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BUILDING MULTIDISCIPLINARY PROFESSIONAL PARTNERSHIPS WITH THE COURT ON BEHALF OF HIGH-CONFLICT DIVORCING FAMILIES AND THEIR CHILDREN: WHO NEEDS WHAT KIND OF HELP?

Janet R. Johnston, Ph.D.*

I. HISTORICAL BACKGROUND

During the last third of the twentieth century, the United States led many other western countries in radical legal changes that aimed to make the process of marital dissolution less acrimonious and the outcomes of divorce both gender neutral and more protective of the interests of children.1 Throughout the United States, coincident with rapidly rising rates of divorce (to a record high of about one in two marriages)2 between 1969 and 1985, “no fault” divorce laws replaced the previous onerous ones that required divorcing parties to establish who had violated the marital contract. Alimony and marital property rules changed dramatically around the country, ensuring a more equitable distribution of family assets between men and women. During the same period, the “tender years doctrine” dictating that the custody of young children should normally go to the mother was replaced with the “best interests of the child” standard for determining which parent should be legally and physically responsible for the care of children.

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following divorce. Joint custody preferences or presumptions were subsequently introduced in many states.\textsuperscript{3} During the 1980s, California led the country in these and other legal reforms, most notable of which was the introduction of custody mediation to facilitate the private resolution of disputes. During the 1990s, parenting education swept the country. This involved efforts to empower divorcing families by providing them with information on the process of divorce and the needs of their children to have frequent, continuing and conflict-free access to both parents.

Despite these radical historical changes, we are currently confronted with distressing levels of frustration, anger, alienation, and cynicism from divorcing parents and children about their experience with family courts and about the professionals who work in this field.\textsuperscript{4} In spite of the widespread provision of mediation services, approximately one fourth to one third of divorcing couples report high degrees of hostility and discord over the daily care of their children many years after the separation.\textsuperscript{5} Only about one tenth of all separating couples with children resort to extended litigation, court hearings, and trial.\textsuperscript{6} However, this relatively small sub-group of the divorcing population consumes a disproportionate share of the court's precious resources, with fairly dismal outcomes using the traditional adversarial legal system.\textsuperscript{7} Moreover, this sub-group tends to engage in protracted and repeated litigation. Outside the courts, the unremitting hostility and chaos can shadow the entire growing-up years of the children. This means that an accumulating sub-group of children are being caught up in these family situations. In fact, over the span of the past two decades

\textsuperscript{3} See Marsha Kline Pruett & Kathy Hoganbruen, Joint Custody and Shared Parenting, 7 CHILD & ADOLESCENT PSYCHIATRIC CLINICS N. AM. 273 (1998).


\textsuperscript{5} See MACCBOY & MNOOKIN, supra note 1, at 137-41. See also JUDITH S. WALLERSTEIN & JOAN B. KELLY, SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE 206-34 (1980).

\textsuperscript{6} See MACCBOY & MNOOKIN, supra note 1, at 137. These data are from California, which has been in the forefront of divorce reform, and where mediation has been mandated state-wide for custody and visitation matters since 1981. See id.

\textsuperscript{7} See generally Mary Duryee, Mandatory Court Mediation: Demographic Summary and Consumer Evaluation of One Court Service, 30 FAM. & CONCILIATION CTS. REV. 260 (1992). Those who fail to settle in mediation use more than twice the hours of family court service staff. See id. They also presumably consume the major portion of judges' time. See id.
in the U.S., it has been estimated that a critical mass of highly-conflicted divorcing families (with 2 million children) are passing in and out of a revolving court door.\(^8\)

**II. Salient Features of High-Conflict Litigating Families**

The family environments of chronic custody disputes are characterized by the parents' mutual distrust, fear, anger, projection of blame onto the ex-partner, refusal to cooperate and communicate, allegations of abuse, and sabotage of each other's parenting and time with the child.\(^9\) The extent to which parents' negative views and behaviors are realistic responses to the other parent's violent, neglectful, or substance-abusing behavior is difficult to determine. Some of the children involved clearly meet the criteria for an abused child, justifying their protection by the state. More often, when such allegations are investigated by child protective services, they are frequently dismissed by overworked staff as being either indicators of interparental spite, not able to be proven, or insufficiently serious to require state intervention. Clinical histories indicate that many of these families were dysfunctional long before the couple separated, and their children have been chronically subjected to ongoing marital conflict and the erratic, emotionally abusive care of personality-disordered and emotionally troubled parents. Studies indicate that domestic violence of varying severity is a feature of about three fourths of these families; concerns about child molestation and abuse are a feature of a substantial minority of the families (in about one tenth and three tenths, respectively).\(^{10}\)


9. Interestingly, no demographic descriptors (income, education, ethnicity) distinguish the high-conflict group from the large majority of divorcing families. See Maccoby & Mnookin, supra note 1, at 237-45. Although parents of younger children and those with larger families tend to experience more conflict, no other characteristics of family composition appear to predict who will be in high conflict. See id. Instead, it is pervasive distrust about the other parent's ability to care for their child adequately and discrepant perspectives about parenting practices that generally typify the couples who are disputatious both inside and outside the court. See Charlene E. Depner et al., Building a Uniform Statistical Reporting System: A Snapshot of California Family Court Services, 30 Fam. & Conciliation Cts. Rev. 185 (1992).

More commonly, however, the extremely negative views parents have of one another are exaggerated and emanate from one spouse’s humiliation at the rejection inherent in the divorce itself. The couple’s enmeshment derives from their inability to separate and realistically grieve the loss of the marriage relationship. Traumatic separations, by which a divorcing partner’s sense of trust and shared reality has been precipitously betrayed and shattered, have resulted in negatively revised views of one another that are often unwittingly confirmed by others within their split social world of new partners, kin and even professionals.11 Unable to settle their disputes with one another, these vulnerable people are then forced to enter the traditional legal system, which greatly increases their anxiety and defensiveness, and further undermines their parental competence. In the spirit of an adversarial culture, divorcing couples seek vindication through litigation by polarizing their respective positions and blaming the other parent.

In effect, the task of establishing fault in marital dissolution has not been abolished; rather, it has shifted from the divorce to the custody arena. To some extent, the battles fought over children in separating families are a reflection of custody laws that are the product of the larger societal war between men and women at this historical juncture. The problem is that children have neither a legal nor a political voice in the family battles and the larger gender wars that are fought in their name.12 Yet they are the ones most adversely impacted.

III. THE NEED FOR INTERDISCIPLINARY PARTNERSHIPS WITH THE COURT

The beginning of the twenty-first century finds the legal and mental health communities struggling to deepen and refine a truly revolutionary approach to helping families with separation and divorce, with the realization that it must involve a paradigm shift from an adversarial to a collaborative approach in family law. This collaborative approach suggests a fundamental redefinition of the role of family court, and it requires new multi-disciplinary partnerships between the courts and attorneys and mediators and mental health professionals, in order to arrive at viable solutions.13 Having worked with and researched this

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13. This approach is compatible with that of therapeutic jurisprudence which seeks to apply social science to examine the impact of laws on the mental and physical health of the people they affect and to propose changes in laws and procedures accordingly.
population of embattled divorce for two decades, it is our thesis that the outcome of the divorce has very much to do with how the stormy waters of the divorce transition are navigated, and what kind of help or hindrance these vulnerable persons get from others during the process.\textsuperscript{14} In particular, family courts, attorneys, custody evaluators, counselors, and therapists can act in ways that inadvertently contribute to family impasses; whereas, by intervening in more effective ways, these same helping professionals can play a critical role in resolving custody disputes.

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

IV. RETHINKING THE ROLE OF FAMILY COURT IN DIVORCE MATTERS

There are a number of assumptions about the traditional role of family courts in conflicted custody matters that need to be questioned. First, family courts have primarily been used to make decisions for divorcing couples who cannot make their own. This assumes that the court has greater wisdom or some special knowledge about what is best for children. Second, family courts which make repeated decisions for some highly conflicted families have been induced to act \textit{in loco parentis}. This assumes the court has the capacity to oversee the day-to-day care of children. Third, the custody litigation process has customarily determined which parent is the better parent, which implies that the other parent is of secondary, inferior status.\textsuperscript{15} This assumes that it is


\textsuperscript{15} See Robert L. McWhinney, \textit{The “Winner-Loser Syndrome”: Changing Fashions}
appropriate for separating parents to be publicly scrutinized and held to a higher standard of accountability than those in non-disputing divorces and intact families. Fourth, judges have been asked to pass judgment on family dilemmas that other professionals and the community-at-large have failed to resolve: the cases attorneys have failed to negotiate, or that mediators have failed to settle, and the people that counselors and therapists have failed to help. This assumes that judges are equipped to resolve the most difficult and complex of all family problems. In the face of this onerous burden, it should be no surprise that family court assignments for judges are unpopular, often avoided, and usually staffed by rotating assignments to prevent burn-out.

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

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

Note that this reframing of the court’s primary function entails a proactive rather than a reactive stance. To accomplish the task, family court procedures will need to be revised to allow for more judicial case-

\[\text{in the Determination of Child "Custody", 33 FAM. & CONCILIATION CTs. REV. 297 (1995).}\]
\[\text{16. The standard for determining parental incompetence in divorcing families should be the same as that determining abuse and neglect in dependency court.}\]
\[\text{17. See Leslie E. Shear, From Competition to Complementarity: Legal Issues and Their Clinical Implications in Custody, 7 CHILD & ADOLESCENT PSYCHIATRIC CLINICS N. AM. 311 (1998); see also Judith S. Wallerstein, Tailoring the Intervention to the Child in the Separating and Divorced Family, 29 FAM. & CONCILIATION CTs. REV. 448 (1991). This approach is also consistent with the emphasis upon developing a parenting plan, rather than deciding who is the better parent. See Robert Tompkins, Parenting Plans: A Concept Whose Time Has Come, 33 FAM. & CONCILIATION CTs. REV. 286 (1995).}\]
This can be a range of possibilities including the following: direct calendaring of cases to help ensure that one judge follows a case over time; judicial initiation of status and settlement conferences with options for telephone conferencing to expedite the decision-making process; judicial authority to require mental health and legal professionals to work collaboratively, including having disputing experts confer prior to giving their testimony; and a timely judicial review of progress whenever a succession of temporary orders is needed to settle the case.

It is essential that courts be experienced by families as supportive—rather than confusing or divisive, as is too often the case—and that provisions be made for communication between courts and consolidating actions arising in different courts. The development of unified family courts is the principal way of achieving this goal. Further, to build a cadre of effective bench officers, the special expertise of family judges needs to be acknowledged by providing specialized training opportunities and incentives for career advancement within family court. These and many other reforms are necessary if the court is to provide leadership in a collaborative approach. Even so, the court, by itself, cannot provide answers to what a divorcing family needs. In partnership with the court, each of the helping professions must reorient its focus to these same primary goals.

V. THE ROLE OF ATTORNEYS IN ESCALATING CONFLICT AND THE NEED FOR SHIFTING ROLES

Traditionally, the family law attorney’s role has been to initiate action from a purely partisan perspective, to strategically maneuver the presentation of evidence and evoke statutes and case law in order to win the client’s case. Attorneys contribute to rather than resolve disputes when they are wedded solely to their advocacy role within an ad-


19. The numerous reform efforts around the United States and other countries to produce unified family courts are intended to produce a court system that is more rational and responsive to family problems. See, e.g., Judith S. Kaye & Jonathan Lippman, New York State Unified Court System: Family Justice Program, 33 Fam. & Conciliation Cts. Rev. 144 (1998).

versarial judicial system. Advising the client not to talk to the other spouse, making extreme demands to increase the bargaining advantage, and filing motions that characterize the other parent in a negative light, are all typical examples. Needing to show evidence of neglect, abuse, physical violence, or emotional or mental incompetence in order to win their client’s case, attorneys produce emotionally charged documents that become a public record of charges and counter-charges, citing—often out of context—the unhappy incidents and separation-engendered desperate behaviors of the emotionally vulnerable parties. The consequent public shame, guilt and fury at being so one-sidedly represented motivates the other party’s compelling need to set the record straight in costly litigation. Invariably, attorneys cite their advocacy role to rationalize and justify their intractable adversarial stance. A typical hypothetical example:

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

The new collaborative approach by lawyers assumes that clients are profoundly interested in the effect of one parent’s “victory” on the lives of their children, and it assumes a need for an ongoing, working relationship with the other spouse/parent. From this collaborative perspective, the family attorney’s role involves counseling each client fully on their rights and responsibilities as a parent and as a co-parent, and exploring deeply the ramifications of all of their actions on the

welfare of the children. Attorneys can then responsibly and ethically advocate their clients' more clearly defined and deeply explored interests. When both attorneys pursue these goals in concert, creative win-win solutions are more likely to be generated.

Further, attorneys play a vital role in guarding against the dangers inherent in a collaborative approach that could become collusive. There is a potential threat for new collaborative models of alternative dispute resolution to compromise clients' civil liberties by subjecting families to unwarranted intrusiveness by outside agencies, including the vagaries and biases of an over-zealous mental health approach. Family attorneys are needed to draft creative but unambiguous stipulations and court orders with sufficient detail to, first, protect their client’s civil rights, and second, to provide the kinds of external structures and constraints that allow families fragmented by ongoing conflict to proceed with some semblance of order and safety.

VI. THE ROLE OF MENTAL HEALTH COUNSELORS IN FUELING CONFLICT AND THE NEED FOR SHIFTING ROLES

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

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

23. See JOHNSTON & CAMPBELL, supra note 11, at 24-51.
extremely defensive and then irate about the psychiatrist's treatment of his child without his consent. He wrote belligerent letters to the psychiatrist, threatening a malpractice suit. The psychiatrist then testified against the father before the judge and reported the father's threats as evidence in his testimony.

Traditionally, mental health professionals who undertake therapy with parents and children pursue their investigation into the emotional lives of their clients in isolation from the legal decision-making process. Under the rationale of client confidentiality, they work behind closed doors, too often oblivious to the fact that divorcing families are further fragmented by competing demands from professionals with access to different information, different perspectives and different agendas. This has resulted in situations, for example, where a child who refuses to visit a father is viewed by the mother's mental health consultant as having been "sexually molested" and by the father's therapist as a child who is suffering from "parent alienation syndrome." Attempting any intervention to effect a reconciliation of such a child with the father is doomed, because the parents are intractably wedded to the views of their supportive advocates, and they will wage court battles or even abduct their children with absolute moral conviction of their rectitude.24

Contrary to popular belief, parents in entrenched custody disputes are not characteristically aggressive, hostile, or spiteful people. Psychological testing of parents in high-conflict divorce and custody evaluations indicates that, as a group, these people are interpersonally sensitive and hypervigilant to criticism. They often lack a firm approach to solving problems, reason idiosyncratically, and tend to cognitively simplify their world.25 This makes them especially vulnerable to conflicting views of professionals and a legal system that polarizes positions around blame and fault-finding. The worst possible scenarios occur in those high-profile cases where the parents' mental


health and legal professionals squabble among themselves about the case, playing out the parental dispute in a community or court arena.

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

VII. HOW CUSTODY EVALUATORS CAN HELP OR HINDER THE PROCESS

Custody evaluations are a source of inordinate stress and shame for many vulnerable parents. Despite the fact that during the past decade, a number of professional organizations have developed standards of practice for custody evaluations, further thought needs to be given to how they are conducted. Within a litigation-conscious arena, evaluators may become more focused upon establishing their technical expertise and protecting their own professional reputations than upon the needs of the family. This can result in inappropriately exhaustive and


27. In fact, as forensic experts, custody evaluators are primarily servants of the court. See generally Jonathan W. Gould, Scientifically Crafted Child Custody Evaluations, 37 FAM. & CONCILIATIONCTS. REV. 64 (1999).
intrusive negatively-biased assessments and reports. Among the possible negative influences of mental health professionals are written evaluations of the parents during the upheaval of the separation that explain the situation solely in terms of the individual psychopathology of the spouses. Psychodiagnostic terms, such as "paranoid," "alcoholic," "narcissistic," "sociopathic," "violent," or "battered woman's syndrome," reduce the explanation of complex marital dynamics to the psychological or moral capacities of the individual parents, clearly pathologizing and blaming one of the parties. These evaluative declarations, and many psychological tests that are used to support them, are often not clearly related to each parent's ability to care for the child. Moreover, such psychodiagnostic terms have special technical meanings within the mental health professions. When used in public or in court, they become pejorative labels strategically employed to degrade or destroy the reputation of one parent and "win" custody for the other. When made known to the divorcing spouses and their legal counsels, these authoritative declarations as to the character of each parent serve to solidify already negative, polarized views, which then become "written in stone," ensuring that the dispute will continue.

An alternative conflict-reducing approach requires custody evaluators to pay more attention to prescribing how the family can resolve its impasse, the ways in which children can have access to the positive contributions of each parent, and how the children's development can be protected, rather than assessing who is and who is not emotionally disturbed, and who is and who is not "the better parent." To ensure that all parties have similar expectations and to avoid unnecessary intrusiveness and cost, it is helpful for the court to define a specific scope and purpose for the evaluation. In many instances, custody evaluations can focus on particular issues (for example, which school the child should attend), and only where necessary does it need to encompass a complete family study involving psychological testing of all members, school and home visits, substance abuse assessments, and child abuse and molestation investigations.

Procedures for appointing evaluators, and for re-evaluations when a custody report is contested, need to be carefully considered so as not

30. See generally Gould, supra note 27.
to subject the child and family to the inordinate stress of multiple assessments. Evaluators can serve the child most effectively if they are impartial experts appointed by the court, or by stipulation of the parties, and if they are provided with access to all family members. A multidisciplinary team of evaluators is perhaps the optimal choice here, but costs for such "team" endeavors are usually prohibitive. If the initial custody report is contested, a second evaluator appointed in the same manner should not expect to re-evaluate the family directly; rather he or she (or the multidisciplinary panel, if such is available) should review the procedures, findings, and recommendations of the first evaluator to determine whether they conform to professional standards, ethics, and scientific rigor.\(^3\) If an update on the custody evaluation is needed, it follows that, in the interests of continuity of care and cost-effectiveness, the first evaluator should be excluded only if there is indication that standards of practice were initially violated.\(^2\) At the very least, the first evaluator should be part of an evaluation team that undertakes the update.

Explicit prior arrangements should be made regarding the manner in which the final custody report will be disseminated and reviewed, so that the family can make good use of this information. Optimally such an arrangement should be made in writing and signed by both parties and their attorneys. Allowing each parent to hear the contents of a report from his or her attorney, in chambers, or in court, rather than in privacy with the evaluator, reinforces the win/lose mentality of the litigation, and is most likely to exacerbate the parents' sense of shame and helplessness. On the other hand, having the opportunity to review the report with its author offers a greater potential for diffusing the conflict and ensuring that the parents really hear what the report has to say about the needs of the child over the short and long term.\(^3\)

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33. See Roseby, supra note 29, at 109.
If we agree that conflicted custody cases are, in part, exacerbated and entrenched by traditional adversarial proceedings and by inappropriate responses from mental health professionals, important social policy questions then arise as to what is needed in terms of a more responsive system of legal and mental health care for separating and divorced families in our courts and communities. A procedural system that has been evolving in many jurisdictions, albeit piecemeal, comprises a spectrum of services which begins with preventive measures that are minimally intrusive and designed for the broadest population of families—such as divorce orientation, parenting education, mediation, and collaborative law. Those who fail to settle through these means are referred to other, progressively more intrusive treatment interventions that wed mental health interventions to the social control mechanisms of the courts—such as therapeutic interventions, custody evaluations, ongoing co-parenting counseling, arbitration, or special masters, and various kinds of supervised visitation.4

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

The balance of this paper briefly defines each service and proposes some criteria to determine who benefits from each kind of service, and for whom each is contraindicated. It is important to note that the proposed criteria are mostly based upon observation and deduction, and in most cases not upon systematic research. By proposing a preliminary set of guidelines for the use (and misuse) of the range of these new

dispute resolution forums, we hope to stir some debate which will contribute to a more discriminating articulation of professional roles and ethics in these new models of interdisciplinary practice.

A. Divorce Orientation/Educational Programs

Separating parents embarking on divorce need easy access to preliminary information about the psychological process of divorce, legal procedures and custody options, and the general needs of children for conflict-free access to both parents. Furthermore, if they are to make informed choices, they need to know about available services in the community and to receive some guidance as to what services are likely to meet their needs. Essential information can be provided publicly through various media such as books, videos, television and brief educational classes.\(^{35}\)

Evaluation of general divorce education programs is in its infancy.\(^ {36}\) Available data indicate high consumer satisfaction and increased knowledge and skills regardless of whether attendance is mandated or voluntary. This evidence probably translates into greater consumer good will towards the legal process and more informed choices. However, the findings are mixed as to the extent to which these brief programs promote better child and parent adjustment, or reduced conflict and litigation.\(^ {37}\) More thought needs to be given as to when parents in crisis are amenable to education about their children and


\(^{36}\) See Geasler & Blaisure, supra note 35, at 37.

when such information is ineffective, or will be misconstrued and used in the service of furthering parental disputes.

B. Specialized Educational Programs

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

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

High-conflict, violent, and chronically litigating families need specialized educational programs. Such programs are currently being developed in a number of jurisdictions following the recognition that,


41. See Johnston & Roseby, supra note 8, at 77.
for this sub-group, generalized divorce information is both ineffective and inappropriate. In cases of domestic violence, general divorce education that encourages parental cooperation and communication may actually be dangerous for victims who are often subject to ongoing manipulation and control by the abusive partner after separation.\textsuperscript{42} Cognitive-behavioral or skill-based approaches that teach effective communication and problem solving, and attempts to heighten parents' empathic awareness of the children's plight in conflicted custody, are the most important and effective components of these programs.\textsuperscript{43} How to develop separate, "parallel" parenting arrangements governed by an explicit court order rather than attempting a cooperative co-parenting relationship should be taught. In addition, these classes can explain laws regarding the rights of both parents to custody and access, contempt proceedings, protection from domestic violence, management of abduction risk, criteria for child protective agencies to take action, and grounds for supervised visitation.\textsuperscript{44}

These specialized educational programs are appropriate for families who lack general knowledge about the laws and procedures of family and dependency courts, those who are overly dependent upon litigation to make parenting decisions, and those who are deficient in communication and problem-solving skills.\textsuperscript{45} However, providing this range of information to all divorcing families is unnecessary. Such programs are probably inappropriate or insufficient in situations requiring state intervention to protect victims: cases of serious allegations of child abuse, domestic violence, substance abuse, and mental illness. They are also questionable for those character-disordered parents who tend to use educational information to further a strategic advantage in litigation.

\textsuperscript{43} See Kevin M. Kramer et al., Effects of Skill-Based Versus Information-Based Education Programs on Domestic Violence and Parental Communication, 36 Fam. & Conciliation Cts. Rev. 9 (1998).
\textsuperscript{44} See Sherrie Kibler et al., Pre-contempt/contemnors Group Diversion Counseling Program: A Program to Address Parental Frustration of Custody and Visitation Orders, 32 Fam. & Conciliation Cts. Rev. 62, 63 (1994).
C. Affordable Legal Services and Collaborative Law

There is a growing need for affordable legal consultation to help the large majority of divorcing families make the transition through separation and divorce. Large numbers of parents are now entering family courts without legal representation. This raises the level of frustration and confusion for clients and court personnel alike. Moreover, it creates inefficiencies in court administration, and presents many ethical dilemmas for judges dealing with litigants who are trying to represent themselves with little or no knowledge of the law, due process, court rules, or procedures. One response to this emerging, serious problem has been the "unbundling and rebundling" of legal services in an attempt to provide specific kinds of legal counsel at affordable rates with less than full legal representation. Safeguards for clients who receive partial or limited counsel and appropriate liability protection for the professionals involved need to be clearly specified in these cases.

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

Because this dispute resolution method is so new, there is little systematic information about its outcomes. Collaborative law benefits parties where there is a need to retain the advocacy role of each attorney. This protection is not always afforded in mediation, and it is especially important that it be provided where there are imbalances of power.

46. See Forrest S. Mosten, Unbundling Legal Services, 57 OR. B. BULL. 9, 9 (1997).
47. See id.
between the parties. Collaborative law motivates creative "win-win" solutions, and decreases the high costs of formal fact finding, depositions, preparation of briefs, filing of motions, etc. However, these new practices demand the highest ethical standards of practice; consequently, some of the corresponding risks are lack of scrutiny and accountability when informal legal procedures are used, and the cost of starting again from scratch in court if they are unsuccessful. There are also concerns about inequities in the administration of justice by developing separate tiers or private levels of justice for people who can afford collaborative law, compared to those who use the public forum of the courts. For these reasons, in cases where there is distrust between the legal advocates, inability of the attorneys to maintain appropriate client control, or serious concerns about abuse and exploitation, the parties may be better protected in family court.

D. Mediation

Mediation is fairly widely available in the United States, both publicly and privately. This forum uses a neutral third party to help parents develop custody and visitation plans (in most public settings) and both financial and child custody settlements (in the case of many private providers). Mediation is generally confidential and time-limited; it focuses on problem resolution of specific issues and does not involve psychological counseling and therapy. This kind of issue-focused mediation attains full resolution in one-half, and partial resolution in two-thirds, of all custody and access disputes that enter into court. This solidly researched "success rate" of mediation supports the philosophy that most couples have the capacity to re-order their lives in a private, confidential setting, according to their personal preferences,


50. 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. See MacCoby & Mnookin, supra note 1, at 137.

with the relatively limited help of a mediator who focuses on specific issues.

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

E. Custody Evaluation

Custody evaluations involve fact-finding by a qualified mental health professional and a written report with recommendations presented to the court. Although extremely effective in producing settlements and aiding judicial decisions (85-90% of disputing parents settle), such stipulations/court orders are twice as likely to be relitigated compared to those that are settled voluntarily. Custody evaluations are also very costly, and they do not help with ongoing co-parenting problems. To date, custody evaluations have generally been the standard option when families are unable to settle through mediation and attorney negotiation. A collaborative approach, however, questions whether a custody evaluation is the optimal way of using family resources when mediation fails.

Where parents have extremely discrepant views of their child’s needs, a confidential child-focused psychological assessment may suffice.\textsuperscript{53} Often an objective assessment of the child’s needs can be the basis for further mediation, counseling, or a recommended settlement. Formal custody evaluations can then be reserved for serious allegations of child abuse, neglect and molest, as well as contested claims of parental psychopathology, substance abuse, or domestic violence. If these allegations are substantiated, the court will need to impose a protective custody arrangement and a plan for monitoring it. This means that where the facts are not really in dispute, serious family or individual dysfunction need not be evaluated further, and resources can be used for treatment rather than for further investigation.

F. Therapeutic Intervention

This type of intervention (also called family "impasse-mediation") involves a combination of confidential counseling and mediation to resolve the psychological and family problems that contribute to chronic disputes or stalemates in reaching a custody settlement.\textsuperscript{54} The intervention is undertaken by child and family therapists who are also experienced divorce mediators. They begin by taking a history of the parental disputes, identifying the family dynamics that have created the impasse, and then seeking to understand how the parental conflict is affecting the children. This information is used in brief, strategic therapeutic interventions and counseling with the family members, the goal being to develop psychologically sound child access plans and to help the parents through the emotional divorce. Unlike issue-focused mediation, the completion of a custody and access agreement is not seen as an end in itself. The attorney’s role is to set up the treatment contract, translate the agreements reached into court orders, and take unresolved issues back to another dispute-resolution forum.


\textsuperscript{54} Families can be seen individually or in groups of 5-8 other families. Children are always included in the intervention which is usually relatively brief (25-40 hours). See Johnston & Campbell, supra note 11, at 198. See also H. McDonough et al., For Kids’ Sake: A Treatment Program for High-Conflict Separated Families (Parents’ Group Manual) (1995) (unpublished manuscript on file with the Family Court Clinic, Clarke Institute of Psychiatry, 250 College Street, Toronto, M5T1R8 Canada). This model of service has also been adapted and used within Alameda County Family Court Services. See Johnston, supra note 45.
A series of studies have indicated that about two thirds of cases that have failed brief issue-focused mediation have been successful using these therapeutic interventions, i.e., they have been settled and have stayed out of court over a two-to-four-year period. Specifically, this type of intervention is useful when emotional issues intrude and disrupt regular mediation or attorney negotiations. Emotional turmoil can emanate from acute reactions to the humiliation and loss inherent in the divorce, from a recent traumatic separation experience, or when parents are so preoccupied with their own pain that they cannot respond to their children's acute distress. Family impasse intervention and mediation is also the method of choice when there is "tribal warfare"—that is, where new partners, extended kin and professionals become embroiled in the dispute. However, this forum is not appropriate for serious allegations of abuse, and it is insufficient, although helpful, for cases where there is serious parental character pathology.

G. Co-Parenting Coordination and Arbitration

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

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decisions may be challenged in court, at which time the arbitrator may have to testify.  

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

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

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


It is generally believed that co-parenting arbitrators are appropriate for chronic litigants and entrenched custody conflicts emanating from serious psychopathology and personality disorders in parents who have parenting deficits. They can be used to monitor potentially abusive situations involving domestic violence and intermittent mental illness of a parent. They can also be used for children who are very young or who have special medical needs, where parents cannot communicate sufficiently to coordinate the care of the child in a timely manner.

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

H. Supervised Visitation and Monitored Exchange

The purpose of supervised access is to provide a protected setting for parent-child contact with a neutral third person monitoring the contact or exchange of the child between parents. A court order dictates the requirements for visit supervision. This specialized service, generally staffed by trained volunteers under the direction of a professional coordinator, has grown rapidly across the United States and internationally during the past decade. It is appropriately used where


a victim-parent and child are at risk because of ongoing high-conflict and threat of domestic violence. This kind of protected setting is also needed for parent-child contact when the child is at high risk because of a parent’s mental illness, substance abuse problems, history of emotional, physical abuse or molestation, or when there is a threat of child abduction.

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

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

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

- Parenting and Co-parenting in Domestic Violence Families. Currently, domestic violence perpetrator and victim programs deal with the dynamics of abusive relationships in separate forums but touch little or not at all on parenting and co-parenting issues. Safe protocols for parental communication in domestic violence cases need to be developed to prevent the abusive parent from continuing to exercise control and manipulation of the victim, especially

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60. Unfortunately, this may be occurring. See Pearson & Thoennes, supra note 59.

protocols that allow "parallel" rather than cooperative parenting. Children who have been damaged by witnessing family violence also need special help to deal with the residual symptoms of post-traumatic stress disorder and dysfunctional adaptation to chronic trauma.

Therapeutic Supervision involves family intervention by a qualified professional counselor in cases where there has been a major violation of the child's trust in the non-custodial parent (following abuse, abandonment, or unsubstantiated molestation allegations), or where an alienated child refuses to visit the rejected parent (in part because of the custodial parent's actions). A number of experienced clinicians have expertise with therapeutic supervision, and systematic theory-based approaches are currently being developed.

IX. THE NEED FOR COORDINATION BETWEEN COMMUNITY SERVICES AND COURTS

In conclusion, and most important as we review the range of newly developed and revised services for our present-day separating and divorced families, especially those more extensive interventions designed for the high-conflict or embattled sub-group, we must be aware that with sophistication and differentiation of services that can better fit the multiple needs of these families, there is a corresponding need for coordination of these services with one another and with the court. More intransigent conflict-ridden families are likely to be more troubled by indications of domestic violence, child neglect, molestation and abuse, parental substance abuse, mental health problems, and child abduction. The family court's interventions must be closely orchestrated with interventions provided by community-based services: psychological and parenting counseling, substance abuse monitoring and treatment, batterers' treatment programs and victims' advocacy, and mental health services.

64. See Mary A. Duryee, A Model for Therapeutic Supervision and a Proposal for a Family-Community Court (1999) (unpublished manuscript, on file with author) (final report submitted to Family Court Services, County of Alameda, 1221 Oak St., Room 250, Oakland, Cal. 94612).
Case management protocols and time lines must be devised to coordinate, monitor and follow up on progress of the case plans that have been ordered by the family court for many of these most troubled families and high-risk children. Otherwise, our interventions run the risk of further fragmenting vulnerable families rather than helping them, permitting families to fall through the cracks between different services, or leaving families forever suspended in the never-never land of an intrusive state intervention.