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THE EVOLVING JUDICIAL ROLE IN CHILD CUSTODY DISPUTES: FROM FAULT FINDER TO CONFLICT MANAGER TO DIFFERENTIAL CASE MANAGEMENT

*Andrew Shepard, J.D.**

I. INTRODUCTION

The judiciary's role in divorce related child custody disputes has been transformed in the latter half of the twentieth century in response to the changing characteristics of American families, changing perceptions of the needs of children, and an overwhelming case load increase. The transformation occurred in two distinct phases, and a third is currently in process.

In Phase I, from the late 1960s (the beginning of widespread "no fault" divorce) to 1980, the child custody court was a fault finder functioning through adversary procedure. The court's job was to identify a single custodial parent and assign that parent primary legal rights to the child after a trial about which parent was a better custodian for the child.

Phase I courts conceived of a custody dispute much like a will contest. The parents' marriage, like the decedent, was dead. Parents, like the heirs, were in dispute about the distribution of one of the assets of the estate—their children. The Phase I court's role was, after trial, to determine which heir/parent was more morally or psychologically worthy to control the children. The goal of the proceeding was a one time determination of custody "rights" which created "stability" for the future management of the asset. The winner was, however, largely predetermined by gender biased substantive standards that eliminated the seeming indeterminacy of the "best interests" test. Once the court distributed custody rights, its role in facilitating the ongoing process of reorganizing the child's relationships with both parents was over, except

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for enforcement or modification of its initial award, tasks also accomplished through adversary process.

Phase I courts did not survive the advent of mass “no fault divorce,” the associated increase in disputes about children, the drive against gender bias in the legal system, and, most significantly, the increasing evidence that the child’s well-being after divorce generally is promoted by reduced parental conflict and continuing relationships with both. American society became more tolerant of divorce as a necessary evil in promoting adult happiness. It also came to recognize, however, that for children divorce is a process of redefining relationships over a long period of time—not the death of the family, but an occasion for its reorganization.

Custody courts responded by redefining themselves as conflict managers rather than fault finders, Phase II in their late twentieth century evolution. Courts became the apex of a multi faceted dispute resolution system that encourages out-of-court agreement on parenting plans. Court-affiliated education programs, mediation, and legal rules which reward post divorce and separation cooperation between parents are the core of a newly created settlement culture, and trials are a last resort for particularly troublesome cases.

A Phase II custody court can be analogized to a bankruptcy court supervising the reorganization of a potentially viable business in current financial distress. The business is raising children and the parents—the managers of the business—are in conflict about how that task is to be accomplished. The court’s aim is to get the managers to voluntarily agree on a parenting plan rather than impose one on them. The court uses education and mediation to facilitate voluntary agreement. The court ratifies the parties’ agreements and only decides issues that the parents cannot decide themselves. The court has an ongoing role in managing parental conflict; parents have continuing access to the settlement processes if future disputes arise or modification of the parenting plan is necessary because of changed circumstances.

The Phase II managerial court better serves the needs of most parents and children in divorcing families than its Phase I fault finding predecessor. The need for transformation of the judicial role in custody disputes, however, is not over. Phase III in the continuing evolution of the judicial role in child custody disputes is for courts to recognize that not all divorce related custody disputes are the same. High conflict cases—roughly defined as those involving repeated relitigation, family violence, child abduction, mental illness, or drug or substance abuse—require special treatment. The disproportionate judicial

resources such cases consume create a temptation to include them in the settlement culture of Phase II. Phase II mediation and education programs are, however, not tailored to include such families. The special risks high conflict divorces pose to children and vulnerable family members make it imperative that they are identified through careful screening, that existing programs are adopted for them and that mental health resources are available for such families.

Overall, Phase III custody courts need to establish differential case management plans (DCM) for high conflict cases. These plans should develop criteria to “triage” these particularly difficult cases early in their judicial life cycle without burdening the great percentage of reasonably cooperative divorcing parents with unduly intrusive state intervention. Court-affiliated parent education and mediation must be adapted to account for the risks that high conflict disputes create for physical and emotional safety of children and parents. Mental health and child protection systems must be integrated into the DCM plan. DCM plans also must create an expedited, actively managed dispute resolution plan for the chaotic and conflicted families involved in high conflict cases to insure that someone in authority monitors the behavior of parents and the welfare of their children.

The first part of this article is a condensed history of the evolution of the judicial role in divorce and custody cases from fault finder to conflict manager. The second part describes the need for and the mechanisms of a plan for DCM of high conflict divorce-related custody disputes. It first summarizes some available data on high conflict divorces and their effects on children. It then describes a high conflict family, a composite drawn from actual cases. Finally, the article identifies several of the core principles that should govern how that family is treated by the judicial system—court unification, differential diagnosis, and multiple dispute resolution and treatment options.

II. FROM FAULT FINDER TO CONFLICT MANAGER

Before describing the transformation in the custody court’s role from fault finder to conflict manager and beyond, it is important to note that it is a transformation of ideas that different states have implemented with different levels of operational enthusiasm and resource commitments. The transformation is far from complete at an operational level in the day to day resolution of custody disputes in courthouses throughout the nation. Rather, as will be seen, California has been at the forefront of change, and other states like Oregon, Washington, and New

Jersey are also far along. New York, in contrast, continues to support a more adversarial child custody dispute resolution system. It does not mandate mediation of custody disputes,¹ does not have legislation or court rules authorizing courts to require attendance at parent education programs,² and does not mention the need for a child to have relationships with both parents following divorce in its custody statute.³

It is also important to note that the transformation from fault finder to conflict manager paralleled a period of great instability in American family life as reflected in official divorce statistics, court filings, and the

1. The first comprehensive statutory proposal for mediation of child custody disputes in New York grew out of a study in the 1980s by the New York State Law Revision Commission for which Professor Linda Silberman of New York University Law School and I were co-consultants. See *Recommendations of the Law Revision Commission to the 1985 Legislature Relating to the Child Custody Decision-Making Process*, 19 COLUM. J.L. & SOC. PROBS. 105 (1985). The Legislature did not enact the proposal in the face of opposition from the matrimonial bar and womens' lawyers groups. Bills are regularly introduced to require mediation of child custody disputes in New York, but so far, none has passed.

2. New York does, of course, have parent education programs, including P.E.A.C.E. (Parent Education and Custody Effectiveness) of which I am one of the founders. See Andrew Schepard, *War and P.E.A.C.E.: A Preliminary Report and a Model Statute on an Interdisciplinary Educational Program for Divorcing and Separating Parents*, 27 U. MICH. J.L. REFORM 131, 155 (1993) [hereinafter Schepard, *War and P.E.A.C.E.*]. Judicial referrals to parent education programs in New York, however, are not presently authorized by court rules or legislation. New York's Office of Court Administration has introduced legislation to remedy the situation. See S. 587-B, 222d Leg., Reg. Sess. (N.Y. 1999). Arkansas, in contrast, has recently joined the 44 other states that have enacted court rules authorizing courts to require parents to attend education programs as part of the divorce process. See Act of Mar. 18, 1999, No. 704 (codified at ARK. CODE ANN. § 9-12-322 (LEXIS Supp. 1999)). See also Debra A. Clement, *1998 Nationwide Survey of the Legal Status of Parent Education*, 37 FAM. & CONCILIATION CTS. REV. 219, 221 (1998) (providing a list of the other 44 states).

3. The only specific factor that the court must consider in a child custody dispute in New York is an allegation of domestic violence. See N.Y. DOM. REL. LAW § 240.1(a) (McKinney 1999). In contrast, Arkansas recently amended its child custody standards to require the court to consider the child's need for frequent and continuing contact with both parents and proven allegations of domestic violence in making a custody order. See ARK. CODE ANN. § 9-13-101 (a)-(c) (LEXIS Supp. 1999). See IRA MARK ELLMAN ET AL., *FAMILY LAW: CASES, TEXT, AND PROBLEMS* 672-73 (3d ed. 1998) (providing a brief description of and citations to statutes and articles describing the national trend to joint custody). After comprehensive study, a Special Joint Committee on Joint Custody and Access of the Canadian Parliament recently proposed that "[t]he willingness and ability of each of the parties to facilitate and encourage a close and continuing relationship between the child and the other parent" be added as a factor for courts to consider in their multi-factored child custody analysis, along with "[a]ny proven history of family violence" perpetrated by an applicant. SPECIAL JOINT COMMITTEE ON CHILD CUSTODY AND ACCESS OF THE PARLIAMENT OF CANADA, REPORT: FOR THE SAKE OF THE CHILDREN 45 (1998) [hereinafter CANADIAN PARLIAMENT CUSTODY REPORT].

social attitudes toward divorce that lie beneath them. Between 1950 and 1997, the divorce rate in the United States rose from 2.6 per 1,000 people to 4.3 per 1,000 people, with a peak of 5.3 per 1,000 people in 1981.⁴ Between 1951 and 1999, the number of children annually involved in divorce climbed from approximately 6.1 per thousand to 16.8 per thousand⁵ (which translates to about 1,005,000 per year), a fundamental change in the way children experience growing up in American society.⁶ Almost half of United States first marriages end in divorce and 65 % of those couples have minor children.⁷ “Parents with young children are the fastest growing segment of the divorcing population, presently constituting the majority of those who are divorcing in the 1990s.”⁸ At least 40% of today’s young adult women are likely to divorce sometime in their lives.⁹

The increase in divorces affecting children parallels an increase in court filings arising from changes in family composition. The number of divorce and custody related disputes filed in state courts has increased enormously in recent years. According to the National Center for State Courts, “[d]omestic relations cases are the largest and fastest-growing segment of state court civil caseloads. In 1995, 25 percent of total civil filings, over 4.9 million, were domestic relations cases. The total number of domestic relations cases increased 4.1 percent since 1994 and 70 percent since 1984.”¹⁰ Divorces registered an 8% increase from 1988 to 1995 while custody cases increased 43% in that same period.¹¹ It is also important to note that a large percentage of the increase in custody cases are disputes between parents who were never married. Even

4. UNITED STATES CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES, VITAL STATISTICS 75 (1999). The divorce rate recently declined slightly and is presently at the lowest annual rate in two decades. This recent decline, however, must be measured against a 67% increase in the divorce rate between 1970 and 1990.

5. ELLMAN ET AL., *supra* note 3, at 240.

6. See Andrew Schepard, *Parental Conflict Prevention Programs and the Unified Family Court: A Public Health Perspective*, 32 FAM. L.Q. 95, 98-100 (1998) [hereinafter Schepard, *Conflict Prevention Programs*].

7. See National Center for Health Statistics, Centers for Disease Control, *Advance Report of Final Divorce Statistics, 1989 & 1990* (visited Mar. 3, 2000) <http://www.cdc.gov/nchswwww/products/pubs/pubd/mvsr/supp/44-43/mvs43_9s.htm>.

8. 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, 284 (1999).

9. Richard E. Behrman & Linda Sandham Quinn, *Children and Divorce: Overview and Analysis*, THE FUTURE OF CHILDREN: CHILDREN AND DIVORCE, Spring 1994, at 5.

10. BRIAN J. OSTROM & NEIL B. KAUDER, EXAMINING THE WORK OF STATE COURTS, 1995: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT 39 (1996).

11. See *id.* at 40.

though the divorce rate has stabilized in recent years, the number of custody disputes reaching court has grown, largely because of the increase in disputes between never married parents.¹² Disputes about children resulting from divorce and separation are the largest category of family related filings in the New York court system (child support is the first with child custody a close second).¹³

To me, as will be described, the transformation in the judicial role from fault finder to conflict manager is based on a policy judgment shared by legislators and the judiciary that children's best interests generally are promoted by parental conflict reduction and continuing relationships with both parents after family reorganization. A more cynical person might, however, view the transformation as a necessity for judicial survival—an adaptation to cope with an exponentially increased workload in a time of limited resources rather than a philosophical shift. The cynic would argue that the court system would break down if all of the child related divorce cases filed had to be tried and that judges are happy to delegate responsibility for family matters to settlement processes because they do not want such cases on their dockets. It is difficult to convince a cynic that her "realistic" view of human motivation has no basis. Interviews and discussions with many judges and family court personnel, however, have convinced me that most courts have embraced a better vision of children's best interests in moving from Phase I to Phase II. In any event, the operational result is the same no matter what the reasons are for it.

A. Phase I: No Fault Divorce and the Sole Custody System

Until the second half of the twentieth century, only virtuous spouses could get divorces and "[t]he divorce laws of every state assumed an adversary proceeding between spouses in which the plaintiff had to prove the defendant's 'fault.'"¹⁴ Today, every state has a no-fault divorce ground.¹⁵ Overall, the philosophical shift to no-fault divorce has

12. See Schepard, *Conflict Prevention Programs*, *supra* note 6, at 100.

13. See Judith S. Kaye & Jonathan Lippman, *New York State Unified Court System Family Justice Program*, 36 FAM. & CONCILIATIONCTS. REV. 144, 145 (1998). The authors are the Chief Judge and the Chief Administrative Judge of the Courts of the State of New York.

14. ELLMAN ET AL., *supra* note 3, at 191.

15. See ELLMAN ET AL., *supra* note 3, at 201. There are, of course, important differences between types of no-fault divorce statutes. See *id.* Some states have eliminated fault grounds entirely and make their sole ground for divorce "irreconcilable differences," "incompatibility," or some variation thereof. *Id.* Other states simply add

been described by one scholar as a "silent revolution" which took place without extended public debate or dramatic political controversy.¹⁶

Ironically, the silent revolution began in California in the 1960s as an effort to preserve marriages and reduce divorce, not to make family dissolution easier. Liberalized grounds for divorce were, in the conception of the no-fault divorce revolution's designers, tied to the creation of an expert family court one of whose goals was to scrupulously examine whether couples did indeed have "irreconcilable differences" and to reconcile as many couples as possible.¹⁷ Politics and budgetary limitations, however, intervened, and only one half of the plan was ever implemented. The family court was never created while the liberalized grounds for divorce were. In effect, adults gained freedom to divorce without state scrutiny of their family life. The result was what my colleague J. Herbie DiFonzo has called the triumph of "naked divorce"—"no fault divorce on demand"¹⁸ in many states.

The no-fault divorce revolution was not, however, linked to changes in thinking about the court's role in the child custody dispute resolution process. Even after no-fault divorce, custody courts awarded sole custody to one parent after a highly adversarial trial in contested cases. Children remained a prize to be won by casting aspersions on the other spouse in a courtroom. The result was that while fault was de-emphasized in the grounds for divorce, it remained the dominant criteria in the custody determinations which resulted from it.

Ostensibly, the substantive standard for custody determinations in Phase I was the indeterminate "best interests of the child" test. What the court really did, however, was to determine which of the contestants was the "better parent" and award all custody rights to her leaving the other parent legally marginalized with "visitation." The justification for the sole custody award was to create "stability" for the child and the legal system by identifying a "primary parent," thus supposedly authoritatively ending the possibility of future disputes.

a no-fault ground like living "separate and apart" for a period of time (often relatively lengthy like 18 months or so) to familiar fault grounds like "adultery" and "cruel or inhuman treatment." *Id.* The requirement of a lengthy period of separation or a formal separation agreement as a condition of no-fault divorce "may be sufficient to persuade parties to seek divorce on fault grounds instead." *Id.*

16. See generally HERBERT JACOB, *SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES* (1988).

17. See MAX RHEINSTEIN, *MARRIAGE, STABILITY, DIVORCE AND THE LAW* 373-81 (1972).

18. J. HERBIE DIFONZO, *BENEATH THE FAULT LINE: THE POPULAR AND LEGAL CULTURE OF DIVORCE IN TWENTIETH CENTURY AMERICA* 145, 170 (1997).

In actual operation, the “tender years” doctrine filled in the indeterminacy of the “best interests” test in most cases involving younger children—mother won unless she was unfit. This standard placed a tremendous premium on one spouse demeaning the other in the courtroom, particularly fathers demeaning mothers. Custody trials were thus relatively rare because most of the time the outcome was preordained; few fathers wanted to invest the financial and emotional resources to contest in what was likely to be a losing battle. When trials occurred, however, they were intense acts of adversarial battle involving counter accusations of unfitness that would have qualified as grounds for divorce under the repealed fault regime.

The social and constitutional revolution against gender discrimination that began in the 1970s, however, also began to draw the sole custody system into question.¹⁹ As mentioned earlier, divorce became a predictable event in the life cycle of American families, and the social stigma associated with it began to decrease. The entry of women into the workplace in massive numbers undercut the tender years doctrine’s economic underpinnings, as many mothers were no longer willing or available to stay home with the children. Fathers began to perceive they had a chance to win a custody dispute and began to assert “rights” to the custody of their children in larger numbers. Most states eliminated the tender years doctrine in name if not necessarily in operation. The courts were faced with more disputes to resolve at the same time they lost their lodestone doctrine that provided certainty in decision-making and reduced the number of cases.

Into the breach rode mental health experts who sought to fill the gap in the sole custody system created by the demise of the tender years doctrine with gender neutral standards based on their expertise in assessing the child’s best emotional interests. The most notable attempt was Goldstein, Freud, and Solnit’s “psychological parent” test.²⁰ Goldstein, Freud, and Solnit urged courts to, above all, create emotional stability for children caught between warring parents by making a final and decisive determination of custody rights to one parent or the other. In this respect their goal was the same as the fault-based/tender years doctrine system, but their test was based on a vision of a child’s mental

19. See Andrew Schepard, *Taking Children Seriously: Promoting Cooperative Custody After Divorce*, 64 TEX. L. REV. 687, 669-702 (1985) (historical overview of the development of child custody standards) [hereinafter Schepard, *Taking Children Seriously*].

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

health. Working from a psychoanalytic framework, Goldstein, Freud, and Solnit defined the task for divorce courts in resolving child custody disputes as identifying the single parent with whom the child had primary psychological relationships. Stability of the child's emotional relationship with that parent was so important to Goldstein, Freud, and Solnit that they advocated granting the psychological parent the power to preclude the other parent from even visiting with the child for fear it would cause emotional conflict.²¹ No court, however, took the policy of stability that far, although the thinking behind it on the importance of emotional stability for the child caught in the turmoil of divorce was enormously influential. The importance of stability for the child also often served as a mental health surrogate for the "tender years" doctrine, as during this period mother was still usually the child's caretaker and many thought her the child's "psychological parent."

The "psychological parent" test appropriately focused courts on the emotional meaning of custody decisions for the child and the importance of stability in the child's emotional life amid the turmoil of family reorganization. Goldstein, Freud, and Solnit, however, formulated their standard based largely on clinical observations of the problems of children in foster care and first applied it to custody contests between the foster family and the child's natural parent. Children in foster care placed there by a natural parent are often shifted from one foster care giver to another and do not have day-to-day relationships with their natural parents for extended periods of time. Mental health experts are thus rightly concerned that a foster child forms a secure emotional attachment with at least one adult, an attachment which the legal system should give a very high priority to protecting.

Maintaining stability of relationships with the only adult with whom the child has emotionally bonded, however, is not the only mental health value in the divorce setting. Identifying a single psychological parent is a quite different and more difficult (some might say impossible) task to accomplish in divorce compared to the foster care setting.²² The child of divorce, unlike the child in foster care, usually has two involved parents; each can plausibly claim important emotional attachments to the child. Generally, each parent sees the child on a daily basis and neither has placed the child in the care and control of the other.

21. *See id.* at 38.

22. See Schepard, *Taking Children Seriously*, *supra* note 19, at 710-715, for a discussion of the limitations of the sole "psychological parent" test in a divorce and custody context.

Setting the court's task as identification of the child's single "psychological parent," moreover, did nothing to change the adversarial procedure used to conduct the "best interests" inquiry in divorce related custody cases; it simply shifted the dialogue from fault language to a mental health framework. The custody trial remained a "winner take all" contest, albeit one enriched with the often conflicting testimony of mental health experts. Parents vigorously disputed which of them had closer emotional bonds with their child while also contesting which was more morally fit to parent. Mental health experts (particularly those hired by one side or the other) sometimes went beyond the available empirical data and their limited capacity to predict the future in making conclusions about which parent should have sole custody to serve the child's best interests.²³

The Phase I court was, in effect, prepared to declare one parent more important in the life of the child in the name of creating legal and emotional stability for the child. Both types of stability required a judicial choice of one parent over the other. The court's determination did not focus on maintaining a major role for the visiting parent in the life of the child or on long term management of the conflict between the parents so the child could maintain a relationship with both. "Stability" required that the legal death of the marriage because of divorce resulted also in a custody decision that came close to declaring one parent legally

23. A graphic illustration of how adversarial procedure and the sole custody system stretched the limits of credibility of mental health experts in the 1970s is the transcript of the custody hearing in *Rose v. Rose*, extensively excerpted in JUDITH AREEN, *FAMILY LAW: CASES AND MATERIALS* 488-574 (4th ed. 1999). Partisan witnesses and experts for each side repeat accusations of parental incompetence and infidelity and grandparent meddling worthy of a daytime soap opera. Goldstein himself testifies on behalf of the father, asserting the primacy of his emotional bond with the child without interviewing any of the parties or the child. It suffices to note that the Rose parents, their expert witnesses, and their lawyers were also in deep dispute about whether the mother or the father was the child's "psychological parent." Mother had the closest relationship with the child until she attempted suicide. Father—and most significantly, the paternal grandmother—took over care of the child during the mother's recovery period. Much of the transcript is devoted to attempts by each parent to bolster evidence of the child's psychological attachment to him or her and to minimize and disparage the child's psychological attachment to the other with the help of hired experts. None of the mental health experts interviewed all relevant family members. The only confident conclusion one can draw from the transcript on this point is the not surprising one that the child had psychological attachments to both sides and their extended families. The whole trial seems a sad exercise in futility and revenge. For a discussion of the limits of the empirical evidence on the effects of divorce on children in making mental health assessments in individual cases, see GARY B. MELTON ET AL., *PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS* 192-93 (2d ed. 1997).

and emotionally dead to the child. The court's role was to preside over a family dissolution, not its reorganization. As late as 1978, in considering whether a court should award joint custody over the objections of one parent in a high conflict divorce case,²⁴ the New York Court of Appeals (its highest court) stated that "[d]ivorce dissolves the family as well as the marriage, a reality that may not be ignored."²⁵

B. Phase II: Joint Custody, Mediation and Parent Education

For many American children, however, the "reality that may not be ignored" was that they needed a different approach to child custody decision making than that provided by Phase I courts. Serious rethinking of the judicial role in custody disputes began when evidence began to accumulate showing that for the child, divorce may be the legal dissolution of a marriage, but is certainly not the dissolution of the importance of parent-child or parent-parent relationships. Research suggested that divorce was not, as had been optimistically assumed, a benefit for most children, but potentially the beginning of a downhill spiral with serious emotional, educational, and economic consequences. Research also established that involved fathers played a role in child development that was different from, but as important as, the role of mothers. Rather than needing a stable relationship with a single psychological parent, children generally had important emotional relationships with both parents before divorce and benefitted if such relationships continued after divorce.²⁶

These research findings strengthened the resolve of fathers to seek custody, particularly after the demise of the tender years doctrine.

24. See *Braiman v. Braiman*, 378 N.E.2d 1019 (N.Y. 1978) (resulting from a custody modification brought by father two years after a separation agreement was entered into giving mother custody; mother accused father of gambling and physical abusiveness while father accused mother of sexual promiscuity; after award of joint custody in lower court father denied mother visitation in violation of court orders; mother disappeared for a period of time).

25. See *id.* at 1022.

26. A major landmark in the evolution of thinking about the effects of divorce on children was the publication of the first longitudinal study of fifty families experiencing divorce in Marin County, California. See generally JUDITH S. WALLERSTEIN & JOAN BERLIN KELLY, *SURVIVING THE BREAK-UP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE* (1980). Other social science researchers also made major contributions to our understanding of the problem. See Shepard, *Taking Children Seriously*, *supra* note 19, at 703-08, for a summary of the empirical literature through the middle of the 1980s. For an updated summary, see Shepard, *Conflict Prevention Programs*, *supra* note 6, at 96-105.

Popular culture began to reinforce the notion that fathers could be nurturing parents and should assert custody rights.²⁷ These forces and the influx of cases that resulted caused a substantive and procedural transformation of the child custody dispute resolution process from fault finding and adversarial procedure to cooperative parenting and alternative dispute resolution.

Beginning in the late 1970s, many courts authorized joint custody using their common law powers. Additionally, the number of states authorizing joint custody by statute increased enormously, from three in 1978 to an overwhelming majority today.²⁸ The change in substantive legal doctrine was what two commentators have called a “small revolution . . . in child custody law”—enactment of joint custody or “friendly parent”²⁹ provisions of various levels of operational effect. The statutes vary in strength from making joint custody following divorce a presumption, a preference, or simply a possibility for parents who do not agree to their own parenting plans.³⁰ Whatever their strength, however, all joint custody statutes constitute a radical break

27. The defining event in popular culture legitimizing fathers' claims to custody was the enormously popular Academy Award winning movie, *KRAMER VS. KRAMER* (Columbia 1979). Ironically, the movie relied on the discredited “tender years” doctrine to create dramatic tension; mother (played by Meryl Streep), who had abandoned her child and agreed to sole custody for the father (played by Dustin Hoffman), actually had a weak case for modification of the initial agreement. She was awarded sole custody after trial on the basis of the tender years doctrine which had been declared unconstitutional by New York courts several years before. Moreover, the film was woefully inaccurate in its depiction of the adversarial process in child custody cases—the child was, for example, never interviewed by a mental health expert. The parents in the end chose to voluntarily establish a custody arrangement rather than adhere to the one favoring the mother that had been ordered by the court, perhaps foreshadowing the judicial system's increasing emphasis on parental rather than judicial decision making in child custody disputes. See David Ray Papke, *Peace Between the Sexes: Law and Gender in Kramer vs. Kramer*, 30 U.S.F. L. REV. 1199 (1996).

28. See ELLMAN ET AL., *supra* note 3, at 673.

29. Elizabeth Scott & Andre Derdeyn, *Rethinking Joint Custody*, 45 OHIO ST. L.J. 455, 456 (1984).

30. See ELLMAN ET AL., *supra* note 3, at 673 (citing Doris Freed & Henry Foster, *Family Law in the 50 States*, 22 FAM. L.Q. 367, 467 (1989)). By 1989, 34 states had joint custody statutes of one sort or another. See ELLMAN ET AL., *supra* note 3, at 673. See also ELLMAN ET AL., *supra* note 3, at 673-75, for various state statutes which describe different state policies towards joint custody. The authors of this well respected family law case book conclude their survey of state statutes on joint custody as follows: “[s]ome [states] simply allow joint custody; others require it to be considered[.] . . . whether special findings are required if joint custody is (or is not) ordered, and the extent to which the details of a joint custody arrangement are left up to the parents themselves.” *Id.* at 675.

with the sole custody system. All elevate the child's maintaining relationships with both parents after divorce to an important goal of public policy, one often in conflict with the "stability" that was the goal of the Phase I fault finding court.

The joint custody revolution also required a rethinking of the procedural role of the custody courts. That role had to be broader than simply declaring the marriage dead and distributing the assets with a final order. A core insight of modern developmental psychology is that children have different needs and different relationships with their parents at different stages of their emotional maturation. Parental conflict after divorce also ebbs and flows over time. To serve the child's best interest in maintaining relationships with both parents after divorce, courts had to help parents manage the different stages of their conflict and development. They had to recognize, in effect, that for parents and children divorce is a process of adjustment, not a single event encapsulated in a court order. The New Jersey Supreme Court encapsulated this philosophy when it specifically rejected the notion of the New York Court of Appeals that "divorce dissolves the family as well as the marriage. Both the legislation and the case law of this state are designed to encourage parent-child interaction following divorce. This policy is based on the best interests of the child and not on any notion of parental rights."³¹

From the early 1980s on, the critical question for judicial administration became how courts could implement the policy of encouraging continued contact with both parents. Fortunately, the philosophy and procedure of judicial dispute resolution began to shift at about the same time as the movement to encourage relationships with both parents after divorce gathered steam. Courts became more and more interested in "alternative" methods of dispute resolution such as mediation and arbitration, "a reference to the use of these processes in place of litigation."³² The landmark national event in the increased judicial consciousness of ADR was the 1976 Pound Conference sponsored by the American Bar Association at which leading judges and lawyers expressed deep concern about expense and delay in the justice system in all cases. Professor Frank Sander, Reporter for the Pound Conference's follow-up task force, projected a powerful vision of the court as not simply "a courthouse but a dispute resolution center where the

31. *Beck v. Beck*, 432 A.2d 63, 66 n.3 (N.J. 1981).

32. STEPHEN GOLDBERGET AL., *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES* 7 (3d ed. 1999).

greivant, with the aid of a screening clerk, would be directed to the process (or sequence of processes) most appropriate to a particular type of case."³³ ADR processes—particularly mediation—were thought to be better for litigants with who had to have continuing relationships after the trial was over, as it emphasized their common interests rather than what divided them.

Custody cases were an obvious category of disputes that required not just a "courthouse, but a dispute resolution center." Children in general needed continuing relationships with both parents; parents, in turn, needed a procedural forum to work out their disagreements for the benefit of the child rather a courtroom for adversarial combat which further alienated them from each other.³⁴ The substantive law movement toward post-divorce cooperative parenting found its procedural partner in the ADR movement. California mandated mediation of child custody disputes in 1980, the event which most clearly marks the beginning of Phase II in the evolution of the judicial role.³⁵ Many states followed California's lead. A 1995 count by the National Center for State Courts estimated that 200 court-connected programs existed in 38 states, with 33 states having court rules or statutes mandating mediation in child custody disputes.³⁶

Despite opposition and natural problems of growth and development,³⁷ mediation has proved itself generally well suited for the

33. See *id.* (citing Frank E. A. Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111 (1976)).

34. See Schepard, *Taking Children Seriously*, *supra* note 19, at 756-59, for a 1986 discussion of the benefits of mediation in child custody disputes.

35. See Susan C. Kuhn, Comment, *Mandatory Mediation: California Civil Code Section 4607*, 33 EMORY L.J. 733 (1984). The mandatory mediation statute was originally enacted as part of the California Civil Code. See CAL. CIV. CODE § 4607 (West 1983). Today, it is part of the California Family Code. See CAL. FAM. CODE § 3170-3171 (West Supp. 1999).

36. See Peter Salem & Ann L. Milne, *Making Mediation Work in a Domestic Violence Case*, 17 FAM. AD. 34, 34 (1995).

37. Some suggested, for example, that mediation is not in the best interests of women because they have fewer resources and are more likely to make compromises for the sake of their children than men and thus are easy targets for unscrupulous manipulation. See Penelope Eileen Bryan, *Reclaiming Professionalism: The Lawyer's Role in Divorce Mediation*, 28 FAM. L. Q. 177 (1994). There are case histories to support such concern (as there are case histories of women being traumatized by courts and unscrupulous lawyers) but little systematic empirical evidence that women fare worse in mediation than litigation or negotiations in the adversarial system. In most studies, men and women express approximately equal satisfaction with mediation as a dispute resolution process. Furthermore, women report that mediation is helpful to them in "standing up" to their spouses, and rated themselves more capable and knowledgeable as a result of participation in mediation. See Joan B. Kelly, *A Decade of Divorce*

emerging role of dispute resolution forum of choice for encouraging a child's relationship with both parents following divorce.³⁸ It is confidential, so parents' negative statements about each other do not reach the public forum of a court and their families, friends, and neighbors. Mediation offers parents the possibility of self-determination, the ability to voluntarily formulate their own post divorce parenting plan rather than have a court impose one on them. Many states offer it at low or no cost to parents, saving both the parents' and the courts' resources.³⁹ "In California, about 20-30% of the total population of separating families file in court to resolve their disputes over the care and custody of their children and are mandated to use mediation. [M]ediation attains full resolution in one-half, and partial resolution in two-thirds, of all custody and access disputes that enter into court."⁴⁰ In addition to resolving disputes, mediation generally results in greater consumer satisfaction, less expense and better parent-child and parent-parent relationships compared to adversary litigation.

Consumer satisfaction with custody mediation is not a surprising finding, given parents' highly negative views of their experiences in family courts. Parents often feel that after the litigation process starts, it quickly caroms out of control. Decisions are made for them—by lawyers and judges and custody evaluators—rather than by them.

A national commission recently reported survey results in which 50-70% of parents characterized the legal system to be "impersonal, intimidating, and intrusive."⁴¹ A recent empirical study of a sample of

Mediation Research, 34 FAM. & CONCILIATION CTS. REV. 373, 377-78 (1996) (describing numerous studies); Carol J. King, *Burdening Access to Justice: The Cost of Divorce Mediation on the Cheap*, 73 ST. JOHN'S L. REV. 375, 441 (1999) (summarizing the results of a survey of mediation participants in two Ohio judicial districts by reporting that "[t]he data [from the study] does not support the fears that women feel disadvantaged in mediation").

38. See Andrew Schepard, *Supporting Parent-Clients in Mediation of Child Custody Disputes*, 10 PRAC. LITIGATOR 7 (1999).

39. Problems in the delivery of mediation services to the large population of divorcing and separating parents continue to exist. One major problem, of course, is how to fund mediation services in an era of tight judicial budgets. For a discussion of the available alternatives, see King, *supra* note 37. Another problem is the creation of generally recognized standards of practice and professionalism for mediators, a task in which the family mediation community is currently engaged. See *Draft Model Standards of Practice for Divorce and Family Mediators*, 38 FAM. & CONCILIATION CTS. REV. 106 (2000).

40. 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. 451 (2000).

41. UNITED STATES COMMISSION ON CHILD AND FAMILY WELFARE, PARENTING OUR CHILDREN: IN THE BEST INTERESTS OF THE NATION. A REPORT TO THE PRESIDENT AND

divorcing parents and their children about their attitudes toward their lawyers confirmed these findings. It reported "an overall consensus that the attorneys' roles and responsibilities in the divorce process are not translating into actual practice. The parents and children did not feel they had adequate representation through guidance, information, attention or quality of service."⁴² Parents in the survey felt the process was too long and never finalized, too costly, inefficient, taking control of their lives.⁴³ "Many of the parents did recognize that they were already feeling angry and hostile, but 71 percent of them maintained the legal process pushed those feelings to a further extreme."⁴⁴ Higher number of ethics complaints seem to be filed against divorce lawyers than lawyers in other fields of practice,⁴⁵ another rough reflection of public dissatisfaction with the adversary process. The Oregon Task Force on Family Law, a legislatively authorized interdisciplinary reform group,⁴⁶ summed up public dissatisfaction after extensive public hearings on that state's divorce system:

The divorce process in Oregon, as elsewhere, was broken and needed fixing. Lawyers, mediators, judges, counselors and citizens in Oregon 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.

The Task Force found that the sheer volume of cases was causing the family court system to collapse. Too often, children were treated like property while parents clogged the courts with bitter fights over money, assets and support. The combative atmosphere

CONGRESS 38-39 (1996).

42. Pruett & Jackson, *supra* note 8, at 306.

43. See Pruett & Jackson, *supra* note 8, at 299-300.

44. Pruett & Jackson, *supra* note 8, at 298.

45. See Stephen Labaton, *Are Divorce Lawyers Really the Sleaziest?*, N.Y. TIMES, Sept. 5, 1993, § 4 (Week in Review) at 5.

46. Working in tandem with the Future of the Courts Committee, the Oregon Legislature established the bipartisan interdisciplinary Task Force on Family Law which can well serve as a model for other states considering divorce and custody reform. See William Howe III & Maureen McNight, *Oregon Task Force on Family Law: A New System to Resolve Family Law Conflicts*, 33 FAM. & CONCILIATION CTS. REV. 173 (1995). See also Schepard, *Conflict Prevention Programs*, *supra* note 6, at 124-26, for a description of the Task Force and its work in rethinking the adversarial system of divorce.

made it more difficult for divorcing couples to reach a settlement and develop a cooperative relationship once the divorce was final.⁴⁷

Mediation looks very good in contrast to the adversarial litigation system. Studies report that mediation parents reach resolution of their disputes more quickly than litigation parents, taking less than half the time and less cost to produce a parenting plan.⁴⁸ Even mediation parents who fail to reach agreement are more likely to settle prior to trial than litigation parents. Mediated agreements also tend to be more specific and detailed than those negotiated by attorneys alone.⁴⁹ Studies also report that mediated agreements result in higher rates of children's contact with both parents following divorce and higher rates of compliance with parenting plans and child support agreements compared to agreements reached by negotiations in the shadow of the adversarial process.⁵⁰

Beginning in the early 1990s, educational programs joined mediation as an important service that courts made available to parents.⁵¹ Virtually no court-affiliated educational programs for parents existed in 1960. Today, court-affiliated education is part of the child custody dispute resolution process in most states, as revolutionary a development as no fault divorce, joint custody, and mandated mediation. A recent survey computed a 180% increase in such programs between 1994 and 1998.⁵² Forty-five states as of this writing have enacted legislation or court rules authorizing courts to require parents to attend such programs.⁵³

The rapid grass roots development of court-affiliated educational programs for divorcing families indicates an emerging national consensus that family courts should have a strategy that encourages parents to reduce and manage their conflicts, not just serve as a forum for litigating about them.⁵⁴ Court-affiliated programs typically educate

47. OREGON TASK FORCE ON FAMILY LAW, FINAL REPORT TO GOVERNOR JOHN A. KITZHABER AND THE OREGON LEGISLATIVE ASSEMBLY 2 (1997).

48. See Kelly, *supra* note 37, at 376-77.

49. See Kelly, *supra* note 37, at 373 (short summary of research results with citations).

50. See Peter A. Dillon & Robert E. Emery, *Divorce Mediation and Resolution of Child Custody Disputes: Long Term Effects*, 66 AM. J. OF ORTHOPSYCHIATRY 131, 132-33 (1996).

51. See generally Schepard, *War and P.E.A.C.E.*, *supra* note 2; Schepard, *Conflict Prevention Programs*, *supra* note 6.

52. See Margie J. Geasler & Karen R. Blaisure, *1998 Nationwide Survey of Court-Connected Divorce Education Programs*, 37 FAM. & CONCILIATION CTS. REV. 36 (1999).

53. See *supra* note 2 and sources cited therein.

54. See Schepard, *Conflict Prevention Programs*, *supra* note 6, at 124.

parents about the legal process of divorce and separation, the impact of divorce on the adults involved and, most important, the impact of divorce on their children and how parents can make the transitions easier for them.⁵⁵ Parents and judges have been quite enthusiastic about educational programs, and there is some preliminary evidence that parental attitudes and behavior improve as a result of attendance.⁵⁶

Phase II of the transformation of the court's role in divorce related custody disputes accomplished a great deal. During Phase II, divorce became a predictable event in the life cycle of American children and lost its social stigma. Courts broke the stranglehold the sole custody system and adversary procedure had on judicial thinking about children's best interests and the nature of dispute resolution in custody disputes that was inconsistent with the nature and incidence of family reorganization in modern American life. Judicial policy makers appropriately constructed a dispute resolution system on the premise that the problems for children did not result from their parents' divorce per se, but came about because parents put their children in the middle of their continuing conflict. The Phase II managerial court embraced the substantive and procedural changes that encouraged continuing relationships between both parents and their children and helped parents manage their conflict responsibly.

III. PHASE III: DIFFERENTIATED CASE MANAGEMENT OF HIGH CONFLICT DIVORCE

A. The Scope and Dimensions of the Problem

The next phase of development for the child custody dispute resolution is to recognize that all divorce-related custody disputes are not equal and promoting parental cooperation is not appropriate public policy in some cases. Divorce related custody disputes which involve the interrelated problems of violence, drug and alcohol abuse, mental illness, and repetitive conflicts pose a greater threat to children and parents involved than cases where those factors are not present. Most parents adjust to the transitions of divorce and separation after a reasonable time; a small, but highly significant percentage, however, do not. For them and their children, the reorientation of divorce is a never-

55. See Geasler & Blaisure, *supra* note 52, at 51.

56. See Shepard, *Conflict Prevention Programs*, *supra* note 6, at 118-21, for a summary of research findings.

ending crisis rather than a period of transition. These families take up more scarce judicial resources than less conflictual divorcing families and there is a tendency to wish they would simply go away. They won't, and the children who are damaged by the parents' behavior need judicial intervention, special treatment, and targeted programs. Courts must thus create a plan (many have already) for Differentiated Case Management (DCM) of such cases. DCM starts from the:

premise that cases are not all alike and the amount and type of court intervention will vary from case to case. Under this model . . . a case is assessed at its filing stage for its level of complexity and management needs and placed on an appropriate "track." Firm deadlines and time frames are established according to the case classification.⁵⁷

Creating a DCM plan is difficult because there is a great deal we do not know about high conflict divorce involving children. Indeed, there is as yet no consensus about what constitutes a high conflict divorce, with some believing it should include families who experience domestic violence, while others believe it should be limited to those involved in repetitive litigation.⁵⁸ Moreover, while some empirical data exists that can help shape DCM plans for high conflict custody cases, much more research is required for confident conclusions. Opinions are plentiful, but hard data is not. A recent comprehensive study on high conflict divorce cases by the Canadian Parliament, for example, bemoans the absence of data for policymakers and asks for an immediate program of empirical research on indicia of high conflict divorce including, false allegations of abuse and neglect; parental alienation; the behaviors, patterns, and dynamics of domestic violence and parental child abduction. Longer term, the Canadian Parliament's study requests a research program on: the impact of continued contact with grandparents and on losing contact with a parent; the long term well-being of children after parenting arrangements are made; and the impact on the child of an amicable settlement between parents.⁵⁹ The need for empirical research is so pressing that our own federal government might consider creating a national institute to insure both the funding for and quality of the research needed and its wide dissemination.

We also cannot pinpoint the exact number of highly conflicted divorce related custody cases defined in terms of "repetitive litigation." Research suggests that a relatively small number of parents continue in

57. Kaye & Lippman, *supra* note 13, at 163.

58. See CANADIAN PARLIAMENT CUSTODY REPORT, *supra* note 3, at 73.

59. See CANADIAN PARLIAMENT CUSTODY REPORT, *supra* note 3, at 78.

very high conflict over family reorganization for a number of years.⁶⁰ Constance Ahrons found such parents (whom she labeled "Angry Associates") to be 25 % of her small sample of the divorcing population.⁶¹ Janet Johnston and Vivian Roseby estimate that "about one-fourth of all divorcing couples with children have considerable difficulty completing the legal divorce without extensive litigation" and about one-fifth of families relitigate custody issues after divorce.⁶² A recent empirical study of five court systems found that 16% of divorcing families who had children had been to court for another family-related matter during the previous five years.⁶³ Other estimates are 5%-10% of the total population of divorcing and separating parents.⁶⁴

While they are a minority of divorces involving parents, these high conflict cases pose serious risks to children and require a significant amount of attention from the court system. By anyone's definition, for example, a child custody dispute involving allegations of child abuse and neglect by one parent or the other qualifies as "high conflict." The child custody and child protection systems intersect in such cases and they thus require a carefully thought out DCM plan.

A recent study of such cases in the Australian Family Court sheds some light on both the prevalence and on the intractable nature of these highly conflicted families.⁶⁵ The Australian research team carefully

60. See Michael E. Lamb et al., *The Effects of Divorce and Custody Arrangements on Children's Behavior, Development, and Adjustment*, 35 FAM. & CONCILIATION CTS. REV. 393, 396 (1997) (consensus statement by experts in psychology, law, and social welfare convened under the auspices of the National Institute of Child Health and Human Development).

61. See CONSTANCE AHRONS, *THE GOOD DIVORCE* 56 (1994).

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

63. See H. Ted Rubin, *The Nature of the Court Today*, in 6 *THE FUTURE OF CHILDREN: THE JUVENILE COURT* 43 (Center for the Future of Children of the Packard Foundation ed., 1996).

64. See Lamb et al., *supra* note 60, at 396; see Janet R. Johnston, *Developing and Testing a Group Intervention for Families at Impasse*, in CONGRESS PROCEEDINGS OF THE THIRD INTERNATIONAL CONGRESS ON PARENT EDUCATION PROGRAMS 5 (Association of Family and Conciliation Courts ed., 1997) (Executive Summary of a Forthcoming Report to the California Judicial Conference).

65. See Thea Brown et al., *Problems and Solutions in the Management of Child Abuse Allegations in Custody and Access Disputes in the Family Court*, 36 FAM. & CONCILIATION CTS. REV. 431 (1998). The researchers are academic and practicing social workers who participate in the Australian Family Courts' Family Violence and Family Court Research Program. The description of their study in text which follows is drawn from the article cited in this footnote. To avoid repetitive citations to this article, page citations will be provided only for direct quotations from the article.

tracked allegations of child abuse of all kinds—physical, sexual, and neglect—in a sample of 200 custody and visitation cases in Canberra, Australia's national capital and a small city, and in Melbourne, Australia's second largest city. While custody and access disputes with child abuse allegations were only a small percentage of total family related court filings, the researchers found they were particularly troublesome subjects for judicial management. Such cases have what might be called "staying power" on the court docket—"the child abuse cases stayed in the court; they did not drop out [settle] or become resolved as frequently as other custody and access cases."⁶⁶ Thus, though small in number, custody and visitation disputes involving child abuse allegations took an especially large amount of the time and effort of judges and court personnel.

The Australian researchers also found that the families involved in child custody disputes with child abuse allegations shared some of the same socioeconomic characteristics of others families in their geographic areas, including race and ethnicity. But the abuse allegation families also had different characteristics indicating that serious social problems were associated with their dispute—their unemployment rates were higher, and they had higher rates of criminal convictions, substance abuse, and partner to partner violence. Many of them were known to child protective services before the custody dispute was filed.

The Australian researchers also tested a perception widely shared by judges and lawyers everywhere in emotionally laden custody and access disputes with child abuse allegations. Many professionals involved in such cases believe that the allegations are presumptively false, simply a nuclear weapon in the ongoing divorce and custody wars. The Australian data did not, however, support that perception. The researchers studied a subset of thirty cases and found the same rate of false allegations as those reported to the Australian child protective services in traditional child abuse and neglect cases—only 9%. They also noted that a different study of fifty custody and access cases the previous year came to the same conclusion.

The Australian data suggests that all allegations of child maltreatment and endangerment in a divorce related custody proceeding should be taken seriously. Courts need to consider a full range of alternative explanations for the allegations, but needs to pursue them thoroughly and carefully.⁶⁷ Many (not all) of them will turn out to be true and

66. *See id.* at 433.

67. *See* Kathleen Coulborn Faller, *Child Maltreatment and Endangerment in the*

therapeutic and legal intervention is required to protect the children. To minimize the number of false claims of this very serious charge, serious penalties should be imposed for a parent's making intentionally false allegations of abuse and neglect in a divorce related custody case.⁶⁸

Domestic violence can also be a symptom of a high conflict custody case. We do know something about its prevalence and its effects on children. Domestic violence directed toward women is one of the most frequently reported crimes in the United States; estimates report that a beating takes place every 18 seconds.⁶⁹ While the exact number is uncertain because of differing definitions of domestic violence, about two million women every year are seriously physically abused by their partners.⁷⁰ A smaller—but significant—number of men suffer abuse each year at the hands of their female partners.⁷¹ We do not know, however, how many victims of domestic violence seek the help of the legal system through divorce and custody proceedings.

The effects of domestic violence on children are becoming increasingly well-documented. The available research shows a significant connection between partner and child abuse and maltreatment, though estimates of the exact correlation vary widely.⁷² In addition, there is strong data that suggests children are powerfully affected by being exposed to violence even if they are themselves not actual victims. A review of recent research on the subject concludes:

Context of Divorce, 22 U. ARK. LITTLE ROCK L. REV. 427 (2000).

68. See CANADIAN PARLIAMENT CUSTODY REPORT, *supra* note 3, at 85-91 (recommending assessment of the adequacy of the Criminal Code to deal with intentional false allegations of abuse or neglect in custody disputes).

69. See Katherine M. Reihing, *Protecting Victims of Domestic Violence and Their Children After Divorce: The American Law Institute's Model*, 37 FAM. & CONCILIATION CTS. REV. 393, 393 (1999).

70. See *id.*

71. Janet Johnston and Linda Campbell found men to be the victims of female-initiated violence in 10-15% of their sample of 140 domestic violence cases. See Janet R. Johnston & Linda E. G. Campbell, *Parent-Child Relationships in Domestic Violence Families Disputing Custody*, 31 FAM. & CONCILIATION CTS. REV. 282, 288-89 (1993). Canadian data shows that in 1996 11% of the victims of domestic violence were male, while 89% were female. CANADIAN PARLIAMENT CUSTODY REPORT, *supra* note 3, at 79. Recent survey data suggest that women now account for a quarter to a third of all domestic violence arrests, up from less than 10% a decade ago. See Carey Goldberg, *Spouse Abuse Crackdown, Surprisingly, Nets Many Women*, N.Y. TIMES, Nov. 23, 1999, at A1.

72. See Clare Dalton, *When Paradigms Collide: Protecting Battered Parents and Their Children in the Family Court System*, 37 FAM. & CONCILIATION CTS. REV. 273, 285-86 (1999); Catherine C. Ayoub et al., *Emotional Distress in Children of High-Conflict Divorce: The Impact of Marital Conflict and Violence*, 37 FAM. & CONCILIATION CTS. REV. 297, 300 (1999).

Children who have witnessed domestic violence present a variety of emotional factors, sense a lack of control over their life circumstances, and experience feelings of hopelessness and helplessness. Children from violent families may experience depression, anxiety, and an increase in somatic complaints or they may externalize their distress through aggression and delinquency.⁷³

Perhaps most significantly, children exposed to violence and high conflict “bear an acutely heightened risk of repeating the cycle of conflicted and abusive relationships as they grow up and try to form families of their own.”⁷⁴

Finally, of mental illness and drug and alcohol abuse complicate judicial treatment of high conflict divorce. According to the Surgeon General, one in five Americans experiences mental illness of varying levels of seriousness in a given year, and half of all Americans experiences such disorders during their lives.⁷⁵ Divorce is a significant social stress that can aggravate pre-existing mental illness.⁷⁶ In a small number of cases, violence against family members may result when mental illness and divorce interact. While we cannot pinpoint the relationship with precision, research suggests that substance abuse and mental illness are important factors in some high conflict families, as they also seem to have a relationship to the incidence of family violence. Drug and alcohol use and abuse seem, for example, to be associated with

73. See 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).

74. See JOHNSTON & ROSEBY, *supra* note 62, at 5.

75. See Robert Pear, *Few Seek to Treat Mental Disorders, A U.S. Study Says*, N.Y. TIMES, Dec. 13, 1999, at A1.

76. The psychiatric community recognizes the social stress that divorce creates for people with mental illness in its classification for mental illness. The authoritative Fourth Edition of the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders (DSM-IV)* uses a multiaxial system to describe a person's mental functioning. “The use of the multiaxial system facilitates comprehensive and systematic evaluation with attention to the various mental disorders and general medical conditions, psychosocial and environmental problems, and level of functioning that might be overlooked if the focus were on assessing a single presenting problem.” AMERICAN PSYCHIATRIC ASSOCIATION, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS FOURTH EDITION DSM-IV* 25 (1994). Axis IV of the *DSM-IV* multiaxial system is a measurement of the person's “[p]sychosocial and environmental problem.” *Id.* at 29. “Axis IV is for reporting psychosocial and environmental problems that may affect the diagnosis, treatment and prognosis of mental disorders.” *Id.* at 29. Conditions which should be noted on Axis IV include “[p]roblems with primary support group—e.g. . . . disruption of family by separation, divorce or estrangement.” *Id.*

particularly violent forms of wife battering.⁷⁷ Substance abuse and mental illness also seem to reduce the ability of some parents to care for children.⁷⁸

High conflict divorce cases thus pose numerous special challenges to family courts. The families involved in them are deeply troubled in a variety of interrelated ways. Their cases raise issues of immediate physical safety of vulnerable parents and children as well as mental health and substance abuse. High conflict cases involving violence also present emotionally charged issues of gender politics and “an obvious fault orientation that runs counter to a broad trend towards disregarding marital conduct in family law.”⁷⁹ Repetitive litigants take judicial resources away from other families and place their children in the middle of a perpetual war zone. Above all, high conflict cases put children at particular risk because of the long-lasting negative effects exposure to prolonged parental conflict and violence can have on them. One respected family violence research team recently stated:

those of us who assist the courts in the resolution of visitation and custody disputes should be aware of the damage that continued conflict could cause the children involved. As a result, encouraging a more aggressive mandate for conflict reduction becomes one central goal in the court process. The best-interests standard must be informed by the cumulative negative impact of these factors and their weight in examining emotional well-being during the process of decision making for children of acrimonious divorce.⁸⁰

B. Integrating Violence Sensitivity into Parent Education and Mediation

Substantive legal doctrine is changing to incorporate violence sensitivity by, for example, mandating that courts consider proven domestic violence as a factor in making a custody determination.⁸¹ The

77. See JOHNSTON & ROSEBY, *supra* note 62, at 29.

78. See Ayoub et al., *supra* note 72, at 309-10.

79. See Nicholas Bala, *Spouse Abuse and Children of Divorce: A Differentiated Approach*, 13 CAN. J. FAM. L. 215, 217 (1996).

80. Ayoub et al., *supra* note 72, at 311.

81. A recent law review comment states that “there are custody statutes which address domestic violence in forty-four states and the District of Columbia.” Lynne R. Kurtz, Comment, *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, 1348 (1997).

child custody dispute resolution multi-door courthouse created in Phase II needs to, and is, adapting to the special problems family violence creates. A first and important step for court systems to help the children and parents in high conflict families is to integrate violence sensitivity into existing court-affiliated parent education and mediation programs. Indeed, mediation programs and parent education programs are beginning to adopt their theories and techniques to recognize the need for differential treatment of high conflict and violent families.⁸²

For too long, the domestic violence community and the mediation and parent education community viewed each other as adversaries. In gross terms, the domestic violence community viewed the mediation and parent education community as promoting parental cooperation without adequate understanding of the incidence and role of domestic violence in divorce and custody disputes and without adequate screening and safeguards for domestic violence victims in their programs. The mediation and parent education community, on the other hand, sometimes viewed the domestic violence community as not recognizing the steps that were taken to protect violence and as not recognizing the child's need for relationships with both parents in some cases where violence occurred.

Part of the problem may be that while both groups use the term "domestic violence" they may be talking about different social phenomena.⁸³ As the model interdisciplinary team of psychologist Geri Fuhrmann, social worker Joseph McGill, and law professor Mary O'Connell recently suggested, the mediation and parent education community think of domestic violence more as "'conflict-instigated violence' . . . physical violence used as a tool of conflict resolution."⁸⁴ The domestic violence community is built around a very different kind of domestic violence—"control instigated" a largely male phenomena where the aggressor's goal is to dominate the partner and the violence is part of a larger and planned pattern of domination.⁸⁵ Conflict instigated violence is certainly not admirable and has serious negative consequences for children and parents. It may not, however, be as

82. See Jennifer P. Maxwell, *Mandatory Mediation of Custody in the Face of Domestic Violence: Suggestions for Courts and Mediators*, 37 FAM. & CONCILIATION CTS. REV. 335, 340 (1999).

83. Compare Dalton, *supra* note 72, with Janet R. Johnston, *Response to Clare Dalton's "When Paradigms Collide: Protecting Battered Parents and Their Children in the Family Court System"*, 37 FAM. & CONCILIATION CTS. REV. 422 (1999).

84. See Geri S. W. Fuhrmann et al., *Parent Education's Second Generation: Integrating Violence Sensitivity*, 37 FAM. & CONCILIATION CTS. REV. 24, 26 (1999).

85. See *id.*

dangerous for both parents to have a continuing relationship with the children requiring parental contact as when control instigated violence is the problem. Perpetrators of conflict instigated violence may be able to learn to resolve conflict more peacefully than those who use violence as part of a pattern of control. Control instigated violence seems far more based in deeply rooted character and personality traits that are far less amenable to positive intervention. As Janet Johnston, one of the nation's leading clinicians and researchers in high-conflict divorcing families observed: "All violence is unacceptable . . . however . . . not all violence is the same . . . domestic violence families need to be considered on an individual basis when helping them to develop post divorce parenting plans."⁸⁶

There is no more important need than for a serious discussion between domestic violence advocates and the mediation and parent education community about when and how it is appropriate for children in violent families to maintain a relationship with both parents after divorce and separation. This dialogue may require reevaluation of previously held positions on all sides.

The parent education and mediation community has to recognize that physical safety has to override the need for a child to have a relationship with both parents after divorce if there are serious concerns about child abuse, domestic violence, substance abuse, and mental illness. There is evidence that mediation and parent education programs are in the process of incorporating violence sensitive perspectives into their operations. To cite two examples: Court-affiliated parent education programs are beginning to recognize the need to integrate understanding of family violence into their programs and to modify their message from "parents should cooperate for the benefit of the children" to "parents should cooperate if it is safe for parents and children to do so."⁸⁷ The mediation community is in the process of revising its standards of practice to implement the general principle that "[w]hile [mediators] are neutral about the particular agreement reached (provided it is reached voluntarily), [mediators] are not neutral about the safety of our clients and their children."⁸⁸ The Draft *Standards of Practice* require that mediators be trained to recognize and screen for domestic violence

86. Bala, *supra* note 79, at 217 (quoting Janet Johnston, *Domestic Violence and Parent-Child Relationships in Families Disputing Custody*, 9 AUST. J. FAM. L. 12, 25 (1995)).

87. See Geri Fuhrmann et al., *supra* note 84, at 32.

88. This principle was articulated by a group of prominent Canadian mediators at a Toronto forum and is reported in Bala, *supra* note 79, at 282.

before and during the mediation process.⁸⁹ They also require mediators to take steps to structure the mediation process to insure physical safety for victims and children.⁹⁰ Finally, they suspend the mediator's general obligation of confidentiality when child abuse is disclosed or one parent credibly threatens the physical safety of another during mediation sessions.⁹¹

For its part, the domestic violence community may need to recognize that some victims of violence involved in custody disputes may benefit from parent education and mediation. Some victims of domestic violence may need the information and perspective that appropriately designed parent education programs can provide them. Not all violent partners are necessarily conniving batterers who use physical aggression as part of an overall plan for total intimidation and control of the victim. Some victims of domestic violence may have recovered their self-confidence enough to be a suitable mediation participant if advised by counsel and protected by appropriate safeguards in the mediation process. Certainly, some domestic violence victims want to mediate their post-divorce parenting relationships with their partner. They report as much, if not more, satisfaction with the mediation process as do women who do not experience domestic abuse.⁹² Recent empirical studies of custody mediation in Ohio and Maine report higher levels of participation and satisfaction by victims

89. See *Draft Model Standards of Practice for Divorce and Family Mediators Standard XI A.-E.*, 38 FAM. & CONCILIATION CTS. REV. 110, 120 (2000). The Standard of Practice is that "A family mediator should recognize a family situation involving domestic violence and take appropriate steps to shape the mediation process accordingly." *Id.* Subparts to the Standard provide specific guidelines to the family mediator about how to achieve the goal set forth in the Standard.

90. See *Draft Model Standards of Practice for Divorce and Family Mediators Standard XI D.-E.*, 38 FAM. & CONCILIATION CTS. REV. 110, 120 (2000) (specifying various measures that the mediator should take to insure safety for victims of domestic violence and their children, including holding separate sessions with the parties, encouraging representation of the victim by an advocate at the sessions and specifically requiring the mediator ensure that victims of domestic violence consider whether parenting plans resulting from mediation "protect the physical safety and psychological well-being of themselves and their children").

91. See *Draft Model Standards of Practice for Divorce and Family Mediators Standard VIII E.*, 38 FAM. & CONCILIATION CTS. REV. 110, 120 (2000) (requiring the mediator to disclose "a party's threat of violence against another party likely to result in imminent death or substantial bodily harm to the threatened party and the appropriate authorities").

92. See King, *supra* note 37, at 444-46; see Roselle Wissler, *Family Law Mediation: Study Suggests Domestic Violence Does Not Affect Settlement*, 6 DISP. RES. MAG., Fall 1999, at 29.

of domestic violence in mediation as compared to attorney-negotiated settlements.⁹³

More women [who are victims of domestic violence] reported feeling pressure to settle outside mediation than in mediation Clearly, not all women feel a need to cut off all contact with [an abusive] former spouse. Adherence to such assumptions places all abused women into a single group and ignores evidence suggesting there is much variability among abused women as a class.⁹⁴

C. A Plan for Differential Case Management

Integration of violence sensitivity into existing court-affiliated programs for managing parental conflict is an important part in the creation of a comprehensive plan for DCM for high conflict custody cases involving children.⁹⁵ Such a plan must create criteria to identify high conflict parents early in their dispute for special treatment.⁹⁶ Only an effective screening program can provide high conflict families with special treatment without overly burdening the reasonably cooperative majority of divorcing parents whose children do not need extensive state intervention for their protection.⁹⁷ The DCM plan must also provide

93. See King, *supra* note 37, at 446.

94. King, *supra* note 37, at 446.

95. Idaho has developed a sophisticated DCM for children of high conflict divorce very similar to that described in this article. See generally 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 (1997).

96. See Brown et al., *supra* note 65, at 440-41, for a DCM plan for custody cases involving allegations of child abuse.

97. The need for sophisticated judicial planning to serve these multiple goals was recently emphasized by a Special Joint Committee on Child Custody and Access of the Canadian Parliament which conducted a comprehensive study of Canada's child custody dispute resolution system. The Committee's recommendations on high conflict divorce recognize the fundamental problem: "the desire . . . to improve the legal system's response to high-conflict divorces, without imposing any harmful restrictions on the co-operative majority." The Special Committee strongly recommended creation of:

a mechanism for screening out high-conflict divorces and treating them in a different stream. This would recognize the potential harm to children whose parents continue their conflict far beyond a reasonable adjustment period. The system should identify these families in order to provide protection for their children, who are at greater risk than most children of divorce. Once families are identified, their files should be "red tagged" or flagged in some other way, so that decision makers do not make determinations about parenting arrangements without knowing the full

high conflict families with services that show promise of helping their children while protecting their legal rights.

Developing a comprehensive plan for a differential child custody dispute resolution process is a daunting task, given the scant research and experience to draw on. It requires experimentation, interdisciplinary dialogue, and much more space than can be given in this article. It may be helpful, however, to begin to sketch what such a system might look like and extend an invitation to the courts, lawyers, the mental health community and all those concerned with children to draw on their experience and comment and improve upon it.

Imagine a hypothetical high conflict family (by anybody's definition)

D. The Nelson Family

Harriet Nelson is a dentist and Ozzie a police captain. They have been married for 19 years. They have two children: David, a boy, 10, and Ricki, a girl, 8. Tension in the house is palpable since Ozzie discovered Harriet is having an affair with a former mutual friend. The affair began after Ozzie's harsh and repeated criticism of Harriet for excessive drinking and abusing prescription drugs. The two have had a few violent incidents which arise out of disagreements between them. The violence is sometimes initiated by Ozzie, sometimes by Harriet. Ozzie always eventually prevails by physically dominating Harriet but without inflicting any permanent physical injury on her. Ozzie also never threatens Harriet with violence, never tries to control her finances, her relationships with friends, etc. The last violent episode was a year prior to the date the divorce complaint was filed. David and Rikki have witnessed some of the parental violence. Ozzie hit David when David tried to break up a fight between his parents. He is deeply remorseful about what has occurred. Harriet, in contrast, states that the family problems all result from Ozzie's behavior, not hers. Both children express a great love for both parents. Rikki is withdrawn, depressed and has spoken of suicide, problems piled on top of a learning disability. David is very protective of his mother while Rikki is not obviously aligned with either parent. Mutual orders of protection are outstanding against both Ozzie and Harriet. Harriet files for divorce from Ozzie and seeks sole custody of the children. Her expressed motivation is a desire

details of the case and the families history.

CANADIAN PARLIAMENT CUSTODY REPORT, *supra* note 3, at 73-74.

to marry her lover. Ozzie is adamant he will not loose his children to Harriet.

What principles should determine how the legal system processes the Nelson's dispute?

1. *Unified Treatment*

The Nelson family's dispute resolution process should, if at all possible, be determined by a single judge, aided by a single social services team, all of whom have full information about the previous court proceedings.⁹⁸ The same judge who decides who should have temporary custody of David and Rikki should also decide: whether orders of protection are made permanent; if Ozzie or Harriet should move out; whether supervised visitation is necessary; whether mediation and parent education are appropriate; whether a lawyer or guardian ad litem should be appointed for the children; if Rikki needs hospitalization (if Ozzie and Harriet don't agree); if Ozzie or Harriet might be referred to anger management classes, interim support payments; and the schedule for the families' forensic evaluations. Otherwise, the Nelsons will suffer what Professor Catherine Ross has labeled "the failure of fragmentation"⁹⁹—different judges, each with a piece of jurisdiction over the Nelsons, issuing conflicting orders, conflicting schedules for court-related events, and multiple court appearances without any benefit to David and Rikki.

The court and support staff must take also charge of managing the high conflict custody case and put it on an expedited, rational track toward resolution. Chaotic, potentially violent parents need to be under intense supervision by an authority figure who puts the interests of their children first. Ozzie and Harriet must have the right to have access to the court to insure their legal rights are protected and the court must ultimately be responsible for the quality of services delivered by its affiliated programs and professionals.

98. See Andrew Schepard, *Law and Children: Introduction to Unified Family Courts*, N.Y.L.J., Apr. 16, 1997, at 3 (describing history and rationale of unified family courts movement). For a comprehensive discussion of unified family courts, see Barbara Babb, *Fashioning an Interdisciplinary Framework for Court Reform in Family Law: A Blueprint to Construct a Unified Family Court*, 71 S. CAL. L. REV. 469 (1998).

99. See generally Catherine J. Ross, *The Failure of Fragmentation: The Promise of a System of Unified Family Courts*, 32 FAM. L.Q. 3 (1998).

2. *Early Screening and Differential Diagnosis*

Early identification of high conflict families such as the Nelsons is an essential prerequisite to DCM of their dispute. The longer the dispute goes on without someone in authority recognizing it needs top priority case management, the greater the chance of further violence and deterioration of the children. If the Nelsons are recognized early as a high conflict family, they can be ordered or referred to dispute resolution and health and social services interventions that might help them cope with their conflict, medical problems, and stress.

Screening the Nelson family for violence, substance abuse, and the risk of harm to self, is the single greatest need and the single greatest problem that a DCM plan faces.¹⁰⁰ The legal system only knows of the Nelson's dispute when a complaint or action is filed in court. This basic fact suggests that an immediate preliminary conference with family court support services should be required for every family whose initial court filings indicate that custody is in dispute. A screening protocol which can be administered in a short amount of time with reasonable accuracy needs to be developed to identify which families need high conflict treatment and which do not.

The screening task is particularly daunting, as it is the key to the DCM process. Many victims of domestic violence are, for example, reluctant to disclose experiences of domestic abuse because of fear for their own or their children's safety or economic dependence on the batterer. Skilled interviewers of children are also vital parts of a screening process. In addition, agreed upon criteria for differentiating between types of family violence are presently hard to come by. In the hypothetical situation, for example, it seems to be that the violence between Ozzie and Harriet is conflict rather than control instigated and thus potentially more amenable to therapeutic interventions.¹⁰¹ But it may be hard to reach that conclusion with any degree of confidence through a manageable screening program.

Ultimately, any screening process will have to rely heavily on the judgment of the professionals who undertake it, informed by a shared flow of research results from long term studies and similar programs in other states. The absence of confident guidelines for screening suggests that the process should be undertaken by a multi disciplinary team of mental health professionals and legally trained personnel to insure that

100. See Reihing, *supra* note 69, at 403-04.

101. See Part III.B., *supra*.

different perspectives enter into it. The absence of confident guidelines also suggests the importance of amassing experience in pilot programs and carefully analyzing it before permanent policy judgments are made.

3. *Multiple Dispute Resolution Options and Expedited Case Management*

The Nelsons will benefit if the court and its support staff have a rich variety of dispute resolution and health and social service options to call on to help manage their conflict and shield their children from harm. The screening team should be responsible for developing a short and long term case management plan for the Nelsons for approval by the court before implementation. The plan must assure safety of all involved, perhaps recommending that the court order one of the parents to "move out" of the marital residence. The plan may recommend supervised visitation, the appointment of a lawyer for the child and an expedited forensic evaluation. Therapy for the children may be helpful, as might an educational program for them in which they can learn about the legal process, and what they and their parents are experiencing.¹⁰² Harriet may need medical treatment for substance abuse. The Nelsons might be required to attend an education program specially designed for high conflict families¹⁰³ and, if safe, participate in mediation to develop a parenting plan for David and Rikki. If conflict continues endlessly, a special master may be appointed to supervise the families' transitions during divorce and separation.¹⁰⁴ As a matter of fundamental fairness, each parent must have the right to contest any of the team's recommendations at a hearing before the judge.

What is more important, however, than the specific services that the Nelsons experience is that the process of dispute resolution and therapeutic intervention does not drag along and that the Nelsons follow through on what they are ordered to do. Children must feel that the state through its court system is looking out for their interests; parents must feel that the dispute resolution is a rational progression toward the same end. Children have a unique sense of time; a day can seem like a month

102. See generally Trecia DiBias, *Some Programs for Children*, 34 FAM. & CONCILIATION CTS. REV. 112 (1996).

103. See generally Hugh McIsaac & Charlotte Finn, *Parents Beyond Conflict: A Cognitive Restructuring Model for High-Conflict Families in Divorce*, 37 FAM. & CONCILIATION CTS. REV. 74 (1999) (describing such a program in Multnomah County Circuit Court in Portland, Oregon).

104. See Andrew Schepard, *Law and Children: Managing Parents in High Conflict: Special Masters in High Conflict Custody Cases*, N.Y.L.J., Sept. 17, 1997 at 3.

and a month a year depending on their developmental stage. Dispute resolution should take place in accordance with the child's sense of time, not the adults. In addition, the imposition and enforcement of time deadlines will help convince the Nelsons that the court system is serious about protecting their children and will hold them accountable for their welfare.¹⁰⁵

One way the court can achieve these goals is to appoint a case manager to supervise the DCM plan's implementation for the Nelson family. The case manager could be responsible for regular conferences with the Nelsons and their lawyers to insure that deadlines are met and to inform the court and family services if they are not. The case manager could also be the point person for the Nelsons and their counsel for contacting the court.

All in all, it is the court's responsibility to create a rational, expeditious plan for resolution of the Nelson's dispute drawing on the advice of an interdisciplinary team and on a wide variety of options tailored for high conflict families. Each court will, of course, have to create its own flow chart for high conflict cases that incorporates the resources available for such families in its local community. In larger communities services may be provided by court employees; in smaller communities, they could be provided by qualified service providers who do different things for different families.

The critical point is more that the family court should have a DCM plan for high conflict families rather than what its exact content is. The plan can change as resources develop and experience accumulates as to which services work best for high conflict families. Funding for the necessary services is obviously critical. It will also be hard to obtain because many believe that high conflict families bring their troubles upon themselves and do not deserve help from public resources.¹⁰⁶ Concerned professionals need to convince policy makers that funding is an investment in the future of children and will save judicial resources in the long run.

105. See Schepard, *Taking Children Seriously*, *supra* note 19, at 773-74.

106. See Nancy Thoennes & Jessica Pearson, *Supervised Visitation: A Profile of Providers*, 37 FAM. & CONCILIATION. CTS. REV. 460, 474 (1999) (describing a "public perception that supervised visitation programs serve dysfunctional adults who are undeserving of charity rather than children").

IV. CONCLUSION

The child custody court has been transformed in what is, for the legal system, a comparatively short period of time—approximately forty years. The child custody court has moved permanently beyond the stage where its sole function is to award sole custody to the better parent. Today's child custody court is a conflict manager, not a fault finder. Much progress has been made in adopting the child custody dispute resolution system to the needs of both children and parents for continuing relationships through the wide spread implementation of parenting plans, mediation and parent education.

As Chief Judge Vanderbilt's stated, however, "judicial reform is no sport for the short-winded or for lawyers who are afraid of temporary defeat."¹⁰⁷ The custody dispute resolution system's collective challenge for the next Millennium is to encourage the majority of parents who can cooperate for the benefit of their children to do so while creating an expedited and structured process for higher conflict families whose children need protection through more intrusive expedited interventions. Meeting that challenge will require costs, and a process of trial and error and education of the bench, bar, and mental health community. The result, however, will be a system that targets scarce resources to families that really need help and, above all, provides substance to the claim that the court protects the best interests of the child in high conflict custody cases.

107. See Arthur T. Vanderbilt, *Introduction*, in *MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION* xix (Arthur T. Vanderbilt ed., 1949). Vanderbilt continued: "Rather, we must recall the sound advice given by General Jan Smuts to the students at Oxford: 'When enlisted in a good cause, never surrender, for you can never tell what morning reinforcements in flashing armor will come marching over the hilltop.'" *Id.*