Approved
Date: 2-1--02

MINUTES OF THE SENATE JUDICIARY COMMITTEE.

The meeting was called to order by Chairperson Senator Vratil at 9:37 a.m. on January 29, 2002 in Room 123-S of the Capitol.

All members were present.

Committee staff present:
Gordon Self, Revisor
Mike Heim, Research
Mary Blair, Secretary

Conferees appearing before the committee:
Nancy Lindberg, Office of Attorney General
Mike Taylor, City of Wichita
Tom Palace, Petroleum Marketers and Convenience Store Association (PMCA)
Senator Lyon
Linda Elrod, Professor, Kansas Bar Association (KBA)

Others attending: see attached list

The minutes of January 28th meeting were approved on a motion by Senator Adkins , seconded by Senator Gilstrap, Carried.

Bill introductions:
Senator Umbarger requested introduction of a bill which would provide limited immunity from liability for owners of anhydrous ammonia. (no attachment) Senator Donovan moved to introduce the bill conceptually, Senator O'Connor seconded. Carried.

Senator Goodwin requested introduction of a bill which would change current law regarding battery against a law enforcement officer changing the penalty from a misdemeanor to a nondrug level 5. (attachment 1) Senator Umbarger moved to introduce the bill, Senator Oleen seconded. Carried.

Conferee Lindberg requested introduction of a bill which would amend current law by adding language which would allow Kansas residents who are victims of crime in other countries to apply for compensation benefits with the Crime Victims Compensation Board.(attachment 2) Senator Donavan moved to introduce the bill, Senator O'Connor seconded. Carried.

Conferee Taylor requested introduction of two bills which would assist cities in collection of delinquent fines. The first bill would allow the collection agency fee amount to be added to the amount of the fine and the second would provide that, prior to obtaining an automobile registration, all fines must be paid. (no attachment) Senator Goodwin moved to introduce the bills, Senator Donovan seconded. Carried.

Conferee Palace requested introduction of a conceptual bill that would make it unlawful to sell motor fuel that is below the acquired cost of the fuel, plus taxes and transportation. (attachment 3) Senator O'Connor moved to introduce the bill, Senator Schmidt seconded. Carried.

Senator Goodwin reported on DNA testing information she received from Kyle Smith, KBI in response to her inquiry about expanding the DNA databank law to all felonies. (attachment 4)

SB 173–concerning divorce; re: grounds
Conferee Lyon testified in support of **SB 173**, a bill which "restricts the divorce ground of incompatibility to the case of mutually consenting spouses with no dependent children"...and reinstates permissible grounds for couples with dependent children or where one of the spouses objects to the divorce. He discussed the intent of the legislation, a history and impact of unilateral "no-fault" divorce, and problems with the existing statute. He outlined what the bill would do and presented a summary of supporting testimony from a number of groups and individuals including a review and comments by Attorney Joe Patton on the state's fiscal note on **SB 173.** (attachment 5)

Conferee Elrod testified in opposition to **SB 173.** She discussed, in detail, why she felt the bill will not accomplish it's intent of providing children with "two parent" homes, reviewing data from a study she authored called "Reforming the System to Protect Children in High Conflict Custody Cases." She offered other solutions which she felt would be more effective than reinstating fault divorce. (attachment 6)

The meeting adjourned at 10:33 a.m. The next scheduled meeting is February 1, 2002.

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: January 29, 2002

NAME	REPRESENTING
Sandy Barnett	KCSDV
Mike Taylor	city of Wichita
Nancy Lindberg	AG
Frank Henderson Jr.	Attorney General's
Kevin Bowe	Mem/weir Cl+d
Ron Miller	JJA
Lynaea South	JJA
Jared Holroyd	SN. Co. Drug Court
Craig Collins	KS Assn of Addiction Professionals
Ron Ewenthath	" " " "
Elizabeth Force	
Marsha Stephens	CWA of Kansas
Kate Hays	Intern
Ruth Glassmann	Secretary to Sen. Lyon
Michelle Peterson	Ks. Governmental Consulting
STEVE KEARNEY	PMCA
Pete Bodyk	KDOR
Helen Pedigo	Governor's Office
Bruce Dimmitt	Independent

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: Jan 29 '02

NAME	REPRESENTING
Jeff Bottenberg	KS Police officers
Charles Simmons	Dept. of Corrections
KEITH R LANDIS	CHRISTIAN SCHEDLE COMMITTEE ON PUBLICATIONS FOR KANSAS
Jean Barker	KADC
Ron Lyon	—
Kristen Pyle	Senator Lyon
Brenda Harmon	KSC
Joe Herold	KSC
Trudy Racove	SRS
Laura Howard	SRS
Lori Alvarado	SRS/MH/SAPTR
Donna Doolin	SRS/MH/SAPTR
Paul Davis	KBA
Linda Elrod	KBA
Janet Schalansky	SRS
Charles BARTLETT	SRS
Connie Burns	Whitney B. Damron. PA
Ami Hyten	JUDICIAL BRANCH
Mike Hutfles	KS Gov't Consulting

Bedspace Impact Assessment
Battery against Law Enforcement Officer
From Misdemeanor A to Nondrug Level 5

KEY ASSUMPTIONS

- Projected admission to prison is assumed to increase by an annual average of half percent. Bed space impacts are in relation to the baseline forecast produced in September 2001 by the Kansas Sentencing Commission.

- Percentage of target inmate sentences served in prison is assumed to be 85 percent, which is in consistent with the official projections released in September 2001.

- The average length of stay in prison for the target inmates is assumed to be 49 months.

- **Scenario One**: It is assumed that **10 offenders** will be convicted of the crime of "battery against law enforcement officer" and eventually sentenced to prison at a rate of **25%, 30% and 40%** respectively for a ten-year period.

- **Scenario Two**: It is assumed that **50 offenders** will be convicted of the crime of "battery against law enforcement officer" and eventually sentenced to prison at a rate of **25%, 30% and 40%** respectively for a ten-year period.

- **Scenario Three**: It is assumed that **100 offenders** will be convicted of the crime of "battery against law enforcement officer" and eventually sentenced to prison at a rate of **25%, 30% and 40%** respectively for a ten-year period.

FINDINGS

- There was no offender sentenced to prison or on probation under the crime of "battery against law enforcement officer" during FY 2001.

- **Scenario #1:** If **10 offenders** will be convicted of the crime of "battery against law enforcement officer" and eventually sentenced to prison at a rate of **25%, 30% and 40%** respectively, by the year 2012 there will be 10, 10 and 14 beds needed respectively.

- **Scenario #2:** If **50 offenders** will be convicted of the crime of "battery against law enforcement officer" and eventually sentenced to prison at a rate of **25%, 30% and 40%** respectively, by the year 2012 there will be 47, 55 and 73 beds needed respectively.

- **Scenario #3:** If **100 offenders** will be convicted of the crime of "battery against law enforcement officer" and eventually sentenced to prison at a rate of **25%, 30% and 40%** respectively, by the year 2012 there will be 91, 108 and 146 beds needed respectively.

Jud 1-29-02 att 1

Scenario One: Bed Space Impact Assessment

June of Each Year	10 Offenders Per Year with 25% Admissions to Prison		10 Offenders Per Year with 30% Admissions to Prison		10 Offenders Per Year with 40% Admissions to Prison	
	Admissions	Beds Needed	Admissions	Beds Needed	Admissions	Beds Needed
2003	3	3	3	3	4	4
2004	3	6	3	6	4	8
2005	3	9	3	9	4	12
2006	3	11	3	11	4	14
2007	3	10	3	10	4	14
2008	3	10	3	10	4	14
2009	3	10	3	10	4	14
2010	3	10	3	10	4	14
2011	3	11	3	11	4	14
2012	3	10	3	10	4	14

Scenario Two: Bed Space Impact Assessment

June of Each Year	50 Offenders Per Year with 25% Admissions to Prison		50 Offenders Per Year with 30% Admissions to Prison		50 Offenders Per Year with 40% Admissions to Prison	
	Admissions	Beds Needed	Admissions	Beds Needed	Admissions	Beds Needed
2003	13	13	15	15	20	20
2004	13	26	15	30	20	40
2005	13	39	15	45	20	60
2006	13	45	15	52	20	69
2007	13	45	15	53	20	69
2008	13	46	15	52	21	70
2009	13	46	15	53	21	71
2010	13	45	16	53	21	72
2011	14	45	16	55	21	74
2012	14	47	16	55	21	73

1-2

Scenario Three: Bed Space Impact Assessment

June of Each Year	100 Offenders Per Year with 25% Admissions to Prison		100 Offenders Per Year with 30% Admissions to Prison		100 Offenders Per Year with 40% Admissions to Prison	
	Admissions	Beds Needed	Admissions	Beds Needed	Admissions	Beds Needed
2003	25	25	30	30	40	40
2004	25	50	30	60	40	80
2005	25	75	30	90	40	120
2006	25	86	30	105	41	141
2007	26	87	31	106	41	141
2008	26	89	31	107	41	143
2009	26	90	31	108	41	141
2010	26	89	31	108	41	143
2011	26	89	31	108	42	142
2012	26	91	31	108	42	146

K3

State of Kansas
Office of the Attorney General
120 S.W. 10th Avenue, 2nd Floor, Topeka, Kansas 66612-1597

Carla J. Stovall
Attorney General

Main Phone: (785) 296-2215
Fax: (785) 296-6296

Nancy Lindberg, Assistant to the Attorney General
Office of Attorney General Carla J. Stovall
Before the Senate Judiciary Committee
Re: Bill Introductions
January 29, 2002

Chairperson Vratil and Members of the Committee:

Thank you for the opportunity to appear on behalf of Attorney General Carla J. Stovall today to introduce a bill for your consideration. My name is Nancy Lindberg and I am the Assistant to the Attorney General.

This is a bill which would amend K.S.A. 74-7301 (2) by adding the words "or a violent crime that posed a substantial threat, personal injury or death". By making this amendment, you would allow Kansas residents who are victims of crime in other countries to apply for compensation benefits with the Crime Victims Compensation Board.

I have a draft of the proposal attached for your review, and would be happy to answer questions. Thank you.

Sen Jud
1-29-02
att 2

K.S.A. 74-7301. Definitions.

. . .

(e) 'Criminally injurious conduct' means conduct that: (1) (A) Occurs or is attempted in this state or occurs to a person whose domicile is in Kansas who is the victim of a violent crime which occurs in another state, possession, or territory of the United States of America may make an application for compensation if:

(i) The crimes would be compensable had it occurred in the state of Kansas; and

(ii) the places the crimes occurred are states, possessions or territories of the United States of America not having eligible crime victim compensation programs;

(B) poses a substantial threat or personal injury or death; and

(C) either is punishable by fine, imprisonment or death or would be so punishable but for the fact that the person engaging in the conduct lacked capacity to commit the crime under the laws of this state; or

(2) is an act of terrorism, as defined in 18 U.S.C. 2331, or a violent crime that posed a substantial threat, personal injury or death committed outside of the United States against a person whose domicile is in Kansas.

Such term shall not include conduct arising out of the ownership, maintenance or use of a motor vehicle, except for violations of K.S.A. 8-1567 and amendments thereto, or violations of municipal ordinances prohibiting the acts prohibited by that statute, or violations of K.S.A. 8-1602, 21-3404, 21-3405 and 21-3414 and amendments thereto or when such conduct was intended to cause personal injury or death.

PMCA
of Kansas

MEMO TO: SENATE JUDICIARY COMMITTEE
FROM: TOM PALACE, EXECUTIVE DIRECTOR PMCA OF KANSAS
DATE: JANUARY 29, 2002
RE: INTRODUCTION OF SENATE BILL

Mr. Chairman and members of the committee, I would like to introduce a conceptual bill that would make it unlawful to sell motor fuel that is below the acquired cost of the fuel, plus taxes and transportation.

Cost to be defined as; product cost, plus freight (transportation) and taxes. If no invoice is used, price is determined by the lowest price on the day fuel is purchased at the terminal from which the most recent supply of gasoline was acquired.

Petroleum Marketers and Convenience Store Association of Kansas
201 NW Highway 24 • Suite 320 • PO Box 8479
Topeka, KS 66608-0479
785-233-9655 Fax: 785-354-4374

SJud 1-29-02 att 3

Kyle Smith

From: Kyle Smith
Sent: Monday, January 28, 2002 8:48 AM
To: 'mailto:goodwin@senate.state.ks.us'
Cc: 'adkins@senate.state.ks.us'; 'schmidt@senate.state.ks.us'
Subject: DNA Testing

Senator Goodwin
I hope this is timely for your needs. First I'd like to thank you and Senators Adkins and Schmidt for your continuing interest and support of this vital investigative tool. If I fail to answer any of your questions please advise.

I. Databank vs current investigations

I want to first distinguish between DNA testing on current investigations and the DNA databank. Our first priority is solving current cases. This involves conducting tests on biological samples taken at crime scenes and comparing them to suspects. The databank is also important as it can solve crimes and literally prevent rapes and murders, but we have to prioritize our resources.

II. Last years expansion in HB 2176 expanded the databank law to all level 1-6 person felons, off-grid felonies, burglary, cruelty to animals, drug manufacturing and money laundering. As you were advised there are federal grants available for analyzing backlogs of such samples, but not for their collection. The backlog of DNA cases, for the first time, had been substantially reduced, thanks to previous NIJ grants. As you may remember, we requested that the bill be effective upon publication in the Kansas Register. An all-out effort was set up to collect as many samples as possible before the grant deadline to maximize the federal dollars. We have submitted a grant request for $384,000 and are hopeful that it will be approved next month. However, we have also heard that some of the funds may be diverted by congress for homeland security expenses. I will keep you posted.

III. Storage of samples pending analysis:
It is scientifically accepted in the forensic science community as reliable and acceptable to store biological samples such as DNA in a frozen state. Properly collected and stored DNA samples can be held for years, probably decades with no deterioration. To the extent funding allows, we will continue to collect as many samples as possible. However, financially we may not be able to continue to collect all the samples now authorized.

IV. Expansion.
Numerous states are indeed expanding their DNA registration laws to cover all felony convictions. Such action will solve more crimes and, by getting serial and repeat offenders incarcerated, actually prevent rapes and murders that will happen with out such a system. However, absent additional funding, we literally can not afford to even continue collecting samples on the felonies currently covered, let alone conduct the analysis.

SJud 1-29-02 att 4

While the technology and techniques have improved in DNA, so have the cost of that technology. Currently, DNA analysis in a murder or rape has risen to about $900 per case, and as there is no grant money available for current cases, we've had to absorb those costs in our budget for the lab. Since 9/11 the KBI has been faced with substantial and compelling demands for our services. Expenses that, of course, were not contemplated in our budget. In addition the problem of meth labs hasn't disappeared, the number of labs seized in Kansas last year increased by another 20%. And our budget has not. The KBI is appealing the FY 2003 budget recommendation of $56,579 in general funds for our operating expense FY 2003 as that amount would enable the entire lab to operate only for one month. But given that the Ways and Means committee voted to cut the KBI budget even more, we are not hopeful.

Conclusion:

As much as we'd love to expand the DNA databank law to all felonies, and as much as we all hate the thought that there will be rapes and murders that would otherwise be prevented, the KBI regretfully reports that such expansion does not appear to be fiscally possible at this time.

STATE OF KANSAS

BOB LYON
SENATOR, 3RD DISTRICT
LEAVENWORTH AND JEFFERSON COUNTIES
14431 SALINE RD.
WINCHESTER, KS 66097

STATE CAPITOL, ROOM 143-N
TOPEKA, KANSAS 66612-1504
(785) 296-7372

TOPEKA

SENATE CHAMBER

COMMITTEE ASSIGNMENTS
MEMBER: FEDERAL AND STATE AFFAIRS
STATE BUILDING CONSTRUCTION
TRANSPORTATION
UTILITIES

Testimony For Senate Bill 173
Senate Judiciary Committee
Tuesday, January 29, 2002

Bill Description and Intent

Senate Bill 173 restricts the divorce ground of incompatibility to the case of mutually consenting spouses with no dependent children. For couples with dependent children, or where one of the spouses objects to the divorce, the proposed legislation reinstates permissible grounds. The intent of this legislation is to:

- Restore moral and legal strength to the institution of marriage and the family
- Provide legal protection to the offended spouse and children
- Reduce the societal costs of divorce
- Reduce the divorce rate

History and Impacts of Unilateral "No-Fault"

Prior to 1969, divorce law reflected the moral conviction that divorce should be rare, and for sufficient reason. A product of the social revolution of the 1960's, unilateral "no-fault" divorce law was introduced amid promises of liberation and pain-free divorces. In reality, this contributed to a 25% increase in the rate of divorce, and resulted in higher costs to society than anyone could have imagined. There is no evidence that "no-fault" provisions have made divorce less acrimonious.

Supporting testimony from recognized experts cite documented evidence regarding the harmful effects of divorce. These effects are particularly pervasive for the children of divorce:

- Reduced incomes, greater welfare participation
- Higher rates of incarceration
- Lower educational achievement
- Greater medical care, day care, child support
- Greater drug use, at-risk behavior, and suicide

5 Jud 1-29-02 att 5

Problems with Existing Statute

The existing statute permits one spouse to unilaterally walk away from a fundamental human commitment. It has inadvertently subverted the idea of marital permanence. Statistics show that 80% of divorces today are unilateral. Current Kansas law favors the spouse seeking to end the marriage, at the expense of the spouse wishing to maintain the relationship. Previously existing obstacles to divorce have been removed. It is now "harder to fire an employee of three years than to divorce a mother with three young children". As Mike McManus states, "Divorce is the only civil contract in which one person can cancel the contract with impunity".

What Would SB 173 Do?

Senate Bill 173 would reinstate the moral and legal accountability of marriage. It would hold a spouse responsible for committing a serious marital offense. It would legally protect and would give greater bargaining power to the offended spouse. It would provide greater protection to the children of divorce, by restricting the ability of one spouse to walk away from their parental responsibility. It would reduce the divorce rate by saving marriages.

Statistics show that 60% of divorces occur in "low-conflict" marriages, that is, the unhappiness in the marriage is not any greater than in those that do not consider divorce. Those that treat the "bad" marriage as justification for divorce assume the "bad" marriage cannot be changed. Groups such as Marriage Savers are achieving 80% success rates in restoring marriages on the brink of divorce. In addition, 85% of unhappily married people who stay together find that 5 years later their marriages are happier.

Passage of Senate Bill 173 will do more to preserve the family and protect children than any other piece of legislation in 2002. The State of Kansas cannot claim a high value for marriage and the family and continue to trivialize it in law. Our divorce law needs to be revised to reflect our values and convictions regarding the institution of marriage. Senate Bill 173 gives Kansas an opportunity to lead the nation in reforming unilateral divorce.

Summary of Supporting Testimony

FAMILY RESEARCH COUNCIL
FAMILY, FAITH AND FREEDOM

Dear Chairman Vratil and Committee Members:

Thank you for considering SB 173 to reform no-fault divorce. We at Family Research Council wholeheartedly support SB 173 and the positive steps it takes to strengthen marriage.

Since the introduction of no-fault divorce, divorce rates in the US have skyrocketed. This can be attributed in part to the easiness of walking away from a marriage. Indeed, a marriage contract is the only contract that can be broken for no reason at all. In today's culture a person can get into more legal trouble for breaking a business contract than destroying the lives of their spouse and children.

Remember, divorce not only hurts the innocent spouse but also the children involved. There are many long-range consequences that effect children from divorced parents.

- Children from divorced families have a risk of divorce that is two or three times greater than children from married parent families.
- Children from divorced families are much more likely to become depressed and withdrawn, display antisocial, impulsive, and hyperactive behaviors, and exhibit more behavioral problems at school than children from intact families.
- Children of divorced families are more likely to drop out of high school, engage in premarital sex at an early age, become pregnant as teens, and cohabit than children of married parents.

As children from divorced families enter adulthood they can continue to demonstrate problems. Specifically, adults who experienced parental divorce as children have lower levels of well-being than adults from intact families.

We urge you to pass SB 173 to help protect the innocent spouses and children from the devastation that divorce will bring to their lives.

Thank you for your considering this important piece of legislation to protect the family.

Sincerely,

Dimitri Kesari
Director of State & Local Affairs

801 G STREET NW, WASHINGTON, DC 20001
PHONE: 202-393-2100 FAX: 202-393-2134 ORDER LINE: 1-800-225-4008 INTERNET: WWW.FRC.ORG

5-3

MICHIGAN FAMILY FORUM

The Voice of Hope for Michigan's Families

February 8, 2001

Legislative Testimony
Ks. S.B. 173

Dear Chairman Vratil and Committee Members:

At the request of Sen. Bob Lyon, I am pleased to submit the following comments and testimony regarding Senate Bill 173. I am sorry that I am unable to be there in person, but short notice makes it impracticable.

Senate Bill 173 would change current Kansas law respecting divorce. It would require that, when one person objects to the divorce, grounds must be established. Currently, a marriage contract is the only legal agreement that can be breached with no reason and no particular penalty, and this Bill would change that.

Many lawyers will tell you that doing away with no-fault divorce will bring back the days of animosity and hate. As if they ever went away! Courts still use fault (indirectly) when dividing up property, awarding alimony and in deciding which parent is the more fit. Right now divorce trials are going on all over the State, only the battle is over custody, assets and future interests in retirement benefits. What this bill will do is to restore justice to a system for the person wanting to protect themselves and the family from one-sided, walk away divorce.

What has Kansas gotten from its current no-fault divorce system? High divorce rates and a legal system that is turned on its head. No-fault divorce laws send a message—a message that the state values a marriage contract even less than it does any other contract. Prenuptial agreements, which are essentially preplanned divorce, are nearly as common as preplanned funerals. This is a good system? For lawyers maybe, but certainly not families.

Please, give these thoughts some serious consideration, and let the Senate as a whole debate this important question by sending them Senate Bill 173.

Mike Harris
Executive Director

Mike Harris

Michigan Family Forum • 611 South Walnut Street • P.O. Box 15216 • Lansing, MI 48901-5216
517 374 1171, *telephone* • 517 374 6112, *fax* • http://www.mlforum.com

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TO: COMMITTEE ON JUDICIARY, KANSAS LEGISLATURE

RE: SENATE BILL NO. 173

FROM: Joe Patton, Attorney at Law

DATE: January 22, 2002

I write concerning Senate Bill 173. I certainly believe that we should review the social cost of no-fault divorce on the family. I will not presume to tell you whether this bill or another would be the best vehicle. I do know that our community pays a high price because of the law's cavalier attitude toward the institution of marriage.

The law in the case of divorce has become a teacher, and the lesson taught is not compatible with a healthy society. The family is the basic building block of society, and no-fault divorce has contributed to the family's demise.

For many years, I handled domestic relations cases, although I do not currently. Enough years have passed for me to see the actual social costs of no-fault divorce. A large portion of the welfare rolls are single mothers. I cannot help but believe the increase in juvenile crime is directly related to the destruction of the family, as well.

Perhaps most alarming for the family and for the future of our State and our Nation, current no-fault divorce laws require no consideration of or concern for the children of the divorcing couple. The difficulties of raising children in a single-parent home are well documented. The effects of divorce on the children's intellectual and emotional development, as well as their social skills and feelings of self-worth and self-confidence, are equally well documented. However, current no-fault divorce laws ignore the children completely. If Mom and Dad are unhappy, they are allowed to dissolve the family unit without any concession to the responsibility they both have to the health and welfare of their children. Society too often has to pick up the tab and the responsibility for those children. It is more than time to include this paramount element of the family in the divorce process.

This is certainly an issue that deserves further study.

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VIA FACSIMILE 368-7119

January 22, 2002

Senator Bob Lyon
Kansas Legislature, Rm 143-N
300 SW 10th Avenue
Topeka, KS 66612-1504

Re: SB 173

Dear Senator Lyon:

I have reviewed the Fiscal Note to SB 173 from Duane Goossen, Director of the Budget, and offer the following comments:

1. There is not documentation to support Mr. Goossen's statement that 70% of the divorce cases filed would meet the criteria of SB 173.

2. It does not take into consideration that some individuals would simply not file for divorce because of the new criteria. That number might be substantial and would reduce the case load to that extent.

3, The increased cost to the individual filing for divorce will also deter some filings and lower the case load.

4 It does not take into consideration the excellent mediation services now available, which judges use extensively in domestic cases to avoid a significant amount of litigation.

5. An unknown percentage of the cases will settle without mediation or litigation, as they do under the old law.

6. The increased case load does not automatically mean additional judges being added to the bench. If that were true, the legislature would have automatically increased the number of judges every year as the number of cases filed increased. I don't believe this has happened.

7. The costs mentions would be more than offset by the benefits accruing from the salvaging of the at least some segments of our family structure. It will also be offset by the monetary and societal costs associated with the thousands of children annually cast adrift, financially and emotionally, by divorce. Society is paying those costs now in the increased need for special educational and counseling programs, police and prisons, and financial support programs. Wouldn't the money be better spent preventing the damage than in trying to remedy it afterwards?

Very truly yours,

Joe Patton

FJP:rlh

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VIA FACSIMILE 368-7119

January 22, 2002

Senator Bob Lyon
Kansas Legislature, Rm 143-N
300 SW 10th Avenue
Topeka, KS 66612-1504

Re: SB 173

Dear Senator Lyon:

One additional thought on the fiscal note: A University of California at San Diego study showed that no-fault divorce was responsible for a 17 percent increase in the divorce rates between 1968 and 1988. (Leora Friedburg, "Did Unilateral Divorce Raise Divorce Rates? Evidence from Panel Data," *American Economic Review* 88 (1998): 327-340.) So we can anticipate a complimentary decline in the divorce rate if no-fault divorce is no longer available to couples with children. So the fiscal note should be amended to reflect the anticipated reduction in filings and concomitant reduction in costs to the entire system as a result of the proposed legislative change.

I have enclosed a research paper by Bridget Maher on the impacts of divorce, especially on the children involved.

Very truly yours,

Joe Patton

FJP:rlh

THE DEVASTATION OF DIVORCE

by
Bridget Maher

Divorce has become so widespread in America that it now affects virtually everyone. At the beginning of the twentieth century, there were only three divorces for every 1,000 marriages.[1] In 1996, the divorce rate among married women was 19.5, which is more than double the divorce rate of 9.2 in 1960.[2] Over half of all marriages are likely to end in divorce, based upon projections of current divorce rates.[3]

Much of the rise in divorce is due to no-fault divorce laws, which are on the books in all 50 states.[4] A recent study showed that the elimination of fault from marital dissolution and property settlements led to an increase in divorce rates.[5] In fact, a University of California at San Diego study showed that no-fault divorce was responsible for a 17 percent increase in the divorce rates between 1968 and 1988.[6]

American families have suffered greatly from divorce. The effects of divorce on children are particularly devastating. In 1990, over one million children were involved in divorce, which is more than double the number in 1960.[7] Several studies have shown how children are negatively impacted by divorce:

- Children from divorced families have a risk of divorce that is two or three times greater than children from married parent families.[8]
- Judith Wallerstein, who has extensively researched children of divorce, says that children experience feelings of rejection, loneliness, anger, guilt, anxiety, fear of abandonment by their parents and a deep yearning for the absent parent when their parents divorce.[9] Five years after their parents divorced, 37 percent of the children Wallerstein studied were moderately to severely depressed.[10]
- Researcher Nicholas Zill found that children from divorced families are "much more likely to become depressed and withdrawn, display antisocial, impulsive, and hyperactive behaviors, and exhibit behavioral problems at school" than children from intact families.[11]
- Children of divorced families are more likely to drop out of high school, engage in premarital sex at an early age, become pregnant as teens, and cohabit than children of married parents.[12]
- In a nationwide study of 669 elementary students, children of divorce had lower scores in reading, spelling, and math when compared to children in intact families.[13]

- A study of 18 year-old children who experienced their parents' marital disruption found that children of divorced families are more likely to endorse premarital sex and cohabitation, have negative attitudes toward marriage, and prefer a small family size than children who experienced the death of a parent.[14]

Adults are also negatively impacted by their parents' divorces or by their own divorces:

- A study of 407 young adults aged 18-22 found that those who came from divorced families had less favorable attitudes toward marriage than those from intact families.[15]

- Studies have shown that adults who experienced parental divorce as children have lower levels of well-being than adults from intact families.[16]

- Divorced men have higher rates of mental illness and death due to accidents and suicide than married men. Also, divorced fathers who do not live with their children are more likely to engage in behaviors that compromise their health.[17]

- A study of children's home environments found that divorced mothers are less able to provide the same level of emotional support to their children than married mothers.[18]

Miss Maher is a policy analyst on marriage and family at the Family Research Council.

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ENDNOTES

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6. Leora Friedburg, "Did Unilateral Divorce Raise Divorce Rates? Evidence from Panel Data," *American Economic Review* 88 (1998): 608–627.
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I .ERINE S. SPAHT
Jules and Frances Landry Professor of Law

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January 29, 2002

To: Members of the Senate Judiciary Committee

From: Katherine Shaw Spaht
Jules F. and Frances L. Landry Professor of Law
LSU Law Center

Re: Senate Bill No. 173 by Senator Lyon (divorce law reform)

As a professor of family law for twenty-nine years and the drafter of Louisiana's covenant marriage law in 1997, I urge you to vote favorably on Senate Bill No. 173. I am also the chairman of the Committee responsible for the revision of Louisiana's law of the family, hired by the Louisiana State Law Institute, the official law reform agency of the state, and I have served in this capacity since 1981. Because of my extensive experience and expertise, I as an outsider presume to suggest that this bill would benefit your citizens beyond what you can possibly envision.

- ***Anecdotal evidence about success of covenant marriage in saving marriages***

What we now know anecdotally about Louisiana's divorce reform effort, covenant marriage, offers the rest of the country great hope. Even though the numbers of covenant couples remain small (the reasons for which are difficult to pinpoint but include failure of civil servants to implement the law), the significantly longer waiting period for divorce (one and one-half years longer) combined with the legal obligation to take reasonable steps to preserve the marriage if difficulties arise ***have saved marriages***. Most importantly, these marriages involved children (ABC Good Morning America broadcast on November 26, 2001)--children spared the suffering of divorce and its long-term consequences. Any form of divorce reform that slows down or restricts divorce or denies opportunistic behavior by *only one spouse* (often the "wrongdoer") improves outcomes and life for your state's children.

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- ***Do not be surprised if virtually all of the attorneys in Kansas oppose divorce reform.***

There is an explanation for their opposition, but it is not the explanation publicly offered. No-fault divorce revolutionized divorce law practice: for the first time it was possible to produce an enormous volume of divorce cases and move them quickly through the system. In Louisiana to obtain a no-fault divorce requires only the filing of pleading forms that can be stored on computer disk and names of the petitioner substituted. There need be no hearing and there is no defense, other than reconciliation during the "cooling off" period. By comparison when divorce cases required proof of "fault," divorce law practice meant difficult work gathering evidence of fault in preparation for filing a divorce petition and a trial that might not ultimately result in the divorce the client so desperately desired, a reduced profit margin per case because clients simply could not pay the costs of extensive litigation, and, potentially, diminished professional stature because of the daily pursuit of the salacious.

Lawyers argue that divorce law reform such as that contained in Senate Bill No. 173 will reintroduce acrimony into the divorcing process and hurtful allegations about the behavior of a spouse, not to mention for those spouses who both desire a divorce, collusion to obtain a divorce by perjured testimony. Acrimony never left the divorcing process and neither did allegations of "fault" which simply reappear for other purposes--child custody (where the allegations tend to be the most injurious), spousal support, and in some jurisdictions distribution of marital property. As to the argument that any change in divorce law grounds reintroduces the temptation to perjure oneself, lawyers and judges bear the responsibility to discover and expose perjury. Furthermore, even in divorce cases in which perjured testimony was offered and a divorce granted, the fraud upon the court, which is surely to be condemned, did at least require *cooperation of both spouses*

and precluded the current practice of legalized desertion by one spouse.

Ultimately, lawyers are interested in their own economic "bottom line" and no-fault divorce proved to be the equivalent of the entry of McDonald's into the "food" market.

Respectfully submitted,

Katherine S. Spaht
Jules and Frances Landry Professor of Law

Elizabeth Force

711 Colleen Drive>

Gardner, Ks. 66030

913-856-4582

January 23, 2002

Senator John Vratil

Senate Judiciary Committee

Re: Senate Bill No. 173, divorce reform

Hearing date: 1-29-02

Dear Sir:

It is with tremendous grief that I offer you my testimony about the devastation that the current Kansas divorce laws have allowed to happen to my children and me.

My name is Elizabeth Force. I was married for 14 years before the divorce I did not consent to. My husband and I have three beautiful children: Michael, 9 years old, Katherine, 7 ½ years old, and Daniel, 2 ½ years old.

1999 dawned as the best year of our lives. My husband and I had our third child, a very planned and extremely wanted child. The business we began together was beginning to prosper. We signed a contract with a builder to construct our dream home. Life seemed to be working out great for us.

Imagine my shock in December 1999 to discover that my husband was making plans to leave me. I don't think I can adequately describe for you the knives of pain that sliced into my heart. I couldn't eat. I lost 22 pounds in six weeks. I couldn't sleep. I cried continually, especially as I looked at the innocent faces of my precious children. Their security was about to be ripped out from under them. I am a child of divorce myself, and I know all too well the scars left by the breakup of your parents' marriage.

I pleaded with my husband to reconsider the awful decision he had made. He seemed to be wavering, sometimes talking about staying. During his indecision, he checked the Kansas laws

to see if a period of separation was required before divorce. It wasn't. He consulted a lawyer. Divorce would be quick and easy, he was told. After seven agonizing weeks, he moved out. Within a few days, the divorce papers were served.

I believe if my husband had discovered that getting a divorce would be more difficult, if a long separation were required, or if fault had to be proven, he might have been swayed to stay and try to make our marriage work.

I didn't want a divorce. Imagine my surprise at being told by my lawyer that it didn't matter if I wanted it or not, I would be divorced. Against my will. Against the best interests of my children.

I told the judge that I didn't want this. I told the mediator. I told the lawyers. I told my husband. But there was no allowance in the law for trying to save this marriage. No counseling, no waiting period, no required time of separation, no penalty in division of marital assets. Nothing exists in the Kansas divorce laws to slow down the process. I felt the law failed to protect my children and I from one of the most devastating losses a person can experience.

My children were given no voice in the divorce proceedings. Their sorrow at the loss of their father is heartbreaking. Our children long for their father with an insatiable intensity. No amount of visitation satisfies them. They want their daddy home. They want him there every morning when they awake and every night when they go to sleep. They want him at dinner. Memories haunt them: "We used to go to that restaurant with Daddy." "I used to sit on Daddy's lap and watch that movie."

Our daughter tells me that sometimes she wakes up in the middle of the night and crawls into bed with me, hoping to find Daddy there. Six months after my husband moved out, our precious little girl drew a picture of herself with large circles over her hands and feet. "It is like (being) tied up," she wrote.

Our oldest son struggles to describe his feelings. "Mom, it's like I'm a computer and Daddy is a micro-chip. The micro-chip has blown up, and the computer doesn't work anymore." Not satisfied that he has conveyed his feelings, he adds, "Or it's like I'm an island, and I've been cut off from the land."

Our youngest was just 8 months old when his father moved out. Unless things change, he will never remember having his dad at home. He will never know the joy of greeting Daddy at the door after work.

The research of Judith Wallerstein proves that children do not recover from their parents' divorce the way most people recover from a trauma. Time does not heal this wound. Even five years out, the effects of the divorce are more traumatic for the children than immediately afterwards.

I believe the proposed changes in the Kansas divorce laws might have helped save our marriage. At least a period of separation would have been required, giving a chance for circumstances to

have changed. Our marriage was, and still is, salvageable. Perhaps if there were a price to pay, my husband would have reconsidered. I urge you to replace the current law with one that values marriage and family, one that protects innocent young children. Thank you.

Sincerely,

Elizabeth Force

Judiciary Committee Hearing/Kansas Senate Bill No. 173
Remarks by Attorney Graham Chynoweth of Concord, New Hampshire

To the Committee:

My name is Graham Chynoweth. For identification purposes only I tell you I am a former member of the NH Bar Association Board of Governors, former Chair of the NH Bar's Family Law Section and was once a NH State Representative. For 18 years I have been a family law attorney in Concord, NH.[1] I've represented many spouses in no-fault divorces and some in fault divorces (NH fault grounds are similar to Kansas fault grounds).

The New Hampshire House of Representatives is presently (January, 2001) considering amending, by House Bill 1301, its unilateral "no fault" ("irreconcilable differences causing the irremediable breakdown of the marriage") divorce statute. The amendment would allow a no-fault divorce only "if there are no minor children of the parties."

Your Senate Bill No. 173 would, with other changes also, similarly amend your no-fault divorce statute by not allowing a no-fault ("a breakdown of the marriage relationship...") divorce "..if a dependent child of the marriage resides with a spouse".

No-fault divorce was introduced into NH two years after the Kansas no-fault divorce statute was passed in 1969. The divorce rate (meaning the number of divorces granted as a percent of the number of weddings in any one year) in NH doubled within just a few years of no-fault (from 24% in 1970 to 48% in 1975). NH presently has an approximate 60% divorce rate. Some NH counties have a 70% divorce rate. Such rates cannot be sustained over the long run without severe degradation to our social structure.

There are many statistics and social science arguments that support such an amendment to our no-fault divorce statutes. I expect that you will hear many such arguments, and attempted refutations, in your consideration of SB 173.

Some of the arguments against amending no-fault divorce statutes to eliminate no-fault when there are minor children of the marriage are common. I here offer my perspective as a divorce attorney on three of the arguments heard in New Hampshire against amending the no-

[1] My address is 188 North Main Street, Concord, NH 03301. Telephone (603) 225 9900.

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fault divorce statute.

(1) Acrimony will be promoted and involve children. A misleading argument.

Acrimony means a condition of sharpness, harshness, bitterness.

My experience is that acrimony exists in divorces independent of fault grounds plead, not because they are plead. Pleading a fault ground only infrequently engenders involvement of the children. Children are involved, almost always inappropriately and to their short and long term harm, mostly in contested custody and visitation situations. Such situations exist independent of the grounds plead for divorce.

The divorce courts have a responsibility to protect children in such situations and are doing a better job than ever. To quote a recent NH divorce court decision: (disclosure of the adult debate in a divorce) "carries with it the probability of irreparable injury to ... innocent (children) trapped in the vituperative jaws of an acrimonious war waged by two they love equally...Protecting the parties' children from the acid fallout of divorce is the purpose (of) the Court..".[2] If fault grounds do appear to allow expression of acrimony in divorces, the Courts can also respond by removing the acrimony from the public discourse by promoting and using less public dispute resolution methods.

Finally, bitterness over the break-up of a till-death-do-us-part relationship may be an appropriate human response to dreams gone bad. If we could socially or legally engineer acrimony out of all divorces the institution of marriage and society would be the poorer.

(2) With the Amendment marriage would be a "prison". A false argument.

When two initially get together the relationship is between themselves. When they marry the relationship also involves society through the marriage license procedure. When the two have a child or children, society must expect to have the married couple take into account the child in all matters, including divorce. Society, through its no-fault divorce statutes, presently excludes formal consideration of the child in the starting of the divorce process.

Children are taken into account after the divorce process is started. In some divorces, children are taken into account after filing of the divorce by appointment of a Guardian AD

---

[2] In re: Holmes and Holmes, Hillsborough County (NH) Superior Court (North), Docket # 00-M-0815, (November 7, 2001).

LITEM (GAL) for the children. The GAL is appointed by the Court only if there are contested issues related to the children. Also, parents of minor children must attend a "child impact seminar" before a divorce decree is issued. These structural responses related to children appeared well after the NH no-fault law went into effect. They do not address the fundamental fact that children are not legally expected to be taken into account in the filing of the divorce. The 30+ year social experiment of no-fault has failed, and the victims are our children. Our children should no longer only be an after-filing concern.

If the proposed change to the no-fault divorce statute is adopted, society (through the legislature) will be making a statement that, with children coming to the married couple, there is a fundamental change to the considerations in splitting-up the marriage. For some, this statement is hard to hear right now because the 30+ year experience of no-fault has created the legal expectation that only the husband and wife are to be considered in the decision whether to file for divorce. The proposed change requires that a married couple with children consider the seriousness of the rip in the marital relationship before filing for divorce. If the rip is not sufficiently serious to allow for an articulable fault cause, then the mere presence of the child should prevent the divorce. This properly reflects studies (especially a recent study by Professor Paul Amato of Johns Hopkins University) that show that most divorces come from low-conflict marriages. But some call the proposed change in the no-fault divorce statute making a "prison" of marriage. Our society, however, needs to emphasize the seriousness of marriage and of the special responsibility of having children within marriage. The price being presently paid by many of our children of divorced couples is too high. Requiring a fault ground to be articulated does not make marriage a "prison", as some allege. Marriage is a voluntarily entered-into relationship which society has a stake in maintaining, especially if there are children.

(3) There is no basis for an expectation that divorce rate would be lowered by the amendment. Not True.

Opponents to changing the no-fault statute state that the dramatic increase in divorce rates since the introduction of no-fault may be explained by a number of factors other than no-fault. They cite major social movements such as the feminist movement and the increased percentage of households in which both parents are employed to be as likely linked to the rise in divorce rate.

They conclude that the proposed amendment to the no-fault law should therefore not occur. But amending the divorce statute is something the legislature can do. Having a high percentage of working parents, for instance, may require other social responses but saying both parents can't work is not the role of a legislature.

There are studies of the impact of no-fault divorce that take into account other social trends even while concluding that no-fault has increased the divorce rate. Both Kansas and New Hampshire are "unilateral" no-fault divorce states. In a unilateral divorce only one person needs to bring the divorce action to the Court. A MIT Professor of Economics published a recent study of all 50 states' divorce statistics and laws and found "a very sizable and highly significant impact of unilateral (no-fault) divorce on the likelihood of divorce."[3] The study states that the odds of getting divorced are increase by about 12% just by a unilateral no-fault divorce statute. Another study reports that the shift to unilateral divorce by itself raised divorce rates by 6.5%, accounting for 17% of the increased in divorce rates overall.[4] Opponents to the change do not and cannot point to studies that the rate would not be reduced by the change.

When no-fault was passed 30+ years ago in New Hampshire, proponents of the then change predicted that divorce would be harder to get because "irreconcilable differences" would have to be proved. No study was offered or made in support of such as assertion and they were wrong. Many children have since needlessly suffered the pain of divorce.

I urge you to recommend passage of SB 173 to the full Senate. If you believe in protecting children, promoting the institution of marriage and generally increasing the stability of society through a greater number of intact families, I believe you will do so.

Thank you

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[3] Jonathan Gruber, "Is Making Divorce Easier Bad for Children? The Long Run Implications of Unilateral Divorce" National Bureau of Economic Research Working Paper No. W7968, October 2000. Available at SSRN.com.

[4] See The Case for Marriage, Gallagher and Waite, Doubleday, 2000, page 179.

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RE: SB 173

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Comments on Senate Bill No. 173
To the Senate Judiciary Committee

January 25, 2002

I have reviewed the proposed legislation by Senator Bob Lyon to amend K.S.A. 60-1610 and wish to comment in support of Senate Bill No. 173. As an attorney with a family law practice in the State of Kansas for more than 10 years, I handle divorce cases on a regular basis. Many of those cases are prosecuted by one party against the wishes of their spouse.

I find that most people confronted with an impending divorce filed against them by their spouse want some way to slow down the process to allow time to attempt to rebuild the relationship. However, under current law, specifically K.S.A. 60-1610, divorce is easy to obtain. Our court system severs the marital relationship without addressing whether or not the parties have made genuine efforts to repair the strained relationship. The Court grants divorce solely on the basis of the testimony of one party that they believe the marriage relationship to be irreconcilable. I do not believe this is in the best interests of our society, our court system, and especially, the minor children involved in the process.

In those divorce cases in which the parties have minor children, the children suffer most. To continue to encourage divorce by making the process easy undermines the duty our society has to protect those children. Can we force people to address the issues and attempt to repair their marriage relationship by requiring grounds for divorce? I believe that many people faced with the requirement that they allege a specific basis for a divorce in the divorce petition will realize they must confront issues in the marriage, rather than simply saying, "we no longer get along, I want a divorce."

The argument in support of "no-fault" divorce has been that we relieve the needless accusations between parties and somehow begin a healing process of the relationship. Perhaps we do alleviate some of the tension that arises when one party accuses another of an act which constitutes grounds for divorce. However, I believe that this argument fails in recognizing the people who deserve our consideration, which are the children. Childern are better off when their parents remain married. Any child who has been through divorce expresses a desire for an intact family. I believe we must take steps to discourage divorce, to encourage the development of vibrant family relationships, and above all, to protect the children who otherwise become the innocent victims of adult misbehavior. Senate Bill 173 is a step in the right direction of discouraging divorce.

—Martin Mishler

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REGENT UNIVERSITY

School of Law

January 26, 2002

From:
Lynne Marie Kohm
John Brown McCarty Professor of Family Law
Regent University School of Law
Virginia Beach, VA 23464
757.226.4335

To:
Senator Bob Lyon
Kansas State Capitol
300 SW 10th Room 143N
Topeka, Kansas 66612
VIA FAX 785.368.7119

Re: In Support of Kansas Senate Bill No. 173 – on the Limitation of No-Fault Divorce when Minor Children are third parties to the Marriage

Please accept the following as a brief summary of proffered expert testimony.

1. Subject Matter of Testimony:

The determination of fault secures the release of the innocent spouse's marital obligations while legally confirming the other's continuing obligations. A no-fault divorce action releases one party from a previous agreement without compensating the relying party's present and often continuing obligations. [Brinig and Carbone, 855] Minor children of the marriage are relying parties as well.

The existing system of no-fault divorce in Kansas provides no scale for balancing contractual agreements that require personal and financial sacrifices. This results in inequities that carry neither analysis nor remedy for the interests at stake. Any contract requires a

breaching party to fairly compensate the non-breaching party based on the agreement between the parties. The marriage contract, however, does not provide the non-breaching party with any such contract remedies whatsoever in a no-fault jurisdiction, and currently provides no protection whatsoever to third party beneficiaries who rely on that contract (minor children).

Furthermore, the massive destructive social effects of divorce can no longer be ignored. [Glendon] "As social scientists track successive generations of American children whose parents have ended their marriages, the data are leading even some of the once-staunchest supporters of divorce to conclude that divorce is hurting American society and devastating the lives of children. Its effects are obvious in family life, educational attainment, job stability, income potential, physical and emotional health, drug use, and crime." [Fagan and Rector, 1]

2. Children's Interest in No-Fault Divorce:

Reliance Interests: Marriage is an agreement between two people, made before many witnesses and often before the highest authority, in every religious tradition. [Witte] Children are beneficiaries who must rely on that marital agreement. These children are citizens of the state, which is charged with the general welfare of its members. The state, therefore, has a reasonable interest in the welfare of its minor citizens. SB 173 is rationally related to a reasonable state interest of protecting children of Kansas. No Fault Divorce should be prohibited when minor children will be harmed by the grant of that divorce and the breach of that marital agreement without adjudication of fault.

Third Party Beneficiary Interests: Children are third party beneficiaries of their parents' marriage. Minor children have a legitimate interest in the marriage of their parents. As third party beneficiaries of their parents' marriage contract, they will suffer uncompensated damage from a divorce between their parents. Legal and sociological principles produce evidence

against no-fault divorce, as applied by Kansas law.

3. Documents relied upon:

Patrick F. Fagan and Robert Rector, *The Effects of Divorce on America*, 1373 Backgrounder, June 5, 2000.

JOHN WITTE, JR., FROM SACRAMENT TO CONTRACT (1997).

MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW (1987); THE NEW FAMILY AND THE NEW FAMILY LAW (1981).

Margaret F. Brinig and June Carbone, *The Reliance Interest in Marriage and Divorce*, 62 Tulane L.Rev. 855 (1988).

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Dear Senator John Vratil,

Thank you for your request that I submit a statement in support of Senate Bill No. 173 for the Committee on Judiciary.

Something remarkable is occurring in Johnson and Wyandotte County. In 1997 a group of some 50 pastors gathered together and signed a Community Marriage Policy that brought minimum standards of marriage preparation as well as support for the institution of marriage into our churches. Since that time divorces have fallen over 40% in our community. This is good news, but more can be done.

In preparation for the Community Marriage Policy we learned that divorce impacts children the most. Worse, the pain of divorce never goes away. Most of the recent research has taught us that nearly 70% of marriage should stay together for the sake of the children. In the case of divorce this bill puts the emphasis where it belongs, protecting the children.

Senate Bill No. 173 brings about a systemic solution in the current divorce setting in Kansas. By causing even a pause in the catastrophe of divorce, many marriages can be saved and lives of children will be positively affected. Some will ask about the cost.

What cost are we currently paying? Divorce is a root cause of every sort of social ill. The data is conclusive and, frankly, overwhelming. Passing this bill will inevitably lead to lower incarceration rates, higher graduation rates, lower teen suicide rates, more stable homes, and more secure Kansans. Just try and put a price tag on those benefits!

Sincerely,

Rev Jeffrey T. Meyers

Rev. Jeffrey T. Meyers, MA, EdS, NCC, LPC
State of Kansas Chair for Marriage Savers
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January 25, 2002

Testimony to the Kansas Senate Judiciary Committee
on
Senate Bill 173: Reform of No-Fault Divorce

by

Michael J. McManus,
President & Co-Chair
Marriage Savers
9311 Harrington Dr.
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301 469-5873

As President of **Marriage Savers,** a national non-profit organization whose goal is to reduce the divorce rate, strengthen marriages and restore hope to children in distressed marriages — I enthusiastically endorse Senate Bill 173 Sponsored by Sen. Bob Lyon. I urge the Judiciary Committee to schedule a full set of hearings on this bill which could do more to improve the lives of children than any other single piece of legislation in 2002.

This bill would permit no-fault divorce on grounds of irreconcilable differences for couples without dependent children. However, if there are dependent children, both the man and woman must agree that the marriage is irreconciliable. However, if one parent wants a divorce and the other parent objects, a no-fault divorce would not be granted. To obtain a divorce, the spouse who desired it would have to prove the other person is at fault — for such reasons as being impotent or mentally ill, having committed adultery, been convicted of a felony, or shown extreme cruelty, or been physically abusive. Kansas could lead America in reforming unilateral divorce.

As President Bush asserted last year, "We know that children who grow up with absent fathers can suffer lasting damage. They are more likely to end up in poverty or drop out of school, become addicted to drugs, have a child out-of-wedlock or end up in prison." Statistically, children of divorce are twice as likely as those from intact homes to drop out of school and are six times as likely to be poor or to commit suicide. Fatherless girls are three times as apt to give birth to out-of-wedlock children themselves, expanding the welfare culture into the next generation.[1]

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Contemporary culture says, "All families are loving." From a child's perspective, that is not true. Males from fatherless homes often grow up angry and immersed in crime. Those from divorced homes are ***12.4 times more likely to be incarcerated*** than those from intact homes. Those born out-of-wedlock are 22 times more at risk to be incarcerated.[2] Another study says that children living with their mothers are ***14 times more likely to be physically abused.***[3]

Impact of Divorce on Children

In their landmark book, *The Case for Marriage: Why Married People are happier, Healthier, and Better Off Financially*, Linda Waite and Maggie Gallagher, begin by saying, "In America over the last thirty years, we've done something unprecedented. We have managed to transform marriage, the most basic and universal of human institutions, into something controversial."[4]

They cite a widespread myth, that "Divorce is usually the best answer for kids when a marriage becomes unhappy." For example the 1998 edition of a best-seller, *Creative Divorce*, by Mel and Pat Krantzler, erroneously states, "Many parents may indeed stay together because they believe divorce will harm their children. What they fail to realize is that ... more harm will result from `staying together' than divorcing."

Frankly that is a flat-out rationalization. "It works as long as we avoid talking to the children," says Dr. Judith Wallerstein, who began her study of 60 families who were divorcing two years after California legalized no fault divorce, in 1971. These families had 131 children, who were all doing well in school at the time of divorce. The families were from middle to upper class. "The children had no idea that divorce was coming." Nevertheless, Dr. Wallerstein believed, as did most psychologists and sociologists at the time, that "The impact will be short-lived if the parents refrain from fighting. The children's natural resiliency will come into play."

Dr. Wallerstein interviewed both parents and children at the time of divorce and five years later. The wounds were so stunningly raw, contrary to her expectations, that she interviewed everyone 10 years after the divorce, and again at the 15 year mark. She wrote a major book, *Second Chances*[5], in which she said, "Children feel intensely rejected when their parents divorce: "He left Mom. He doesn't care about me."

> Dr. Wallerstein was "surprised to discover that the severity of a child's reaction at the time of the parents' divorce does not predict how that child will fare five, ten and even fifteen years later....Girls seem to fare much better psychologically than boys. A sleeper effect in females surfaced of troubles they are experiencing now at entrance into young adulthood (which) came as a complete surprise. Girls who have been betrayed or abandoned by a lover fear betrayal and abandonment...Many find maladaptive ways to cope. Some take many lovers at one time. Others seek out older men who are less likely to betray a younger woman." Many cohabit rather than wait for engagement.

> "Ten years after divorce, close to one-half of the boys (now 19-29 years old) are unhappy, lonely, and have few, if any lasting relationships with women...One out of three young men and one of ten young women between the ages 19 and 23 at the ten year mark are delinquent, meaning they act out their anger in a range of illegal activities including assault, burglary, arson, drug dealing, theft, drunk driving, and prostitution," wrote Ms. Wallerstein in *Second Chances.*.

What happened to those children of divorce when they grew up? Dr. Wallerstein interviewed 100 of those children who had been between 2 and 18, when they were aged 27 to 43. If you are an adult child of divorce, a divorced person, someone considering divorce, or anyone professionally involved, such as judges, lawyers pastors or legislators - you must read *The Unexpected Legacy of Divorce* by Dr. Judith Wallerstein with Julia Lewis and Sandra Blakeslee.[6] This top ten bestseller, America's only longitudinal study of divorce, is profoundly disturbing and shatters five major myths about divorce and children:

Myth 1. If parents are happier after divorce, the children will be too. In fact, children of divorce become more aggressive than those in intact homes, suffer more depression, have more learning difficulties, are more promiscuous, bear more children born out of wedlock, are less likely to marry and more likely to divorce.

Myth 2. Divorce is a temporary crisis whose most harmful impact is at the time of divorce. A related myth is that if the parents don't fight in front of the children after divorce, and show love for them, they will be all right. But as Dr. Wallerstein writes, only after observing these children grow into adulthood, did she see the whole picture: "Divorce is a life-transforming experience...The whole trajectory of an individual's life is profoundly altered by the divorce experience...The divorced family has an entirely new cast of characters and relationships featuring stepparents and stepsiblings, second marriages and second divorces, and often a series of live-in lovers. The child who grows up in a postdivorce family often experiences not one loss - that of the intact family - but a series of losses as people come and go."

In fact, adult childrens' new world is "far less reliable, more dangerous place because the closest relationships in their lives can no longer be expected to hold firm." Most lost not only a father, but their mother as well as she became fully engaged in rebuilding her life economically, socially and sexually. Parenting cut loose from marriage is "less stable, more volatile, less protective."

Myth 3: The best time to divorce is when children are very young. In fact, "youngest children tend to suffer the most. At an age when they need constant protection and loving nurturance, these young children have parents in turmoil." Half of the million children whose parents divorce annually are under the age of six.

Wallerstein depicts Paula whose whole world collapsed. Her father was an affluent pharmacist, an attentive husband and parent. Her mother devoted herself to Paula, active in her

school activities, taking her to swimming lessons. After her father's business went bankrupt, he disappeared. Her mother, able only get a minimum wage job, transformed from a cheerful person into a strained, desperately tired, silent and resentful woman with no time for Paula. Only as an adult could Paula put the magnitude of these losses into words: "Suddenly there was no one there. I spent so much time alone that I tried to become my own company. But how can you do that as a four-year-old child? I would go for days without saying a word."

Myth 4: The major impact of divorce occurs in childhood or adolescence. Untrue. It is "in adulthood the children of divorce suffer the most. The impact of divorce hits them most cruelly as they go in search of love, sexual intimacy, and commitment...Anxiety leads many into making bad choices in relationships, giving up hastily when problems arise, or avoiding" all relationships.

At 15, Paula dressed like a slut, boasted about being high every day on drugs or alcohol and was very promiscuous. Six years later she was living with a man whom she planned to marry. Why? "He loves me, he's kinda hyper, and he likes to party. I said to him, `It's my birthday, marry me." They had a child who was neglected in their drinking bouts. After a divorce, she was in the same spot as her mother years earlier - "no money, no training, no home, with a child to support."

By contrast, "many young men from divorced families are immobilized," not having had any relationships. This is a major reason the number of never-married Americans has doubled from 21 million in 1970 to 47 million in 1997.

Myth 5: Staying in an unhappy marriage is not good for children. Wallerstein interviewed friends of those whose parents divorced, children who went to the same schools but whose parents remained intact, even when marriages were unhappy. Those children were far more likely to go to college, to marry, and to be happy than children of divorce. Few realize that "children can be reasonably content despite the failing marriage," she says. But if they divorce, "the parents have failed at a central task of adulthood," which builds in their children a fear, `If they failed, I can fail too.'"

Even **25 years** after their parents' divorce, their adult children say, "My childhood ended with my parents' divorce." Of the 60 fathers, 57 remarried and stopped child support when their children reached 18. Few of the children attained the college or graduate education of their affluent fathers. (However, fathers underwrote the college education costs of their stepchildren and their children from a second marriage but rarely their own children from a first marriage.)

Children sadly concluded that ties between men and women "can break capriciously, without warning," which gives them no confidence in building relationships with the opposite sex. Consequently, they are terrified of conflict and tend to explode or run away. What has not been recognized until this book was published is that from the viewpoint of children, "***divorce is a cumulative experience. Its impact increases over time and rises to a crescendo in adulthood" affecting "the personality, the ability to trust, expectations about relationships and ability to cope with change." Only 60 percent married; and many of them divorced.***

The legal system compounds these staggering problems in two damaging ways according to Wallerstein. Visitation plans treat the child "like a rag doll that quietly sits wherever it is placed." Kids are locked into inflexible court-ordered visitation that is not adjusted as children get older. Though its aim is to allow the child to get to know and love the absent parent, what grows is resentment at being taken away from their own friends and activities. As adults they no longer want to see the absent parent.

The legal system also allows child support to stop at age 18. "Many young people consider the cutoff at age 18 the worst hit of their parents' divorce. They tell me bitterly, 'I paid for my folks's divorce,'" Wallerstein writes. Only 29 percent received full or consistent partial support for college compared to 89 percent of their friends living in intact families. Divorced parents offer no explanation or apology for their failure to help. Further, children of divorce are often denied scholarship aid because their father's income is too high!

Impact of Divorce on Adults

According to James J. Lynch, author of *A Cry Unheard: New Insights into the Medical Consequences of Loneliness,* published in 2000, adults who divorce also suffer much more than is realized.[7] For every major cause of death, "the rates for divorced males ranged anywhere from two to six times higher than their married counterparts." The rates are double for the big killers of heart disease, hypertension, stroke, lung and intestinal cancer. Divorced men drink more heavily, and are seven times more apt to die of cirrohisis of the liver and four times more likely to be killed in car crashes than married men. Divorced men are also four times more likely to die of suicide, nine-fold more apt to succumb to pneumonia and homicide, and 10 times more likely to die of tuberculosis.

Women who divorce are much more apt to die of all forms of cancer compared to married women. Women are 49% more likely to have cancer of the lungs, 67% more apt to die of cancer of the buccal cavity and pharynx and 238% more at risk of succumbing to cervix or uterine cancer than a married woman of the same age.

These are immense, unreported consequences of divorce. A smoker is only twice as likely to die in any given year as a person who does not smoke. That is such a huge increased risk that the Surgeon General required cigarette manufacturers to put on the label of every pack that "Smoking is dangerous to your health."

Perhaps you legislators ought to stamp on every divorce certificate, "Divorce is dangerous to your health."

Marriage: The Key to Health, Wealth, Long Life

The problems with divorce can seem overwhelming. However, it is worth fighting the fight. America seems to have forgotten the value of marriage for adults as well as children. As Maggie Gallagher and Linda Waite have documented in their important 2000 book, *The Case for*

Marriage, people who are married are happier than those who are single, much wealthier, healthier and live longer. They also have better sex!

— **Life: A man aged 48 who is married has an 83% chance of living to age 65; but a divorced man's odds are only 63%.** Women have a similar though not as drastic consequence if they divorce. Why? Divorced people are more likely to abuse alcohol or drugs, for example. Such people are more likely to suffer from heart attacks, cancer, be in automobile accidents or commit suicide, as indicated in the book "The Broken Heart: The Medical Consequences of Loneliness" by J.J. Lynch. The never-married live the shortest lives—both men and women.

— **Happiness:** Married people are twice as likely as those who are single for whatever reason to say they are "very happy." Some 38% of married couples say they are very happy, compared to 14% of divorced men and 18% of divorced women, and 18% of the separated. The surprise is that married people are nearly twice as apt as never-married (38% vs. 21%) to say they are very happy. That is not the message of "Friends" and other TV sitcoms which glamorize adults who jump in bed with someone new every weekend.

— **Wealth:** A married couple in their 50s in 1994 had net assets of $132,000, but a divorced person, only $33,600 and a separated person, only $7,600. What is particularly surprising is that a never-married person aged 50-60 has assets of only $36,000, about one-fourth of the wealth of a married couple who spent thousands to raise their children.

— **Sex:** "Married sex really is better sex," report Waite and Gallagher. "Married women are almost twice as likely as divorced or never-married women to have a sex life that (a) exists and (b) is extremely emotionally satisfying." Some 43 percent of married men had sex at least twice a week vs. only 26 percent of single men.

Legislative Remedies

It is time to change laws. I would like to propose these legislative changes:

1. Court-ordered visitation plans should be reviewed every five years, with the child given a larger voice as he/she grows older. The present system which is designed to give the non-custodial parent access and influence upon the child's life — becomes like a straight jacket to a teenager. The majority of children of divorce find the experience so horrible most no longer want to see the absent parent after age 18. That is in no one's interest — not the child nor either parent.

2. Child support should also be mandated to continue until age 22 if the student is enrolled in full-time study. At just the time when the need for child support grows exponentially, seven out of ten absent parents discontinue child support. This outrageous, cruel abandonment by parents of their own children should be prohibited by law, not sanctioned by it.

3. Unilateral divorce of couples with children should be ended.

We need to give as much time, energy and resources to protecting children and marriage as

we give to protecting the environment. When no-fault divorce was first passed by California in 1969 it was sold as a way to reduce the anger and contentiousness of divorce, to protect the children. Examples were given of couples who both longed for divorce, but had to pretend one or the other had committed adultery in order to get divorced.

Divorce lawyers persuaded legislature after legislature — almost without debate, that no fault divorce was a humane reform. In fact, ***no fault divorce should be called unilateral divorce*** because in four out of five cases, one person wants out and the other wants the marriage continue. Certainly all of the children want their parents to remain together. I am urging you, as the Legislature to take a stand on behalf of those children whose lives are permanently twisted by the divorce -- and on behalf of the spouse who wants reconciliation. In Kansas, only one partner has to declare that there are "irreconcilable differences" for there to be a divorce. The other person does not have the right to argue, "Our differences are **not** irreconcilable. We have problems, but I am willing to go seek help to resolve our differences."

Divorce is the only civil contract in which one person can cancel the contract with impunity. If you buy a car with a commitment to pay if off in four years, you can not go back to the dealer and say, "I don't want this car any more. I want a new model. Take this old car back and give me the money I've already paid in." The dealer would laugh. Any equity which has been built up by two years of payments is lost. A big penalty payment would have to be made.

However a husband can tell an older wife, the marriage is over, because he has fallen in love with a new younger model. The children will suffer a one-third cut in the resources available to them and may be cast into poverty along with their mother. Half of all children on welfare are there because of a failed marriage.[8] The father can force the sale of the house, and take out half his equity and use it as a down payment on a new house for his new wife. So the children lose their father, his income, and are forced to move to a smaller home in a worse neighborhood. Their lives are not only shattered at the time, but, as Dr. Wallerstein notes, the "unexpected legacy of divorce," is that its impact "rises to a crescendo in adulthood."

The Reform of Unilateral Divorce

I am not suggesting that no-fault or unilateral divorce be abolished. SB 173 would **not** attempt to roll back 30 years of history. Consider a man and woman who marry at age 25. Either would have the freedom to divorce at, say, age 28 without the consent of the other, if this legislation becomes law — **provided they have had no children.** They would also be able to divorce if they have children ht the marriage was impossible. But if, after those three years, they decide to have children — they should be making a commitment to one another at least until that child is raised. The child is the innocent — and for too long, the ignored victim of the selfishness of the parents.

Before unilateral divorce was legal, if the man wanted a divorce, his wife had leverage. She could refuse to agree to the divorce, and tell her husband, "I forgive you for your adultery. Let's go to counseling to work on the marriage." He, of course, could make her life miserable.

But she could hold out for full ownership of the family home and for alimony payments in addition to child support, so that she could afford to stay in the house. A man or woman whose spouse swore an oath for better for worse, in richer and in poorer, in sickness and in health till death do us part — deserves to have an equal voice in court in an attempt to save the marriage, especially if children are involved.

How would this work, as a practical matter? If the couple has children, they can still become divorced if one proves the other guilty of 9 different faults, outlined on Page 1 of my testimony. However, Professor Paul Amato of Johns Hopkins has found that "Very few people getting divorced mention serious problems, such as mental abuse, violence, alcohol or drug problems. Instead, people mention:

`We have been growing apart.
We don't feel as close as we once were.
The quality of our communication is not as good as it should be.

. Amato has been conducting a longitudinal study in which he has interviewed 2000 married people in 1980, 1983, 1988, 1992, 1997, and 2000. He has interviewed the children of these marriages after they reach 19. The majority of 691 children grew up with continuously married parents. Some 21% experienced divorce and 15% were in homes where the parents stayed married, but had unresolved conflict. Amato confirms that children experiencing divorce reached adulthood with less education, are not as close to their parents, have more symptoms of depression, and were less happy. He confirms that fewer marry and if they do, are more likely to divorce themselves.

What is surprising about his findings is that of 295 couples who divorced, only 40% were in marriages with very low happiness, with few positive interactions and much conflict. In 60% of the divorces, the couple's happiness was average. Their positive interaction is average. They had no more than average conflict. In other words, three out of five couples who divorce are no more unhappy or conflicted than married couples who stayed together!

Such couples do not have sufficient reason to condemn their children.. In these marriages which Amato calls "good enough marriages," the unilateral decision of one partner to walk out is unexpected, stunning and inexplicable. He said, "Most children don't care about midlife crisis; they don't care about how deep the level is of their parents' elf-actualization. They want regular access to both parents. Many of these good enough marriages can be salvaged."

What About Being Trapped in a Bad Marriage?

What about those couples who are profoundly unhappy? Should they be forced to stay together? I offer three answers.

My first answer is that the vast majority of even terrible marriages can be saved with remarkably little effort. Let me give two examples:.

1. **Retrouvaille** is a weekend retreat in which couples whose marriages once nearly failed, who I call "back-from-the-brink" couples -- share details about how they overcame years of adultery, alcoholism, neglect, verbal or physical abuse, and have gone on to build great marriages. The results are spectacular. Of 2,000 couples who have attended in Michigan, *a third had already filed divorce papers, yet 80% rebuilt their marriages. Two-fifths of more than 1,000 couples in Fort Worth had already separated or divorced, yet 70% reconciled and are still together. Buffalo's Retrouvaille has saved 90% of its marriages.* Nationally, about 60,000 couples have attended Retrovaille, and on average, 4 of 5 marriages are saved. The nearest Retrouvaille will be held in Massachusetts ***this weekend.*** If you know a couple whose marriage is headed for divorce, have them call Van and Page Vandewater at 617 782-5626. The only charge is for motel costs. The volunteer couples leading the weekend donate their time, out of a gratitude to God that their marriages were saved.

2. **Marriage Ministry** is a similar proven way to save couples headed for divorce courts -- but it is based in a local church. St. David's Episcopal Church in Jacksonville, Florida trained seven couples whose marriages nearly failed to help those now in trouble. One woman had been in an adulterous affair for eight years. A man was a bisexual, having homosexual affairs on the side. Another man was an alcoholic who lost his job and was out of work two years. *Their pain qualified them to be Mentor Couples who worked with 40 troubled marriages, **and they saved 38 of them – a 95% success rate.*** My organization, Marriage Savers, has planted this Marriage Ministry in dozens of other churches with a stunning 90% success rate. For example, couples are trained in Marriage Ministry at Christ Lutheran Church in Overland Park, KS, a large church with 1,500 members and at Bread of Life Outreach Ministry, an inner city congregation of 150. **None of the seriously troubled marriages they have worked with have divorced!** We at **Marriage Savers** hope to train many more churches in this ministry in the spring of 2002, whose back-from-the-brink couples will learn to tell their story of recovery to couples in crisis.

By contrast with this remarkable track record, professional therapists are no where near as successful. Diane Sollee, the former Associate Director of the American Association of Marriage and Family Therapy, says that ***therapists save less than 20% of the marriages they work with.*** In fact, they often counsel couples to divorce, which is outrageous.

Why are lay couples able to save 80% to 90% of marriages when professionally trained counselors are so ineffectual? The major reason marriages fail is selfishness. The major reason the good ones succeed is selflessness. What's needed is conversion, a recognition that one needs to replace selfishness with selflessness. That can best be inspired by seeing couples who once stood on the brink of divorce for very good reasons — but then stepped back, and saved their marriage. Like a 12-stepper of Alcoholics Anonymous, a couple who has been in the pits and rebuilt their marriage -- has a credibility that no pastor or counselor has. A couple who had lived through adultery, for example, and remained together — can tell a younger couple in crisis

because she found out that he was cheating on her: "We know adultery breaks trust. We have been there, done that. But we are here to tell you that trust can be restored. We have done it. Let us tell you how we rebuilt trust. Let us pray with you about this."

Finally, consider a study by Professor Linda Waite, of the University of Chicago, which drew remarkable findings from the National Survey of Families and Households, a huge study of 13,000 people. "Of those couples who said their marriages were very unhappy in 1987, 82% were still married five years later. And if they were still married, 90% said they were very happy! I was surprised that so many who were unhappy were still together, and that the vast majority said their marriage was terrific or very good, though it was the same marriage! The worst marriages showed the most improvement," Dr. Waite says.

Every marriage has bad patches. ***What's needed is for people to only stick to their vows made at the altar, to remain together "for better for worse, for richer for poorer, in sickness and in health, to love and to cherish, till death do us part."***

The Divorce Rate of Kansas Could be Cut in Half

In 1998 there were 10,691 divorces in Kansas. This number is a significant decline from the 13,410 who divorced in 1980, and the 12,580 couples who divorced in 1990. The divorce rate has been cut by 31% since 1980. This is impressive state-wide evidence that the divorce rate can be reduced. Many believe that the divorce rate is a rock that can not be chipped at.

An important second bit of more recent evidence can be seen in Johnson and Wyandotte Counties, where my wife and I were asked to help the clergy of those counties to create a **Community Marriage Policy** in 1996. It was aimed at reducing the divorce rate. The results have been spectacular. ***The number of divorces have plummeted an astonishing 44%.*** There were 1,530 divorces in these two counties in 1995, the year before a **Community Marriage Policy** was established. By 1997, the numbers fell to 1,001 divorces, and there were only 863 in 1999!

I predict that if Kansas reforms unilateral divorce, you will see a 25% cut in the divorce rate on a state-wide basis. That would save more than 2,500 marriages now ending in divorce. If the churches of the state followed the lead of the clergy in Johnson and Wyandotte Counties in creating **Community Marriage Policies** and in creating

My wife and I Co-Chair an organization called **Marriage Savers** which has persuaded the clergy of 160 cities to adopt reforms in marriage preparation, marriage enrichment and in the reconstruction of bad marriages. The result is that dozens of these cities have slashed their divorce rates. ***Two metro areas have cut their divorce rates nearly in half after they adopted a "Community Marriage Policy"*** with our help. Modesto, CA and Kansas City, KS and two suburban counties, have seen their divorce rates ***plunge 47.6% and 44%*** respectively.

It might be helpful to summarize our experience at **Marriage Savers**, a small non-profit

organization in helping communities to reduce their divorce rate and strengthen marriage. We are privately funded through honoraria, sales of books, videos and manuals, training, gifts and foundation grants, and to date have received no public funding. Based on our experience I assert that ***divorce rates can be cut in half and the marriage rate can be increased.***

The Church Is The Key to Marriage

Even if the benefits of marriage are known, the assumption of many is that the 50% divorce rate and the declining marriage rate are immutable facts of 21st century America. However, it is possible to change these marriage and divorce rates — if organized religion is helped to do a better job, which virtually every pastor longs for.

Three-quarters of all marriages are performed in churches or synagogues. And two-thirds of all Americans are members of a church (69%), according to the Gallup Poll, which also reports that 43% of all Americans attend religious services in any given week. Even higher percentages of African Americans are religiously active, with 55% attending church in an average week, and 48% of Hispanics, reports Gallup! Thus, the church has unparalleled access to most Americans at every level of the socio-economic spectrum.

Yet, half of America's marriages are failing -- a higher rate than any other modern nation. As the writer for two decades of "Ethics & Religion" a nationally syndicated column in secular daily newspapers, I can say with authority that most churches do not have a marriage strategy. In fact, I argue that ***most churches are "wedding factories"*** grinding out weddings on Saturday with little thought about whether they will last, and no strategy to enrich or save the existing marriages in their congregations. Pollster George Barna gave evidence in August, 2001 that the divorce rate of Christians is the same as those who do not attend church!

On the other hand, in researching "Ethics & Religion," a syndicated column I have written for 20 years, I have been able to travel across America and report upon dramatic innovations in isolated Catholic and Protestant churches that are reducing the divorce rate. Organized religion is now a complicit partner in the divorce culture. But it can be the driving energy of reform that by 2010, cuts the divorce rate in half, raises the marriage rate by 25% and pushes down the out-of-wedlock rate by a third.

Churches Have Proven Answers

Some churches have developed reforms that are doing a better job preparing couples for a lifelong marriage, strengthening existing marriages or saving troubled ones. I have already mentioned **Retrouvaille,** which is run by lay Catholics, and **Marriage Ministry** which was created by Episcopalians. Let me outline three other examples.:

1. **Time:** For a generation, most Catholic dioceses have required a minimum time of marriage preparation — typically six months from the time a priest first meets with the couple, to the time a wedding can take place. During that time, many couples are asked to take a premarital inventory to give them an objective view of strengths and weaknesses

and attend classes on such issues as communication and finances. The results of better marriage preparation is clear in a recent George Barna survey revealing that no denomination has a lower divorce rate than Catholics.

2. Premarital Inventory: There are two widely used premarital inventories, FOCCUS and PREPARE, taken by about 400,000 couples a year out of 2.2 million marriages a year. Either can predict with 80% accuracy which couples will divorce. More important, a *tenth of those who take either inventory, break their engagements.* Studies show their scores are equal to those who marry and later divorce! As a result, those couples who break an engagement **avoid a bad marriage before it has begun.**

3. Mentor Couples in Marriage Preparation: At our home Presbyterian church in Bethesda, MD, my wife and I trained 52 Mentor Couples to administer a premarital inventory with seriously dating and engaged couples.[9] From 1992-2000 Marriage Mentors worked with 302 couples. Twenty-one couples dropped out and 34 broke off their relationship or their engagement – 18% of the total. Thus, many in weak relationships discovered it on their own and either broke up or worked to strengthen their union. Mentor Couples also taught couples how to improve communication and conflict resolution. Of those who did marry, there are only seven divorces or separations in nine years, ***a failure rate of 2.5%.***

The core idea of the best programs, is a national treasure, an untapped resource that can be summarized in one phrase, the Mentor Couple, or in one sentence:

> ***In every church there are couples with good marriages who really could be of help to other couples, but have never been asked, inspired or trained to come alongside another couple and share their wisdom on how to make a marriage successful.***

The American Association of Christian Counselors dramatically recognized the importance of this innovation in religious and marital life when it pledged in August, 2001 to train 100,000 Mentor Couples in 10,000 churches over the next five years.

The Modesto Community Marriage Policy®

In 1986 I was invited to address the clergy of Modesto, California by *The Modesto Bee*, which published my Ethics & Religion column. In my speech, I urged the pastors, priests and rabbis of the area to adopt what I called a "**Community Marriage Policy®**" with the conscious goal of "pushing down the area's divorce rate." I noted that some churches were already taking steps to lower the divorce rate. Catholics, for example, required six months of marriage preparation, while most Protestants set no time requirement. Catholics were also the first to train couples in solid marriages to help prepare couples for a marriage. They are called "sponsor couples" or "mentor couples." Catholics also typically require engaged couples to take a "premarital inventory" that can predict with 80% accuracy who will divorce. And a tenth of those

taking an inventory, break an engagement.

I pointed out that the states with America's lowest divorce rates are the predominantly Catholic states of the Northeast, (some of which are a third lower than Kansas). I also noted that Catholics were also the first to start "Marriage Encounter," which prompts four out of five couples to fall back in love. Further, a dozen Protestant denominations now conduct Marriage Encounters: Episcopalians, Methodists, Assemblies of God, Lutherans, Baptists, Mennonites, etc. I asked, "Why doesn't every church plan an annual event like a Marriage Encounter to strengthen the existing marriages in the church?"

Further, I made a prediction: "If the churches and synagogues of Modesto were to implement what we know works to prepare for a lifelong marriage, or strengthen existing ones, I believe the divorce rate here would come down 50% in five years. Why do I say so? Europe's divorce rate is about half that of the U.S. and less than 10% of the people in such countries as Great Britain, France or Germany attend religious services in any given week. The Gallup Poll reports that four out of ten adults in America are in church or synagogue in any week. With a church attendance that is four times that of Europe, we ought to be able to at least reduce our divorce rate to the level of England, France or Germany, where few attend church."

Some 95 pastors, priests and a rabbi in Modesto did agree to create America's first **Community Marriage Policy®**. In the preamble of their covenant, the clergy stated, "It is the responsibility of pastors to set minimal requirements to raise the quality of commitment in those we marry. We believe that couples who participate in premarital testing and counseling will have a better understanding of what the marriage commitment involves. As agents of God, we feel it is our responsibility to encourage couples to set aside time for marriage preparation instead of only concentrating on wedding plans. We acknowledge that a wedding is but a day while a marriage is for a lifetime." Specifically, clergy:

— required "a minimum of four months of preparation" during which all couples would be asked to take a premarital inventory "to help the couple evaluate the maturity of their relationship objectively" and study relevant Biblical doctrines on marriage and divorce

— Clergy pledged to provide "a mature married couple" to help couples to bond.

On the 11th anniversary of the signing in 1997, Modesto clergy invited my wife, Harriet, and I back to Modesto where the clergy agreed to add elements to their Community Marriage Policy[10] based on the evolution of the concept in many other cities:

— Premarital couples were asked to take a premarital course which would cover God's plan for marriage, communication and conflict resolution skills, financial management and intimacy in marriage.

— Churches were urged to develop resources for singles that address issues related to

dating, selecting a spouse and friendship to help prepare them for the premarital process

— Newlyweds are encouraged to meet with Mentor Couples four times during their first year of marriage

— Special courses/workshops were developed for couples creating stepfamilies

— Couples in troubled marriages were to be referred to Retrouvaille, and other proven courses including a locally developed Reconciling God's Way ministry in which even separated couples save their marriages with same gender mentoring, men with men, and women, women.

In the initial 1986 agreement pastors said, ***"Our hope is to radically reduce the divorce rate of those married in area churches."*** (Emphasis added.)

Modesto Divorce Rate Plunges 47.6%

Much more than that goal has been achieved. ***The divorce rate for the entire Modesto metro area has plunged 47.6%*** – nearly cut in half, as I predicted. True, it has taken 15 years, not five. Yet this is clear evidence that the strategy called **Community Marriage Policy®** works.

In the table below, according to the Stanislaus County Clerk, the number of divorces in 2000 is 24% less than the 1986 number, even though the population has grown from 307,000 to 441,400, a 43% increase in the county's population over 15 years. By measuring the number of divorces per 1,000 population in both years, a consistent comparable figure emerges. The rate fell from 6 divorces per 1,000 residents in 1986 to 3.16 divorces per 1000 people in 2000, or 47.6%. If Modesto's divorce rate had remained at the U.S. average, there would be 1,250 more divorces per year!

Modesto (Stanislaus County)

	Marriages	Divorces	Population	Divorce Rate/1000	Marriage Rate/1000
1986	1,391	1,852	307,000	6.03	4.53
1999	2,211	1,668	435,500	3.83	5.07
2000	2,273	1,396	441,400	3.16	5.15

Modesto Marriage Rate Rises 13.6%

There is a second important story in this data. Note that in 1986 there were **more** divorces in Modesto than marriages -- 1,852 divorces and only 1,391 marriages! But the **Community Marriage Policy®** reversed that trend by pushing up the marriage rate. In 2000, there were 2,273 marriages, a big jump from 1,391. While most of the growth of marriages is attributable to the area's remarkable population growth, **the marriage rate has increased 13.6%.** By contrast, the U.S. marriage rate has been declining. It fell 17.8% nationally, in the years Modesto's marriage rate has moved in the opposite direction by 13.6%. Thus, there are 882 more marriages a year now in Stanislaus County.

Teen Dropout and Birth Rates Plunge

With 1,250 fewer divorces and 882 more marriages per year, more than 2,100 homes are keeping intact or are being created in Stanislaus County. That means fewer children are at risk.

Children of divorce are twice as likely as those from intact families to drop out of school and are three times as likely to give birth out-of-wedlock. If divorce rates fall and marriage rates rise, more children will be successful. That should be measurable. And it is. In fact, within just seven years, school dropouts in Stantislaus County fell 20% and births to teenagers plunged 30%, or about twice the U.S. decline in those years.

More marriages and better marriages are an answer to a child's prayer and to that of parents, pastors and yes, even government officials.

Marriage Savers will return to Modesto in the spring to train Mentor Couples from as many churches as possible with the conscious goal to push down divorce rates there another 50%!

Divorces Plunge in 32 Cities with Community Marriage Policies

Nor is Modesto's achievement unique. Some 150 cities have now adopted a **Community Marriage Policy®** or a **Community Marriage Covenant®** as some cities call them. Divorces have plunged in 33 of 35 cities where a Community Marriage Policy has been established, and data on divorces has been checked with county clerks. *In each of the 33 cities, divorces fell at least 10 times more than they have in the United States!* U.S. divorces have fallen from 1,181,000 in 1979 to 1,163,000 in 1997, a decline of only 1.5% in 19 years. By contrast, in an average city such as Baton Rouge, Tallahassee or Springdale, AR divorces fell 6% in one year. That is four times the U.S. drop in one-nineteenth of the time, or ***76 times better than the U.S.*** (4 X 19 = 76).

Further, divorces are falling much faster in more recent cities to create a CMP, than they have in Modesto. Its 47.6% drop is about 3% a year for 15 years. By contrast, divorces fell 18% in Corvallis, OR and by 19% in Chattanooga in three years. El Paso's divorces plummeted from 3,176 to 2,179. That's ***a one-third decline in three years.*** More remarkable, divorces plunged in Kansas City, KS and a two suburban counties from 1,530 in 1995 to only 863 in 1999 ***a stunning 44% plunge in only four years***, while divorces actually rose across the river in Kansas City, MO and its suburbs!

What Can Government Do to Reduce the Divorce Rate?

First you can reform no-fault divorce so that it is off limits to parents of minor children. When no-fault divorce laws swept the nation, divorces soared 25% immediately. A reform should roll those numbers back down.

Second, you can use some of your surplus welfare funds to strengthen marriage. Did you know that there were three central goals of the 1996 federal welfare reform law:

-- "Reduce the dependence of the poor on the government

— "Reduce the incidence of out-of-wedlock pregnancies"

— "Encourage the formation and maintenance of two-parent families."

Public attention has focused on the first goal, and there has been remarkable reduction of the poor's dependence on government. Welfare rolls have been cut 58%, an extraordinary achievement. Equally important, black and Hispanic poverty rates are at their lowest rate ever; in fact, black and Hispanic incomes are at all time high. Yet illegitimacy rates have continued to rise, as they have for 60 years. In 1940, only 89,000 babies were born out-of-wedlock. By 1996, when welfare reform was passed by Congress, 1.26 million were born to unmarried parents. By 2000 that figure rose to 1,346,000 babies born out-of-wedlock. The percentage of births to unmarried parents also rose from 32.4 percent to an astonishing 33.1 percent of American births in 2000. That includes 27.1% of white babies and 68.5% of African American babies, a figure "unprecedented for any large subpopulations of any culture, ancient or modern," writes Charles Murray.

Clearly, the best way to reduce out-of-wedlock pregnancies is to work at that totally overlooked third goal of welfare reform, to "encourage the formation and maintenance of two-parent families." How? Increase the marriage rate and decrease the divorce rate, as Modesto has accomplished. In an article that appears in the Summer 2001 issue of Brookings Review, Dr. Wade Horn, the new HHS Assistant Secretary, overseeing welfare, flatly states, "No state has yet made a serious effort" to encourage marriage as "one way to reduce welfare dependency." In fact, 46 states have not spent a penny to promote marriage, including Kansas.

What could Kansas do? It could earmark some welfare funds, which are now called "Temporary Assistance to Needy Families," or TANF to build marriages in this state? The law creating welfare reform in 1996 said one of the legislation's goals was to increase the number of two-parent couples in the state. My question to Kansas legislators is "What have you done to increase the number of two parent families and to reduce out of wedlock births? My bet is not much, if anything.[11]

A: Public employees: First welfare workers, public health nurses and teachers who have access to unmarried mothers — need to be trained to tell young mothers and mothers-to-be, about:

- **— The value of marriage to adults as a creator of health, wealth, longer lives and yes, better sex**
- **— The value of marriage to children who are more likely to be successful in school, less likely to abuse drugs and alcohol and less apt to become delinquent or pregnant out-of-wedlock — if their father is a part of their daily life**
- **— Teach how the mothers can improve their communications and conflict resolution skills with the father of the child or children -- a step that would increase the odds their high hopes for marriage will be satisfied.**
- **— Create the courses that will increase the communications and conflict resolution skills of the parents in courses created with TANF funding**

B. Clergy Involvement: Second, the pastors, priests and rabbis of Kansas can be helped to create **Community Marriage Policies®** across the state. At present, they exist in Kansas City and its two county suburbs, and in such cities as Lawrence, Leavenworth, Bonner Springs, Manhattan, Payola, Salina and Shawnee. The latter ones are not as developed as that of Kansas City/Overland Park, but we are prepared to come and help train them to put a safety net under every marriage in the church as Christ Lutheran Church and Bread of Life have done, as noted in more detail elsewhere in this text. Churches need help to train Mentor Couples in the state's 4,000 houses of worship. They have 1.4 million members, some of whom are in excellent marriages who could be trained to be Mentor Couples, who can come alongside couples at every stage of the marital life cycle and help them achieve six great goals::

— Avoid a bad marriage before it begins
— Give "marriage insurance" to the engaged
— Enrich all existing marriages in the congregation
— Save 80% to 90% of the most troubled marriages
— Reconcile more than half of the separated
— Enable four of five stepfamilies to be successful parents and partners.

Marriage Savers' Proposals

We at **Marriage Savers** recommend a number of actions to the President, the Department of Health and Human Services, and to the Ways and Means Committee that oversees welfare:

I. Set High Goals on Divorce, Marriage and Out-Of Wedlock Birth Rates.

President Kennedy faced a major crisis in April 1961 when the Russians shot an astronaut into orbit around the earth. The U.S. was far behind, having not even put a man in space for a minute. Kennedy's scientific advisers said the Soviet Union was likely to land a man on the moon first, and in the process, would extend its superiority in space. At a time when the federal budget was below $100 billion, experts said it would cost $20 to $40 billion to put a man on the moon, a staggering sum at the time. Nevertheless, Kennedy announced a goal to land an American astronaut on the moon by the end of the decade. He knew it would probably happen after he was out of office, even if re-elected in 1964. Setting the goal was an important first step in mobilizing the public support and Congressional backing needed to catch up and surpass the Russians. It took 400,000 people working for eight years to land Neil Armstrong on the moon.

Similarly, I believe President Bush needs to set some high goals to restore the American family which has been steadily disintegrating since 1960. Therefore, I suggest that the President take a bold step by calling on the nation to:

A. Slash the Divorce Rate by 50% *by 2010,* saving 600,000 marriages a year
Two cities have virtually achieved this goal. The clergy of Modesto, CA set a goal in

1986 "to radically reduce the divorce rate," in the nation's first **Community Marriage Policy®**. ***Its divorce rate has plummeted 47.6%.*** A second city is Kansas City, KS and a two county suburban area. In only four years, 1995-1999, its divorce rate has ***plunged 44%*** since clergy created a **Community Marriage Policy® (CMP).**

B. Increase the Marriage Rate by 25% *by 2010,* creating 500,000 more marriages a year. Again, Modesto, CA — yes, the home of Rep. Gary Condit — has shown the way.During years when the nation's marriage rate fell 18%, Modesto ***increased its marriage rate by 13.6%.*** The number of marriages grew by 882 a year, while the number of divorces fell by 1,250 a year. That has created more than 2100 more solid families per year. The 25% goal may seem high, but if the President inspires the country by setting the goal, and an Ad Council campaign makes a case for marriage and against cohabitation, trends can be bent.

C. Decrease the Out-of-Wedlock Birth Rate by 33% by 2010 so 450,000 more babies are born to married couples. With more children growing up in secure homes, ***Modesto's school dropout rate fell 20% and its teen birth rate fell by 30%,*** double the U.S. decline. Thus marriage is a proven strategy to reduce the number of children at risk in our culture.

If only a third of America's churches and synagogues trained 10 Mentor Couples each, there would be a million Mentor Couples. Surely, they could save half of the nearly 1.2 million marriages ending in divorce within a year. Is that realistic? *Christianity Today* quoted me on my vision in an editorial last year and wrote:

> ***"If McManus's projections are at all reasonable — and if we put our minds to the task they are — we could save approximately 600,000 marriages (a year) by 2010. If that vision doesn't motivate us, what will?"***

A Final Thought

No state in America has reformed unilateral divorce. Kansas could be the first to do so. Why not show the rest of the nation you have a plan to slash the divorce rate, raise the marriage rate and thus dramatically lower out-of-wedlock births? You could inspire the nation! Fortunately, immense funds are not needed to achieve these goals.

In Kansas, only two decisive steps are needed:

1. Pass SB 173 to limit unilateral divorce to couples without minor children, or those where both desire the divorce.

2. Use TANF funds to fund public and private efforts to improve the communication and conflict resolution skills of your residents.

Most of the work can be done by volunteers, lay couples. What's needed primarily is to

inspire, recruit and train couples with strong, vibrant marriages, to be Mentor Couples, helping other couples to be successful. It is a worthy cause, deserving of your support.

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1. Sara McLanahan and Gary Sadefur, *Growing Up with Single Parents: What Hurts, Who Helps, 1994.*

2.. Patrick F. Fagan and Robert Rector, "The Effects of Divorce on America," a Backgrounder of The Heritage Foundation, June 5, 2000, calculations based on 1993 data from Wisconsin Department of health and Human Services and U.S. Bureau of the Census, *Current Populaiton Survey.*

3. Robert Whelan, *Broken Homes and Battered Children,* 1994, as reported in The Heritage Foundation's Backgrounder, "The Effects of Divorce on America" by Patrick Fagan and Robert Rector, June 5, 2000.

4. Linda J. Waite and Maggie Gallagher, *The Case for Marriage: Why Married People are happier, Healthier, and Better Off Financially,* Doubleday, New York, 2000.

5. Judith Wallerstein and Sandra Blakeslee, *Second Chances: Men, Women, and Children a Decade After Divorce,* Ticknor & Fields, New York, 1989.

6. Judith Wallerstein, Julia M. Lewis, Sandra Blakeslee, *The Unexpected Legacy of Divorce: A 25 Year Landmark Study,* Hyperion, New York, 2000.

7. James J. Lynch, *A Cry Unheard: New Insights into the Medical Consequences of Loneliness.* Bancroft Press, Baltimore, 2000.

8. Bureau of Census Statistical Brief, "Mothers who Receive AFDC Payments: Fertility and Socioeconommic Characteristics," March, 1995.

9. See the *Manual to Create a Marriage Savers Congregation* by Michael J. McManus, particularly Chapter 6 on preparation. It also provides a step-by-step series of suggestions to create the ministries outlined here and was published by Marriage Savers (2001).

10. See *The Church of Modesto,* Chapter 13, "The Community Marriage Policy," by Jim Bouck, Glenhaven Press, Modesto, 1999.

11. Congressional Research Report for Congress: "Welfare Reform: TANF Grants, Transfers and Unspent Funds Through FY2000. August 20, 2001.

Testimony on Senate Bill No. 173

Linda D. Elrod, Distinguished Professor at Law,
Washburn Law School

"The perfect marriage is perhaps more worth fighting for than the imperfect marriage is worth protecting." Katherine Fullerton Gerrould, "Divorce

Senate Bill No. 173 attempts to reintroduce fault into divorce if there are children. While the intent appears to be to provide children with two parent homes, this bill will not accomplish the purpose. What it will do is bring back the adversarial tactics of thirty years ago and cost divorcing Kansas residents more time, money and energy without producing the results desired.

1. No-fault divorce laws reflect the complexity of societal and legal changes that have occurred since the 1950s. Changes in the economy, technology, equality of the sexes in the workplace, dual career families, mobility of the population, and attitudes toward marriage have resulted in protections of individual autonomy in personal decision-making.

   Law and other causes influence the divorce rate. Thus much is axiomatic. But when an attempt is made to go further and determine the relative influence and effect of law and the sum of other causes, then the controversy opens. Walter F. Willcox, The Divorce Problem: A Study in Statistics (N.Y. Press 1891)(concluding that "the influence of the law, if not nil, is at least much less than commonly supposed.").

2. The presence of parental conflict, not the divorce itself, is the cause of serious harm to children. Reinstituting fault divorce may keep highly conflicted couples together which will increase the harm to children. Note that 37% of children living in single parent families are there because of divorce; but 36% of children living in single parent families are children of those who never married. *See* Linda D. Elrod, *Reforming the System to Protect Children in High Conflict Custody Cases*, 28 WM. MITCHELL L. REV. 495 (2001).

3. Fault divorce laws can make it more difficult and expensive for victims of domestic violence to get out of abusive relationships because of the need to prove fault.

4. No law can make imperfect human relationships perfect. Fault increases the acrimony by parading private problems into a public arena. Is it good public policy to have it of public record that a husband was impotent? Is "impotency" someone's fault?

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5. Finding who is at fault can be difficult and expensive. It also foments further conflict and is prone to mistakes. Kansas cases under the fault law were all over the place. The Kansas ground of "extreme cruelty" was defined in *Talman v. Talman, 203 Kan. 601, 455 P.2d 574 (1969)* as "a course of conduct on the part of one spouse which has become intolerable to the other, so as to disrupt domestic harmony and to destroy the legitimate matrimonial objectives." How does this really differ from the current "incompatibility?" Adultery requires an act of sexual intercourse so Bill Clinton was not technically guilty of adultery with Monica although many would find his conduct "blameworthy."

6. The states that have enacted covenant marriage which requires a showing of fault except in the case of domestic violence have not found many takers. Louisiana, Arkansas, and Arizona have had less than 12 % choose covenant marriage. *See* LA. REV. STAT. ANN. § 9:272 (West 2000).

7. Reintroduction of fault divorce would be a disincentive to marriage. The fastest growing segments of the population are single person households and cohabitants. Married couples with children make up a smaller number of households than ever before.

8. The introduction of fault-only divorce in certain situations (when the other party does not consent or when there are children involved) is contrary to the policy of the 1982 Kansas amendments which was to reduce the adversarial nature of divorce and limit fault. Would fault be a ground for divorce but not considered in the property division? *In re Marriage of Cohee, 26 Kan. App.2d 756, 994 P.2d 663 (1999)(as a general rule, fault is not considered in the financial aspects, even if the divorce ground is failure to perform a material marital duty).*

9. Fault divorce presumes that a marriage fails because one spouse commits an egregious act or engages in a course of conduct that falls under a ground for divorce. Psychological studies do not bear that out. Studies on why marriages fail are unrelated to the law at all. They are related to the emotional and interdependent interactions of the parties. *See John Gottman, Why Marriages Succeed or Fail (Simon & Schuster* 1994).

10. Studies of other countries that do not allow divorce or have difficult divorce laws reveal that strict divorce laws do nothing to prevent marital breakdown. *See Max Rheinstein, Marriage Stability, Divorce and the Law (U. Chicago Press 1972).*

The conclusion that we should reinstall the"unholy trinity" in our divorce

> pantheon is untenable. Conditioning a divorce upon one spouse's epitomizing the other as adulterer, deserter, or beast not only provides a pathetic parody of the complex dynamic of intense psychological relationships but also grossly overestimates the power of law over culture. The mightiest law is that of necessity: couples who seriously desire a divorce will succeed. * * * Bills to gut no-fault divorce and return to the scarlet-letter milieu of proving . . . fault are nostalgic attempts to recapture what never was. J. HERBIE DIFONZO, BENEATH THE FAULT LINE: THE POPULAR AND LEGAL CULTURE OF DIVORCE IN TWENTIETH CENTURY AMERICA (U. Va. Press 1997).

There are several things that CAN be done that would be more effective than reinstating fault divorce. If the legislature is serious about promoting marriage and protecting children, consider the following:

1. Premarital counseling. Florida has enacted legislation that reduces marriage license fees for couples who complete a marriage preparation course. Fla. Stat. § 741.0305 (West 2001).

2. Make sure that an economically disadvantaged spouse is protected in the divorce process, especially if there are children. Add "human capital" or "contribution to spouse's education or profession" as a factor to the property division factors in K.S.A. § 60-1610(b)(1).

3. Redefine the "best interest" factors to focus on the child, not the parents.

4. Adopt principles of differentiated case management.

5. Mandate (and fund) a specialized, trained judiciary.

6. Appoint a lawyer to represent the child in conflicted custody cases.

Number of Marriages and Divorces per 1000 population		
Year	Marriage Rate	Divorce Rate
1900	9.3	0.7
1910	10.3	0.9
1920	12.0	1.6
1930	9.2	1.6
1940	12.1*	2.0
1950	11.1	2.6
1960	8.5	2.2
1970	10.6	3.5
1980	10.6	5.2*
1990	9.8	4.7
1998	8.4	3.5

*indicates highest rate during the century

Medium age at first marriage for males ...
in 1900: **25.9**
in 1950: **22.8**
in 1998: **26.7**

Medium age at first marriage for females ...
in 1900: **21.9**
in 1950: **20.3**
in 1998: **25**
Source: U.S. Bureau of the Census

Percentage of people ages 25-44 living alone in 1970: **14.8**
Percentage of people ages 25-44 living alone in 1997: **29.0**
Source: U.S. Bureau of the Census

State by state divorce numbers

Rankings of the 50 states by number of divorces per 1,000 people in 1998, calculated by the Associated Press based on U.S. government statistics. The national average was 4.2.
(Figures for Texas are from 1997; figures for California, Colorado, Indiana and Louisiana weren't available.)

Ranking	State	Divorce rate
1.	Nevada	8.5
2.	Tennessee	6.4
3.	Arkansas	6.1
4.	Alabama	6.0
5.	Oklahoma	6.0
6.	New Hampshir	5.9
7.	Wyoming	5.9
8.	Idaho	5.7
9.	Kentucky	5.7
10.	Arizona	5.5
11.	Florida	5.4
12.	Alaska	5.2
13.	West Virginia	5.1
14.	Washington	5.1
15.	Texas	4.9
16.	North Carolina	4.9
17.	Missouri	4.7
18.	Mississippi	4.7
19.	Georgia	4.7
20.	Oregon	4.6
21.	New Mexico	4.6
22.	Delaware	4.5
23.	Virginia	4.4
24.	Vermont	4.3
25.	Utah	4.2
26.	Maine	4.1
27.	Ohio	4.1
28.	Kansas	4.1
29.	Hawaii	4.0
30.	Michigan	4.0
31.	Nebraska	3.8
32.	South Carolina	3.8
33.	Montana	3.8
34.	South Dakota	3.5
35.	Wisconsin	3.4
36.	Illinois	3.4
37.	Iowa	3.3
38.	North Dakota	3.3
39.	Minnesota	3.2
40.	Pennsylvania	3.2
41.	Rhode Island	3.2
42.	Maryland	3.2
43.	New Jersey	3.1
44.	Connecticut	2.9
45.	Massachusetts	2.7
46.	New York	2.5

Sources: *U.S. Census Bureau and National Center for Health Statistics*

WILLIAM MITCHELL LAW REVIEW

A MINNESOTA COMPARATIVE FAMILY LAW SYMPOSIUM

Linda D. Elrod

REFORMING THE SYSTEM TO PROTECT CHILDREN IN HIGH CONFLICT CUSTODY CASES

VOLUME 28 NUMBER 2 2001

REFORMING THE SYSTEM TO PROTECT CHILDREN IN HIGH CONFLICT CUSTODY CASES

Linda D. Elrod†

I hope my mom and I hope my dad
Will figure out why they get so mad
I hear them scream . . . I hear them fight
They say bad words that make me want to cry.
I close my eyes when I go to bed
I dream of angels who make me want to smile
I feel better when I hear them say
Everything will be wonderful someday.

I don't want to hear you say
You both have grown in different ways . . .
I don't want to meet your friend
And I don't want to start over again
I just want my life to be the same
Just like it used to be.
Somedays . . . I hate everything
I hate everything; everyone and everything.
So please don't tell me everything is wonderful now.[1]

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I. INTRODUCTION

More children are involved in disputes over their custody than at any time in history.[2] Too many children can attest to the fact that they are affected by even the most amicable divorce, and by parental conflict, throughout their lives.[3] The more serious harm, however, comes not from the event of divorce itself but from parents whose chronic conflict traps children in a maelstrom of experiences and emotions that can erode the child's relationship with one or both parents. Qualitative and quantitative research

1. Art Alexakis, Everclear, *Wonderful, on* SONGS FROM AN AMERICAN MOVIE, VOL. 1: LEARNING HOW TO SMILE (Capitol Records, 2000).

2. *See* United States Census Bureau Statistical Abstract of the United States, Vital Statistics 75 (1999). Divorces increased 65% between 1984 and 1994 with 65% having minor children. The number of children whose parents divorce increased by 16% between 1970 (870,000) and 1990 (1,005,000) *Id.*; Centers for Disease Control, National Center for Health Statistics, Advance Report for Final Divorce Statistics, 1989 & 1990, *available at* http://www.cdc.gov/nchs/products/pubs/pupbd/mvsr/supp/44-3/mvs43_9s.htm (last visited Feb. 16, 2001). *See also* Richard E. Behrman & Linda S. Quinn, *Children and Divorce: Overview and Analysis, in* 4(1) THE FUTURE OF CHILDREN: CHILDREN AND DIVORCE 1, 6 (1994) (stating that more than a quarter of all children of divorce are under age eighteen). *See generally* CHRISTINA M. LYON ET AL., EFFECTIVE SUPPORT SERVICES FOR CHILDREN AND YOUNG PEOPLE WHEN PARENTAL RELATIONSHIPS BREAK DOWN: A CHILD-CENTERED APPROACH 233 (University of Liverpool Center for the Study of the Child, The Family & The Law 1999) (noting in England and Wales, two thirds of divorcing couples have dependent children under age sixteen; an estimated 3.7 million children have experienced their parents' divorce) [hereinafter EFFECTIVE SUPPORT SERVICES].

3. *See* JUDITH S. WALLERSTEIN ET AL., THE UNEXPECTED LEGACY OF DIVORCE: A 25-YEAR LANDMARK STUDY Intro., 297-300 (2000) (stating that divorce is a cumulative experience for children and its impact increases over time); JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, SECOND CHANCES: MEN, WOMEN AND CHILDREN A DECADE AFTER DIVORCE 202-03 (1989) (demonstrating how divorce harms children's psychological development: "[i]t affects their entire growing up and certainly their attitudes as young adults, toward themselves and toward the adult world."); JUDITH S. WALLERSTEIN & JOAN B. KELLY, SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE 303-05 (1980) [hereinafter SURVIVING THE BREAKUP]. *See also* Paul R. Amato, *Life-Span Adjustment of Children to Their Parent's Divorce, in* 4(1) THE FUTURE OF CHILDREN: CHILDREN AND DIVORCE 143 (1994) (detailing how and why children of divorce exhibit more behavioral problems, more symptoms of psychological maladjustment, lower academic achievement, more social difficulties, and poorer self concepts among other things); Michael E. Lamb et al., *The Effects of Divorce and Custody Arrangements on Children's Behavior, Development, and Adjustment*, 35 FAM. & CONCIL. CTS. REV. 393, 395-396 (1997) [hereinafter *The Effects of Divorce*] (arguing that children experience declines in economic circumstances, fear of abandonment by one or both parents, diminished capacity of parents to attend to child's needs, diminished contact with extended family and friends).

conducted over the past thirty years demonstrates that highly conflicted custody cases are detrimental to the development of children, resulting in perpetual emotional turmoil, depression, lower levels of financial support, and a higher risk of mental illness, substance abuse, educational failure, and parental alienation.[4] The level and intensity of parental conflict is now thought to be the most dominant factor in a child's post divorce adjustment and the single best predictor of a poor outcome.[5] Research shows that children exposed to violence and high levels of conflict "bear an acutely heightened risk of repeating the cycle of conflicted and abusive relationships as they grow up and try to form families of their own."[6]

When parents live with their children, they make daily decisions that are never examined by anyone, least of all a judge. The majority of separating parents, even in the middle of great emotional turmoil, enter into negotiated or mediated parenting agreements. When parents (married, unwed,[7] or same-sex,[8]) or

4. E. Mavis Hetherington, *Coping with Family Transitions: Winners, Losers and Survivors*, 60 CHILD DEV. 1, 11 (1989) (describing "losers" as children from homes with high levels of conflict, negative affect, and poor conflict resolution styles); Janet R. Johnston, *High-Conflict Divorce, in* 4(1) THE FUTURE OF CHILDREN: CHILDREN AND DIVORCE 165, 176 (1994) [hereinafter *High-Conflict Divorce*] (stating inter-parental conflict after divorce and the custodial parent's emotional distress are jointly predictive of an increase in problematic parent-child relationships and adjustment problems for children); Robert E. Emery, *Interparental Conflict and the Children of Discord and Divorce*, 92 PSYCHOL. BULL. 310, 310 (1982); Janet Johnston et al., *Ongoing Postdivorce Conflict in Families Contesting Custody: Effects on Children of Joint Custody and Frequent Access*, 59 AM. J. ORTHOPSYCHIATRY 576 (1989). *See also* EFFECTIVE SUPPORT SERVICES, *supra* note 2, at 11 (discussing conflict linked to greater social and behavior problems); ELIZABETH M. ELLIS, DIVORCE WARS: INTERVENTIONS WITH FAMILIES IN CONFLICT, Ch. 2 (2000) (summarizing research on families in conflict); Catherine C. Ayoub et al., *Emotional Distress in Children of High Conflict Divorce: The Impact of Marital Conflict and Violence*, 38 FAM. & CONCIL. CTS. REV. 297, 297 (1999); *See generally* Marsha Kline et al., *The Long Shadow of Marital Conflict*, 53 J. MARRIAGE & FAM. 297 (1991).

5. CARLA B. GARRITY & MITCHELL A. BARIS, CAUGHT IN THE MIDDLE: PROTECTING THE CHILDREN OF HIGH-CONFLICT DIVORCE 19 (1994) [hereinafter GARRITY & BARIS]; Paul R. Amato & Bruce Keith, *Parental Divorce and the Well-being of Children: A Meta-Analysis*, 110 PSYCHOL. BULL. 26, 27, 40 (1991).

6. JANET JOHNSTON & VIVIENNE ROSEBY, IN THE NAME OF THE CHILD: A DEVELOPMENTAL APPROACH TO UNDERSTANDING AND HELPING CHILDREN OF CONFLICTED AND VIOLENT DIVORCE 4, 5 (1997).

7. Thirty percent of children are born out of wedlock. *See* Miller v. Mangus, 893 P.2d 823, 827-828 (Idaho Ct. App. 1995) (granting unwed father custody of his fourteen year-old son and stating that this was in the child's best interest because the child's mother interfered with the father-son relationship).

8. *See* LaChapelle v. Mitten, 607 N.W. 2d 151, 156-57 (Minn. Ct. App. 2000)

grandparents[9] cannot agree, judges must make difficult decisions on parenting arrangements that will affect the child and the parties' relationships forever.[10] Although only a small number[11] of parents engage in a type of guerilla warfare,[12] litigating repeatedly for years after an initial custody award, they have a disproportionate

(holding both a lesbian partner and the gay sperm donor were allowed to petition for visitation with a child); V.C. v. M.J.B., 748 A.2d 539, 546 (N.J. 2000) (setting out test for psychological parenthood for same sex partner to seek custody and visitation); Rubano v. DiCenzo, 759 A.2d 959, 961 (R.I. 2000) (holding family court could enforce parties' written agreement to allow former partner to have visitation with child).

9. *See In re* N.Z.B., 779 So. 2d 508, 509-10 (Fla. Dist. Ct. App. 2000) (finding that mother and child had lived with grandmother for years but when mother died, father was entitled to custody); *In re* Mehring, 2001 WL 911420 at *1 (Ill. App. Ct., Aug. 13, 2001).

10. Ford v. Ford, 371 U.S. 187, 193 (1962) ("[E]xperience has shown that the question of custody, so vital to a child's happiness and well-being, frequently cannot be left to the discretion of parents. This is particularly true where . . . the estrangement of husband and wife beclouds parental judgment with emotion and prejudice.").

11. *See* ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY 100, 159 (1992) [hereinafter DIVIDING THE CHILD] (fewer than 25% of divorcing parents filed conflicting custody requests); Albert J. Solnit et al., *Best Interests of the Child in the Family and Community*, 42 PEDIATRIC CLINIC N. AM. 181, 184 (1995) (estimating 6-10% are high conflict); CONSTANCE AHRONS, THE GOOD DIVORCE 56 (1994) (25% are "angry associates"); JOHNSTON & ROSEBY, *supra* note 6, at 4 (up to one-fourth may be high conflict); *The Effects of Divorce*, *supra* note 3, at 396; OFFICE OF THE STATE COURT ADMINISTRATOR, OREGON JUDICIAL DEPARTMENT, INTERVENTIONS FOR HIGH CONFLICT FAMILIES: A NATIONAL PERSPECTIVE 1 (1999) [hereinafter INTERVENTIONS FOR HIGH CONFLICT] (estimating 10% are high conflict); Deena L. Stacer & Fred A. Stemen, *Intervention for High Conflict Custody Cases*, 14 AM. J. FAM. L. 242-43 (2000) (estimating one fourth to one third are high conflict within two years of divorce). *See also* SPECIAL JOINT COMMITTEE OF THE PARLIAMENT OF CANADA, REPORT ON CHILD CUSTODY AND ACCESS: FOR THE SAKE OF CHILDREN, CH. 5 (1998) [hereinafter THE CANADIAN REPORT] (estimating between 10% and 20% are high conflict); Andrew Schepard, *Evolving Judicial Role in Child Custody Disputes: From Fault Finder to Conflict Manager to Differential Case Management*, 22 U. ARK. LITTLE ROCK L. REV. 395, 413-414 (2000) [hereinafter *Evolving Judicial Role*].

12. *In re* Marriage of Mehring, 2001 WL 911420, at *1 (Ill. App. Ct. Aug. 13, 2001) (analogizing judges in high conflict custody cases to generals in war changing Clemenceau's challenge that "War is much too serious to leave to the generals" to "families are too important to be left to the courts."); Ralph J. Podell, *The "Why" Behind Appointing Guardians Ad Litem for Children in Divorce Proceedings*, 57 MARQ. L. REV. 103, 103 (1973) (describing the child as a "disenfranchised victim used as a pawn in a game of chess being played between its warring parents who frequently want the court to physically cut up and divide the child between them in the same manner that they have [done] emotionally."). *See* MARY ANN MASON, THE CUSTODY WARS: WHY CHILDREN ARE LOSING THE LEGAL BATTLE AND WHAT WE CAN DO ABOUT IT 2 (1999).

impact on the legal system and do great harm to their children. An emotional dispute between two parents who profess love for a child can often turn into a courtroom battle with armies of lawyers, mental health professionals, doctors, and court service officers all professing to know the "right" answer for a child's future. Children become the spoils of battle[13] and the court system is held hostage as these high conflict cases drain family, legal, court, and mental health resources and clog court dockets.[14]

The welfare of the children, rather than the "rights" of parents, should be the top priority in any parenting arrangement. Those who care about the future of children need to be proactive in developing innovative and comprehensive ways to reduce conflict[15] and deal more effectively with high conflict custody cases.[16] The second part of this article will define the characteristics of a high conflict case and the major contributing factors. Section three contains suggestions for reforming the system. Some reforms, like the unified family court, would require a substantial reworking of a state's judicial system. Other proposals, however, involve changes that can be made in the existing system to provide services to parents embroiled in a custody dispute. Judges, lawyers, and mental health professionals are the principal professionals with the greatest power to influence the course of a custody case. These professionals can develop new collaborative models that will more effectively identify and resolve the vast majority of high-conflict custody cases.

13. MASON, *supra* note 12, at 11.

14. Wingspread Conferees, *High-Conflict Custody Cases: Reforming the System for Children*, 34 FAM. L. Q. 589 (2001) (Report and action plan of multi-disciplinary conference co-sponsored by the American Bar Association Family Law Section and the Johnson Foundation) [hereinafter *Wingspread Conference Report*]. *See Report of the Family Law Supreme Court Steering Committee*, 26 FLA. L. WEEKLY S287 at 1 n.3 (May 3, 2001) [hereinafter *Florida Family Law*] (stating family law cases made up over 40% of court filings and nearly 70% of reopenings). *See* Lythgoe v. Guinn, 884 P.2d 1085, 1086 (Alaska 1994) (parent who lost dispute sued court-appointed psychologist for negligence); Lavit v. Superior Court, 839 P.2d 1141, 1142-43 (Ariz. Ct. App.1992); Duff v. Lewis, 958 P.2d 82, 83 (Nev. 1998); Mosley v. Figliuzzi, 930 P.2d 1110, 1111-15 (Nev. 1997). *See also* Mosley v. Nevada Com'n. On Judicial Discipline, 22 P.3d 655, 657 (Nev. 2001) (judge called before disciplinary authority for conduct in his own custody case).

15. *Wingspread Conference Report*, *supra* note 14, at 590; *Evolving Judicial Role*, *supra* note 11, at 413-18 (summarizing additional studies).

16. *See Wingspread Conference Report*, *supra* note 14, at 590.

II. IDENTIFYING THE HIGH CONFLICT CASE

Identifying the high conflict case is the first critical step in developing programs and targeting resources that protect children and help conflicted parents. An international group of lawyers, judges, child advocates, mediators, court services personnel and mental health professionals met to address the problems presented by high conflict cases at the Wingspread Conference Center in Racine, Wisconsin, in the fall of 2000.[17] The Wingspread conferees developed a broad working definition of the high conflict custody cases:

> High-conflict custody cases are marked by a lack of trust between the parents, a high level of anger and a willingness to engage in repetitive litigation. High-conflict custody cases can emanate from any (or all) of the participants in a custody dispute—parents who have not managed their conflict responsibly; attorneys whose representation of their clients adds additional and unnecessary conflict to the proceedings; mental health professionals whose interaction with parents, children, attorneys or the court system exacerbates the conflict; or court systems in which procedures, delays or errors cause unfairness, frustration or facilitate the continuation of the conflict. High conflict cases can arise when parents, attorneys or mental health professionals become invested in the conflict or when parents are in a dysfunctional relationship, have mental disorders, are engaged in criminal or quasi-criminal conduct, substance abuse or there are allegations of domestic violence, or child abuse or neglect.[18]

Numerous reasons exist for high conflict—some systemic and some personal to the litigants. Among the systemic reasons are the adversarial legal system, the vague "best interest" of the child standard, the increasing frequency of joint custody awards requiring frequent interaction between the parents, and understaffed and under-funded court systems with insufficient resources to provide necessary services for litigants. The personal reasons for high conflict arise both from the context of the dispute and from the personalities of the individuals involved.

17. *Wingspread Conference Report*, *supra* note 14, at 589, 600 (listing attendees).
18. *Wingspread Conference Report*, *supra* note 14, at 590.

A. *The Role of the Adversary System*

The adversarial system has proven to be poorly equipped to handle the complexities of interpersonal relations in the custody context. Unlike a tort action where the issue is liability and the litigants may never cross paths again, a divorce legally ends a relationship between people who may not have separated emotionally and who must continue to interact as long as there are minor children. The numerous legal issues involving custody, support and equitable distribution may not be as time consuming or complex as the underlying emotional issue of family dysfunction, drug abuse, domestic violence, or the psychological impact of learning a partner is unfaithful. The tort action examines facts of an event that occurred in the past while the custody issue attempts to make a prediction about the child's future well-being. Because of the complexities of human behavior, the same adversarial tools that work for discovering past events may not produce evidence sufficient to predict which parent will best meet the needs of a minor child. The win/lose framework encourages parents to find fault with each other rather than to cooperate. In an attempt to be in the best position to argue for stability, a parent may try to take or maintain possession of the child. In addition, the lawyer arguing for the client's position may espouse a position that could harm the child. When an attorney increases hostility between parents, their parenting ability often decreases. For example, advising clients not to talk to the other spouse, filing for protective orders to get a person out of the house when safety is not an issue and making extreme demands to increase the bargaining advantage only escalate conflict.[19]

In addition, unlike tort cases that end with a money judgment, issues regarding children remain modifiable throughout a child's minority, giving parents more opportunities to carry on a dispute. Allegations of domestic violence and child abuse,[20] which have risen dramatically in the past two decades, create further tensions. These allegations may require the provision and coordination of

19. *See* G.S. v. T.S., 582 A.2d 467, 471 (Conn. App. Ct. 1990) (lawyer for a parent in a custody case owes no obligation to act in the best interest of the child); Lamare v. Basbanes, 636 N.E.2d 218, 219 (Mass. 1994) (holding lawyer for parent owed no duty of care to children represented by guardian ad litem).
20. *See* Foster v. Foster, 788 So.2d 779, 784 (Miss. Ct. App. 2000) (finding both parents had accused the other of child abuse at one time during a several year struggle over custody).

additional services and monitoring or coordination with other courts. Judges, untrained in the dynamics of divorce or child development, may assume either that the parties making allegations are unduly adversarial and fail to provide adequate protections for the child, or assume that every allegation is true, issuing tough protective orders that damage relationships between parents and children. The entire process becomes negative and expensive.[21]

As the volume of family law filings increased (70% between 1984 and 1995), the use of mental health professionals (mainly clinical psychologists) as expert witnesses grew from approximately 10% of cases in 1960 to over 30% in the 1990s.[22] Mental health professionals may be involved in a custody case either as therapists, custody or parent evaluators, providers of services to the family, or as witnesses in a case. Evidence indicates that when mental health professionals become part of a custody dispute, the parties may become more polarized and actually less likely to reach agreement.[23] A therapist who sees only one of the parties and then writes recommendations or treats a child at the request of only one parent without a court order contributes to the adversarial nature of the proceedings.[24] Some judges expect the mental health professional to give an opinion as to the ultimate issue of which

21. Janet Weinstein, *And Never the Twain Shall Meet: The Best Interests of the Children and the Adversary System*, 52 U. MIAMI L. REV. 79, 133 (1997) ("[L]itigation itself is often demeaning, as litigants attempt to exaggerate each other's flaws . . . the process itself is disempowering as it forces the parties to place their fates in the hands of their attorneys and the court . . . the family's resources are expended and depleted with no beneficial outcome for the child or parent.").

22. Mary Ann Mason & Ann Quirk, *Are Mothers Losing Custody? Read My Lips: Trends in Judicial Decision-Making in Custody Disputes - 1920, 1960, 1990 and 1995*, 31 FAM. L. Q. 215, 231 (1997). *See also* MARTHA ALBERTSON FINEMAN, THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM 148-51 (1991) (noting the mental health professional's role in obtaining radical shifts in substantive policy as they became expert witnesses in divorce cases).

23. INTERVENTIONS FOR HIGH CONFLICT, *supra* note 11, at 17-18 (citing Janet R. Johnston, *Developing and Testing Group Interventions for Families at Impasse*, Final Report submitted to the Statewide Office of Family Court Services, Administrative Office of the Courts, Judicial Council of the State of California). *See also* ELLIS, *supra* note 4, at 119 ("Warring parties who come to mental health professionals for evaluation have expectations and agendas that are unique and unsettling. Each contestant is, by that time, highly emotionally and financially invested in his or her own position and in winning . . . . They have lost all perspective.").

24. Janet R. Johnston, *Building Multidisciplinary Professional Partnerships with the Court on Behalf of High-Conflict Divorcing Families and Their Children: Who Needs What Kind of Help?* 22 U. ARK. LITTLE ROCK L. REV. 453, 461 (2000) [hereinafter *Building Multidisciplinary Partnerships*].

parent should have primary residency, even though there may be no "scientific" basis for such an opinion.[25]

The use of lawyers, judges, mental health professionals and court service workers makes parents believe that professionals are increasingly in charge of what was once the family's private life. The Oregon Task Force on Family Law summarized public dissatisfaction with the adversary process to resolve family disputes:

> The divorce process in Oregon, as elsewhere, was broken and needed fixing. Lawyers, mediators, judges, counselors and citizens . . . agreed that the family court system was too confrontational to meet the human needs of most families undergoing divorce. The process was adversarial where it needn't have been. All cases were prepared as if going to court, when only a small percentage actually did. The judicial system made the parties adversaries, although they had many common interests.
>
> [T]he sheer volume of cases was causing the family court system to collapse. Too often, children were treated like property . . . . The combative atmosphere made it more difficult for divorcing couples to reach a settlement and develop a cooperative relationship once the divorce was final.[26]

Other states have made similar findings in the process of court reform.[27] One study found that 50-70% of parents characterized

25. *See, e.g.*, GARY B. MELTON ET AL., PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS 329-30 (1st ed. 1987); Kirk Heilbrun, *Child Custody Evaluation: Critically Assessing Mental Health Experts and Psychological Tests*, 29 FAM. L. Q. 63, 64-66 (1995); Daniel W. Shuman, *What Should We Permit Mental Health Professionals to Say about "The Best Interest of the Child?" An Essay on Common Sense, Daubert, and the Rules of Evidence*, 31 FAM. L. Q. 551, 552-56 (1997). *See also* David B. Dolittle & Robin Deutsch, *Children and High Conflict Divorce: Theory, Research and Intervention*, *in* THE SCIENTIFIC BASIS OF CHILD CUSTODY DECISIONS 425, 435-37 (Robert M. Galatzer-Levy & Louis Kraus eds., 1999).

26. OREGON TASK FORCE ON FAMILY LAW, FINAL REPORT TO GOVENOR JOHN A. KITZHABER AND THE OREGON LEGISLATIVE ASSEMBLY 2 (1997). *See also* William Howe III & Maureen McNight, *Oregon Task Force on Family Law: A New System to Resolve Family Law Conflicts*, 33 FAM. & CONCILIATION CTS. REV. 173, 173-81 (1995) (outlining recommendations for improving the system).

27. *See, e.g.*, Hildy Manzerall et al., *Protecting the Children of High Conflict Divorce: An Analysis of the Idaho Bench/Bar Committee to Protect Children of High Conflict Divorce's Report to the Idaho Supreme Court*, 33 IDAHO L. REV. 291, 303 (1991) [hereinafter *Idaho Report*]. *See generally* THE CANADIAN REPORT, *supra* note 11, at ch. 5; *Florida Family Law*, *supra* note 14.

the legal system as impersonal, intimidating and intrusive.[28] Parties, who appear *pro se* or *in propria persona* may file papers with substantive and procedural flaws, take an extraordinary amount of time trying to introduce irrelevant evidence, or otherwise slow the system by failing to comply with local court rules.[29]

Legal scholars and critics of the adversary system contend that the divorce process is time-consuming and expensive and that the parties are too adversarial and have inadequate referrals for nonjudicial resolution. In addition, lack of judicial training results in little or no attention to child-related issues.[30] While the adversary system may be essential to resolve sincere differences of opinion, to balance power in relationships, and to enforce orders on recalcitrant parties, the system has failed to protect the interests of children. The legal system has traditionally reacted to crises rather than being proactive in trying to prevent problems from arising. An English judge summarized the goals of the system as they relate to custody disputes:

> The optimum result of a child dispute is that the parents should leave the court, knowing that there has been a careful and courteous hearing centered on the interests of the child, knowing that their respective cases have been firmly but fairly advanced, understanding if not accepting the reasons for the judge's decision, and still able to co-operate to maximize the child's welfare. If the legal process is such as to promote hostilities and aggravate existing resentments, the probable consequence is that the child, the parties, and their extended families will suffer in the future.[31]

28. Marsha Kline Pruett & Tamara D. Jackson, *The Lawyer's Role During the Divorce Process: Perceptions of Parents, Their Young Children and Their Attorneys*, 33 FAM. L. Q. 283, 294 (1999).

29. *See Florida Family Law*, *supra* note 14 (estimating 65% *pro se* at start of case); Robert B. Yegge, *Divorce Litigants Without Lawyers*, 28 FAM. L. Q. 407, 409 (1994) (indicating about 20% choose to appear on their own).

30. UNITED STATES COMMISSION ON CHILD AND FAMILY WELFARE, PARENTING OUR CHILDREN: IN THE BEST INTERESTS OF THE NATION. A REPORT TO THE PRESIDENT AND CONGRESS 38-39 (1996) [hereinafter PARENTING OUR CHILDREN]. *See* Jane C. Murphy, *Access to Legal Remedies: The Crisis in Family Law*, 8 BYU J. PUB. L. 123, 124 (1993); Patricia G. Barnes, *It May Take a Village . . . Or a Specialized Court to Address Family Problems*, A.B.A. J., Dec. 1996, at 22. For a scathing indictment of the adversarial system, *see generally* KAREN WINNER, DIVORCED FROM JUSTICE: THE ABUSE OF WOMEN AND CHILDREN BY DIVORCE LAWYERS AND JUDGES xix (1996).

31. David Harris & Maureen Roddy, *High Conflict Custody Cases: The English Experience*, A.B.A. Family Law Section Fall Meeting Compendium 964 (Oct. 2000).

B. *The Best Interest Standard and Joint Custody*

During the 19th century, the law moved from a paternal presumption of custody to a maternal presumption. The maternal presumption was based on the theory that mothers should care for children of "tender years" and that unless the mother was unfit this was in the child's best interest.[32] With the move toward gender equality,[33] more divorces of parties with young children, and the recognition of due process rights for unwed fathers,[34] the "best interests" standard became a duel over the relative merits of the competing parents.[35] The vague best interest standard lacks a child focus because it fails to take into consideration the child's developmental stages or the child's preference.[36] The standard offers no guidance as to what society thinks is best for a child,

32. *See* LINDA D. ELROD, CHILD CUSTODY PRACTICE AND PROCEDURE § 1:06 & § 4:05 (1993 & Supp. 2000) (describing the tender years doctrine). *See also* MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES ch. 4 (1994); Schepard, *Evolving Judicial Role*, *supra* note 11, at 400-02.

33. Orr v. Orr, 440 U.S. 268, 283 (1979) (holding unconstitutional statutes granting alimony exclusively to the wife). *See also Ex Parte* Devine, 398 So.2d 686, 696-97(Ala. 1981) (finding that the tender years presumption is unconstitutional and the sex and age of the child are only two of the factors courts must consider). *But see* Pusey v. Pusey, 728 P.2d 117, 119-20 (Utah 1986) (rejecting the tender years presumption as unconstitutional).

34. *See* Lehr v. Robertson, 463 U.S. 248, 267-268 (1983) (according unwed parents different rights under the Equal Protection Clause when biological father had not established a custodial relationship); Caban v. Mohammed, 441 U.S. 380, 396 (1979) (finding statute allowing unwed mothers but not unwed fathers to block adoption unconstitutional); Quilloin v. Walcott, 434 U.S. 246, 255-56 (1978) (holding no Due Process violation when father, who had never sought custody, could not stop stepfather from adopting child); Stanley v. Illinois, 405 U.S. 645, 658 (1972) (finding that the Due Process and Equal Protection Clauses mandate hearings so that children of single fathers do not become wards of the state).

35. *See* Barbara Bennett Woodhouse, *Child Custody in the Age of Children's Rights: The Search for a Just and Workable Standard*, 33 FAM. L. Q. 815, 820 (1999).

36. Numerous other articles discuss and criticize the "best interest of the child" standard at length. *See, e.g.*, Robert H. Mnookin, *Child Custody Adjudication: Judicial Function in the Face of Indeterminacy*, 39 L. & CONTEMP. PROBS. 226 (1975) (arguing the courts lack capacity to determine which parent is "better" or to discern a child's best interest; noting that a judicial determination of a subjective issue can actually harm children); Cheri L. Wood, *Childless Mothers? - The New Catch-22: You Can't Have Your Kids and Work For Them Too*, 29 LOY. L.A. L. REV. 383, 401-402 (1995) ("[T] he indeterminate and speculative nature of custody decisions under current child custody law leaves the parties' expectations up in the air—and without, in some cases, the prospect of settlement."). *See generally* ELROD, *supra* note 32, Chapters 1 and 4.

leaving judges free to rely on their own values.[37] Dissatisfied with unfettered judicial discretion, legislatures attempted to limit discretion by enumerating factors for the judge to consider, many based on the factors outlined in the Uniform Marriage and Divorce Act.[38] Some legislatures added factors such as the "friendly parent"[39] provision and evidence of spousal abuse.[40] The wide variety of unweighted best interests factors often cancel each other out, making the result difficult to predict. Hoping the behavioral sciences could more objectively determine a child's best interests, courts began relying on the questionable expertise of mental health professionals.[41] If one cannot predict the outcome and only one parent will "win," parents are encouraged to engage in unnecessary litigation, to hire expensive experts for each, and to engage in strategic or manipulative behavior.[42] The standard thus

37. David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 481-82 (1984) ("Legislatures have failed to convey a collective social judgment about the right values."). *See also* Joan B. Kelly, *The Best Interests of the Child: A Concept in Search of Meaning*, 35 FAM. & CONCILIATION CTS. REV. 377, 384 (1997) (stating that the lack of scientific knowledge by the decision maker may result in a custody decision based on personal experience and beliefs of the judge).

38. Unif. Marr. & Divorce Act § 402, 9A U. L. A. 288 (1979) addresses: (a) the wishes of the child's parents; (b) the desires of the child; (c) the interaction and interrelationship of the child with parents, siblings and any other person who may significantly affect the child's best interests; (d) the child's adjustment to the child's home, school and community; and (e) the mental and physical health of all parties. *Id.*

39. *See, e.g.*, Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law: Redefining Families, Reforming Custody Jurisdiction, and Redefining Support Issues*, 34 FAM. L. Q. 607, 654, Chart 2 (2001). *But see* Lawrence v. Lawrence, 2001 WL 175621, at *2 (Wash. Ct. App. 2001) (finding that the state legislature "has declined to determine that, as a matter of public policy, frequent and continuing contact with both parents is in the best interests of the child" and that the policy is not to reward or punish parents for their conduct).

40. Elrod & Spector, *supra* note 39, at 654 (finding that all fifty states require consideration of domestic violence in making custody decisions). *See also* Jack M. Dalgleish, Jr., *Construction and Effect of Statutes Mandating Consideration of, or Creating Presumptions Regarding, Domestic Violence in Awarding Custody of Children*, 51 A.L.R. 5th 241 (1997). *See generally* William G. Austin, *Assessing Credibility in Allegation of Marital Violence in the High Conflict Custody Case*, 38 FAM. & CONCILIATION CTS. REV. 462, 464 (2000).

41. *See* Lois Weithorn & Thomas Grisso, *Psychological Evaluations in Divorce Custody: Problems, Principles, and Procedures*, *in* PSYCHOLOGY AND CHILD CUSTODY DETERMINATIONS 157, 160 (Lois Weithorn ed., 1987).

42. *See* Attorney Griev. Comm'n v. Kerpelman, 420 A.2d 940, 959-60 (Md. Ct. Spec. App. 1980) (disciplining attorney who advised a client to physically take the child from his estranged wife even though child was in her custody by virtue of a court order).

increases the likelihood of conflict and litigation between parents, which in turn, causes substantial psychological harm to the children.[43]

In the 1970s mental health professionals suggested that stability was in a child's best interest and that sole custody should be awarded to the "psychological" parent with whom the child has the primary attachment.[44] As mothers began working more hours and fathers sought custody, notions of gender equality affected parenting relationships. Legislatures made a public policy shift finding that it was in a child's best interest to maintain relationships with both parents after divorce.[45] As a result, the concept of joint custody emerged.[46] In 1978, only three states had statutes pertaining to custody issues, today joint custody is the most popular form of parenting arrangement.[47] Joint legal custody allows both parents to retain decision-making authority while joint physical custody implies that parents have equivalent roles and share time and responsibilities as equally as possible. Joint custody may be the ideal arrangement for well-functioning, flexible parents

43. *See* Mary Becker, *Maternal Feelings: Myth, Taboo and Child Custody*, 1 S. CAL. REV. L. & WOMEN'S STUD. 133, 175 (1992) (asserting that judges tend to apply the best interest standard in ways that are systematically biased against mothers who are sexually active, have less money than the father, lesbian, work outside the home, or marry a person of another race). *See generally* MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES (1995); MASON, *supra* note 12.

44. JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTEREST OF THE CHILD 37-38 (1973).

45. *See* Beck v. Beck, 432 A.2d 63, 66 (N.J. 1981) (encouraging parenting interaction after divorce is in the best interests of the child); MASON, *supra* note 32, at 964; Jo-Ellen Paradise, *The Disparity Between Men and Women in Custody Disputes: Is Joint Custody the Answer to Everyone's Problems?*, 72 ST. JOHN'S L. REV. 517, 567-68 (1998); *see also* Constance R. Ahrons, *Joint Custody Arrangements in the Postdivorce Family*, 3 J. DIVORCE 189, 189 (1980); Joyce A. Arditti, *Differences Between Fathers with Joint Custody and Noncustodial Fathers*, 62 AM. ORTHOPSYCHIATRIC ASS'N. 186 (1992); Irene M. Cohen, *Postdecree Litigation - Is Joint Custody to Blame?*, 36 FAM. & CONCILIATION CTS. REV. 41, 49 (1998); Susan Steinman, *Joint Custody: What We Know, What We Have Yet To Learn, and the Judicial and Legislative Implications*, 16 U.C.DAVIS. L. REV. 739, 746-47 (1983). *See generally* ISOLINA RICCI, MOM'S HOUSE, DAD'S HOUSE (2d ed. 1997).

46. *See* ELROD, *supra* note 32, at ch.5; MASON, *supra* note 32, at 123, 129.

47. *See* Woodhouse, *supra* note 35, at 825 (stating that judges seemed to have grown tired of the fighting in high conflict cases and saw joint custody as a compromise); *Evolving Judicial Role*, *supra* note 11, at 406-407. *See also* Dodd v. Dodd, 403 N.Y.S 2d 401, 402 (1978) ("Joint custody is an appealing concept. It permits the court to escape an agonizing choice, to keep from wounding the self-esteem of either parent and to avoid the appearance of discrimination between the sexes.").

who put their child's needs first and can effectively co-parent.[48] Joint custody can work for parents who can develop a good parallel parenting relationship that allows them to function well as parents for their children even if they cannot work together on other matters.

Joint custody, however, is not a panacea, especially if the parties do not agree to it.[49] Joint custody is not a cookie cutter solution to contested cases. The rate of relitigation for sole custody and joint custody in court-mandated arrangements is the same.[50] Children suffer more in conflicted joint custody arrangements.[51] Joint custody can harm the child if one parent is abusive, extremely rigid, or "emotionally undivorced" and manipulative to the other parent.[52] A presumption in favor of joint physical custody can result in the child being treated more like chattel, with time divided fifty/fifty, even with parents living in different states.[53] Research demonstrates that judges should not order joint legal nor

48. DIVIDING THE CHILD, *supra* note 11, at 277; FRANK F. FURSTENBERG, JR. & ANDREW CHERLIN, DIVIDED FAMILIES: WHAT HAPPENS TO CHILDREN WHEN PARENTS PART 20, 75-76 (1991). *See* Barton v. Hirshberg, 767 A.2d 874, 887 (Md. Ct. Spec. App. 2001) (stating that parents need not agree on all aspects of child rearing, "but their views must not be so widely divergent or so inflexibly maintained so as to forecast continued disagreement on important matters.").

49. *See* DIVIDING THE CHILD, *supra* note 11, at 159. (stating joint legal custody often merely relabels sole custody; joint physical custody often results in lower child support payments without a greater assumption of care by the paying parent). *See generally* FINEMAN, *supra* note 43.

50. Beverly W. Ferreiro, *Presumption of Joint Custody: A Family Policy Dilemma*, 39 FAM. REL. 420, 422 (1990); Gerald W. Hardcastle, *Joint Custody: A Family Court Judge's Perspective*, 32 FAM L.Q. 201, 209 (1998); Andrew Schepard, *Taking Children Seriously: Promoting Cooperative Custody After Divorce*, 64 TEX. L. REV. 687, 718 (1985). Relocation cases often result in relitigation of custody. *See, e.g.*, Tarry v. Mason, 710 N.E.2d 215 (Ind. Ct. App. 1999) (mother's relocation); Tibor v. Tibor, 598 N.W.2d 480 (N.D. 1999); Hoover (Letourneau) v. Hoover, 764 A.2d 1192, 1194 (Vt. 2000).

51. DIANA MERCER & MARSHA KLINE PRUETT, YOUR DIVORCE ADVISOR 203 (2001). *See* G. Hardcastle, *supra* note 50, at 210-11; DIVIDING THE CHILD, *supra* note 11, at 34; Joyce A. Arditti & Debra Madden-Derdich, *Joint and Sole Custody Mothers: Implications for Research and Practice*, 78 FAM. SOC'Y: J. CONTEMP. HUM. SERVICES 36, 37 (1997); Jana B. Singer & William L. Reynolds, *A Dissent on Joint Custody*, 47 MD. L. REV. 497, 507 (1988).

52. Janet R. Johnston, *Children's Adjustment in Sole Custody Compared to Joint Custody Families and Principles for Custody Decision Making*, 33 FAM. & CONCILIATION CTS. REV. 415, 420 (1995). *See* Andre P. Derdeyn & Elizabeth Scott, *Joint Custody: A Critical Analysis and Appraisal*, 54 AM. J. ORTHOPSYCHIATRY 199, 202 (1984).

53. Woodhouse, *supra* note 35, at 825 (discussing Fisher v. Fisher, 535 A.2d 1163 (Pa. Super. Ct. 1988) (overturning custody award that would have required child to change schools every other year).

physical custody in cases of domestic violence.[54] Recently, there has been a growing consensus that neither joint legal or physical custody should be imposed in high conflict cases.[55] Joint custody may "cement rather than resolve chronic hostility and condemn the child to living with two tense, angry parents indefinitely."[56] Therefore, promoting parental cooperation in high conflict cases may not be in the child's best interest and may not represent appropriate public policy.[57]

C. *Family Dysfunction—Personality Disorders, Alienation, Domestic Violence*

For parents and children, divorce is a continuing process of adjustment while trying to regain a sense of normalcy. Most people perceive divorce as a failure or a rejection. Divorcing persons go through stages of grief similar to death of a loved one, experiencing emotions ranging from hurt, anger, grief, self-righteousness, guilt, jealousy, revenge, and vulnerability.[58] The majority of parents work through changing emotions and return to some semblance of normalcy within two to three years. For some,

54. Naomi R. Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VAND. L. REV. 1041, 1059-61 (1991) (batterers should not receive joint or sole custody of children); B. Rabin, *Violence Against Mothers Equals Violence Against Children: Understanding the Connections*, 58 ALBANY L. REV. 1109, 1112-13 (1995) (discussing the dangers of perpetuating the abuse cycle if children remain in abuser's custody). *See generally* Mildred Pagelow, *Effects of Domestic Violence on Children and Their Consequences for Custody and Visitation Agreements*, 7 MEDIATION Q. 347, 353-55 (1990).

55. *Idaho Report*, *supra* note 27, at 317 ("Joint legal custody is not appropriate where there is ongoing high conflict . . ."); MERCER & PRUETT, *supra* note 51, at 203 ("[H]igh contact with both parents coupled with high conflict is not in children's best interests. There is no ambiguity about this."). *See also High-Conflict Divorce*, *supra* note 4, at 176 ("[A]n association between joint custody/frequent access and poorer child adjustment appears to be confined to divorces that are termed high-conflict.").

56. H. Patrick Stern et al., *Battered-Child Syndrome: Is It a Paradigm for a Child of Embattled Divorce?*, 22 U. ARK. LITTLE ROCK L. REV. 335, 379 (2000). *See* McCauley v. Schenkel, 977 S.W.2d 45, 48-49 (Mo. Ct. App. 1998) (examining a situation in which a private school expelled children because of parents' "constant, ongoing, severe tension and bickering.").

57. *Evolving Judicial Role*, *supra* note 11, at 417-18.

58. *See* SHEILA KESSLER, THE AMERICAN WAY OF DIVORCE: PRESCRIPTION FOR CHANGE 19-44 (1975); Geoffrey Hamilton & Thomas S. Merrill, *"Why is My Client Nuts?" An Inquiry into the Psychodynamics of Divorce*, ABA Section of Family Law Annual Compendium C-1 (1993) (noting that the person initiating the divorce or separation passes through the stages faster because they have been thinking about ending the relationship longer).

however, the conflict lasts years or throughout their lives, entangling children in perpetual turmoil.[59] As a Canadian study noted, some couples "perpetuate their conflict regardless of developments in the lives of their children, their own remarriage and prohibitive legal expenses."[60] Parents in chronic custody disputes often distrust each other, are afraid, angry, project blame onto the ex-partner, refuse to cooperate and communicate, make allegations of abuse, and sabotage each other's parenting.[61] Many high conflict cases pose an even greater threat to children because there are additional problems of violence, substance abuse, mental illness or threats of abduction.[62]

1. Personality Disorders

Most parents involved in repeated litigation over custody have personality characteristics different from those parents who readily agree. Separating parents may feel shame and a vulnerability that turns their perceptions into "black and white" issues, i.e., I am good and my spouse is evil.[63] Some parents have a need to win, to be in charge or a need to maintain a semblance of the marital relationship.[64] Some of these parents, however, have serious personality characteristics that distort relationships and make them unable to tolerate negative emotions.[65]

59. UNEXPECTED LEGACY OF DIVORCE, *supra* note 3, at 297-300; *see, e.g., In re* Marriage of Gordon-Hanks, 10 P.3d 42, 44-45 (Kan. Ct. App. 2000) (finding that after ten years of parental squabbling over visitation, child support and custody, court appointed dispute resolution counseling, case manager recommended transfer of custody to father).

60. THE CANADIAN REPORT, *supra* note 11, at 73.

61. *Building Multidisciplinary Partnerships*, *supra* note 24, at 455-57.

62. Isolina Ricci & Charlene Depner, New Frontiers in Family Court, Speech Presented at Conflict and Cooperation in Families Conference (March 3-4, 2000) (providing the following statistics: 55% of contested custody cases had a current or previous domestic violence restraining order; 41% had a child who has witnessed violence; and 25% had been investigated by protective services).

63. JANET R. JOHNSTON & LINDA E. G. CAMPBELL, IMPASSES OF DIVORCE: THE DYNAMICS AND RESOLUTION OF FAMILY CONFLICT 52 (1988).

64. *See, e.g.*, Bologna v. Bologna, 719 N.Y.S.2d 755, 756 (App. Div. 2001) (denying joint custody based on expert's description of father as rigid personality . . . quality of "unyielding self" and self centeredness in that "what [he] wants is the most important . . . also has an inability to acknowledge the needs of others."). *See also* ELROD, CHILD CUSTODY PRACTICE AND PROCEDURE, *supra* note 32, at § 6:26.

65. *See* Carl F. Hoppe, *Test Characteristics of Custody-Visitation Litigants: A Data-Based Description of Relationship Disorders*, *in* EMPIRICAL APPROACHES TO CHILD CUSTODY DETERMINATION (Stefan Podrygula ed., 1993) (identifying some of the features of character disorders as enduring distortion of self image (low or grandiose); difficulty sustaining intimacy and relating to others; passivity; difficulty initiating or completing tasks; rigid, consistent distorted perspective of life events; impaired functioning; an all or nothing approach; and inability to resolve or adjust to loss); Jeffery C. Siegel & Joseph S. Langford, *MMPI-2 Validity Scales and Suspected Parental Alienation Syndrome*, 16(4) AM. J. OF FORENSIC PSYCHOLOGY 4, at 5, 9 (1998); Philip M. Stahl, *Personality Traits of Parents And Developmental Needs of Children in High-Conflict Families*, 3 ACAD. CERT. FAM. LAW SPECIALISTS NEWSLETTER 8 (Winter 1999).

In most high-conflict families, one or both parents exhibit either narcissistic, obsessive-compulsive, histrionic, paranoid, psychotic or borderline personalities.[66] These parents chronically externalize any blame, possess little insight into their own role in the conflict, fail to understand the impact of the conflict on their children and routinely feel self-justified. The adversary system may exacerbate the negative behaviors of parents who posses the financial resources for extended litigation and who believe the court will eventually prove them "right."

2. Alienation

Alienation cases are often manifested when a child refuses to visit a parent. As a Canadian study noted, a child's wish not to have contact with a parent is a serious problem that should warrant immediate referral of the family for therapeutic intervention.[67] In addition to the confusion over definitions and causes of parental alienation, there is controversy over whether this is a diagnosable "syndrome."[68] Cases involving alienation present a wide range of family dynamics; but, in any case, an alienated child is a symptom

66. Stahl, *supra* note 65, at 8; AMERICAN PSYCHIATRIC ASSOCIATION: DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-IV) (4th ed 1994); T. MILLON, DISORDERS OF PERSONALITY: DSM-IV AND BEYOND (1996). *See also High Conflict Divorce*, *supra* note 4, at 169 (two thirds of 160 parents in study had personality disorders).

67. THE CANADIAN REPORT, *supra* note 11, at 74.

68. *See* David Darnell, *Parental Alienation: Not in the Best Interests of Children*, 75 N.D. L. REV. 323, 325-327 (1999); RICHARD A. GARDNER, THE PARENTAL ALIENATION SYNDROME (2d ed. 1998); Cheri L. Wood, *The Parental Alienation Syndrome: A Dangerous Aura of Reliability*, 27 LOYOLA L.A. L. REV. 1367, 1402-13 (1994); L.M. Kopetski, *Identifying Cases of Parent Alienation Syndrome - Part I*, 27(2) THE COLORADO LAWYER 65 (1998) (parental alienation may be a form of psycho-social pathology which is "exacerbated by legal procedures that coincide with and strengthen the pathological defenses alienating parents' use"); L.M. Kopetski, *Identifying Cases of Parent Alienation Syndrome - Part II*, 27(3) THE COLORADO LAWYER 61 (1998) (alienating parents have narcissistic or paranoid orientation). *See also* ELLIS, *supra* note 4, at 205-233.

of a larger problem.[69] While a parent may attempt to alienate the child by actively blocking or interfering with the other parent's access or making direct or indirect attacks on the other parent such as false abuse allegations,[70] there may be other reasons for the alienation.

Deep-rooted problems exist when the child strongly prefers one parent and rejects or denigrates the other. An alienated child freely expresses *unreasonable* negative feelings towards a parent. There is often a sudden negative change in a former positive relationship between the absent parent and child and the child fears rejection or abandonment by the alienating parent. Children ages nine to thirteen appear to be the most susceptible to alienation.[71] Alienation and alignment may be a product of numerous factors, including the child's cognitive understanding of the parental dispute, unabated intense conflict for years, and the child's witnessing of hostility and physical violence.[72]

> Divorces characterized by bitter and protracted legal proceedings, continued verbal and/or physical aggression after separation, unsubstantiated allegations and counter allegations of child abuse, neglect, or parental lack of interest are . . . more likely to potentiate alienation in the child.[73]

The intensity of the conflict over an extended period of time and polarization from extended family may create anguish, tension and anger, which the child tries to relieve by rejecting the "bad" parent.[74] In addition, alienation may indicate problems of substance abuse or domestic violence. Cases involving alienation need special, focused attention

69. *See, e.g.*, Schutz v. Schutz, 581 So.2d 1290, 1292 (Fla. 1991) (recalling that trial court found that "the cause of the blind, brainwashed, bigoted belligerence of the children toward their father grew from the soil nurtured, watered and tilled by the mother."); *In re* Marriage of Cobb, 988 P.2d 272, 272 (Kan. Ct. App. 1999) (mother's repeated interference with the father's visitation since 1992 divorce in spite of subsequent court admonition to cooperate caused alienation of eight year old and was factor in changing custody to the father); Begins v. Begins, 721 A.2d 469, 472-73 (Vt. 1998) (finding that father alienated the children from their mother justified change of custody to her).

70. *See generally* GARDNER, *supra* note 68.

71. SURVIVING THE BREAKUP, *supra* note 3, at 77-80.

72. Joan B. Kelley & Janet R. Johnston, *The Alienated Child: A Reformulation of Parental Alienation Syndrome*, 39 FAM. CT. REV. 249, 255-256 (2001).

73. *Id.* at 256.

74. *Id.*

3. Domestic Violence

Any form of physical violence, intimidation or stalking indicates "high conflict" as does any form of verbal or nonverbal aggression, abuse, harassment or threats. Domestic violence of any kind, including psychological abuse,[75] can have dramatic and long-term detrimental effects on children.[76] Batterers may contest custody to punish, control or hurt their partners and their children. If judges and mental health professionals do not understand the dynamics of abuse and fail to take the threat seriously, the batterer may gain custody because the victim's behavior may seem too passive or uncooperative.[77] Substance abuse

75. AMERICAN PROFESSIONAL SOCIETY ON THE ABUSE OF CHILDREN, PSYCHOLOGICAL EVALUATION OF SUSPECTED PSYCHOLOGICAL MALTREATMENT IN CHILDREN AND ADOLESCENTS, PRACTICE GUIDELINES (1995) (defining psychological abuse as "a repeated pattern of caregiver behavior or extreme incident(s) that conveys to children that they are worthless, flawed, unloved, unwanted, endangered, or are only of value in meeting another's needs."). *See* Gould v. Gould, 687 So.2d 685, 692 (La. Ct. App. 1997) (viewing father's documentation of every minor injury and magnifying any mistake the mother made as well as coaching the children before a psychological examination "as placing exceptional stress on the children and [is] just as responsible, if not more so, for the reported problems than [the mother's] conduct."); J.D. v. N.D., 652 N.Y.S.2d 468, 471 (N.Y. Fam. Ct. 1996) ("economic, verbal and sexual abuse, coupled with regular and frequent threats and intimidation, while more subtle in nature, are no less damaging than a physical blow."). *See generally* Gunther Klosinski, *Psychological Maltreatment in the Context of Separation and Divorce*, 17 CHILD ABUSE & NEGLECT 557 (1993).

76. *See* Peter Jaffe, *Children of Domestic Violence: Special Challenges in Custody and Visitation Disputes, in* Nancy K.D. Lemon, *Domestic Violence and Children: Resolving Custody and Visitation Disputes*, A NATIONAL JUDICIAL CURRICULUM 19, 22 (1995) (stating that the majority of abusive husbands grew up in families where they witnessed their fathers abuse their mothers); Joy D. Osofsky, *The Impact of Violence on Children, in* 9(3) THE FUTURE OF CHILDREN: DOMESTIC VIOLENCE AND CHILDREN 33 (1999); Joseph C. McGill et al., *Visitation and Domestic Violence: A Clinical Model of Family Assessment and Access Planning*, 37 FAM. & CONCILIATION CTS. REV. 315, 320 (1999). Children who witness domestic violence present a variety of emotional factors, sense a lack of control over their life circumstances and experience feelings of hopelessness and helplessness. *Id.*; Stern et al., *supra* note 56, at 336 (noting that children embroiled in high conflict cases may exhibit similar characteristics to a "battered child.").

77. *See* Hicks v. Hicks, 733 So. 2d 1261, 1267 (La. Ct. App. 1999) (reversing joint custody with residence to father during school year to sole custody with mother and supervised visitation to father where evidence showed eight incidences of domestic violence); CHILDREN EXPOSED TO MARITAL VIOLENCE: THEORY, RESEARCH AND APPLIED ISSUES (George W. Holden et al., eds. 2000); Stephen E. Doyne et al., *Custody Disputes Involving Domestic Violence: Making Children's Needs a Priority*, 50(2) JUV. & FAM. CT. J. 1 (1999); Leigh Goodmark, *Summary of Law Review Articles From Property to Personhood: What the Legal System*

problems may be present in abusive and high conflict situations.[78]

Domestic violence cases often involve abduction of children. A study of cases demanding the return of children pursuant to the Hague Convention on the Civil Aspects of International Child Abduction revealed that the majority of the abductors were women fleeing domestic violence.[79] Most international child abduction cases occur in cross cultural marriages that involve religious or cultural issues where the predictable parental acrimony is exacerbated by the tendencies of each parent to see little redeeming worth or value in the other parent and culture.[80] As in other high conflict cases, additional risk factors include (1) a history of alcohol or substance abuse; (2) a history of past criminal or antisocial activity; and (3) and character pathology or personality disorder.

4. Allegations of Abuse

Some high conflict custody cases involve allegations of child abuse and neglect against one or both parents. Allegations are most likely to arise at the time of separation. The state, a juvenile court rather than the divorce court, and other players may be involved adding hearings and rulings. While there has been a tendency to discount abuse allegations made in the context of a

Should Do for Children in Family Violence Cases, 102 W. VA. L. REV. 237 (1999) (indicating batterers fighting for custody win seventy percent of the time); Lynne R. Kurtz, *Protecting New York's Children: An Argument for the Creation of a Rebuttable Presumption Against Awarding a Spouse Abuser Custody of a Child*, 60 ALBANY L. REV. 1345, 1350 (1997); *see also* Marjory D. Fields, *The Impact of Spouse Abuse on Children and Its Relevance in Custody and Visitation Decisions in New York State*, 3 CORNELL J. L. & PUB. POL'Y 221, 231 (1994) ("[T]he tendency of child witnesses to model violent behavior is well established.").

78. *See High Conflict Divorce, supra* note 4, at 169 (one-fourth of the 160 parents in study had substance abuse problems). *See also* Judy Howard, *Chronic Drug Users as Parents*, 43 HASTINGS L. J. 645, 652 (1992) (describing attributes of drug users).

79. Merle H. Weiner, *International Child Abduction and the Escape from Domestic Violence*, 69 FORDHAM L. REV. 593, 598 n. 20 (2000). In his article, Mr. Weiner recommends a total defense to the Hague Convention's remedy of return for battered women forced to flee and enactment of a procedure similar to Uniform Child Custody Jurisdiction and Enforcement Act for those who go to a foreign country, then flee to avoid domestic violence. This allows litigation in the country to which they fled and delays return until custody litigation is complete. *Id.* at 632.

80. Glen Skoler, *A Psychological Critique of International Child Custody and Abduction Law*, 32 FAM. L. Q. 557, 562-63 (1998) (noting the frequency and thoroughness with which abductors psychologically devalued the worth of the other parent).

custody dispute, research indicates that the majority of accusations are substantiated.[81] The fact that a party makes an allegation, regardless of its merit, is indicative of high conflict.[82]

5. Relocation Cases

Relocation is one of the most difficult of the high conflict issues because it pits the interests of a primary residential parent, relocating for educational or work opportunities, against the other parent who has a strong desire to maintain frequent and regular contact. The interests of the child may conflict with both. Because each case is fact sensitive and there are no uniform standards, the potential for conflict is great.[83] Polarized parents make legal arguments about the presumptions that courts should apply in deciding whether to allow a move. Such arguments inherently ignore the child's interests.[84] As one appellate court noted:

> [A] child's development is not something with which courts should experiment and risk disruption. Although ideally a child would develop a close relationship with his loving and caring parents through an equal division of the parenting time, the ideal is difficult to achieve when . . . the child's parents elect to establish their homes in different communities. This problem is further

81. *See* ANN M. HARALAMBIE, CHILD SEXUAL ABUSE ALLEGATIONS IN CIVIL CASES: A GUIDE TO CUSTODY AND TORT ACTIONS 35 (1999) (less than 8% invalidated); Kathleen Coulborn Faller, *Child Maltreatment and Endangerment in the Context of Divorce*, 22 U. ARK. LITTLE ROCK L. REV. 429, 430-431 (2000) (vast majority of allegations validated). *See Symposium Issue: New Perspectives on Child Protection*, 34 FAM. L. Q. 301-552 (2000). When allegations are false, however, some courts have changed custody. *See also* Young v. Young, 628 N.Y.S.2d 957, 966 (N.Y. App. Div. 1995).

82. Allen v. Farrow, 611 N.Y.S.2d 859 (App. Div. 1994) (finding that even if abuse did not occur, adoptive father's inappropriately intense relationship with one child could only be resolved in a therapeutic setting and damaged relationship between the parents would require recovery).

83. *See In re* Marriage of Burgess, 913 P.2d 473 (Cal. 1996); Tropea v. Tropea, 665 N.E. 2d 145 (N.Y. 1996). *See also* Carol S. Bruch & Janet M. Bowermaster, *The Relocation of Children and Custodial Parents: Public Policy, Past and Present*, 30 FAM. L.Q. 245 (1996); Judith S. Wallerstein & Tony J. Tanke, *To Move or Not to Move: Psychological and Legal Considerations in the Relocation of Children Following Divorce*, 30 FAM. L.Q. 305 (1996); Kimberly K. Holtz, *Move-Away Custody Disputes: The Implications of Case By Case Analysis and the Need for Legislation*, 35 SANTA CLARA L. REV. 319 (1994). For legal and social science perspectives, see also *Special Issue on Relocation*, 10 J. AM. ACAD. MATRIMONIAL LAW. (1998).

84. *See generally* Janet Leach Richards, *Children's Rights v. Parents' Rights: A Proposed Solution to the Custodial Relocation Conundrum*, 29 N.M. L. REV. 245 (1999).

compounded by the friction that often develops between ex-spouses as they move on with their lives after their divorce. . . .

In ordering this change in custody the *trial court forgot that the paramount consideration in a child custody decision is the child's best interests, not those of his parents.*[85]

6. Religion

Religious differences, like cultural differences, can manifest themselves through high conflict following a divorce. These cases invoke constitutional issues of freedom of religion, establishment and the like.[86] The problems posed by cultural and religious issues are particularly difficult for judges because there is no consensus on how the system should deal with deeply seated difference in religion and culture.

III. REFORMING THE SYSTEM

Families present high conflict in numerous ways; the key is that the courts need to treat all high conflict cases differently than they treat the majority of cases. High conflict families reveal a continuum of problems with contributing factors requiring a variety of interventions and approaches. The question is how to improve the legal system's response to these high conflict cases without unduly burdening the majority of parents who can amicably resolve parenting issues. Some think reform should focus on prevention programs;[87] others suggest "a fundamental rethinking and restructuring of the legal system" for family disputes;[88] and still others urge applying concepts of therapeutic

85. Winn v. Winn, 593 N.W.2d 662, 669-70 (Mich. Ct. App. 2000) (emphasis added).

86. *See* Kendall v. Kendall, 687 N.E.2d 1228 (Mass. 1997); Zummo v. Zummo, 574 A.2d 1130 (Pa. Super. Ct. 1990); *In re* Marriage of Wang, 896 P.2d 450 (Mont. 1995).

87. *See* Thomas E. Schacht, *Prevention Strategies to Protect Professionals and Families Involved in High-Conflict Divorce*, 22 U. ARK. LITTLE ROCK. L. REV. 565, 577-78 (2000) (identifying prevention programs as universal health insurance for children, parity for mental health services to family units, universal family-life education, increased access to family support services, increased marital education and increased study of specialized marriage contracts).

88. Susan L. Brooks, *A Family Systems Paradigm for Legal Decision Making Affecting Child Custody*, 6 CORNELL J. L. & PUB. POL'Y 1, 5, 19 (1996) (advocating for courts to base custody on nonjudgmental consideration of the child in the context of the family and its interactions). *See generally* ELLIS, *supra* note 4, at 341-342.

jurisprudence.[89]

There are several ways to address the needs of families in conflict. First, putting in place a unified family court system may be the ideal for coordinating and providing services. Short of a complete overhaul of a state's judicial system, however, there are numerous improvements that could reduce conflict and assist parents and their children in moving on with their lives. The following recommendations may help in high conflict cases:

1. Redefine the "best interest" factors to focus on the child;
2. Adopt principles of differentiated case management for family law cases;
3. Mandate and fund a specialized (trained) judiciary;
4. Appoint a lawyer for the child in high conflict cases;
5. Require parents to develop parenting plans;
6. Make it possible for courts to provide for case management and more specialized services, as well as more intensive intervention for highly conflicted families;
7. Make substantial changes in the way lawyers handle family law cases;

89. *Florida Family Law*, *supra* note 14, at 2. Therapeutic justice is defined as "a process that attempts to address the family's interrelated legal and nonlegal problems to produce a result that improves the family's functioning. The process should empower families through skills development, assist them to resolve their own disputes, provide access to appropriate services, and offer a variety of dispute resolution forums where the family can resolve problems without additional emotional trauma." *Id.* at 3. *See* Bruce J. Winick, *The Jurisprudence of Therapeutic Jurisprudence*, *in* LAW IN A THERAPEUTIC KEY 645, 652-57 (David B. Wexler & Bruce J. Winick eds., 1996) (defining therapeutic jurisprudence as "the study of the role of the law as a therapeutic agent."). *See also* K. Maxwell, *Preventive Lawyering Strategies to Mitigate the Detrimental Effects of Clients' Divorces on the Children*, *in* DENNIS P. STOLE ET AL., PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION (2000). For application of therapeutic jurisprudence principles to family law, see generally Barbara A. Babb, *An Interdisciplinary Approach to Family Law Jurisprudence: Application of an Ecological and Therapeutic Perspective*, 72 IND. L. J. 775, 790-800 (1997) (discussing how therapeutic jurisprudence would protect families and children by reducing conflict, promoting family harmony, and providing individualized, efficient and effective family justice).

8. Work on collaborative models among the professionals involved in cases;
9. Adopt uniform standards for custody evaluations and treatment by mental health professionals;
10. Hold all parties accountable for their contributions to the conflict.

A. *Redefining the "Best Interests" Standard*

Predictability and certainty of result would reduce custody disputes. Legislatures should therefore be encouraged to adopt a more detailed list of factors and to assign weight to the factors. For example, the statute could provide that the preference of a child over the age of twelve be given more weight than the parents' wishes for custody. Another option would be to consider the American Law Institute's (ALI) recommendations. ALI suggests that the allocation of custody and significant decision-making should be more child-centered so as to replicate the child-care and decision-making patterns prior to the conflict. Section 2.09 provides that:

> Unless otherwise resolved by agreement of the parents . . ., the court should be required to allocate custodial responsibility so that the proportion of custodial time the child spends with each parent approximates the proportion of time each parent spent performing caretaking functions for the child prior to the parents' separation or, if the parents never lived together, before the filing of the action . . . .[90]

90. AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 2.09 (Tentative Draft No. 4, 2000). With regard to the subject of significant decision-making responsibility, section 2.10 provides that:

> Unless otherwise resolved by agreement of the parties . . ., the court should be required to allocate responsibility for making significant life decisions on behalf of the child, including decisions regarding the child's education and health care, to one parent or to two parents jointly, in accordance with the child's best interests . . . .

Id. at § 2.10; *see also* Kjelland v. Kjelland, 609 N.W.2d 100, 103-06 (N.D. 2000) (adding that primary care taking is one factor in determining the best interests of the child).

The standard embodies values that advance the child's interests such as encouraging the parents to enter into an agreement that is in their child's best interest. But if this is not possible, they should maintain the continuity of existing parent-child arrangements. The standard also results in predictability and is relatively easy to administer, thus making it efficient and fair. If the arrangement prior to the divorce was a fifty-fifty sharing of parental time and responsibilities, then custody would ideally preserve this allocation of time. The main disadvantage to the ALI proposal is that replicating the existing arrangement may not be a viable option because a divorce changes many things. A parent who previously stayed at home may enter the workforce or a parent who previously worked fulltime may cut back. A standard that reduces the prospect of litigation, however, would be an improvement over what exists in most states today.

B. *Unified Family Courts*

In addition to the involvement of social services, high conflict cases may involve numerous issues and more than one court. A bitter custody dispute may lead to allegations of child abuse or neglect by one of the parents. In that case, the hearings in family court may take place at the same time as the actions in juvenile court and thus may result in conflicting orders. The establishment of a unified family court is the most comprehensive and effective way to deal with high conflict cases. A unified family court

> involves a single court system with comprehensive jurisdiction over all cases involving children and relating to the family. One specially trained and interested judge addresses the legal and accompanying emotional and social issues challenging each family. Then under the auspices of the family court, judicial action, informal court processes, and social service agencies and resources are coordinated to produce a comprehensive resolution tailored to the individual family's legal, personal, emotional and social needs.[91]

This type of court offers the structural change necessary to coordinate and provide services, reduce fragmentation, provide continuity and consistency, and make the legal system more user-

91. Paul A. Williams, *A Unified Family Court for Missouri*, 63 U.M.K.C.L. REV. 383, 384 (1995).

friendly.[92] Establishing a family court would require a significant initial investment. The ideal family court would have its own building with an information center, court services, mediation rooms, childcare facilities and secure courtrooms. This system would utilize a single judge, one social services team per family, centralized physical facilities, comprehensive support services, time standards, integrated information systems, adequate training, intake services, and community advisory counsel.[93]

In the past decade, several states have established study groups that developed standards of public policy to guide in the creation of a unified family court.[94] Florida is the most recent state to move toward "a fully integrated, comprehensive approach to handling all cases involving children and families" in order to avoid causing additional emotional harm to children and families and to resolve disputes in a fair, timely, efficient, and cost-effective manner. The stated goals are to: (1) reduce the impact of inconsistent orders on law enforcement, witnesses, and the parties; (2) encourage agreed-upon resolution of issues; (3) reduce the need for future modification or enforcement proceedings; (4) reduce the overall time that a family is in court, thereby minimizing the disruption to litigants and their employment; and (5) reduce the duplication of services.

Overall, movement towards unified family courts has been extremely slow. Although Rhode Island established the first unified family court in 1961, forty years later less than fifteen states

92. *See* Sanford N. Katz & Jeffrey A. Kuhn, Recommendations for a Model Family Court: A REPORT FROM THE NATIONAL FAMILY COURT 1 (1991). *See also* AMERICAN BAR ASSOCIATION, ABA SUMMIT ON UNIFIED FAMILY COURTS: EXPLORING SOLUTIONS FOR FAMILIES, WOMEN AND CHILDREN IN CRISIS (1998); Catherine J. Ross, *The Failure of Fragmentation: The Promise of a System of Unified Family Courts*, 32 FAM. L.Q. 3 (1998); Barbara A. Babb, *Fashioning an Interdisciplinary Framework for Court Reform in Family Law: A Blueprint to Construct a Unified Family Court*, 71 S. CAL. L. REV. 469, 520 (1998) [hereinafter *Blueprint for Unified Family Court*]; ABA PRESIDENTIAL WORKING GROUP ON THE UNMET LEGAL NEEDS OF CHILDREN AND THEIR FAMILIES, AMERICA'S CHILDREN AT RISK: A NATIONAL AGENDA FOR LEGAL ACTION (1993). *See generally* Judith S. Kaye, *Changing Courts in Changing Times: The Need for a Fresh Look at How Courts Are Run*, 48 HASTINGS L.J. 851 (1997); Robert W. Page, *"Family Courts": A Model for the Effective Judicial Approach to the Resolution of Family Disputes*, 44 JUV. & FAM. CT. J. 1 (1993).

93. *See Blueprint for Unified Family Court*, *supra* note 92. *See also* American Bar Association, *Symposium, Unified Family Courts*, 32 FAM. L. Q. 1, 1-2 (1998) (discussing the achievements and failures of unified family courts).

94. *See, e.g.*, *Florida Family Law*, *supra* note 14, at 1; *Idaho Report*, *supra* note 27, at 301-14.

have statewide family courts. Several states have pilot projects or family courts in some judicial districts, but many still have no specialized system for family law cases,[95] despite the endorsement of many national groups.[96] More states need to establish study committees and initiate pilot projects.

C. *Improving the Judiciary and Court Services*

High conflict custody cases require a specialized approach that reflects the complexities of the issues presented. The Wingspread conferees urged that courts be proactive in seeking ways to help parents protect or restore healthy relationships with their children and develop mechanisms for resolving disputes with one another in a timely manner.[97] There will be a need for collaboration and multi-disciplinary partnerships.[98] Special training in handling high conflict cases will be necessary for all professionals who interact with the family. New models need to be sensitive to the rights and privacy of individuals and courts should be prepared to intervene in order to protect children.[99]

1. *Differentiated Case Management and Screening for High Conflict*

Courts need to adopt principles of differentiated case management (DCM) to distinguish custody disputes as low, medium or high conflict cases and direct families towards the appropriate services. DCM starts with the premise that:

Cases are not all alike and the amount and type of court

95. *See Blueprint for Unified Family Courts*, *supra* note 92, at 529-31, App. A, B, & C.

96. Jessica Pearson, *Court Services: Meeting the Needs of Twenty-First Century Families*, 33 FAM. L. Q. 617, 630 (1999). This article notes that that the American Bar Association, National Council of Juvenile and Family Court Judges, American Association of Family and Conciliation Courts, Conference of State Court Administrators, National Association of Counsel for Children, National Association of Women Judges, and National Judicial College have endorsed this concept, but little has been done because of cost, large case volumes, low status of family law, opposition of the matrimonial bar and advocates for victims of domestic violence. *Id.*; *see also* Jeffery A. Kuhn, *A Seven-Year Lesson on Unified Family Courts: What We Have Learned Since the 1990 National Family Court Symposium*, 32 FAM. L.Q. 67 (1998) (providing commentary and recommendations concerning therapeutic justice).

97. *Wingspread Conference Report*, *supra* note 14, at 596.

98. *See Building Multidisciplinary Partnerships*, *supra* note 24, at 456-57.

99. *Wingspread Conference Report*, *supra* note 14, at 597.

> intervention will vary from case to case . . . . [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 case classification.[100]

Appropriate time tracks can be created for different cases depending on the level of complexity, the need for discovery, need for services, need for protection and other factors.

Jurisdictions adopting the DCM approach will require two primary components (1) a timely identification and screening process that includes efficient assessment tools to identify high conflict cases so they may be streamlined into an expedited process, and (2) wide ranging services designed to improve outcomes for children.[101] The vast majority of low conflict cases can be steered to non-adversarial channels through mediation and collaborative divorce but may benefit from general educational programs and other services. Expedited procedures for filing and depositing completed parenting plans would reduce the courts' role in the affairs of low conflict families so that court intervention is minimal and self-determination is great.

The court could then devote more of its resources to identifying and dealing with the high conflict case. Cases involving violence or pathology need more court attention and more structure from the beginning. Court should develop protocols for dealing with domestic violence and parent alienation cases. For example, a judge may decide not to send a high conflict case to mediation when it is likely to be a waste of time, money and resources for the parties and the court. High conflict parents would likely benefit more from a quick resolution of the dispute by a judge or other court officer who can use coercive power to compel them to attend education and evaluation programs and prevent them from inflicting violence on each other or abducting their children.[102]

While several states have developed screening mechanisms for

100. Judith S. Kaye & Jonathan Lippman, *New York State Unified Court System: Family Justice Program*, 36 FAM. & CONCILIATION CTS. REV. 144, 163 (1998); *see also Evolving Judicial Role*, *supra* note 11, at 413 (observing that while DCM has been used in criminal and other civil cases, it is only in the last couple of years that some have suggested using the same concepts for high conflict custody cases).

101. *Wingspread Conference Report*, *supra* note 14, at 597; THE CANADIAN REPORT, *supra* note 11, at 74.

102. *Evolving Judicial Role*, *supra* note 11, at 413.

domestic violence, none have developed validated screening mechanisms to identify high conflict cases.[103] Idaho has established factors that assist the identification of high conflict cases such including: (1) petitions for temporary custody; (2) protection petitions including child protection and domestic violence orders; (3) family dysfunction such as substance abuse; (4) changes in attorneys; (5) a child's refusal to visit a parent; and (6) a parent who is unable to separate a child's needs from his or her own.[104] In contrast, Fulton County, Georgia, looks at (1) the presence of more than one child in the household; (2) younger children (more potential years for court involvement); (3) intimate involvement of extended family; (4) child abuse; (5) trauma; and (6) whether either party was opposed to the divorce.[105] Idaho and Vermont use a Conflict Assessment Scale developed by Carla Garrity and Mitchell Baris.[106] A high conflict case probably exists if the parties cannot agree on the basic principle that both parents should continue a relationship with the child. Another indication would be the parents' inability to collaborate on drafting a parenting plan.

Any refusal of a child to visit a parent as well as all allegations of parental alienation require in depth, comprehensive, neutral and prompt evaluation. Refusal to visit can be an indication of abuse or alienation. Early detection and intervention are essential in alienation and alignment cases to prevent alienation from growing progressively worse. The parties can often benefit from an immediate therapeutic approach or case management.[107]

2. *Specialized and Educated Judges*

Family law cases generally, and high conflict cases in particular, require a "specialized" judiciary trained to separate the analysis of a child's best interests from the bitter clash of the parents. Ideally, judges with even temperament would choose to handle family law cases because they enjoy helping families resolve

103. *See generally* INTERVENTIONS FOR HIGH CONFLICT, *supra* note 11, at 1-3.

104. *See Idaho Report*, *supra* note 27, at 303.

105. *See* INTERVENTIONS FOR HIGH CONFLICT, *supra* note 11, at 1 (citing J. Cohen, Report on Identifying High Conflict Divorces, Colorado Domestic Relations Study Group (1999)).

106. GARRITY & BARIS, *supra* note 5, at 19; *see* Appendix.

107. *See* PHILIP M. STAHL, COMPLEX ISSUES IN CHILD CUSTODY EVALUATIONS 3-4 (1999) (citing examples of mild, moderate, and severe cases of alienation).

problems. Family court judges require a specialized education and training to understand the general dynamics of family relationships, the impact of divorce on litigants and children, the particular dynamics of high conflict cases and effective ways to manage conflict. Judges should understand that domestic violence poses serious safety concerns for both parent and child,[108] and they should also be sensitive to the general behavioral patterns that victims of abuse exhibit.[109]

Judges need to understand the developmental stages of children because children have different needs and different relationships with their parents at different stages of emotional maturation. Before approving any parenting plans or making awards of custody, judges should consider these issues. Judges need to be knowledgeable about cross-disciplinary issues affecting high conflict custody cases, such as competencies of other professionals, available community resources and the advantages and limitations of alternative conflict resolution.[110]

There must be continuity of service so that one judge does not start a case or address some motions while other judges, who are unfamiliar with the family dynamics and the history of the conflict, hear other aspects of the case. In order to promote continuity and provide for the learning curve in high conflict cases, states should establish a set term, for example three years, for family court judges.

Judges should take control of high conflict custody cases by demanding that the lawyers and participants focus on the best interests of the child. A judge can reduce conflict by mandating civility, requiring reasonableness in pleading, and by punishing lawyers who file frivolous or bad faith motions.[111] Another key to

108. Jessica O'Brien & Lavita Nadkarni, *Domestic Violence Under the Microscope: Implications for Custody and Visitation*, 23 FAM. ADVOC. 35 (Summer 2000); *See* Nancy K.D. Lemon, *The Legal System's Response to Children Exposed to Domestic Violence*, *in* 9 (3) THE FUTURE OF CHILDREN 67 (1999); Lois Schwaeber, *Domestic Violence: The Special Challenge in Custody and Visitation Dispute Resolution*, 10 (8) DIVORCE LIT. 141, 143 (1998). *See also* Joan Zorza, *Protecting The Children in Custody Disputes When One Parent Abuses the Other*, CLEARINGHOUSE REV. 1113 (April 1996).

109. Elizabeth Barker Brandt, *The Challenge to Rural States of Procedural Reform in High Conflict Custody Cases*, 22 U. ARK. LITTLE ROCK L. REV. 357, 367 (2000).

110. *Wingspread Conference Report*, *supra* note 14, at 598.

111. In England a lawyer in a custody case who fails to contest the case openly and cooperatively with all cards on the table at the earliest possible time may not be reimbursed or be subject to a "wasted costs order." *See Re* G, S and M (Wasted Costs)[2000] 2 FLR 52 and *Re* CH (family proceedings: court bundles)[2000] 2 FCR 193.

control is the quick and efficient calendaring of high conflict cases to reduce costs and time.

Courts should utilize designated case managers and adequate technology systems to link and track cases involving the same parties and to facilitate connection to community resources. Courts should implement a system for coordinating and monitoring the multiple claims, deadlines, services, and other litigation and resource requirements. Time tables for case disposition should be set depending on the level of complexity, the need for discovery, the need for services and unusual emotional factors. Courts should either have the resources or refer people to a multitude of services and programs tailored to meet the unique needs of individual families that should be available without regard to income.[112] In addition, if the child is involved in both the child custody and child protection systems, decision makers who may have the responsibility for the same children in different legal settings should cooperate and share information.[113]

3. Appoint a lawyer for the child

For years both lawyers and mental health professionals have recommended appointment of attorneys to represent children in contested cases.[114] Lawyers can serve two different functions for children involved in custody disputes: (1) as an advocate to give the child a voice; and (2) as and independent fact-finder (*guardian ad litem*). To give the child a voice, judges should appoint a specially trained[115] lawyer just for the child in high conflict custody cases.[116]

112. *Wingspread Conference Report*, *supra* note 14, at 597. Issues that should be considered in developing a service plan are the level of intrusiveness of the services, the number of requirements being imposed, accountability for the adequacy of the service, and the parents' level of interest in the service. *Id.*

113. THE CANADIAN REPORT, *supra* note 11, at 74.

114. Linda D. Elrod, *Counsel for the Child in Custody Disputes - The Time is Now*, 26 FAM. L. Q. 53 (1992); *See* Howard A. Davidson, *The Child's Right to be Heard or Represented in Judicial Proceedings*, 18 PEPP. L. REV. 255, 260 (1991). *See also* Catherine M. Brooks, *When a Child Needs a Lawyer*, 23 CREIGHTON L. REV. 757 (1990). Children are also not given a voice in evaluations; MASON, *supra* note 12, at 65-92. *See generally* JOHNSTON & ROSEBY, *supra* note 6; GARRITY & BARIS, *supra* note 5.

115. *See* HARLAMBIE, *supra* note 81, at 279-82. The English share this view. See Re Pelling (Rights of Audience) [1997] 2 FLR 458 at 470 ("The courts in this country are particularly anxious that in children cases those representing them . . . should be specially experienced. . . .The whole ethos . . . is that these cases must not be carried on as battles in the old adversarial system).

Even though the child is not a "party" to the custody action, the child is the "party in interest." Whatever decision the judge makes will affect that child for the rest of his or her life. The lawyer representing the parent does not often take into consideration the welfare of the child because the child is not the "client."[117] However, many states provide that the child's preference is one factor to consider.[118] Several states specifically authorize the appointment of a lawyer or guardian ad litem for children in contested cases.[119]

The United States Supreme Court has not yet addressed the child's due process rights to have independent advocacy in chronic conflict custody cases.[120] Several states specifically authorize the appointment of a lawyer or a guardian *ad litem* for children in contested divorce cases.[121] As a Colorado court noted: "[T]he need for an independent guardian ad litem is particularly compelling in custody disputes. Often, parents are pitted against one another in an intensely personal and militant clash. Innocent children may be pawns in the conflict."[122]

One of the sticking points has been whether the person appointed is a guardian *ad litem* who is an officer of the court, conducts an independent investigation, is entitled to immunity, and argues for the child

116. *Wingspread Conference Report*, *supra* note 14, at 598.

117. *See, e.g.*, G.S. v. T.S., 582 A.2d 467, 471 (Conn. Ct. App. 1990) (counsel for parent has no duty to act in best interest of children); Lamare v. Basbanes, 636 N.E.2d 218, 219-20 (Mass. 1994). *But see Bounds of Advocacy*, 9 J. AMER. ACAD. MATRIMONIAL LAW. 4 (1992) ("In representing a parent, an attorney should consider the welfare of the children.").

118. *See* Elrod & Spector, *supra* note 39, at 654.

119. *Representing Children: Standards for Attorneys and Guardians Ad Litem in Custody or Visitation Proceedings*, 13 J. AMER. ACAD. OF MATRIMONIAL LAWYERS 1, 2, Section 2.2 (1995) (stating that the attorney should discuss the objectives of representation with a child of twelve or older).

120. Dana E. Prescott, *The Guardian Ad Litem in Custody and Conflict Cases: Investigator, Champion, and Referee?*, 22 U. ARK. LITTLE ROCK L. REV. 529, 560 (2000). *But see* C.W. v. K.AW., 2001 WL 360589 at *3 (Pa. Super. Ct. March 21, 2001) (bitterness between the parties is not sufficient reason to appoint a guardian ad litem); Poll v. Poll, 588 N.W.2d 583, 587 (Neb. Ct. App. 1999) (child had no due process right to counsel in modification proceeding.).

121. *See* Schult v. Schult, 699 A.2d 134 (Conn. 1997) (attorney representing minor child could advocate position contrary to the guardian *ad litem*); Samson v. Samson, 594 N.W.2d 420 (Wis. Ct. App. 1999); *See also* Badgett v. Badgett, 698 N.E.2d 84 (Ohio Ct. App. 1997) (if any party requests). *See generally* ELROD, CHILD CUSTODY PRACTICE AND PROCEDURE, *supra* note 32, at Chapter 12.

122. Short *ex rel* Oosterhous v. Short, 730 F. Supp. 1037, 1039 (D. Colo. 1990); *see also* Veazey v. Veazey, 560 P.2d 382, 385 (Alaska 1977).

who is the child's advocate.[123] The court appointing the representative should clearly establish the role the representatives play and should adopt appointment criteria and performance standards for appointment of children's representatives.

4. Alternative Dispute Resolution

Courts should offer a variety of dispute resolution procedures to meet the needs of parents at differing levels of conflict. For many couples mediation[124] has proven to be a valuable asset for cooperative parenting, reducing the number of cases that go to trial,[125] and reducing prolonged parental conflict that causes harm to children.[126] Since California first mandated mediation of custody disputes in 1981, all but a handful of states allow, and many mandate, mediation in contested custody and visitation disputes. Mediation, however, works best with low conflict parents who both want a divorce, have been able to communicate openly in the past, have relatively equal bargaining power, and have some respect for each other's parenting ability.[127]

Mandatory mediation does not appear to resolve issues for highly conflicted couples because they are not able to use

123. *Compare* Auclair v. Auclair, 730 A.2d 1260, 1268 (Md. Ct. Spec. App. 1999) (guardian ad litem is agent or arm of court), *with* Roski v. Roski, 730 So. 2d. 413, 414 (Fla. Dist. Ct. App. 1999) (cautioning "trial judges against abdicating their decision-making responsibility to a guardian ad litem."). *See generally Symposium Issue on the Ethical Representation of Children*, 34 FORDHAM L. REV. 1281 (1996).

124. Mediation, the process by which an impartial third party facilitates the resolution of a dispute by promoting a voluntary agreement, is beyond the scope of this article. There are numerous additional sources available on the process of mediation. *See, e.g.*, NANCY H. ROGERS & CRAIG A. MCEWEN, MEDIATION: LAW, POLICY, PRACTICE (1st ed. 1989 and Supp. 1993); JOHN M. HAYNES, THE FUNDAMENTALS OF FAMILY MEDIATION (1994); *see also* KIMBERLEE K. KOVACH, MEDIATION: PRINCIPLES AND PRACTICE (2nd ed. 2000); FORREST MOSTEN, FAMILY LAW MEDIATION (1996). *See generally* JAY FOLBERG & ALISON TAYLOR, MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION (1984).

125. Pearson, *supra* note 96, at 631-632 (stating that parents reach agreements in 50-85% of disputes in a faster time and at reduced cost over litigation; even if the parties do not come to an agreement in mediation, parents may be more likely to settle prior to trial because of an increased ability to communicate). *See also* JOHNSTON & ROSEBY, *supra* note 6, at 5.

126. Andrew Schepard, *The Model Standards of Practice for Family and Divorce Mediation*, 38 FAM. L. Q. 1 (2001); *Building Multidisciplinary Partnerships*, *supra* note 24; Joan B. Kelly, *A Decade of Mediation Research: Some Answers and Questions*, 34 FAM. & CONCILIATION CTS. REV. 373, 377-378 (1996).

127. Orna Cohen *et al.*, *Suitability of Divorcing Couples for Mediation: A Suggested Typology*, 27 AM. J. FAM. THERAPY 239, 334-336 (1999).

mediation constructively. Court-mandated mediation may be inappropriate, and even dangerous, in high conflict cases, especially for women.[128] The most serious danger is the harm to one of the parties if mediation is imposed in a case where the imbalance of power is too great, one of the parties is incapacitated or a victim of domestic violence,[129] or if one of the parties is so vengeful as to sabotage the process. Mediation is not recommended for parental alienation cases because of deceptive and manipulative tactics and the lack of mediator's training for recognizing the undercurrents that occur when one parent's interferes with the child's relationship with the other party.[130] These parents need a lawyer to protect and represent their interests.

Some types of mediation may help high conflict parents draft a parenting plan that helps them disengage from the conflict by parallel parenting. But any mediation program must be carefully structured.[131]

While some feel that mediation is totally inappropriate for domestic violence cases, one author has suggested a mediation model for domestic violence cases that emphasizes: (1) the need for mental health expertise; (2) the need for assurance that the court will take swift, clear judicial action when necessary; (3) the need to balance the power discrepancy; and (4) the need for an ongoing process to monitor cooperation with court orders or agreed upon steps in the mediation process.[132]

There are some therapeutic models of mediation that can work for high conflict couples. Therapeutic or "impasse directed"

128. *See* Penelope Eileen Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441 (1992); Penelope Eileen Bryan, *Reclaiming Professionalism: The Lawyer's Role in Divorce Mediation*, 28 FAM. L.Q. 177 (1994). *But see* Craig A McEwen et al., *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317, 1324-39 (1995).

129. American Bar Association, *Model Standards of Practice for Family and Divorce Mediation*,35 FAM. L. Q. 27 Standard X (2001) (stating some cases may not be suitable for mediation becauseof domestic violence).

130. *See* J. Michael Bone & Michael R. Walsh, *Parental Alienation Syndrome: How to Detect It and What to Do About It*, 73(3) FLA. B. J. 44 (1999).

131. *Building Multidisciplinary Partnerships*, *supra* note 24, at 471-72; *see also* Christine Coates, *Mediation with High Conflict Families*, Paper Given at AFCC INSTITUTE 6, New Orleans, May 31, 2000, at 6 (indicating the key to impasse model of mediation is thorough and accurate assessment of the nature of the impasse and counseling to help parties move through it).

132. Anita Vestal, *Mediation and Parental Alienation Syndrome: Considerations for an Intervention Model*, 37 FAM. & CONCILIATION CTS. REV. 487, 501-02 (1999).

mediation conducted by a mediator trained in the dynamics of alienation/alignment may help highly conflicted couples, Super mediation is another model that can help high conflict parents. Mediators and parent coordinators or case managers can intervene together with one facilitating communication and the other setting boundaries of reality.

A combination of mediation and arbitration (med/arb) can be used with high conflict couples. In this process, the parties attempt mediation, but if they cannot reach agreement, the mediator makes a decision. To some extent this is the model many case managers, special masters or parent coordinators use as discussed *infra*. High conflict couples may need a "mediator" on call for emergency situations. A therapist mediator can help monitor the parenting plan but this is expensive and time consuming.[133]

5. Parenting Plans

There is already a legislative shift to require parents to draft parenting plans, either filing a joint plan or for each to submit a plan when seeking custody.[134] All courts should require parents to develop and submit plans that describe the time each parent will spend with the child and the responsibility and system for making decisions about the child, consistent with the need for physical and emotional safety of parents and child. If the parents cannot agree on a temporary parenting plan, this may be an indication of high conflict. The courts could then provide mediation or other services to the parties to assist them with drafting a plan.

Parenting plans should take into account the developmental needs of children and provide ways to revise the plan accordingly.[135] Highly structured parenting plans that help parents disengage may be valuable tools to deal with high conflict parents. A lengthy and detailed parenting plan gives less room for each parent to

133. Pearson, *supra* note 96, at 628.

134. PARENTING OUR CHILDREN, *supra* note 30, at 36-37. *See, e.g.*, D.C. CODE § 16-911 (1998); ILL. STAT. ANN. CH. 750 § 5/602.1 (WEST 1998); KAN. STAT. ANN. § 60-1625 (Supp. 2000); MONT. STAT. ANN. § 40-4-233 (1997); NEB. REV. STAT. § 43-2912 (1997); N.M. STAT. § 40-4-9.1 (1997); OHIO REV. CODE § 3109.04(D) (2000); OR. REV. STAT. § § 107.101-102 (WEST 1998); TENN. CODE ANN. § 36-6-400 (1998); WASH. REV. CODE ANN. § 26.09.181 (1999). *See generally* Robert Tompkins, *Parenting Plans: A Concept Whose Time Has Come*, 33 FAM. & CONCILIATION CTS. REV. 286 (1995).

135. Risa J. Garon, et al., *From Infants to Adolescents: A Developmental Approach to Parenting Plans*, 38 FAM. & CONCILIATION CTS. REV. 168, 184 (2000).

manipulate or feel the other parent is manipulating them. The rules need to be clear. Vagueness promotes parental conflict, and conflict creates or intensifies a child's insecurity. The court needs to adopt specific and concrete plans to assist parents in fulfilling the tasks of parallel parenting to reduce the likelihood that they remain engaged in conflict. The more specific these plans are, the more parents can understand the rules and avoid conflict. In the event of a dispute, a case manager or special master can resolve the issue.[136]

All parenting plans will include the residential schedule (including holidays, birthdays and vacations), decision-making responsibility and methods for resolving disputes. For high conflict parents, the parenting plan should also:

1. Address how communication between the parents will take place;
2. Detail arrangements for picking up and dropping off children;
3. Include rules about contact;
4. Address parents' respective attendances at school and recreational events;
5. Address telephone contacts between parents and between parents and children;
6. Determine each household will share the children's toys and clothes;
7. Indicate methods for resolving intermittent disputes, including emergency procedures for unexpected parental flare ups;
8. Determine if, and to what extent, to allow flexibility in scheduling;
9. Outline how to handle children's refusals to visit, if they occur; and
10. Build in sanctions for violations.[137]

136. STAHL, *supra* note 107, at 3-4.

137. GARRITY & BARIS, *supra* note 5, at 124-125; *see also* INTERVENTIONS FOR HIGH CONFLICT, *supra* note 11, at 29.

The Idaho Report suggests requiring the parties to maintain a written log, which travels with the children, so that information about meals, medications, activities may be transmitted with minimal contact between the parents and without putting the burden on children to carry messages.[138]

6. Parent Education Programs

Court-sponsored parent education begins when the parents enter the courthouse to file for divorce or custody. The court should disseminate objective literature on divorce laws and procedures to parties involved in custody disputes. Parents and children should have a roadmap that explains the court system, what is expected of them and the roles of other participants. The courts should distribute information about community resources available to the family.

In addition to general information, courts need to inform parents about the divorce process and the effects that their divorce and their behavior will have on their children. Such information can be provided either as part of court services or by referral to parent education programs designed to prevent conflict.[139] Parent education programs, begun in 1978, exist in nearly every state.[140] Most programs, designed for the general divorcing population, range from three to eight hours and provide general information on the psychological process of divorce; legal procedures and custody options; needs of child during and after divorce; co-parenting; child's need for access to both parents; and services

138. *See Idaho Report*, *supra* note 27, at 329. ELIZABETH B. BRANDT, THE IDAHO BENCHBOOK, PROTECTING CHILDREN OF HIGH CONFLICT, Ch. 2, p. 47 (1998).

139. For a discussion, see *Evolving Judicial Role*, *supra* note 11, at 411; Andrew Schepard, *War and P.E.A.C.E: A Preliminary Report and a Model Statute on an Interdisciplinary Educational Program for Divorcing and Separating Parents*, 27 U. MICH. J.L. REFORM 131, 149 (1993).

140. *See Idaho Report*, *supra* note 27, at 300; Debra A. Clement, *1998 Nationwide Survey of the Legal Status of Parent Education*, 37 FAM. & CONCILIATION CTS. REV. 219, 221 (1999). *See also* ARK. CODE ANN. § 9-12-322(a)(1)(2001) (two hours required); Nelson v. Nelson, 954 P.2d 1219, 1222 (Okla. 1998). In *Nelson*, a statute and an administrative order required divorcing parents to attend classes to help their child cope with divorce. The court held that this did not violate equal protection because the state has strong interests in setting terms and procedures of marriage and divorce and protecting minor children. In addition, the classes were educational and specifically related to children of divorcing parents, a classification reasonably related to state's interests. *Id.*

available in the community. Programs designed to enhance parental awareness of how their behavior affects their children by active participation and building communication skills appear to be more effective in changing behavior.[141]

The overall effectiveness of various programs differs according to the content and teaching strategies, the degree of parental conflict, the timing of attendance.[142] Parents tend to like the general parent education programs, may become more sensitive to their children's needs and more amenable to the provision of services. Studies, however, fail to indicate that general parent education programs improve poor parental relationships or affect relitigation patterns.[143] High conflict parents need more specialized programs. There are a few high conflict divorce education programs currently existing. For many high conflict couples, training in cooperative parenting cannot occur until after the parties have disengaged from the conflict. Disengagement is the essential task.[144] Teaching parents how to "parallel parent" may be the most effective education for highly conflicted parents at the time of divorce.

There is a need to develop additional and more intensive programs targeted at high conflict families. Such programs need to emphasize constructive parenting behavior and preserve safety.[145] Programs could include information on seeking protection from abuse, parallel parenting, rights of parents to access, and enforcing orders through means such as contempt. Post divorce continuing education could consist of workshops, literature, videotapes, and support groups targeted at parents in chronically conflicted custody and visitation cases.

141. Kevin Kramer et al., *Effects of Skill-Based vs. Information Based Divorce Education Programs on Domestic Violence and Parental Communication*, 36 FAM. & CONCILIATION CTS. REV. 5 (1998).

142. Jack Arbuthnot et al., *Patterns of Relitigation Following Divorce Education*, 35 FAM. & CONCIL. CTS. REV. 269 (1997) (noting significantly lower rates of relitigation two and a half years after divorce); Karen R. Blaisure & Marjorie J. Geasler, *Results of a Survey of Court-Connected Parent Education Programs in U.S. Counties*, 34 FAM. & CONCILIATION CTS. REV. 23 (1996).

143. Nancy Thoennes & Jessica Pearson, *Parent Education in the Domestic Relations Court: A Multisite Assessment*, 37 FAM. & CONCILIATION CTS. REV. 195, 213-15 (1999).

144. GARRITY & BARIS, *supra* note 5, at 19; STAHL, *supra* note 107, at 4.

145. *Building Multidisciplinary Partnerships*, *supra* note 24, at 468-69.

7. *Parenting Coordinators, Case Managers, Masters and Monitors*

A relatively new way to deal with highly conflicted parents involves use of parent coordinators appointed under the authority of either state statute, court rule or ad hoc orders. A parent coordinator is a neutral third party, either a therapist, guardian ad litem, mediator, attorney or trained paraprofessional, who assists the parties in creating, maintaining and monitoring compliance with a parenting plan.[146] Parenting coordinators are trained to manage chronic, recurring disputes, such as visitation conflicts, and to help parents adhere to court orders and protect their child.[147] Parent coordinators may be particularly useful where (1) one or both parents have severe personality disorders and are chronically litigating; (2) in families with great difficulty coordinating childrearing decisions; (3) in potentially abusive situations; and (4) when there is intermittent mental illness of a parent.[148] These parent coordinators can handle day-to-day decision-making for parents.[149] The parent coordinator can perform investigatory functions, as well as make recommendations to the court and testify. The primary benefits are helping families resolve disputes expeditiously and moving difficult families out of the court system.

Some states have provisions for case managers, special masters or arbitrators who perform many of the same functions as a parent coordinator. The effectiveness of the neutral depends on whether the neutral can make binding decisions.[150] In California, a special master can make a conclusive determination on some things without further action of the court; in other situations, the master makes advisory findings that do not become binding without court adoption after independent consideration.[151]

146. INTERVENTIONS FOR HIGH CONFLICT, *supra* note 11, at 18. The names vary - Arizona (Maricopa County - Family Court Advisors); Colorado (Med-arbiter); Georgia (parent coordinators); Kansas (case managers); Northern California (Special Masters); Massachusetts (parent coordinators); New Mexico ("wise persons"); Oklahoma (resolution coordinator); Vermont (parent coordinators).

147. GARRITY & BARIS, *supra* note 5, at 19.

148. JOHNSTON & ROSEBY, *supra* note 6, at 4.

149. *See* Hugh McIsaac, *Programs for High-Conflict Families*, 35 WILLIAMETTE L. REV. 567, 569 (1999); Philip Stahl, *The Use of Special Masters in High Conflict Divorce*, 28 (3) CAL. PSYCHOLOGIST 29 (1995); M.S. Lee, *The Emergence of Special Masters in Child Custody Cases*, FAM. & CONCILIATION CTS. REV. NEWSLETTER 5 (Spring 1995).

150. *In re* Marriage of Gordon-Hanks, 10 P.3d 42, 45-46 (Kan. Ct. App. 2000); *see also* ELLIS, *supra* note 4, at 339-41.

151. CAL. CIVIL CODE § 638 (1)(2)(2000).

Because of problems in assigning decisional powers to an extra-judicial agent, in most jurisdictions the neutral cannot make binding decisions unless the attorneys file a detailed stipulation with the court.[152] In the high conflict families, an immediate decision may be better than waiting to get a hearing date with the judge. Closure to an issue may be the most important thing.

In 1994, Garrity and Baris set out the following requirements:

Ideally a parent coordinator should be:

(i) Appointed by the court

(ii) Appointed primarily to implement a shared parenting plan

(iii) A mental health professional, a court-appointed guardian ad litem, or a well-trained paraprofessional

(iv) Familiar with family law, conflict resolution and mediation, family therapy and child development

(v) A "first-line decision maker"

(vi) Specified in a binding legal agreement among all the parties as to his/her powers

(vii) Part of either a confidential or non-confidential process; i.e., may or may not report regularly to the court about the implementation of a shared-parenting plan

(viii) Highly skilled in dispute resolution and work to mediate disputes between the parents

(ix) Serving in a supplemental capacity as arbitrator or not; i.e., be ultimately responsible for "all decisions regarding implementation of the visitation schedule and any modifications made in it" or delegate this role to someone else, retaining only the mediation aspect of the role

(x) Protective of the neutrality of the children's therapy, relieving the therapist of being forced to take sides in making decisions

152. *See* Ruisi v. Thieriot, 62 Cal. Rptr. 2d 766, 773 (Cal. Ct. App. 1997); *In re* Marriage of McNamara, 962 P.2d 330, 334 (Colo. Ct. App. 1998). *But see* Dick v. Dick, 534 N.W.2d 185, 190 (Mich. Ct. App. 1995).

about visitation.[153]

8. Supervised Visitation and Child Transfer Centers

Every court should have supervised parenting programs.[154] Supervised transfers or visitation are necessary when the child needs protection from physical or psychological harm while preserving the parent-child relationship. Supervised visitation is contact between a parent and one or more children in the presence of a suitable third party who can observe, listen and intervene if necessary to protect a child.[155] Supervised visitation may be ordered when there is a risk that a visiting parent may abuse a child physically or sexually; to protect a partner from an abusive partner; when there is a danger of false allegations about visiting parent's behavior during a visit; when a child is refusing to visit; when separated parents are in protracted high conflict and children show signs of loyalty conflict; there are concerns about a visiting parent's ability to care adequately for the child; or to provide factual information to assist in valuations.[156]

Supervised transfers may be appropriate when (1) there is little or no concern about the capacity of the visiting parent to take care of the child; (2) there is a significant risk of direct conflict between the parents during transitions; (3) the child has difficulty with the transitions; (4) there is a concern one parent may interfere with visits; or (5) there may be a need to monitor the mental or physical status of the visiting parent.

9. Accountability

All participants—parties, judges, lawyers and mental health professionals—need to be accountable for their contribution to

153. Garrity & Baris, *supra* note 5, at 120-127, 130.

154. *Wingspread Conference Report*, *supra* note 14, at 597; THE CANADIAN REPORT, *supra* note 11, at 76.

155. *See* Robert B. Straus, *Supervised Visitation and Family Violence*, 29 FAM. L. Q. 229, 229 (1995); Robert B. Straus et al., *Standards and Guidelines for Supervised Visitation Network Practice: Introductory Discussion*, 36 FAM. & CONCILIATION CT. REV. 96 (1998). *See* Poll v. Poll, 588 N.W.2d 583, 588 (Neb. 1999) (ordering supervised visitation where children were suffering from post-traumatic stress resulting in part from their father's violence).

156. *See* Ishmael v. Ishmael, 989 S.W.2d 923, 926 (Ark. Ct. App. 1999) (father threatened to abduct child); Cox v. Cox, 515 S.E.2d 61, 67 (N.C. Ct. App. 1999) (family therapist and child psychologist indicated supervised visitation in child's best interests).

increasing or decreasing levels of conflict. Judges should require lawyers to be civil and should impose sanctions for lawyers who file frivolous or harassing motions. When parties do not comply with parenting plans or court orders, enforcement must be swift and inexpensive. There should be a variety of enforcement tools available to the court, including contempt charges, incarceration, posting of security, make-up parenting time, and monetary sanctions such as fines or payment of the other party's attorney fees and court costs. Community service and a public apology may also be appropriate.

Problems with visitation are usually one of the first symptoms of other difficulties to come. Therefore, courts should establish a "rocket docket" for visitation enforcement issues. Visitation disputes need high priority treatment and early intervention. The contemnor's Program in California is one example of a program that attempts to catch conflicted parents early and reshape their behaviors.

D. The Role of Lawyers

Lawyers who deal with both clients and the courts possess the power to control the pace and tone of a custody case. The Wingspread conferees recommended that lawyers should take a proactive role in reducing, rather than increasing, conflict between disputing parents and promoting collaborative problem solving.[157]

1. Education

Family law is a specialty area and lawyers who practice family law should be required to meet additional requirements, i.e. board certification or some type of state or bar-approved specialization, to practice in this area. Those who practice in the field need to understand family dynamics and the impact of divorce on all of the parties, in addition to all of the complexities of pensions, corporate valuation, taxation and child support. Lawyers who want to help families should have additional training in child development, child abuse and neglect, domestic violence and alternative conflict resolution. In addition, family lawyers should be knowledgeable in cross-disciplinary issues affecting their high-conflict custody cases, such as competencies of other professionals and availability of

157. *Wingspread Conference Report*, *supra* note 14, at 595.

community resources.

Family lawyers require training in the principles of collaborative law and should have a commitment to interest-based rather than positional bargaining. Family lawyers should also develop and participate in special continuing legal education programs for high-conflict custody cases.

While many lawyers take a basic family law course in law school, few law schools train lawyers to work with professionals in other areas. In the area of family law, law schools should incorporate inter-disciplinary training in mental health and dispute resolution into the family law curriculum to improve lawyers' ability to reduce conflict in custody cases.[158]

2. Client Counseling and Control Issues

Lawyers have the ability to counsel clients as to appropriate courses of action. An Illinois appellate judge felt that analogizing custody litigation to a form of warfare fostered "an image of unprincipled, unlimited, and bitter combat as the norm" in family matters and noted that:

> the responsible practitioner will counsel litigants to put the interests of their children ahead of their own emotions, desires, and feelings of anger and hurt. . . . The worst possible fate for minor children caught in the maelstrom of a custody or visitation fight is to be used as pawns in a litigation game or to be used as swords to injure the opposing party.[159]

The Wingspread Conferees developed the following list of ways lawyers can help reduce conflict in custody disputes:

1. Counsel clients to not fight inappropriately;
2. Discuss with clients the negative effects of custody fights on children;

158. Judge James Hauser, Circuit Judge for the 9th Judicial District of Florida, recommends that all family lawyers have a curriculum either in law school or after which includes education on the impact of divorce on society; the emotional impact of divorce on adults and children and its impact on settlement negotiations and litigation, and the attorney/client relationship; the role of mental health professionals in interventions or child custody evaluations; drafting parenting agreements that work; child support issues; alternative dispute resolution; and special circumstances that arise like domestic violence, high conflict cases, parents with personality disorders or child abuse.

159. *In re* Marriage of Mehring, 2001 WL 911420 at *12 (Ill. App. Ct.) (Goldenhersh, J., concurring specially).

3. Advise parents about the availability of resources to reduce conflict as well as alternatives to litigation, such as mediation;
4. As a general rule, encourage clients to cooperate with forensic custody and mental health evaluations;
5. Realistically evaluate their client's case and not raise false expectations;
6. Encourage early court interventions to identify issues in high-conflict cases;
7. Refer clients to available resources and processes to help them resolve their conflicts outside the courtroom;
8. Cooperate in defining and limiting the issues, procedures, and evidence necessary to determine the best interests of the child;
9. Maintain a civil demeanor and encourage their clients to follow their example; and
10. Avoid using the media, child protective services, or other means to create or exacerbate conflict.[160]

If lawyers hold out the expectation that self-determination is the norm, clients will respond.

While another option for some divorcing couples is collaborative law, which focuses on the procedure, emotions, and preservation of an ongoing relationship, it may not work for the highly conflicted cases. Under this system, each party retains a separate, specially trained lawyer to help settle the case. The lawyer and client enter into an agreement with the opposing party and their counsel that all will engage in good faith negotiations and that the lawyers will not litigate. If the parties cannot reach a settlement, both lawyers must withdraw and the parties must seek other counsel if they wish to pursue action in court.[161] Collaborative divorce provides an interdisciplinary, gender-based divorce team consisting of two coaches, a financial counselor, child specialist and two collaborative lawyers.[162]

160. *Wingspread Conference Report*, *supra* note 164 at 597; *see also Bounds of Advocacy*, *supra* note 117, at 2.19.

161. PAULINE H. TESLER, COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION 11 (ABA 2001) [hereinafter COLLABORATIVE LAW].

162. For more thorough discussion, see generally A. Rodney Nurse & Peggy Thompson, *Collaborative Divorce: A New, Interdisciplinary Approach*, 13 AM. J. FAM. LAW 226 (1999).

Proponents are optimistic about the potential of collaborative divorce and call it the "next-generation family law dispute resolution mode."[163] At least one scholar denounces the lack of emphasis on the substantive outcome as being harmful to women and children because "power disparities between husbands and wives, gender bias and incompetence among lawyers and judges, and indeterminate substantive laws combine to produce inequitable and destructive results."[164] Even the proponents acknowledge that because of the "looser" discovery (often a signed affidavit) and format, the parties need to be trustworthy, have respect for themselves and at least a modicum of respect for the other spouse. Collaborative law may be inappropriate for persons with personality or character disorders, mental illness or for those who are in abusive relationships.[165]

3. *Ethical Considerations*

The Model Rules of Professional Conduct contemplate adversarial proceedings. Zealous representation of a client in a custody dispute is complicated by the fact that the end result (residential placement) will have profound consequences on a third party—the child. The Model Rules of Professional Responsibility do not specifically address the duty of a lawyer for a parent to not harm the child. Rule 2.1 requires a lawyer to exercise independent professional judgment and render candid advice and Rule 1.4(b) suggests that a lawyer explain "a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."[166] Although these can be read as requiring the lawyer to inform the client as to why the lawyer believes the client's course of conduct is not in the child's best interests, the rules do not specifically require a lawyer to consider the child's interest.

There should be specific recognition of the differing roles that lawyers serve in helping people resolve problems. Many of the problems posed for lawyers who serve as mediators have been

163. COLLABORATIVE LAW, *supra* note 161, at 3.

164. Penelope Eileen Bryan, *"Collaborative Divorce" Meaningful Reform or Another Quick Fix?*, 5(4) PSYCHOL. PUB. POL'Y & LAW 1001, 1002-1003 (1999).

165. COLLABORATIVE LAW, *supra* note 161, at 3.

166. *See* Loretta W. Moore, *Lawyer-Mediators: Meeting the Ethical Challenges*, 30 FAM. L. Q. 679, 679-81 (1996); MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION, 35 FAM. L. Q. 27 (2001).

addressed through the adoption of Model Standards of Practice for Family and Divorce Mediation. The American Academy of Matrimonial Lawyers has recognized that lawyers in family law cases need differing ethical rules. Its Standard 2.23 provides that an attorney for a parent "should consider the welfare of the children."[167] Lawyers trying to help people resolve their problems need to have ethical rules that reflect the complexities of the issues involved and protect lawyers from unwarranted attacks from unhappy litigants.

The American Bar Association should either amend the Model Rules of Professional Responsibility or develop separate rules specific to the context of family law, particularly to include rules that allow (and encourage) lawyers to collaborate and cooperate when appropriate. The Rules should prohibit filing a motion for child custody to gain either a financial benefit or for vindictiveness. The Model Rules should explicitly prohibit a lawyer for parent in a contested custody case from assisting the parent in conduct that the lawyer knows is inconsistent with the child's interests.

The legal profession should develop protocols for working with unrepresented opposing parties in high-conflict cases. In addition, there is a need for the formulation of mechanisms that will provide independent representation of indigent parents without encouraging publicly funded litigation. Providing public funding for attorneys of indigent parents in custody proceedings creates an ethical dilemma in the context of high-conflict custody cases. While indigent parents who need legal assistance should receive it, when parents are paying their attorneys themselves, the cost of litigation can serve as a means for constraining conflict.[168]

E. Experts - Mental Health Professionals

Mental health professionals may need to be involved in the high conflict case either to treat a parent with a personality disorder, to conduct a child custody evaluation, to serve as a mediator, case manager, or parent-coordinator. It is most critical that roles are distinguished and that every participant knows who is playing which role.

167. *Bounds of Advocacy*, *supra* note 117, at 2.23. Although Rule 3.1 (prohibits asserting an issue unless nonfrivolous basis) or Rule 4.4 (prohibits using means that have no substantial purpose other than to embarrass, delay or burden a third person) might apply, they are insufficient.

168. *Wingspread Conference Report*, *supra* note 14, at 596.

1. Custody Evaluation

The custody evaluation is comparative and focuses on family relationships, parental capacities, and the needs of the children and requires the voluntary or court-ordered participation of both parents and the children. The child custody evaluation, not to be confused with a "parental capacity evaluation," focuses on one parent and can be conducted on behalf of one parent alone.[169]

Most courts and evaluators feel that an evaluator can be most effective in serving the interests of the child, avoiding the battle of the experts and saving money, if the evaluator is a neutral and able to see both parents and child.[170] The English courts have affirmed that the function and responsibilities of an expert in family proceedings is to assist the court with a responsible and balanced opinion. To that end the expert must not mislead by omission and, must not fail to discuss material matters that detract from the opinion or may be inconsistent with the client's position. The report should be the same regardless of the client.[171]

The Wingspread conferees recommended that states establish uniform qualifications for child custody evaluators by court rule or statute. In addition, mental health professionals should strive to develop and adhere to national qualification guidelines for child custody evaluations in divorce proceedings. Note, however, that there is potential for discrepancies as each group—psychiatrists, psychologists and social workers—have different ethical criteria and different standards.[172] Child custody evaluators should have training and continuing education in relevant areas including the differentiation of different types of conflict, the impact of conflict on child and adult development and functioning, child interview techniques, custody evaluation protocols, domestic violence, child

169. *See* Jonathan W. Gould, *Scientifically Crafted Child Custody Evaluations - Part Two: A Paradigm for Forensic Evaluation*, 37 FAM. & CONCILIATION CTS. REV. 159, 162-63 (1999); *see also* Evans v. Lungrin, 708 So.2d 731, 739-40 (La. 1998) (reversing the lower court and recognizing expert testimony by a custody evaluator who failed to evaluate the father but freely expressed an opinion about custody and access).

170. Anthony Champagne et al., *Are Court-Appointed Experts the Solution to the* Problems *of Expert Testimony?*, 84 JUDICATURE 178 (2001); *see also Building Multidisciplinary Partnerships*, *supra* note 24, at 465.

171. *See Re* R (A Minor) (Experts' Evidence) [1991] 1 FLR 291.

172. *Compare* American Psychological Association, *Guidelines for Child Custody Evaluations in Divorce Proceedings*, 49 AM. PSYCHOL. 677 (1994), *with* American Academy of Psychiatry and the Law, *Ethical Guidelines for the Practice of Forensic Psychiatry*, AM. ACAD. PSYCHIATRY & LAW (1989).

abuse and neglect, substance abuse, and basic principles of child custody law and procedure. Understanding these topics is essential for neutral evaluators.

In reporting or testifying about their custody or visitation recommendations, mental health professionals should distinguish among their clinical judgments, research-based opinions, and philosophical positions. As one scholar noted, mental health professionals lack the proficiency to specify what constitutes the best interests of other people's children.[173] In addition, mental health professionals should summarize their data-gathering procedures, information sources and time spent and present all relevant information on limitations of the evaluation that result from unobtainable information, such as failure of a party to cooperate or the circumstances of particular interviews. Evaluation reports should be written in plain English without technical jargon or legal terms. The reports should accentuate positive parental attributes as well as negative ones and avoid adding to the family's shame by stigmatizing or blaming parents or children. Psychiatric diagnoses should not be used unless they are relevant to parenting. If making a recommendation to the court regarding a parenting plan, the reports should provide clear, detailed recommendations that are consistent with the health, safety, welfare and best interest of the child.

To reduce both conflict and costs, the Wingspread Conferees suggested that a presumption be established that the court will order only one custody evaluation, rebuttable through a separate hearing on whether the court should appoint a new evaluator because of reported inadequacies or other unusual circumstances. Procedures should be established (1) to identify deficiencies of a custody evaluation report prepared by a court-appointed evaluator and (2) for expeditious and cost-effective procedures for examination and cross-examination of evaluators, such as telephone conferences; audio or video examinations; videoconferences; and scheduling of appearances.

Evaluators should work with the courts to establish appropriate confidentiality requirements for custody evaluations. Before an evaluation is undertaken, the evaluator and the court should ensure that the attorneys and family members know who will have

173. Robert L. Halon, *The Comprehensive Child Custody Evaluation - Ten Years Later*, 22 U. ARK. LITTLE ROCK L. REV. 481, 485, 492 (2000).

access to the report and who will be allowed to have a copy of the report. Evaluators should consider whether, when and how they should share their observations and recommendations with the parents or children as a way of reducing conflicts. When feasible, evaluators should consider meeting with the parents to share observations and recommendations rather than leaving that to the legal professionals and the court.

To avoid both the high costs of repetitive evaluations and the parents need to take off work for various appointments and services, all the participants, including mental health professionals and attorneys should work together to conserve the family's available time and financial resources. If there are multiple mental health professionals, they should coordinate their roles in order to bring about the best outcome for the family and the child.[174]

2. Treatment

In a custody dispute, both the parents and the children may need therapy. The court should make a specific order outlining the goals of any therapeutic intervention. For example, in an alienation case, the court order should specify the roles of all professionals and provide a coordinated process for managing ongoing conflict including:

1. Goals of service;
2. Who will be seen in treatment;
3. Limits of confidentiality;
4. Permitted lines of communication;
5. A timely procedure for resolving issues when parents cannot communicate;
6. Payment for therapy; and
7. Process for termination or transfer.[175]

Before treating a child involved in a custody dispute, mental health professionals should make good faith efforts to obtain the consent of both parents, except for emergency situations. If

174. *Id.*

175. Janet R. Johnston et al., *Therapeutic Work with Alienated Children and Their Families*, 39 FAM. CT. REV. 316, 330 (Appendix) (2001); *See generally* Matthew J. Sullivan & Joan B. Kelly, *Legal and Psychological Management of Cases with an Alienated Child*, 39 FAM. CT. REV. 299 (2001).

permission is not obtained, unless one parent has sole legal custody, the parent should be required to get a court order for treatment. To avoid confusing roles and getting caught in the middle of a dispute, mental health professionals should make affirmative efforts to determine if a custody dispute is contemplated.

Confidentiality concerns abound when treating members of divorcing and separating families. Mental health professionals should describe their obligations of confidentiality to their clients and obtain adequate informed consent prior to beginning treatment and obtain signed waivers of confidentiality to allow them to confer among themselves concerning issues of parenting and the child's interest and welfare. Such shared communication should remain confidential and not be revealed to the parties or their attorneys.

Children's therapists should be aware of the possible negative impact of their testimony on the therapeutic relationship. When required to testify, children's therapists should assure that privilege has been appropriately waived; clearly indicate that they do not have the information needed to make specific recommendations regarding custody or visitation; and explain that information they provide to the court on how the child may react to proposed arrangements can be based only on developmental needs or stated preferences of the child, and not on a comparison of the parents.

3. Coordination with Other Professionals

Lawyers and mental health professionals need to be familiar with each other's ethical rules and standards as they relate to child custody disputes so each can respect the other's duties and limitations. If conflicts arise between the lawyer's ethical standards and the mental health professional's standards, both professionals should meet with court representatives to determine how best to proceed.[176] Lawyers, mental health professionals and others should prioritize and coordinate their efforts when recommending services. When multiple mental health professionals work with a separated family, they should coordinate their roles in order to bring about the best outcome for the family and the child.

The mental health community must be clear about and respect the role boundaries and responsibilities that are involved in the

176. *Wingspread Conference Report*, *supra* note 14, at 593.

process of divorce and separation, distinguishing among roles of evaluator, therapist, parent coordinator, mediator, arbitrator and other professionals involved in the case. Mixing the therapist and forensic roles undermines both therapy and the judicial process.[177]

IV. CONCLUSION

Protecting children from the devastating effects of their parents' conflicts requires a focus on the welfare of the child and a proactive approach by all parties, including the court system. We may want to borrow a page from the English system which places the "welfare of the child" as the highest priority and allows judges to go beyond the evidence and agreements presented.[178] No one solution is going to reduce conflict. State legislatures, courts, lawyers and mental health professionals are just beginning to experiment with programs to deal with high conflict cases.[179] Several legislatures have replaced the terms "custody" and "visitation" with "parenting time" that more accurately describes parenting responsibilities.[180] But the system requires much more than simply substituting terminology—the system needs more judges, more services of all kinds from mental health to parent education to parenting supervisors. There must be a concerted effort among all of the professionals who work with and care for children to work together for solutions. Specialized training for all professionals, collaboration and case management are crucial elements of any plan to ease the negative impact of divorce on children. As the Wingspread Conferees summarized:

The goal of the family law system should be to give the

177. Stuart A. Greenberg & Daniel W. Shuman, *Irreconcilable Conflict Between Therapeutic and Forensic Roles*, 28 PROF. PSYCHOL: RES. & PRAC. 50, 56 (1997).

178. The Children's Act [1989] § 1(1) (the paramount consideration in any action for responsibility for children is the welfare of the child). In *In re* L (A Minor) (Police Investigation: Privilege) [1997] AC 16, the court stated that "in family proceedings . . . the court is not concerned simply to decide an issue between the parties . . . on the basis of the evidence the parties have chosen to present. The court is concerned to protect the child and promote the child's welfare. The court is not confined . . . to the alternative courses proposed by the parties . . . . The judge may call for more evidence or for assistance from other parties . . . ." *Id.* at 31 (L. Nicholls).

179. *See* INTERVENTIONS FOR HIGH CONFLICT, *supra* note 11; ELLIS, *supra* note 4; *see also* EFFECTIVE SUPPORT SERVICES, *supra* note 2.

180. PARENTING OUR CHILDREN, *supra* note 30. *See, e.g.* KAN. STAT. ANN. § 60-1610, 1625 (Supp. 2000); OR. REV. STAT. § 107.101, 107.434 (1997). *See also* THE CANADIAN REPORT, *supra* note 11, at Ch. 5.

> parties the tools to restructure their lives after the immediate case. Central tenets of this system should be to reduce conflict, assure physical security, provide adequate support services to reduce harm to children, and to enable the family to manage its own affairs. To accomplish this, judges, lawyers and mental health professionals need to adopt new models for resolving family disputes that focus on the welfare of children.[181]

If all of the participants in the system start planning on ways to humanize the divorce process and lessen the hostilities surrounding custody of children, there will be fewer children bearing scars of their parents' battles. All participants in the contested custody cases should emphasize to parents the words of Minnesota Trial Judge Haas, recently quoted by the Tennessee Appellate Court:

> Your children have come into this world because of the two of you . . . . [E]very time you tell your child what an idiot his father is, or what a fool his mother is, . . . you are telling the child that half of him is bad. This is an unforgivable thing to do to a child. That is not love; it is possession. If you do that to your children, you will destroy them as surely as if you had cut them into pieces, because that is what you are doing to their emotions . . . . Think more about your children and less of yourselves, and make yours a selfless kind of love, not foolish or selfish, or they will suffer.[182]

181. *Wingspread Conference Report*, *supra* note 14, at 590.

182. Burke v. Burke, 2001 WL 921770, at *10 (Tenn. Ct. App. Aug. 7, 2001) (quoting Judge Haas of Walker, Minn.).

V. APPENDIX

Table 1: Conflict Assessment Scale[183]

1. Minimal	2. Mild	3: Moderate	4. Moderately Severe	5. Severe
Cooperative parenting	Occasionally berates other parent in front of child	Verbal abuse with no threat or history of physical violence	Child is not directly endangered but parents are endangering to each other	Endangerment by physical or sexual abuse
Ability to separate children's needs from own needs	Occasional verbal quarreling in front of child	Loud quarreling	Threatening violence	Drug or alcohol abuse to point of impairment
Can validate importance of other parent	Questioning child about personal matters in life of other parent	Denigration of other parent	Slamming doors, throwing things	Severe psychological pathology
Can affirm the competency of other parent	Occasional attempts to form a coalition with child against other parent	Threatens to limit access of other parent	Verbally threatening harm or kidnapping	
Conflict is resolved between adults using only occasional expressions of anger		Threats of litigation	Continual litigation	
Negative emotions quickly brought under control		Ongoing attempts to form a coalition with child against other parent around isolated issues	Attempts to form a permanent or standing coalition with child against parent (alienation syndrome)	
			Child is experiencing emotional endangerment	

183. GARRITY & BARIS, *supra* note 5, 43 tbl. 4-1.

Parent/Divorce Education for "High Conflict" Families

Pre-Contempt/Contemnnors Group Diversion Counseling Program (Los Angeles, CA). Begun in 1989, the program developed as a response to a lack of enforcement remedies for custody orders. Judges refer the program participants. Parents are required to attend the class in lieu of being found in contempt of court. The program has six consecutive Wednesday group sessions for two hours each held at the courthouse. Family Court Services run the program and have the participants park in different parking lots. The bailiff is present with screening device. The program teaches child development theory, parenting plan options, and through role playing teaches cooperation rather than competition and uses two videos—Don't Divorce the Children and You're Still Mum and Dad. The graduates receive a certificate. Some judges require a paper or a return to court to talk about what the parents learned.

Parents Beyond Conflict (Portland, OR). Based on the tenets of cognitive restructuring, this class asserts that the key to successful co-parenting is reframing negative perceptions about the other spouse to emphasize cooperation and joint problem solving. The program has five to eight couples per class referred by order of the court. There are five, two hour classes. The teaching modalities include reading, film viewing, discussion, simulation, class exercised and homework. There is a fee of $100 per parent, which can be waived at poverty level. Spouses and significant others are encouraged to come for free.

Divorce Transitions—Seminar for Successful Co-Parenting (CO). This is one of two adult divorce education programs used in three judicial districts. This is a four-hour class to teach cooperative parenting skills to divorcing parents.

Divorce Transitions—SUCCEED, Parenting After Divorce Where There is High Conflict (CO). The program is a four-hour class, which emphasizes parallel parenting and anger management tools. It defines parallel parenting as each parent assumes total responsibility of the children during the time the children are in their care. The parties disengage from each other. There is a policy of noninterference and communication about the children does not take place face to face.

San Diego High Conflict Intervention Program. This program teaches parents to immediately cut the communication and control

the contact in "Parents Apart" (MA). The five-hour class teaches a developmental approach to post-divorce parenting relationships and teaches couples how to disengage by parallel parenting. If the parents can manage this format and gradually the conflict lessens, they can then progress to cooperative parenting. The class costs $50 per person. The teaching materials include a parent's handbook, slides, videotape, role-plays and hypothetical situations.

"Parental Conflict Resolution" (PCR)(Maricopa County, AZ). Begun in 1999, the court may order high conflict parties, the parties may choose or court-connected mediators or court services staff may recommend that parents be ordered to attend. The program has one four-hour class with no fee. A family court judge addresses participants at the beginning emphasizing the need to put children first and the extent of emotional damage caused when parents expose them to conflict. The judge also warns of the tougher sanctions for noncompliance. Two videos are shown that address high conflict and alienation/alignment issues.

The Divorce Center (Newton, MA) has numerous parental education programs including a pamphlet by Robert A. Zibbell, "Effective Parenting for People Going Through Divorce: Saving Your Child from Psychological Harm."

See Karen Blaisure & Margie Geasler, *Results of a Survey of Court-Connected Parent Education Programs*, 34 FAM. & CONCILIATION CTS. REV. 23 (1996) (Appendix lists thirteen programs used around the country).

Group Treatment/Therapeutic Mediation

- Vivienne Roseby & Janet R. Johnston, High-Conflict, Violent, and Separating Families: A Group Treatment Manual for School Age Children (1999).
- For Kids' Sake Program: A Treatment Program for High Conflict Separated Families (Canada)
- A "How-To" Manual for Treating High-Conflict Separated Families

Parent Coordination and Related Models

- Carla Garrity and Michael Baris (Denver, CO) - training and information on parent coordination
- Family Court Advisor (Maricopa County, AZ)

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• Vermont Family Court-Parent Coordination Program—copies of protocols, forms, draft stipulations for parent coordination
• "Resource Coordinators"—Tulsa County District Court Domestic Relations Division "Families in Transition"
• Cooperative Parenting Institute: Susan Boyan & Ann Marie Termini - training on parent coordination

Comprehensive Family Court Systems

• "Families in Transition"—Tulsa County District Court Domestic Relations Division Information—procedure and forms pertaining to how dissolution matters are processed through local family court
• Expedited Services Programs (Maricopa County, AZ)
• Expedited Visitation Services Program
• Friend of the Court—MI
• Parental Access and Visitation Enforcement (PAVE) Program - Marion County, OR
• Supervised Visitation Protocols—MA

Special Masters

• Special Master Training (CA)—videotape and materials for "Third Training Conference for Special Masters"

Med-Arbiters

• "Med-Arbiter" Model (CO)

Guardians Ad Litem or Attorneys

• American Academy of Matrimonial Lawyers Booklet: "Standards for Attorneys and Guardians Ad Litem in Custody or Visitation Proceedings"
• Washington State Bar Association—Court Rules Committee Proposed Changes in GAL Rules
• Superior Court Guardian Ad Litem Committee (Spokane County Bar Association, WA)—Booklet "Child-Centered Residential Schedules"
• Proposed ABA Standards for Lawyers Representing Children in Child Custody and Visitation Cases (ABA 2001)

CASA Advocates in Custody and Divorce Cases

• National CASA Association, Task Force Report and Recommendations on CASA Volunteers in Custody/Divorce cases

Parental Alienation/Alignment

• F.A.C.T. (Fathers Are Capable Too)—A non-profit non-custodial parents' and children's rights organization in Canada created to deal with custody & access issues.
• Douglas Darnall, Ph.D. - the Parental Alienation Directory website

Miscellaneous

• Elizabeth Brandt, Idaho Benchbook "Protecting Children of High Conflict Divorce"