POL'Y 1, 5, 19 (1996) (advocating for courts to base custody on nonjudgmental consideration of the child in the context

jurisprudence.<sup>89</sup>

There are several ways to address the needs of families in conflict. First, putting in place a unified family court system may be the ideal for coordinating and providing services. Short of a complete overhaul of a state's judicial system, however, there are numerous improvements that could reduce conflict and assist parents and their children in moving on with their lives. The following recommendations may help in high conflict cases:

1. Redefine the "best interest" factors to focus on the child;
2. Adopt principles of differentiated case management for family law cases;
3. Mandate and fund a specialized (trained) judiciary;
4. Appoint a lawyer for the child in high conflict cases;
5. Require parents to develop parenting plans;
6. Make it possible for courts to provide for case management and more specialized services, as well as more intensive intervention for highly conflicted families;
7. Make substantial changes in the way lawyers handle family law cases;

---

of the family and its interactions). *See generally* ELLIS, *supra* note 4, at 341-342.

89. *Florida Family Law*, *supra* note 14, at 2. Therapeutic justice is defined as "a process that attempts to address the family's interrelated legal and nonlegal problems to produce a result that improves the family's functioning. The process should empower families through skills development, assist them to resolve their own disputes, provide access to appropriate services, and offer a variety of dispute resolution forums where the family can resolve problems without additional emotional trauma." *Id.* at 3. *See* Bruce J. Winick, *The Jurisprudence of Therapeutic Jurisprudence*, in *LAW IN A THERAPEUTIC KEY* 645, 652-57 (David B. Wexler & Bruce J. Winick eds., 1996) (defining therapeutic jurisprudence as "the study of the role of the law as a therapeutic agent."). *See also* K. Maxwell, *Preventive Lawyering Strategies to Mitigate the Detrimental Effects of Clients' Divorces on the Children*, in DENNIS P. STOLE ET AL., *PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION* (2000). For application of therapeutic jurisprudence principles to family law, see generally Barbara A. Babb, *An Interdisciplinary Approach to Family Law Jurisprudence: Application of an Ecological and Therapeutic Perspective*, 72 *IND. L. J.* 775, 790-800 (1997) (discussing how therapeutic jurisprudence would protect families and children by reducing conflict, promoting family harmony, and providing individualized, efficient and effective family justice).



8. Work on collaborative models among the professionals involved in cases;
9. Adopt uniform standards for custody evaluations and treatment by mental health professionals;
10. Hold all parties accountable for their contributions to the conflict.

A. *Redefining the “Best Interests” Standard*

Predictability and certainty of result would reduce custody disputes. Legislatures should therefore be encouraged to adopt a more detailed list of factors and to assign weight to the factors. For example, the statute could provide that the preference of a child over the age of twelve be given more weight than the parents’ wishes for custody. Another option would be to consider the American Law Institute’s (ALI) recommendations. ALI suggests that the allocation of custody and significant decision-making should be more child-centered so as to replicate the child-care and decision-making patterns prior to the conflict. Section 2.09 provides that:

Unless otherwise resolved by agreement of the parents . . . , the court should be required to allocate custodial responsibility so that the proportion of custodial time the child spends with each parent approximates the proportion of time each parent spent performing caretaking functions for the child prior to the parents’ separation or, if the parents never lived together, before the filing of the action . . . .<sup>90</sup>

---

90. AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 2.09 (Tentative Draft No. 4, 2000). With regard to the subject of significant decision-making responsibility, section 2.10 provides that:

Unless otherwise resolved by agreement of the parties . . . , the court should be required to allocate responsibility for making significant life decisions on behalf of the child, including decisions regarding the child’s education and health care, to one parent or to two parents jointly, in accordance with the child’s best interests . . . .

*Id.* at § 2.10; see also *Kjelland v. Kjelland*, 609 N.W.2d 100, 103-06 (N.D. 2000) (adding that primary care taking is one factor in determining the best interests of the child).

The standard embodies values that advance the child's interests such as encouraging the parents to enter into an agreement that is in their child's best interest. But if this is not possible, they should maintain the continuity of existing parent-child arrangements. The standard also results in predictability and is relatively easy to administer, thus making it efficient and fair. If the arrangement prior to the divorce was a fifty-fifty sharing of parental time and responsibilities, then custody would ideally preserve this allocation of time. The main disadvantage to the ALI proposal is that replicating the existing arrangement may not be a viable option because a divorce changes many things. A parent who previously stayed at home may enter the workforce or a parent who previously worked fulltime may cut back. A standard that reduces the prospect of litigation, however, would be an improvement over what exists in most states today.

### *B. Unified Family Courts*

In addition to the involvement of social services, high conflict cases may involve numerous issues and more than one court. A bitter custody dispute may lead to allegations of child abuse or neglect by one of the parents. In that case, the hearings in family court may take place at the same time as the actions in juvenile court and thus may result in conflicting orders. The establishment of a unified family court is the most comprehensive and effective way to deal with high conflict cases. A unified family court

involves a single court system with comprehensive jurisdiction over all cases involving children and relating to the family. One specially trained and interested judge addresses the legal and accompanying emotional and social issues challenging each family. Then under the auspices of the family court, judicial action, informal court processes, and social service agencies and resources are coordinated to produce a comprehensive resolution tailored to the individual family's legal, personal, emotional and social needs.<sup>91</sup>

This type of court offers the structural change necessary to coordinate and provide services, reduce fragmentation, provide continuity and consistency, and make the legal system more user-

---

91. Paul A. Williams, *A Unified Family Court for Missouri*, 63 U.M.K.C.L. REV. 383, 384 (1995).

friendly.<sup>92</sup> Establishing a family court would require a significant initial investment. The ideal family court would have its own building with an information center, court services, mediation rooms, childcare facilities and secure courtrooms. This system would utilize a single judge, one social services team per family, centralized physical facilities, comprehensive support services, time standards, integrated information systems, adequate training, intake services, and community advisory counsel.<sup>93</sup>

In the past decade, several states have established study groups that developed standards of public policy to guide in the creation of a unified family court.<sup>94</sup> Florida is the most recent state to move toward “a fully integrated, comprehensive approach to handling all cases involving children and families” in order to avoid causing additional emotional harm to children and families and to resolve disputes in a fair, timely, efficient, and cost-effective manner. The stated goals are to: (1) reduce the impact of inconsistent orders on law enforcement, witnesses, and the parties; (2) encourage agreed-upon resolution of issues; (3) reduce the need for future modification or enforcement proceedings; (4) reduce the overall time that a family is in court, thereby minimizing the disruption to litigants and their employment; and (5) reduce the duplication of services.

Overall, movement towards unified family courts has been extremely slow. Although Rhode Island established the first unified family court in 1961, forty years later less than fifteen states

---

92. See Sanford N. Katz & Jeffrey A. Kuhn, *Recommendations for a Model Family Court: A REPORT FROM THE NATIONAL FAMILY COURT 1* (1991). See also AMERICAN BAR ASSOCIATION, *ABA SUMMIT ON UNIFIED FAMILY COURTS: EXPLORING SOLUTIONS FOR FAMILIES, WOMEN AND CHILDREN IN CRISIS* (1998); Catherine J. Ross, *The Failure of Fragmentation: The Promise of a System of Unified Family Courts*, 32 *FAM. L.Q.* 3 (1998); Barbara A. Babb, *Fashioning an Interdisciplinary Framework for Court Reform in Family Law: A Blueprint to Construct a Unified Family Court*, 71 *S. CAL. L. REV.* 469, 520 (1998) [hereinafter *Blueprint for Unified Family Court*]; ABA PRESIDENTIAL WORKING GROUP ON THE UNMET LEGAL NEEDS OF CHILDREN AND THEIR FAMILIES, *AMERICA'S CHILDREN AT RISK: A NATIONAL AGENDA FOR LEGAL ACTION* (1993). See generally Judith S. Kaye, *Changing Courts in Changing Times: The Need for a Fresh Look at How Courts Are Run*, 48 *HASTINGS L.J.* 851 (1997); Robert W. Page, “Family Courts”: *A Model for the Effective Judicial Approach to the Resolution of Family Disputes*, 44 *JUV. & FAM. CT. J.* 1 (1993).

93. See *Blueprint for Unified Family Court*, *supra* note 92. See also American Bar Association, *Symposium, Unified Family Courts*, 32 *FAM. L. Q.* 1, 1-2 (1998) (discussing the achievements and failures of unified family courts).

94. See, e.g., *Florida Family Law*, *supra* note 14, at 1; *Idaho Report*, *supra* note 27, at 304-14.

have statewide family courts. Several states have pilot projects or family courts in some judicial districts, but many still have no specialized system for family law cases,<sup>95</sup> despite the endorsement of many national groups.<sup>96</sup> More states need to establish study committees and initiate pilot projects.

### *C. Improving the Judiciary and Court Services*

High conflict custody cases require a specialized approach that reflects the complexities of the issues presented. The Wingspread conferees urged that courts be proactive in seeking ways to help parents protect or restore healthy relationships with their children and develop mechanisms for resolving disputes with one another in a timely manner.<sup>97</sup> There will be a need for collaboration and multi-disciplinary partnerships.<sup>98</sup> Special training in handling high conflict cases will be necessary for all professionals who interact with the family. New models need to be sensitive to the rights and privacy of individuals and courts should be prepared to intervene in order to protect children.<sup>99</sup>

#### *1. Differentiated Case Management and Screening for High Conflict*

Courts need to adopt principles of differentiated case management (DCM) to distinguish custody disputes as low, medium or high conflict cases and direct families towards the appropriate services. DCM starts with the premise that:

Cases are not all alike and the amount and type of court

---

95. See *Blueprint for Unified Family Courts*, *supra* note 92, at 529-31, App. A, B, & C.

96. Jessica Pearson, *Court Services: Meeting the Needs of Twenty-First Century Families*, 33 *FAM. L. Q.* 617, 630 (1999). This article notes that the American Bar Association, National Council of Juvenile and Family Court Judges, American Association of Family and Conciliation Courts, Conference of State Court Administrators, National Association of Counsel for Children, National Association of Women Judges, and National Judicial College have endorsed this concept, but little has been done because of cost, large case volumes, low status of family law, opposition of the matrimonial bar and advocates for victims of domestic violence. *Id.*; see also Jeffery A. Kuhn, *A Seven-Year Lesson on Unified Family Courts: What We Have Learned Since the 1990 National Family Court Symposium*, 32 *FAM. L.Q.* 67 (1998) (providing commentary and recommendations concerning therapeutic justice).

97. *Wingspread Conference Report*, *supra* note 14, at 596.

98. See *Building Multidisciplinary Partnerships*, *supra* note 24, at 456-57.

99. *Wingspread Conference Report*, *supra* note 14, at 597.

intervention will vary from case to case . . . . [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 case classification.<sup>100</sup>

Appropriate time tracks can be created for different cases depending on the level of complexity, the need for discovery, need for services, need for protection and other factors.

Jurisdictions adopting the DCM approach will require two primary components (1) a timely identification and screening process that includes efficient assessment tools to identify high conflict cases so they may be streamlined into an expedited process, and (2) wide ranging services designed to improve outcomes for children.<sup>101</sup> The vast majority of low conflict cases can be steered to non-adversarial channels through mediation and collaborative divorce but may benefit from general educational programs and other services. Expedited procedures for filing and depositing completed parenting plans would reduce the courts’ role in the affairs of low conflict families so that court intervention is minimal and self-determination is great.

The court could then devote more of its resources to identifying and dealing with the high conflict case. Cases involving violence or pathology need more court attention and more structure from the beginning. Court should develop protocols for dealing with domestic violence and parent alienation cases. For example, a judge may decide not to send a high conflict case to mediation when it is likely to be a waste of time, money and resources for the parties and the court. High conflict parents would likely benefit more from a quick resolution of the dispute by a judge or other court officer who can use coercive power to compel them to attend education and evaluation programs and prevent them from inflicting violence on each other or abducting their children.<sup>102</sup>

While several states have developed screening mechanisms for

---

100. Judith S. Kaye & Jonathan Lippman, *New York State Unified Court System: Family Justice Program*, 36 FAM. & CONCILIATION CTS. REV. 144, 163 (1998); see also *Evolving Judicial Role*, *supra* note 11, at 413 (observing that while DCM has been used in criminal and other civil cases, it is only in the last couple of years that some have suggested using the same concepts for high conflict custody cases).

101. *Wingspread Conference Report*, *supra* note 14, at 597; THE CANADIAN REPORT, *supra* note 11, at 74.

102. *Evolving Judicial Role*, *supra* note 11, at 413.

domestic violence, none have developed validated screening mechanisms to identify high conflict cases.<sup>103</sup> Idaho has established factors that assist the identification of high conflict cases such including: (1) petitions for temporary custody; (2) protection petitions including child protection and domestic violence orders; (3) family dysfunction such as substance abuse; (4) changes in attorneys; (5) a child's refusal to visit a parent; and (6) a parent who is unable to separate a child's needs from his or her own.<sup>104</sup> In contrast, Fulton County, Georgia, looks at (1) the presence of more than one child in the household; (2) younger children (more potential years for court involvement); (3) intimate involvement of extended family; (4) child abuse; (5) trauma; and (6) whether either party was opposed to the divorce.<sup>105</sup> Idaho and Vermont use a Conflict Assessment Scale developed by Carla Garrity and Mitchell Baris.<sup>106</sup> A high conflict case probably exists if the parties cannot agree on the basic principle that both parents should continue a relationship with the child. Another indication would be the parents' inability to collaborate on drafting a parenting plan.

Any refusal of a child to visit a parent as well as all allegations of parental alienation require in depth, comprehensive, neutral and prompt evaluation. Refusal to visit can be an indication of abuse or alienation. Early detection and intervention are essential in alienation and alignment cases to prevent alienation from growing progressively worse. The parties can often benefit from an immediate therapeutic approach or case management.<sup>107</sup>

## 2. *Specialized and Educated Judges*

Family law cases generally, and high conflict cases in particular, require a "specialized" judiciary trained to separate the analysis of a child's best interests from the bitter clash of the parents. Ideally, judges with even temperament would choose to handle family law cases because they enjoy helping families resolve

---

103. See generally INTERVENTIONS FOR HIGH CONFLICT, *supra* note 11, at 1-3.

104. See *Idaho Report*, *supra* note 27, at 303.

105. See INTERVENTIONS FOR HIGH CONFLICT, *supra* note 11, at 1 (citing J. Cohen, Report on Identifying High Conflict Divorces, Colorado Domestic Relations Study Group (1999)).

106. GARRITY & BARIS, *supra* note 5, at 19; see Appendix.

107. See PHILIP M. STAHL, COMPLEX ISSUES IN CHILD CUSTODY EVALUATIONS 3-4 (1999) (citing examples of mild, moderate, and severe cases of alienation).

problems. Family court judges require a specialized education and training to understand the general dynamics of family relationships, the impact of divorce on litigants and children, the particular dynamics of high conflict cases and effective ways to manage conflict. Judges should understand that domestic violence poses serious safety concerns for both parent and child,<sup>108</sup> and they should also be sensitive to the general behavioral patterns that victims of abuse exhibit.<sup>109</sup>

Judges need to understand the developmental stages of children because children have different needs and different relationships with their parents at different stages of emotional maturation. Before approving any parenting plans or making awards of custody, judges should consider these issues. Judges need to be knowledgeable about cross-disciplinary issues affecting high conflict custody cases, such as competencies of other professionals, available community resources and the advantages and limitations of alternative conflict resolution.<sup>110</sup>

There must be continuity of service so that one judge does not start a case or address some motions while other judges, who are unfamiliar with the family dynamics and the history of the conflict, hear other aspects of the case. In order to promote continuity and provide for the learning curve in high conflict cases, states should establish a set term, for example three years, for family court judges.

Judges should take control of high conflict custody cases by demanding that the lawyers and participants focus on the best interests of the child. A judge can reduce conflict by mandating civility, requiring reasonableness in pleading, and by punishing lawyers who file frivolous or bad faith motions.<sup>111</sup> Another key to

---

108. Jessica O'Brien & Lavita Nadkarni, *Domestic Violence Under the Microscope: Implications for Custody and Visitation*, 23 FAM. ADVOC. 35 (Summer 2000); See Nancy K.D. Lemon, *The Legal System's Response to Children Exposed to Domestic Violence*, in 9 (3) THE FUTURE OF CHILDREN 67 (1999); Lois Schwaeber, *Domestic Violence: The Special Challenge in Custody and Visitation Dispute Resolution*, 10 (8) DIVORCE LIT. 141, 143 (1998). See also Joan Zorza, *Protecting The Children in Custody Disputes When One Parent Abuses the Other*, CLEARINGHOUSE REV. 1113 (April 1996).

109. Elizabeth Barker Brandt, *The Challenge to Rural States of Procedural Reform in High Conflict Custody Cases*, 22 U. ARK. LITTLE ROCK L. REV. 357, 367 (2000).

110. *Wingspread Conference Report*, *supra* note 14, at 598.

111. In England a lawyer in a custody case who fails to contest the case openly and cooperatively with all cards on the table at the earliest possible time may not be reimbursed or be subject to a "wasted costs order." See *Re G, S and M (Wasted Costs)* [2000] 2 FLR 52 and *Re CH* (family proceedings: court bundles) [2000] 2

control is the quick and efficient calendaring of high conflict cases to reduce costs and time.

Courts should utilize designated case managers and adequate technology systems to link and track cases involving the same parties and to facilitate connection to community resources. Courts should implement a system for coordinating and monitoring the multiple claims, deadlines, services, and other litigation and resource requirements. Time tables for case disposition should be set depending on the level of complexity, the need for discovery, the need for services and unusual emotional factors. Courts should either have the resources or refer people to a multitude of services and programs tailored to meet the unique needs of individual families that should be available without regard to income.<sup>112</sup> In addition, if the child is involved in both the child custody and child protection systems, decision makers who may have the responsibility for the same children in different legal settings should cooperate and share information.<sup>113</sup>

### 3. *Appoint a lawyer for the child*

For years both lawyers and mental health professionals have recommended appointment of attorneys to represent children in contested cases.<sup>114</sup> Lawyers can serve two different functions for children involved in custody disputes: (1) as an advocate to give the child a voice; and (2) as an independent fact-finder (*guardian ad litem*). To give the child a voice, judges should appoint a specially trained<sup>115</sup> lawyer just for the child in high conflict custody cases.<sup>116</sup>

---

FCR 193.

112. *Wingspread Conference Report*, *supra* note 14, at 597. Issues that should be considered in developing a service plan are the level of intrusiveness of the services, the number of requirements being imposed, accountability for the adequacy of the service, and the parents' level of interest in the service. *Id.*

113. THE CANADIAN REPORT, *supra* note 11, at 74.

114. Linda D. Elrod, *Counsel for the Child in Custody Disputes - The Time is Now*, 26 FAM. L. Q. 53 (1992); See Howard A. Davidson, *The Child's Right to be Heard or Represented in Judicial Proceedings*, 18 PEPP. L. REV. 255, 260 (1991). See also Catherine M. Brooks, *When a Child Needs a Lawyer*, 23 CREIGHTON L. REV. 757 (1990). Children are also not given a voice in evaluations; MASON, *supra* note 12, at 65-92. See generally JOHNSTON & ROSEBY, *supra* note 6; GARRITY & BARIS, *supra* note 5.

115. See HARLAMBE, *supra* note 81, at 279-82. The English share this view. See Re Pelling (Rights of Audience) [1997] 2 FLR 458 at 470 ("The courts in this country are particularly anxious that in children cases those representing them . . . should be specially experienced. . . .The whole ethos . . . is that these cases must not be carried on as battles in the old adversarial system)."



Even though the child is not a “party” to the custody action, the child is the “party in interest.” Whatever decision the judge makes will affect that child for the rest of his or her life. The lawyer representing the parent does not often take into consideration the welfare of the child because the child is not the “client.”<sup>117</sup> However, many states provide that the child’s preference is one factor to consider.<sup>118</sup> Several states specifically authorize the appointment of a lawyer or guardian ad litem for children in contested cases.<sup>119</sup>

The United States Supreme Court has not yet addressed the child’s due process rights to have independent advocacy in chronic conflict custody cases.<sup>120</sup> Several states specifically authorize the appointment of a lawyer or a guardian *ad litem* for children in contested divorce cases.<sup>121</sup> As a Colorado court noted: “[T]he need for an independent guardian ad litem is particularly compelling in custody disputes. Often, parents are pitted against one another in an intensely personal and militant clash. Innocent children may be pawns in the conflict.”<sup>122</sup>

One of the sticking points has been whether the person appointed is a guardian *ad litem* who is an officer of the court, conducts an independent investigation, is entitled to immunity, and argues for the child’s best interests, or a lawyer for the child

116. *Wingspread Conference Report*, *supra* note 14, at 598.

117. *See, e.g.*, G.S. v. T.S., 582 A.2d 467, 471 (Conn. Ct. App. 1990) (counsel for parent has no duty to act in best interest of children); Lamare v. Basbanes, 636 N.E.2d 218, 219-20 (Mass. 1994). *But see Bounds of Advocacy*, 9 J. AMER. ACAD. MATRIMONIAL LAW. 4 (1992) (“In representing a parent, an attorney should consider the welfare of the children.”).

118. *See* Elrod & Spector, *supra* note 39, at 654.

119. *Representing Children: Standards for Attorneys and Guardians Ad Litem in Custody or Visitation Proceedings*, 13 J. AMER. ACAD. OF MATRIMONIAL LAWYERS 1, 2, Section 2.2 (1995) (stating that the attorney should discuss the objectives of representation with a child of twelve or older).

120. Dana E. Prescott, *The Guardian Ad Litem in Custody and Conflict Cases: Investigator, Champion, and Referee?*, 22 U. ARK. LITTLE ROCK L. REV. 529, 560 (2000). *But see* C.W. v. K.A.W., 2001 WL 360589 at \*3 (Pa. Super. Ct. March 21, 2001) (bitterness between the parties is not sufficient reason to appoint a guardian ad litem); Poll v. Poll, 588 N.W.2d 583, 587 (Neb. Ct. App. 1999) (child had no due process right to counsel in modification proceeding.).

121. *See* Schult v. Schult, 699 A.2d 134 (Conn. 1997) (attorney representing minor child could advocate position contrary to the guardian *ad litem*); Samson v. Samson, 594 N.W.2d 420 (Wis. Ct. App. 1999); *See also* Badgett v. Badgett, 698 N.E.2d 84 (Ohio Ct. App. 1997) (if any party requests). *See generally* ELROD, CHILD CUSTODY PRACTICE AND PROCEDURE, *supra* note 32, at Chapter 12.

122. *Short ex rel Oosterhous v. Short*, 730 F. Supp. 1037, 1039 (D. Colo. 1990); *see also* Veazey v. Veazey, 560 P.2d 382, 385 (Alaska 1977).

who is the child's advocate.<sup>123</sup> The court appointing the representative should clearly establish the role the representatives play and should adopt appointment criteria and performance standards for appointment of children's representatives.

#### 4. *Alternative Dispute Resolution*

Courts should offer a variety of dispute resolution procedures to meet the needs of parents at differing levels of conflict. For many couples mediation<sup>124</sup> has proven to be a valuable asset for cooperative parenting, reducing the number of cases that go to trial,<sup>125</sup> and reducing prolonged parental conflict that causes harm to children.<sup>126</sup> Since California first mandated mediation of custody disputes in 1981, all but a handful of states allow, and many mandate, mediation in contested custody and visitation disputes. Mediation, however, works best with low conflict parents who both want a divorce, have been able to communicate openly in the past, have relatively equal bargaining power, and have some respect for each other's parenting ability.<sup>127</sup>

Mandatory mediation does not appear to resolve issues for highly conflicted couples because they are not able to use

---

123. *Compare* Auclair v. Auclair, 730 A.2d 1260, 1268 (Md. Ct. Spec. App. 1999) (guardian ad litem is agent or arm of court), *with* Roski v. Roski, 730 So. 2d 413, 414 (Fla. Dist. Ct. App. 1999) (cautioning "trial judges against abdicating their decision-making responsibility to a guardian ad litem."). *See generally* Symposium Issue on the Ethical Representation of Children, 34 FORDHAM L. REV. 1281 (1996).

124. Mediation, the process by which an impartial third party facilitates the resolution of a dispute by promoting a voluntary agreement, is beyond the scope of this article. There are numerous additional sources available on the process of mediation. *See, e.g.*, NANCY H. ROGERS & CRAIG A. MCEWEN, MEDIATION: LAW, POLICY, PRACTICE (1st ed. 1989 and Supp. 1993); JOHN M. HAYNES, THE FUNDAMENTALS OF FAMILY MEDIATION (1994); *see also* KIMBERLEE K. KOVACH, MEDIATION: PRINCIPLES AND PRACTICE (2nd ed. 2000); FORREST MOSTEN, FAMILY LAW MEDIATION (1996). *See generally* JAY FOLBERG & ALISON TAYLOR, MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION (1984).

125. Pearson, *supra* note 96, at 631-632 (stating that parents reach agreements in 50-85% of disputes in a faster time and at reduced cost over litigation; even if the parties do not come to an agreement in mediation, parents may be more likely to settle prior to trial because of an increased ability to communicate). *See also* JOHNSTON & ROSEBY, *supra* note 6, at 5.

126. Andrew Shepard, *The Model Standards of Practice for Family and Divorce Mediation*, 38 FAM. L. Q. 1 (2001); *Building Multidisciplinary Partnerships*, *supra* note 24; Joan B. Kelly, *A Decade of Mediation Research: Some Answers and Questions*, 34 FAM. & CONCILIATION CTS. REV. 373, 377-378 (1996).

127. Orna Cohen *et al.*, *Suitability of Divorcing Couples for Mediation: A Suggested Typology*, 27 AM. J. FAM. THERAPY 239, 334-336 (1999).

mediation constructively. Court-mandated mediation may be inappropriate, and even dangerous, in high conflict cases, especially for women.<sup>128</sup> The most serious danger is the harm to one of the parties if mediation is imposed in a case where the imbalance of power is too great, one of the parties is incapacitated or a victim of domestic violence,<sup>129</sup> or if one of the parties is so vengeful as to sabotage the process. Mediation is not recommended for parental alienation cases because of deceptive and manipulative tactics and the lack of mediator's training for recognizing the undercurrents that occur when one parent's interferes with the child's relationship with the other party.<sup>130</sup> These parents need a lawyer to protect and represent their interests.

Some types of mediation may help high conflict parents draft a parenting plan that helps them disengage from the conflict by parallel parenting. But any mediation program must be carefully structured.<sup>131</sup>

While some feel that mediation is totally inappropriate for domestic violence cases, one author has suggested a mediation model for domestic violence cases that emphasizes: (1) the need for mental health expertise; (2) the need for assurance that the court will take swift, clear judicial action when necessary; (3) the need to balance the power discrepancy; and (4) the need for an ongoing process to monitor cooperation with court orders or agreed upon steps in the mediation process.<sup>132</sup>

There are some therapeutic models of mediation that can work for high conflict couples. Therapeutic or "impassé directed"

---

128. See Penelope Eileen Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441 (1992); Penelope Eileen Bryan, *Reclaiming Professionalism: The Lawyer's Role in Divorce Mediation*, 28 FAM. L.Q. 177 (1994). But see Craig A McEwen et al., *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317, 1324-39 (1995).

129. American Bar Association, *Model Standards of Practice for Family and Divorce Mediation*, 35 FAM. L. Q. 27 Standard X (2001) (stating some cases may not be suitable for mediation because of domestic violence).

130. See J. Michael Bone & Michael R. Walsh, *Parental Alienation Syndrome: How to Detect It and What to Do About It*, 73(3) FLA. B. J. 44 (1999).

131. *Building Multidisciplinary Partnerships*, *supra* note 24, at 471-72; see also Christine Coates, *Mediation with High Conflict Families*, Paper Given at AFCC INSTITUTE 6, New Orleans, May 31, 2000, at 6 (indicating the key to impassé model of mediation is thorough and accurate assessment of the nature of the impassé and counseling to help parties move through it).

132. Anita Vestal, *Mediation and Parental Alienation Syndrome: Considerations for an Intervention Model*, 37 FAM. & CONCILIATION CTS. REV. 487, 501-02 (1999).

mediation conducted by a mediator trained in the dynamics of alienation/alignment may help highly conflicted couples. Super mediation is another model that can help high conflict parents. Mediators and parent coordinators or case managers can intervene together with one facilitating communication and the other setting boundaries of reality.

A combination of mediation and arbitration (med/arb) can be used with high conflict couples. In this process, the parties attempt mediation, but if they cannot reach agreement, the mediator makes a decision. To some extent this is the model many case managers, special masters or parent coordinators use as discussed *infra*. High conflict couples may need a “mediator” on call for emergency situations. A therapist mediator can help monitor the parenting plan but this is expensive and time consuming.<sup>133</sup>

### 5. Parenting Plans

There is already a legislative shift to require parents to draft parenting plans, either filing a joint plan or for each to submit a plan when seeking custody.<sup>134</sup> All courts should require parents to develop and submit plans that describe the time each parent will spend with the child and the responsibility and system for making decisions about the child, consistent with the need for physical and emotional safety of parents and child. If the parents cannot agree on a temporary parenting plan, this may be an indication of high conflict. The courts could then provide mediation or other services to the parties to assist them with drafting a plan.

Parenting plans should take into account the developmental needs of children and provide ways to revise the plan accordingly.<sup>135</sup> Highly structured parenting plans that help parents disengage may be valuable tools to deal with high conflict parents. A lengthy and detailed parenting plan gives less room for each parent to

---

133. Pearson, *supra* note 96, at 628.

134. PARENTING OUR CHILDREN, *supra* note 30, at 36-37. See, e.g., D.C. CODE § 16-911 (1998); ILL. STAT. ANN. CH. 750 § 5/602.1 (WEST 1998); KAN. STAT. ANN. § 60-1625 (Supp. 2000); MONT. STAT. ANN. § 40-4-233 (1997); NEB. REV. STAT. § 43-2912 (1997); N.M. STAT. § 40-4-9.1 (1997); OHIO REV. CODE § 3109.04(D) (2000); OR. REV. STAT. § § 107.101-102 (WEST 1998); TENN. CODE ANN. § 36-6-400 (1998); WASH. REV. CODE ANN. § 26.09.181 (1999). See generally Robert Tompkins, *Parenting Plans: A Concept Whose Time Has Come*, 33 FAM. & CONCILIATION CTS. REV. 286 (1995).

135. Risa J. Garon, et al., *From Infants to Adolescents: A Developmental Approach to Parenting Plans*, 38 FAM. & CONCILIATION CTS. REV. 168, 184 (2000).

manipulate or feel the other parent is manipulating them. The rules need to be clear. Vagueness promotes parental conflict, and conflict creates or intensifies a child's insecurity. The court needs to adopt specific and concrete plans to assist parents in fulfilling the tasks of parallel parenting to reduce the likelihood that they remain engaged in conflict. The more specific these plans are, the more parents can understand the rules and avoid conflict. In the event of a dispute, a case manager or special master can resolve the issue.<sup>136</sup>

All parenting plans will include the residential schedule (including holidays, birthdays and vacations), decision-making responsibility and methods for resolving disputes. For high conflict parents, the parenting plan should also:

1. Address how communication between the parents will take place;
2. Detail arrangements for picking up and dropping off children;
3. Include rules about contact;
4. Address parents' respective attendances at school and recreational events;
5. Address telephone contacts between parents and between parents and children;
6. Determine each household will share the children's toys and clothes;
7. Indicate methods for resolving intermittent disputes, including emergency procedures for unexpected parental flare ups;
8. Determine if, and to what extent, to allow flexibility in scheduling;
9. Outline how to handle children's refusals to visit, if they occur; and
10. Build in sanctions for violations.<sup>137</sup>

---

136. STAHL, *supra* note 107, at 3-4.

137. GARRITY & BARIS, *supra* note 5, at 124-125; *see also* INTERVENTIONS FOR HIGH CONFLICT, *supra* note 11, at 29.

The Idaho Report suggests requiring the parties to maintain a written log, which travels with the children, so that information about meals, medications, activities may be transmitted with minimal contact between the parents and without putting the burden on children to carry messages.<sup>138</sup>

### 6. *Parent Education Programs*

Court-sponsored parent education begins when the parents enter the courthouse to file for divorce or custody. The court should disseminate objective literature on divorce laws and procedures to parties involved in custody disputes. Parents and children should have a roadmap that explains the court system, what is expected of them and the roles of other participants. The courts should distribute information about community resources available to the family.

In addition to general information, courts need to inform parents about the divorce process and the effects that their divorce and their behavior will have on their children. Such information can be provided either as part of court services or by referral to parent education programs designed to prevent conflict.<sup>139</sup> Parent education programs, begun in 1978, exist in nearly every state.<sup>140</sup> Most programs, designed for the general divorcing population, range from three to eight hours and provide general information on the psychological process of divorce; legal procedures and custody options; needs of child during and after divorce; co-parenting; child's need for access to both parents; and services

---

138. See *Idaho Report*, *supra* note 27, at 329. ELIZABETH B. BRANDT, THE IDAHO BENCHMARK, PROTECTING CHILDREN OF HIGH CONFLICT, Ch. 2, p. 47 (1998).

139. For a discussion, see *Evolving Judicial Role*, *supra* note 11, at 411; 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. REFORM 131, 149 (1993).

140. See *Idaho Report*, *supra* note 27, at 300; Debra A. Clement, *1998 Nationwide Survey of the Legal Status of Parent Education*, 37 FAM. & CONCILIATION CTS. REV. 219, 221 (1999). See also ARK. CODE ANN. § 9-12-322(a)(1)(2001) (two hours required); *Nelson v. Nelson*, 954 P.2d 1219, 1222 (Okla. 1998). In *Nelson*, a statute and an administrative order required divorcing parents to attend classes to help their child cope with divorce. The court held that this did not violate equal protection because the state has strong interests in setting terms and procedures of marriage and divorce and protecting minor children. In addition, the classes were educational and specifically related to children of divorcing parents, a classification reasonably related to state's interests. *Id.*

available in the community. Programs designed to enhance parental awareness of how their behavior affects their children by active participation and building communication skills appear to be more effective in changing behavior.<sup>141</sup>

The overall effectiveness of various programs differs according to the content and teaching strategies, the degree of parental conflict, the timing of attendance.<sup>142</sup> Parents tend to like the general parent education programs, may become more sensitive to their children's needs and more amenable to the provision of services. Studies, however, fail to indicate that general parent education programs improve poor parental relationships or affect relitigation patterns.<sup>143</sup> High conflict parents need more specialized programs. There are a few high conflict divorce education programs currently existing. For many high conflict couples, training in cooperative parenting cannot occur until after the parties have disengaged from the conflict. Disengagement is the essential task.<sup>144</sup> Teaching parents how to "parallel parent" may be the most effective education for highly conflicted parents at the time of divorce.

There is a need to develop additional and more intensive programs targeted at high conflict families. Such programs need to emphasize constructive parenting behavior and preserve safety.<sup>145</sup> Programs could include information on seeking protection from abuse, parallel parenting, rights of parents to access, and enforcing orders through means such as contempt. Post divorce continuing education could consist of workshops, literature, videotapes, and support groups targeted at parents in chronically conflicted custody and visitation cases.

---

141. Kevin Kramer et al., *Effects of Skill-Based vs. Information Based Divorce Education Programs on Domestic Violence and Parental Communication*, 36 FAM. & CONCILIATION CTS. REV. 5 (1998).

142. Jack Arbuthnot et al., *Patterns of Relitigation Following Divorce Education*, 35 FAM. & CONCIL. CTS. REV. 269 (1997) (noting significantly lower rates of relitigation two and a half years after divorce); Karen R. Blaisure & Marjorie J. Geasler, *Results of a Survey of Court-Connected Parent Education Programs in U.S. Counties*, 34 FAM. & CONCILIATION CTS. REV. 23 (1996).

143. Nancy Thoennes & Jessica Pearson, *Parent Education in the Domestic Relations Court: A Multisite Assessment*, 37 FAM. & CONCILIATION CTS. REV. 195, 213-15 (1999).

144. GARRITY & BARIS, *supra* note 5, at 19; STAHL, *supra* note 107, at 4.

145. *Building Multidisciplinary Partnerships*, *supra* note 24, at 468-69.

### 7. *Parenting Coordinators, Case Managers, Masters and Monitors*

A relatively new way to deal with highly conflicted parents involves use of parent coordinators appointed under the authority of either state statute, court rule or ad hoc orders. A parent coordinator is a neutral third party, either a therapist, guardian ad litem, mediator, attorney or trained paraprofessional, who assists the parties in creating, maintaining and monitoring compliance with a parenting plan.<sup>146</sup> Parenting coordinators are trained to manage chronic, recurring disputes, such as visitation conflicts, and to help parents adhere to court orders and protect their child.<sup>147</sup> Parent coordinators may be particularly useful where (1) one or both parents have severe personality disorders and are chronically litigating; (2) in families with great difficulty coordinating childrearing decisions; (3) in potentially abusive situations; and (4) when there is intermittent mental illness of a parent.<sup>148</sup> These parent coordinators can handle day-to-day decision-making for parents.<sup>149</sup> The parent coordinator can perform investigatory functions, as well as make recommendations to the court and testify. The primary benefits are helping families resolve disputes expeditiously and moving difficult families out of the court system.

Some states have provisions for case managers, special masters or arbitrators who perform many of the same functions as a parent coordinator. The effectiveness of the neutral depends on whether the neutral can make binding decisions.<sup>150</sup> In California, a special master can make a conclusive determination on some things without further action of the court; in other situations, the master makes advisory findings that do not become binding without court adoption after independent consideration.<sup>151</sup>

---

146. INTERVENTIONS FOR HIGH CONFLICT, *supra* note 11, at 18. The names vary - Arizona (Maricopa County - Family Court Advisors); Colorado (Med-arbiter); Georgia (parent coordinators); Kansas (case managers); Northern California (Special Masters); Massachusetts (parent coordinators); New Mexico ("wise persons"); Oklahoma (resolution coordinator); Vermont (parent coordinators).

147. GARRITY & BARIS, *supra* note 5, at 19.

148. JOHNSTON & ROSEBY, *supra* note 6, at 4.

149. See Hugh McIsaac, *Programs for High-Conflict Families*, 35 WILLIAMETTE L. REV. 567, 569 (1999); Philip Stahl, *The Use of Special Masters in High Conflict Divorce*, 28 (3) CAL. PSYCHOLOGIST 29 (1995); M.S. Lee, *The Emergence of Special Masters in Child Custody Cases*, FAM. & CONCILIATION CTS. REV. NEWSLETTER 5 (Spring 1995).

150. *In re Marriage of Gordon-Hanks*, 10 P.3d 42, 45-46 (Kan. Ct. App. 2000); see also ELLIS, *supra* note 4, at 339-41.

151. CAL. CIVIL CODE § 638 (1)(2)(2000).



Because of problems in assigning decisional powers to an extra-judicial agent, in most jurisdictions the neutral cannot make binding decisions unless the attorneys file a detailed stipulation with the court.<sup>152</sup> In the high conflict families, an immediate decision may be better than waiting to get a hearing date with the judge. Closure to an issue may be the most important thing.

In 1994, Garrity and Baris set out the following requirements:

Ideally a parent coordinator should be:

- (i) Appointed by the court
- (ii) Appointed primarily to implement a shared parenting plan
- (iii) A mental health professional, a court-appointed guardian ad litem, or a well-trained paraprofessional
- (iv) Familiar with family law, conflict resolution and mediation, family therapy and child development
- (v) A “first-line decision maker”
- (vi) Specified in a binding legal agreement among all the parties as to his/her powers
- (vii) Part of either a confidential or non-confidential process; i.e., may or may not report regularly to the court about the implementation of a shared-parenting plan
- (viii) Highly skilled in dispute resolution and work to mediate disputes between the parents
- (ix) Serving in a supplemental capacity as arbitrator or not; i.e., be ultimately responsible for “all decisions regarding implementation of the visitation schedule and any modifications made in it” or delegate this role to someone else, retaining only the mediation aspect of the role
- (x) Protective of the neutrality of the children’s therapy, relieving the therapist of being forced to take sides in making decisions

---

152. See *Ruisi v. Thieriot*, 62 Cal. Rptr. 2d 766, 773 (Cal. Ct. App. 1997); *In re Marriage of McNamara*, 962 P.2d 330, 334 (Colo. Ct. App. 1998). *But see* *Dick v. Dick*, 534 N.W.2d 185, 190 (Mich. Ct. App. 1995).

about visitation.<sup>153</sup>

### 8. *Supervised Visitation and Child Transfer Centers*

Every court should have supervised parenting programs.<sup>154</sup> Supervised transfers or visitation are necessary when the child needs protection from physical or psychological harm while preserving the parent-child relationship. Supervised visitation is contact between a parent and one or more children in the presence of a suitable third party who can observe, listen and intervene if necessary to protect a child.<sup>155</sup> Supervised visitation may be ordered when there is a risk that a visiting parent may abuse a child physically or sexually; to protect a partner from an abusive partner; when there is a danger of false allegations about visiting parent's behavior during a visit; when a child is refusing to visit; when separated parents are in protracted high conflict and children show signs of loyalty conflict; there are concerns about a visiting parent's ability to care adequately for the child; or to provide factual information to assist in valuations.<sup>156</sup>

Supervised transfers may be appropriate when (1) there is little or no concern about the capacity of the visiting parent to take care of the child; (2) there is a significant risk of direct conflict between the parents during transitions; (3) the child has difficulty with the transitions; (4) there is a concern one parent may interfere with visits; or (5) there may be a need to monitor the mental or physical status of the visiting parent.

### 9. *Accountability*

All participants—parties, judges, lawyers and mental health professionals—need to be accountable for their contribution to

---

153. Garrity & Baris, *supra* note 5, at 120-127, 130.

154. *Wingspread Conference Report*, *supra* note 14, at 597; THE CANADIAN REPORT, *supra* note 11, at 76.

155. See Robert B. Straus, *Supervised Visitation and Family Violence*, 29 FAM. L. Q. 229, 229 (1995); Robert B. Straus et al., *Standards and Guidelines for Supervised Visitation Network Practice: Introductory Discussion*, 36 FAM. & CONCILIATION CT. REV. 96 (1998). See *Poll v. Poll*, 588 N.W.2d 583, 588 (Neb. 1999) (ordering supervised visitation where children were suffering from post-traumatic stress resulting in part from their father's violence).

156. See *Ishmael v. Ishmael*, 989 S.W.2d 923, 926 (Ark. Ct. App. 1999) (father threatened to abduct child); *Cox v. Cox*, 515 S.E.2d 61, 67 (N.C. Ct. App. 1999) (family therapist and child psychologist indicated supervised visitation in child's best interests).

increasing or decreasing levels of conflict. Judges should require lawyers to be civil and should impose sanctions for lawyers who file frivolous or harassing motions. When parties do not comply with parenting plans or court orders, enforcement must be swift and inexpensive. There should be a variety of enforcement tools available to the court, including contempt charges, incarceration, posting of security, make-up parenting time, and monetary sanctions such as fines or payment of the other party's attorney fees and court costs. Community service and a public apology may also be appropriate.

Problems with visitation are usually one of the first symptoms of other difficulties to come. Therefore, courts should establish a "rocket docket" for visitation enforcement issues. Visitation disputes need high priority treatment and early intervention. The contemnor's Program in California is one example of a program that attempts to catch conflicted parents early and reshape their behaviors.

#### *D. The Role of Lawyers*

Lawyers who deal with both clients and the courts possess the power to control the pace and tone of a custody case. The Wingspread conferees recommended that lawyers should take a proactive role in reducing, rather than increasing, conflict between disputing parents and promoting collaborative problem solving.<sup>157</sup>

##### *1. Education*

Family law is a specialty area and lawyers who practice family law should be required to meet additional requirements, i.e. board certification or some type of state or bar-approved specialization, to practice in this area. Those who practice in the field need to understand family dynamics and the impact of divorce on all of the parties, in addition to all of the complexities of pensions, corporate valuation, taxation and child support. Lawyers who want to help families should have additional training in child development, child abuse and neglect, domestic violence and alternative conflict resolution. In addition, family lawyers should be knowledgeable in cross-disciplinary issues affecting their high-conflict custody cases, such as competencies of other professionals and availability of

---

157. *Wingspread Conference Report*, *supra* note 14, at 595.

community resources.

Family lawyers require training in the principles of collaborative law and should have a commitment to interest-based rather than positional bargaining. Family lawyers should also develop and participate in special continuing legal education programs for high-conflict custody cases.

While many lawyers take a basic family law course in law school, few law schools train lawyers to work with professionals in other areas. In the area of family law, law schools should incorporate inter-disciplinary training in mental health and dispute resolution into the family law curriculum to improve lawyers' ability to reduce conflict in custody cases.<sup>158</sup>

## 2. *Client Counseling and Control Issues*

Lawyers have the ability to counsel clients as to appropriate courses of action. An Illinois appellate judge felt that analogizing custody litigation to a form of warfare fostered "an image of unprincipled, unlimited, and bitter combat as the norm" in family matters and noted that:

the responsible practitioner will counsel litigants to put the interests of their children ahead of their own emotions, desires, and feelings of anger and hurt. . . . The worst possible fate for minor children caught in the maelstrom of a custody or visitation fight is to be used as pawns in a litigation game or to be used as swords to injure the opposing party.<sup>159</sup>

The Wingspread Conferees developed the following list of ways lawyers can help reduce conflict in custody disputes:

1. Counsel clients to not fight inappropriately;
2. Discuss with clients the negative effects of custody fights on children;

---

158. Judge James Hauser, Circuit Judge for the 9th Judicial District of Florida, recommends that all family lawyers have a curriculum either in law school or after which includes education on the impact of divorce on society; the emotional impact of divorce on adults and children and its impact on settlement negotiations and litigation, and the attorney/client relationship; the role of mental health professionals in interventions or child custody evaluations; drafting parenting agreements that work; child support issues; alternative dispute resolution; and special circumstances that arise like domestic violence, high conflict cases, parents with personality disorders or child abuse.

159. *In re Marriage of Mehring*, 2001 WL 911420 at \*12 (Ill. App. Ct.) (Goldenhersh, J., concurring specially).

3. Advise parents about the availability of resources to reduce conflict as well as alternatives to litigation, such as mediation;
4. As a general rule, encourage clients to cooperate with forensic custody and mental health evaluations;
5. Realistically evaluate their client's case and not raise false expectations;
6. Encourage early court interventions to identify issues in high-conflict cases;
7. Refer clients to available resources and processes to help them resolve their conflicts outside the courtroom;
8. Cooperate in defining and limiting the issues, procedures, and evidence necessary to determine the best interests of the child;
9. Maintain a civil demeanor and encourage their clients to follow their example; and
10. Avoid using the media, child protective services, or other means to create or exacerbate conflict.<sup>160</sup>

If lawyers hold out the expectation that self-determination is the norm, clients will respond.

While another option for some divorcing couples is collaborative law, which focuses on the procedure, emotions, and preservation of an ongoing relationship, it may not work for the highly conflicted cases. Under this system, each party retains a separate, specially trained lawyer to help settle the case. The lawyer and client enter into an agreement with the opposing party and their counsel that all will engage in good faith negotiations and that the lawyers will not litigate. If the parties cannot reach a settlement, both lawyers must withdraw and the parties must seek other counsel if they wish to pursue action in court.<sup>161</sup> Collaborative divorce provides an interdisciplinary, gender-based divorce team consisting of two coaches, a financial counselor, child specialist and two collaborative lawyers.<sup>162</sup>

---

160. *Wingspread Conference Report*, *supra* note 164 at 597; see also *Bounds of Advocacy*, *supra* note 117, at 2.19.

161. PAULINE H. TESLER, COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION 11 (ABA 2001) [hereinafter COLLABORATIVE LAW].

162. For more thorough discussion, see generally A. Rodney Nurse & Peggy Thompson, *Collaborative Divorce: A New, Interdisciplinary Approach*, 13 AM. J. FAM. LAW 226 (1999).

Proponents are optimistic about the potential of collaborative divorce and call it the “next-generation family law dispute resolution mode.”<sup>163</sup> At least one scholar denounces the lack of emphasis on the substantive outcome as being harmful to women and children because “power disparities between husbands and wives, gender bias and incompetence among lawyers and judges, and indeterminate substantive laws combine to produce inequitable and destructive results.”<sup>164</sup> Even the proponents acknowledge that because of the “looser” discovery (often a signed affidavit) and format, the parties need to be trustworthy, have respect for themselves and at least a modicum of respect for the other spouse. Collaborative law may be inappropriate for persons with personality or character disorders, mental illness or for those who are in abusive relationships.<sup>165</sup>

### 3. Ethical Considerations

The Model Rules of Professional Conduct contemplate adversarial proceedings. Zealous representation of a client in a custody dispute is complicated by the fact that the end result (residential placement) will have profound consequences on a third party—the child. The Model Rules of Professional Responsibility do not specifically address the duty of a lawyer for a parent to not harm the child. Rule 2.1 requires a lawyer to exercise independent professional judgment and render candid advice and Rule 1.4(b) suggests that a lawyer explain “a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”<sup>166</sup> Although these can be read as requiring the lawyer to inform the client as to why the lawyer believes the client’s course of conduct is not in the child’s best interests, the rules do not specifically require a lawyer to consider the child’s interest.

There should be specific recognition of the differing roles that lawyers serve in helping people resolve problems. Many of the problems posed for lawyers who serve as mediators have been

---

163. COLLABORATIVE LAW, *supra* note 161, at 3.

164. Penelope Eileen Bryan, “Collaborative Divorce” *Meaningful Reform or Another Quick Fix?*, 5(4) PSYCHOL. PUB. POL’Y & LAW 1001, 1002-1003 (1999).

165. COLLABORATIVE LAW, *supra* note 161, at 3.

166. See Loretta W. Moore, *Lawyer-Mediators: Meeting the Ethical Challenges*, 30 FAM. L. Q. 679, 679-81 (1996); MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION, 35 FAM. L. Q. 27 (2001).

addressed through the adoption of Model Standards of Practice for Family and Divorce Mediation. The American Academy of Matrimonial Lawyers has recognized that lawyers in family law cases need differing ethical rules. Its Standard 2.23 provides that an attorney for a parent “should consider the welfare of the children.”<sup>167</sup> Lawyers trying to help people resolve their problems need to have ethical rules that reflect the complexities of the issues involved and protect lawyers from unwarranted attacks from unhappy litigants.

The American Bar Association should either amend the Model Rules of Professional Responsibility or develop separate rules specific to the context of family law, particularly to include rules that allow (and encourage) lawyers to collaborate and cooperate when appropriate. The Rules should prohibit filing a motion for child custody to gain either a financial benefit or for vindictiveness. The Model Rules should explicitly prohibit a lawyer for parent in a contested custody case from assisting the parent in conduct that the lawyer knows is inconsistent with the child’s interests.

The legal profession should develop protocols for working with unrepresented opposing parties in high-conflict cases. In addition, there is a need for the formulation of mechanisms that will provide independent representation of indigent parents without encouraging publicly funded litigation. Providing public funding for attorneys of indigent parents in custody proceedings creates an ethical dilemma in the context of high-conflict custody cases. While indigent parents who need legal assistance should receive it, when parents are paying their attorneys themselves, the cost of litigation can serve as a means for constraining conflict.<sup>168</sup>

#### *E. Experts - Mental Health Professionals*

Mental health professionals may need to be involved in the high conflict case either to treat a parent with a personality disorder, to conduct a child custody evaluation, to serve as a mediator, case manager, or parent-coordinator. It is most critical that roles are distinguished and that every participant knows who is playing which role.

---

167. *Bounds of Advocacy*, *supra* note 117, at 2.23. Although Rule 3.1 (prohibits asserting an issue unless nonfrivolous basis) or Rule 4.4 (prohibits using means that have no substantial purpose other than to embarrass, delay or burden a third person) might apply, they are insufficient.

168. *Wingspread Conference Report*, *supra* note 14, at 596.

### 1. Custody Evaluation

The custody evaluation is comparative and focuses on family relationships, parental capacities, and the needs of the children and requires the voluntary or court-ordered participation of both parents and the children. The child custody evaluation, not to be confused with a “parental capacity evaluation,” focuses on one parent and can be conducted on behalf of one parent alone.<sup>169</sup>

Most courts and evaluators feel that an evaluator can be most effective in serving the interests of the child, avoiding the battle of the experts and saving money, if the evaluator is a neutral and able to see both parents and child.<sup>170</sup> The English courts have affirmed that the function and responsibilities of an expert in family proceedings is to assist the court with a responsible and balanced opinion. To that end the expert must not mislead by omission and, must not fail to discuss material matters that detract from the opinion or may be inconsistent with the client’s position. The report should be the same regardless of the client.<sup>171</sup>

The Wingspread conferees recommended that states establish uniform qualifications for child custody evaluators by court rule or statute. In addition, mental health professionals should strive to develop and adhere to national qualification guidelines for child custody evaluations in divorce proceedings. Note, however, that there is potential for discrepancies as each group—psychiatrists, psychologists and social workers—have different ethical criteria and different standards.<sup>172</sup> Child custody evaluators should have training and continuing education in relevant areas including the differentiation of different types of conflict, the impact of conflict on child and adult development and functioning, child interview techniques, custody evaluation protocols, domestic violence, child

---

169. See Jonathan W. Gould, *Scientifically Crafted Child Custody Evaluations - Part Two: A Paradigm for Forensic Evaluation*, 37 FAM. & CONCILIATION CTS. REV. 159, 162-63 (1999); see also *Evans v. Lungrin*, 708 So.2d 731, 739-40 (La. 1998) (reversing the lower court and recognizing expert testimony by a custody evaluator who failed to evaluate the father but freely expressed an opinion about custody and access).

170. Anthony Champagne et al., *Are Court-Appointed Experts the Solution to the Problems of Expert Testimony?*, 84 JUDICATURE 178 (2001); see also *Building Multidisciplinary Partnerships*, *supra* note 24, at 465.

171. See *Re R (A Minor) (Experts' Evidence)* [1991] 1 FLR 291.

172. Compare American Psychological Association, *Guidelines for Child Custody Evaluations in Divorce Proceedings*, 49 AM. PSYCHOL. 677 (1994), with American Academy of Psychiatry and the Law, *Ethical Guidelines for the Practice of Forensic Psychiatry*, AM. ACAD. PSYCHIATRY & LAW (1989).



abuse and neglect, substance abuse, and basic principles of child custody law and procedure. Understanding these topics is essential for neutral evaluators.

In reporting or testifying about their custody or visitation recommendations, mental health professionals should distinguish among their clinical judgments, research-based opinions, and philosophical positions. As one scholar noted, mental health professionals lack the proficiency to specify what constitutes the best interests of other people's children.<sup>173</sup> In addition, mental health professionals should summarize their data-gathering procedures, information sources and time spent and present all relevant information on limitations of the evaluation that result from unobtainable information, such as failure of a party to cooperate or the circumstances of particular interviews. Evaluation reports should be written in plain English without technical jargon or legal terms. The reports should accentuate positive parental attributes as well as negative ones and avoid adding to the family's shame by stigmatizing or blaming parents or children. Psychiatric diagnoses should not be used unless they are relevant to parenting. If making a recommendation to the court regarding a parenting plan, the reports should provide clear, detailed recommendations that are consistent with the health, safety, welfare and best interest of the child.

To reduce both conflict and costs, the Wingspread Conferees suggested that a presumption be established that the court will order only one custody evaluation, rebuttable through a separate hearing on whether the court should appoint a new evaluator because of reported inadequacies or other unusual circumstances. Procedures should be established (1) to identify deficiencies of a custody evaluation report prepared by a court-appointed evaluator and (2) for expeditious and cost-effective procedures for examination and cross-examination of evaluators, such as telephone conferences; audio or video examinations; videoconferences; and scheduling of appearances.

Evaluators should work with the courts to establish appropriate confidentiality requirements for custody evaluations. Before an evaluation is undertaken, the evaluator and the court should ensure that the attorneys and family members know who will have

---

173. Robert L. Halon, *The Comprehensive Child Custody Evaluation - Ten Years Later*, 22 U. ARK. LITTLE ROCK L. REV. 481, 485, 492 (2000).

access to the report and who will be allowed to have a copy of the report. Evaluators should consider whether, when and how they should share their observations and recommendations with the parents or children as a way of reducing conflicts. When feasible, evaluators should consider meeting with the parents to share observations and recommendations rather than leaving that to the legal professionals and the court.

To avoid both the high costs of repetitive evaluations and the parents need to take off work for various appointments and services, all the participants, including mental health professionals and attorneys should work together to conserve the family's available time and financial resources. If there are multiple mental health professionals, they should coordinate their roles in order to bring about the best outcome for the family and the child.<sup>174</sup>

## 2. Treatment

In a custody dispute, both the parents and the children may need therapy. The court should make a specific order outlining the goals of any therapeutic intervention. For example, in an alienation case, the court order should specify the roles of all professionals and provide a coordinated process for managing ongoing conflict including:

1. Goals of service;
2. Who will be seen in treatment;
3. Limits of confidentiality;
4. Permitted lines of communication;
5. A timely procedure for resolving issues when parents cannot communicate;
6. Payment for therapy; and
7. Process for termination or transfer.<sup>175</sup>

Before treating a child involved in a custody dispute, mental health professionals should make good faith efforts to obtain the consent of both parents, except for emergency situations. If

---

174. *Id.*

175. Janet R. Johnston et al., *Therapeutic Work with Alienated Children and Their Families*, 39 FAM. CT. REV. 316, 330 (Appendix) (2001); *See generally* Matthew J. Sullivan & Joan B. Kelly, *Legal and Psychological Management of Cases with an Alienated Child*, 39 FAM. CT. REV. 299 (2001).

permission is not obtained, unless one parent has sole legal custody, the parent should be required to get a court order for treatment. To avoid confusing roles and getting caught in the middle of a dispute, mental health professionals should make affirmative efforts to determine if a custody dispute is contemplated.

Confidentiality concerns abound when treating members of divorcing and separating families. Mental health professionals should describe their obligations of confidentiality to their clients and obtain adequate informed consent prior to beginning treatment and obtain signed waivers of confidentiality to allow them to confer among themselves concerning issues of parenting and the child's interest and welfare. Such shared communication should remain confidential and not be revealed to the parties or their attorneys.

Children's therapists should be aware of the possible negative impact of their testimony on the therapeutic relationship. When required to testify, children's therapists should assure that privilege has been appropriately waived; clearly indicate that they do not have the information needed to make specific recommendations regarding custody or visitation; and explain that information they provide to the court on how the child may react to proposed arrangements can be based only on developmental needs or stated preferences of the child, and not on a comparison of the parents.

### 3. *Coordination with Other Professionals*

Lawyers and mental health professionals need to be familiar with each other's ethical rules and standards as they relate to child custody disputes so each can respect the other's duties and limitations. If conflicts arise between the lawyer's ethical standards and the mental health professional's standards, both professionals should meet with court representatives to determine how best to proceed.<sup>176</sup> Lawyers, mental health professionals and others should prioritize and coordinate their efforts when recommending services. When multiple mental health professionals work with a separated family, they should coordinate their roles in order to bring about the best outcome for the family and the child.

The mental health community must be clear about and respect the role boundaries and responsibilities that are involved in the

---

176. *Wingspread Conference Report*, *supra* note 14, at 593.

process of divorce and separation, distinguishing among roles of evaluator, therapist, parent coordinator, mediator, arbitrator and other professionals involved in the case. Mixing the therapist and forensic roles undermines both therapy and the judicial process.<sup>177</sup>

#### IV. CONCLUSION

Protecting children from the devastating effects of their parents' conflicts requires a focus on the welfare of the child and a proactive approach by all parties, including the court system. We may want to borrow a page from the English system which places the "welfare of the child" as the highest priority and allows judges to go beyond the evidence and agreements presented.<sup>178</sup> No one solution is going to reduce conflict. State legislatures, courts, lawyers and mental health professionals are just beginning to experiment with programs to deal with high conflict cases.<sup>179</sup> Several legislatures have replaced the terms "custody" and "visitation" with "parenting time" that more accurately describes parenting responsibilities.<sup>180</sup> But the system requires much more than simply substituting terminology—the system needs more judges, more services of all kinds from mental health to parent education to parenting supervisors. There must be a concerted effort among all of the professionals who work with and care for children to work together for solutions. Specialized training for all professionals, collaboration and case management are crucial elements of any plan to ease the negative impact of divorce on children. As the Wingspread Conferees summarized:

The goal of the family law system should be to give the

---

177. Stuart A. Greenberg & Daniel W. Shuman, *Irreconcilable Conflict Between Therapeutic and Forensic Roles*, 28 PROF. PSYCHOL: RES. & PRAC. 50, 56 (1997).

178. The Children's Act [1989] § 1(1) (the paramount consideration in any action for responsibility for children is the welfare of the child). In *In re L* (A Minor)(Police Investigation: Privilege) [1997] AC 16, the court stated that "in family proceedings . . . the court is not concerned simply to decide an issue between the parties . . . on the basis of the evidence the parties have chosen to present. The court is concerned to protect the child and promote the child's welfare. The court is not confined . . . to the alternative courses proposed by the parties . . . . The judge may call for more evidence or for assistance from other parties . . . ." *Id.* at 31 (L. Nicholls).

179. See INTERVENTIONS FOR HIGH CONFLICT, *supra* note 11; ELLIS, *supra* note 4; see also EFFECTIVE SUPPORT SERVICES, *supra* note 2.

180. PARENTING OUR CHILDREN, *supra* note 30. See, e.g. KAN. STAT. ANN. § 60-1610, 1625 (Supp. 2000); OR. REV. STAT. § 107.101, 107.434 (1997). See also THE CANADIAN REPORT, *supra* note 11, at Ch. 5.

parties the tools to restructure their lives after the immediate case. Central tenets of this system should be to reduce conflict, assure physical security, provide adequate support services to reduce harm to children, and to enable the family to manage its own affairs. To accomplish this, judges, lawyers and mental health professionals need to adopt new models for resolving family disputes that focus on the welfare of children.<sup>181</sup>

If all of the participants in the system start planning on ways to humanize the divorce process and lessen the hostilities surrounding custody of children, there will be fewer children bearing scars of their parents' battles. All participants in the contested custody cases should emphasize to parents the words of Minnesota Trial Judge Haas, recently quoted by the Tennessee Appellate Court:

Your children have come into this world because of the two of you . . . . [E]very time you tell your child what an idiot his father is, or what a fool his mother is, . . . you are telling the child that half of him is bad. This is an unforgivable thing to do to a child. That is not love; it is possession. If you do that to your children, you will destroy them as surely as if you had cut them into pieces, because that is what you are doing to their emotions . . . . Think more about your children and less of yourselves, and make yours a selfless kind of love, not foolish or selfish, or they will suffer.<sup>182</sup>

---

181. *Wingspread Conference Report*, *supra* note 14, at 590.

182. *Burke v. Burke*, 2001 WL 921770, at \*10 (Tenn. Ct. App. Aug. 7, 2001) (quoting Judge Haas of Walker, Minn.).

V. APPENDIX

**Table 1: Conflict Assessment Scale**<sup>183</sup>

1. Minimal	2. Mild	3. Moderate	4. Moderately Severe	5. Severe
Cooperative parenting	Occasionally berates other parent in front of child	Verbal abuse with no threat or history of physical violence	Child is not directly endangered but parents are endangering to each other	Endangerment by physical or sexual abuse
Ability to separate children's needs from own needs	Occasional verbal quarreling in front of child	Loud quarreling	Threatening violence	Drug or alcohol abuse to point of impairment
Can validate importance of other parent	Questioning child about personal matters in life of other parent	Denigration of other parent	Slamming doors, throwing things	Severe psychological pathology
Can affirm the competency of other parent	Occasional attempts to form a coalition with child against other parent	Threatens to limit access of other parent	Verbally threatening harm or kidnapping	
Conflict is resolved between adults using only occasional expressions of anger		Threats of litigation	Continual litigation	
Negative emotions quickly brought under control		Ongoing attempts to form a coalition with child against other parent around isolated issues	Attempts to form a permanent or standing coalition with child against parent (alienation syndrome)	
			Child is experiencing emotional endangerment	

183. GARRITY & BARIS, *supra* note 5, 43 tbl. 4-1.

## **Parent/Divorce Education for “High Conflict” Families**

**Pre-Contempt/Contemnors Group Diversion Counseling Program (Los Angeles, CA).** Begun in 1989, the program developed as a response to a lack of enforcement remedies for custody orders. Judges refer the program participants. Parents are required to attend the class in lieu of being found in contempt of court. The program has six consecutive Wednesday group sessions for two hours each held at the courthouse. Family Court Services run the program and have the participants park in different parking lots. The bailiff is present with screening device. The program teaches child development theory, parenting plan options, and through role playing teaches cooperation rather than competition and uses two videos—Don’t Divorce the Children and You’re Still Mum and Dad. The graduates receive a certificate. Some judges require a paper or a return to court to talk about what the parents learned.

**Parents Beyond Conflict (Portland, OR).** Based on the tenets of cognitive restructuring, this class asserts that the key to successful co-parenting is reframing negative perceptions about the other spouse to emphasize cooperation and joint problem solving. The program has five to eight couples per class referred by order of the court. There are five, two hour classes. The teaching modalities include reading, film viewing, discussion, simulation, class exercised and homework. There is a fee of \$100 per parent, which can be waived at poverty level. Spouses and significant others are encouraged to come for free.

**Divorce Transitions—Seminar for Successful Co-Parenting (CO).** This is one of two adult divorce education programs used in three judicial districts. This is a four-hour class to teach cooperative parenting skills to divorcing parents.

**Divorce Transitions—SUCCEED, Parenting After Divorce Where There is High Conflict (CO).** The program is a four-hour class, which emphasizes parallel parenting and anger management tools. It defines parallel parenting as each parent assumes total responsibility of the children during the time the children are in their care. The parties disengage from each other. There is a policy of noninterference and communication about the children does not take place face to face.

**San Diego High Conflict Intervention Program.** This program teaches parents to immediately cut the communication and control

the contact in “Parents Apart” (MA). The five-hour class teaches a developmental approach to post-divorce parenting relationships and teaches couples how to disengage by parallel parenting. If the parents can manage this format and gradually the conflict lessens, they can then progress to cooperative parenting. The class costs \$50 per person. The teaching materials include a parent’s handbook, slides, videotape, role-plays and hypothetical situations.

**“Parental Conflict Resolution” (PCR)(Maricopa County, AZ).** Begun in 1999, the court may order high conflict parties, the parties may choose or court-connected mediators or court services staff may recommend that parents be ordered to attend. The program has one four-hour class with no fee. A family court judge addresses participants at the beginning emphasizing the need to put children first and the extent of emotional damage caused when parents expose them to conflict. The judge also warns of the tougher sanctions for noncompliance. Two videos are shown that address high conflict and alienation/alignment issues.

**The Divorce Center (Newton, MA)** has numerous parental education programs including a pamphlet by Robert A. Zibbell, “Effective Parenting for People Going Through Divorce: Saving Your Child from Psychological Harm.”

See Karen Blaisure & Margie Geasler, *Results of a Survey of Court-Connected Parent Education Programs*, 34 FAM. & CONCILIATION CTS. REV. 23 (1996) (Appendix lists thirteen programs used around the country).

### **Group Treatment/Therapeutic Mediation**

- Vivienne Roseby & Janet R. Johnston, *High-Conflict, Violent, and Separating Families: A Group Treatment Manual for School Age Children* (1999).
- For Kids’ Sake Program: A Treatment Program for High Conflict Separated Families (Canada)
- A “How-To” Manual for Treating High-Conflict Separated Families

### **Parent Coordination and Related Models**

- Carla Garrity and Michael Baris (Denver, CO) - training and information on parent coordination
- Family Court Advisor (Maricopa County, AZ)



- Vermont Family Court-Parent Coordination Program—copies of protocols, forms, draft stipulations for parent coordination
- “Resource Coordinators”—Tulsa County District Court Domestic Relations Division “Families in Transition”
- Cooperative Parenting Institute: Susan Boyan & Ann Marie Termini - training on parent coordination

### **Comprehensive Family Court Systems**

- “Families in Transition”—Tulsa County District Court Domestic Relations Division Information—procedure and forms pertaining to how dissolution matters are processed through local family court
- Expedited Services Programs (Maricopa County, AZ)
- Expedited Visitation Services Program
- Friend of the Court—MI
- Parental Access and Visitation Enforcement (PAVE) Program - Marion County, OR
- Supervised Visitation Protocols—MA

### **Special Masters**

- Special Master Training (CA)—videotape and materials for “Third Training Conference for Special Masters”

### **Med-Arbiters**

- “Med-Arbiter” Model (CO)

### **Guardians Ad Litem or Attorneys**

- American Academy of Matrimonial Lawyers Booklet: “Standards for Attorneys and Guardians Ad Litem in Custody or Visitation Proceedings”
- Washington State Bar Association—Court Rules Committee Proposed Changes in GAL Rules
- Superior Court Guardian Ad Litem Committee (Spokane County Bar Association, WA)—Booklet “Child-Centered Residential Schedules”
- Proposed ABA Standards for Lawyers Representing Children

in Child Custody and Visitation Cases (ABA 2001)

### **CASA Advocates in Custody and Divorce Cases**

- National CASA Association, Task Force Report and Recommendations on CASA Volunteers in Custody/Divorce cases

### **Parental Alienation/Alignment**

- F.A.C.T. (Fathers Are Capable Too)—A non-profit non-custodial parents' and children's rights organization in Canada created to deal with custody & access issues.
- Douglas Darnall, Ph.D. - the Parental Alienation Directory website

### **Miscellaneous**

- Elizabeth Brandt, Idaho Benchbook "Protecting Children of High Conflict Divorce"