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PROMOTING THE BEST INTERESTS OF CHILDREN WHOSE PARENTS ARE DIVORCING: THE NEXT STEPS FOR ARKANSAS

*Kenneth S. Gallant, J.D.**

As the essays from this conference demonstrate, promoting the best interests of children caught in the web of divorce is not easy. A high level of conflict between the parents is just one of many factors, such as poverty, substance abuse, or spousal and child abuse, that makes the situation more difficult. No court system has all the answers. Many problems faced by children and their divorcing parents are not legal, and do not have solutions in the law. Nonetheless, these papers demonstrate that there is a great deal that can be done to improve the legal system and associated support systems, helping them produce better outcomes for children and their parents.

The American legal system was not designed specifically for high conflict divorce cases. The court rule-making movement of the twentieth century, which resulted in the Federal Rules of Civil Procedure and similar rules in most states, including Arkansas, was intended to reform and improve the overall civil dispute resolution system. The movement nationally was from fragmented causes of action to a single form of civil action—though in Arkansas the division between law and equity courts remains. The notion—correct so far as it went—was to reduce formality and technicality in pleading and proof, so that the underlying merits of a dispute could be addressed in a higher percentage of cases.

As we have discovered, one style of case handling does not fit all cases. The problems faced by divorcing parents and their children are different from those in most civil cases in ways that suggest they should be treated differently by the court system. Legislatures and courts have slowly come to recognize this fact.¹ Additionally, the needs and resources of a state such as Arkansas are significantly different from those of higher population states with larger urban centers.²

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1. For a concise history of this change, see Andrew Schepard, *The Evolving Judicial Role in Child Custody Disputes: From Fault Finder to Conflict Manager to Differential Case Management*, 22 U. ARK. LITTLE ROCK L. REV. 393 (2000).

2. See Elizabeth Barker Brandt, *The Challenge to Rural States of Procedural Reform in High Conflict Custody Cases*, 22 U. ARK. LITTLE ROCK L. REV. 355 (2000).

In 1999, the Arkansas Legislature made three important changes to the system for litigating custody and visitation issues that will allow for the implementation of important reforms. First, legislation now permits the court to order divorcing parents to attend “classes concerning parenting issues faced by divorced parents.”³ Second, the court may order parents to “[s]ubmit to mediation in regard to addressing parenting issues.”⁴ Finally, legislation authorizes chancellors⁵ to appoint an attorney ad litem for a child when an appointment would “facilitate a case in which custody is an issue and further protect the rights of the child.”⁶

All three of these changes are aimed at promoting the best interests of children. They cannot prevent personal bitterness between divorcing parents. These devices are designed to help reduce bitterness, and reduce its effects on the parents’ children. These changes can also help prevent this bitterness from driving the litigation process and controlling the result of the process. How successful these steps are depends on how well we—judges, lawyers, social scientists, clinicians, and parents—implement them.

The first reform, allowing courts to order parents to classes concerning issues arising from divorce, is essentially designed to refocus parents’ attention from the conflict to the effect the conflict is having on their children. When made aware of these effects, parents may change their actions to minimize the psychological damage caused to their children.⁷ The challenge for Arkansas now is to develop effective orientation and education programs, or utilize programs from other states, with permission. These programs must be evaluated and modified for maximum effectiveness.⁸

3. ARK. CODE ANN. § 9-12-322(a)(1) (LEXIS Supp. 1999).

4. ARK. CODE ANN. § 9-12-322(a)(2) (LEXIS Supp. 1999).

5. For non-Arkansas readers, “chancellor” is the name used in Arkansas for judges in equity courts, which have jurisdiction over divorce matters.

6. ARK. CODE ANN. § 9-13-101(d)(1)(B) (LEXIS Supp. 1999). Another provision provides for attorneys ad litem in guardianship cases involving custody in probate court. See ARK. CODE ANN. § 9-13-101(d)(2) (LEXIS Supp. 1999).

7. The extent to which divorce orientation and education succeeds in doing this is the subject of ongoing research. See Janet R. Johnston, *Building Multidisciplinary Professional Partnerships with the Court on Behalf of High-Conflict Divorcing Families and Their Children: Who Needs What Kind of Help?*, 22 U. ARK. LITTLE ROCK L. REV. 451 (2000).

8. See *id.* See also Thomas E. Schacht, *Prevention Strategies to Protect Professionals and Families Involved in High Conflict Divorce*, 22 U. ARK. LITTLE ROCK L. REV. 563 (2000).

The second reform, allowing courts to order parents to mediation over parenting issues, is designed to manage the present conflict and to help parents continue to communicate about their offspring with as little harmful conflict as possible. To implement this reform properly will require the development of skilled and experienced mediators, who will not necessarily be lawyers. Providing training for family mediation is not enough. Durable resolution of high conflict custody battles requires special mediation skills that can only be developed by thoughtful reflection on experience. Some of these cases may require brief therapeutic interventions with one or more family members as well as joint mediation sessions.⁹ Specially skilled mediators for high conflict custody battles will need to be available throughout Arkansas at reasonable fees.¹⁰

Finally, the attorney ad litem program is designed to allow input into the process that is aimed solely at promoting the best interests of the children, and is not based on the wants or needs of one of the divorcing parents. The attorney ad litem represents the child or children. Such a person can negotiate for a resolution of the controversy based on the children's best interests more effectively than a judge. The attorney ad litem can also determine the need for evidence, including neutral expert testimony, as a basis for negotiation or for presentation at trial.¹¹ Appointment is not automatic, but depends on a finding by the chancellor that appointment would protect the rights of the child and facilitate the case. Importantly, the Arkansas Legislature has set up a funding system by which children whose parents cannot afford some or all of the cost of an attorney ad litem may nonetheless have one appointed.¹²

These reforms focus on specific ways of making the legal system work effectively to resolve child custody disputes. They do not address other elements of a comprehensive approach to the best interests of the child. For example, they do not address the need for therapeutic help or

9. See Johnston, *supra* note 7.

10. See Brandt, *supra* note 2. On the fee issue, compare Arkansas Code Annotated section 9-12-322(b) (LEXIS Supp. 1999) (stating that parties are to pay own costs of mediation) with ARK. CODE ANN. § 9-13-101(d)(1)(D)-(G) (LEXIS Supp. 1999) (providing funding system for attorneys ad litem). See also *infra* note 22.

11. The attorney ad litem program, as enacted in Arkansas, is based on the model that the attorney ad litem "represent[s] children." ARK. CODE ANN. § 9-13-101(d)(1)(A) (LEXIS Supp. 1999). The program is not based on the model predicted in Dana E. Prescott, *The Guardian Ad Litem in Custody and Conflict Cases: Investigator, Champion, and Referee?*, 22 U. ARK. LITTLE ROCK L. REV. 527 (2000) (stating that the officer ad litem will serve as a referee or arbitrator, responsible for making ultimate decisions).

12. See ARK. CODE ANN. § 9-13-101(d)(1)(D)-(G) (LEXIS Supp. 1999).

education that many children and their parents have at and following the time of divorce.¹³ Nor do they address the need for a protocol, a set of specific procedures judges can use for early identification of high conflict divorces and as a guide to the procedural and substantive steps most likely to resolve a case effectively.¹⁴

Yet the Legislature's reforms have in them the seeds of a comprehensive approach. They provide for three key elements: parental education, a means for helping parents resolve their own disputes, and systemic input aimed at promoting the best interests of the child. The questions are how to bring these reforms together most effectively, and what needs to be added to them?

One approach that will help in Arkansas is inter-institutional cooperation. For example, the Arkansas Alternative Dispute Resolution Commission, a body whose membership is appointed by leaders of all three branches of Arkansas government,¹⁵ has statutory responsibility for setting out guidelines for inclusion of persons on a court-connected mediation roster. In specific cases, the judge is responsible for giving a list of potential mediators to the parties.¹⁶ The Administrative Office of the Courts establishes the attorney ad litem program and the funding mechanism for it, but the Arkansas Supreme Court, in cooperation with the chancellors, adopts the "standards for practice and qualifications for service" for the attorneys ad litem.¹⁷

One important thing that all of these institutions can do is keep chancellors around the state up to date on who has qualified as mediators or attorneys ad litem, along with their backgrounds and experience. They can also share the most recent findings from state, national, and international sources about the best use of the various tools for resolving contentious custody disputes.

13. See Johnston, *supra* note 7. See also Prescott, *supra* note 11.

14. See Brandt, *supra* note 2. See also Schepard, *supra* note 1.

15. Three members are appointed by the Chief Justice of Arkansas (including one recommended by the Arkansas Bar Association), two by the Governor, and one each by the Speaker of the House of Representatives and the President Pro Tempore of the Senate. See ARK. CODE ANN. § 16-7-102 (Michie 1994). This author was appointed to the Commission by the Speaker of the House.

16. See ARK. CODE ANN. § 9-12-322(c)(1) (LEXIS Supp. 1999). As of the current writing, February 2000, the Arkansas Alternative Dispute Resolution Commission has created the guidelines for inclusion on a court-connected mediation roster, but has not yet begun to keep the roster.

17. ARK. CODE ANN. § 9-13-101(d)(1) (LEXIS Supp. 1999).

The approach suggested by Professor Brandt,¹⁸ which she was instrumental in developing and implementing in Idaho, holds much promise for Arkansas. Its key feature is a protocol, approved by the state supreme court, for use by the trial court in high conflict divorce cases. A protocol is a set of steps that helps a court make early identification of divorce cases which are likely to involve high conflict or protracted custody battles. It gives the court a framework for deciding which tools, such as parental education, mediation, attorney ad litem, and/or neutral evaluation by experts, will most likely provide the best result for the child or children in any given case. Where a conflict proves to be intractable, the protocol provides guidelines to help the court develop a parenting plan based upon the level and type of conflict, in light of recent research of the effects of conflict on children.

The protocol does not compel the outcome of any particular case. It provides a guide to the most appropriate tools for resolving the matter. It allows the court to provide firm direction to divorcing parents and others involved to place the interests of the children first.

Creation of such a protocol is not easy. It requires the leadership of the bench, the bar, and the medical and social service professions that serve the needs of divorcing parents and their children.¹⁹ Specialized knowledge can come from the universities of the state as well. A multidisciplinary task force might be established to make concrete proposals.²⁰

Support of the Arkansas Supreme Court will be necessary, because it has the responsibility to consider the procedural reforms implicit in adoption of a protocol.²¹ Also essential to the process are the chancellors and the family law bar, who are the legal professionals working with these cases every day. To the extent that funding is required to

18. See Brandt, *supra* note 2. By creating this protocol, Professor Brandt, her co-workers, and the state of Idaho became national leaders in the effort to promote the best interests of children of divorcing parents.

19. The author disagrees with Professor Brandt on only one relatively minor point. While this author agrees with her that leadership from the top is essential, he places somewhat more emphasis on the value of grassroots support, both in the professions and from the population at large, in working out solutions to these difficult problems.

20. In Idaho, this was done through a multidisciplinary task force appointed by the state Supreme Court. See Brandt, *supra* note 2.

21. Arkansas is a state in which judicial rule-making is both statutorily authorized and considered an inherent constitutional power of the Arkansas Supreme Court. For statutory authorization, see Arkansas Code Annotated section 16-11-302 (Michie 1994).

For inherent constitutional power, see, e.g., *In re Arkansas Supreme Court Board of Certified Court Reporter Examiners*, 280 Ark. 598, 656 S.W.2d 694 (1983) (interpreting ARK. CONST. art. VII, § 4).

provide for services, or substantive rights are to be redefined, the political leaders of the state must be brought into the process.²² The task force developing the protocol must produce a good substantive proposal, grounded in the best social science and jurisprudential judgment. The task force must also work to ensure that the interested constituencies have input into the protocol, and are able to support it. If this can be done, both formal adoption and actual implementation throughout the state are more likely.

There is a limit to what courts and professionals can do. They can provide parents with the best available tools for reducing the traumatic effects of divorce on their children. Courts can provide incentives for using these devices. Parents themselves bear the ultimate responsibility for resolving their conflicts in the best interests of their children.

22. This author would suggest, at the least, a statutory plan for funding mediation for parents who cannot afford its entire cost, similar to that provided for attorneys ad litem. *See supra* note 12 and accompanying text.