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Family Law and the New Access to Justice

Erratum

Law; Litigation; Family Law; Civil Procedure; Courts; Dispute Resolution and Arbitration

FAMILY LAW AND THE NEW ACCESS TO JUSTICE

*Rebecca Aviel**

INTRODUCTION

Civil litigation reform has so consistently and predictably benefitted a certain set of defendants, at the expense of a certain set of plaintiffs, that it has understandably come to be assumed antithetical to access-to-justice values.¹ The view, however, looks different in family court, where reformers are implementing transformative changes that are consistent with access-to-justice values: these reforms are delivering dispute-resolution mechanisms that are faster, cheaper, and easier to maneuver, particularly for self-represented litigants.²

This Article explores whether the optimistic prospect suggested by this experience—of reform that promotes rather than inhibits access-to-justice values—is inherently limited to family law. Does the experience with family court reform offer insights that transfer to other contexts, or is family law simply too exceptional? On the one hand, family law disputes are unique in some truly important ways. It is difficult, for example, to conceive of a convincing analogue for postdivorce parenting, and what we mean by “justice” can be fundamentally different for domestic-relations litigants than for others. On the other hand, reform in family court has been driven in part by concerns about cost and speed that are hardly unique to domestic-relations litigants. This Article suggests that some features of family court reform may transfer to other contexts. Chief among these features is an emphasis on triage rather than standardization as the touchstone of a fair and effective specialized court.

This Article first sets out the view from family court, describing the reforms that are taking root and arguing that they serve access-to-justice values. It then assesses whether the core attributes of family law make the field too exceptional for these reforms to have any transferable application to

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1. See, e.g., Myriam Gilles, *Class Warfare: The Disappearance of Low-Income Litigants from the Civil Docket*, 65 EMORY L.J. 1531, 1537 (2016) (describing a series of substantive and procedural developments that “have erected near-impossible obstacles in the path to the courthouse for economically disadvantaged groups”).

2. See *infra* Part I.

other contexts. Having established that domestic-relations litigants and the institutions that serve them are concerned about reducing cost and increasing speed, this Article observes that these objectives no doubt transfer to other contexts, and so it is worth focusing on some of the essential qualities that family court reformers have used to balance efficiency and individualized justice.

I. THE VIEW FROM FAMILY COURT

Family law has undergone a pronounced turn away from formal adversarial procedure that is well documented in the academic literature.³ For policymakers, judges, administrators, and other professionals working in domestic relations, the consensus that adversarial resolution of family issues is best avoided can hardly be overstated,⁴ and the ongoing effort to focus on problem-solving models with a therapeutic orientation is robust.⁵ Nonetheless, to assist with the overarching goal of assessing whether family court reform might provide insight for other contexts, it is useful to begin with a brief sketch of how far family law has come over the last fifty years to arrive at this juncture.

To truly appreciate the current vantage point, it is essential to remember that until the so-called “no fault revolution” of the 1960s and 1970s, divorce was only available to an “innocent” spouse who could prove that his or her partner had committed a specific type of misconduct—such as adultery, cruelty, or abandonment—and was therefore at fault for breach of the marital contract.⁶ Divorce was inescapably adversarial: spouses were not encouraged to work together to end their marriage in a collaborative way and

3. See, e.g., Rebecca Aviel, *Counsel for the Divorce*, 55 B.C. L. REV. 1099, 1111 (2014) (“The traditional model of full-fledged, individualized partisan advocacy has all but become obsolete for family law cases—unaffordable for most couples and unattractive for many more.”); Barbara A. Babb, *Reevaluating Where We Stand: A Comprehensive Survey of America’s Family Justice Systems*, 46 FAM. CT. REV. 230, 230 (2008) (“Court reform relative to family law matters has risen steadily over the past decade. States have restructured their justice systems to handle increasingly complex family law cases and burgeoning family law caseloads.”).

4. See generally Aviel, *supra* note 3; Babb, *supra* note 3; Jane C. Murphy & Jana B. Singer, *Moving Family Dispute Resolution from the Court System to the Community*, 75 MD. L. REV. ENDNOTES 9 (2016). As captured in one pithy summary, “Everyone who works in family law . . . agrees on two things: family court is not good for families, and litigation is not good for children.” Michael Saini, *Triage as an Innovative Framework for Domestic Relations Cases*, Presentation at Modern Families, Innovative Courts: The 2015 Domestic Relations Best Practice Court Institute for Judges, Magistrates, Family Court Facilitators and Sherlocks (June 1–3, 2015) (PowerPoint on file with author).

5. See, e.g., Murphy & Singer, *supra* note 4, at 9 (“Mediation, collaboration, and other non-adversarial processes have replaced a traditional, law-oriented adversarial regime.”).

6. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 142–45 (3d ed. 2005); *id.* at 145 (“[Fault-based divorce was] an adversary proceeding. An innocent and virtuous spouse sued an evil or neglectful partner. The defendant had to be at fault; there had to be ‘grounds’ for the divorce.”).

were in fact *prohibited* from doing so.⁷ As difficult as it may be to imagine now, such cooperation was treated as collusive and a fraud on the court.⁸

A much-needed corrective arrived in the form of no-fault divorce, which allowed spouses to divorce upon a showing of “irreconcilable differences”⁹ or the “irretrievable breakdown”¹⁰ of their marriage, but this reform was only a partial response. For well after the advent of no-fault divorce, family court still operated on the premise that divorce would unfold in much the same way as other civil litigation: each party would be represented by a capable lawyer, the parties would engage in discovery, motions would be filed and hearings would be held, and, after a trial in which evidence was proffered and legal arguments presented, a judge would issue an order dissolving the marriage and resolving the attendant financial and child-related issues.¹¹ Even if the couple were in agreement that the marriage should end, and were permitted by the innovation of no-fault divorce to openly proceed in that joint endeavor, there were still multiple avenues to press for advantage, using all the procedures and techniques of adversarial litigation.¹² Commentators have thus suggested that no-fault divorce did not eliminate the rancor or hostility from divorce proceedings but merely shifted it from the dissolution itself to the collateral issues of property distribution, spousal support, child support, and child custody.¹³

Family court reformers, to their credit, have resisted the conclusion that such hostility is an unavoidable feature of any system that involves divorcing spouses.¹⁴ Rather than assuming that divorcing spouses bring with them to

7. *Id.* at 145.

8. *See* Fuchs v. Fuchs, 64 N.Y.S.2d 487, 488–89 (Sup. Ct. 1946) (noting that “a party cannot consent to the entry of a decree of divorce” because of the “well known vigilance of the courts to prevent collusion, and because of the general interest of the people of the state in the preservation of the matrimonial status of its citizens”); *see also* FRIEDMAN, *supra* note 6, at 145 (“The law insisted that divorce by mutual consent was wrongful and impossible.”).

9. *See, e.g.*, CAL. FAM. CODE § 2400(a)(2) (West 2015).

10. *See, e.g.*, COLO. REV. STAT. § 14-10-110 (2016).

11. *See* Alan H. Frank et al., *No Fault Divorce and the Divorce Rate: The Nebraska Experience—an Interrupted Time Series Analysis and Commentary*, 58 NEB. L. REV. 1, 49 (1978) (suggesting that even after many states began to embrace the no-fault system, the practice of family law remained largely the same for several years). One notable difference, however, with ramifications that extend well beyond professional ethics, is the prohibition on contingency-fee arrangements in domestic-relations cases. *See* MODEL RULES OF PROF'L CONDUCT r. 1.5 (AM. BAR ASS'N 2016).

12. *See* Frank et al., *supra* note 11, at 49–51.

13. *See, e.g.*, FRIEDMAN, *supra* note 6, at 579–80; Frank et al., *supra* note 11, at 50–51.

14. *See, e.g.*, LOGAN CORNETT ET AL., OUT OF COURT AND IN COLLABORATION: EVALUATING A NEW MODEL FOR SEPARATION AND DIVORCE IN A UNIVERSITY SETTING 1 (2016), http://iaals.du.edu/sites/default/files/documents/publications/rcsdf_out_of_court_and_in_collaboration.pdf [<https://perma.cc/Y96T-VC34>] (“Even when families intend to divorce with dignity, integrity, and support for their children, the structure of the court system is often at odds with that approach. Court processes continue to emphasize traditional civil adjudication in family cases, which naturally places parents in the position of adversaries.”); NATALIE ANNE KNOWLTON, STEWARDS OF THE SYSTEM, LEADERS OF CHANGE 4–5 (2016), http://iaals.du.edu/sites/default/files/documents/publications/the_family_law_bar_stewards_of_the_system_leaders_of_change.pdf [<https://perma.cc/RN6N-E4SP>]; Andrew Schepard et al., *The Family Law Bar, the Interdisciplinary Resource Center for Separating and Divorcing Parents, and the “Spark to Kindle the White Flame of Progress,”* 55 FAM. CT. REV. 84, 89

family court some static, predetermined level of conflict to which the system passively responds, reformers have internalized the premise that the system itself can either heighten or reduce conflict, and family court processes should be designed with this in mind.¹⁵ While it might seem inevitable, for example, that divorcing spouses will be adverse to one another on what appear to be zero-sum financial matters, the transaction costs of proceeding in an adverse posture can quickly overtake whatever financial gains might result from litigating to the hilt. A sophisticated system will help divorcing spouses see and avoid these costs, offering them the infrastructure to recognize the shared gains to be had from cooperation.¹⁶ And yet, for families struggling with substance abuse, violence, mental health concerns, and other chronic challenges, it may be inappropriate to expect or encourage cooperation.¹⁷ The ongoing challenge for family court reformers, then, has been to design systems and processes that do not exacerbate family conflict but do not ignore it, either, and instead offer individualized responses in the face of persistent resource constraints.

In jurisdictions that have moved the furthest toward this goal, families coming to court for the resolution of domestic-relations matters encounter a multistream system that endeavors to tailor the level of procedural intricacy to the degree of conflict and complexity presented by their particular circumstances, a concept sometimes described as “differentiated case management.”¹⁸ Such systems encourage simplification where possible, rely heavily on the expertise of nonlegal professionals to provide both diagnostic and therapeutic services, and offer a dynamic rather than lockstep process.¹⁹ These systems are managed by court officials and constantly respond to developments in the earlier stages of a given case.²⁰ This Part explores some of the specific innovations that one might see in such jurisdictions and then considers whether they can be characterized as access-to-justice reforms.

(2017) (“Many parents want and benefit from a model of legal service delivery that emphasizes problem solving and what unites—rather than divides—them. . . . Rather than assuming the parties will be positioned as adversaries, . . . lawyers and the system should help the parties work together.”).

15. See generally CORNETT ET AL., *supra* note 14; KNOWLTON, *supra* note 14; Schepard et al., *supra* note 14.

16. See Saini, *supra* note 4.

17. Scholars and advocates have long debated whether mediation, for example, is appropriate in situations involving domestic violence. See generally Susan Landrum, *The Ongoing Debate About Mediation in the Context of Domestic Violence: A Call for Empirical Studies of Mediation Effectiveness*, 12 CARDOZO J. CONFLICT RESOL. 425 (2011) (describing a range of different views and gathering sources).

18. ANDREW I. SCHEPARD, CHILDREN, COURTS, AND CUSTODY: INTERDISCIPLINARY MODELS FOR DIVORCING FAMILIES 113 (2004).

19. *Id.* at 114.

20. *Id.* at 113–14.

A. *Innovations in Modern Divorce*

1. Simplified Dissolution

“Simplified,” “summary,” or “expedited” dissolution allows a couple who meets certain eligibility requirements to convert their agreement into a formal divorce decree with minimal time and process, sometimes without even appearing in court.²¹ The states that have incorporated such an option into their domestic-relations framework differ as to the particulars, but a few commonalities are apparent.²² The basic concept is to set forth a relatively concrete set of criteria that the couple must satisfy in addition to presenting the court with a full agreement as to all collateral issues.²³ These criteria tend to consist of limits on, for example, the length of time the couple has been married, the amount of property or debt the couple has jointly and individually owned or incurred, and whether the couple has children.²⁴ These criteria, although straightforward enough for many couples to apply to their own circumstances without a lawyer, simultaneously reflect some of family law’s most enduring and foundational principles: the idea that a couple’s financial entanglements and mutual dependence grow over time, such that a longer marriage is more difficult to unwind;²⁵ that courts have an independent obligation to vigorously scrutinize parental agreements, ensuring that the best interests of children are considered;²⁶ and that property acquired during marriage, with certain exclusions, is marital and thus subject to equitable distribution upon divorce.²⁷

Simplified dissolution options thus reflect a nuanced balance between the couple’s interest in being the masters of their own separation agreement, as

21. See Hon. Lynda B. Munro (Ret.) et al., *Administrative Divorce Trends and Implications*, 50 FAM. L.Q. 427, 428 (2016) (describing summary dissolution as offering couples “a more efficient, less public, and more cost-effective dissolution of their marriage”). For an early overview of simplified dissolution, see Anne M. Eggers, *Summary Dissolution and Uncontested Pro Se Representation: Viable Alternatives in the Divorce Dilemma*, 12 HAMLINE J. PUB. L. & POL’Y 285, 285 (1991).

22. See generally Munro et al., *supra* note 21 (comparing the summary dissolution procedures of several different states). The states that have adopted a form of summary dissolution include Alaska, Arizona, Colorado, California, Connecticut, Oregon, Illinois, Indiana, Montana, Florida, New York, and Minnesota. *Id.* at 433–34.

23. See *id.*

24. See *id.* at 435–40.

25. See UNIF. MARRIAGE & DIVORCE ACT § 307 (UNIF. LAW COMM’N 1973) (alternatives A and B) (instructing courts to consider the duration of the marriage in making property determinations).

26. See COLO. REV. STAT. § 14-10-124(7) (2016) (instructing that proposed parenting plans must be submitted to the court for approval).

27. See PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 4.03 (AM. LAW INST. 2002). While some of the American Law Institute’s principles are more reformist in nature rather than a reflection of the existing state of the law, section 4.03’s definition of “marital property” does reflect the approach taken in most jurisdictions. JUDITH AREEN ET AL., FAMILY LAW CASES AND MATERIALS 1025 (6th ed. 2012). While couples can, of course, agree to unwind their finances in ways that diverge from the “fruit of marital labor” principle, we might think that where the assets are substantial, it is important that rights be waived in a fully informed and deliberative posture that is not available without a hearing.

quickly and cheaply as possible, and the state's interest in ensuring that the agreement has received an appropriate level of review, roughly calibrated to the interests at stake. As with any such effort to balance competing goals, it is not perfect.²⁸ But neither is it mandatory, and both parties have to agree to participate in order to proceed.²⁹ For those who value speed, the upside is clear: a decree in a fraction of the time, and at a fraction of the cost, that it would take to proceed through the standard sequence. In Minnesota, for example, a simplified dissolution takes thirty days as compared to the twelve-month period that characterizes the vast majority of nonsimplified cases.³⁰

Simplified dissolution, however, is about more than just speed, lowering costs, or reducing the inconvenience of appearing in court. For those couples who qualify, it is a chance to choose a minimalist role for the state in the dissolution of their marriage.³¹ As captured by one judge discussing the importance of offering a simplified dissolution procedure, when it comes to couples who want and are eligible for it, "we need to get out of their way."³² The opportunity to weaken the state's monopoly over divorce should be recognized as an access-to-justice value.³³

28. As one group of commentators observes,

With no judicial review, one or both of the parties may end up with a result that is unfair or inequitable and with no remedy. Rather, the parties will be left to their own devices and may find themselves with an agreement that sounded fair at the time that they signed, but in reality leaves one party with significantly more assets than the other

Moreover, without the discovery process, where the parties have the right to obtain each other's financial documents—including tax returns, bank statements, credit card statements, pay stubs, insurance policies, appraisals of any assets, and the like—there is no way to ensure that each party has an accurate and complete understanding of all of the assets and liabilities in their marital estate.

Munro et al., *supra* note 21, at 442. Note that some of these difficulties are resolvable—Illinois, for example, requires that couples seeking expedited divorce "have disclosed to each other all assets and liabilities and their tax returns for all years of the marriage." 750 ILL. COMP. STAT. 5/452(i) (2016).

29. Munro et al., *supra* note 21, at 433.

30. MINN. STAT. § 518.195(2) (2017) ("The district court administrator shall enter a decree of dissolution 30 days after the filing of the joint declaration if the parties meet the statutory qualifications and have complied with the procedural requirements of this subdivision."). Over 98 percent of dissolutions, with or without children involved, were disposed of within twenty-four months. *See* COURT SERVS. DIV., MINN. JUDICIAL BRANCH, PERFORMANCE MEASURES: KEY RESULTS AND MEASURES 5 (2015), <http://www.mncourts.gov/mncourtsgov/media/CIOMediaLibrary/Documents/Annual-Report-2015-Perf-Measures.pdf> [<https://perma.cc/EKN2-CUZ3>]. Of that percentage, 94 percent were resolved in twelve months. *Id.* at 16.

31. This minimalism can be thought of as an antidote for the interventionism and excessive displays of state power that many litigants encounter in family court. *See, e.g.*, Elizabeth L. MacDowell, *Reimagining Access to Justice in the Poor People's Courts*, 22 GEO. J. ON POVERTY L. & POL'Y 473, 503 (2015) ("Lecturing and chiding litigants, typical of problem-solving court judges, infantilizes litigants and reinforces notions that low-income people appearing before the court are childish and in need of state supervision.").

32. Judge Randall Arp, Chair, Colo. Supreme Court Standing Comm. on Family Issues, Remarks at Meeting of the Colorado Supreme Court Standing Committee on Family Issues (Apr. 21, 2017).

33. The Supreme Court's discussion of the state monopoly over divorce nearly fifty years ago is still surprisingly apt:

2. Mediation Improved: Early Neutral Assessment

Families whose circumstances make them ineligible for summary dissolution may nonetheless be able to resolve their dispute without trial if they have access to other alternatives, and mediation is one that has become well established in family court.³⁴ It has a strong track record in reducing costs while increasing litigant satisfaction but has also been plagued by some recognized shortcomings.³⁵ One of the improvements that has been particularly promising is “early neutral assessment” (ENA), also described as “early neutral evaluation” (ENE), in which a neutral third party with substantive experience in the field gives the parties “a confidential opinion regarding the likely outcome of the case and an analysis of the strengths and weaknesses of each side’s arguments.”³⁶

ENA is a voluntary, opt-in process that builds on two crucial insights about assisting families in dissolution. First, that dissolution, like many other processes, is characterized by path dependence—that what happens in the early stages of a divorce dictates and limits subsequent developments.³⁷ It therefore is not enough to offer (or even require) mediation in an effort to divert cases from trial; to optimize the chances for success, parties must enter mediation before they have dug in on their respective positions. The second key insight underpinning ENA is that divorcing couples need more than just passive facilitation to arrive at a fair and effective agreement: they need information and context to guide their negotiation.³⁸ By offering the couple not only facilitation but also substantive assessment, ENA provides the

[W]e are unaware of any jurisdiction where private citizens may covenant for or dissolve marriages without state approval. Even where all substantive requirements are concededly met, we know of no instance where two consenting adults may divorce and mutually liberate themselves from the constraints of legal obligations that go with marriage, and more fundamentally the prohibition against remarriage, without invoking the State’s judicial machinery.

Boddie v. Connecticut, 401 U.S. 371, 376 (1971).

34. See, e.g., Jane C. Murphy & Robert Rubinson, *Domestic Violence and Mediation: Responding to the Challenges of Crafting Effective Screens*, 39 FAM. L.Q. 53, 53 (2005) (noting that mediation of family law cases has become well established in American courts).

35. Critiques of mediation include concerns that it is “rushed and mechanical.” Rebecca Love Kourlis et al., *Courts and Communities Helping Families in Transition Arising from Separation or Divorce*, 51 FAM. CT. REV. 351, 364 (2013).

36. Jordan Leigh Santeramo, Note, *Early Neutral Evaluation in Divorce Cases*, 42 FAM. CT. REV. 321, 321, 325 (2004). The ENE program adopted in Hennepin County, Minnesota, was named by the Ash Institute for Democratic Governance and Innovation at the Harvard Kennedy School of Government as one of the “Top 50 Government Innovations” in 2009. *Early Case Management/Early Neutral Evaluation*, MINN. JUD. BRANCH, <http://www.mncourts.gov/Help-Topics/ENE-ECM.aspx> [<https://perma.cc/LZ7H-2M3R>] (last visited Mar. 15, 2018).

37. See Oona Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 604 (2001) (“‘[P]ath dependence’ means that an outcome or decision is shaped in specific and systematic ways by the historical path leading to it. It entails, in other words, a causal relationship between stages in a temporal sequence, with each stage strongly influencing the direction of the following stage.”).

38. See Aviel, *supra* note 3, at 1113–16 (explaining that mediation involves the waiver of significant rights and that it is essential that parties are provided with sufficient guidance to make “reasonably informed decisions”).

objective criteria that negotiation theorists have long instructed is a crucial element of “getting to yes.”³⁹

As with simplified dissolution, the details of ENA programs can vary from one jurisdiction to the next. In the Colorado jurisdictions that offer ENA, a team is comprised of one lawyer and one mental health professional, one of whom is male and one of whom is female.⁴⁰ The lawyer is available to answer questions about the governing legal framework;⁴¹ the mental health professional offers insight about child development, attachment theory, and other concepts important for separating parents to understand.⁴² After hearing from the parties, the ENA team will then give an assessment of what, in their professional view, is in the interests of the child (or children) for whom parenting responsibilities are being determined and what is likely to occur if a judge were to rule on the case.⁴³ The premise is that the ensuing negotiation will be more successful if each parent has been assisted in developing a realistic expectation and has had some expert guidance developing child-centered terms.⁴⁴ With this foundation, parties can resolve their entire parenting-time dispute in a period of three to four hours, including the assessment, the negotiation, and the conversion of their agreement into a decree.⁴⁵ As one judge explains, parties can walk into the courthouse for their ENA session, negotiate a fully comprehensive parenting-time agreement—complete with holidays, transportation issues, and the like—and walk out of the courthouse with a permanent order.⁴⁶ It is essential to emphasize the significance of what might seem like a trivial detail—for working parents juggling an array of competing demands during a highly stressful period, access to justice means *less* rather than *more* time in court.⁴⁷

39. ROGER FISHER ET AL., GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 82–93 (2011).

40. *Early Neutral Assessment*, COLO. JUD. DEP'T, https://www.courts.state.co.us/userfiles/file/Court_Probation/08th_Judicial_District/Larimer/ENA%20Info%20Sheet.pdf [<https://perma.cc/4RWH-PPCF>] (last visited Mar. 15, 2018). Minnesota also requires that ENA teams for parenting determinations be comprised of one male member and one female member but does not specify the professional training of the team other than to state that “[e]valuators must be seasoned professionals, able to screen for domestic violence, able to gather relevant information efficiently, and able to ascertain the merits and weaknesses of each party’s case quickly.” Minn. Judicial Council, Minn. Judicial Branch, Minnesota Early Case Management (ECM) and Early Neutral Evaluation (ENE) Best Practices for Family Court 9 (July 1, 2012), [http://www.mncourts.gov/mncourtsgov/media/scao_library/ENE/ECM-ENE_Statewide_Best_Practices_520-1_\(final_5-17-12\).pdf](http://www.mncourts.gov/mncourtsgov/media/scao_library/ENE/ECM-ENE_Statewide_Best_Practices_520-1_(final_5-17-12).pdf) [<https://perma.cc/5VQ6-QXKM>].

41. See *Early Neutral Assessment*, *supra* note 40.

42. *Id.* Notably, parties can choose ENA whether they are counseled or self-represented. *Id.*

43. *Id.*

44. *Id.*

45. Cojudicial, *Early Neutral Assessment*, YOUTUBE (Feb. 14, 2013), <https://www.youtube.com/watch?v=F4vQuj6IYZI> [<https://perma.cc/E5DG-4S5K>].

46. *Id.* (predicting that postdecree modification motions will be much reduced for ENA-resolved cases).

47. See Richard Zorza, *Some First Thoughts on Court Simplification: The Key to Civil Access and Justice Transformation*, 61 DRAKE L. REV. 845, 859 (2013) (noting that “[f]or poor and middle-income people, each hearing or step may represent lost wages, or even the threat of a lost job, as well as incidental travel and childcare expenses”); see also Rebecca Aviel,

3. The Importance of Screening and Triage

In evaluating whether these new programs promote or inhibit access-to-justice values, it is important to understand that they are simply not suitable for all families, and they are not offered with the expectation that every family will participate. In fact, the predicate is the opposite—that the programs only work when matched with families that can benefit from them and that one of the most important functions court staff can perform is the effective sorting necessary to achieve this match.⁴⁸ Screening and triage thus compose the fulcrum upon which family court reform rests.

Family court reformers have learned the importance of screening and triage from experience. The current orientation toward triage represents an evolution from an approach to family court management that could be described as a tiered regime, in which all families move through a sequential phase of services and resolution efforts, supposedly on an increasing spectrum from the least to most intrusive, that escalates to the final stage of litigation where necessary.⁴⁹ Although similarly motivated by the principle that adversarial litigation of family disputes, especially those involving children, is a last resort to be avoided wherever possible, the tiered approach is different from a triage approach in some important ways.⁵⁰ The former is “one-size-fits-all” in the sense that each family moves on the same track, with the effect of shepherding higher-conflict families through interventions that are virtually certain to fail before providing more specialized services tailored to their level of conflict and complexity.⁵¹ Not only is this a waste of resources for the system, but, for the high-conflict families in this category, the lock-step approach slows down their progress toward a final disposition and may even pose risks to their safety. One of the key principles of domestic-relations triage is that families should not undergo services that will not help them; that they should not participate in processes, however salutary

Why Civil Gideon Won't Fix Family Law, 122 YALE L.J. 2106, 2109 (2013) (noting that in family court, “[m]ost litigants want proceedings that are shorter, simpler, cheaper, more personal, more collaborative, and less adversarial”).

48. See Peter Salem, *The Emergence of Triage in Family Court Services: The Beginning of the End for Mandatory Mediation?*, 47 FAM. CT. REV. 371, 383–84 (2009).

49. *Id.* at 372–76. One visual metaphor for this is a staircase: the lowest stair represents services that one might get before even filing an action, such as information available on a website explaining the dissolution process; the middle stairs reflect court intake and mediation; and the top of the staircase represents litigation. See Saini, *supra* note 4.

50. The National Center for State Courts describes the tiered approach as follows:

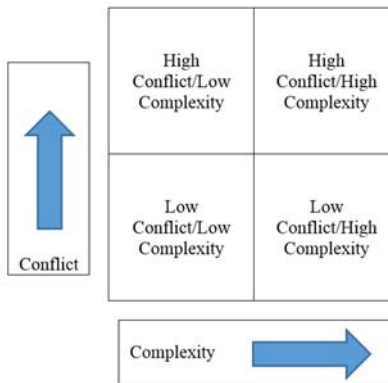
Many courts process divorce cases linearly, each case moving through the same set of prescribed steps. In this model, families are presented with a tiered set of services that specify how a case will move from initial contact with the court through progressively more intrusive and directive services and proceedings. This approach burdens those where both sides are largely in agreement and just want to have the case resolved in timely fashion, while siphoning resources away from families that may truly benefit from enhanced services.

The High Performance Court and Divorce Case Triage, NAT'L CTR. FOR ST. CTS., <http://www.ncsc.org/services-and-experts/areas-of-expertise/children-and-families/divorce-case-triage.aspx> [https://perma.cc/H58J-WVUY] (last visited Mar. 15, 2018).

51. See *id.*

in the abstract, that have no realistic prospect of resolving their dispute.⁵² Correspondingly, under a triage approach, judicial involvement is not withheld until other services have failed; rather, families that require judicial intervention are understood to need it as soon as possible.⁵³

Against this backdrop, family court triage can be understood as an effort to sort litigants by the degree of conflict and complexity presented by their circumstances, with the goal of tailoring court processes accordingly and providing appropriate services as soon as possible.⁵⁴ As the graphic⁵⁵ below suggests, conflict and complexity are distinct concepts and occur independently:



The conflict element is somewhat intuitive as a feature of divorce cases, which involve the dissolution of the most intimate of human relationships. Complexity, on the other hand, might stem from any number of variables in a domestic-relations case, such as marital assets that are difficult to value or partition, prospective relocation for one of the parents, or immigration consequences attendant to the custodial determination.⁵⁶ The presence of either conflict or complexity is likely to drive up the degree of resources necessary to bring a case to resolution, and an effective triage system will have ways of identifying which cases present these features such that litigants can be matched with the appropriate services.⁵⁷

52. Triage might, therefore, mean the end of mandatory mediation. *See generally* Salem, *supra* note 48.

53. *See id.* at 380–81.

54. Kara Martin, Colo. Domestic Relations Triage Project, Presentation at Meeting of the Colorado Supreme Court Standing Committee on Family Issues (Apr. 21, 2017) (PowerPoint on file with the author).

55. *Id.* Alicia Davis of the Nation Center for State Courts granted permission to use this graphic.

56. *Id.*

57. Another expert offers a typology of five different groups of family court litigants, in increasing order of conflict, complexity, and therefore, need. Saini, *supra* note 4. At one end of the spectrum are the “stampers,” who have reached an agreement but need the court to formalize and incorporate it into a decree. *Id.* At the other end are the “intractables”—parties who are severely entrenched in dispute or who exhibit several risk factors for prolonged conflict, and therefore need specialized services to help them arrive at resolution. *Id.* In the middle, we have the “contemplators,” the “nudgers,” and the “entrenchables,” representing

This tailoring is operationalized through intake procedures that seek to elicit from litigants the specific types of information that court staff will need to assess the level of complexity, conflict, and need.⁵⁸ These screening instruments might attempt to discern whether the case presents domestic violence concerns, whether there are pending criminal cases or civil protection orders, whether one of the parties has drained assets from mutual accounts, or whether one spouse has otherwise prevented the other from accessing funds.⁵⁹ They might also seek information about disability or immigration status.⁶⁰ Screening tools vary by jurisdiction—Alaska’s screening instrument, for example, elicits information about potential tribal court jurisdiction that would not need to be front and center for family courts in other states.⁶¹ In some jurisdictions, triage is practiced informally, by individual court administrators bringing to bear their own experiences managing family court dockets.⁶² The practices are widely understood to be essential to the effective management of the system but are not institutionalized or systematized.⁶³

It should be understood that in all of their varied forms, the screening instruments are not simply ministerial, record-gathering exercises. They are the product of decades of experience with domestic-relations litigants as well as input from mental health experts and advocates for domestic violence survivors, and they are constantly being discussed, evaluated, and refined. The efficacy of these tools is, of course, an ever-present concern.

varying degrees of complexity and conflict, requiring different types of assistance from court staff to resolve their disputes. *Id.*

58. See BRIAN J. OSTROM ET AL., THE HIGH PERFORMANCE COURT AND DIVORCE CASE TRIAGE 6–10 (2014), <http://www.ncsc.org/~media/Files/PDF/Services%20and%20Experts/Areas%20of%20expertise/Children%20Families/The-HPC-and-Divorce-Case-Triage-Final-Report-12312014.ashx> [<https://perma.cc/CS3H-PC5F>] (describing how researchers surveyed existing screening instruments).

59. See, e.g., *id.* at 9; Colo. Domestic Relations Triage Project, Triage Tools Currently Used, Presentation at Colorado Domestic Relations Triage Project Workshop (Dec. 1, 2016) (on file with author) (compiling and reviewing existing screening tools used in Connecticut, Alaska, Nebraska, Colorado, Arizona, and Florida).

60. See, e.g., OSTROM ET AL., *supra* note 58, at 9.

61. See Kara Martin, Colo. Courts, Alicia Davis, Nat’l Ctr. for State Courts, Exploration of a Systematized Triage Approach, Presentation at Colorado Domestic Relations Triage Project Workshop (Dec. 1, 2016) (on file with author). In determining whether a case might be inappropriate for its early resolution program, Alaska’s screening instrument seeks to elicit particular information, such as whether there is a tribal court custody case pending; whether there is any dispute about jurisdiction (either as between state court jurisdictions or between state and tribal court); whether there are complicated financial determinations that must be made, such as the ownership of a business that must be partitioned; and whether there is a third-party request for custody from a grandparent or other relative or an assertion by a nonparent that he or she has been functioning as a parent and is the child’s psychological parent. *Id.*

62. *Id.*

63. State court administrators in Colorado gave a presentation providing an overview of domestic-relations triage practices throughout the state, highlighting some of the challenges faced in each jurisdiction. For one sparsely populated district in the state’s mountain west region, one of the chief problems identified was that there was only “one Mary, one Laurie.” *Id.*

Fortunately, as the next Part explains, family law contains within it one of the best possible ways of testing whether a triage system is actually working.

4. Happily Divorced?: Metrics for Judging Performance

Any overview of innovation in family court needs to grapple with the question of evaluation: how do we know whether these programs are working? This, in turn, breaks down into (at least) two related questions: (1) how do we define success and (2) how do we measure for it? Although these questions require more attention than can be given here, this Article briefly discusses two very different ways we might judge performance and then hones in on one particularly important metric.

The first approach for judging performance focuses on the subjective perceptions of individual participants: whether they feel they were treated fairly, had a chance to be heard, and received the information they needed to make progress in the resolution of their case. As summarized by the National Center for State Courts, an institutional leader in the field of domestic-relations triage, “This measure evaluates the extent to which the court is seen by its customers to demonstrate fairness, respect, equal treatment, and concern.”⁶⁴

The second approach focuses on quantitative, system-wide measures of effective case processing, which might include a court’s clearance rate (defined as the number of incoming cases as a percentage of outgoing cases), the age of pending cases, or the average time from filing to disposition.⁶⁵ These metrics help us understand whether courts are managing their dockets effectively and sustainably.

Both subjective and systemic evaluations of family court programs are essential components of any comprehensive evaluation effort, and reformers and administrators are pursuing them assiduously.⁶⁶ There is, however, one exceptionally important metric that bridges these two types of information and offers insight as to both litigant satisfaction and systemic improvement. This metric is the number and timing of postdecree motions filed in a particular case or in a particular jurisdiction. Understanding why this metric is so important is very simple: when families are not happily divorced, they will say so. They will be back in court, presenting either old issues that were not really resolved by the previous disposition or new issues that have emerged from a postdivorce arrangement that is not working.⁶⁷

64. *Giving Courts the Tools to Measure Success*, NAT’L CTR. FOR ST. CTS. (2017), <http://www.courttools.org/~media/Microsites/Files/CourTools/CourToolsOnline-Final.ashx> [<https://perma.cc/MVB2-VMVW>].

65. See Roger Hanson et al., *The Pursuit of High Performance*, INT’L J. FOR CT. ADMIN., Nov. 2010, at 1, 6.

66. See, e.g., BRIAN OSTROM & ROGER HANSON, *ACHIEVING HIGH PERFORMANCE: A FRAMEWORK FOR COURTS* 41 (2010), <https://cdm16501.contentdm.oclc.org/digital/collection/ctadmin/id/1874> [<https://perma.cc/HD6K-M7RQ>] (describing the need to measure both customer satisfaction and institutional efficiency and productivity).

67. The doctrinal foundation for this is a bit more complicated. Essentially, custody orders are not considered final judgments because of the importance of allowing courts to exercise continuing jurisdiction over matters such as child custody and support. See Rebecca Aviel, A

That is why, when the programs described above are being reviewed for efficacy, the evaluations do not just examine the time it takes to bring a case to decree—although that is an important metric, it would not capture whether families are being herded into arrangements that do not really meet their needs. The evaluations also track the number of postdecree motions that are filed in the first two years after the decree, as this is a revealing test of whether a family’s custodial and financial issues were comprehensively and meaningfully resolved in ways that will endure beyond the decree.

The early returns for this most important indicator of success are very good, and I offer here one example. When a jurisdiction in Alaska implemented and then evaluated an early resolution program, a study compared 299 cases that were resolved using the new program to a control group of randomly selected divorce and custody cases that were resolved during a two-year period before the program was implemented.⁶⁸ Importantly, because the control group was comprised of randomly selected cases that were resolved *before* the new program was available, the study was not distorted by the selection effect of having the most potentially cooperative families pulled out of the sample.⁶⁹ Reviewing the results, it is notable that the cases from the early resolution program were resolved three to four times faster than the control-group cases.⁷⁰ But what is truly significant was that there was no material difference in the number of modification motions filed within the first two years after the decree.⁷¹ Thus, the speed with which the early resolution program allowed participants to resolve their cases came at no cost to the long-term viability of the arrangements to which they agreed.

The upshot of the foregoing is that the resolution of family disputes used to resemble other forms of civil litigation but is now undergoing a quiet transformation—a series of small changes that together are significant. In the Part section, this Article considers whether these reforms promote access-to-justice values.

B. An Access-to-Justice Movement?

There is no single universally accepted definition of “access to justice,” and there is robust debate about what it means, both in the scholarly literature and among the reformers and advocates who work on access-to-justice initiatives.⁷² At its core, the concern has always been the inability of low-

New Formalism for Family Law, 55 WM. & MARY L. REV. 2003, 2028–29 (2014) (explaining that the court must be able to revisit custody disputes as necessary to protect the interests of the children involved).

68. Martin & Davis, *supra* note 61.

69. *Id.*

70. *Id.*

71. *Id.*

72. One commenter objects to the very term, asserting that it is “amorphous” and distracting to talk about “justice” when what someone really wants, for example, is a will. Dan Lear, *Lawyers Need to Move to Beyond ‘Access to Justice’ to Close the Legal Services Gap*, A.B.A. J. (Sept. 1, 2015, 8:30 AM), <http://www.abajournal.com/legalrebels/article/lawyers>

and middle-income Americans to afford counsel for civil legal problems and the resulting “pro se crisis” that is overwhelming civil courts.⁷³ The concept has expanded beyond legal representation to encompass a much broader range of strategies to meet the needs of people who cannot afford counsel,⁷⁴ an innovation born in part of necessity. As one scholar has observed, a relentless series of defeats for the idea of a civil right to counsel has necessitated other solutions.⁷⁵ She goes on to articulate a vision for “demand side reform,” describing “an overhaul of the processes and rules that govern litigation so that they best serve the interests of the overwhelming majority of customers in the lower state courts—the unrepresented.”⁷⁶ In a similar vein, others have argued that simplification of court processes is an essential component of any meaningful access-to-justice movement.⁷⁷

As the foregoing descriptions suggest, the innovations in family court are consistent with these concepts of access to justice: if there are not enough lawyers to work the system, then we will change the system so that it relies less on lawyers. But there is something essential missing from that characterization. The new family court was not developed in begrudging acceptance of the reality that a civil right to counsel was never going to materialize; it was envisioned as the *best* way to handle family disputes. In fact, one of the great ironies of family dispute-resolution reform is that the turn toward problem-solving mechanisms and away from adversarial litigation has been most successful for families with means.⁷⁸ This dynamic

[_need_to_move_beyond_access_to_justice_to_close_the_legal_services_g \[https://perma.cc/5RB9-7R9Z\]](https://perma.cc/5RB9-7R9Z).

73. Deborah L. Rhode, *Access to Justice: A Roadmap for Reform*, 41 FORDHAM URB. L.J. 1227, 1228 (2014) (noting that “[o]ver four-fifths of the poor’s legal needs and two- to three-fifths of the legal needs of middle-income Americans remain unmet”). See generally Aviel, *supra* note 47 (compiling sources that address the inability of many civil litigants to afford counsel for serious legal problems). A broader concept includes the sort of phenomena described by Professor Arthur Miller, marking a “retreat from the principles of citizen access, private enforcement of public policies, and equality of litigant treatment in favor of corporate interests and concentrated wealth.” Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 10 (2010).

74. These include unbundled delivery of legal services, self-help centers, the development of forms that guide litigants to provide those facts that will be legally relevant to the resolution of their dispute, and the deployment of inquisitorial judicial practices. See generally Jessica K. Steinberg, *Informal, Inquisitorial, and Accurate: An Empirical Look at a Problem-Solving Housing Court*, 42 LAW & SOC. INQUIRY 1058 (2017).

75. See Jessica K. Steinberg, *Demand Side Reform in the Poor People’s Court*, 47 CONN. L. REV. 741, 746 (2015).

76. *Id.* (“Effective demand side reform would revise the procedural and evidentiary rules that commonly cause pro se litigants to stumble and require judges to develop facts that support established claims and defenses, thus enabling meaningful participation in the court system by those who appear without counsel.”).

77. See, e.g., Zorza, *supra* note 47, at 847–50. In fact, the Center on Court Access to Justice for All has an entire section of its website devoted to the concept that simplification is an access-to-justice principle. Ctr. on Court Access to Justice for All, *Rule and Process Simplification*, NAT’L CTR. FOR ST. CTS., <http://www.ncsc.org/microsites/access-to-justice/home/Topics/Rule-and-Process-Simplification.aspx> [https://perma.cc/Z9DF-AME2]. But see MacDowell, *supra* note 31, at 498 (critiquing “informalism” and “delegalization” in family court).

78. As two commentators note:

offers a twist on Benjamin Barton's exhortation to imagine a legal system that so effectively serves the interests of poor people that it becomes the envy of the rich.⁷⁹

The Center for Out-of-Court Divorce (COCD) in Denver, Colorado, illuminates some of these themes. It started at the University of Denver, subsidized and operated in the model of clinical education, and then after two years transitioned to a free-standing center with the intent to become financially self-sustaining.⁸⁰ Families paid a flat rate for a suite of services that included counseling, access to support groups, financial planning, legal education, mediation of parenting plans and financial issues, and the drafting of documents necessary to formalize the resulting agreements.⁸¹ Couples could choose to have the final hearing, during which their agreements would be converted to a decree, at the COCD instead of in court.⁸² Most COCD

If disputing families have money, they can choose when and how much the court will be involved in their break up and reorganization. Family lawyers now offer clients a range of options for resolving disputes relating to separation and divorce. Given these options, well-resourced parties increasingly choose out-of-court processes such as mediation, negotiation, and collaborative practice to resolve their conflicts without resorting to court involvement—thus reducing the acrimony and avoiding the loss of control and privacy that result from extended court proceedings. Murphy & Singer, *supra* note 4, at 9–10.

79. “[I]magine a world where there are special courts that are set up for the poor that operate so well that they are the envy of the wealthy, who are still using a lawyer-driven model that persists from 17th Century England.” Benjamin H. Barton, *Against Civil Gideon (and for Pro Se Court Reform)*, 62 FLA. L. REV. 1227, 1273–74 (2010).

80. Unfortunately, this business model has presented some unforeseen challenges, and the COCD has had to suspend operations while “changes and refinements are researched that could ensure fiscal stability for a next version of the out-of-court model.” Emily Hastings, *CODC Ceasing Operations as of November 20, 2017*, CTR. FOR OUT-OF-CT. DIVORCE (Nov. 13, 2017), <http://centerforoutofcourtdivorce.org/blog/cocd-ceasing-operations-november-20-2017/> [https://perma.cc/JE5K-TE8J]. While this highlights the importance of financial viability in developing alternative service models for divorcing families, it does not detract from the observations offered here about the extent to which families intentionally sought out, and benefitted from, nonadversarial alternatives, for reasons that go well beyond the extraordinary expense of traditional representation.

81. *Separation and Divorce Services*, CTR. FOR OUT-OF-CT. DIVORCE, <http://centerforoutofcourtdivorce.org/services/> [https://perma.cc/V9CA-LRKM] (last visited Mar. 15, 2018). The legal education component is described as helping couples to [i]dentify marital vs. separate assets and debt; [a]llocate marital assets and debt equitably between the parties; [d]etermine gross monthly incomes; [i]dentify which child-related expenses should be considered when calculating child support; [r]eview the Colorado child support guidelines to determine the recommended child support number; [r]eview the Colorado advisory maintenance guidelines concerning a monthly maintenance amount (formerly known as alimony) and duration; [and] deliver a plan for moving forward as two separate households.

Emily Hastings, *Navigating the Legal Transaction of Divorce*, CTR. FOR OUT-OF-CT. DIVORCE (Sept. 23, 2016), <http://centerforoutofcourtdivorce.org/blog/video-navigating-legal-transaction-divorce/> [https://perma.cc/XNK7-HZC2].

82. Emily Hastings, *Understanding the Out-of-Court Divorce Model: Part Two*, CTR. FOR OUT-OF-CT. DIVORCE (Jan. 31, 2017), <http://centerforoutofcourtdivorce.org/blog/understanding-court-model-part-two/> [https://perma.cc/5DXX-RSUC]; see Andrew Shepard & Rebecca Kourlis, *Redefining Access to Justice for Separating and Divorcing Families*, DISP. RESOL. MAG., Spring 2016, at 22, 25 (observing that “[t]his is, to our knowledge, the first time in American history that a required judicial hearing approving a couple’s final divorce has been held outside a courthouse”).

families were able to complete the dissolution process within ninety to 120 days.⁸³ The fee for a “comprehensive transition package” was \$6500, an amount that is simultaneously minute in comparison to traditional legal fees and yet utterly out of reach for a great many families.⁸⁴

Of the parents who participated in the first two years of the program, 40.6 percent had an undergraduate degree and an additional 26.9 percent had also obtained a graduate degree, combining for an astonishing majority with significant educational attainment.⁸⁵ As for income, 41 percent of the parents participating had individual annual incomes above \$56,000.⁸⁶ Twenty-three percent of all participating parents, in fact, reported individual annual incomes above \$76,000.⁸⁷ These figures bedevil customary assumptions about access to justice because they suggest that family law litigants who can afford to fund their preferences want out of the courthouse.⁸⁸ Scholars who study the lawyer-client relationship have long understood that lawyers shape the behavior of clients rather than just reflecting preexisting client preferences.⁸⁹ The remarkable insight that emerges from the family court context is that prospective clients understand that dynamic, and many of them want to avoid the siren song. One of the COCD clients, reflecting on her experience, explained why she thought that not having a lawyer was actually a benefit in arriving at a satisfactory resolution of her divorce: “During the division of the assets, when I came out thinking I was paying more—and I was, but that’s what was fair and equitable—it was important that I didn’t have somebody in my corner egging me on to fight,” she said. “I could see where this could get ugly if we were in court and represented by people battling for us, rather than having two people who were advocates for both of us and for the family,” she continued.⁹⁰

Family court reform promotes access to justice, but it is a new kind of access to justice. It overlaps substantially with the goals of delivering meaningful “demand-side reform” to low- and middle-income litigants to ameliorate the unfairness of being priced out of the market for legal services,

83. G.M. Filisko, *Model Program Brings Holistic Solutions to Divorce*, A.B.A. J. (Feb. 2015), http://www.abajournal.com/magazine/article/model_program_brings_holistic_solutions_to_divorce [https://perma.cc/Q23Q-XYPL].

84. *Separation or Divorce Support Services*, CTR. FOR OUT-OF-CT. DIVORCE, <http://centerforoutofcourtdivorce.org/services/comprehensive-transition-support/> [https://perma.cc/T3HW-8YP2] (last visited Mar. 15, 2018) (listing the various services provided for the comprehensive \$6500 family fee).

85. See CORNETT ET AL., *supra* note 14, at 16.

86. *Id.* at 16–17.

87. *Id.*

88. See *id.* One testimonial reported that the out-of-court divorce process was a good fit because, “[a]s people who are relatively law abiding, the thought of going into the courthouse and sitting in front of the judge just feels terrifying.” J.P., *Testimonials and Reviews*, CTR. FOR OUT-OF-CT. DIVORCE, <http://centerforoutofcourtdivorce.org/about-us/testimonials/> [https://perma.cc/2MSJ-HTDB] (last visited Mar. 15, 2018).

89. Katherine R. Kruse, *Engaged Client-Centered Representation of the Moral Foundations of the Lawyer-Client Relationship*, 39 HOFSTRA L. REV. 577, 587 (2011) (noting that “clients do not arrive with static and pre-determined objectives to which lawyers can simply defer”).

90. See Filisko, *supra* note 83.

but it also advances goals that are not born out of economic necessity, that are driven by a much more extensive and complex set of ambitions. The difficulty is not so much in accepting that these reforms promote access-to-justice values but in assessing whether they offer any insight into other areas of law. It is that to which we briefly turn next.

II. CAN FAMILY COURT REFORM OFFER INSIGHT FOR OTHER CONTEXTS?

We must start with the recognition that family law is exceptional in some truly significant ways, including the field's central and most pressing charge to protect the interests of children. One of the reasons divorcing spouses might deem it in their interest to work collaboratively to unwind their marriage is that their definition of self-interest includes the well-being of their children. The well-being of children, in turn, rests on their parents' ability to minimize conflict during the divorce proceeding and to coparent effectively afterwards.⁹¹ Other areas of law might also involve litigants who will need to be able to work together or coexist relatively peacefully after the conclusion of their dispute, including disputes pertaining to employment, landlord-tenant relations, and small business partnerships. None of these other areas, however, present the same concerns about vulnerable, dependent, unrepresented third parties being caught at the center of the dispute, and it is difficult to find any persuasive analogue for postdivorce coparenting: a dissolution proceeding involving children restructures but does not truly end the parents' relationship to one another.

Nor is concern for children's interests the only material difference that emerges when comparing family law to other regimes. One of the foundational principles in the law of marital property is the rule that labor performed during marriage is marital labor, and the fruit of marital labor belongs to the marital estate rather than to the individual laboring spouse.⁹² Moreover, except for gifts and inheritances, all property acquired during marriage is marital.⁹³ This means that when divorcing couples drive up the transaction costs of their dissolution, they are depleting the very pot of assets for which they are seeking to obtain a favorable distribution.⁹⁴ The unique interdependent and fiduciary relationship between divorcing spouses is

91. See, e.g., Jana B. Singer, *Dispute Resolution and the Postdivorce Family: Implications of a Paradigm Shift*, 47 FAM. CT. REV. 363, 363 (2009) (“[S]ocial science suggests that children’s adjustment to divorce and separation depends significantly on their parents’ behavior during and after the separation process: the higher the levels of parental conflict to which children are exposed, the more negative the effects of family dissolution.”).

92. *Innerbichler v. Innerbichler*, 752 A.2d 291, 302–06 (Md. Ct. Spec. App. 2000) (holding that the increase in the value of stock acquired by a spouse prior to the marriage was marital property because the increase was the result of the spouse’s efforts during the marriage); see Brett R. Turner, *Active Appreciation: Second-Tier Managers*, 22 EQUITABLE DISTRIBUTION J. 1, 1 (2005) (“Equitable distribution theory provides that all value created during the marriage by the active efforts of one or both spouses constitutes marital property.”).

93. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS, *supra* note 27, § 4.03.

94. I have detailed this phenomenon in earlier work. See Aviel, *supra* note 3, at 1110–11.

reflected and reinforced by a growing trend of mandatory mutual financial disclosures that diverge significantly from other forms of civil discovery.⁹⁵ With regard to both their children and their assets, then, divorcing spouses have incentives to cooperate that other litigants might not have.

However, some of what is exceptional about family law cuts in the other direction, meaning that it does not necessarily promote collaborative problem-solving approaches. As anyone who has ever lived in a family or known one can attest, the emotional valence that attends family disputes sometimes lends itself all too well to an adversarial posture and the kind of conflict that is not constrained by rational self-interest. We want to be careful not to romanticize family court as some sort of mystical terrain of alternative dispute resolution where people are uniquely inclined to work collaboratively and forgo opportunities for aggressive adversarial process. While this Article does not go so far as to treat “amicable divorce” as one of the “great oxymorons” of family law,⁹⁶ it notes the wry observation here because it is a useful reminder that divorcing spouses who choose to work collaboratively to unwind their marriage may be overcoming a great deal of anger, resentment, betrayal, and antagonism to leverage their shared interest in avoiding litigation.

Perhaps most importantly, in assessing whether the reforms reshaping family court might yield insights for other contexts, we need to emphasize that speed and cost are among the interests that family litigants repeatedly and overwhelmingly invoke as among their highest priorities.⁹⁷ Domestic-relations litigants are willing to knowingly and voluntarily forgo the opportunity to deploy doctrinal principles that might increase their take in return for a faster, smoother, more certain resolution. To provide one example, the statutes that govern the distribution of marital property typically instruct that among the factors courts should take into account in arriving at an equitable allocation is the contribution of each party to the marital estate.⁹⁸ One can readily see how spouses might litigate the issue of contribution to increase their share, introducing evidence to substantiate the claim that their contribution was more than 50 percent and that it would thus be equitable to award them more than half of the marital property. Every divorcing spouse who agrees to an equal distribution of marital property under such a scheme is waiving the opportunity to persuade the court that their particular circumstances warrant more than half of the assets. As noted throughout,

95. *See, e.g.*, COLO. R. CIV. P. 16.2(e) (“Parties to domestic relations cases owe each other and the court a duty of full and honest disclosure of all facts that materially affect their rights and interests and those of the children involved in the case. The court requires that, in the discharge of this duty, a party must affirmatively disclose all information that is material to the resolution of the case without awaiting inquiry from the other party. This disclosure shall be conducted in accord with the duty of candor owing among those whose domestic issues are to be resolved under this Rule 16.2.”).

96. *See* Patrick L. Baude, *One Lawyer for the Family: A Response to Alysa Rollock*, 73 IND. L.J. 601, 603 (1998).

97. *See, e.g.*, Munro et al., *supra* note 21, at 440–41.

98. *See, e.g.*, UNIF. MARRIAGE & DIVORCE ACT § 307 (UNIF. LAW. COMM’N 1973) (alternative B).

there are very good reasons for divorcing spouses to do that. The point is that family litigants, for all their other specialized qualities, face a tension between efficiency and individualized justice that is commonly present in other contexts as well.

With this very summary comparison as a backdrop, what might we then emphasize in thinking about how family court reform could transfer to other contexts? This Article offers a few preliminary thoughts. First, the transformation taking place in family court is not in any way a replacement regime.⁹⁹ Not only does the system still offer a traditional, adversarial resolution of financial and custodial issues, but either party can demand it. To put the point in reverse, only when both parties agree to simplified dissolution or early resolution do these programs initialize. While this means that there will inevitably be some loss of efficiency, when a party irrationally vetoes one of these alternatives under circumstances in which it would be optimal, that element of mutual consent seems like an important attribute of reform that is access enhancing rather than access inhibiting.

Second, and closely related, the procedural reforms of the post-no-fault era have not changed the substantive entitlements. As noted above, the law casting a shadow over a couple's divorce negotiation still identifies contribution as an element in marital property distribution. The entitlement that confers—however unpredictable and indeterminate—is still available to spouses who choose to pursue it. Divorcing spouses waive out of these principles on the basis of a calculation of self-interest, as bounded and defined by the family relationships that are being restructured. Those who choose not to waive the right to invoke such principles are under no compulsion to do so.¹⁰⁰

That brings us to the last and most important insight: “fit the forum to the fuss,” that hoary adage of alternative dispute resolution, is an internal command.¹⁰¹ In trying to “expedite, streamline, and rationalize,”¹⁰² it is not sufficient, and can in fact be terribly inapt, to think about categories of like cases—whether it be divorce, landlord-tenant, or otherwise—and then to design a set of procedures that applies inflexibly to all the cases within.¹⁰³ The cases on either side of the domestic-relations spectrum, although they will each result in judgments of dissolution resolving the couple's financial affairs, hardly resemble each other. On one end are couples with brief marriages, few assets, and no kids, who literally do not have to show up,

99. Nora Freeman Engstrom, *A Dose of Reality for Specialized Courts: Lessons from the VICP*, 163 U. PA. L. REV. 1631, 1640 (2015) (defining a “replacement regime” as one that displaces and makes unavailable prior systems).

100. Although they will, of course, still face the difficulty of affording the high costs of legal representation to meaningfully litigate these issues, which this Article acknowledges is itself a coercive dynamic.

101. See generally Frank E.A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEGOT. J. 49 (1994).

102. Engstrom, *supra* note 99, at 1636.

103. See Jason Parkin, *Due Process Disaggregation*, 90 NOTRE DAME L. REV. 283, 285 (2014) (describing “identifiable clusters of individuals in a particular context whose procedural needs are different from those of the majority”).

bringing new meaning to the term “mailing it in.” On the other end of the spectrum, we might have any number of different circumstances. If one parent is accusing the other of intimate partner violence, there may be civil protection orders pending and a collateral criminal proceeding awaiting resolution. Child welfare agencies may be involved if there are concerns that the children are at risk for abuse or neglect. Perhaps the couple owns a business together that will require a professional valuation prior to partition. There may be immigration issues triggering consequences under federal law.¹⁰⁴ The possibilities for conflict and complexity abound, as they can in any context that involves human relationships.

What the new family court can teach the rest of the world is that simplification is an essential component of access-enhancing reforms but that not all cases are amenable to it, and that systems must be designed around that recognition. We must judge the system on how well it differentiates, rather than treating the complex and challenging cases as some sort of unexpected anomaly that prevents the system from achieving its goals.¹⁰⁵

104. See generally *De Guardado v. Guardado Menjivar*, 901 N.W.2d 243 (Minn. Ct. App. 2017).

105. See generally Richard Zorza, *The Access to Justice “Sorting Hat”: Towards a System of Triage and Intake That Maximizes Access and Outcomes*, 89 DENV. U. L. REV. 859 (2012).