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# QUALIFICATIONS OF AND TECHNIQUES TO BE USED BY JUDGES, ATTORNEYS, AND MENTAL HEALTH PROFESSIONALS WHO DEAL WITH CHILDREN IN HIGH CONFLICT DIVORCE CASES

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## I. THE IMPACT ON CHILDREN OF HIGH CONFLICT DIVORCE

The world of the high conflict custody disputant is topsy-turvy. Diagnostic tools that are very effective when used with most people are ineffective in this world. Standard therapeutic processes are not only ineffective in this world, but typically become the source of more, rather than fewer problems in the future.

While we can find no formal definition of "high conflict divorce," most researchers endorse the notion that things are at their worst (1) when post-divorce conflicts last more than two years, (2) when the children become enmeshed in the parents' continued disputes, and (3) when the parents have poor coping strategies.<sup>1</sup>

### A. The Empirical Evidence

Cooperative co-parenting relationships are achieved by only one fourth of divorcing couples. Another quarter of divorcing couples have acrimonious relationships, and the remaining half experience various levels of conflict in their relationships.<sup>2</sup> Marital conflict has more negative effects on children's adjustment than has been demonstrated for any other researched variable (*i.e.*, gender, age, parent adjustment, custody disposition).

Emery concluded that poorer psychological adjustment is found in children in both intact and divorced families where levels of parent conflict are high.<sup>3</sup> A meta-analysis of ninety-two studies found that

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1. See David B. Doolittle & Robin Deutsch, *Children and High-Conflict Divorce: Theory, Research and Intervention*, in THE SCIENTIFIC BASIS OF CHILD CUSTODY DECISIONS 425 (Robert M. Galatzer-Levy & Louis Kraus eds., 1999).

2. See ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY* (1992).

3. See Robert E. Emery, *Interparental Conflict and the Children of Discord and*

children in high conflict intact families did more poorly than those in low conflict intact families and those in divorced families.<sup>4</sup> A better adjustment to divorce in children has been related to a low level of post-divorce conflict.<sup>5</sup> In the *Virginia Longitudinal Study of Divorce and Remarriage*, children who formed the maladaptive, aggressive-insecure cluster were from homes with high levels of conflict, negative affect, and poor conflict resolution styles that involved verbal or physical attacks, withdrawal rather than compromise, or assertion of power.<sup>6</sup>

In a study of boys and girls in either mother, father, or joint custody, witnessing hostility between parents led to aggressive behavior in children for several years following divorce.<sup>7</sup> Anxious, depressed, and withdrawn behavior began to appear in these children several years post-divorce. There was an inverse relationship between interparental hostility and parenting skills; hostility interfered with co-parenting ability.

One of the most important findings comes from a study of sole and joint custody families involved in chronic custody disputes for a period of one to four and a half years.<sup>8</sup> The children with more frequent access to both parents had more behavioral and emotional problems. Parents more often perceived these children to be depressed, withdrawn, and aggressive, and to have more somatic symptoms. The more overt the parental conflict, the more disturbed the children are likely to be. The more frequent the contact with both parents in distressed families (*i.e.*, families involved in ongoing custody and visitation disputes), the more disturbed the children were, even with low levels of parental aggression. Overall, girls with frequent access to both parents suffered more in emotional and behavioral adjustment, while boys with a greater frequency of access were frequently used and caught in the middle of

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*Divorce*, 92 PSYCHOL. BULL. 310 (1982).

4. See Paul R. Amato & Bruce Keith, *Parental Divorce and the Well-Being of Children: A Meta-Analysis*, 110 PSYCHOL. BULL. 26 (1991).

5. See generally E. Mavis Hetherington et al., *Effects of Divorce on Parents and Children*, in NON-TRADITIONAL FAMILIES 233 (Michael E. Lamb ed., 1982); see also JUDITH S. WALLERSTEIN & JOAN B. KELLY, *SURVIVING THE BREAK UP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE* (1980).

6. See E. Mavis Hetherington, *Coping with Family Transitions: Winners, Losers, and Survivors*, 60 CHILD DEV. 1 (1989).

7. See P.E. Walsh & A.L. Stolberg, *Parental and Environmental Determinants of Children's Behavioral, Affective and Cognitive Adjustment to Divorce*, 12 J. DIVORCE 265 (1989).

8. See Janet R. Johnston et al., *Ongoing Postdivorce Conflict: Effects on Children of Joint Custody and Frequent Access*, 59 AM. J. ORTHOPSYCHIATRY 576 (1989).

parental disputes, and suffered disruptions in social competence and school performance.

In a sample of infants and toddlers in maternal custody, pre-separation conflict between parents was linked to less regular visitation with the non-custodial father, and less regular visitation was related to developmental delays in language and gross motor skills.<sup>9</sup>

Stolberg and Bush studied the direct and indirect effects of background factors including marital hostility, custodial parental divorce adjustment, and child-rearing environmental factors on adaptive and maladaptive child adjustment.<sup>10</sup> In a path analysis, it was found that marital hostility directly (*i.e.*, unmediated by any of the other variables) predicted children's higher levels of internal and external psychopathology and lower levels of social skills.<sup>11</sup>

In another path analysis, parental conflict indirectly affected children's adjustment to divorce through disruptive effect on parenting skills.<sup>12</sup> Three conflict-engendered disruptions in parenting behavior (lax parenting, psychologically controlling parenting, and parental withdrawal from or rejection of the child) were believed to result from divorce and were found to mediate the relationship between parental conflict and children's divorce adjustment.<sup>13</sup> Of the three, rejection/withdrawal was most consistently associated with child adjustment problems.

The simultaneous (path) analysis of factors relevant to children's behavioral problems and emotional adjustment following divorce included parental conflict as one of the pre-separation factors under study.<sup>14</sup> One of the most important findings was the indirect effect of marital conflict through the mother-child relationship. That is, conflict before separation affected mothers' warmth and acceptance in their relationships with their children. Hypothesized reasons for this effect include changes in family roles that could discredit parental authority or

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9. See William F. Hodges et al., *Infant and Toddlers and Postdivorce Parental Access: An Initial Exploration*, 16 J. DIVORCE & REMARRIAGE 239 (1991). The sample measured children birth to 36 months old. See *id.*

10. See A.L. Stolberg & J.P. Bush, *A Path Analysis of Factors Predicting Children's Divorce Adjustment*, 14 J. CLINICAL CHILD PSYCHOL. 49 (1985).

11. See *id.*

12. See Robert Fauber et al., *A Mediational Model of the Impact of Marital Conflict on Adolescent Adjustment in Intact and Divorced Families: The Role of Disrupted Parenting*, 61 CHILD DEV. 1112 (1990).

13. See *id.*

14. See Jeane M. Tschann et al., *Conflict, Loss, Change and Parent-Child Relationships: Predicting Children's Adjustment During Divorce*, 13 J. DIVORCE 1 (1990).

result in children assuming parent roles or taking sides in loyalty conflicts.

Borrine, Handal, Brown, and Searight found that adolescent adjustment was related to the adolescent's perceptions of family conflict.<sup>15</sup> Lower levels of post-divorce conflict were associated with children's adaptive divorce adjustment<sup>16</sup> while higher levels of interparental conflict were related to more problematic parent-child relationships.<sup>17</sup> Among a variety of parenting practices evaluated in a prospective study of both divorced and intact families, parental conflict was the only variable that consistently predicted poorer adjustment in children across both time and gender.<sup>18</sup>

Hetherington recently analyzed five different perspectives on factors that account for children's post-divorce adjustment.<sup>19</sup> These include: (1) individual parent or child characteristics that render each more vulnerable to adverse outcomes; (2) single parent or stepparent family configurations as deviations from the optimal intact, biological parent family; (3) negative social and economic changes associated with divorce; (4) parental psychological problems; and (5) disruptions in family process and relationships, caused primarily by conflict. She concluded that factors in the first four perspectives are mediated by the effects of dysfunctional interactions in divorced families, including high conflict between parents.

Hoppe, based on his own summation of his empirical research (cited below) and vast clinical experience, lists six reasons why children are damaged by high conflict litigants.<sup>20</sup> Of special note is that all six of the categories have to do with the special personality characteristics these parents manifested in his research, not just with the fact that they were openly disputatious. (1) Their non-reality bound way of both modeling and giving advice on developing close interpersonal relationships frequently results in socially incompetent children. (2) Since they themselves were poorly helped with separation/individuation issues,

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15. See M. Lisa Borrine et al., *Family Conflict & Adolescent Adjustment in Intact, Divorced, and Blended Families*, 59 J. CONSULTING AND CLINICAL PSYCHOL. 753 (1991).

16. See Joseph H. Brown et al., *Family Functioning Factors Associated with the Adjustment of Children of Divorce*, 17 J. DIVORCE & REMARRIAGE 81 (1991).

17. See Rex Forehand et al., *A Short-Term Longitudinal Examination of Young Adolescent Functioning Following Divorce: The Role of the Family Factors*, 19 J. ABNORMAL CHILD PSYCHOL. 97 (1991).

18. See Daniel S. Shaw et al., *Parental Functioning and Children's Adjustment in Families of Divorce: A Prospective Study*, 21 J. ABNORMAL CHILD PSYCHOL. 119 (1993).

19. See E. Mavis Hetherington, *Coping with Family Transitions: Winners, Losers, and Survivors*, 60 CHILD DEV. 1 (1989).

20. Telephone Interview with Carl F. Hoppe (Aug. 27, 1999).

their ability to help their children with these same issues is compromised. (3) Because children view a high conflict parents' interpersonal decision making as capricious and unpredictable, they suffer heightened levels of anxiety in the real or psychological presence of these parents. (4) Even though the children are often cast in the roles of "judge" and "adult decision maker" by parents seeking their allegiance, the parents' narcissistic qualities actually shrink the children's sense of self-worth. (5) Parents' consistent aggressiveness models this behavior as somehow desirable. The children's aggressiveness is already heightened as a reaction to the loyalty conflicts they endure. (6) The murderous and physically vindictive behaviors of some of these litigants terrifies the children but paradoxically often leads to the children behaving similarly. The technical term "identification with the aggressor" describes a process in which a child, to master the fear of certain behavior, actually ends up "becoming" the aggressor. Other very negative outcomes have been detailed by Clawar and Rivlin<sup>21</sup> in their important work commissioned by the American Bar Association.

A very fine classification scheme by Garrity and Baris focuses on the spectrum of behaviors manifested by high conflict disputants.<sup>22</sup> Note, however, that there is no direct relationship between what parents do, and the impacts of such behaviors on specific children. A very low level of high conflict behavior can devastate vulnerable children, while higher levels have less noticeable effects on more resilient children (remembering, however, that so called sleeper-effects have been widely reported among the children of high conflict parents, *i.e.*, the negative effects are only noticed years later).

## B. What One Sees in the Clinician's World

We most frequently encounter the following reactions among the children of high conflict parents. (1) We call one group the "I'll exploit the rift in my parents' relationship" group. These children are typically at least 9 years of age. They exploit a (usually more alienated) parent, very directly: "If you expect me to come see you this weekend, you're going to have to buy me that catcher's mitt." (2) Another group is composed of those who end up aligned with one parent against the other. In addition to alienated children (discussed later), this group also

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21. See STANLEY S. CLAWAR & BRYNNE V. RIVLIN, *CHILDREN HELD HOSTAGE: DEALING WITH PROGRAMMED AND BRAINWASHED CHILDREN* (1991).

22. See CARLA B. GARRITY & MITCHELL A. BARIS, *CAUGHT IN THE MIDDLE: PROTECTING THE CHILDREN OF HIGH-CONFLICT DIVORCE* (1994).

includes the "I'll choose one over the other so I never have to agonize over all this decision-making again" children. (3) Another is composed of junior-league "diplomats," the "Leave-me-out-of-this; I-vote-for-both-of-you" (or "neither-of-you") children. These children often seem the most flexible and resilient of this population (but remember sleeper-effects). (4) Both Group 4 and the following group of children seem at highest risk. The first group—composed of parentified children—are the ones who present the following message to a parent: "It's too frightening to have a parent who is so impaired and self-absorbed that you cannot take care of me, so I'll take care of you so that maybe then you can take care of me." These children often become general "caretakers," and later in life choose needy, self-absorbed companions and then burn themselves out trying to care for and change them. (5) The last group is composed of "enmeshed" children. Their relationships with their parents become so intertwined (by a parent's confusing all of his or her own needs with those of the child) that such a child eventually sends this message: "I'm no longer sure if anything I feel or want or believe are my feelings or desires or attitudes or yours." Technically called "boundary diffusion," this is a serious condition.

### C. The Increasing Incidence of High Conflict Cases

The incidence is rising as society has moved from almost impossible-to-challenge rules of custody dispute resolution, *i.e.*, in the early days, a father's rights were absolute, followed later by the tender years doctrine, in which mothers automatically prevailed (especially with young children). As the criteria of resolution has shifted to a search for the "psychological parent"<sup>23</sup> and "best interests of the child" models, there is much more room to fight. Three other forces have, in our opinions, greatly increased the levels of hostile conflict. (1) More fathers now seek primary legal and/or physical custody. (2) Money is seen and used as a potent weapon. (3) The internet makes available an unbelievable amount of scientific and pseudo-scientific materials with which a disputant can be led to believe in, or attack, almost any position on anything.

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23. See generally JOSEPH GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* (1973).

## II. WHAT MAKES HIGH CONFLICT LITIGANTS RESISTANT TO USUAL TECHNIQUES

### A. High Conflict Litigants Are Statistically Anomalous

In a very important body of work, Carl Hoppe and various collaborators have demonstrated that parents caught up in high conflict child custody disputes have personality characteristics quite different from those shown by a variety of other statistically "average" groups.<sup>24</sup> The behavioral traits manifested by high conflict litigants, translated into non-technical terms, include all of the following: They are self-centered and narcissistic, harboring angry, self-righteous attitudes and exceedingly blaming orientations, and they have an inability to tolerate negative or even complex emotions. These traits, along with a need to make others experience the negative emotions they themselves feel, led one of Hoppe's subjects to say: "I don't get ulcers; I give them!" They have a propensity to "see" their own negative emotions as though these emotions are taking place within persons with whom they interact rather than within themselves. They are unable to recognize their own dependency. Their perceptions of others are marred by "tunnel vision." They only see what they want to see. This compromises their ability, when interacting with others, to see a "whole person." They have disturbed self esteem and often have married people with the same (or similar) sets of attributes. As if all of these traits were not bad enough, they are further characterized by statistically deviant and negative perceptions and reasoning processes. They lack insight into their own negative contributions at impasse points.

The possession of these negative traits interferes with, or stymies, their ability to access and maintain those personality resources crucial to compromise or even negotiation, that is, to multiple-perspective-taking-skills (the ability to experience and understand the feelings and

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24. See, e.g., Carl F. Hoppe, *Test Characteristics of Custody-Visitation Litigants: A Data-Based Description of Relationship Disorders*, in EMPIRICAL APPROACHES TO CHILD CUSTODY DETERMINATION (Stefan Podrygula ed., 1993); Carl F. Hoppe & Lynne M. Kenney, *Characteristics of Custody Litigants: Data from the Southern California Group* (1994) (unpublished manuscript, on file with author) (presented at a meeting of the American Psychological Association); Carl F. Hoppe & Lynne M. Kenney, *MMPI-2 and Rorschach Profiles of Custody Litigants: A Intercorrelational Study* (1995) (unpublished manuscript, on file with author) (presented at a meeting of the American Psychological Association); Carl F. Hoppe & Lynne M. Kenney, *Therapeutic Intervention in High-Conflict Divorce: Countertransference and the Horrible Decision* (1997) (unpublished manuscript, on file with author) (presented at a meeting of the American Psychological Association).



attitudes of others). These negative personality characteristics are far more likely to become manifest within interpersonal relationships that at one time were close and personal. Hence estranged lovers become the main triggers for all of them. Because they harbor the naive expectation the court will eventually find them "right," they get involved in ceaseless litigation.

If one were to assemble a list of all of the personality characteristics that would contribute to the success of standard individual (or marital or family) psychotherapy, the list would consist of the antitheses of every single trait shown by members of this group. That is, good prognoses with standard techniques hinge on the capacity for insight, the lack of a self-centered attitude, the ability to tolerate complex (and ambivalent) emotions, the ability to be aware of one's own shortcomings, a willingness to reduce underlying rage and anger, and solid reasoning processes. The list of traits a high conflict litigant brings to a psychotherapist's office is, in fact, a therapist's nightmare. Hoppe's work makes scientifically clear what has become clinically clear: standard clinical procedures are exceedingly unlikely to achieve positive results with them.

#### B. The Difficulty of Obtaining Unbiased Data

Another reason that special techniques and qualifications are needed to deal with high conflict litigants is because it is very difficult to get relevant and unbiased information from them. This is a daunting challenge in regard to even relatively amicable divorcing couples. The challenge is much greater with the high conflict groups. Their perceptions and allegations are not only deliberately falsified, but are frequently based on distorted thinking processes, projections, and denials. The problems for professionals go far beyond the need to be able to recognize the already difficult challenge of knowing when a client or patient is merely lying.

#### C. The Negative Role of the Legal System

The adversarial nature of the legal system plays right into the self-righteous, blaming, punishing, and ego-centric attitudes of high conflict litigants. Their traits are amplified by the fact that a fault model, in contradistinction to the conceptual thrust of divorce resolution, lies at the core of child custody resolution. Even though the legal system speaks of the "best interests" standard, a "parental fitness" paradigm is

operationally at the center of legal child custody dispute resolution, reinforcing the already rabid zeal of high conflict litigants to prove that their adversaries are "unfit."

### III. SPECIAL PROCEDURES NEEDED TO CREATE IMPROVEMENT IN HIGH CONFLICT CASES

This section spells out the techniques we believe to be essential in working with high conflict cases. The qualification needed is basically an awareness of these procedures and the often hidden roles played by the underlying forces they attempt to mitigate.

#### A. The Usual and Standard Clinical Methods Are Ineffectual in High Conflict Cases

It is not only Hoppe's research that sends a clear message about why most of the standard clinical techniques are ineffectual with high conflict custody litigants. So too does one's case load, especially if one does a fair share of work in the custody field. Here is a one-week random sample of some of the cases we were currently working with. They graphically demonstrate why standard approaches would be insufficient to bring progress. Our main point here is not only that standard clinical techniques are ineffectual in such cases, but also that true gains for the children almost always require active and continuing involvement of the court in the therapeutic process.

##### 1. *Case 1*

The parents were in the process of divorcing. No written custody order existed. The mother wanted to relocate; the father was vehemently opposed to this. A comprehensive evaluation indicated the mother should have primary physical custody. The evaluator believed the relocation would be in the best interests of the two children, ages 10 and 12. Because each parent believed the judge would interview the children, each began a campaign to win over the hearts and minds of the children on this issue. The children developed serious psychological distress. The father believed the stress was caused by the upcoming move. He believed the children were perfectly content with their current residences and time-share plan, which was liberal for both parents. (This seemed true.) Hence he believed the children suffered tension because that they had to move away. The mother, on the other hand,

believed the greater source of the children's stress was the father's intense and direct manipulating of their attitudes, thoughts and feelings. It was clear that the children were in agony over the role in which they were placed. What is a therapist to do? There is no solid body of research on the cost-benefit ratios of relocations (in spite of the excellent model relocation act of the American Academy of Matrimonial Lawyers<sup>25</sup>) nor is there any research on the advisability of making children feel responsible for custody decisions. A minority of polled experts, members of the Professional Academy of Custody Evaluators, believe children, even young ones, should be consulted. This is premised on the belief that anxiety is reduced when a person feels he or she has some degree of control over outcomes. However, there is at least some research evidence to the contrary. It may be that this position ("asking the children") co-creates alienation. Lampel found that children who aligned themselves with a particular parent were much more angry than non-aligned children, less well adjusted, and less able to conceptualize complex situations.<sup>26</sup> Lampel believes children frequently "choose a side" because their information processing skills are deficient in dealing with ambiguity and ambivalence. Once the choice is made, however, the child is stuck with it. When we put a child in a judge's role, even one who is not initially alienated against a parent, we are inviting the most vulnerable of the children caught in such conflicts to become part of an alienation scenario, and for all the worst reasons. Children will choose a "side" to escape ambiguity, not because they have really thought out if the choice is a good one. When we proceed to actually encourage such a child to choose between his parents, we are solidifying the child's (usually misbegotten) endorsements.

Our own research reinforces the majority belief.<sup>27</sup> When children of any age are asked about who they would rather live with, Mom or Dad, their consciously-sourced responses, (as opposed to those based on out-of-awareness or unconscious ones) agree with the conclusions of experienced evaluators somewhere (only) in the 35% to 65% range. Further, most evaluators believe it is unwise (because of the likelihood

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25. See American Academy of Matrimonial Lawyers, *Proposed Model Relocation Act*, 15 J. AM. ACAD. MATRIM. LAW. 1 (1998).

26. See Anita K. Lampel, *Children's Alignment with Parents in Highly Conflicted Custody Cases*, 34 FAM. & CONCILIATION CTS. REV. 229 (1996).

27. See BARRY BRICKLIN, *THE BRICKLIN PERCEPTUAL SCALES: CHILD PERCEPTION OF PARENT SERIES* (1984).

of current and future guilt) to ever ask children direct questions about who they favor as a primary custodian.

Returning to the case discussed, whatever one thinks about the merits or trauma of relocation, most evaluators believe children should not be put directly in a judge's role, however softly and lovingly the key questions are posed to them. *And the only way this would happen is if a judge were able to make it known that the children were out of the loop on this issue.* The children in this case rightly questioned what a therapist could do for them. Their belief was that their extreme distress was the choose-a-side role into which their parents put them. No matter which side each child would vote for, it was a Hobson's choice—they would, in their minds, have to betray one of their parents. Note well: there are ways (to be discussed) to elicit important data from children without asking them directly to choose between their parents.

## 2. Case 2

A 13-year old lad was being treated for starting fires and self mutilation. As therapy progressed, the mother—the legal and primary physical custodian—began to make all kinds of excuses as to why the boy did not need professional help. She came to believe that the father could use the situation against her, that he would seek to have custody reversed, because the child's problems became manifest during her watch. She, in fact, stopped the treatments. *The therapist could do nothing, unless a judge either could (creatively) assure her the continuation of therapy would not be used against her* or if an emergency petition for relief were granted to the father (who wanted the therapy to continue, and was willing to stipulate he would not now or ever use the situation to the mother's disadvantage). Below, we will tell why many parents are afraid to choose the "emergency relief" route.

## 3. Case 3

While treating an 11-year old boy, it had become obvious that he suffered from severe attention deficit disorder. A comprehensive assessment was definitely warranted. The parents had shared legal custody. Here is the conversation that took place between the father and the therapist as the father sought to understand the implications of the assessment. The father began:

"How much will the assessment cost?"

"It has to be very complete as it is time-consuming to do. It must cover psychological, behavioral and educational areas. Probably in the vicinity of \$1,000."

"After the evaluation, is it possible the child might need special tutoring?"

"It's possible."

"Might he even need a special school?"

"It's possible."

"Forget it."

*Without the court's aid, nothing will move forward in this matter.*

#### 4. Case 4

Here we have a standard alienation case. A 9-year old boy increasingly made statements to his father (our patient) that were obviously manipulative: "You deserted us; you don't deserve to be a father." "You drag us to court!" "You have no respect for me" (stated whenever the father would not rubber-stamp approval of whatever the child wanted to do). "You should only phone me when I want you to."

One complex issue here that is illustrated by the above four cases is that many parents are caught up in situations where no resolution is possible without a judge's assistance, and are fearful of initiating a court procedure. They worry about time, costs, and the belief they will be seen as devious manipulators, exaggerating problems in order to overturn an existing order. Things would be somewhat easier if the mental health professional could directly seek the court's assistance and spell out what is needed.

Further, the therapist in such cases must be tough, decisive, and hugely knowledgeable about the ploys and maneuverings of high conflict and parental alienation cases. There must be just one therapist, or at least only one who is in overall charge of a team. Individual therapy with this population not only does not help, it usually makes everything markedly worse. The mind-set of a therapist is to believe what his or her patients say. And, indeed, why not? There is no need in regular therapy, within a given time span, to establish the "truth." The therapist hopes to build a bridge to the patient so that the truth gradually emerges. Typical patients have no great reason to consciously deceive a therapist, while custody litigants do. The rugged, confrontative authoritarian "prove-it-to-me" attitude required in these cases would wreck a standard therapeutic relation (another reason why the court's involvement is needed). Suppose a weakish, fantasy-prone

non-athletic 16 year old patient says to a standard therapist soon after the two of them have begun working together, "I ran for a 100-yard touchdown today." The therapist is hardly going to say, "That sounds highly unlikely; you're going to have to prove that to me." But in a high conflict case, this attitude and emotional tone may indeed be relevant and necessary.

Another important article about dealing with such litigants is by Ward and Harvey.<sup>28</sup> Their approach has an Individualized Educational Plan (IEP) quality to it; it is a series of highly concrete, specific and detailed behaviors demanded of litigants engaged in high conflict tactics.

#### IV. SPECIALIZED MENTAL HEALTH PROFESSIONAL ROLES IN HIGH CONFLICT CASES

The one decisive head of a therapy team should establish overarching therapeutic goals, devise therapeutic strategies, and promote continuing communication and awareness among members of the team. This person would also have final say on the need to gather diagnostic information as the therapy progresses. The need to continually formulate diagnostic hypotheses is an integral part of all therapies, but nowhere is this more important than in high conflict/alienation cases in which the participants fabricate and "engineer" the data. So, too, are special monitoring strategies to be listed later. Unless there is only one therapist or at least one team leader, individual therapists end up being advocates, not therapists.

Some other specialized roles are enumerated in an important article by Kenney and Vigel.<sup>29</sup> A consultant to the court, helpful at low levels of conflict, is a mental health professional who develops a working relationship with the court and consults about procedural issues, family dynamics, psychological risk factors and makes referrals to other mental health experts. He or she would also evaluate the work of other mental health experts. An arbitrator serves as a binding decision maker without serving in the fact-finding and evaluative role. A mediator serves as a neutral person with the goal of assisting parties in reaching mutually acceptable agreements. A conciliation/divorce counselor is a profes-

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28. See Peggie Ward & J. Campbell Harvey, *Family Wars: The Alienation of Children*, THE CUSTODY NEWSL. (Professional Academy of Custody Evaluators, Inc., Doylestown, Pa.), 1993, at 2.

29. See Lynne M. Kenney & Diana Vigel, *A Lawyers's Guide to Therapeutic Intervention in Domestic Relations Court*, 28 ARIZ. ST. L.J. 648 (1996).

sional who aims to help couples navigate issues at the time of separation, dissolution, and divorce. The conciliation/divorce counselor does not play a formal role in the legal process. A therapeutic re-contact clinician is a professional experienced in child maltreatment, who assists families in re-establishing contact between caretakers, siblings, and children after some form of separation. A therapeutic reunification clinician is a professional with training and experience in child and adult maltreatment, child trauma, adult psychopathology, child psychopathy, offender dynamics, and family therapy. This person treats and manages the family during the reunification process. The aim is to move the family toward being able to follow some visitation plan as spelled out in a written court order. (This would be a legally-mandated response to a situation where a child has been bribed or manipulated to shun a particular parent. Sometimes, a child's fear of an alienated parent is so severe as to require special psychological phobia treatment.) A therapeutic supervised-visitation clinician supervises visits so as to insure the child's physical and emotional safety. This role may also involve therapeutic intervention, such as teaching a parent how to be a better parent. An emergency case stabilizer has the highest level of training and expertise of all of the previously defined therapeutic roles. In order to serve in this role, the clinician needs to be a good therapist, and thoroughly understand all the legal issues involved. He or she may operate under an emergency order from the court, and will advise the court regarding the necessity for further evaluation or treatment or other intervention.

#### V. TECHNIQUES NECESSARY TO MITIGATE THE PERILS OF THE MOST WIDELY USED DIAGNOSTIC TOOL

In any area where the persons involved see the stakes of victory versus defeat in extremes, and where lying, misrepresentation, and manipulations are common, the ability of the professional to obtain accurate information is paramount. The interview is undoubtedly the most widely used technique to gather information in child custody cases of all types.<sup>30</sup> The interview's accuracy in establishing correct diagnoses and clinical formulations ranges from unknown to dubious.<sup>31</sup> Not only

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30. See Marc J. Ackerman & Melissa C. Ackerman, *Custody Evaluation Practices: A Survey of Experienced Professionals (Revisited)*, 28 PROF. PSYCHOL.: RES. & PRAC. 137 (1997).

31. See PAUL EKMAN, *TELLING LIES* (1992). See also Paul Ekman & Maureen O'Sullivan, *Who Can Catch a Liar?*, 46 AM. PSYCHOL. 913 (1991); William M. Grove &

is it difficult to differentiate truth-telling from lying with interview data, but there is the further challenge of obtaining accurate information from children who may have been bribed, manipulated, frightened, or coerced into presenting verbal information to a professional. All of this is even more daunting if one is aware of the research summarized and integrated by Rossi on state dependent memory, learning and behavior.<sup>32</sup> In our writings, where we show this concept's relevance to obtaining accurate information, we label the area of interest state-of-arousal ("SOA") research.<sup>33</sup> The main premise is that stored information, which co-determines any given response, is maximally available and operative if an important aspect of a person's neurochemistry at the time of retrieval (or current action) is the same as it was at the time the experiences behind the stored information were initially encoded. An easy way to understand this is provided in research showing that subjects who learned poems while they were inebriated recalled, in the future, much more of what they had learned when they were again inebriated, as compared to what they could remember when sober. What this suggests is that much of the verbal and even behavioral information we obtain from people is in large part a product of some prevailing SOA. One immediate challenge is that many SOAs are limited to very narrow contexts and may occur infrequently. Parent-observed-by-professional may be a very narrow, infrequently occurring SOA. In this context, the parent may be gracious, calm and polite with his or her child. Mental health professionals are often looking to detect lying and deception. But the complexity actually lies in the fact that the parent, in this particular SOA, may indeed be genuinely acting these ways. The behavior will not look "phony" because it isn't. The real problem is that the graciousness may be limited to a very narrow cluster of SOAs. Hence the challenge, is not only (as it is usually seen) to detect lying and deception, it is also to detect truths that have little predictive value. (One way around this, exemplified in the manner in which two of our tests are designed to be used, is to elicit a wide range of SOAs from the respondent in regard to the areas in which information is sought.)

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Paul E. Meehl, *Comparative Efficiency of Informal (Subjective, Impressionistic) and Formal (Mechanical, Algorithmic) Prediction Procedures: The Clinical-Statistical Controversy*, 2 PSYCHOL. PUB. POL'Y & L. 293 (1996).

32. See EARNEST L. ROSSI, *THE PSYCHOBIOLOGY OF MIND-BODY HEALING* (1986); see also EARNEST L. ROSSI, *THE PSYCHOBIOLOGY OF MIND-BODY HEALING* (Rev. ed., 1993).

33. See BARRY BRICKLIN & GAIL ELLIOT, *ACCESS: A COMPREHENSIVE CUSTODY EVALUATION STANDARD SYSTEM 96* (1995).



Another peril of interview data is pinpointed in research that shows how key similarities in demographic variables can bias even professionals into assigning higher levels of credibility to informants than is the case when there is a low level of similarity.<sup>34</sup> Other research suggests this same thing happens when there are key similarities in how people process information.<sup>35</sup>

What special techniques are available for the professional who seeks accurate and relevant information from persons caught up in high conflict dispute? For one thing, our experiences have been the same as Ekman and O'Sullivan: the more one can find non-verbal and/or largely unconscious sources of information (in which the patient or client is not fully conscious of what he or she may be revealing), the better.<sup>36</sup> Although this cannot totally get around the challenge presented in the SOA research, non-verbal cues tend to yield far more accurate information than do verbal ones, especially when dealing with individuals who have much to gain from "bending" the truth. The scorable aspect of two of our key tools used to elicit information from children utilize non-verbal responses.<sup>37</sup> Non-verbal responses allow children to "tell without telling," greatly reducing loyalty conflicts. Non-verbal responses are far more indicative of a child's gut-level reactions than are verbal ones. They are far more likely to reflect a child's genuine interactions with a person than are verbal responses (unless the child has had such scant contact with a measured person that it is difficult to tell what one is measuring). Further, non-verbal responses circumvent the inadequate vocabularies of younger children. Children's vocabularies lack the richness and sensitivity needed to express complex emotional reactions. Children rarely use many words to describe their parents. When in fact they do use words beyond "great," "good," and "not so good," especially if the words are negative, they have almost always been manipulated into doing so. When a child, even an abused (young) child, makes blatantly negative comments about his or her parents, alienation ploys are usually lurking behind the scenes (or the child is actually upset about something trivial that happened recently, *i.e.*, the parent would not allow the child to see a certain movie).

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34. See Robert H. Woody, *Behavioral Science Criteria in Child Custody Determinations*, 3 J. MARRIAGE & FAM. COUNSELING 11 (1977).

35. See generally Barry Bricklin & Sophie G. Gottlieb, *The Prediction of Some Aspects of Marital Compatibility by Means of the Rorschach Test*, 35 PSYCHIATRIC Q. SUPP. 281 (1961).

36. See Eckman & O'Sullivan, *supra* note 31.

37. See BARRY BRICKLIN, *THE PERCEPTION-OF-RELATIONSHIPS TEST* (1989); see also BRICKLIN, *supra* note 27 (1984).

Since manipulation and/or parental alienation patterns are so frequently encountered in high conflict cases, it is imperative that professionals be aware of some of the diagnostic tools and procedures without which these patterns may escape detection. First, we would like to take a brief look at the parent alienation concept Richard Gardner has done so much to explicate.<sup>38</sup> We are especially concerned about recent articles and “shop-talk” among professionals which are dismissive of Gardner’s contributions. Try as we might, we cannot understand this negative commentary.

A scientific methodology can be described in four steps. (1) A concept is a way to understand and/or predict some aspect of the world. “Intelligence,” “depression,” and “good custody arrangements” are all concepts. (2) Empirical equivalents are what one looks at in the real sensory world that are manifestations of the concept. (3) Principles define the relations among concepts. Interest centers on concepts that can predict other concepts. For example, it is believed the concept of “intelligence” can predict the concept of “performance” in certain areas. (4) Validation takes place when the empirical equivalents of two concepts match what is predicted by the principle, *i.e.*, the empirical equivalents of intelligence match those of some aspect of achievement.

Gardner carefully defines the concept of a parent alienation syndrome (“PAS”). It occurs when a child’s anger, rejection and denigration of a parent is not warranted. It is caused by a combination of alienating strategies on the part of a parent and an extra “added-on” negative embellishment by the child. Hence, PAS is not just “manipulation” or “brainwashing.” If the piece added on by the child is not present, in Gardner’s view the situation would not call for the PAS label. Nor, of course, would a situation be labeled PAS where the child’s anger at a given parent is justified by the facts.<sup>39</sup>

As empirical equivalents, Gardner lists eight criteria one looks for in the real world that are manifestations of the concept.<sup>40</sup> They include the campaign of denigration, absurd explanations from the child to justify his or her position, a lack of ambivalence in the child, an insistence that the negative position is the child’s own idea, a reflexive support in every sphere for the alienating parent, an absence of guilt, an adoption of the alienating parent’s view on the whole matter, and a spread of animosity to the alienated parent’s extended family.

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38. See RICHARD A. GARDNER, *THE PARENTAL ALIENATION SYNDROME* (2d ed. 1998).

39. See *id.* at 76-77.

40. See *id.*

A principle predicts the relationships between PAS and various outcome states. Validation occurs when PAS in fact predicts the existence of such conditions as parentification (the child takes an "I must help" parent role toward the parent, rather than a "You-are-the-parent-you-take-care-of-me" role), enmeshment (the child ceases to be able to differentiate his or her own attitudes and feelings from those of the parent), and, of course, phobic avoidance of the target parent. PAS would also predict that standard clinical techniques will be relatively useless.

Would Gardner's contribution be more valued if he gave some statistics? Probably, but since the PAS concept adequately fulfills the criteria of a scientific approach, that is enough, in our eyes, to make it an important contribution. (Some argue PAS is not really a "syndrome." PAS meets the definition of "syndrome" in every dictionary we have consulted. And what difference would it make if we called it something else, since at an operational level a concept is only as good as its empirical equivalents, not its label. Others have argued that the phenomena covered by PAS could be accounted for by already existing concepts, *i.e.*, emotional problems, defiant behaviors, etc.)

We find Gardner immensely more convincing than his critics. As we see it, there is room for debate about the recommendation, sometimes made on the basis of PAS phenomena, to switch custody from the alienating to the target parent. In any event, no one (including Gardner) recommends this except in the most severe cases, where damage to the child is blatantly obvious in the existing custody plan (*i.e.*, one sees enmeshment and parentification trends, which are quite serious). The problem with switching custody is complex not only because the child will resist it tooth and nail, but also because of the frequently encountered parenting deficiencies in the target parent. Further, tremendous levels of training are required to teach even an "average" parent how to deal with an enmeshed or parentified child, let alone one who has deficiencies in parenting skills. A decision to reverse custody must be made on a case-by-case basis.

Our protocol, designed to elicit accurate information from children, targets criteria that differentiate between responses based on actual interactions a child has had with a parent, as opposed to those that are the result of things the child has been told, manipulated into believing, or are based on the child's desire to "save" a parent seen as impaired and in need of help. Consequently, it aims to pick up scenarios that include the PAS, but also cases in which the "add-on" piece by the child may be

absent. Our criteria are listed in our textbook<sup>41</sup> and in the manual of our comprehensive evaluation system.<sup>42</sup> They would include items such as the following: responses sound rehearsed, unasked-for information volunteered, responses given too quickly with no pause between question and response, child avoids eye-contact, child does not progressively relax as the evaluation unfolds, and consciously-sourced responses do not match unconsciously-sourced ones on two key tests. These techniques are not only useful for diagnostic purposes prior to a legal determination of a custody plan, but, as we will see, are essential in monitoring many plans, for example, cases in which the diagnostic evidence is unclear and/or where the psychological risks for the child of any plan are high.

It is essential that professionals at all levels of involvement be aware that the most commonly used observation evaluation format, each parent alone with each child, is inadequate in high conflict cases. The evaluator must be able to compare how a child behaves in the simultaneous presence of both parents, where he or she has the choice of which parent to approach for feelings of safety or for information, to behavior exhibited when he or she is alone with each parent. Further, a child who will not approach, say, his mother, when in the simultaneous presence of both parents but who is comfortable with her in the alone scenario, may suggest that the child is afraid to let his father view his warmth toward her.<sup>43</sup> However, it is also important to realize that under other circumstances a child may be afraid to act genuinely toward a parent, say, negatively, *except* when the other parent is present. It was these kinds of difficulties with all interview and observation data that led us in the late 1950s to begin research on developing techniques to elicit information in ways that could circumvent the limitations of consciously derived data and instead tap into gut-level reactions. Part of our comprehensive system does this. Data exist on more than four thousand examined cases. Validity, reliability and normative data are available.<sup>44</sup>

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41. See BARRY BRICKLIN, *THE CUSTODY EVALUATION HANDBOOK: RESEARCH-BASED SOLUTIONS AND APPLICATIONS* (1995).

42. See BRICKLIN & ELLIOT, *supra* note 33.

43. See BRICKLIN & ELLIOT, *supra* note 33; see also Barry Bricklin & Gail Elliot, *Time-Share Plans: Assessing the Unique Qualities of Specific Dyads*, in *DIVORCE AND CUSTODY: CONTEMPORARY DEVELOPMENTAL PSYCHOANALYTIC PERSPECTIVES* (Linda Gunsberg & Paul Hymowitz eds., forthcoming 2000).

44. See Barry Bricklin, *The Contribution of Psychological Tests to Custody-Relevant Evaluations*, in *THE SCIENTIFIC BASIS OF CHILD CUSTODY DECISIONS* 120 (Robert M. Galatzer-Levy & Louis Kraus eds., 1999); see also BARRY BRICKLIN & GAIL ELLIOT, *TEST MANUALS SUPPLEMENT* (1997).

While none of the techniques mentioned (or to be mentioned) are foolproof in eliciting accurate information, the more such methods are used, the better.

Should professionals believe they can depend on information derived from interviews, they should be aware of and use many of the methods summarized by Kuehnle.<sup>45</sup> While her book is about assessing allegations of sexual abuse, we believe her interview protocols are relevant for assessing just about anything.

A small sample of some of the language-based and other items that can influence the accuracy of interview data would include the following: the respondent's age; grammar construction; word choice; ability to articulate details; the role of repeated questions; the use of pronouns, negatives and referents; lack of auditory discrimination skills, and word knowledge; the amount of information a person does not realize he or she does not have; the role of all prior questionings and conversations on some topic; interviewer bias; and the roles of sociocultural and personality factors.<sup>46</sup> All of the child-directed interview questions in our comprehensive system start out open-ended, and only gradually become more focused and detailed, to avoid leading questions.<sup>47</sup>

Other research areas of promise that can upgrade the quality of interview data are criterion-based content analysis and statement validity analysis.<sup>48</sup> Both procedures aim to discover any factors about attained information that either decrease or increase its credibility. While none are silver bullets, the more professionals adhere to the conceptual principles embodied in them, the more accurate will be the gathered information.

## VI. THE NEED FOR TECHNIQUES AND RECOMMENDATIONS THAT ARE CUSTODY-RELEVANT

Information gathered in any custody-related assessment should be relevant to the issue of legal custody and/or the details of a time-share

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45. See KATHRYN KUEHNLE, *ASSESSING ALLEGATIONS OF CHILD SEXUAL ABUSE* (1996).

46. See *id.* at 128.

47. See BRICKLIN & ELLIOT, *supra* note 33.

48. See David C. Raskin & Phillip W. Esplin, *Assessment of Children's Statements of Sexual Abuse*, in *THE SUGGESTIBILITY OF CHILDREN'S MEMORIES* 153 (John Doris ed., 1991); Max Stellar & Toscha Boychuck, *Children as Witnesses in Sexual Abuse Cases: Investigative Interview and Assessment Techniques*, in *CHILDREN AS WITNESSES* 47 (Helen Dent & Rhona Flin eds., 1993); Udo Undeutsch, *Beurteilung der Glaubhaftigkeit von Aussagen*, in *HANDBUCH DER PSYCHOLOGIE, BAND II: FORENSISCHE PSYCHOLOGIE* GOETTINGEN: HOGREFE 26 (Udo Undeutsch ed., 1967).

plan (which could include the recommendation of no access to the child). Two frequent sources of misinformation occur when facts that become part of conclusionary thinking are either not relevant to a parent's ability to be a parent, or where the data are not relevant to the options that exist in real-life.

Regarding the former point, we draw attention to the admonition in the Uniform Marriage and Divorce Act, Section 402<sup>49</sup> that in regard to parental behaviors only those that could impact childcare skills, or, of course, the child, should be considered. To do otherwise makes the already bewilderingly complex task of prioritizing all of the data collected in the course of a comprehensive custody evaluation basically impossible. We developed, for those who appreciate formal models, a protocol that assists a professional to view the collected information from the vantage point of "impact on the child."<sup>50</sup> Two data-based tests, in addition to the observation format, are geared to understand the particular qualities of each specific parent-child dyad. They address time-share issues, but not those relevant to legal custody. The conceptual foundation assumes, as in quantum mechanics where particles come to "exist" only when they impact an observational mechanism, that there is no such thing as "parental behavior" until it impacts a particular child at a specific point in that child's development (except at extremes). To assume otherwise would be like trying to determine the gravitational attraction of the moon. It cannot be done. The moon's gravitational attraction exists only in relation to other bodies. This concept goes beyond an interactional model in which stable traits of a parent are assumed to interact with stable traits in a child. This approach allows the child to say to us: "Given my age, my developmental needs, the ways in which I process information and assign meaning to the world, Mom's/Dad's range of styles is a better match for me." Suppose, in the tests which reflect this concept, a seven year old boy experiences his father as "warm and supportive." Suppose an interview or a traditional test identifies the father as "emotionally cold." What is happening here? Since personality is layered, is the boy seeing something others cannot see? Or is he seeing something that in fact does not exist? But what if there is something in the child's behavior that elicits warmth from the father, and what if few others in the world can do this? Would it matter to the child? Maybe not. Our concepts and tools aim to understand these kinds of unique dyadic relationships.

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49. UNIF. MARRIAGE & DIVORCE ACT § 402 9AII U.L.A. 282 (1979).

50. See BRICKLIN, *supra* note 41; see also BRICKLIN & ELLIOT, *supra* note 33.

Along this same conceptual line, the data-based tests assist the professional to understand useful trade-offs. Picture a child with mild learning disabilities who desperately requires pre-organized and already-prioritized verbal communications in order to function adequately (and hence develop good self-esteem). A parent with these kinds of skills but who is not as good in providing emotional warmth may offer, for this child, a life-saving trade-off. This very same trade-off would be of much less value to a child who is already (internally) organized. This child would profit more from exposure to the heightened warmth. An anxious child may profit greatly from exposure to the parent who can best calm him or her down, even though this parent may not be as good at modeling competency skills, while for a non-anxious child this could be a trade-off of limited value.

Again, our point is that in all custody disputes, but especially in high conflict cases, evaluation data should focus not only on what parents say and do, but on the impacts of parental reactions on a specific child at a particular time-span in that child's development. The data should also address the issue of useful versus toxic trade-offs.

The second class of evaluator misinformation occurs when clinical recommendations are non-implementable. We call this 'mis'information because under the banner of trying to appear helpful, no real-life help is given. We encounter two categories. One is where custody recommendations are based solely (or even primarily) on a child's developmental needs, without any attempt to match these needs to the degree of cooperation that exists between the parents or to how well a parent is able to comprehend and respond to a specific child's needs, *i.e.*, a parent's attunement to the ways in which the child takes in, assimilates, remembers, and retrieves offered communications. An example of misinformation would be one author's recommendation of a custody plan based on the developmental needs of a child up to about one year of age. The child is to live with the mother and the father is to visit her home three or four times a week, at which times he takes over parenting responsibilities.<sup>51</sup> We are not sure from whence this author gets his referrals, but if we found among our cases the degree of cooperation required for this kind of plan to work, we certainly would not be writing an article like this one.

Also in the category of "not realistically implementable" are diagnostic categorizations and subsequent clinical recommendations that

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51. See PHILIP M. STAHL, CONDUCTING CHILD CUSTODY EVALUATIONS: A COMPREHENSIVE GUIDE 33 (1994).

could take years to bear fruit, *i.e.*, “long term psychotherapy.” Not that we are against these suggestions. But in high conflict cases, where at least some (any!) results are needed immediately, evaluation-derived recommendations should include any that are amenable to either a parent’s will-power, short-term teaching or a court order with a built-in threat of sanctions for non-compliance. Our system, for example, avoids the mention (whenever possible) of formal diagnostic categories (*i.e.*, “depressive disorder,” “obsessive compulsive disorder,” etc.) and instead concentrates on measuring categories directly relevant to childcare that are immediately amenable to short-term implementation. These would include the following: knowledge of the child’s interpersonal relationships and school needs, knowledge of diverse childcare strategies, knowledge of the necessity for speaking in terms understandable to a child, ability to acknowledge a child’s feelings, and knowledge of a child’s preferred communication methods. In other words, while our tools and tests certainly diagnose and address serious psychopathology, they also reveal a rather large number of childcare categories that can be quickly upgraded.

## VII. CAN MEDIATION HELP?

The degree to which mediation can help custody disputants reach agreed-upon settlements is not clear even in low conflict cases, especially when the mediation is mandatory rather than voluntary. For one thing, it is difficult to tell whether the ability and willingness to negotiate settlements have to do with the mediation process itself or rather with the preexisting personalities of the participants.<sup>52</sup> A professional who believes mediation can help in high conflict cases should be aware of research targeting the ability to predict when mediation is most likely to work. Kressel, Jaffee, Tuchman, Watson, and Deutsch believe the prognosis for mediation is positive when both participants are clear about wanting a divorce, their past communication patterns have been frequent and open, and the degree of conflict is relatively low.<sup>53</sup>

The most recent authors to present research on this issue note that prognoses hinge on five dimensions of the couple’s situation: the clarity of each person’s commitment to divorce, the degree to which they have

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

53. See Kenneth Kressel et al., *Typology of Divorcing Couples: Implication, Mediation and the Divorce Process*, 19 FAM. PROCESS 210 (1980).



already dragged each other to court, the level of interparental hostility, their ability and willingness to communicate openly and clearly, and the nature of their commitment to the involved children.<sup>54</sup> Other factors that argue for mediation include each parent's having respect for the child-rearing skills of the other and an absence of intense anger and an absence of major psychopathology. Parents who have major disagreements about the children are usually poor candidates for mediation. In high conflict cases, binding arbitration via a guardian ad litem is a better bet.

### VIII. THE NEED FOR CREATIVE, NON-STANDARD TECHNIQUES

The post-divorce world is a volatile one. No wonder it is difficult for mental health professionals to develop formal models that are robust enough to be able to predict all possible important future events in families from this world. While the test-retest consistency of the core tools in ACCESS is quite good,<sup>55</sup> the entrance into a family system of any of the following can potentially destabilize the system: a new stepparent, live-in companion, step-sibling, school setting, relocation, money problems, etc. We have elsewhere addressed the so-called "environment" issue, which essentially requires that any scientific predictive procedure needs to specify the (possibly limited) context or environments in which its predictions will be true.<sup>56</sup> Even in physics, no predictive system works in every environment, *i.e.*, the world of small particles and that of objects moving at incredible speeds, etc. This restriction, along with the operation of errors of measurement and the plain lack of a formal model that can predict the obviously multivariate complexities of a destabilized family interacting with an array of external forces, brings us to the importance of monitoring plans in high conflict cases.

When predictions in high-risk situations are difficult to make, the need for built-in safety measures runs especially high. Even if our predictive instruments were perfect, we would still require creative, relatively non-obtrusive monitoring strategies, due to the very nature of the variables we need to predict. Many of them (*i.e.*, personality traits) are the results of infrequent SOAs, and could therefore be rarely

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54. See Cohen, *supra* note 52, at 334-36.

55. See BRICKLIN & ELLIOT, *supra* note 33.

56. See Barry Bricklin & Patricia M. Bricklin, *Custody Data as Decision-Theory Information: Evaluating a Psychological Contribution by Its Value to a Decision-Maker*, 6 CLINICAL PSYCHOL.: SCIENCE & PRAC. 339 (1999).

manifested although of possibly huge importance when they are accessed. And the social sciences, more so than is the case with any other branch of science, has little way to know ahead of time the huge range of environmental stressors any given individual is likely to encounter.

There are five features we believe a good monitoring plan should have. First, most of them may need to be performed randomly and unannounced beforehand. Second, the monitoring plan may require the services of a variety of different professionals. For example, in one case there were suspicions that a mother was not only physically inappropriate with her children, but was giving them high levels of an over-the-counter medication to sedate them (when she did not feel like dealing with normal childhood exuberance). Random visits by a pediatric nurse were built into the monitoring plan. Both parents paid for these services. Which brings us to the third point. We get both parents to see that the plan protects each of them. In this case, the mother, who vehemently denied the allegations, was shown that the way things were going, she had more to gain from the implementation of this plan than the father, since it would, hopefully prove her assertions to be correct and the suspicions unfounded. Fourth, the monitoring plan often will require the power of the court to implement. Sanctions should be spelled out in advance. Last, and absolutely not least, non-obtrusive, disguised and non-verbal techniques are needed to elicit information from the child as to his or her ongoing adjustment to, and relationship with, each parent and within each family subsystem (*i.e.*, alone with a parent; in the simultaneous presence of both; with extended family, etc.). The child must be spared loyalty conflicts, engulfment in alienation ploys, and/or being placed in "spy" or messenger roles. The Perception-of-Relationships Test (PORT), so far tested on close to 2,000 cases, has shown promise in generating helpful information from children.<sup>57</sup> It, and other techniques of its type, are needed in monitoring plans with high conflict custody disputants. The techniques need to be relatively disguised in intention, *i.e.*, elicit a non-verbal response, never force the child to directly choose between his or her parents and never lead to the child's being placed in any loyalty-conflict scenarios, *i.e.*, spying, carrying messages, etc.

Recently we have experimented with two subtle therapeutically oriented techniques for use in high conflict cases. One is aimed at directly reducing the anger between the disputants, and the other at

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57. See generally BRICKLIN, *supra* note 37.

redirecting the focus of any need to fight away from the child and the courtroom to areas where much less damage can be done to the child. The latter technique is easier to explain, though it is probably not as effective a behavior changer as is the former procedure.

In order to redirect battling litigants away from their child and the courtroom, we make known to a client all the newer mental health options that now exist (detailed earlier in this article, *i.e.*, re-unification expert, etc.), to help him or her discover those options that can favor his or her goals. This is admittedly a "tough sell," since most high conflict litigants have a hard time distinguishing between legitimate goals (*i.e.*, to protect a child) and the driving need to prove the other parent wrong. But when we use a so-called "match and pace" therapeutic maneuver ("match," that is, join them at the level of intention, *i.e.*, "Let's save this child from that other parent," and then "pace," that is, lead them to do this in a way that can really work without harm to the child) we are often successful. The so-called psychological "law of requisite variety" (the more legitimate choices you are able to offer someone, the more likely he or she is to choose at least one of them), can be quite effective.

Another experimental procedure, based on the collected research of Moshe Feldenkrais and Paul Ekman, makes use of the motor system (especially facial and vocal muscles) to bring subtle and gradual changes in anger levels. This, again, must be done in a subtle, yet of course honest way. High conflict litigants are rarely open to a direct "Let-us-help-you-reduce-your-anger" approach, since they believe the anger they direct at the other parent is totally justified.

In our technique, the procedures are presented to them as able to increase the creativity with which they will be able to deal with the other parent and his or her attorney, as well as any involved judge.<sup>58</sup> But as they practice the methods, their levels of anger will also decrease. This follows from the fact that the way their creativity is increased simultaneously decreases existing levels of anger. The "messages" or information carried by various parts of a person's anatomic-skeletal, muscle-group systems de-access the fight-flight SOA which prevails whenever he or she is mentally and/or physically dealing with the other parent in aggressive ways.<sup>59</sup>

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58. See Barry Bricklin & Gail Elliot, *Therapeutic and Monitoring Strategies in High Conflict Custody and Visitation Disputes Using New Motor Therapy Strategies to Increase Cooperation* (1998) (unpublished manuscript, on file with author) (presented at a meeting of the American Psychological Association).

59. See BRICKLIN, *supra* note 41, at 169-71.

## IX. OUR MEDIATION PROTOCOL

Should mediation be attempted, we believe it should embrace several principles. First, the participants should understand that the process requires that each participant sign a special contract, whether the mediation/binding arbitration is court-ordered or not. Second, they must accept that it is characterized by its long-term nature, whether the visits be frequent or on an as-needed basis. This ongoing contact is essential. The professional must have expertise in child development and education, as well as family processes and therapy and mediation techniques. The professional can thereby help assess the likely effects on the child of alternative proposed parental plans or actions. Parents can more easily accept any decision which is presented with supporting evidence (research, principles of child development and education, etc.) by someone who can be perceived as unbiased and well-trained.

Over time and with continued contact with the mediator, trust in this system increases. That is, a history of positive (or at least neutral) outcomes allows parents to realize the system can work and that the dire consequences predicted by one or the other did not materialize.

An especially important feature of our approach and one that is made known to the participants, is that the decision-tree models we use to solve childcare problems are always based on pre-existing models (for handling a wide variety of typical situations like summer vacations, major holidays, holiday weekends, etc.) This reduces parents' fears that a mediator's proposed solutions are being generated on the spot and therefore might favor one parent over the other.

Additionally, the mediator models effective non-adversarial communication skills. All of these factors can lead to reduced conflict levels. Our non-adversarial method is detailed in a textbook.<sup>60</sup>

Careful record keeping and written communications by the professional minimize the potential for misunderstandings, selective memory losses, and blatant denials. Everything is on the record and can be called up later as a reminder of what occurred in the past.

## X. QUALIFICATIONS OF JUDGES, ATTORNEYS, AND MENTAL HEALTH PROFESSIONALS TO WORK WITH HIGH CONFLICT CASES

Two blue ribbon committees recommended that mental health professionals who would be involved with even average, let alone high

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60. See BRICKLIN, *supra* note 41, at 165-76.

conflict, custody disputants be knowledgeable in all of the following areas: child development; functional and dysfunctional family dynamics; child psychopathology; adult psychopathology; effective parenting techniques and behaviors; the effects of divorce and remarriage on families; applicable methods of psychological assessment; applicable state statutes and common law; typical custody and visitation arrangements; ethical standards in child custody evaluations; life-span developmental psychology; mental retardation and developmental disabilities, child psychotherapy and behavior change; and parent, family, and school intervention.<sup>61</sup>

Furthermore, some counties in some states (*i.e.*, Arizona) are or have developed extensive, specific and high-aiming guidelines for any mental health professional who would serve in a forensic capacity, for example, in criminal court (the most stringent requirements) and in family court (a bit less so).

Our concern, which we have tried here to document, is that neither of the above two approaches may prove optimal in high conflict cases, because of how specialized the techniques needed have become. Both the perils of getting accurate information, and the remedial techniques needed, are frequently quite different from those that would serve in other forensic areas.

Hence, it is our belief that the qualifications needed by judges, attorneys and mental health professionals, are an awareness of the issues raised in this article and its companion articles.

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61. See HARRY L. MUNSINGER & KEVIN W. KARLSON, UNIFORM CHILD CUSTODY EVALUATION SYSTEM 3 (1994).