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Resolving Family Conflicts: Implications of a Paradigm Shift

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## **Resolving Family Conflicts: Implications of a Paradigm Shift**

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## Introduction: **The Promise of the New Paradigm**

Over the past two decades, virtually all areas of family law have undergone major doctrinal and theoretical changes – from the definition of marriage, to the financial and parenting consequences of divorce, to the legal construction of parenthood. Family law scholars have analyzed and critiqued these changes from a variety of perspectives. But scholars have paid less attention to another important set of family law developments --changes that signal a paradigm shift in the way that most family legal conflicts are resolved. These changes in family conflict resolution have transformed the practice of family law and fundamentally altered the way in which disputing families interact with the legal system. Moreover, the changes have important implications for the way that family law is understood and taught. Our objective in this paper is to examine the contours of this paradigm shift in family conflict resolution and explore its implications for family law scholarship, practice and teaching.

### I. Elements of the Paradigm Shift

The paradigm shift that we describe encompasses a number of related components. The first component is a profound skepticism about the value of traditional adversary procedures. An overriding theme of family law reform efforts

is that adversary processes are ill-suited to resolving disputes involving children.<sup>1</sup> Similarly, social science research suggests that children's adjustment to divorce depends significantly on their parents' behavior during and after the separation process: the higher the level of parental conflict to which children are exposed, the more negative the effects of family dissolution.<sup>2</sup> Armed with these social science findings, court reformers have argued that family courts should abandon the adversary paradigm, in favor of approaches that help parents manage their conflict and encourage them to develop positive post-divorce co-parenting relationships.<sup>3</sup>

Family courts have embraced this insight and have adopted an array of non-adversary dispute resolution mechanisms designed to avoid adjudication of family cases. This rejection of adversary procedures has moved beyond divorce-related custody disputes -- where court-connected mediation is now the norm -- to child welfare proceedings, where family group conferencing and other problem-solving approaches have begun to supplant more traditional adjudicative models.<sup>4</sup> An increasing number of family lawyers have also rejected the adversary paradigm, in favor of a "collaborative law" model under which lawyers pledge at the outset of

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<sup>1</sup> See Gregory Firestone and Janet Weinstein, *In the Best Interests of Children: A Proposal to Transform the Adversarial System*, 42 Family Court Review 203 (2004).

<sup>2</sup> Robert L. Emery, *Renegotiating Family Relationships: Divorce, Child Custody and Mediation* 205 (1994).

<sup>3</sup> See Richard Boldt & Jana Singer, *Juristocracy in the Trenches: Problem-solving Judges and Therapeutic Jurisprudence in Drug Courts and Unified Family Courts* 65 Maryland L. Rev 82, 94 (2006).

<sup>4</sup> See, e.g., S. Chandler & M. Giovannuci, *Family Group Conferences: Transforming Traditional Child Welfare Policy and Practice*, 42 Family Court Review 216 (2004); Clare Huntington, *Rights Myopia in Child Welfare*, 53 UCLA L. Rev. 637 (2006).

their representation not to take a client's case to trial.<sup>5</sup> As two leading reformers recently stated "in the last quarter century, the process of resolving legal family disputes has, both literally and metaphorically moved from confrontation toward collaboration and from the courtroom to the conference room."<sup>6</sup>

A second element of the paradigm shift is the assertion that most family disputes are not discrete legal events, but ongoing social and emotional processes.<sup>7</sup> This recharacterization of family disputes began with the shift from fault-based to no-fault divorce; more recently, it has become one of the basic tenets of the movement for unified family courts.<sup>8</sup> Thus recharacterized, family disputes call for interventions that are collaborative, holistic, and interdisciplinary, rather than zealously legal.<sup>9</sup> Understanding family conflict as primarily a social and emotional process, rather than a legal event, also reduces the primacy of lawyers and enhances the role of mental health professionals in the family court system.

This new understanding of family disputes has also led to a reformulation of the goal of legal intervention in the family. Traditionally, legal intervention was a

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<sup>5</sup> See Pauline Tesler, *Collaborative Family Law*, 4 Pepperdine Dispute Resolution Law Journal 317 (2004); William Schwab, *Collaborative Lawyering: A Closer Look at an Emerging Practice*, 4 Pepperdine Dispute Resolution Law Journal 351 (2004).

<sup>6</sup> Andrew Schepard & Peter Salem, *Foreword to the Special Issue on the Family Law Education Reform Project*, 44 Family Court Rev. 513, 516 (2006).

<sup>7</sup> 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. 395, 407 (2000)

<sup>8</sup> See, e.g., Barbara A. Babb, *An Interdisciplinary Approach to Family Law Jurisprudence: Application of an Ecological and Therapeutic Perspective*. 72 Indiana Law Journal 775 (1997)

<sup>9</sup> See Andrew Schepard & James Bozzomo, *Efficiency, Therapeutic Justice, Mediation and Evaluation: Reflections on a Survey of Unified Family Courts*, 36 Fam. L. Q. 39-40 (2003)

backward looking process, designed primarily to assign blame and allocate rights; under the new paradigm, by contrast, judges assume the forward looking task of supervising a process of family reorganization. As Andrew Schepard has noted, family court judges no longer function primarily as fault-finders or rights adjudicators, but as ongoing conflict managers.<sup>10</sup> The therapeutic jurisprudence movement incorporates this forward-looking purpose. From a therapeutic perspective, the goal of legal intervention is not merely to resolve disputes, but to improve the material and psychological well being of individuals and families in conflict.<sup>11</sup> Problem-solving judges embrace this therapeutic role by attempting to understand and address underlying family dynamics and by using their “authority to motivate individual to accept needed services and to monitor [the parties] compliance and progress.”<sup>12</sup>

To achieve these therapeutic goals, family courts have adopted systems that de-emphasize third-party dispute resolution in favor of capacity-building processes that seek to empower families to resolve their own conflicts. Consistent with this philosophy, jurisdictions across the country have instituted mandatory divorce-

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<sup>10</sup> Andrew Schepard, *The Evolving Judicial Role in Child Custody Disputes: From Fault Finder to Conflict Manager to Differential Case Management*, 22 U. Ark. L. Rev. 395, 396 (2000).

<sup>11</sup> See, e.g., Bruce J. Winnick, *Therapeutic Jurisprudence and Problem-Solving Courts*, 30 Fordham Urb. L. J. 1055 (2003); Richard Boldt & Jana Singer, *Juristocracy in the Trenches: Problem-Solving Judges and Therapeutic Jurisprudence in Drug Treatment Courts and Unified Family Courts*, 65 Maryland L. Rev. 82, 95-97 (2006) (discussing influence of therapeutic jurisprudence on problem-solving courts)

<sup>12</sup> Bruce J. Winick, *Therapeutic Jurisprudence and Problem Solving Courts* 30 Fordham Urb. L. J. 1055, 1055 (2003)

related parenting education and other skill-building programs.<sup>13</sup> Similarly, the American Law Institute's Principles of the Law of Family Dissolution endorses individualized parenting plans, as an alternative to judicial custody rulings and urges the adoption of court-based programs that facilitate these voluntary agreements.<sup>14</sup> More recently, a number of family courts have added "parenting coordinators" to their staffs; these quasi-judicial officials assist high conflict families to develop concrete parenting plans and to resolve ongoing parenting disputes that arise under these plans.<sup>15</sup>

A fifth component of the paradigm shift is an increased emphasis on pre-dispute planning and preventive law. Familiar examples included the increased acceptance and enforceability of prenuptial and domestic partnership agreements. More recently, June Carbone and Harold Fink have argued for a similar pre-dispute approach to parentage determinations.<sup>16</sup> Proposals for mandatory pre-marital education reflect a similar theme, and the federal government has invested substantial resources in public and private marriage education program aimed especially at low income partners.<sup>17</sup> More generally, scholars and advocates of

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<sup>13</sup> Andrew Schepard, *Parental Conflict Prevention Programs and the Unified Family Court: A Public Health Perspective*, 32 Family Law Quarterly 95 (1998-99);

<sup>14</sup> American Law Institute, *Principles of the Law of Family Dissolution: Analysis and Recommendations* (2002) (Overview of the Principles of Chapter 2)

<sup>15</sup> Christine Coates, Robin Deutsch, Hugh Starnes, Matthew Sullivan & Bealisa Sydlik, *Parenting Coordination For High Conflict Families*, 42 Family Court Review 246-260 (2004).

<sup>16</sup> Howard Fink and June Carbone, *Between Private Ordering and Public Fiat: A New Paradigm for Family Law Decision-making*, 5 Journal Law & Family Studies 1 (2003)

<sup>17</sup> M. Robin Dion, *Healthy Marriage Programs: Learning What Works*, 15 The Future of Children 139 (Fall, 2005)

“preventive law” have urged individuals to use legal mechanisms to anticipate and plan for family transitions.<sup>18</sup> This emphasis on publicly-supervised private ordering creates a hybrid model that expands the role of family lawyers and courts beyond their traditional dispute-resolution function. It also extends the time frame during which families interact with the legal system.

Taken together, these developments hold considerable promise for families. Most legal scholars agree that adversary justice works best for antagonists with conflicting interests and no ongoing personal ties. Alternative dispute resolution procedures offer families a mode of conflict resolution that is both more enduring and less destructive of ongoing relationships than adversary litigation. Non-adversary processes are also more amenable to direct participation by family members – a particularly important feature, given the high percentage of family litigants who are not represented by counsel.<sup>19</sup> Similarly, judicial interventions that successfully build capacity and enhance problem solving skills should allow families to avoid the financial and emotional drain of future encounters with the legal system. On a more theoretical level, the paradigm shift that we describe appropriately rejects the mythology of the private family – a mythology that characterizes “normal” families as fully autonomous and self-sufficient and that labels families that seek – or are subject to -- state intervention as dysfunctional or inadequate. The new paradigm recognizes instead that family and state governance

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<sup>18</sup> See, e.g., Jennifer K. Robbennolt & Monica Kirkpatrick Johnson, *Legal Planning for Unmarried Committed Partners: Empirical Lessons for a Preventive and Therapeutic Approach*, 41 *Arizona Law Review* 417 (1999);

<sup>19</sup> See generally, Steven Berenson, *A Family Law Residency Program?: A Modest Proposal in Response to the Burdens Created by Self-Represented Litigants in Family Court*, 33 *Rutgers Law Journal* 105, 107-117 (2001).

are intertwined and that most families need public support in order to function effectively

## **II. Some Cautionary Notes**

Despite the promise the developments described in Part I of this Article hold for families in conflict, a number of cautionary comments are in order. Although these dramatic shifts in family dispute resolution have been underway for close to a decade, scholars and family policy makers have engaged in relatively little critical analysis of the risks and potential negative consequences of such change. This Section explores these concerns by examining: the limits of institutional competence of courts, the surrender of fact finding and decision making to individuals without legal training, the loss of autonomy and privacy for family members subject to continuing court oversight, particularly low income families, and the disjunction between alternative dispute resolution and authoritative legal norms.

As with most discussions of relative strengths and weaknesses, many of the concerns raised here are really the “flip-side” of a potential benefit. Gaining the flexibility and informality necessary to move quickly to respond to a range of challenging circumstances facing families in court can lead to legitimate concerns about reduced accountability and fairness. Having the benefit of a variety of experts from a number of disciplines to address family conflict may result in confusions about roles and appropriate authority to act. Looking for ways to sustain any family harmony and agreement achieved in court proceedings may inevitably threaten strongly valued norms of family privacy and autonomy. As with any reform, the

value and impact of this paradigm shift must be evaluated in the context of available alternatives. And the potential problems posed by the new family courts described in this section may well be worth risking given the demonstrated problems in the adversary system.<sup>20</sup> But in order to begin a meaningful evaluation of these reforms it is critical to identify the issues and engage in the challenging process of balancing benefits and losses in ways that will serve the families seeking justice in our courts.

### **A. Questions About the Institutional Competence of Family Courts**

Institutions called “family courts” began appearing as early as the 1900’s<sup>21</sup> and a Standard Family Court Act was circulating in the 1950’s.<sup>22</sup> But the new model of a unified family court with expanded services and programs for both child welfare and divorce and child access cases did not begin to be established around the country in significant numbers until the 1990’s.<sup>23</sup> As a result, there is limited empirical data on the impact, positive or negative, of these courts on the families they serve. But a few observations about the way in which these courts operate in

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<sup>20</sup> See e.g. Andrew Shepard & James W. Bozzomo, Efficiency, Therapeutic Justice, Mediation, and Evaluation: Reflections on a Survey of Unified Family Courts, 37 Fam. L.Q. 333, 341(2003)(arguing that the risks of “overreaching and incompetent judges” in a unified family court “pale in comparison” to the “chaos created for families” when family disputes are resolved in the traditional adversary system)

<sup>21</sup> Jane Spinak, *Lawyering for a New Democracy*, supra note \_\_ at \_\_ (providing a brief history of the family court movement)

<sup>22</sup> citation to Standard Family Court Act

<sup>23</sup> ABA’s two year pilot project and current stats on #s of unified family court systems in U.S. But see Jane Spinak, *Lawyering for a New Democracy*, supra note \_\_ at \_\_ (providing a brief history of the family court movement and noting the cyclical nature of reform efforts); Richard Boldt and Jana Singer, *JURISTOCRACY IN THE TRENCHES: PROBLEM-SOLVING JUDGES AND THERAPEUTIC JURISPRUDENCE IN DRUG TREATMENT COURTS AND UNIFIED FAMILY COURTS*, 65 Md. L. Rev. 82, 91 (2006)(analyzing the new Unified Family Court movement as an “outgrowth of the juvenile court movement of the early twentieth century”).

both theory and practice, how families experience these courts and the impact of economics on that experience are possible at this time.

Although families may benefit from the capacity-building and problem-solving approaches embraced in the new paradigm described in Part I of this Article, it is unclear whether courts are competent to provide these services. Court-based procedures have historically been designed to determine facts and enforce norms. The model family court movement has sought to expand this function with a complex, ambitious agenda to address both the legal and non-legal problems of families who come before them seeking resolution of their disputes. While the goals of the court system have expanded substantially, the structural changes contemplated in even the ideal courts may not be sufficient to meet the ambitious agenda and transform the traditional functions of the courts.<sup>24</sup> Courts with their "limited remedial imaginations," may not be the best institutional settings for resolving the non-legal issues proponents wish to place within their authority.<sup>25</sup> As a result, the restructured family courts may be incapable of achieving the formidable task of improving "the material and psychological well being of

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<sup>24</sup> The ideal unified family court has been defined as having the following components: 1) comprehensive subject-matter jurisdiction over family-related legal matters; (2) a "one family, one team" assignment system, designed to ensure that all matters affecting a family are handled by a single judge or judicial team; (3) an emphasis on interdisciplinary training and collaboration; and (4) the provision and coordination of a comprehensive range of court-connected family services. Catherine J. Ross, *The Failure of Fragmentation: The Promise of a System of Unified Family Courts*, 32 *Fam. L.Q.* 3, 13 (1998) See also, Patricia A. Garcia, *American Bar. Ass'n, Unified Family Courts: Justice Delivered* (2001)(summarizing the characteristics of unified family courts)

<sup>25</sup> Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 *Wm. & Mary L. Rev.* 5, 5-7 (1996)

individuals and families in conflict.”<sup>26</sup>

In addition to the problems in adjusting to the proposed change in goals and function, state court dockets, particularly the family law docket, continue to grow and resources for these courts are on the decline.<sup>27</sup> Recruiting, training and retaining appropriate judicial and non-judicial staff for the multiple functions contemplated or, in some cases, statutorily mandated in these courts would challenge even a well-financed, broadly committed effort. As one commentator has noted:

The Family Court model court movement is barely five years old, and these courts are just beginning to realize the complexity of their endeavor. Reading what the courts engaged in this experiment say about themselves reveals a mixture of shock and optimism: shock at how hard change is to accomplish, and optimism after seeing real differences in outcomes for families and children. It is also apparent that some of their earliest efforts were procedurally-oriented just to get them started. Those steps have resulted in administrative restructuring and procedural mechanisms for problem-solving that can now be applied to the substantive mandates of the model court movement, an even harder task to accomplish.<sup>28</sup>

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<sup>26</sup> Babb, *supra* note \_\_\_ at \_\_\_

<sup>27</sup> Court Statistics Project, *State Court Caseload Statistics*, 2005 (National Center for State Courts 2006), 106-123, 125-130, 153-197, (accessed Oct. 7, 2006). (Reporting caseloads for State Courts); R. Schauffler, R. LaFountain, S. Strickland & W. Raftery, *Examining the Work of State Courts, 2005: A National Perspective from the Court Statistic Project* (National Center for State Courts 2006), 35-36, [http://www.ncsconline.org/D\\_Research/csp/2005\\_files/0-EWWhole%20Document\\_final\\_1.pdf](http://www.ncsconline.org/D_Research/csp/2005_files/0-EWWhole%20Document_final_1.pdf) (accessed Oct. 7, 2006). (Reporting domestic relations case loads in state courts); C. Cass, *Midwest News Overflowing Dockets, Lack of Social Services Frustrate Foster Care Judges*, [http://www.yankton.net/stories/070104/new\\_20040701025.shtml](http://www.yankton.net/stories/070104/new_20040701025.shtml) (posted July 1, 2004, accessed Oct. 7, 2006). (Quoting family court judges saying that because of overcrowded dockets “You wind up giving minutes to a case when you should give it several hours and you just don’t have the hours to give”); Wendell Large, *The Cost of Justice*, 21 *Maine Bar J.* 119 (Summer 2006) (discussing Maine’s State Court’s need for increased funding).

<sup>28</sup> Spinak at 375

Asking a court system to take on these tasks may detract from its fundamental role as a forum for fair and authoritative dispute resolution.<sup>29</sup> Scarce resources are spread even more thinly and some courts may have difficulty meeting both basic conflict resolution functions and the broader and more ambitious goals of the new family courts.<sup>30</sup> A recent study in looking at the impact of establishing Family Divisions in one state demonstrates the difficulty in delivering the promised services to more than a small percentage of the litigants before the court.<sup>31</sup> And, as more fully explained in the following sections of this paper, making good on the broad promise of reform for even a handful of parties may come at a substantial cost to long held values of due process, family privacy and autonomy.

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#### **B. The Surrender of Fact Finding and Decision-Making to Non-lawyers**

The new paradigm for family law decision-making contemplates substantial involvement and reliance on non-legal staff to “manage cases,” provides court-connected services and assist fact-finders and decision-makers in achieving settlements or reaching decisions. One family court proponent has described the need for an expanded role for these new players in the system to provide “a high level of administrative organization both to manage cases and to coordinate services. The court management system, including non-judicial personnel, must aim to resolve disputes in a timely manner, to supply and to coordinate efficiently the necessary resources or services, and to network appropriately with other courts in

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<sup>29</sup> See Anne Geraghty and Wallace Mlyniec, *Unified Family Courts: Tempering Enthusiasm With Caution*, 40 Fam. Ct. Rev 435, 441 (2002).

<sup>30</sup> Data on delays in jury trials from budget issues

<sup>31</sup> WLC/AOC Study, Families in Transition (2006)

the system to share information about families that allows for consistent judicial decision-making”<sup>32</sup>.

Non-legal and, in many instances, non-professional staff have always exercised enormous influence in the outcome of child welfare proceedings where the state has intervened after allegations of child abuse or neglect.<sup>33</sup> But the role of such staff, particularly case managers and mediators, has expanded in both child protection and divorce and child access proceedings in the new model courts. In terms of child protection cases, this expanded use of non-legal personnel can be attributed to two trends prevalent in such courts. First, there has always been “a subtle dynamic” that “arises on a day-to-day level in these cases, due in part to the prevalence of social work discourse and the tendency of the participants to view these cases in therapeutic rather than legalistic terms. This dynamic implicitly suppresses rights talk and discourages the participants from taking advantage of those procedural protections that do exist.”<sup>34</sup> Second, the family court movement has contributed to the expansion of informal, non-adversarial alternative dispute

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<sup>32</sup> Barbara A. Babb, *Fashioning an Interdisciplinary Framework for Court Reform in Family Law: A Blueprint to Construct A Unified Family Court* 71 S. Cal. L. Rev. 469, \_\_\_ (1998)

<sup>33</sup> See e.g., Jane C. Murphy, *Legal Images of Motherhood: Conflicting Definitions from Welfare "Reform," Family and Criminal Law*, 83 Cornell L. Rev. 688, 707 (1998) (concluding that child protective service workers who may have little or no experience or specialized education make most of the decisions in this arena. These workers make largely discretionary judgments about bad mothering and their underlying assumptions are, for the most part, unexamined and unchallenged. Conversations with workers reveal a deep bias about bad mothering based on race, class, and poverty” (footnotes omitted)

<sup>34</sup> Amy Sinden, *Why Won't Mom Cooperate? A Critique of Informality in Child Welfare Proceedings*, 11 Yale J. Law & Feminism 339, \_\_\_ (1999)

resolution mechanisms in child welfare cases.<sup>35</sup> As a result, social workers, child protection staff, and other non-legal actors play a central role in decisions about removal and placement of children where abuse or neglect is alleged. As discussed more fully in Part II D infra., the danger for families, primarily poor, involved in these proceedings is that the disregard for statutory and constitutional norms will result in extensive state involvement in these families by non-judicial personnel prior to any judicial determination of abuse or neglect justifying such involvement. And decisions will be made in informal settings based upon the evaluations, however flawed, of staff with few standards guiding these decisions and little or no opportunity for review.

The model family court has also expanded the role of such personnel in private family disputes, particularly those involving divorce, child custody and visitation in which the state is not a party. The non-legal personnel given new roles in these cases. include expanded roles for professional staff drawn from mental health and social work backgrounds with relatively established or familiar roles such as mediators and custody evaluators.<sup>36</sup> They also include staff with new titles and somewhat less established roles such as “parenting coordinators”<sup>37</sup> , “early

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<sup>35</sup> Lisa Merkel-Holguin, Sharing Power with the People: Family Group Conferencing as a Democratic Experiment, 31 *Journal of Sociology & Social Welfare* 155 (2004)

<sup>36</sup> Mary Kay Kisthardt and Barbara Glesner Fines, *Making a Place at the Table: Reconceptualizing the Role of the Custody Evaluator in Child Custody Disputes* 43 *Fam. Ct. Rev.* 229 (April, 2005).

<sup>37</sup> Christine Coates, Robin Deutsch, Hugh Starnes, Matthew Sullivan & Bealisa Sydik, *Parenting Coordination For High Conflict Families*, 42 *Fam.Ct. Rev.* 246 (2004).

neutral evaluators<sup>38</sup> and “family law facilitators.”<sup>39</sup> Finally, the new family court, at least as experienced in some court systems, continues a pattern well entrenched in its predecessor courts, of vesting enormous power in non-professional staff such as clerks, custody investigators, case managers, and, in many cases, mediators.<sup>40</sup>

As early as the late 1980’s, a few commentators were beginning to recognize the shifts in both the rhetoric and decision-making in family disputes, particularly in the child access area. Martha Fineman, in an early and much cited article<sup>41</sup>, noted that the “professional language of the social workers and mediators has progressed to become the public, then the political, then the dominant rhetoric. It now defines the terms of contemporary discussions about custody and effectively excludes or minimizes contrary ideologies and concepts.”<sup>42</sup> She attributed this shift, in part, to the willingness of judges and lawyers to cede authority because of their feelings of inadequacy to make judgments about the best interests of children, the existing legal standard in child custody decisions.<sup>43</sup>

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<sup>38</sup> See e.g., Jordan Santeramo (Student Note), *Early Neutral Evaluation in Divorce Cases*, 42 Family Court Review 321 (2004); Janet R. Johnston, Ph.D., *Building multidisciplinary professional partnerships with the court on behalf of high-conflict divorcing families and their children: Who needs what kind of help?*, 22 Univ. of Arkansas Little Rock Law Review 453 (2000)

<sup>39</sup> Deborah Chase, *Pro Se Justice and Unified Family Courts*, 37 Fam. L. Quarterly 403, 422 (2003)

<sup>40</sup> *A Survey of Domestic Mediator Qualifications and Suggestion for a Uniform Paradigm* 16 Ohio S.J. Disp. Resol. 1 (2000)

<sup>41</sup> Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decision Making.*, 101 Harv. L. Rev. 727 (1988)

<sup>42</sup> Id. at \_\_\_\_

<sup>43</sup> Id at \_\_\_\_

Recognizing the problems associated with leaving child access cases to an adversarial system making decisions under a best interests standard, Professor Fineman nonetheless cautions against “turning over decision-making to another set of professionals.” These non-legal professionals are viewed as neutral but, in her view have a bias in favor of joint custody, regardless of the circumstances of the case.<sup>44</sup> Judicial deference to agreements or recommendations coming from these processes poses risks to primary parents and their children. Instead, she argues for a return to a legal model in custody cases that protects and recognizes the role of the parent assuming care for the child and proposes the "primary parent" rule as the way to implement this goal.<sup>45</sup>

Other, more recent critiques of the growing reliance on non-legal personnel to make custody decision raise concerns about the bases for such “expert” opinions. Tippins and Whitman, a family law attorney and a psychologist, take the position

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<sup>44</sup> Id at \_\_\_\_ (“ [S]ocial workers and other members of the helping professions... present themselves as neutral, nonadversarial decision makers in contrast to attorneys, whom they characterize as both adversarial and combative. Yet social workers are not neutral; they have a professional bias in favor of a specific substantive result. That result benefits their profession by creating the need for mediation and counseling. It is this bias and self-interest that makes the process one for political consideration. The bias inherent in mediation is different from, but no less suspect than, the bias that can result from overt favoritism of one party over another.”)

<sup>45</sup> Id at \_\_\_\_ . Others have argued also for a variation of the “primary caretaker” standard to replace best interests. Robert F. Cochran, Jr., *The Search for Guidance in Determining the Best Interests of the Child at Divorce: Reconciling the Primary Caretaker and Joint Custody Preferences*, 20 U. Richmond L. Rev. 1, 37 (1985) No state expressly follows a primary caretaker presumption today. A number of states weigh findings about who is the primary caretaker as a factor in child custody determinations. See, e.g., Michigan Child Custody Act of 1970, Mich. Comp. Laws Ann. §722.23 (2002) (infra at p. 670). In other states, the primary caretaker inquiry is a creature of common law. *Kjelland v. Kjelland*, 609 N.W. 2d 100 (N.D. 2000)

that while forensic psychological assessments<sup>46</sup> are often “pivotal documents” that form the basis of judicial decisions on child access, they fail to meet ethical and scientific standards in both psychology and law:

Indeed, there is probably no forensic question on which overreaching by mental health professionals has been so common and so egregious. Besides lacking scientific validity, such opinions have often been based on clinical data that are, on their face, irrelevant to the legal questions in dispute. Indeed, whatever position one might take on the ultimate issue rule with respect to other species of expert testimony, such opinions by mental health witnesses on the ultimate question of a child’s best interest ought not to be allowed. ...The best interests standard is a legal and socio-moral construct, not a psychological construct. There is no empirically supportable method or principle by which an evaluator can come to a conclusion with respect to best interests entirely by resort to the knowledge base of the mental health professional.<sup>47</sup>

Others have noted that this critique can also be applied, perhaps more forcefully, to the range of non-professional staff that is often called upon to conduct custody investigations and assist the court in reaching custody decisions:

“[C]ustody evaluators are more likely to make inferences and recommendations from unsubstantiated theory, personal values and experiences, and cultural and personal values. Our own observations and reviews of evaluations over several decades lead us to the same conclusion. Common examples include the unexamined strong beliefs in the primacy of mothers (or essentiality of fathers) regardless of the circumstances, biased perception of their clients derived from their own negative

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<sup>46</sup> Definition of forensic psych. assessment.

<sup>47</sup> Timothy M. Tippins and Jeffrey P. Wittmann, *Empirical and Ethical Problems with Custody Recommendations: A Call for Clinical Humility and Judicial Vigilance*, 43 Family Court Rev. 193 (April, 2005).

marital and divorce experiences, or a conviction that joint physical custody benefits (or harms) all children.”<sup>48</sup>

Criticisms of increased reliance on non-judicial personnel also stems from the often unclear ethical standards that govern the behavior of such personnel. While non-lawyer mediators may be bound by court rules or statutes requiring mediator confidentiality and prohibiting testimony in court or ex parte contacts with judges about what happened in mediation sessions,<sup>49</sup> not all states have such rules. Indeed, some state statutes authorize mediators to make recommendations to the court in the event mediation fails.<sup>50</sup> The ethical obligations of staff with roles such as “custody evaluators” or “parenting coordinators” are even less clear. Commentators have raised concerns about the practices of such staff in both obtaining information about parties and sharing such information with judges and others.<sup>51</sup> These concerns exist when parties are represented by counsel and court personnel do not appropriately consult with counsel before giving “advice” to parties or seeking information from them<sup>52</sup> The concerns are even greater where parties are unrepresented and have little understanding of the relative authority of various players in the family court system.<sup>53</sup>

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<sup>48</sup> Joan B. Kelly and Janet R. Johnston, Commentary on Tippins and Wittmann's "Empirical and Ethical Problems with Custody Recommendations: A Call for Clinical Humility and Judicial Vigilance," 43 Fam. Ct. Rev. 233 (April, 2005); See also, Joan Zorza, \_\_\_\_\_, Domestic Violence Report

<sup>49</sup> Examples of confidentiality rules for mediators

<sup>50</sup> California mediation statute

<sup>51</sup> See discussion in Section II C infra at \_-

<sup>52</sup> Chase, supra note 32 at \_\_\_\_

<sup>53</sup> Id. Some have responded to these concerns with a call for more training or regulation of non-judicial personnel. Kelly supra note \_\_ at \_\_\_\_ But others, like the American Law Institute, have joined Martha Fineman in suggesting a return to a

### C. The Loss of Privacy and Autonomy for Families

A particularly troubling risk associated with the new paradigm in family dispute resolution is the increased loss of privacy that results from the expanded role of the family court. When family disputes are viewed as opportunities for therapeutic and holistic interventions in the family,<sup>54</sup> increased state interference in family life is inevitable. What raises serious concerns in the new model courts, however, is both 1) the lack of clearly defined parameters for such intervention and 2) the disparate impact expanded state intervention may have on poor families.

Low income families, particularly mothers, have always been at risk of unjustified or inappropriate state intrusion in the child welfare context.<sup>55</sup> These proceedings have always been characterized by informal proceedings under vague standards<sup>56</sup> with resulting limited judicial review. These circumstances combined

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legal model for custody decision-making that would lead to child-centered decisions while serving as a check on inappropriate intrusions of non-judicial personnel such as custody evaluators or mediators. American Law Institute, *Principles of the Law of Family Dissolution: Analysis and Recommendations*, supra note 14 at \_\_\_ (approximation standard)

<sup>54</sup> Catherine J. Ross, *The Failure of Fragmentation: The Promise of a System of Unified Family Courts*, 32 Fam. L.Q. 3, 13 (1998)

<sup>55</sup> Jane C. Murphy, *Legal Images of Motherhood: Conflicting Definitions From Welfare "Reform," Family, and Criminal Law*, 83 Cornell L. Rev. 688, 707-709 (1998) (analyzing the treatment of mothers in a range of legal proceedings involving children and noting "[b]ecause mothers overwhelmingly are the custodians and caretakers of children, they are, in most cases, the focus of the state's intervention in cases of allegations of child abuse or neglect. As noted, from their inception, child welfare programs focused on poor children. ...)

<sup>56</sup> Although there is variation among standards for state intervention, the language of state statutes generally allows intervention based on: abandonment; physical,

with state and federal statutes requiring continuing review and oversight by the court and the child welfare bureaucracy.<sup>57</sup> have led to well-documented victimization of poor women under this system.<sup>58</sup> The family court movement's increased reliance on informal procedures like family group conferencing<sup>59</sup> increases the risk of unchecked state intervention and threats to due process in these cases. These new procedures for resolving allegations of child abuse and neglect are described by one practitioner:

[I]nformal processes replace the initial factual adjudication of whether acts of abuse or neglect warranting state intervention actually occurred with a free-ranging family therapy session. There is virtually no limit on the topics that can be discussed or on the people who may be invited to join. Mediation programs typically give discretion to the mediator to invite people who are not parties to the case, including foster parents, extended family members, and members of the "community," such as a local church pastor. Once these people are brought to the table, all become equal participants, entitled to have their "concerns" heard and their "needs" met. Rather than seeking to determine the truth of the allegations of abuse or neglect, the focus of the discussion becomes "finding solutions which meet the competing needs and interests of all parties." Suddenly, the needs and interests of foster parents, aunts, uncles, grandparents, and social workers are placed on an equal footing with those of the parents and children. But before the family is forced to participate in therapy, the process is supposed to first make a determination as to whether state intervention is warranted. This stage has been skipped. In essence, the mediation session becomes the very state intrusion that the

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sexual, or emotional "abuse"; or failure to protect a child from abuse or educational or medical neglect. See, e.g., ., [Cal. Penal Code 270](#) (LEXIS 2006); Cal. Penal Code 271 (LEXIS 2006); [D.C. Code 16-2301\(9\)\(a\)\(ii\)](#) (LEXIS 2006) (defining a neglected child as one "who is without proper parental care or control ... necessary for his or her physical, mental, or emotional health"); Mass. Ann. Laws Ch. 119, 39 (LEXIS 2006); [N.M. Stat. Ann. 32A-4-2](#) (LEXIS 2006); [Vt. Stat. Ann. tit. 33, 4912](#) (LEXIS 2006).

<sup>57</sup> Jane C. Murphy, *Protecting Children by Protecting Motherhood*, 14 Wm. & Mary Bill of Rts. J. 969 (2006) (cite to fed statute))

<sup>58</sup> Murphy, Roberts, etc. (Wm /Mary Article)

<sup>59</sup> See e.g. Lisa Merkel-Holguin, *Sharing Power with the People: Family Group Conferencing as a Democratic Experiment*, Journal of Sociology & Social Welfare; March 2004, Vol. 31 Issue 1, p. 155

proceeding is supposed to determine whether or not to allow it in the first place.<sup>60</sup> (footnotes omitted)

The new regime is also raising similar concerns proceedings involving divorce and child access. The risk of due process violations and loss of privacy in family life has increased under the new system in which the goals of intervention are more ambitious and the roles of both judges and non-judicial personnel have changed. As noted, one of the principle components of the new family court is that one judge will hear all matters involving a single family. Such an approach may result in both more informed and more efficient decision-making.<sup>61</sup> But it may also result in judges having access to information about a family that would be inadmissible in traditional adversarial proceedings. Judges might also reach decisions in one proceeding based upon conclusions reached in another.<sup>62</sup> In addition, the judges' role in the new "problem solving" family court has shifted from the more narrow role of resolving disputes to the less defined and potentially broader role of using his or her "authority to motivate individuals to accept needed services and to monitor[the parties'] compliance and progress."<sup>63</sup> The latter role creates a greater risk of unwarranted intervention in the traditionally private spheres of family life.

In addition to the risk of loss of privacy and due process posed by judges in the new family courts, the wide range of non-judicial court-sponsored actors and

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<sup>60</sup> Amy Sinden, *Why Moms Are Losing*, supra note \_\_ - at 393

<sup>61</sup> Gloria Danziger, *Delinquency Jurisdiction in a Unified Family Court: Balancing Intervention, Prevention, and Adjudication*, 37 *Fam. L.Q.* 381, 394 (2003)

<sup>62</sup> Anne H. Geraghty & Wallace J. Mlyniec, *Unified Family Courts: Tempering Enthusiasm with Caution*, supra note \_\_ 40 *Fam. Ct. Rev.* at 439.

<sup>63</sup> Boldt and Singer, supra note \_\_ at \_\_ (quoting Bruce J. Winick, *Therapeutic Jurisprudence and Problem Solving Courts*, 30 *Fordham Urb. L.J.* 1055 (2003)).

services in these courts pose similar risks. Given the goal of addressing both the perceived legal and non-legal needs of families, parties seeking remedies like divorce or child support may be required to comply with orders or referrals for parenting classes,<sup>64</sup> substance abuse or mental health evaluations,<sup>65</sup> custody evaluations,<sup>66</sup> family mediation,<sup>67</sup> and other similar services. All of these “services” require significant disclosures of personal information by family members with few rules or procedures to protect the scope of the information sought or, in some instances, the limits of its dissemination. As a result, they pose a risk to both family privacy and autonomy.

But, for those with resources, there are still opportunities to limit court involvement in family breakup and its consequences in the new system. When the court orders mediation, parties may be able to bypass court sponsored programs. Their attorneys can object to mediation, negotiate directly with opposing counsel or choose a private mediator.<sup>68</sup> While courts have the authority to order services regardless of family income, those parties who have attorneys who have negotiated agreements can present them at the first court proceeding and avoid referrals for services, thus remain “under the radar” of the court. For families without lawyers to navigate the system or without resources for “outside” experts or services,

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<sup>64</sup> See e.g. Md Fam. Law 7-103.2

<sup>65</sup> See e.g. Md. Rule 16-204

<sup>66</sup> Id.

<sup>67</sup> Md. Rule 9-205

<sup>68</sup> Statistics from one court system support the need for concern that court sponsored “services” are being utilized disproportionately by low income families. 1999 and 2003 Women’s Law Center Studies. See also, [Robert Rubinson, A Theory of Access To Justice](#), 29 *J. Legal Prof.* 89, \_\_\_ (2005)(discussing the likelihood that parties with resources will “opt out of court based mediation program”).

involvement in the web of interventions in the new family court is almost impossible to avoid if legal remedies such as custody orders and child support are sought.<sup>69</sup>

#### **D. The Disjunction Between Alternative Dispute Resolution and Authoritative Legal Norms**

One of the centerpieces of the new paradigm in family decision-making is the expanded use of alternative dispute resolution and, in particular, mediation. The use of mediation in divorce and related child access disputes is relatively well-established but has grown exponentially as court mandated family mediation has spread in the new family courts.<sup>70</sup> Most recently, the use of mediation or “family conferencing” has spread into child welfare cases.<sup>71</sup> Encouraged by judges and court administrators who welcomed both the reduction of cases on their dockets and relief from making difficult child placement decisions, mediation continues to grow throughout the family court system.

It is difficult to underestimate the sea change in family dispute resolution when one moves from the courtroom to the mediation room. As an alternative to a legal system suffused with the norms of traditional advocacy, mediation presents both enormous possibilities and enormous risks. There is no fact-finder, there is no decision-maker apart from the parties in mediation. Rather, a mediator “facilitates”

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<sup>69</sup> Not surprisingly, all of the stories of both successes and problems in the new family court in the next section involve low income families.

<sup>70</sup> Milne, Salem, Folberg

<sup>71</sup> Lisa Merkel-Holguin, *Sharing Power with the People: Family Group Conferencing as a Democratic Experiment*, *Journal of Sociology & Social Welfare*; March 2004, Vol. 31 supra note\_\_

the parties in resolving their own disputes. Mediating parties “may address any issue they wish, not limited to legal causes of action; they may bring in any information they wish, not limited by rules of evidence and procedure to probative evidence, relevant to legal causes of action and meeting evidentiary requirements for authenticity and accuracy.”<sup>72</sup> Even in court-based programs the sessions are private and informal with few rules governing the scope of discussions or exchange of information in the sessions, other than mediator developed rules of courtesy. Legal norms play a very limited role. While laws regarding child support formula may be mentioned, in mediation of child access issues and to some extent, marital property and alimony, parties are encouraged to generate their own norms that will guide the resolution to their dispute.<sup>73</sup>

In appropriate cases, mediation can empower parties, enhance the ability of parties to work together in the future, and promote flexible and creative problem-solving. But participation in mediation also poses a serious risk that parties may waive important legal rights or enter into agreements that exacerbate conflict. This is particularly true when mediators are ill-equipped or poorly trained.<sup>74</sup> Bad mediators can do great harm, especially to vulnerable parties, when the “empowering” promise of mediation can become, instead, an exercise in coercion and arm-twisting.<sup>75</sup> This risk is particularly acute without appellate review, a public

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<sup>72</sup> Jonathan M. Hymand & Lela P. Love, *If Portia Were A Mediator: An Inquiry Into Justice in Mediation*, 9 Clinical L. Rev. 157, 161 (2002)

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<sup>74</sup> Kimberlee Kovach, *Mediation: Principles and Practice* 429-78 (collecting authorities). (3d ed. 2004)

<sup>75</sup> For discussions of the damage that poor mediators can wreak in family law mediation, see, e.g., Grillo, *supra* note 14, at 1603. For a rare instance where an

record, or established grievance procedures that, at least in theory, provide a check on a comparable risk of "bad" judging.

The risks of mediation are heightened where parties are encouraged or ordered to participate in mediation and lack information about legal norms. Attorneys have not traditionally played a central role in mediation. Unless confronted with a court order for mediation, attorneys rarely mention mediation as an option for clients facing family breakup, either in divorce or through child welfare proceedings.<sup>76</sup> Although some recognized early on the important role attorneys can play in both preparing clients for mediation and in the mediation sessions themselves,<sup>77</sup> the prevailing view is that attorneys have little or no role to play in mediation.<sup>78</sup> Some proponents of mediation not only see attorneys having a limited role but actively discourage their participation. Without complex rules of procedure and evidence and governing substantive law, parties can navigate the

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alleged bad mediator was subjected to judicial scrutiny, albeit unsuccessfully, *see Allen v. Leal*, 27 F. Supp. 2d 945 (S.D. Tex. 1998) (plaintiffs alleged that mediator coerced settlement).

<sup>76</sup> Note changes to ABA Model Rule on attorneys' obligation to counsel clients about ADR

<sup>77</sup> Craig McEwen et al., *Bring in the Lawyers: Challenging the Dominant Approaches to Insuring Fairness in Divorce Mediation*, 79 Minn. L. Rev. 1317 (1995). (analyzing a study of lawyer participation in divorce mediation in Maine and concluding that such participation protects clients and otherwise improves the quality of the mediation process)

<sup>78</sup> Mark Rutherford, *Lawyers and Divorce Mediation: Designing The Role of "Outside Counsel"*, June 1986 *Mediation Q.* 18, 27 ("For mediation to succeed as a profession and to reach its highest objectives, advocacy has no place in any part of the process. For outside counsel to advocate a client's interests contradicts the very essence of mediation and can produce inequitable results.") [add relevant sections of Uniform Mediation Act and Model Standards]

process of mediation themselves. Under this conception of family mediation, lawyers have little or no role.

But the risks of loss of rights from the mediation process are significantly greater for unrepresented parties. Even if the attorney does not attend the mediation, the represented party has far greater access to an expert source of information about judicial proceedings, each party's legal rights and remedies, and the parties' chances of success in court. No comparable source of information exists for the unrepresented party. One scholar describes his view of the potential harm for unrepresented litigants in court sponsored mediation programs:

From a mediator's point of view, the [neutral role of mediator] flows naturally from the concept of mediation, a process voluntarily selected by the parties as a means of dispute resolution different from an adversarial trial. From an unrepresented litigant's point of view, however, the effect of the rules can be devastating. The pressure exerted by courts to send cases to mediation and the lack of explanation of the mediation process raise serious questions about the "voluntary" nature of the decision to mediate. Once in mediation, the pressures on mediators to obtain settlements are immense. With a large number of unrepresented litigants, this pressure guarantees that mediators will rarely, if ever, exercise the option to terminate the mediation due to the incapacity of an unrepresented litigant to participate. ...In mediated settlements, the routine waiver of rights by unrepresented litigants flows from presumptions that the choice to mediate is voluntary and informed; that the litigant has a realistic opportunity to obtain counsel and chooses to forego counsel; that the litigant has access to independent advice; and that the litigant appears in mediation aware of her legal rights and capable of participating in mediation. ...In theory, judges could provide a check on the dangers identified above in mediation, because mediated agreements are usually sent to them for approval. In reality, judges typically rubber-stamp agreements reached in mediation.<sup>79</sup>

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<sup>79</sup>Russell Engler *And Justice For All – Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 *Fordham L. Rev.* 1987, 2006-2011(1999) (arguing for changing the role of mediator when one or both parties are unrepresented to include providing legal information). See also

The risks of mediation are also heightened when it involves family disputes involving couples where one party is less powerful than the other.<sup>80</sup> The 1) the lack of formal procedures 2) the confidential, private setting, 3) the focus on the parties' "needs" rather than "rights" under substantive family law and 4) the virtual lack of review of both the process and outcome of mediation create a setting where the more powerful dominate and bias and prejudice are unchecked.<sup>81</sup> Power imbalances may exist in cases where only one party is represented by an attorney or may result from race, gender, class, sexual orientation and cultural differences in

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Ellen A. Waldman, *Identifying the Role of Social Norms in Mediation: A Multiple Model Approach* 48 *Hastings L.J.* 703(1997) (proposing a “norm educating” or even “norm advocating” role for mediators in some situations, including certain types of family mediation) But the vast majority of mediators reject such a role. See e.g., Lela Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 *Fla. St. U.L. Rev.* 937(1997)

<sup>80</sup> One of the earliest articulations of this position is the oft-cited article by Tina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 *Yale L. Journal* 1545(1991) Of course, some mediators argue that just opposite is true: mediation is particularly appropriate for relationships marked by power imbalances, particularly gender.. They argue that the hierarchical, "winner takes all" approach of a still white male dominated adversary system further disempowers and silences the less powerful. The delays, expense, complexity and inflexibility of litigation make it particularly ill suited to resolving family law disputes. Mediation, on the other hand, with its emphasis on listening, relationships, and problem solving has greater potential to "heal" and "hear" all voices. Further, mediation's focus on permitting participants to express emotions and articulate needs may be better suited to women than men. Its procedural informality, lack of reliance on substantive rules of law and lower cost might make it more accessible to those who cannot afford lawyers and are not well versed in the American justice system. [citations]

<sup>81</sup> Ann Milne, *Mediation - A Promising Alternative for Family Courts*, 1991 *JUV. & FAM. CTS. J.* 61 (1991) (arguing that mediation is particularly well-suited to resolving disputes among family members because agreements, rather than a public adversarial proceeding, are less destructive to family relationships, particularly parent-child ties)

mediation.<sup>82</sup> The most disabling power imbalance in mediation may be in relationships where domestic violence has taken place. In these cases, there has already been a severe abuse of power and the consequent power imbalance can make mediation impossible. A consensus has emerged that cases involving family violence need special treatment in mediation, reflected in both standards for mediators<sup>83</sup> and mediation statutes and rules,<sup>84</sup> Despite this consensus, there is evidence that the new family courts, in which mediation plays such a central role, are still ordering couples who have experienced domestic violence to mediate their

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<sup>82</sup> Delgado et al

<sup>83</sup>. The Model Standards of Practice for Family and Divorce Mediation, endorsed by among others, the American Bar Association and the Association of Family and Conciliation Courts, include provisions defining domestic violence, requiring domestic violence training for mediators, screening, and setting forth steps to ensure safety during mediation. The Model Standards also recognize that some cases should not be mediated "because of safety, control or intimidation issues. A mediator should make a reasonable effort to screen for the existence of domestic abuse prior to entering into an agreement to mediate. The mediator should continue to assess for domestic abuse throughout the mediation process." Another group of distinguished academics, judges and practicing lawyers, the American Law Institute (ALI), has also addressed the issue of mediating family disputes where domestic violence is present. In its Principles of the Law of Family Dissolution, the ALI takes the position that the risks of coercion and intimidation in mediation for victims of domestic violence require that all mediation programs be voluntary

<sup>84</sup> Courts and legislatures have responded to the consensus that domestic violence cases should be given special treatment in mediation by enacting a variety of rules and statutes to achieve that goal. As of 2004, forty-two states have enacted statewide statutes or court rules authorizing mandatory, discretionary or voluntary court-sponsored mediation programs of selected family law disputes. Of the forty-two statutes or rules, twenty-nine create some kind of exception to the court's authority. Jane C. Murphy and Robert Rubinson, *Domestic Violence and Mediation: Responding to the Challenges of Creating Effective Screens*, 39 ABA Fam. L. Q. 55 (Spring 2005)

family law disputes with little or no particularized examination of the couples' circumstances.<sup>85</sup>

Perhaps an even more troubling example of risks posed by mediation in the face of a disabling power imbalance is “family conferencing” in child welfare cases. While these cases may involve more attorneys than private family disputes,<sup>86</sup> the attorneys’ role in family conferencing is almost as ill-defined and limited as in divorce and custody disputes.<sup>87</sup> And these cases are often marked by intimate partner violence<sup>88</sup> and parties with limited education and resources.<sup>89</sup> All of these circumstances create risks that a parent, most often the mother, will “suppress her point of view in order to achieve agreement.” and not benefit from statutory or constitutional protections in place in the child welfare context<sup>90</sup> As Amy Sinden has described it:

..... [I]nformal procedures are unlikely overall to be as successful as formal ones in meeting the outcome and process goals of due process. The substantial power disparity between the parties, the emotionally charged nature of the subject matter, and the lack of a shared set of interests and values between the parties all tend to distort the decision making process. Traditional formal adversarial processes have mechanisms that, while far from perfect, are designed to combat the distortion

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<sup>85</sup> Murphy and Rubinson, supra note 103 at \_\_\_\_ (citing studies in California and Maryland’s Family Courts in which large numbers of cases involving family violence go to family mediation without being identified and properly screened) But see (report identifying new procedures for court screening of domestic violence cases prior to referral for court-sponsored mediation in Maryland’s family divisions)

<sup>86</sup> Statutes providing representation of parents and children in child abuse and neglect cases.

<sup>87</sup> citations

<sup>88</sup> Legal Images of Motherhood

<sup>89</sup> Id.

<sup>90</sup> Sinden at \_\_\_\_

caused by such conditions. But informality generally offers no equivalent protections

While research addressing the concerns raised here exists, much of it is conflicting. The research addressing these concerns in family mediation tends to show different results depending upon a number of factors including the type of issues mediated (custody vs. financial issues), whether process or outcomes are being examined, and whether the parties have experienced both litigation and mediation.<sup>91</sup> One of the difficulties in evaluating family mediation is the complexity of measuring "success." Given mediation's focus on "needs" rather than "rights," measuring participant "satisfaction" has been the dominant appropriate measure of success. Minorities and other traditionally less powerful groups may, however, have lower expectations about how well their needs can be met, thus rendering "satisfaction" an inadequate measure of success for these individuals. "Fairness" in both process and outcome instead of "satisfaction" may also have to be evaluated to measure the "success" of these new forms of alternative dispute resolution in child welfare cases.

### **III. The Promise and the Risk of the New Paradigm: Stories from the Field**

#### **A. Introduction**

Maryland was among a handful of states to explore new ways to handle family law matters by establishing Family Divisions in its five largest jurisdictions by court rule in 1998.<sup>92</sup> Although not all components of the model family court

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<sup>91</sup> Id. For a summary of some of the research regarding gender and mediation, see J. Folberg, A. Milne and P. Salem, *Divorce and Family Mediation* 456-57 (2004)

<sup>92</sup> Md. Rule 16-204 (effective July 1, 1998).

were adopted in Maryland,<sup>93</sup> the courts embarked on an ambitious experiment to approach family law decision-making from a “therapeutic, holistic, and ecological” perspective “with the aim of improving the lives of families and children and maximizing the potential positive outcomes of court intervention.”<sup>94</sup> The system was designed by an impressive and thoughtful array of jurists, scholars and practitioners. Great care was invested in creating performance standards by which to measure the impact of the new reforms. Indeed, some evaluation of the Family Division has already taken place over the eight years since it was first established and there is every indication the judiciary in Maryland is committed to ongoing evaluation, oversight and improvement of the system. As such, the Maryland Family Divisions present a particularly good court system from which to draw examples of both the promise and risks of the new paradigm.

**B. The Successes [Jana insert]**

**C. The Risks**

As with other similar efforts around the country, the planned reforms in the Family Divisions in Maryland have been both difficult to achieve and, where change has taken place, it has come at some cost to due process, family privacy and autonomy. While the court system has made some effort to evaluate the

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<sup>93</sup> describe components of Family Division

<sup>94</sup> Performance Standards and Measures for Maryland’s Family Divisions 48, Standard 5.1; found at <http://www.courts.state.md.us/family/index.html> (last visited September 25, 2006) The report goes on to describe the mandate of the courts: [T]he Family Divisions must prove to the public and Maryland’s policymakers both the therapeutic qualities of the Family Divisions and the wisdom of the family justice system that invests in early intervention, prevention, and treatment as a means to secure the future well-being of Maryland’s children and families.” Id at 53.

performance of the courts' different components,<sup>95</sup> the negative impact on poor litigants' privacy and autonomy has not been analyzed and is difficult to capture in such evaluations. The majority are parties entering the Family Divisions are unrepresented, making them particularly vulnerable to the risk of abuses of power within the court system.<sup>96</sup> Many of these litigants have no experience with the court system and thus have limited ability to distinguish requests from non-judicial actors to participate voluntarily in programs from judicial authority to compel action. For those who regularly experience the state social service bureaucracy in other contexts—those who may have experienced the punitive power of child support, welfare and child protection bureaucracies—the impulse to comply with requests made by anyone within the courthouse is strong. Even with counsel, few “offers” for services are declined and judicial or non-judicial exercises of authority are rarely challenged.<sup>97</sup> The following examples, drawn from two different jurisdictions in Maryland, illustrate the dangers of this system.<sup>98</sup>

### **Case #1: The Risk of “Post Judgment Monitoring”<sup>99</sup>**

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<sup>95</sup> Pro Se Project evaluation, other AOC evaluations

<sup>96</sup> Stephen K. Berenson, *supra* note \_\_\_\_\_. See also, Dep't of Family Admin, MD Judiciary, 2005 Annual Report.

<sup>97</sup> The combination of informal action, lack of clear standards and limited litigant resources make judicial review of family court action rare.

<sup>98</sup> Both of these examples involve represented parties. One can only imagine the number of cases in which similar or more egregious abuses occur daily where the parties (or even attorneys) do not know they can object or are unwilling to do so given the vague and unclear exercises of authority vested in all players in the new family court.

<sup>99</sup> This case is drawn from the caseload of the University of Baltimore Clinical Program in which co-author Jane Murphy teaches. See <http://law.ubalt.edu/clinics/index.html> (last visited October 1, 2006) Although much

Mrs. Tate, a mother of two young children, had been in an extended relationship with the children's father who had been physically abusive to her over a period of years. She was granted sole physical and legal custody and, in a separate proceeding, obtained a civil order of protection<sup>100</sup> against the children's father. Shortly after, her ex-husband was imprisoned for violating the protection order when he went to her home, pushed her onto the floor and threw some of her belongs out the window. Upon his release, he filed a motion to modify custody. A guardian ad litem was appointed for the child and the case was referred for mediation, despite the presence of domestic violence. The mother's counsel objected to mediation and the motion to modify custody was denied, as the legal standard of a material change in circumstance had not been met.

Despite the denial of the motion to modify custody, the hearing examiner<sup>101</sup> viewed this as a "high conflict"<sup>102</sup> family who warranted extended intervention by the court. He modified the custody order to permit the father more time with the children, on the condition the father attend batterers' counseling. The hearing examiner also set in a series of review hearings, despite the fact that no legal issues were pending. At each subsequent hearing, the mother's behavior was scrutinized and the father was able to gain more and more visitation without filing anything

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of what is reported here is a matter of public record in the court file, the names and identifying information have been changed to protect the privacy of the client.

<sup>100</sup> Md. Fam. Law Code Ann. § 4-506 (2006).

<sup>101</sup> Define role of master

<sup>102</sup> For a thorough discussion of "high conflict family," a phrase that has become a term of art in family courts, see Christine Coates, Robin Deutsch, Hugh Starnes, Matthew Sullivan & BeaLisa Sydik, *Parenting Coordination For High Conflict Families*, 42 Fam.

Ct. Rev. supra note \_\_\_ at \_\_\_.

new and without complying with the court's previous order that he attend domestic violence counseling.<sup>103</sup> The repeated hearings gave the father's attorney and the court appointed Guardian Ad Litem the opportunity to argue the father's case over and over to a series of judicial officers, none of whom fully understood the context of the case.

In the last review hearing, the court doubled the amount of overnight visitation immediately after the mother expressed her discomfort with the father taking the child to church. The hearing examiner also appeared to be sympathetic to the Guardian Ad Litem's position that the father should not have to 'keep paying for the domestic violence' even though there was evidence of such violence within months of the court hearing and the father had not participated in batterer's counseling as ordered by the court. This series of reviews and changes in the existing child access order all happened with no motion pending, no notice to the mother and no evidentiary basis or record from which to seek review.

## **Case # 2: The Family Court Services Coordinator with Unlimited Authority**

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In a smaller, suburban Maryland jurisdiction, the statewide legal services organization began to get complaints shortly after the establishment of a Family Division in that suburban court. A new position had been created and filled for a

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<sup>103</sup> Compliance issues with such orders are substantial [study cite]

<sup>104</sup> This illustration is drawn from interviews with staff at the Legal Aid Bureau of Maryland a private, non-profit, multi-funded law firm providing free legal services to low-income persons statewide in Maryland. Legal Aid serves Baltimore City and Maryland's 23 counties from 13 office locations. [www.mdlab.org](http://www.mdlab.org) (last visited September 25, 2006)

“family court services coordinator.” According to one attorney who represented a number of low income clients in that court, this non-lawyer with a background in human services thought her position “gave her license to play God.”<sup>105</sup> She described the coordinator as “terrorizing unrepresented litigants, particularly young mothers in child access cases.”<sup>106</sup> Reports of inappropriate actions the coordinator has taken in family law cases include 1) regularly threatening young mothers with loss of their children and, in some cases, making arrangements to take their kids from them and place them with third parties, 2) ordering random drug tests without court order, 3) conducting custody “evaluations” which the parent never saw and testifying about the contents of such evaluations in child access cases; and 4) engaging in ex parte contacts with at least one Family Division judge on the merits of family cases. All of these actions were taken without a court order or other express authority.

The court employee may have been, in some instances, well-intentioned, taking actions she believed were within her general authority to “engage in differentiated case management.”<sup>107</sup> But for the parents for whom contact with their children was at stake, these actions subjected them to broad violations of their privacy with no practical means to object. While many of the problems in this jurisdiction were connected to a single individual’s inappropriate conduct,<sup>108</sup> they

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<sup>105</sup> Interview with Hannah Lieberman

<sup>106</sup> Id.

<sup>107</sup> AOC Family Division Report

<sup>108</sup> These problems were eventually reported by the Legal Aid Bureau to Maryland’s Administrative Office of the Courts who responded quickly and appropriately.

demonstrate the risks inherent when courts embrace ambitious agendas to address problems outside the realm of dispute resolution without clearly designated procedures, grants of authority or, in some cases, the resources to appropriately train or hire professional staff. As one Legal Aid lawyer described it, “I think [these] stories exemplify a good idea run horribly amuck, and the need to find that often elusive balance between formalized legal procedures ,including all of the due process protections we used to expect, and the desire to address the spectrum of issues poor family law litigants often have”<sup>109</sup>.

#### **IV. The Impact of the Paradigm Shift on Family Law Teaching and Scholarship**

The paradigm shift that we describe has also exacerbated the gap between the teaching and practice of family law. While the practice of family law has changed dramatically over the past two decades, the teaching of family law has remained relatively static.<sup>110</sup> Most family law teachers (ourselves included) continue to emphasize doctrine and theory -- with perhaps a smattering of policy analysis.<sup>111</sup> Similarly, most standard family law texts continue to emphasize litigated appellate cases.<sup>112</sup> But today’s family lawyers need to draw on a breadth

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<sup>109</sup> Interview with Hannah Lieberman

<sup>110</sup> Mary E. O’Connell & J. Herbie DiFonzo, *The Family Law Education Reform Project Final Report*, 44 Family Court Rev. 524 (2006).

<sup>111</sup> Clinical teaching of family law may be an exception.

<sup>112</sup> See Mary E. O’Connell & J. Herbie DiFonzo, *The Family Law Education Reform Project Final Report*, 44 Family Court Rev. 524, 527-528 (2006) (reporting on a survey of standard family law textbooks which showed that close to 80% of the pages “were devoted to case material or statutes, with the vast bulk of those pages being case law.”).

of traditional legal analysis. For example, if family courts increasingly incorporate the views of mental health professionals, then our students need to understand not only the roles these non-lawyer professionals play, but the theories and assumptions on which they rely. Similarly, if many family lawyers now serve as – or work closely with -- mediators, arbitrators and parent coordinators, then our family law classes should discuss the appropriate – and inappropriate – uses of the full range of family dispute resolution processes. If significant numbers of family lawyers are practicing “collaborative law” or representing children, then our family law curriculum knowledge -- and to master a range of skills -- that go well beyond should include the distinct ethical issues that these practices raise. Unfortunately, few existing family law casebooks emphasize these topics.

The Family Law Education Reform (FLER) Project is attempting to address this gap between the teaching and practice of family law.<sup>113</sup> The Project is an interdisciplinary collaboration between the Association of Family and Conciliation Courts (AFCC) and the Center for Children, Families and the Law at Hofstra Law School. The Project’s initial Report, published in October, 2006, documents “the divergence between family law in the classroom and family law in the courtroom, lawyer’s office, conference room, and home.”<sup>114</sup> It then recommends changes in the content and structure of family law courses, designed to better prepare students

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<sup>113</sup> See Andrew Schepard & Peter Salem, *Foreword to the Special Issue on the Family Law Education Reform Project*, 44 Family Court Rev. 513, 516 (2006). The Project has been endorsed by a number of professional organizations, including the ABA Section of Disputes Resolution, the National Association of Counsel for Children, the National Council of Juvenile and Family Court Judges.

<sup>114</sup> Mary E. O’Connell & J. Herbie DiFonzo, *The Family Law Education Reform Project Final Report*, 44 Family Court Rev. 524, 526 (2006).

to serve their clients effectively and ethically. The next stage of the FLER Project will be to develop curricular modules on key topics such as child development, alternative dispute resolution and interdisciplinary collaboration that family law professors can incorporate into their courses. The FLER Project thus offers one response to the paradigm shift that we describe – a response that merits careful attention.

**Conclusion** [to come]