AN APPEAL FOR AUTONOMY, ACCESS, AND ACCOUNTABILITY IN FAMILY COURT REFORM EFFORTS

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An array of dispute resolution alternatives should be available to families who elect to use them. We suggest a system where parties maintain unhindered access to traditional courts but are able to knowingly and voluntarily opt into dispute resolution processes that are delivered in a fair, affordable, and accountable manner. We support provision of community-based and private-sector services to the extent that court funding and access is not diminished.

Key Points for the Family Court Community:

- Choices about participation in dispute resolution processes should be party driven.
- Parties should receive complete and accurate information about available dispute resolution processes and have access to confidential legal advice.
- Dispute resolution processes should be fair, affordable, competently provided, and accountable.
- Parties should have open access to traditional court processes.

Keywords: *Access*; *Accountability*; *Courts*; *Dispute Resolution*; *Fairness*; *and Informed Consent*.

INTRODUCTION

This article is written in response to an invitation seeking reactions to the White Paper of the Institute for the Advancement of the American Legal System's Honoring Families Initiative on the court and separating and divorcing families.[1] We hope that publication of our perspective will lead to wider engagement with the important issues raised in the White Paper.

The White Paper explores at some length the character, source, and availability of dispute resolution processes and it poses dilemmas for future consideration.[2] In this response, we discuss challenges that specifically pertain to decisions about the appropriateness of dispute resolution processes for individual families, fairness and accountability of dispute resolution processes, and access to traditional court processes as and when needed, leaving for another day other questions raised in the White Paper.

The White Paper advances the laudable goal of promoting "dignified and fair processes for the resolution of divorce and child custody cases in a manner that is more accessible and more responsible to children, parents, and families."[3] It recognizes that family law cases involve important rights and constitutional values and that family courts serve a vital function in protecting those rights and values.[4] The White Paper also acknowledges that many families can successfully resolve divorce and child custody cases without the full machinery of the family courts coming to bear on their lives and that a variety of services and options, including parent education, mediation, and financial planning, should be available to support families through the process of separation and divorce.[5] Indeed, the White Paper points to the trend among family courts across the nation to promote cooperative decision making in family law cases, reserving judicial intervention for "the most complex, conflicted, or dangerous cases."[6] Given the practical realities of mounting caseloads, diminishing resources, lack of ready access to legal advice and information, and the capacity of most separating parents to resolve custody disputes short of trial, the White Paper argues that an array of dispute resolution alternatives should be available to those who can safely, knowingly, and responsibly benefit from them, without the need for elaborate judicial intervention.[7]

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The novelty of the White Paper is its proposal to expand delivery of and access to services beyond the walls of the courthouse and into the community. More specifically, the White Paper envisions:

> . . . 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.[8]

We agree that an array of dispute resolution alternatives should be available to those who can safely, knowingly, and responsibly benefit from them without resort to formal judicial intervention.[9] And we are cognizant of more than three and a half decades of research and commentary on the virtues and limitations of various dispute resolution alternatives.[10] Our analysis focuses on how, by what means, and in what manner dispute resolution processes should be performed rather than where they might be located.

We want to emphasize the importance of implementing delivery models that: (1) are truly voluntary in that they require parties to knowingly and freely opt in to clearly defined dispute resolution processes, regardless of whether those processes are provided in court, by community agencies, or through the private sector; (2) assure that all dispute resolution processes are fair, affordable, competently performed, and professionally accountable; and (3) preserve direct and unobstructed access to court when and as parties perceive they need it.

INFORMED AND AUTONOMOUS DECISION MAKING BY FAMILIES

We agree with countless other legal scholars and dispute resolution commentators that parties who are provided with accurate information and competent advice are best positioned to choose among available dispute resolution processes.[11] We are wary of delivery models where parties could be subtly or overtly pressured into "voluntary" processes not of their choosing, for reasons of judicial economy or inadequately tailored social policy.[12] We view the processes themselves as essentially neutral—the salient questions involve the quality and appropriateness of the process for the individual family.

DECISIONS SHOULD BE PARTY DRIVEN

The White Paper recognizes that families and their circumstances vary considerably, as do the processes available to them for resolving their disputes.[13] As the White Paper makes clear, dispute resolution processes approach problem solving differently, with different legal protections and degrees of opportunity for autonomous decision making.[14] For some families, a particular form of dispute resolution may be beneficial, but for other families, the same process may be counterproductive or even harmful.[15]

The White Paper implies that families who would benefit from traditional court proceedings can be quickly and reliably identified and "cabined off."[16] Early identification of high-needs families is a worthy goal, and efforts to screen for issues like intimate partner violence are necessary for many reasons, including risk assessment, safety planning, and implementation of procedural safeguards. Nevertheless, screening efforts present special challenges and may have unintended consequences when undertaken by systems to determine whether the parties should participate in one form of dispute resolution or another.[17]

Elsewhere, we have listed and elaborated on our chief concerns about court-connected triage systems, which include the following observations.

(1) It is often hard to detect critical issues like intimate partner violence in contested family law cases.
(2) It is often difficult to resolve competing factual assertions and procedural preferences of the parties in triage settings.
(3) The mere presence of an issue like intimate partner violence, without a deeper understanding of its nature, context, and implications does not indicate which dispute resolution processes would be appropriate in any given case.
(4) There are many circumstances, quite apart from complicated matters like intimate partner violence, that might render a dispute resolution process inappropriate, yet would not be captured in a typical triage screening protocol.[18] Such circumstances might include the reputation and professional experience of available service providers; local custom and practice; the practicalities of the parties' daily lives or the daily lives of their children, including the security of their living situations and the stability of their resources and support systems; the relative risks and benefits of compromising on critical issues; and the consequences of making or not making a record of the proceedings, to name a few.

Moreover, exempting or excluding cases from certain dispute resolution processes can disempower families and potentially lock them out of processes that could benefit them at a later time. Thus, instead of "creat[ing] a triage function that will allow *systems* to identify high-needs families,"[19] we recommend a function that will inform *families* of dispute resolution options and support them in identifying their own needs and making their own decisions about participation in those processes.[20] Parties should not be put in a position of having to say "no" to system-driven dispute resolution options. "Starting from yes" would be a much more empowering paradigm, where parties affirmatively select processes best suited to their own particular circumstance.

The decision to pursue one dispute resolution process over another is complex. It involves a delicate calculation of risks and benefits and often requires consideration of multiple, sometimes competing factors that are best known by and sometimes only known to the parties themselves.[21] With good information, confidential advice, and adequate support, parties can decide which forms of dispute resolution are most appropriate for them.[22]

PARTIES SHOULD RECEIVE COMPLETE AND ACCURATE INFORMATION

To promote educated decision making, parties should receive complete and accurate information about the dispute resolution options available to them. Because all forms of dispute resolution share the common goal of achieving justice and fairness in the settlement of controversies,[23] efforts to characterize dispute resolution alternatives as "adversarial" or "problem solving" can be misleading.[24] A more productive approach is to provide information to the parties about: (1) the essential features and practical operation of all processes, regardless of whether they are performed in court, by community agencies, or through the private sector; (2) the legal rights and protections that attach to traditional court processes;[25] and (3) the legal rights and protections that parties effectively waive in nontraditional court settings and processes that are delivered out of court.[26]

PARTIES SHOULD HAVE ACCESS TO CONFIDENTIAL LEGAL ADVICE

That so many separating parents do not have access to counsel is a very real problem that carries significant consequences. Competent legal advice is crucial whenever the parties' legal rights and responsibilities are or may be adjusted, whether those adjustments occur in court, through community-based services, or by means of private-sector interventions.[27] Attorneys play a vital role in providing confidential counsel and advice at all stages of a legal proceeding, especially before a specific dispute resolution process is selected. Attorneys help parents: (1) understand important legal rights and

responsibilities; (2) understand the law that governs their case; (3) understand the nature, scope, and limitations of available dispute resolution alternatives; (4) make informed decisions about whether and how to engage in available dispute resolution processes; (5) develop realistic goals and expectations about prospective outcomes; and (6) access necessary legal protections and constitutional guarantees accorded to them under the law.[28]

We support efforts to provide unbundled confidential legal counseling for parties who seek it and we believe that this should be a major focus of system reform efforts in the future. We also support efforts to simplify and streamline dispute resolution processes, both in court and out of court, so they are understandable, manageable, and accessible to all, including those who do not have or do not want to have any form of legal representation.

We believe that, with good information, confidential advice, and adequate support, parties can identify their own needs instead of relying on courts and service providers to make quick determinations without the benefit of reliable tools, complete and accurate information, sufficient time, and comprehensive procedural safeguards.

FAIR, COMPETENT, AND ACCOUNTABLE SERVICES

All dispute resolution processes, whether provided in court, by community agencies, or through the private sector, should meet minimum standards of procedural fairness, competency, and accountability. When services are provided in court, the law provides minimum guarantees of fairness and accountability that do not exist in the same way when those services are provided in community or private settings. While community and private actors strive to provide services that are fair, their work is largely self-directed, off the record, and not subject to appeal in case of error.[29] We support efforts to establish enforceable standards of procedural fairness in all dispute resolution processes whether provided in court or out of court.

OPEN ACCESS TO TRADITIONAL COURT PROCESSES

As the White Paper asserts, family law and the practice of it have changed enormously over the last thirty years.[30] Processes such as mediation and parent education that were once rare have become commonplace; many lawyers now practice in a less adversarial and more cooperative way than they did ten or twenty years ago; and family law professionals and court systems are more sensitized to the needs of children. Boundaries between alternative processes and traditional court proceedings have blurred and the role of courts has expanded well beyond the provision of a neutral forum. These rapid changes have resulted in confusion about what the family court system is, does, and should be.

In reality, today's traditional courts are primarily venues for settlement of cases and the practice of family law is largely transactional in nature.[31] Settlement is systematically encouraged through education, negotiation, and various amounts of judicial intervention.[32]

Parties participate in traditional court processes in a variety of ways and it is difficult to generalize about their use. For some families, a formal court process provides a needed safe container for conflict, and its predictable rules and accountability mechanisms can decrease the level of hostility and confrontation. Other families enter into a formal court process, but engage in fruitful interest-based and conciliatory negotiation. Still others use formal processes like discovery to narrow issues and promote information-based decision making.[33]

Although relatively few families ever have need of a full trial, judicial availability fulfills the social expectation of an orderly, predictable, and fair method of dispute resolution that is capable of protecting and supporting children, even in the most contentious cases.[34] This is because, when fully engaged, the judicial system is governed by enforceable rules of procedure, rules of evidence, and local rules of court, as well as legislative, decisional, and constitutional authority.

As more dispute resolution processes are made available to more families, it is important to assure that, in practice, all parties are free to choose and easily enter into the traditional judicial process. Separation and divorce is the most significant personal and legal problem that most families ever face. Substantial interests such as children's rights and welfare, parental rights, place of residence, distribution of resources, and physical safety are at stake. Serious concerns would arise if as a matter of judicial economy or social preference access to the courts is discouraged, limited, or foreclosed to some families based on the nature of their concerns or the extent that issues are contested.[35] This could deprive parties of their legal right to have their claims decided on the merits or their agreements enforced, on the record, by a fair and impartial tribunal.

We support the White Paper's assessment that the family court system is underfunded and struggling and that many families would benefit from more accessible and streamlined processes. We urge that these processes be provided as voluntary options that supplement access to traditional court proceedings.

CAUTION AND CONCLUSION

We agree that an array of dispute resolution alternatives should be available to those who can safely, knowingly, and responsibly benefit from them without resort to elaborate judicial intervention.[36] We believe that families, with appropriate information and support, are best situated to make choices about their futures and the processes that will help them achieve their goals.

So long as families have direct and easy access to court, we believe that the public or private nature of the process is less important than the extent to which processes are clearly defined, widely accessible, fairly implemented, competently performed, and subject to enforceable standards of practice.

We are concerned that there is presently no reliable alternative source of funding for community-based services and that existing services are threatened by budgetary challenges.[37] To the extent that suggested reforms involve moving processes and services out of the family court system, they are likely to become even less fundable and accessible, especially for people of low, modest, or even average means. We support the prospect of devising new strategies to make competent and accountable community-based and private-sector services available to all, so long as it can be accomplished without diminishing court funding or restricting access to traditional court processes.

The White Paper correctly identifies a number of challenges confronting judicial processes including an influx of cases, a proliferation of unrepresented parties, lack of clarity about the role and application of law to separating parents, persistent family conflict, and the "burden of managing the affairs of reorganizing families."[38] These challenges extend to all types of dispute resolution processes whether delivered in court, community, or private settings. In short, some of the challenges identified in the White Paper are not unique to in-court processes, but extend to *any* process that might be used to resolve family law cases, whether in court or not. Thus, in addition to focusing on process alternatives, we strongly urge that as a society we attend to the root causes of family distress and the costly underfunding of the family court system.

NOTES

1. Rebecca Love Kourlis et al., *IAALS' Honoring Families Initiative: Courts and Communities Helping Families in Transition Arising From Separation or Divorce*, 51 FAM. CT. REV. 351 (2013) [hereinafter White Paper].

2. White Paper, *supra* note 1, at 371.

3. *Id.* at 353.

4. *Id.* at 354.

5. *Id.* at 355.

6. *Id.* at 362.

7. *Id*. at 355.

8. *Id*. at 370. Because community agencies are not required or mandated to fulfill the responsibility of providing helping services, it is not clear that those responsibilities would, in fact, be carried out.

9. *Id.* at 355.

10. *See*, *e.g.,* John Lande, *The Revolution in Family Law Dispute Resolution*, 24 J. AM. ACAD. MATRIMONIAL LAW. 411 (2012).

11. *See generally* Nancy Ver Steegh et al., *Look Before You Leap: Court System Triage of Family Law Cases Involving Intimate Partner Violence*, 95 MARQ. L. REV. 955 (2012); *see also* Frank E.A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEG. J. 49 (1994); Jacqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking*, 74 NOTRE DAME L. REV. 775 (1999); John Lande & Gregg Herman, *Fitting the Forum to the Family Fuss: Choosing Mediation, Collaborative Law, or Cooperative Law for Negotiating Divorce Cases*, 42 FAM. CT. REV. 280 (2004); Timothy Hedeen, *Coercion and Self-Determination in Court-Connected Mediation: All Mediations Are Voluntary, But Some Are More Voluntary Than Others*, 26 JUST. SYST. J. 273 (2005).

12. *See generally* Jacqueline M. Nolan-Haley, *Judicial Review of Mediated Settlement Agreements: Improving Mediation With Consent*, 5 PENN. ST. Y.B. ARB. & MEDIATION 152 (2013).

13. White Paper, *supra* note 1, at 371.

14. *Id*. at 354–55.

15. Timothy Hedeen, *Remodeling the Multi-Door Courthouse to "Fit the Forum to the Folks": How Screening and Preparation Will Enhance ADR,* 95 MARQ. L. REV. 941, 944 (2012).

16. White Paper, *supra* note 1, at 355, 365–366, 368–370.

17. *See generally* Ver Steegh, *supra* note 11.

18. *Id*. at 987.

19. White Paper, *supra* note 1, at 365, 370 (emphasis added).

20. Ver Steegh, *supra* note 11, at 988–91.

21. Sander & Goldberg, *supra* note 11, at 49.

22. *See generally* Hedeen, *supra* note 15, at 954; Lande & Herman, *supra* note 11, at 284; Ver Steegh, *supra* note 11.

23. Nolan-Haley, *supra* note 11, at 777.

24. While it is undeniably true, as the White Paper asserts, that traditional court processes *can* and sometimes *do* foster interparental antagonisms that imperil children, it is equally true that they *need not*. Linda Elrod, *Reforming the System to Protect Children in High-Conflict Custody Cases*, 28 WM. MITCHELL L. REV. 495, 501 (2001); Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 746–747 (1988); Jane C. Murphy, *Revitalizing the Adversary System in Family Law*, 78 U. CIN. L. REV. 891, 919–20 (2010). Similarly, while mediation and other forms of interest-based dispute resolution can, if properly employed, promote cooperation and diffuse conflict, they can also foster antagonisms that imperil children, especially where the parents hold strongly opposing positions or make markedly different factual assertions. Gary B. Melton & E. Allen Lind, *Procedural Justice in Family Court: Does the Adversary Model Make Sense*?, 5 CHILD & YOUTH SERVICES 65, 73 (1982); *see generally* Gerald W. Hardcastle, *Adversarialism and the Family Court: A Family Court Judge's Perspective*, 9 UC DAVIS J. JUV. L. & POL'Y 57 (2005). The processes themselves are not inherently civil or uncivil or socially acceptable or unacceptable. It is the way the processes are employed that make them so.

25. *See generally* Nolan-Haley, *supra* note 11, at 775.

26. The kinds of enforceable protections guaranteed in formal court hearings that do not necessarily attach as of right to nontraditional court and out-of-court processes might include such things as: (1) the right to an unbiased tribunal, (2) notice of the nature of the claim or dispute, (3) an opportunity to be heard, (4) the right to call witnesses, (5) the right to present evidence, (6) the right to have decisions made based solely on the law and the evidence presented, (7) the right to employ counsel, (8) the right to a record of the proceedings, (9) the right to know the basis for the decision, (10) the right to a public forum, and (11) the right to meaningful review. Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1278–95 (1975).

27. White Paper, *supra* note 1, at 369.

28. *See generally* Jane C. Murphy & Robert Rubinson, *Domestic Violence and Mediation: Responding to the Challenges of Crafting Effective Screens*, 39 FAM. L. Q. 53, 65–66 (2005).

29. *Id.*

30. White Paper, *supra* note 1, at 354–55, 362–67.

31. Peter Robinson, *An Empirical Study of Settlement Conference Nuts and Bolts: Settlement Judges Facilitating Communication, Compromise and Fear*, 17 HARV. NEGOTIATION L. REV. 97, 105 (2012).

32. *Id*. at 97.

33. Frank E.A. Sander & Lukasz Rozdeiczer, *Matching Cases and Dispute Resolution Procedures: Detailed Analysis Leading to a Mediation-Centered Approach*, 11 HARV. NEGOTIATION L. REV. 1, 6 (2006).

34. *See generally* Hardcastle, *supra* note 24.

35. White Paper, *supra* note 1, at 354, 369.

36. *Id.* at 355.

37. *See Id.* at 367 (Australian Family Relationship Centers are "publicly funded, but privately operated.").

38. White Paper, *supra* note 1, at 356–58, 371.

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