

# COURTS AND COMMUNITIES HELPING FAMILIES IN TRANSITION ARISING FROM SEPARATION OR DIVORCE

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HONORING FAMILIES INITIATIVE  
WHITE PAPER



**IAALS' HONORING FAMILIES INITIATIVE:  
COURTS AND COMMUNITIES HELPING FAMILIES IN  
TRANSITION ARISING FROM SEPARATION OR DIVORCE**

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Keypoints:

- It is time for a national dialogue about the feasibility of creating out-of-court alternatives for separating and divorcing families.
- Research indicates that separating parents who provide their children with consistency, emotional support, and low conflict help children successfully adapt in the transition process.

**Keywords:** *Divorce; Effects on Children; Family Law; Financial Impacts of Divorce; Mediation; and Separation.*

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INSTITUTE *for the* ADVANCEMENT  
*of the* AMERICAN LEGAL SYSTEM



The Institute for the Advancement of the American Legal System (IAALS) is a national, independent research center at the University of Denver dedicated to continuous improvement of the process and culture of the civil justice system. By leveraging a unique blend of empirical and legal research, innovative solutions, broad-based collaboration, communications, and ongoing measurement in strategically selected, high-impact areas, IAALS is empowering others with the knowledge, models, and will to advance a more accessible, efficient, and accountable civil justice system.



**HONORING FAMILIES  
INITIATIVE**

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*Honoring Families* is an initiative of IAALS dedicated to advancing empirically informed models to ensure greater accessibility, efficiency, and fairness in divorce and child custody matters. Through comprehensive analysis of existing practices and the collaborative development of recommended models, *Honoring Families* empowers, encourages, and enables continuous improvement in practices and procedures for divorce and child custody matters.

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### I. EXECUTIVE SUMMARY

#### **Honoring Families Initiative: Mission**

The pages that follow will describe the premises and policies for the Honoring Families Initiative (HFI) of IAALS, the Institute for the Advancement of the American Legal System. The goal of the

paper and, more broadly, of HFI's projects, listed below, is to offer new models of service delivery in order to facilitate an informed national dialogue on how courts and communities can better meet the needs of parents and children that arise from the transitions of separation or divorce.

## **MISSION**

The mission of HFI is to advance empirically informed models for dignified and fair processes for the resolution of divorce and child custody cases in a manner that is more accessible and more responsive to children, parents, and families.

HFI is currently engaged in two major projects to fulfill this mission:

The first is to identify Principles that would undergird in-court dissolution or child custody cases. The Principles will be research informed and will reflect stakeholder input. They will address the priorities of the divorce and custody court in an era of limited resources and make recommendations as to how courts can manage their dockets to meet the critical needs of reorganizing families. The development of the Principles will take 18 to 24 months; however, more immediately, the Initiative will work with the state of Oregon to assist in designing a stream-lined model for a responsive and cost-effective divorce and custody court.

The second objective is to develop a model for a multidisciplinary Center, the pilot for which will be located at the University of Denver. The Center will permit litigants to gain access to various services outside of the court: with a goal of helping litigants or prospective litigants develop parenting skills, financial stability, and strategies for navigating the legal system that foster healthy reorganizing families.

## **The Purposes and Organization of this Paper**

The purpose of this paper is to describe the rationale for HFI's mission and to invite others interested in the welfare of children and families to engage in dialogue and collaborate with HFI. It begins with an overview of the core functions of the family court, fact finding and creating and enforcing orders, and the important social purposes they serve for separating and divorcing parents and the community.<sup>1</sup> It then describes legal and social trends for families, courts, and communities that call for a fundamental reconsideration of the support that communities provide for separating and divorcing families. It emphasizes the important need that separating and divorcing families have to plan for the future of their children through non-adversarial processes such as mediation, early neutral evaluation and parent education. Finally, it proposes a set of principles that frame an action plan in which we invite further stakeholder discussion and input.

## **Overview**

Families are the fundamental unit to raise the next generation, and a fundamental force for promoting social stability and economic productivity. Families maintain these functions even when parents and children must reorganize their relationships and responsibilities due to separation and divorce. These challenging times of transition place parents and children at risk for emotional, educational, and economic decline if conflict between parents is not resolved and stability for children is not rapidly achieved. When the conflict is prolonged and when instability persists, the result is significant costs to parents, children, and the larger society.

## **A. DUE PROCESS-BASED CORE FUNCTIONS OF THE FAMILY COURT FOR DIVORCING AND SEPARATING PARENTS**

The court is the basic institution assigned the task of resolving disputes between separating and divorcing parents about their children or about their finances arising from reorganization of the parental relationship. It performs essential core functions in disputed cases by creating and enforcing orders when parents cannot agree or when family members need protection and enforcement of obligations.

The court undertakes these core functions within the framework of the adversarial process. Court proceedings must be consistent with due process of law, as judicial orders entered over the opposition of one parent involve important legal rights and constitutional values. Due process, for example, generally requires courts to make determinations after notice and hearing, sworn testimony, the presentation of evidence and the opportunity to appeal decisions to a higher court.

Due process–based litigation and judicial determinations by the family court serve vital social purposes. Courts articulate, apply, and expand principles of law necessary to provide order to family, social, and economic life. Even when the court is not directly involved in entering orders in a particular case, negotiations take place in the “shadow of the law” and precedents created by litigation provide a framework for parents’ expectations.

Courts can also protect the vulnerable through due process–based procedures. For example, courts play an essential role in protecting victims of violence. At the same time as our concerns about families experiencing separation and divorce have increased, our collective awareness of the dangers and problems that family violence creates for parents and children in reorganizing families has also amplified, as has the legal system’s response to it. Every court has a process for emergency orders when there is an allegation of abuse associated with the filing. Courts recognize and act on the need to identify those cases as early as possible, providing additional access and oversight. Protecting victims from violence, holding abusers accountable, and, ideally, setting parties on a course of rehabilitation are core functions of the legal system. In this regard, courts need procedures to protect victims of domestic violence and to address any mental health or substance abuse issues that may be exhibited by litigants.

The family court is, however, overwhelmed with a deluge of cases and diminishing resources that threaten its ability to perform its core functions. Many cases may not require the protection or enforcement functions of the court, but rather, the administrative function of entry of decree. In order to determine what functions are needed and dispense those functions as fairly and efficiently as possible, family cases must be triaged so that the protection and enforcement cases can be prioritized and given their full due. Shrinking resources demand that court services be deployed efficiently, effectively, and only where necessary.

## **B. LIMITS OF THE ADVERSARY PROCESS FOR SEPARATING AND DIVORCING FAMILIES**

Although adversary procedures are rooted in due process of law and perform essential social functions, they do not meet the needs of many reorganizing families who look to the courts for solutions. The adversarial process required for judicial fact-finding and enforcement of judicial orders bears with it significant emotional and financial costs. The process by which “bad” behavior and “deficient” parenting is alleged by one parent regarding the other in an effort to buttress his or her position in court exacerbates existing hostility and engenders long-term mutual distrust. As one critic colorfully put it, “the formal nature of the courts pits the parties against one another like two scorpions in a bottle, at a time when they are most angry and hostile toward one another.”<sup>2</sup>

Children experiencing parental separation and divorce tend to adapt best when both parents are involved in their postreorganization life and they receive safe and competent parenting. Participation in litigation or adversary negotiations impels parents in the opposite direction—toward antagonistic positions which imperil children and prolong litigation. It may be difficult for parents to retreat from such opposition, and the result is frequently protracted delays and unnecessary expenditure.

Litigation over children is costly to the emotional, economic, and educational health of children, their families, and ultimately, the community.

## **C. PROBLEM-SOLVING AND PLANNING PROCEDURES**

Recognizing that adversarial procedures are essential but do not fit the needs of most separating and divorcing families, family courts have incorporated processes such as mediation and education

into the range of services they offer. These future-focused, problem-solving services encourage parents to resolve their disputes without an adversary trial. Research and experience have established that a significant percentage of separating and divorcing parents benefit from these services. They are well regarded by parents, and save the parties and communities the emotional, educational, and economic costs associated with contentious separation and divorce.

Therefore, the overall goal for social policy is not to eliminate the necessary role of litigation, but rather to cabin it and to create alternatives better suited to the realities of family reorganization than the O.K. Corral. Hospitals must have operating rooms, but most patients do not begin or end up there. So, too, courts must have a range of services available besides litigation. Making services such as parent education, mediation, and financial planning widely available is a sound investment in family stability and productivity; helping parents make their own decisions through the separation and divorce, in turn, prepares them to continue doing so without the need for judicial intervention and the adversarial process.

#### **D. COURT AND COMMUNITY COLLABORATIONS TO AID SEPARATING AND DIVORCING FAMILIES**

These court-annexed problem-solving services are not widely available in many communities, and are the first services to be cut in the specter of fiscal uncertainty and decline. If budgetary choices have to be made, it is entirely understandable that the courts must put resources toward the core functions of fact finding and order enforcement. On the other hand, families who do not have access to problem-solving services are left adrift, and they must navigate the considerable challenges of separation and divorce without essential assistance.

Providing problem-solving services for separating and divorcing families is a community responsibility, not just a judicial responsibility. The welfare of the entire community—especially its children—is impacted by how the members of the reorganized family relate to each other. Non-profit institutions, universities, and the private sector have a critical role to play in collaboration with family courts to insure that separating and divorcing families receive the help and support they need. Interdisciplinary collaborations between law, social work, psychology, dispute resolution, and financial planning are fundamental components of those problem-solving services. Making them widely available in a cost-effective way will meet the needs of the majority of families who are undergoing reorganization and planning for their future.

## **II. SEPARATING AND DIVORCING FAMILIES, COURTS, AND COMMUNITIES: A TWENTY-FIRST CENTURY PERSPECTIVE**

How have court proceedings for separation and divorce evolved over the last few decades, particularly with respect to parenting rights and responsibilities? As a threshold, we note that divorce has undergone what one scholar has characterized as a “silent revolution.”<sup>3</sup> Not so long ago, divorce was a scourge and a sign of personal failure, and having a child out of wedlock a moral wrong. In 1969, California became the first state to eliminate fault-based grounds for divorce.<sup>4</sup> By 1976, forty-six other states had effectively removed fault impediments to dissolution, either by replacing their fault-based divorce statutes with pure no-fault legislation or by adding no-fault provisions to their existing grounds for divorce.<sup>5</sup> However, only in 2010 did the last fault-based divorce state finally move to no-fault.<sup>6</sup>

Even in a no-fault model, our society has clung to the myth that divorce is akin to a private civil case, in which the parties are pitted against one another with attorneys to represent them. In the end there will be winners and losers economically and regarding the parent-child relationships.

One or both parties may file dissolution or child custody petitions. The filing commences an action, which is then monitored by the court staff. Evidence is presented if matters are contested. The court makes a final decision apportioning the incidents of the family relationship—parenting, support, property—in a final order that determines the parties’ rights and responsibilities for the future. As we

will discuss, many states have modified the traditional adversarial system to incorporate problem-solving procedures such as mediation and parent education. When those procedures either do not exist or do not result in an agreement, however, courts typically default to the traditional adversarial system: the same system that applies in a complex anti-trust case or a criminal burglary case.

As discussed above, the adversary model of dispute resolution is rooted in due process and recognizes that important legal rights govern the resolution of disputes between parents arising from separation and divorce. Both it and the problem-solving procedures of the family court have, however, come under intense challenge from the confluence of a number of interrelated legal and social factors. Each will be discussed in turn.

#### **A. AN INCREASE IN SEPARATION AND DIVORCE**

Currently, the probability of separation or divorce for the average couple marrying for the first time is estimated to be somewhere between 40 and 50 per cent.<sup>7</sup> The rate of divorce is even higher for those in second and third marriages, with some estimates as high as 60 per cent.<sup>8</sup> Overall, this means that one million children live with parents who are in the midst of a divorce each year.<sup>9</sup>

Marriage, divorce, and the accompanying family transitions in America have changed radically over the last fifty years. The divorce rate in America has nearly doubled since the 1960s, having declined somewhat in the last twenty years after peaking in the 1980s.<sup>10</sup> Some researchers attribute this decline to the rising number of couples choosing to cohabit or to have children outside of marriage, suggesting that there would not have been any decline in the divorce rate if these couples had not chosen to “opt out” of marriage.<sup>11</sup> Increasingly, people are choosing not to marry at all: “About 41 per cent of births in the United States occur outside marriage, up sharply from 17 per cent three decades ago.”<sup>12</sup> In 2009, 69 per cent of children under the age of 18 lived with two parents; 27 per cent lived with one parent, the majority being with the mother; and the remaining 4 per cent lived with neither parent. The increase in separation and divorce of families in the context of the changing landscape of America’s family structures continues to challenge our current traditional adversary model.<sup>13</sup>

#### **B. AN INFLUX OF CASES**

The family courts have, in effect, become an emergency room for family problems when separating and divorcing parents have nowhere else to turn for help in addressing their problems with each other and their children. Nationwide conclusions about disposition statistics are not available for separation- and divorce-related filings, in part because different states keep data differently. However, in 2009, the National Center for State Courts examined and compared the domestic relations caseloads of 36 jurisdictions, finding that 25 of these 36 jurisdictions had clearance rates of less than 100 per cent.<sup>14</sup> This means that more cases are entering the system each year than are being disposed of in a year timeframe. The study demonstrates that the “inherent complexities of domestic relations cases seem to have a direct effect on the court’s ability to dispose of as many cases as are introduced into their system each year.”<sup>15</sup> These findings show that domestic relations cases are staying on the court’s dockets longer and are increasing the burdens on the courts.

Family courts are, effectively, overwhelmed and disputes arising from separation and divorce are a major component of that overload. The result can be significant delays, and those delays in final resolution increase anxiety and uncertainty at a time when parents and children need stability to reorganize their lives. If the matter is contested, the in-court process includes possible temporary orders hearings, motions, status conferences, and final orders hearings. Forensic mental health trained evaluators may be appointed to help the court assess the best interests of children, often leading to a lengthy and costly investigation into family history and relationships. Discovery is also a possibility; increasingly, discovery of electronically stored information is sought, which can be expensive and complex. All of these expenses associated with the legal process are incurred at a time when family finances are strained by the added costs of operating two households rather than one and childcare is difficult and costly to obtain, requiring many parents to work less time in employed positions.

### C. AN INFLUX OF SELF-REPRESENTED LITIGANTS

Another development that impacts court resources is the growth of the number of self-represented litigants. The court process is shaped by procedures established to comply with due process guarantees. It assumes that parents will be represented by lawyers to navigate legal procedures, present evidence, and advise them along the way.

Contrary to that interpretation, somewhere between 60 per cent and 80 per cent of cases arising from separation and divorce nationwide are estimated to proceed with at least one party, and frequently both parties, representing themselves.<sup>16</sup> Parents also switch between having a lawyer, and not, then hiring another lawyer, throughout the process, adding to the time, economic, and emotional costs of separation and divorce.<sup>17</sup>

Litigants generally have difficulty affording legal services as currently provided, fail to understand when a lawyer may be helpful to their problem, are reluctant to talk to an attorney, and do not use attorney services for the majority of their legal problems.<sup>18</sup> As a consequence, many litigants are resentful of our legal system and lawyers, fail to resolve their disputes satisfactorily, and may even lose their rights as a result.<sup>19</sup>

Legal aid in divorce proceedings is increasingly not available to those of modest means, let alone to the indigent.<sup>20</sup> A difficult economy has led many individuals to handle their legal issues without the benefit of full legal representation.<sup>21</sup> Fewer clients are willing to pay an attorney's regular hourly rate for the costly activities of litigation, such as time spent traveling to and from the courthouse, waiting for the case to be called, and formal discovery.<sup>22</sup>

There are suggestions in the literature that increases in self-representation also result from a widespread distrust of lawyers<sup>23</sup> and the availability of legal information from sources like the Internet.<sup>24</sup> As a 2002 Oregon Task Force reported after statewide public hearings on the divorce system: "Many pro se litigants can afford lawyers. They do not seek the legal representation they need because they fear to consult a lawyer would be to shake hands with the tar baby."<sup>25</sup> Couples who wish to divorce cooperatively are wary that lawyers will aggravate and prolong conflict and that seeking legal representation will impede their ability to control the dispute resolution process.<sup>26</sup> With the availability of legal information from sources like the Internet and self-help books, the options for the potential divorcee have grown.<sup>27</sup> Parties now have instant access to legal information, advice, forms, and specific information about the divorce laws of each state.<sup>28</sup>

Significant numbers of parents who do engage counsel express dissatisfaction with their attorneys. A 1999 survey of divorcing parents and their children in Connecticut validates these concerns. Many parents and children reported that their attorneys failed to provide adequate guidance, information, or quality of services. They also complained that the adversary divorce process took control of their lives and that it was too long, too costly, and too inefficient.<sup>29</sup>

Whatever the cause, the increase in self-representation means that more parents are navigating an intricate and adversarial legal process without the guidance and perspective provided by counsel. This system has the potential to dramatically change parents' relationships with their children and with each other. In addition, self-represented litigants place strain on the court system, as courts have to adjust their processes to accommodate persons unschooled in the law and in legal procedures.<sup>30</sup> Many courts have established programs to provide self-represented parents with education on how to be a litigant in separation and divorce.<sup>31</sup>

The role of the judge in a family case involving self-represented litigants is also more complex. Judges must master all aspects of family law because they cannot rely on the attorneys to raise all relevant legal issues. Judges are often conflicted about how much help to provide a self-represented litigant so that he/she avoids mistakes and still complies with legal procedures, fearing they will be compromising their neutrality and impartiality in providing assistance.<sup>32</sup> In July 2010, the ABA conducted a nationwide survey of approximately 1,200 state trial judges on the issue of pro se litigation. The judges responded that litigants are generally doing a poor job of representing themselves and are burdening the courts.<sup>33</sup> Many state court judges around the country view the rise in self-represented litigants as one of the foremost challenges facing the system.<sup>34</sup>

#### **D. CHANGES IN SUBSTANTIVE FAMILY LAW CREATING MORE DISCRETION AND CONTENTION**

The pace of change in the substantive law and procedural rules applied by the courts in separation and divorce disputes has increased at the same time that legal representation is declining. As one scholar recently summarized:

Marriage and divorce law—and related social norms about family life—started changing in the nineteenth century, but much of the change occurred in the last fifty years. Formerly, adultery was grounds for divorce, sometimes the only ground. Now, with no-fault divorce, whether a spouse committed adultery is irrelevant to whether spouses can divorce and generally has no bearing on other issues in a divorce. A couple's property is now generally considered joint "marital property" regardless of who is the title owner or who contributed the property after marriage. The law of alimony has changed so that both husbands and wives can receive alimony (often called "spousal support" or "maintenance") and, instead of a lifelong commitment, it is intended to be transitional assistance promoting self-sufficiency. Courts no longer follow the "tender years doctrine," so that there is no legal presumption that mothers get physical custody of young children after divorce. In addition, the federal government required states to adopt child-support guidelines based on the incomes of both parents.<sup>35</sup>

The social changes undergirding these shifts in legal doctrine are also dramatic: more mothers of young children than ever before in history are returning to work soon after their baby is born;<sup>36</sup> more fathers are working at home, or are choosing jobs that enable them to be more hands-on involved with their children;<sup>37</sup> options for adopting children and using technology to have children biologically have multiplied;<sup>38</sup> costs of living keep rising while incomes have remained stable;<sup>39</sup> more couples are engaging in prenuptial and post-nuptial contracts;<sup>40</sup> and some states authorize same-sex marriages and adoptions.<sup>41</sup>

All of these conditions have led to dizzying changes in families and courts for which there is no clear direction. Some of these changes, such as the creation of formulas for awarding child support, create more certainty and ease of application. Others, while promoting gender equality and the best interests of children, also create less certainty in application. Less certainty in application can lead to greater contention and conflict and a greater reliance on judicial discretion for final determination: a particular concern as many judges receive little or no training prior to being assigned to family court.

#### **E. RECOGNITION THAT SEPARATION AND DIVORCE CREATES ECONOMIC, BEHAVIORAL, EMOTIONAL, AND EDUCATIONAL RISKS FOR CHILDREN**

The well-being of children raised in single-parent families, on average, is less than children raised in two-parent families with respect to aggregate measures of emotional health, behavioral adjustment, economic well-being, and educational achievement. Furthermore, children who have been subjected to a contentious divorce or whose parents struggle for years with divorce-related emotional and financial issues may have difficulties into adulthood that range from feelings of sadness and vulnerability, to problems with relationships with other adults, to more serious mental health issues. As stated in a recent article in *The New York Times*: "[A] large body of research shows that [children of single parents] are more likely than similar children with married parents to experience childhood poverty, act out in class, become teenage parents and drop out of school."<sup>42</sup>

These statistics in no way reflect a criticism of single or divorced parents, who typically raise children in difficult circumstances and are usually successful. However, these well-documented empirical facts persist across long-term studies of families from different countries, cultures, and socioeconomic backgrounds. As a society, it would be counterproductive for us to stand resolutely by, advocating the benefits of two-parent families, without providing the services and resources to help

families negotiate key transitions of separation and divorce. These facts call for a court and community response to support families in functioning more effectively after separation or divorce and to keep both parents safely and positively involved in the lives of their children to the fullest extent possible given each parent's capacity to nurture his or her children. Such responses would serve to promote family health.

The risks to healthy development inherent in single parenthood stem in large part from the strong link between poverty and single parenthood. Children who live in a household with only one parent are substantially more likely to have family incomes below the poverty line than are children who live in a household with two parents<sup>43</sup> and families are economically hit by the financial burdens resulting from a separation or divorce.<sup>44</sup> The separated parents will have to adapt to the reality that the income used to support one household will now have to be used to support two households. Consequently, children, particularly adolescent children, experience fear and uncertainty about their parents' financial situation and how it will affect them.<sup>45</sup>

However, the disadvantages of growing up in a single-parent family are not limited to economics. Less adult involvement in children's lives leads to less adult investment in their emotional development and education.<sup>46</sup> Studies have established that father absence accompanying separation and divorce, in particular, correlates with greater risk of educational and cognitive deficits in children, and with greater behavioral problems, including early pregnancy, drug use, and involvement in the juvenile justice system.<sup>47</sup> Children in single-parent families score lower on virtually all indicators of childhood stability and quality of life than do their counterparts living with two parents. Overall, these children tend to be pessimistic about their capacity to master life's opportunities and problems and about developing lasting relationships with others, a pessimism that reduces their aspirations for achievement and weakens their physical and mental health.<sup>48</sup> Children in single-parent families are, in general, more likely to be in poor physical health, have a higher rate of suicide and mental illness, and suffer more accidents and injuries than children in two-parent families.

Educational problems for children begin during the period preceding the parents' separation, and continue thereafter. One study measured the effects of divorce on children's emotional well-being and educational achievement among 10,000 adolescents at four points in time—three years and one year before the divorce and one year and three years after it. Compared with their peers in intact families, children of divorce fared less well on all measures at all points in time. By three years after the divorce, their emotional well-being had improved, but their success in school continued to decline. The researchers speculate that this permanent drop in academic achievement results from the children of divorce falling behind in their educational progress and either not catching up or losing motivation even after their emotional life stabilizes. The specific data on the effects of divorce on the educational success of children is reinforced by the general data on the educational achievement of children in single-parent families.<sup>49</sup>

#### **F. RECOGNITION THAT CONTINUING CONFLICT BETWEEN PARENTS EXACERBATES THE RISKS FOR CHILDREN ARISING FROM SEPARATION OR DIVORCE**

Separation and divorce is not, however, an economic, emotional, and educational death sentence for a child. Children adapt and adjust if they are supported by well-functioning, competent parents who continue to maintain high expectations and provide structure, discipline, and warm emotional support during the transitions of separation and divorce.<sup>50</sup>

Highly conflicted parents, however, may view their child as a possession to be won instead of a loved one to be nurtured, protected, and emotionally supported. It is hard for such parents to function effectively if they are in constant combat with each other over how to raise a child, let alone using the child to hurt each other. Parental conflict drains economic and emotional resources from parents that should be devoted to children and distracts children from their age appropriate focus. Moreover, although most litigation between parents is eventually settled short of trial, "the hostile and

competitive attitude which prospective litigation creates pervades the entire process of negotiating a settlement.”<sup>51</sup>

Decades of research clearly shows that the level of conflict between parents is one of the most important influences on how well children cope with the challenges that separation and divorce present. While experts disagree about the magnitude and long-term effects of divorce on children, all researchers acknowledge that “parental conflict is toxic for children in divorce.”<sup>52</sup> The more pervasive and the higher levels of parental conflict to which children are exposed, the more negative the effects of family dissolution.

Children “caught in the crossfire of parental acrimony” are at increased risk for a myriad of emotional, behavioral, and psychological problems because parents who are in constant conflict do not:

- provide positive role models for their child about handling challenges in their own lives;
- make compromises that allow the children to have beneficial relationships with both;
- plan effectively together; or
- make choices that support children’s ongoing developmental interests and activities.<sup>53</sup>

Compromise and adjustment of parent-parent and parent-child relationships are particularly difficult to achieve through the adversarial system. They are fluid, continuing to evolve before, during, and after court proceedings. Cases involving readjusting parenting arrangements are thus not like civil cases involving awards of money, where the parties may never have to see one another again, let alone parent a child together. Family disputes involving children are not well suited to final resolution by a court in a one-time static determination of parenting responsibilities. Furthermore, there is a need for fluidity and flexibility which is ill served by a line-in-the-sand approach. A parenting plan that splits a young child’s time equally between parents does not necessarily continue to be appropriate when the child turns twelve and must practice daily for a soccer team or when one parent gets a new job with greater responsibilities. Flexibility and changes in parenting decrees are, however, disfavored by substantive law and the significant emotional and economic costs of bringing an already decided matter back to an already overcrowded court in an adversarial-based proceeding. Problem-solving procedures such as mediation are better suited to the intricate adjustments of human relationships that effective separation and post-divorce parenting requires.

Parental conflict also can negatively affect parent-child relationships. As Robert Emery notes, the modal level of contact between many divorced, nonresidential parents and their children ranges between every other weekend and several times a year, and the frequency of this contact drops off sharply over time, particularly in conjunction with events such as remarriage or relocation.<sup>54</sup> Some research involving noncustodial fathers suggests that the win/lose orientation of adversary divorce procedures contributes significantly to this disengagement process.<sup>55</sup>

Litigants, too, tend to express dissatisfaction with the adversary process, even when they prevail at trial. For example, between 50 per cent and 70 per cent of participants in a nationwide study of custody cases in the mid 1990s characterized the adversarial system as “impersonal, intimidating and intrusive.”<sup>56</sup> Similarly, 71 per cent of divorcing parents in a Connecticut study reported that the court process escalated their level of conflict and distrust “to a further extreme.”<sup>57</sup> More generally, surveys have found that “the complexity of litigation leaves many individuals feeling lost, confused and uninvolved.”<sup>58</sup>

The actual comments of children reflecting on their experience of separation and divorce reinforce the conclusions of empirical research. While each child’s experience of this difficult transition is unique, common themes of shock, anger, and loss predominate. For example:

I think it is rare that a child sees their parents getting divorced before it happens. For me it came as quite a shock, which in retrospect seems a bit naive considering how much my parents were fighting openly before they told me they were getting divorced. I think that, at least for me, a lot of my strength came from my security in my family unit and knowing that would never go away, regardless of what other bad things

happened. When that got destroyed and my dad left, I was completely devastated. When I found out, I was angry and felt very betrayed. I had seen the effects the separation had already taken on my mom and that made me very scared.

In a study of children seven years or younger, a seven-year-old girl declared, "I never want to see my father again, except if he's back with my mom." With the toy houses and figures, she played sequences of "squishing" the dad to death. One six-year-old explained: "It starts with love, then you don't live together, then you get unmarried, then you love other people, go back and back and back and forth and back and forth." He picked up a Slinky from his toy box and slowly stretched it. "With that, he let the Slinky snap close and crash to the floor."

## **G. CONFLICTED SEPARATION AND DIVORCE GENERATES HIGH COSTS TO PARENTS AND BUSINESS PRODUCTIVITY**

While exact calculations are hard to come by, most estimates attribute highly significant aggregate costs of divorce to individuals and communities.<sup>59</sup> The estimated costs of divorce in one comparatively small state (Utah) have been calculated at \$414 million per year (\$448 million in 2010), which includes \$300 million (\$324.6 million in 2010) in direct and indirect costs to both the state and federal government.<sup>60</sup> The estimated costs of divorce nationally are estimated at \$33.3 billion annually (\$36 billion in 2010).<sup>61</sup>

As these numbers reflect, the delay and tension from conflict and instability in transitioning families has impacts beyond the children and parents involved.<sup>62</sup> It also decreases parents' economic productivity, thus impacting the workplace.<sup>63</sup>

Divorce and marital strife can negatively impact workplace productivity, either by increased absences or decreased output while the employee is at work.<sup>64</sup> An employee in the throes of a domestic relations matter is distracted, angry, and depressed, has more absences from work, and, while at work, is less productive.<sup>65</sup> When the legal process drags on—too often for years—the employee is drained financially and emotionally.<sup>66</sup> The result is a less productive employee.<sup>67</sup>

To illustrate, a 1996 study found that as marital distress increased, work-loss days increased at a rate of 1.34.<sup>68</sup> This was true for men married ten years or less.<sup>69</sup> These results are consistent with studies from other countries.<sup>70</sup> A Canadian study found that divorce was related to a 7 per cent drop in labor force participation among men.<sup>71</sup> Other European studies have shown that divorce or domestic strife strongly predicts increased absences from work due to health issues.<sup>72</sup>

Marital strife also can impact an employee's attitude about work.<sup>73</sup> There is a demonstrated correlation between family stress and job burnout or satisfaction.<sup>74</sup> Marital quality plays a significant role in job satisfaction; negative family support is related to job burnout.<sup>75</sup>

Employee Assistance Programs (EAP) identify marital conflict as one of the most prevalent problems in the workplace (25 per cent); approximately 35 per cent of all EAP cases began or developed into marital or family therapy.<sup>76</sup> One-third of the clients in a federal EAP program cited marriage, relationships, and family issues as the primary presenting problem.<sup>77</sup> Marital discord may be even more prevalent; in a 2004 Warren Sheppell research report, an employee assistance consultant suggested that as much as 75 per cent of counseling could be related to marital problems even if it is not the presenting problem, because marital discord is often manifested or depicted for EAPs as workplace stress.<sup>78</sup> A 2004 study supports this assertion: nearly two-thirds of employees in family therapy available through their EAP reported serious family problems in their lives and a need for services.<sup>79</sup>

Family conflict also has been linked to other kinds of individual problems.<sup>80</sup> Mental health, domestic violence, impaired immune function, and addiction have all been linked to diminished job performance and absenteeism. Emotional and personal problems are associated with increased absences, tardiness, on-the-job injuries, property damage, medical claims, and employee turnover.<sup>81</sup> It is also a significant public safety concern as personal problems have been implicated in 80 to 90 per cent of industrial accidents.<sup>82</sup>

Lastly, domestic violence, which is often implicated at the time of separation and divorce, has significant impacts on work performance. Studies have shown that between 35 and 74 per cent of battered women report being harassed at work by their partner. Almost half of domestic violence victims miss at least three days of work every month and 70 per cent report “having difficulty” performing their jobs.<sup>83</sup> It is estimated that victims of domestic violence lose nearly eight million days of paid work annually in the United States, equivalent to more than 32,000 full-time jobs.<sup>84</sup> Victims miss work to recover from or seek care for injuries, attend counseling sessions, find new housing, develop safety plans, obtain legal advice, and be present for court proceedings.<sup>85</sup> 60 per cent of victims have been reprimanded at work for abuse-related problems such as tardiness or interference with work.<sup>86</sup> In addition to the effects on victims, coworkers are less productive due to stress and distraction, and perpetrators also tend to miss work days and are distracted on the job.<sup>87</sup> Various studies have estimated the annual organizational cost of domestic violence could reach as high as five billion dollars nationwide and the value of annual lost productivity could be as much as \$727.8 million.<sup>88</sup>

### III. PROBLEM-SOLVING-PROMOTING PROCESSES AND THE FAMILY COURT—THE “VELVET REVOLUTION”

Faced with the realities summarized above, family courts have been edging toward a different model that is responsive to the research and the realities of separating and divorcing families. Many states and other countries like Australia have adopted a revolutionary concept: Family Courts, where families have access not just to the in-court process, but also to a range of additional court-annexed services such as counseling, education and mediation, and family court case managers or facilitators, to provide a one-stop forum for helping families work through their problems effectively.<sup>89</sup> States such as Oregon and Hawaii have developed a rich family court model that is designed to serve families in need and to funnel people through the system with as little collateral damage as possible.<sup>90</sup>

Thus, in the early 2000s, most courts in the United States were moving toward a therapeutic model for family cases, where court involvement was reserved for the most complex, conflicted, or dangerous cases, or where judges actively managed the case through a series of processes designed to help the parties resolve their own disputes.

The result has been another revolution in divorce and custody processes, this time what a scholar has called a “velvet revolution”: “This paradigm shift has replaced the law-oriented and judge focused adversary model with a more collaborative, interdisciplinary and forward-looking family dispute resolution regime. It has also transformed the practice of family law and fundamentally altered the way in which disputing families interact with the legal system.”<sup>91</sup>

In many jurisdictions today, parents of children are required to attend parent education as a prerequisite to obtaining a decree of dissolution.<sup>92</sup> In other jurisdictions, mediation continues to be another mandatory component.<sup>93</sup> Some states have looked beyond these services and provide parents with early neutral evaluation.<sup>94</sup> Still others have developed a form of triage that attempts to match available services to family needs.<sup>95</sup>

Research suggests that these attempts to formulate problem-solving-focused alternatives to the adversary process for separating and divorcing parents have yielded positive results. “[D]ivorce education, custody mediation, and mediation/arbitration interventions for parents in high conflict are often effective in reducing conflict and promoting communication between parents during and after separation or divorce.”<sup>96</sup>

#### A. MEDIATION

Mediation is a dispute resolution process in which a neutral third party facilitates problem-solving negotiations. Mediators stimulate parents’ consideration of their own interests, and seek to find common ground and compromises that will result in creative solutions to impasses. The mediator’s goal is to generate an agreement that satisfies the parties’ diverse needs and interests.

Research supports the conclusion that mediation achieves the goals of promoting parental self-determination, reducing the emotional and economic costs of resolving custody disputes, and improving parent-child relationships: "There is considerable evidence of user satisfaction with mediation and some evidence that the agreements reached through mediation are both less costly to the conflicting parties and more robust than traditional adjudication."<sup>97</sup> Additionally, "[i]f there is any consistent finding in the mediation research, it is that the participants like the process and view it as fair, regardless of whether a settlement was reached."<sup>98</sup>

California has a long standing program of mandatory mediation of custody disputes.<sup>99</sup> Researchers have found that:

[i]n California, about 20–30 per cent of the total population of separating families file to resolve their disputes over the care and custody of their children in court and are thus mandated to mediate. Mediation attains full resolution in one-half, and partial resolution in two thirds, of these disputes. This solidly researched 'success rate' of mediation supports the philosophy that most couples have the capacity to re-order their lives in a private, confidential setting, according to their personal preferences, with the relatively limited help of a mediator who focuses on specific issues.<sup>100</sup>

Furthermore:

Mediating couples report liking the focus on the children, the chance to air grievances, the opportunity to discuss real issues, and having the discussion kept on track . . . Research shows that both men and women are more satisfied with mediation than with the adversarial process. 77 per cent of mediating couples are pleased with the mediation process, but only 40 per cent of litigating couples are satisfied with court procedure. In fact, 50 per cent to 70 per cent of those litigating express active dissatisfaction with the legal system.<sup>101</sup>

Studies report that mediating parents reach a resolution of their disputes more quickly than litigating parents, taking less than half the time and at lower cost to produce a parenting plan. Even mediating parents who fail to reach agreement are more likely to settle prior to trial than litigating parents. Mediation is thus a benefit to them because the issues in dispute have been narrowed and a climate for successful negotiation and agreement created.<sup>102</sup>

Studies indicate higher levels of participant satisfaction with mediation than with litigation or adversarial settlement.<sup>103</sup> For example, in a study of divorcing families randomly assigned either to mediate or to continue with adversarial procedures, Bob Emery and his colleagues found that, on average, parents who mediated were more satisfied with their participation in the process and with respect to the protection of their rights. Moreover, the results persisted over time: parents were happier with mediation than with adversarial settlement when they were first queried six weeks after dispute resolution, a year and a half later, and again 12 years after the initial settlement<sup>104</sup>. "[I]t was not the case that the cooperative families chose mediation and the families involved in conflict chose litigation."<sup>105</sup> Random assignment to mediation or litigation allowed the researchers to attribute the statistically significant differences between the groups to the dispute resolution process the parents participated in, not to outside factors such as attitudes toward each other or to socio-economic status.

Emery and colleagues also found that nonresidential parents who mediated their dispute were far more likely to see their children every week than nonresidential parents who litigated their dispute. The nonresidential parents who litigated were more likely to follow the national trend by dropping out of their children's lives; the nonresidential parents who mediated tended to be much more involved with their children, through both in-person and telephone contact. Residential parents reported that nonresidential parents who mediated were more involved with discipline, school, and church activities and in problem-solving than nonresidential parents in the litigation control group.

Mediation also promotes respect for law and legal process. Significant numbers of court orders in family-reorganization cases are not complied with by parents. In 2010, 13.7 million parents had custody of 22 million children while the child's other parent lived elsewhere, with just over half of these parents (50.6 per cent) reporting either a formal or informal child support agreement with the

child's non-custodial parent.<sup>106</sup> Of those with agreements, only 41.2 per cent report having received the full amount of support owed for the previous year.<sup>107</sup> In 2009, 61 per cent of the \$35 billion owed for child support was actually received.<sup>108</sup> For those parents who were still owed support dollars at the end of 2009, more parents (72.8 per cent) report having received at least some support when they had a partial custody or visitation agreement with the child's non-custodial parent compared with those who did not have contact agreements.<sup>109</sup> These numbers support what a large body of research has previously shown, that noncustodial parent-child contact is positively associated with support order compliance.<sup>110</sup>

Higher parental conflict and lower rates of non-custodial parent-child contact following divorce significantly decreases the likelihood that parents will follow court orders. Studies have emerged to support the conclusion that non-adversarial dispute resolution methods increase compliance with visitation and child support orders. While the bodies of these studies are small, the results are promising. In 2004, the Texas Division for Families and Children initiated a pilot program to increase child support compliance by offering non-custodial parents free attorney consultations and non-adversarial parent conferences aimed at promoting parent-child contact.<sup>111</sup> Study participants were those who had been flagged as reporting difficulties accessing their children, with many reporting lack of visitation as the reason for withholding child support.<sup>112</sup> Of those parents who participated in services, 45 per cent reported improvement in their visitation situation (compared with 15 per cent of non-participants) and 48 per cent reported more cooperation with their child's custodial parent.<sup>113</sup> Furthermore, the percentage of child support paid by non-custodial parent participants rose from 73 per cent to 86 per cent.<sup>114</sup> This program is one of several which reports significant increases in child support compliance after mediation to resolve access issues.<sup>115</sup>

Not surprisingly, research indicates that parents who participate in consensual dispute resolution, for example, mediation, early in their dispute feel a greater commitment to the agreement they have reached and to the other party in the conflict and are more likely to comply with that agreement as compared to one imposed on them. Parents also generally prefer consensual processes, such as negotiation and mediation, to resolution of disputes by court order, even if they result in unfavorable outcomes. They view consensual processes as subjectively fairer and less stressful than adversarial dispute resolution.<sup>116</sup>

These research results must be interpreted with the caveats and conditions that undergird all empirical research. Mediation is relatively new. There are different ways to conduct it, and there are serious methodological difficulties in designing definitive studies. Many parents feel that mediation in court-based programs is rushed and mechanical, a "not surprising perception given that in some counties mediation is limited to only one session."<sup>117</sup> Several studies, including Emery's research, suggest that women who litigate custody disputes may be more satisfied with the outcomes than mothers who mediate, at least under the judicial custody standards that prevailed during the 1980s and 1990s. Emery suggests that this finding reflects the fact that mothers in his adversary settlement group almost always won full legal and physical custody, while mediation gave fathers more of a voice and was more likely to result in joint legal (but not joint physical) custody arrangements.<sup>118</sup> Other studies have found no significant gender differences and have reported that both mothers and fathers were more satisfied with mediation than with adversary settlement of their disputes.<sup>119</sup> There is much we do not know, but what we do know soundly supports the conclusion that mediation is preferable to litigation for a majority of separating and divorcing families.

## **B. EARLY NEUTRAL EVALUATION**

Family courts are also experimenting with potentially promising dispute resolution programs such as Early Neutral Evaluation (ENE). In general terms, ENE is:

a nonbinding form of ADR designed to give parties a realistic view of their case, identify issues, speed up discovery, and encourage settlement. It provides an opportunity to meet an adversary face-to-face before a neutral third party who has experience in the subject matter being litigated. This neutral offers parties a confidential opinion regarding the likely outcome of the case and an analysis of the strengths and weaknesses of each side's argument.<sup>120</sup>

Hennepin County Family Court Services and the Minnesota Fourth Judicial District Family Court use the ENE Process in child custody disputes. Parties are referred by the court to a male/female team of experienced neutral evaluators for early feedback on the probable outcome of a full evaluation and an opportunity to negotiate a settlement. The determination is then conveyed in the form of a recommendation to the parties. Following the recommendation, the ENE team meets with both sides to shape an agreement that is tailored to meet the needs of the parties and their families. Approximately 70 per cent of cases are reported to settle. ENE has proven to be a highly successful program in its first two years, with the majority of cases reaching an early settlement. The ENE program is believed to reduce the stress and expense of custody disputes for clients, expedite judicial case management, maximize Family Court Services staff efficiency, and focus subsequent evaluations on critical issues.<sup>121</sup>

### C. PARENT EDUCATION

The last three decades have seen a widespread and sustained proliferation of a diverse set of parent education programs that possess a range of goals, teaching strategies, institutional affiliations and authority. Parent education represents a departure from previous family court practice because many courts, through mandatory attendance policies, engage most separated and divorcing parents in services designed to prevent or mitigate divorce-related risk. This approach mirrors a public health model and contrasts with the traditional family court practice of referring to services (e.g., mediation, child custody evaluation, parenting coordination) only in response to a legal conflict, rather than preventing future family conflicts or promoting children's adjustment. Parent Education programs encourage parents to become educated about the effects of divorce on children and their role in ensuring their children's transition.<sup>122</sup>

A recent overview of the history and development of parent education programs suggests these programs are "widely disseminated, popular and diverse in their structure, goals and teaching strategies" and "many programs deliver important information to separated and divorcing parents. This is a promising beginning."<sup>123</sup> The article calls for more research and program innovation to determine their influence on the actual behavior of parents.

### D. TRIAGE AND DIFFERENTIATED CASE MANAGEMENT

Some family courts have taken steps to meet the needs of parents and children through adopting Differentiated Case Management (DCM) as the core method of providing services to separating and divorcing families. DCM starts from the "premise that cases are not all alike and the amount and type of court intervention will vary from case to case. Under this model . . . a case is assessed at its filing stage for its level of complexity and management needs and placed on an appropriate 'track.' Firm deadlines and time frames are established according to the case classification."<sup>124</sup> Many courts use DCM in business cases, classifying them as expedited, standard, or complex.<sup>125</sup>

Many have argued for application of DCM (also referred to as "triage") to help courts meet the needs of separating and divorcing families.<sup>126</sup> The State of Connecticut pioneered a combination of intake process and a menu of services that included mediation, a conflict resolution conference, a brief issue-focused evaluation, and a full evaluation.<sup>127</sup> The Conflict Resolution Conference (CRC) is a blend of mediation and negotiation processes. The primary goal of a CRC is to help the parties reach a resolution of their own making; however, if the parties are unable to do so, a court counselor may direct the process, obtain collateral information from individuals or agencies known to the parties, and offer suggestions as well as recommendations. Attorneys are usually present during the conference. The Issue-Focused Evaluation (IFE) is a process of assessing a limited issue impacting a family and/or a parenting plan. The IFE is not a comprehensive assessment of the family, however, it is evaluative and it is not confidential. The goal of an IFE is to define and explore the issue causing difficulties for the family, gather information regarding only this issue, and to provide a recommendation to the parents and the court regarding a resolution to the dispute. It is limited in scope, involvement, and duration.

An evaluation of the intake combined with alternative services against a control group for whom only mediation or comprehensive evaluation was available, showed that many positive outcomes accrued to parents and the court system as a result of adding the new assessment and service alternatives.<sup>128</sup> Some of these positive results are detailed below:

- **Agreement rates** improved significantly, both overall (7 per cent) and for mediation (12 per cent).
- **Rates of return to court** for additional services dropped 10 per cent overall and 14 per cent for mediating couples, indicating that the new services offered alternatives to mediation which assisted in lowering the return rate.
- **Motions filed** are an indicator of the emotional and economic costs to the family and to the courts. There were no group differences in the number of cases overall in which motions were filed or the average number of motions filed per case, suggesting that having available services alone does not change the culture of litigation. However, in individual cases, there was a 5 per cent reduction in custody motions for the group exposed to the new services. A small, significant reduction in child-related therapy orders was also found. This decrease may indicate that issues potentially requiring therapy are being better addressed in services than they had been previously. Notably, the group differences that were found for custody and access motions pertained to those motions that required *a judge's involvement*. Thus, in a modest way, the screen and new services may have contributed to fewer motions being filed that pertain to major child-related issues: where they live, who they live with, and where they go to school. In addition, court time and costs, measured by judges' time and input, were also favorably impacted.
- **Court costs** were significantly reduced. Real cost savings to the court were \$110,000 in the first year, with that difference expanding to \$440,000 or nearly a half-million dollars by the following year.
- Finally, **agreement rates** were higher for families receiving the new services regardless of their marital status (once married or never married couples), and across legal representation categories (represented or pro se). **Return rates** were lower for families receiving services across marital status, as well. Since the implementation of the screen and new services, dual self-represented couples were more likely to complete mediation in a shorter period. Therefore, service provision was equally effective across marital status and representation groups.

## E. THE VELVET REVOLUTION IN THE PRIVATE SECTOR

The velvet revolution in family courts described above has, in turn, led to a velvet revolution in the family law dispute resolution process as practiced by professionals in the United States:

Although no-fault divorce, joint custody, and domestic violence laws have generally been quite appropriate as reflections of social norms and ideals of fairness, they often require difficult decisions using much vaguer legal standards than in the past. The increasing number and complexity of legal issues has led to an increase in the legalization and cost of divorce. Family court caseloads have increased and courts have increased the range of services they provide or require. In addition, a large body of private professionals in a wide range of fields provide divorce-related services. In response to these developments, family courts have increasingly embraced: '[A] philosophy that supports collaborative, interdisciplinary, interest-based dispute resolution processes and limited use of traditional litigation.' Over the years this movement—combined with the growing number of challenges families bring with them to the court—has unleashed the creativity of professionals worldwide, resulting in literally dozens of distinct dispute resolution processes for separating and divorcing parents. These include multiple models of mediation; psycho-educational programs; collaborative law; interdisciplinary arbitration panels; parenting coordination; and early neutral custody evaluation to name just a few.<sup>129</sup>

This experience demonstrates increasing recognition that helping parents through the transitions of separation and divorce requires the skills of multi-disciplinary professionals. These transitions do not present simply a legal problem, an emotional problem, a parenting problem, or a financial problem, but a combination that varies from family to family. Families are best supported through these transitions when the different disciplines work together to address their needs holistically.

#### IV. THE DILEMMAS OF THE PRESENT

All of this background brings us to the present day. In 2012, in the United States, we are faced with a set of dilemmas: despite the fact that state court budgets are less than two per cent of the states' budgets, courts across the nation are suffering severe budget cuts affecting their statutory mandates to provide justice.<sup>130</sup> State judiciaries handle nearly 95 per cent of all court cases filed in the United States, according to the National Center for State Courts.<sup>131</sup> In fiscal year 2011, courts in more than 42 states were forced to reduce their budgets.<sup>132</sup>

The paragon of family court design in the 1990s, Oregon is one of the states most severely hit. In Oregon the judiciary has had to implement staff layoffs, delay in filling vacancies, and reduce courthouse hours.<sup>133</sup> All of these factors have made access to and quality of justice more of a myth than a reality.

Because family cases involving separation and divorce necessarily fall behind criminal cases with speedy trial mandates, dependency and neglect cases, and delinquency cases, they are not getting the attention they deserve. Additionally, the array of family court services so carefully constructed over the last two decades is being dismantled, often episodically and with no plan in place. Our courts and the children, parents, and communities who depend on them are suffering.

Other countries have acted to address the problem by providing a comprehensive set of services for separating and divorcing families based in the community, though with a strong relationship to the courts. In 2004, Australia debuted their innovative Family Relationship Centers (FRCs).<sup>134</sup> The FRCs are publicly funded, but privately operated, community centers across Australia. They offer a range of services, depending upon location and need, but the fundamental service is free mediation (for a limited number of hours) for families who are struggling with issues. The FRCs do not provide services solely to low-conflict parents; many of the parents who come to the FRCs for assistance have complicated problems and a history of family violence, mental health, or addiction issues.<sup>135</sup> The families need not have filed for divorce, they need not be married, and they need not have filed anything in the court; they can be grandparents, as well as parents. The FRCs are housed in the community in a pleasant and comfortable setting. The FRCs seek to deliver quality services that are visible, accessible, and have a positive impact.

When parties reach agreement about their parenting time allocation, they apply those agreements in their personal lives—and return to the FRC when circumstances change or the agreement needs to be amended. The agreement is not filed with the court unless the parties want the court to enforce it. If the parties wish to divide property, and to file an enforceable agreement with the court, they must involve attorneys in the review of the agreement. Child support matters are handled administratively—completely separate from the court or FRCs.

Professor Patrick Parkinson of the University of Sydney notes that research has confirmed that services provided by FRCs have resulted in decreased court filings and interaction with the court. From 2005–2006 there were 18,752 applications for final orders and from 2010–2011 there were 12,815 applications. Contact with the court has gone from 40 per cent before the reforms to 29 per cent postreforms.<sup>136</sup> Parkinson also suggests that while FRCs have resulted in the success of out-of-court dispute resolution services, FRCs have also provided much needed services to people who otherwise may not have been able to afford an attorney or counseling services. It should also be noted that the overall satisfaction rating for people who went to an FRC was 70 per cent, which is particularly noteworthy because many of these parents have mental health, addiction, or high conflict issues prevalent in their relationships.<sup>137</sup>

## V. QUESTIONS GOING FORWARD

The foregoing analysis leads us to some questions for communities and courts that we hope will be discussed through the HFI:

### 1. How can family courts be organized and supported to best perform their core functions in an era of decreasing resources?

We assume that the core functions of the courts are protection, enforcement, and fact-finding. Those are functions that no other entity can provide. Courts *must* continue to offer protection for victims, disputed fact-finding where necessary, and enforcement of orders. They *must* also receive adequate resources to perform these functions efficiently and fairly. If choices have to be made, use of the court's time in family cases will be focused on the cases where the need for judicial intervention is the highest. Family court judges *must* have the opportunity for training and education about child development, family dynamics, and dispute resolution before they rotate into a family court division. No amount of community involvement or service diversion will change the need for these basic services.

### 2. Can the role of the court in other aspects of the separation and divorce process be reduced to enable judicial resources to be shifted to better perform core judicial functions?

There may be ways in which court involvement can be reserved for cases where the need is the greatest. Courts in many states are responsible for reviewing and validating uncontested divorce agreements.<sup>138</sup> A reexamination of that responsibility might result in a conclusion that judicial resources devoted to that task are better expended on core judicial functions.

If the divorce matter is uncontested, courts approach their responsibilities differently from one jurisdiction to another. Those differences may be mandated by statute (such as states that require a judge to assure that a settlement agreement is just and equitable and that a parenting plan is in the best interests of the child),<sup>139</sup> or the difference may be a matter of court culture in that jurisdiction. Some judges set every case on the docket for a hearing, whether it is contested or not. At that hearing, they explore the details of the agreement the parties have reached and either accept the agreement and enter the decree or ask for more information. In some situations they may require the parties to get legal advice. In other jurisdictions, the entry of a decree on a consent matter is either ministerial (judges or judicial officers sit in their offices and review the paperwork for facial compliance) or automatic. Few judges in the United States appear to be comfortable with an automatic entry of decree even when the parties have agreed upon all issues; however, in Canada, there are jurisdictions where that is the procedure.<sup>140</sup>

The judges who do review the agreements and associated paperwork with a view toward assuring compliance with the law report that there is about a 5 per cent rate of rejection.<sup>141</sup> The rejection is likely to be because the parties missed something (a marital pension plan for example) or because the agreement appears unbalanced (a long-term marriage with one wage earner and no spousal support).<sup>142</sup>

Given resource constraints, it is appropriate to ask whether courts should continue to play any role in reviewing uncontested divorce agreements. What are the risks of empowering families to resolve their own disputes, with no interference from the courts? For example, if a couple is able to reach agreement about all issues, that agreement could merely be filed, perhaps even with a registrar, and not reviewed by a judicial officer.

The anecdotal information from judges would suggest that 5 per cent of these cases would result in inappropriate orders that either memorialize unfairness or omit an asset. It is also possible that the parties could agree to conditions that are not appropriate for their children or would allocate child support in a way that deviated from the guidelines without basis.

One way to approach the risk would be to allow only parties without children to use the administrative procedure; however, that would actually be a small portion of dissolution cases and would, again, wholly disserve unmarried parents. Additionally, with the exception of child support, the allocation of parenting time is an issue that is uniquely within the ambit of the parents themselves and

not easily amenable to judicial oversight. Or, perhaps parents should be allowed to use the administrative procedure if they have undergone the education available in parent education programs or institutions similar to the family resource centers of Australia.

If the primary risk is that parties will omit an asset or will fail to allocate property fairly, an option would be to require an attorney for each party to sign off on the fairness of the agreement. This is the system now in place in Australia, where the parties can agree to property division and have an enforceable agreement *if* each of them obtains the advice of an attorney and the attorney approves the agreement.<sup>143</sup> Attorneys offer unbundled services in Australia, as they do in many states in the United States,<sup>144</sup> so the parties can retain counsel purely for the purpose of review of the property division. However, even this constraint would likely impose a difficult financial burden on many divorce litigants, unless the services were available at a reduced rate.

The issues surrounding an administrative procedure that does not involve judges relate to enforceability. Certainly, there must be an entry of a final decree of dissolution that frees the parties to remarry and provides closure to their legal relationship; there must also be some means of entering a property division order that is enforceable. The logical place to achieve that finality and enforceability is through the courts. However, the process, whether statutory or otherwise, would need to provide that judges are *not* expected to review the agreements for fairness or appropriateness. Some judges would likely chafe at that proscription, taking the position that anything bearing their signature would require their review. Others would likely view it as a relief, or an endorsement of what already happens in fact. It would be possible to set up an administrative procedure, which the Australians have done for the decree itself, but even in Australia, the property division must be signed by the court. The bottom line is that it is time to figure out how to reserve scarce judicial resources for the families who really need them, and allow other families to receive whatever imprimatur is necessary to change their legal status without draining either the court's resources or the resources of the family.

### **3. How should mediation, education, legal, and therapeutic services essential to the welfare of transitioning children and parents be organized and delivered?**

If court time is reserved for truly contested proceedings, enforcement, and protection, then what happens to the myriad of families who need help reaching agreement? They may or may not have filed for divorce, they may or may not even be married, but they need assistance planning for the future of their family. It would be irresponsible to cut all court services available to those families through the courts without providing some alternatives, such as the Australian Family Relationship Centers, where they could go to get help. That help may just be information about the process, or financial advice, counseling, or mediation, but without it families could flounder.

The research clearly documents that when families address and solve their own issues, everyone benefits. The research is increasingly clearer that when parties are able to reach agreement as to how to reorganize their family, share the responsibilities and joys of their children, and divide their property, the long-term impact is profound and positive.

Leaving families only with the option of going to court runs the risk of polarizing parents, causing delays and expense, and disserving children. To achieve agreement, families need assistance, education (about the legal process and the areas in which they need to share information and make decisions), access to mediation, access to counseling (financial and relational), and access to some legal services.

Whatever these solutions are, they must be able to function without the need for ever-present legal advice. There are fewer and fewer lawyers involved in dissolution proceedings. Legal services providers can only infrequently supply counsel in dissolution cases, and the parties either cannot afford or do not choose to hire lawyers to represent them.

So, the very real question becomes: how are we going to structure a partnership between courts and communities that is designed to provide families with what they need, while recognizing the realities of budget demands? Therapeutic family courts are not likely to survive a budget crisis in which the courts must focus on their core functions; however, the need for those services remains profound.

It is even possible that creating alternative service centers for families that are *not* in or directly affiliated with the courts would be a better model for families, irrespective of court budgetary considerations. The Australian experience suggests that families prefer an accessible service center where the shadow of the court is more distant.

Placing educational and mediation services for transitioning families under the auspices of the court has advantages. Since the services are publically funded, a modicum of access to them for all, regardless of income, can be achieved. The authority, credibility, and visibility of mediation and parent education services improve because they are affiliated with the prestige and authority of the court. In turn, providing mediation and parent education under court auspices improves parents' perception of the legal system, as they tend to respond favorably to the services and view the system as responsive to their family needs.

Nonetheless, the placement of services under the auspices of the court system creates interrelated problems. Services may be vulnerable to cuts when a budget crisis occurs, as in the present. Courts are an independent branch of government and states are obligated by constitutional guarantee to provide judges to resolve disputes. They do not have an obligation to provide mediators or parent educators who often suffer increased workloads or elimination in times of fiscal crisis when judicial budgets are reduced.

In addition, placing services under the auspices of the court system runs the risk of making the evaluation of the services focus on their role in settling cases rather than helping families adjust to transitions. The goal of mediation, for example, is not simply to resolve disputes, but to facilitate parents reaching their own agreements on how to parent their children rather than having a court impose one on them. To achieve this self-determination, parents must have the ability to voluntarily and meaningfully participate in the process of deciding their outcome, along with having sufficient knowledge to make such a decision. Achieving this goal requires that mediators spend an adequate amount of time with the mediating parents. Reducing court dockets, however, may be a major factor in determining how mediation is actually practiced in court-connected programs.

It is possible to envision a hybrid model of service delivery that splits responsibility between courts and community agencies. Courts would be responsible for delivery of services that fulfill its core functions of fact finding, decision making, and enforcement, such as forensic evaluations in child custody disputes. Community agencies would be responsible for delivery of helping services such as financial planning, mediation, and parent education.

## **VI. PROPOSED PRINCIPLES FOR COURT AND COMMUNITY PROCESSES SERVING FAMILIES IN TRANSITION DUE TO SEPARATION AND DIVORCE**

HFI proposes the following principles as the basis for discussion for evaluating the quality of a court and community response to the needs of separating and divorcing families and invites comment and feedback on them.

1. Judicial resources need to be promptly and consistently available to families for the core functions of fact finding, protection, and enforcement. Systems should be designed to assure that access.
2. High-needs cases also require additional court services, such as intensive case management, assessment, and monitoring. Those cases can be identified either by one or both parties, by a judge, or by an involved expert. Systems should be designed to assure that these cases are treated differently. Assignment to a complex case track should not be a permanent assignment, but removal from that track should require that the parties meet certain criteria.
3. The balance of families in transition does not need to be in the courts. They require access to services that facilitate problem-solving and future planning, but those services need not be provided through the courts, so long as sufficient quality control is in place. Those services include:
  - i. A navigator, case manager, or online resource that can educate the parties about the system and help them understand and manage the legal requirements of the system;

- ii. Parenting education;
  - iii. Dispute resolution assistance;
    - a. Early Neutral Evaluation (ENE) or Early Neutral Assessment (ENA)
    - b. Mediation
    - c. Settlement conference—with a judicial officer or an attorney
    - d. Collaborative law
  - iv. Unbundled legal services, including drafting assistance;
  - v. Mental health counseling—for parents and kids;
  - vi. Financial counseling; and
  - vii. Communication skills training.
4. Unless the family is a high-needs family, the system should be designed to empower parents to reach their own decisions, with appropriate assistance from professionals.
  5. One of the very real questions posed by that paradigm is: how should courts and communities meet the following challenges?
    - How to ensure adequate funding for necessary services.
    - How to create a triage function that will allow systems to identify high-needs families.
    - How to assure quality control for services provided outside the courts.
    - How to assure that the necessary range of services for separating and divorcing parents really is available to them.
    - If divorce decrees are to be registered with the courts with no judicial oversight, what requirements should be imposed? Possibilities include:
      - An attorney sign-off in appropriate cases;
      - A checklist for parents, including child support guideline compliance or explained divergence;
      - Attendance at parenting education classes; and
      - Parenting plans.
        - Should they be filed under all circumstances?

## VII. CONCLUSION

Families in transition need support. The fundamental question is how that support can best be provided in a way that optimizes the chances for long-term health of the children and of the reorganized family unit. In 2012, we have the benefit of research, experience from within the United States and around the world, and a commitment by professionals, judicial officers, legislators, and community groups to solutions. Now, we must collectively begin to develop solutions that are workable, will help relieve the burden on the courts of managing the affairs of reorganizing families and, above all, serve the needs of children and parents.

## NOTES

1. A future HFI paper will focus on the core functions of the family court and what can be done to improve them.
2. Janet Weinstein, *And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System*, 52 U. MIAMI L. REV. 79, 132–33 (1997).
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4. *Id.* at 59; CAL. FAM. CODE § 2310 (1994).
5. JACOB, *supra* note 3, at 80.
6. N.Y. DOM. REL. §170(7) (2010).
7. THE NAT’L MARRIAGE PROJECT, *THE STATE OF OUR UNIONS; MARRIAGE IN AMERICA*, 67, 75–6 (2011), available at [www.stateofourunions.org](http://www.stateofourunions.org) [hereinafter “STATE OF OUR UNIONS”].

8. Susan Pollet, *Still a Patchwork Quilt: A Nationwide Survey of State Laws Regarding Stepparent Rights and Obligations*, 48 FAM. CT. REV. 528, 529 (2010).

9. Karen S. Peterson, *Kids of Divorced Parents Straddle a Divided World*, USA TODAY, July 13, 2003, available at [http://www.usatoday.com/news/health/2003-07-13-divorce-usat\\_x.htm](http://www.usatoday.com/news/health/2003-07-13-divorce-usat_x.htm); see also DIANA B. ELLIOT & TAVIA SIMMONS, U.S. CENSUS BUREAU, MARITAL EVENTS OF AMERICANS: 2009 (2011), available at <http://www.census.gov/hhes/socdemo/marriage/data/acs/index.html> (stating that, in 2009, 1,100,401 children (or 1.5 per cent) lived with a parent who had divorced in the last 12 months).

10. Robert E. Emery et al., *Divorce Mediation: Research and Reflections*, 43 FAM. CT. REV. 22, 23 (2005) (citing U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS; MARRIAGE, DIVORCE AND REMARRIAGE IN THE 1990'S (1992)).

11. Emery et al., *supra* note 10, at 23. See also STATE OF OUR UNIONS, *supra* note 7, at 75–76 (stating that between 1960 and 2010 the number of unmarried couples in America increased more than seventeen-fold). Over 40 per cent of cohabitating households contain children. *Id.*

12. Jason DeParle, *Two Classes Divided by 'I Do'*, N.Y. TIMES, July 14, 2012, available at <http://www.nytimes.com/2012/07/15/us/two-classes-in-america-divided-by-i-do.html?pagewanted=all>; see also NAT'L CTR. FOR HEALTH AND STATISTICS, CTR. FOR DISEASE CONTROL AND PREVENTION, BIRTHS: FINAL DATA FOR 2010 3 (2012), available at <http://www.cdc.gov/nchs/nvss.htm> (stating that in 2010, 40.8 per cent of births were to unmarried women).

13. U.S. CENSUS BUREAU, LIVING ARRANGEMENTS OF CHILDREN: 2009 (2011), available at <http://www.census.gov/prod/2011pubs/p70-126.pdf>.

14. NATIONAL CENTER FOR STATE COURTS, COURT STATISTICS PROJECT; DOMESTIC RELATIONS CASELOADS PROVE DIFFICULT TO DISPOSE (2012), available at <http://www.courtstatistics.org/>.

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131. Betsy M. Adeboyejo & Alexandra Buller, *Cuts to State Courts are Focus of Symposium*, ABA NOW (Sept. 23, 2011), available at <http://www.abanow.org/2011/09/cuts-to-state-court-focus-of-symposium/>.
132. National Law Day address by Chief Judge Eric T. Washington, National Law Day Press Conference, Washington D.C. (May 1, 2012), available at <http://www.ncsc.org/Information-and-Resources/Budget-Resource-Center/Economic-impact.aspx>.
133. Robert J. Derocher, *Justice at Stake? Bars Battle State Budget Cuts*, 28 ABA BAR LEADER MAGAZINE (Sept.–Oct. 2003), available at [http://www.americanbar.org/publications/bar\\_leader\\_home/volume28/2801/budgetcuts.html](http://www.americanbar.org/publications/bar_leader_home/volume28/2801/budgetcuts.html).

134. The Auditor—General: *Implementation of the Family Relationship Centres Initiative*, Audit Report No. 1 (2010-11), available at [http://www.anao.gov.au/~media/Uploads/Documents/2010 percent2011%20audit%20report%20no%201.pdf](http://www.anao.gov.au/~media/Uploads/Documents/2010%20percent2011%20audit%20report%20no%201.pdf).

135. *Id.*

136. Patrick Parkinson, *Children's Dispute Resolution—The Australian Experience* (2012) (unpublished manuscript on file with IAALS).

137. *Id.*

138. See, e.g., MASS. GEN. LAWS ch. 208, §1A (2012); COLO. REV. STAT. § 14-10-110 (2012); MONT. CODE ANN. § 40-4-202 (2011); PA. CONS. STAT. ANN. § 3301 (d) (West 2012).

139. See e.g., MASS. GEN. LAWS ch. 208, §1A.

140. Focus group interview by IAALS with judges from various jurisdictions, Association for Family and Conciliation Courts 49th Annual Conference, Chicago, IL (June 6–9, 2012). These comments reflect the general consensus of interviewees as summarized by the group facilitator. Notes from these sessions are on file with IAALS.

141. *Id.*

142. *Id.*

143. Interview with Diana Bryant, Chief Judge of the Family Court of Australia, Association for Family and Conciliation Courts 49th Annual Conference, Chicago, IL (June 6–9, 2012) (video on file with IAALS).

144. See Judith L. Kreeger, *To Bundle or Unbundle? That is the Question*, 40 FAM. CT. REV. 87 (2002).

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