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## ARTICLES

### Toward a Coherent Approach to Tort Immunity in Judicially Mandated Family Court Services

BY NAT STERN\* & KAREN OEHME\*\*

Child custody litigation is a notorious emotional and legal morass. Its problems are exacerbated in high-conflict cases, those ten to twenty percent of disputes<sup>1</sup> that consume a “wildly disproportion-

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<sup>1</sup> Family court cases are the “largest and fastest growing segment of state court civil caseloads.” AM. BAR ASS’N [hereinafter ABA], UNIFIED FAMILY COURTS: A PROGRESS REPORT 7 (1998) [hereinafter PROGRESS REPORT]. Domestic relation cases represent twenty-five percent of all civil filings. *Id.* (citing ABA, AN AGENDA FOR JUSTICE: ABA PERSPECTIVE ON CRIMINAL AND CIVIL JUSTICE ISSUES 5 (1996)). Because of the differing definitions involved, empirical determinations of the exact number of high-conflict families have not been made. Commentators estimate,

ate”<sup>2</sup> amount of court resources and constitute a “major social, economic, and public health problem.”<sup>3</sup> While researchers have not adopted a uniform definition of parental conduct characterizing high-conflict custody cases, oft-cited behaviors include mutual distrust, intense anger, blame, and refusal to cooperate concerning the needs of their children.<sup>4</sup> These and other volatile parental behaviors,<sup>5</sup> combined with eagerness to pursue repetitive litigation,<sup>6</sup> have led courts to reexamine traditional models for family dispute resolution and to identify components necessary to reduce conflict.

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however, that ten to twenty percent of the divorcing population can be classified as high-conflict. *See, e.g.,* ELEANOR E. MACOBY & ROBERT H. MNOOKIN, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY* 140 (1992) (noting that ten percent of couples in authors’ study experienced “substantial” conflict, and fifteen percent reported “intense” conflict). In reviewing the existing literature, Johnston and Roseby estimate that “about one fourth of all divorcing couples with children have considerable difficulty completing the legal divorce without extensive litigation”; perhaps one fifth of families have “intractable” disputes and relitigate custody issues after divorce. JANET R. JOHNSTON & VIVIENNE ROSEBY, *IN THE NAME OF THE CHILD: A DEVELOPMENTAL APPROACH TO UNDERSTANDING AND HELPING CHILDREN OF CONFLICTED AND VIOLENT DIVORCE* 4 (1997). Canadian authorities estimate that the numbers are similar in Canada. *See* Special Joint Committee of the Canadian Parliament on Joint Custody and Access, *For the Sake of the Children*, Chapter 5, at <http://www.parl.gc.ca/InfocomDoc/36/1/SJCA/studies/reports/sjcarp02/12-Ch1-e.htm> (last visited Oct. 11, 2003).

<sup>2</sup> Andrew Schepard, *Canada’s Re-Examination of Its Child Custody System: A Model?*, N.Y. L.J., Sept. 15, 1999, at 3; *see also* Judith S. Kaye & Jonathan Lippman, *New York State Unified Court System: Family Justice Program*, 36 *FAM. & CONCILIATION CTS. REV.* 144, 144 (1998) (noting that the “skyrocketing caseloads—particularly significant in the areas of termination of parental rights, adoption, custody and visitation, child support, paternity, and neglect and abuse—are not likely to diminish”).

<sup>3</sup> Thomas E. Schacht, *Prevention Strategies To Protect Professionals and Families Involved in High-Conflict Divorce*, 22 *U. ARK. LITTLE ROCK L. REV.* 565, 565 (2000).

<sup>4</sup> *See, e.g.,* 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, 455 (2000) [hereinafter Johnston, *Building Partnerships*].

<sup>5</sup> Other characteristics include allegations of abuse and neglect, allegations of domestic violence, inability or unwillingness to communicate, and interference with the other parent’s right of access to the child. *Id.*

<sup>6</sup> *See, e.g.,* Sarah H. Ramsey, Rep., *The Wingspread Report and Action Plan: High Conflict Custody Cases: Reforming the System for Children*, 39 *FAM. CT. REV.* 146, 146 (2001).

We believe that a missing element in most discussions about child custody litigation and the new court models is the option of affording greater legal protection to those who provide the essential components of conflict reduction. The protections that currently exist on a fragmented continuum—granting judges absolute immunity from civil suit, and some but not other professionals and para-professionals qualified immunity<sup>7</sup>—represent a patchwork that ignores recent trends in court-directed services and threatens to undermine crucial assistance to divided families. This Article recommends that a more consistent and reasoned system of statutory immunities replace the current arrangement. This system would reflect recognition that the expanded role of courts in response to the public health threat of high-conflict families calls for a commensurate expansion in the scope of immunities available to those who assist courts in the reduction of conflict. By dispelling the specter of unwarranted suits by vindictive parents against providers of court-mandated services, states would enhance the capacity of the emerging family court model to perform its most vital function: protecting the best interest of the child.

Part I of the Article offers an overview of the dynamics of high-conflict cases.<sup>8</sup> Part II surveys the range of protections currently available to various participants in the resolution of these cases.<sup>9</sup> Part III proposes a framework for determining the degree of immunity to which a participant should be entitled.<sup>10</sup> Part IV then applies that framework to the example of supervised visitation programs, for which the national trend is the development of standards of practice.<sup>11</sup> Once such standards have crystallized, we argue, these programs' staff, interns, and community workers should receive protection from civil liability<sup>12</sup> similar to the protections offered to others who serve children and families in crisis.

## I. THE NATURE OF HIGH-CONFLICT CASES

Although courts have not embraced a formal definition of a “high-conflict” custody case,<sup>13</sup> judges, lawyers, and mental health professionals

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<sup>7</sup> See *infra* Part II.

<sup>8</sup> See *infra* notes 13–46 and accompanying text.

<sup>9</sup> See *infra* notes 47–175 and accompanying text.

<sup>10</sup> See *infra* notes 176–209 and accompanying text.

<sup>11</sup> See *infra* notes 210–301 and accompanying text.

<sup>12</sup> Consideration of potential criminal liability lies beyond the scope of this Article.

<sup>13</sup> Nor is it necessary, in our view, to formalize a definition. The law is replete with terms that serve useful purposes but are considered not susceptible to precise

apparently believe that they “know it when they see it.”<sup>14</sup> One researcher believes that a salient feature of high-conflict couples is their “enmeshment derive[d] from their inability to separate and realistically grieve the loss of the marriage relationship.”<sup>15</sup> The intense rage and bitterness that characterize some couples’ entrenched disputes lead outsiders to ask what these parents are fighting about. One answer includes:

1. Profound mistrust of [the] ex-spouse’s parenting skills, which frequently includes allegations and accusations of abuse, mistrust, and poor judgment.
2. Parenting time and access to the children.
3. Behavior problems that the children are displaying and [the issue of] who is to blame for these problems.
4. Being disparaged by the other parent to the point of being convinced that the children are being “poisoned” or “brainwashed.”<sup>16</sup>

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definition. *See, e.g.*, Sherman Antitrust Act, 15 U.S.C. § 1 (2002) (forbidding “combination[s] . . . in restraint of trade or commerce among the several states”); 21 U.S.C. § 334(a)(1)(B) (2002) (authorizing Secretary of Food and Drug Administration to institute multiple proceedings for misbranded food or drug where Secretary has probable cause to believe article is “dangerous to health”); *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969) (forbidding classifications penalizing constitutional right to travel “unless shown to be necessary to achieve a *compelling* governmental interest”), *overruled in part by Edelman v. Jordan*, 415 U.S. 651 (1974).

<sup>14</sup> *Cf. Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (stating of hard-core pornography that “I know it when I see it”). Four researchers from the Department of Pediatrics at East Tennessee State University distributed to professionals who deal with family conflict in their work a questionnaire on these respondents’ perceptions of divorce. In a section asking whether guidelines were needed to define high-conflict divorce, those respondents “who did not recommend guidelines believed it is not possible to define high conflict divorce, that it can change over time, and it is already easily determined.” H. Patrick Stern et al., *Professionals’ Perceptions of Divorce Involving Children*, 22 U. ARK. LITTLE ROCK L. REV. 593, 597 (2000).

<sup>15</sup> Johnston, *Building Partnerships*, *supra* note 4, at 456. Johnston and Vivienne Roseby write:

In sum, high-conflict parents are identified by multiple, overlapping criteria: high rates of litigation and relitigation, high degrees of anger and distrust, incidents of verbal abuse, intermittent physical aggression, and ongoing difficulty communicating about and cooperating over the care of their children at least two to three years following the separation.

JOHNSTON & ROSEBY, *supra* note 1, at 5.

<sup>16</sup> MITCHELL BARIS ET AL., *WORKING WITH HIGH CONFLICT FAMILIES OF DIVORCE: A GUIDE FOR PROFESSIONALS* 15, 16 (2001).

Researchers disagree whether the term “high-conflict family” should include cases involving domestic violence or whether, because of the erroneous implication of mutual blame, the term should instead be limited to repetitive litigation.<sup>17</sup>

Regardless of the specific definition, however, the psychological impact of high conflict and domestic violence on the children can be devastating. There seems to be considerable consensus on the effect of high-conflict cases: chronic post-separation conflict “seriously harm[s] the children involved.”<sup>18</sup> Certainly the impact of domestic violence on children is well-documented.<sup>19</sup> Children whose parents have been embroiled in extended custody litigation have reportedly shown increased aggression, heightened depression, somatic complaints, and maladaptive ways of coping in interpersonal relationships.<sup>20</sup> The more overt the conflict, the more troubled the children are likely to be.<sup>21</sup> Several authors have gone so

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<sup>17</sup> See Andrew Schepard, *The Evolving Judicial Role in Child Custody Disputes: From Fault Finder to Conflict Manager to Differential Case Management*, 22 U. ARK. LITTLE ROCK L. REV. 395, 413 (2000) [hereinafter Schepard, *Evolving Judicial Role*]. As many researches have explained, domestic violence—while involving conflict—is about the control and abuse by a batterer, and the parties are not on equal footing. See, e.g., AM. PSYCHOLOGICAL ASS’N, REPORT OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION PRESIDENTIAL TASK FORCE ON VIOLENCE AND THE FAMILY 82 (1996) (noting that the typical batterer uses violence to meet needs for power and control over others: “[t]heir actions are often fueled by stereotypical sex-role expectations for ‘their’ women”). For this reason, the term high-conflict itself must be qualified, to avoid blaming victims of domestic violence. Still, it is well-established that batterers often seek to control their victims through the court system: fathers who batter the mother are twice as likely to contest custody as non-batterers. *Id.* at 40. Battering fathers are even more likely to dispute custody when the family includes sons. *Id.*

<sup>18</sup> Ramsey, *supra* note 6, at 146.

<sup>19</sup> AM. PSYCHOLOGICAL ASS’N, *supra* note 17, at 21 (“A substantial body of research suggests that experiencing or observing violence in the home may be the start of a lifelong pattern of using violence to exert social control over others . . .”). Victims of domestic violence, of course, should not be blamed for their batterers’ behavior.

<sup>20</sup> Janet R. Johnston et al., *Ongoing Postdivorce Conflict: Effects on Children of Joint Custody and Frequent Access*, 59 AM. J. ORTHOPSYCHIATRY 576, 588–89 (1989).

<sup>21</sup> *Id.* There also seems to be a gender-based difference in the impact of post-divorce conflict, with girls suffering more emotional and behavioral trauma, and boys experiencing disruptions in social competence and school performance. *Id.* at 589.

far as to contend that children in high-conflict custody cases may suffer psychological abuse, and have recommended that clinical criteria be modified to reflect the high likelihood of child abuse among this population.<sup>22</sup>

The potential irreparable damage to children of chronically litigious parents may perpetuate conflict in the next generation, producing adults who cannot properly parent or function well in society.<sup>23</sup> Alarmed by the

<sup>22</sup> 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, 336 (2000). The authors suggest developing a Diagnostic and Statistical Manual format to define criteria of parental behavior raising suspicions of child psychological abuse. *Id.* at 348. The authors offer the following suggestions for major and minor criteria to be considered. Major criteria would include the following:

1. A parent initiates recurrent court hearings especially to contest custody, visitation, and/or finances.
2. A parent engages in dangerous behavior that threatens the physical safety of the child.

....

4. A parent has a history of physical and/or sexual abuse and/or violent behavior which occurred before or after the divorce.
5. There is concrete objective evidence of a parent trying to purposely turn a child against another parent, stepparent, or sibling.

....

8. A parent kidnaps a child.

*Id.* app. III, at 353. Minor criteria would include the following:

1. Parents unable to settle their divorce without a court hearing.
2. A parent threatens physical and/or emotional violence to other family members.

....

4. A parent refuses to engage in an evaluation or therapy. . . .
5. A parent consistently has a child unavailable or significantly late for the exchange at visitation.

*Id.* app. II, at 353. While we are sympathetic to the frustration and concern that obviously motivated the authors' provocative proposals, our Article does not support the use of a "high-conflict syndrome," because it does not sufficiently address domestic violence. We believe that one of the problems with the use of a "high-conflict syndrome" is that it could potentially be invoked to punish domestic violence victims by claiming that they are failing to protect their children who witness the violence of the abusive parent. For a discussion of the problem with allegations of a "failure to protect" as a means of child maltreatment, see Randy H. Magen, *In the Best Interests of Battered Women: Reconceptualizing Allegations of Failure to Protect*, 4 CHILD MALTREATMENT 127, 128 (1999) (arguing that such a definition is dangerous to battered women, and noting that in at least four states, child neglect has been expanded to include witnessing domestic violence).

<sup>23</sup> BARIS ET AL., *supra* note 16, at 15–16.

devastation caused by acrimonious divorce litigation and forced to find legal and judicial resolutions to the complex personal and social problems presented in custody disputes, the courts and family bar have proposed (and in some instances enacted) several solutions aimed at the reduction of conflict. These efforts, as one author has noted, have transformed the judge's role from fault finder to conflict manager.<sup>24</sup> As Professor Chayes argued a generation ago, "[O]ur traditional conception of adjudication . . . provide[s] an increasingly unhelpful, indeed misleading framework for assessing either the workability or the legitimacy of the roles of judge and court within this model."<sup>25</sup> Indeed, if we examine what courts are increasingly doing "in fact"<sup>26</sup> in disputed custody cases, we must acknowledge that the traditional models of family litigation and immunity protections are sorely antiquated.

Although there have been many approaches to resolving child custody disputes, the most comprehensive of these may be the unified family court movement. This movement "combines the essential elements of traditional family and juvenile courts into one entity"; it also urges courts to provide social service resources thought to play a vital role in resolving families' problems.<sup>27</sup> These courts are "designed to dispense therapeutic justice in an effort to address the personal and social issues that drive families into court,"<sup>28</sup> and they have many "opportunities to intervene in the lives of individual family members."<sup>29</sup>

The unified family court system recognizes that the most distressed families are those involved in overlapping litigation. For example, a husband and wife in a protracted custody and divorce action may also be accused of abuse or neglect by the juvenile protection system, and their children may be involved in a juvenile delinquency action. In order to

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<sup>24</sup> Schepard, *Evolving Judicial Role*, *supra* note 17, at 400.

<sup>25</sup> Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1282 (1976). Professor Chayes was discussing the changes occurring in public law litigation. We believe, however, that his observations on the appropriateness of a revised model to accommodate an expanded judicial role apply to the family court setting as well.

<sup>26</sup> *Id.* Chayes quotes Holmes's admonition to focus on "'what the courts will do in fact, and nothing more pretentious.'" *Id.* at 1281–82 (quoting Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897)).

<sup>27</sup> ABA, PROGRESS REPORT, *supra* note 1, at 8; *see also* Kaye & Lippman, *supra* note 2, at 144 (arguing that unified family courts are more responsive to troubled families).

<sup>28</sup> Stephen J. Cribari, *Unified Family Courts: Therapeutic Power and Judicial Authority*, UFC CHRON. (ABA Communities, Family & Justice System Project), Spring 1999, at 1.

<sup>29</sup> *Id.* at 7.



reduce the fragmentation that results from several courts' dealing with the same family, the unified family court system seeks to coordinate all judicial intervention.<sup>30</sup> In some views, the central principle of the unified family court is that a single judge handles all matters relating to a particular family.<sup>31</sup> More than just case management, though, the unified family court approach<sup>32</sup> includes "support teams" providing comprehensive services for children and families.<sup>33</sup> These teams screen and evaluate families, and link them to court and community resources to deal with substance abuse, violence, mental health issues, and other impediments to a couple's restructuring of their relationship.<sup>34</sup> In describing why litigants' traditional goals—enforcing rights and pursuing remedies<sup>35</sup>—are not suited to family courts, the president of the Atlanta Bar Association endorsed the unified family court approach:

Families are not business entities. Their needs are not best served by a system that is adversarial in nature and designed to produce a winner and a loser . . . . Where the needs of families are involved, our community desperately needs a system that will help them solve their underlying problems, not just one where competition between litigants is the driving force . . . .<sup>36</sup>

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<sup>30</sup> *But cf.* Elizabeth Barker Brandt, *The Challenge to Rural States of Procedural Reform in High Conflict Custody Cases*, 22 U. ARK. LITTLE ROCK L. REV. 357 (2000) (arguing that rural courts may face a more difficult time than their urban counterparts in enacting reform).

<sup>31</sup> Andrew Schepard, *Introduction to the Unified Family Courts*, N.Y. L.J., Apr. 16, 1997, at 3 [hereinafter Schepard, *Introduction*].

<sup>32</sup> For a state-by-state survey of family courts, listing those jurisdictions that have adopted a unified family court approach, see ABA, PROGRESS REPORT, *supra* note 1, at 13–38.

<sup>33</sup> See Schepard, *Introduction*, *supra* note 31, at 3. However, "there is no 'cookie-cutter' definition of a unified family court." UNIFIED FAM. CHRON. (ABA Communities, Families & Justice System Project), July 1998, at 1.

<sup>34</sup> See Schepard, *Introduction*, *supra* note 31, at 3. The ABA has endorsed the availability of such services to unified family courts. See ABA, PROGRESS REPORT, *supra* note 1, at 10. In addition, the ABA has recommended that the office of the family court administrator serve as a liaison to agencies that provide services such as counseling and mediation, and that unified family courts include community outreach programs such as parenting classes and programs addressing sexual abuse and alcohol and drug addiction. *Id.*

<sup>35</sup> Deborah B. Zink, *Family Court: It Just Makes So Much Sense*, ATLANTA LAW., Aug. 1997, reprinted in UNIFIED FAM. CHRON. (ABA Communities, Families & Justice System Project), Aug. 1997, at 2, 3.

<sup>36</sup> *Id.*

Solutions besides the “one-stop shopping” approach<sup>37</sup> have been promoted to deal with high-conflict families.<sup>38</sup> Some of these call for enhanced training for judges, attorneys, and mental health professionals on the dynamics and effects of high conflict and violence, while others advocate an array of special services that should be “available to all families, without regard to income” in order to identify and resolve conflicts effectively.<sup>39</sup> As in the unified family court model, these programs and services include alternative dispute resolution (such as mediation and collaborative law), custody evaluations, parenting monitors, coordinators to manage chronic disputes, trained children’s representatives, individual and group mental health treatment, and supervised visitation.<sup>40</sup> The common objectives of these models, summarized in the American Bar Association’s (“ABA’s”) Wingspread Report, are to “reduce conflict, assure physical security, provide adequate support services to reduce harm to children, and enable the family to manage its own affairs.”<sup>41</sup> This approach is consistent with the trend toward “therapeutic jurisprudence,” defined by the concept’s co-founders<sup>42</sup> as “an interdisciplinary approach to law that builds on the basic insight that law is a social force that has inevitable . . . consequences for the mental health and psychological functioning of those it affects.”<sup>43</sup> The concept may be best known as a means to describe the criminal justice system’s efforts to seek therapeutic solutions—such as treatment and therapy—in drug court cases.<sup>44</sup> Commen-

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<sup>37</sup> See Stephanie Domitrovich, *Utilizing an Effective Economic Approach to Family Court: A Proposal for a Statutory Unified Family Court in Pennsylvania*, 37 DUQ. L. REV. 1, 2 (1998) (advocating the “one-stop convenient shopping” approach as efficient and sensible).

<sup>38</sup> See, e.g., Ramsey, *supra* note 6, at 152 (discussing in depth the interdisciplinary recommendations proposed for the legal and mental health systems to reduce the impact of high-conflict custody cases on children).

<sup>39</sup> *Id.* Ramsey supports the latter approach.

<sup>40</sup> *Id.* Other writers have added substance abuse monitoring, batterers’ treatment programs, and victim’s advocacy to the list. See, e.g., Johnston, *Building Partnerships*, *supra* note 4, at 478.

<sup>41</sup> Ramsey, *supra* note 6, at 147.

<sup>42</sup> DAVID B. WEXLER & BRUCE J. WINICK, *ESSAYS IN THERAPEUTIC JURISPRUDENCE* (1991); see also *PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION* (Dennis P. Stolle et al. eds., 2000) [hereinafter *PRACTICING THERAPEUTIC JURISPRUDENCE*].

<sup>43</sup> Dennis P. Stolle et al., *Integrating Preventive Law and Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering*, in *PRACTICING THERAPEUTIC JURISPRUDENCE*, *supra* note 42, at 7.

<sup>44</sup> See, e.g., David Shichor & Dale Sechrest, *Introduction*, J. DRUG ISSUES, Winter 2001, at 5 (stating that drug courts are premised on the idea that supervised substance abuse treatment may form a “criminal justice alternative to traditional

tators, however, have praised the application of therapeutic jurisprudence and its “healing potential”<sup>45</sup> in family court, and indeed, in cases across the entire legal spectrum.<sup>46</sup>

## II. EXISTING PROTECTIONS

The models championed by the ABA and states that have adopted court reform in family law endorse judicial reliance on a “team approach” and encourage “outreach to social services providers and volunteers.”<sup>47</sup> These providers include an entire cadre of professionals and para-professionals who ideally collaborate with the court to address disputes of high-conflict families and perform neutral services that courts deem necessary.<sup>48</sup> Some believe that the court should be a “sparkplug for mobilizing private sector and volunteer resources”<sup>49</sup> to help troubled families. Apparently, it does “take a village”<sup>50</sup> to help courts assist some parents in resolving addiction

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punishment”); see also Jeffrey S. Tauber, *Therapeutic Jurisprudence Holds Potential for Drug Offenders*, ALCOHOLISM & DRUG ABUSE WKLY., Dec. 24, 2001, at 5 (discussing the challenges of applying therapeutic jurisprudence in criminal settings).

<sup>45</sup> Elizabeth Schwartz, Book Review, *Practicing Therapeutic Jurisprudence: Law as a Helping Profession*, FLA. B.J., Jan. 2002, at 66; see also *In re The Report of the Family Court Steering Comm’n*, 794 So. 2d 518 (Fla. 2001). This court adopts the recommendations of the Family Court Steering Committee, which states: “Therapeutic justice should be a key part of the family court process. Therapeutic justice is 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.* app. at 537.

<sup>46</sup> See WEXLER & WINICK, *supra* note 42, at x; see also Stolle et al., *supra* note 43, at 10 (advocating therapeutic jurisprudence in business planning law and elder law, as well as family law). *But see* Morris B. Hoffman, *Therapeutic Jurisprudence, Neo-Rehabilitationism, and Judicial Collectivism: The Least Dangerous Branch Becomes Most Dangerous*, 29 FORDHAM URB. L.J. 2063, 2088 (2002) (arguing that “[t]he therapeutic jurisprudence movement requires us to become the kind of involved, hands-on, right-thinking, sure-footed activists that the judicial branch was specifically designed to exclude”).

<sup>47</sup> ABA, PROGRESS REPORT, *supra* note 1, at 3.

<sup>48</sup> Mitchell Baris and his co-authors propose a “Parenting Coordinator,” a term which would “include all those individuals who work to help parents in high conflict resolve their impasses so life can move on and their children can be reasonably free from stress and anxiety.” BARIS ET AL., *supra* note 16, at 10.

<sup>49</sup> Schepard, *Introduction*, *supra* note 31, at 3.

<sup>50</sup> See, e.g., Patricia Barnes, *It May Take a Village . . . : Or a Specialized Court to Address Family Problems*, A.B.A. J., Dec. 1996, at 23; see generally HILLARY

and dysfunction and to work together to create new parenting skills. These stewards of at-risk children strive to answer the court's call to help parents forge a constructive partnership in an ongoing relationship fundamentally altered by events such as separation, divorce, remarriage, and blended families, and by the potentially enormous challenges that these changes create.

Inherent in these collaborative measures is an admonition against measures that could increase conflict<sup>51</sup> and a call for "holding all parties [in disputed custody cases] accountable for their contributions to the conflict."<sup>52</sup> Largely left out of the bar's equation, however, is a call for a legislatively created, cohesive scheme to protect those very people on whom judges will depend to help reduce conflict.<sup>53</sup> The need for such protection arises from the nature of the "perpetual war zone"<sup>54</sup> in which the disputing parents—called "hostility junkies" by one commentator<sup>55</sup>—can quickly focus their substantial animosity on other participants in the dispute.

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RODHAM CLINTON, *IT TAKES A VILLAGE, AND OTHER LESSONS CHILDREN TEACH US* (1996).

<sup>51</sup> Ramsey, *supra* note 6, at 147. As the preamble of the Wingspread report states,

High-conflict 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.

*Id.* at 146; *see also* Linda D. Elrod, *Reforming the System to Protect Children in High Conflict Custody Cases*, 28 WM. MITCHELL L. REV. 495, 518 (2001) (listing "numerous improvements that could reduce conflict," including "hold[ing] all parties accountable for their contributions to the conflict").

<sup>52</sup> Elrod, *supra* note 51; *see also* Ramsey, *supra* note 6, at 147.

<sup>53</sup> This Article does not address the issue of reporting child abuse. Most states have created statutes that provide immunity from liability to persons required to report child abuse, unless the report was false and the person knew it was false. *See, e.g.*, CAL. PENAL CODE § 11172 (2001).

<sup>54</sup> Schepard, *Evolving Judicial Role*, *supra* note 17, at 418.

<sup>55</sup> Ann Milne & Jay Folberg, *The Theory and Practice of Divorce Mediation: An Overview*, in *DIVORCE MEDIATION: THEORY AND PRACTICE* 17 (Ann Milne & Jay Folberg eds., 1988) (quoting Hugh McIsaac, *Mediation of Child Custody and Visitation Disputes*, Conference Remarks, Vallambrosa Retreat, Menlo Park, Cal. (Sept. 1981)).

*We illustrate the problem throughout with a fictitious couple*<sup>56</sup>: Mr. and

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<sup>56</sup> Although Mr. and Mrs. Smith's case is purely fictitious, the couple's disputes are not unprecedented in case law. The following is a short sampling of facts alleged in family court cases. *G.T.R. v. U.D.R.*, 632 So. 2d 495 (Ala. Civ. App. 1993) was a case involving modification of a divorce judgment granting custody. The father alleged that the mother's boyfriend, who became her husband, sexually abused the son. *Id.* at 496. The father threatened the mother, suggesting a desire for retribution. *Id.* The father accused the mother of child and animal abuse. *Id.* The father reported to police that the child was taken from daycare, sexually abused, and then returned to daycare. *Id.* The police investigated and charges were dropped. *Id.* Criminal charges resulting from another accusation of sexual abuse were dismissed by the grand jury. *Id.* The father sent a letter to a United States Senator, the Governor of Alabama, and the Alabama Attorney General regarding his accusations of sexual abuse. *Id.* Testimony indicated that the father had a violent temper, carried a gun, had a history of alcohol abuse, had received psychological counseling, and was taking antidepressants. *Id.* at 496-97. The father assaulted the mother in 1991. *Id.* at 497. The father filed a complaint with military officials that the mother had threatened his life. *Id.* In another case, *Winalski v. Winalski*, No. FA 900439823, 1999 Conn. Super. LEXIS 367 (Conn. Super. Ct. Feb. 16, 1999), the court concluded, after an eight-year battle, that "[t]he parents of these children are responsible for making the lives of these children very unhappy, immature and anxiety-ridden, and [the parents] are now reaping the damaged fruits of their labors." *Id.* at \*18. The mother called the police several times, claiming harassment by the father. *Id.* The mother alleged that she needed the court to set boundaries because of the father's violence, gun possession, and inappropriate behavior concerning her safety. *Id.* The court noted:

The [couple's] multiple motions, and earlier allegations of sexual abuse, physical abuse within the marital relationship, emotional abuse, and claims of subversion of the father-child relationship track the most compelling and difficult cases which come before the court in family matters. The court cannot resurrect the lives of these children, and the demeanor of the parties and at least one of their spouses in the courtroom proved their complete unwillingness to hear each others' concerns and work toward collaboration or resolution. These children are being emotionally abused on a continuum by their parents.

*Id.* at \*2-\*3. In *Lori W.C. v. Franklin H.D.*, No. CN93-10367, 1999 Del. Fam. Ct. LEXIS 94 (Del. Fam. Ct. Feb. 3, 1999), the father challenged the mother's allowing their child to see R-rated movies and her leaving the child home alone at night. *Id.* at \*13. The father provided testimony that the mother's behavior was fine while she had a boyfriend, but that there were other times when she "goes off" and lost control both in person and on the phone. *Id.* at \*20-\*21. The father tape recorded eight different calls over a period of one and a half hours; the court characterized the calls as suggestive of "psychological distress." *Id.* at \*21-\*22. At times the daughter could be heard crying in the background. *Id.* at \*21. The father

*Mrs. Smith. Mr. Smith, after five years of marriage, has filed for divorce and alleges that Mrs. Smith is unfit to maintain residency of the couple's young children, Jessie, age two, and John, age four. He contends that she is an alcoholic and has used excessive corporal punishment—resulting in bruising and scarring—which amounts to child abuse under state law. Mrs. Smith denies the accusation, and alleges that Mr. Smith is a recreational drug user who has suffered from bouts of severe depression during the marriage. Mrs. Smith files for temporary sole custody of the children. During the hearing on her motion, Mrs. Smith accuses Mr. Smith of having an affair with her best friend. The judge denies Mrs. Smith's motion for relief and notes that she suspects Mrs. Smith of trying to punish her hus-*

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alleged that the mother called him a loser, alcoholic, and drug abuser in front of the child. *Id.* at \*22. The mother raised the issue of the father's sleeping in the same bed as the child, keeping her dependent on him, and calling the child his "little wife"; she also asserted that the child drew a picture of the father naked after he took her into a male locker room at the YMCA. *Id.* at \*13–\*14. The mother argued that the father's home was not as appropriate as her home, because the father lived with his mother and stepfather. *Id.* at \*12. The mother further accused the father of being jealous of her time with the child and of showing up at different locations during her time with the child. *Id.* at \*20. *Schweinberg v. Click*, 627 So. 2d 548 (Fla. Dist. Ct. App. 1993), involved a mother's accusation that the father allowed his mother to belittle the couple's son, who had cerebral palsy, and to pull his hair and hit him. *Id.* at 551. The mother accused the father of preventing her from visiting their children in retaliation for her reporting the episode to the Department of Health and Rehabilitative Services. *Id.* The mother further alleged that the father threatened to place the couple's son in an institution and to prevent the mother from seeing the children. *Id.* In response, the father asserted that he refused overnight visitation only because the mother's current husband was a felon convicted of lewd and lascivious behavior on a female child and had been under fifteen years of court supervision. *Id.* As a final example, *Dickison v. Dickison*, 874 P.2d 695 (Kan. Ct. App. 1994), dealt with a child who had received psychiatric treatment. The parents were then warned that the child would probably develop a "severe character disorder" if he were not protected from the legal and emotional turmoil resulting from a custody battle. *Id.* at 696. Nevertheless, the battle only escalated. The father accused the mother of not providing adequate food, clothing, and supervision, and frequently apologized to the son for who his mother was. *Id.* The child mistreated the mother and continued to accuse her of sexual abuse. *Id.* Evidence indicated that the father instigated and encouraged this behavior in the child. *Id.* The mother accused the father of trying to destroy her relationship with the child. *Id.* These allegations are extremely troubling to courts, who must sift through them and determine their validity. Such a herculean task requires a deep understanding of complex issues, including sexual abuse, substance abuse, domestic violence, and mental illness.

*band by keeping the children from him. The judge orders temporary joint custody. Mrs. Smith files a civil complaint pro se against the judge.*

### A. Judicial Immunity

In bringing an action against the judge, Mrs. Smith will immediately encounter the common law doctrine of judicial immunity, which protects judges in every state.<sup>57</sup> Parents involved in protracted custody disputes are a famously unhappy group. Some researchers postulate that parents embroiled in custody litigation are narcissistic, may have personality disorders or blaming orientations,<sup>58</sup> and were dysfunctional prior to the separation.<sup>59</sup> When judges make decisions that parents feel are unfair, unreasonable, and damaging to themselves and their children, the parents may first direct their anger toward those judges. They quickly discover, however, that the doctrine of absolute judicial immunity,<sup>60</sup> which has long protected judges from civil suits,<sup>61</sup> will frustrate their intentions. Absolute judicial immunity is immunity from suit, not just from an ultimate assessment of damages,<sup>62</sup> and judges may be protected even if their acts are corrupt or intentionally harmful.<sup>63</sup> When judges render decisions in their judicial capacity—even conspiring with a party to violate another party's

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<sup>57</sup> For a thorough treatment of judicial immunity, see Jeffrey M. Shaman, *Judicial Immunity from Civil and Criminal Liability*, 27 SAN DIEGO L. REV. 1 (1990).

<sup>58</sup> See, e.g., Sanford M. Portnoy, *Effectively Representing the Unreasonable Client*, FAM. L. SEC. COMMENTATOR (Fla. Bar Ass'n, Tallahassee, Fla.), Sept. 2003, at 22.

<sup>59</sup> Johnston, *Building Partnerships*, *supra* note 4, at 456.

<sup>60</sup> See Shaman, *supra* note 57, at 5 (stating that "judicial immunity protects all judges, from the lowest to the highest court, so long as they are performing a judicial act that is not clearly beyond their jurisdiction").

<sup>61</sup> See, e.g., *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347 (1872) (noting that although unfairness and injustice to a litigant may occasionally result, there are compelling policy reasons for judicial immunity).

<sup>62</sup> See, e.g., *Mireles v. Waco*, 502 U.S. 9 (1991) (per curiam). Waco, a public defender, alleged that Judge Mireles violated his constitutional rights when Mireles ordered the police to seize Waco forcibly and to bring Waco into the courtroom after he failed to appear for the calling of the judicial calendar. *Id.* at 10. Judicial immunity was upheld. *Id.* at 13.

<sup>63</sup> See, e.g., *Slavin v. Curry*, 574 F.2d 1256, 1264 (5th Cir.) (holding that judge was immune from suit by plaintiff who alleged that judge had participated in altering the transcript and had wrongfully cancelled his bond), *modified by* 583 F.2d 779 (5th Cir. 1978), *overruled in part by* 604 F.2d 976 (5th Cir. 1979).

constitutional rights—they are protected from suit, unless they act in the “clear absence of all jurisdiction over the subject matter.”<sup>64</sup> Thus, when an Alabama judge settled a dispute over possession of the marital home in the husband’s favor on condition of the husband’s undergoing a vasectomy, the judge was held immune from the husband’s suit.<sup>65</sup>

The egregiousness of any particular case notwithstanding, the rationale for judicial immunity is grounded in sound public policy. The Supreme Court in 1872 enumerated these reasons in *Bradley v. Fisher*.<sup>66</sup> A judge must be “free to act upon his own convictions without fear of personal consequences”;<sup>67</sup> the competing interests in a case before a court make it likely that the losing party may be overly willing to ascribe malevolent motives to the judge;<sup>68</sup> judges faced with the prospect of defending damages actions and satisfying money judgments will be driven to wasteful self-protection and may be less inclined to administer justice;<sup>69</sup> alternative remedies such as appeal and impeachment reduce the need for private rights of action against judges;<sup>70</sup> and the ease of alleging bad faith will make qualified “good-faith immunity” virtually worthless because judges will be constantly forced to defend their motives in court.<sup>71</sup> When considered against the backdrop of difficult, emotionally volatile, and protracted custody cases, these considerations point to the continued vitality of judicial immunity today.<sup>72</sup>

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<sup>64</sup> See, e.g., *Dykes v. Hosemann*, 776 F.2d 942, 943 (11th Cir. 1985) (finding that, because the judge had jurisdiction, he was immune from suit despite allegedly conspiring with a father prior to dependency hearing to declare the child dependent). But see *Pulliam v. Allen*, 466 U.S. 522 (1984) (holding that judicial immunity did not bar defendants’ claim for injunctive relief against judge for wrongful incarceration and violation of civil rights under 42 U.S.C. § 1983); David R. Cohen, Note, *Judicial Malpractice Insurance? The Judiciary Responds to the Loss of Absolute Judicial Immunity*, 41 CASE W. RES. L. REV. 267, 280 (2000) (noting that injunctive relief against judges, as well as assessment of attorney’s fees, are exceptions to judicial immunity).

<sup>65</sup> *Scott v. Hayes*, 719 F.2d 1562, 1567 (11th Cir. 1983).

<sup>66</sup> *Bradley*, 80 U.S. (13 Wall.) at 335.

<sup>67</sup> *Id.* at 347.

<sup>68</sup> *Id.* at 348.

<sup>69</sup> *Id.* at 349.

<sup>70</sup> *Id.* at 350.

<sup>71</sup> *Id.* at 354.

<sup>72</sup> But see K.G. Jan Pillai, *Rethinking Judicial Immunity for the Twenty-first Century*, 39 HOW. L.J. 95, 99 (1995) (proposing a system of personal liability for judges).



In cases subsequent to *Bradley v. Fisher*, the United States Supreme Court<sup>73</sup> and several lower federal courts<sup>74</sup> extended the notion of common-law immunity to several other participants in the judicial process, whose functions were defined as “integral”<sup>75</sup> to that process. State courts followed the federal example, and granted judicial or quasi-judicial immunity to non-judicial court participants including psychologists, child protective workers, and social workers.<sup>76</sup> In those cases, state courts used the federal function analysis<sup>77</sup> to find that some participants who were not governmental employees nonetheless constituted agents of the court.

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<sup>73</sup> See, e.g., *Buckley v. Fitzsimmons*, 509 U.S. 259, 269 (1993) (examining the function the judge serves in the situation when determining whether to extend judicial immunity); *Forrester v. White*, 484 U.S. 219, 227 (1988) (stating that “immunity is justified and defined by the *functions* it protects and serves, not by the person to whom it attaches”); *Harlow v. Fitzgerald*, 457 U.S. 800, 810 (1982) (emphasizing the “‘functional’ approach” to immunity law); *Butz v. Economou*, 438 U.S. 478, 513 (1978) (stating that a federal hearing officer is “‘functionally comparable’ to . . . a judge”).

<sup>74</sup> See, e.g., *Myers v. Morris*, 810 F.2d 1437, 1466–67 (8th Cir. 1987) (extending absolute immunity to a psychologist, guardian ad litem (“GAL”), and attorney who were appointed to fulfill quasi-judicial responsibilities under court direction in a child abuse case); *Mills v. Killebrew*, 765 F.2d 69, 70 (6th Cir. 1985) (upholding the District Court’s decision to apply the function test and to grant the court-appointed mediator absolute quasi-judicial immunity); *In re Scott County Master Docket*, 672 F. Supp. 1152, 1174 (D. Minn. 1987) (granting qualified quasi-judicial immunity to child protective services caseworkers), *aff’d sub nom. Meyers v. Scott County*, 868 F.2d 1017 (8th Cir. 1989).

<sup>75</sup> *Myers*, 810 F.2d at 1467.

<sup>76</sup> See, e.g., *Lythgoe v. Guinn*, 884 P.2d 1085, 1093 (Alaska 1994) (finding court-appointed psychologist in custody dispute to be protected by absolute quasi-judicial immunity); *Seibel v. Kemble*, 631 P.2d 173, 177–79 (Haw. 1981) (deeming psychiatrist appointed by the court as protected by absolute judicial immunity for performing functions essential to the court process); *Delbridge v. Schaeffer*, 569 A.2d 872, 880–82 (N.J. Super. Ct. 1989) (finding psychologist, adoption resource center, and child placement review board to be protected by quasi-judicial immunity in child custody evaluation dispute), *aff’d sub nom. A.D. v. Franco*, 687 A.2d 748 (N.J. App. Div. 1993).

<sup>77</sup> See *Briscoe v. LaHue*, 460 U.S. 325, 335 (1983) (noting that “the common law provided absolute immunity from subsequent damages liability for all persons—governmental or otherwise—who were integral parts of the judicial process”). The right to quasi-judicial immunity depends on the actor’s connection to the judicial process. The court in *Kurzawa v. Mueller*, 732 F.2d 1456 (6th Cir. 1984) extended absolute quasi-judicial immunity to psychiatrists and social workers involved in terminating parental rights, emphasizing that the defendants served functions integral to the judicial process. *Id.* at 1458.

As described in the following section, some professionals involved in disputed custody cases have enjoyed protection conferred by courts on an ad hoc basis or by state legislatures that have by statute cloaked these participants with absolute or qualified quasi-judicial immunity. These reforms, however, have given rise to two new problems. First, while the recognition of family conflict and the need for its reduction are constant and universal,<sup>78</sup> only some states have passed immunity statutes for a few common participants in high-conflict cases. The recent trend is for many *other* participants to be called to assist the court with determining the child's best interest and reducing the family's conflict. For example, courts and some legislatures have been quick to bestow immunity on participants such as court-appointed special advocates ("CASAs"), who frequently come under fire from angry parents.<sup>79</sup> At the same time, a host of other service providers,<sup>80</sup> whose help judges enlist frequently and creatively in high-conflict cases,<sup>81</sup> still enjoy no statutory or judicially created immunity. Secondly, leaving the immunity decisions to judges, who must use the function analysis test on a case-by-case basis only after parents file vin-

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<sup>78</sup> See, e.g., Ramsey, *supra* note 6, at 147; see also Leigh Goodmark, *From Property to Personhood: What the Legal System Should do for Children in Family Violence Cases*, 102 W. VA. L. REV. 237, 239 (2000) ("It has almost become trite to declare that violence against women is an epidemic in the United States.").

<sup>79</sup> See *Bluntt v. O'Connor*, 737 N.Y.S.2d 471, 479 (N.Y. App. Div.), *appeal denied*, 98 N.Y.2d 605 (2002) (holding that absolute immunity was necessary for GALs); *Falk v. Sadler*, 533 S.E.2d 350, 353–54 (S.C. Ct. App. 2000) (holding the guardian immune and stating that "[i]t is the nature of the acts, not simply the status of the . . . guardian ad litem, that determines . . . immunity"). *But see* Holly Marie McIntyre, *Fleming v. Asbill: South Carolina Guardian Ad Litem not Immune from Civil Liability*, 29 CREIGHTON L. REV. 1711, 1712 (1996) (discussing *Fleming v. Asbill*, 42 F.3d 886 (4th Cir. 1994), where the court found GALs not to be immune from a negligence action). For a discussion of GAL and CASA immunities, see *infra* Part II.D.

<sup>80</sup> We use the example of the supervised visitation and monitored exchange workers who serve courts in nearly every state, but there are others. The Supervised Visitation Network's ("SVN") website includes a directory of service providers listing hundreds of supervised visitation programs across the U.S. and abroad. See SVN, *Directory of Service Providers*, at <http://www.svnetwork.net/ServiceProviders.html> (last updated Sept. 18, 2003). We describe supervised visitation at length in Part IV.A of this Article.

<sup>81</sup> Therapeutic re-contact clinicians, therapeutic reunification clinicians, and emergency case stabilizers are a few of the specialized roles mentioned in Lynn M. Kenney & Diana Vigil, *A Lawyer's Guide to Therapeutic Interventions in Domestic Relations Court*, 28 ARIZ. ST. L.J. 629, 637 (1996).

dictive lawsuits, raises questions about the proper judicial role; as one judge put it, “[l]aws should be created by legislation, not by litigation.”<sup>82</sup> In addition, such an ad hoc approach also threatens to overwhelm the workload of an “already beleaguered judiciary.”<sup>83</sup>

### B. Immunity for Mediators: A Spectrum of Standards

*The judge presiding in the Smith case orders the couple to mediation to allow them an opportunity to settle their differences and work out a mutually agreeable parenting plan. Each parent files at least three motions for relief before the mediation session. Mr. Smith’s request to waive mediation is denied. During a lengthy mediation session, Mr. Smith becomes enraged at the mediator, accusing her of bias in favor of his wife. He signs a mediation agreement, but later asserts that he was given excessively restricted access to their children under the agreement and that he was coerced to sign the document. Armed with these allegations, he files a suit against the mediator.*<sup>84</sup>

The basic tenet of domestic relations mediation is that the adversarial process should not be used to decide questions of marital property division

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<sup>82</sup> Howard v. Drapkin, 222 Cal. App. 3d 843, 867–68 (Cal. App. Ct. 1990) (Danielson, J., concurring and dissenting) (“When it is necessary, or desirable, as a matter of public policy to extend judicial immunity to persons who would otherwise . . . not enjoy it the Legislature has the power and the right to do so . . . . Profound changes in our laws, such as the majority seek to make, should be forged in the proven and legitimate crucible of the legislative process. . . . Laws should be created by legislation, not by litigation.”). The majority had held “that the justification for giving judicial and quasi-judicial immunity . . . to court-appointed persons . . . [as well as] nonappointed persons . . . applies with equal force to these neutral persons who attempt to resolve disputes.” *Id.* at 858–59.

<sup>83</sup> George S. Mahaffey, Jr., *Role Duality and the Issue of Immunity for the Guardian Ad Litem in the District of Columbia*, 4 J.L. & FAM. STUD. 279, 299 (2002) (arguing that the District of Columbia should create statutory immunity for GALs).

<sup>84</sup> Mediator liability based on accusations of professional negligence arises under tort law.

Malpractice claims . . . require proof on four elements: (1) A duty owed to the participants by the mediator, (2) a breach of the duty by failure to comply with acceptable standards of practice, (3) damages measurable in money, and (4) a causal relationship between the failure to exercise an acceptable standard of practice and the alleged damages.

Jay Folberg, *Liability of Divorce Mediators*, in *DIVORCE MEDIATION: THEORY AND PRACTICE*, *supra* note 55, at 345.

and child custody.<sup>85</sup> Mediation in family court cases, “a process in which disputing parties select a neutral third party to assist them in reaching a mutually satisfying agreement,”<sup>86</sup> is often considered essential for conflict resolution in child custody cases.<sup>87</sup> Some studies have suggested, however, that when parties have a history of high personal conflict over low-value resources or visits with children, mediation may not be successful.<sup>88</sup>

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<sup>85</sup> See Carol J. King, *Burdening Access to Justice: The Cost of Divorce Mediation on the Cheap*, 73 ST. JOHN’S L. REV. 375, 377 (1999):

The adversary system works by emphasizing the differences between the litigants, and by advancing each litigant’s wishes by attacking the merits of the other’s position. In order to work as designed, divorce litigation actually polarizes the divorcing couple. After trial the adversaries need to rebuild their relationship so as to remain partners and parents to their children. This goal is unlikely to be achieved in a system that operates on the general assumption that the trial court judgment actually ends the case, and also ends the relationship between the disputants, when in fact it does neither.

See also LENARD MARLOW, *DIVORCE MEDIATION: A PRACTICE IN SEARCH OF A THEORY* 1–8 (1997). For a thorough discussion of mediation in the context of family disputes, see CONNIE J.A. BECK & BRUCE D. SALES, *FAMILY MEDIATION: FACTS, MYTHS, AND FUTURE PROSPECTS* (2001).

<sup>86</sup> Kara C. Utzig, *Entering the Debate on Spousal Abuse Divorce Mediation: Safely Managing Divorce Mediation When Domestic Violence Is Discovered*, 7 BUFF. WOMEN’S L.J. 51, 53 (1999).

<sup>87</sup> See, e.g., Andrew Kaplan, *The Advantages of Mediation in Resolving Custody Disputes*, 23 RUTGERS L. REC. 5, ¶2 (1999) (explaining that “[m]ediation is an enticing alternative to litigation when resolving visitation and custody disputes”); see also Jessica Pearson & Nancy Thoennes, *Mediation and Divorce: The Benefits Outweigh the Costs*, FAM. ADVOC., Winter 1982, at 26 (touting the benefits of mediation). *But see* Kerry Loomis, Comment, *Domestic Violence and Mediation: A Tragic Combination for Victims in California Family Court*, 35 CAL. W. L. REV. 355, 360 (1999) (noting that while mediation is often a sound alternative to divorce proceedings, most states provide domestic violence victims with exemptions from compulsory mediation). For a discussion of the reasons to avoid mediation in domestic violence cases, see Barbara Hart, *Gentle Jeopardy: The Further Endangerment of Battered Women and Children in Custody*, MEDIATION Q., Summer 1990, at 317; and Sarah Krieger, Note, *The Dangers of Mediation in Domestic Violence Cases*, 8 CARDOZO WOMEN’S L.J. 235 (2002).

<sup>88</sup> John Wade, *Don’t Waste My Time on Negotiation and Mediation: This Dispute Needs a Judge*, MEDIATION Q., Spring 2001, at 267. The author argues that “[i]t may be that the extended conflict is both causal and symptomatic of the inability to negotiate,” and that “[s]uch disputes arguably need to be diagnosed early and directed toward the bullying style of mediation, med-arb, or an umpire.” *Id.*

Conflict itself may provide a “meaning to life”<sup>89</sup> for some litigants; still, mediation is a “key element of domestic court policy throughout much of the United States.”<sup>90</sup>

Along with a nationwide trend toward creating standards governing mediators’ conduct,<sup>91</sup> many states have developed statutory provisions that grant mediators at least some immunity from civil liability. Even in states that have adopted immunity for mediators, however, the approach is far from uniform. In North Carolina, Florida, West Virginia, and Indiana, for example, mediators enjoy absolute immunity in the same manner and to the same extent as a family court judge.<sup>92</sup> In many other states, legislation protects mediators with qualified immunity from civil liability.<sup>93</sup> Qualified

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<sup>89</sup> *Id.*

<sup>90</sup> Jennifer P. Maxwell, *Mandatory Mediation of Custody in the Face of Domestic Violence: Suggestions for Courts and Mediators*, 37 FAM. & CONCILIATION CTS. REV. 335, 337 (1999); see also Kaplan, *supra* note 87, at 5 (explaining that “[m]ediation is an enticing alternative to litigation when resolving visitation and custody disputes”).

<sup>91</sup> See generally Bobby Marzine Harges, *Mediator Qualifications: The Trend Toward Professionalization*, 1997 BYU L. REV. 687; Dana Shaw, Comment, *Mediation Certification: An Analysis of the Aspects of Mediator Certification and an Outlook on the Trend of Formulating Qualifications for Mediators*, 29 U. TOL. L. REV. 327 (1998). The American Arbitration Association, the American Bar Association, and the Society of Professionals in Dispute Resolution collaborated in developing Model Standards of Conduct for Mediators, which are reprinted in the *Journal of The National Association of Administrative Law Judges*, 17 J. NAT’L ASS’N OF ADMIN. L. JUDGES 323 (1997).

<sup>92</sup> FLA. STAT. ANN. ch. 44.107 (West 2002). Although a civil action may not be brought against a mediator, mediators who violate the Standards of Professional Conduct, FLA. R. MEDIATORS 10.200–10.690 (West 2003), are subject to sanction under the Rules of Discipline established by the Florida Supreme Court, FLA. R. MEDIATORS 10.700–10.900 (West 2003). See also IND. CODE ANN. § 4-21.5-3.5-4 (Michie 1996); N.C. GEN. STAT. § 7A-38.1 (2002) (providing, however, that mediators can be disciplined in accordance with rules developed by the state’s Supreme Court); W. VA. R. PRAC. & FAM. CT. 45 (Michie 2003). *But see* Amanda K. Esquibel, *The Case of the Conflicted Mediator: An Argument for Liability and Against Immunity*, 31 RUTGERS L.J. 131, 140 (1999) (arguing that “given the position of trust that the mediator occupies, the mediator is also in a position to harm the participants through contractual or tortious breaches”); Jennifer L. Schulz, *Mediator Liability in Canada: An Examination of Emerging American and Canadian Jurisprudence*, 32 OTTAWA L. REV. 269, 273 (2001) (arguing that mediator immunity is unnecessary in Canada because there are “no pressing reasons” for such immunity).

<sup>93</sup> See Cassondra E. Joseph, *The Scope of Mediator Immunity: When Mediators Can Invoke Absolute Immunity*, 12 OHIO ST. J. ON DISP. RESOL. 629, 661–62 (1997).

immunity protects defendants in the good-faith exercise of their duties but does not extend to acts made in bad faith or with malice.<sup>94</sup> In Arizona, for example, mediators do not have the cloak of absolute judicial immunity; instead, they are immune “except for those acts or omissions that involve intentional misconduct or reckless disregard of a substantial risk of a significant injury to the rights of others.”<sup>95</sup> Similarly, in Colorado, the liability of mediators is “limited to willful or wanton misconduct.”<sup>96</sup>

These protections exist even though some commentators have criticized the extension of judicial immunity to providers of alternative dispute resolution<sup>97</sup> and have noted that the term “mediation” describes many types of interventions. For example, mediations may follow the labor management model, the legal model, the therapeutic model, or the communication and information model.<sup>98</sup> Whatever the approach used, commentators disagree as to whether mediation actually “transform[s] hostile couples into cooperative ones,”<sup>99</sup> and some have complained that “research cannot indicate whether mediation . . . is more effective than a nonspecific placebo treatment.”<sup>100</sup> Still, many jurisdictions are eager to find ways to offer, and in some cases mandate, alternatives to traditional litigation<sup>101</sup> in an effort

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<sup>94</sup> See *id.* at 640.

<sup>95</sup> ARIZ. REV. STAT. ANN. § 12-2238 (West 2003). See also ALASKA STAT. § 47.12.450 (Michie 2002) (protecting mediators at community dispute resolution centers); DEL. CH. CT. R. 174 (2003) (“Designated mediators shall be immune from civil liability for or resulting from any act or omission done or made while engaged in efforts to assist or facilitate a mediation, unless the act or omission was made or done in bad faith, with malicious intent, or in a manner exhibiting a willful, wanton disregard of the rights, safety, or property of another.”). In South Carolina, mediators “shall not be liable to any person for any act or omission in connection with any mediation conducted under [Family Court mediation] rules.” S.C. ALT. DISPUTE RESOL. 8(i) (2001).

<sup>96</sup> COLO. REV. STAT. ANN. § 13-22-305(6) (West 2002).

<sup>97</sup> See, e.g., Kevin C. Gray, Case Comment, *Torts—Wagshal v. Foster: Mediators, Case Evaluators, and Other Neutrals—Should They Be Absolutely Immune?*, 26 U. MEM. L. REV. 1229, 1249 (1996) (arguing that the “best method of assuring the quality of the neutrals and the ADR Services they provide is to make the neutrals civilly liable for their actions and allow them the common law defenses that already exist”).

<sup>98</sup> BECK & SALES, *supra* note 85, at 9.

<sup>99</sup> *Id.* at 165.

<sup>100</sup> *Id.* at 164.

<sup>101</sup> See Kaplan, *supra* note 87, ¶ 7 (“It is frequently noted that judges are unhappy and uncomfortable making custody determinations.”).

to restore the equilibrium in the family<sup>102</sup> and to avoid turning children into victims of litigation.<sup>103</sup> While the traditional system of winner and loser in litigation is in many cases inadequate in dealing with the emotional world of divorcing parents, mediation may be the first step in stabilizing families coping with divorce.

### C. Immunity for Child Investigators

*Mr. Smith contacts the state's child protection agency and reports that John has come from his mother's house with a large bruise on his back. He suspects that Mrs. Smith's new boyfriend beat John. Mr. Smith gives to the responding investigator a list of fifteen people whom he wants her to interview about the case. When the investigator closes the case without interviewing those on the list, stating that there is no evidence of abuse, Mr. Smith files a complaint for negligence. The complaint alleges that the investigator failed to investigate adequately the allegation of physical abuse.*

Legislatures almost uniformly recognize the importance of immunity for those who investigate and report on claims of abuse and neglect. In some instances, the statute is couched in sweeping terms.<sup>104</sup> Even where protection appears to be somewhat more qualified, statutes typically grant immunity for statements made in good faith.<sup>105</sup>

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<sup>102</sup> *Id.* ¶ 3 (noting that “mediation for child custody will make a significant contribution to the restoration of equilibrium in the family and serve the best interest of children”).

<sup>103</sup> *Id.* ¶ 6 (stating that “when children are involved in the adversarial process of divorce they typically become victims”).

<sup>104</sup> *See, e.g.*, IND. CODE ANN. § 31-33-6-1 (West 2003); 2003 MD. LAWS ch. 308, § 5-708; MICH. COMP. LAWS ANN. § 722.625(5) (West 2002) (exempting from immunity negligent acts that cause injury or death); MINN. STAT. ANN. § 626.556(4) (West 2003); MISS. CODE ANN. § 43-15-125 (2003) (extending immunity to the officers, employees, and representatives of the state agency that investigates child abuse and licenses foster homes); MONT. CODE ANN. § 41-3-203(1) (2002) (exempting from immunity acts that are grossly negligent or in bad faith); NEB. REV. STAT. § 28-716 (2002) (exempting from immunity “maliciously false statements”); N.Y. SOC. SERV. LAW § 419 (McKinney 2003) (exempting from immunity acts of willful misconduct or gross negligence).

<sup>105</sup> *See, e.g.*, ALA. CODE § 26-14-9 (2003); ARK. CODE ANN. § 12-12-517 (Michie 2003); HAW. REV. STAT. § 350-3 (LEXIS 2002); 325 ILL. COMP. STAT. ANN. § 5/9 (West 2001); KAN. STAT. ANN. § 38-1507(k) (2002) (giving immunity where information is provided “without malice”); LA. CIV. CODE ANN. art. 611 (West 1995); ME. REV. STAT. ANN. tit. 22, § 4014 (West 2003); N.J. STAT. ANN.

Where courts are called upon to interpret the scope of immunity, they commonly find immunity “necessary to protect social workers in their vital work from the harassment of civil suits.”<sup>106</sup> Recognizing that a social worker’s independence “would be compromised were [she] constantly in fear that a mistake could result in a time-consuming and financially devastating civil suit,”<sup>107</sup> courts have resisted parents’ attempts to make social workers a “lightning rod for harassing litigation.”<sup>108</sup> In other cases, courts have focused not on the needs of court-appointed workers, but instead on the welfare of the *children* involved:

The welfare of the state’s children would be jeopardized if social workers had to weigh their decision in terms of their potential personal liability. In short, the denial of absolute immunity here has the potential to adversely affect the efficient functioning of the state’s child welfare system. Additionally, the chances are high that suits against the social workers would occur with some degree of regularity. Parents, resentful of and humiliated by an attempt to usurp their rights, would likely channel their frustration “into the ascription of improper and malicious actions to the State’s advocate.”<sup>109</sup>

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9:6-8.29 (West 2003); N.D. CENT. CODE § 50-25.1-09 (2003); OHIO REV. CODE ANN. § 2151.3523 (West 2003); 23 PA. CONST. STAT. ANN. § 6318 (West 2003); S.C. CODE ANN. § 20-7-545 (Law. Co-op. 2002); UTAH CODE ANN. § 62A-4a-410(1) (2003); VA. CODE ANN. § 63.2-1512 (Michie 2003); W.VA. CODE § 49-6A-6 (2003); WIS. STAT. § 48.981(4) (2003); WYO. STAT. ANN. § 14-3-209 (Michie 2002).

<sup>106</sup> *Alicia T. v. County of Los Angeles*, 222 Cal. App. 3d 869, 881 (Cal. Ct. App. 1990) (granting social workers who performed investigative tasks related to child abuse allegations absolute immunity from suit).

<sup>107</sup> *Meyers v. Contra Costa County Dep’t of Soc. Servs.*, 812 F.2d 1154, 1157 (9th Cir. 1987) (holding “that social workers are entitled to absolute immunity in performing quasi-prosecutorial functions connected with the initiation and pursuit of child dependency proceedings”).

<sup>108</sup> *Coverdell v. Dep’t of Health Servs.*, 834 F.2d 758, 765 (9th Cir. 1987) (holding that a social worker who carries out judicial order in child apprehension case is granted absolute quasi-judicial immunity).

<sup>109</sup> *Vosburg v. Dep’t of Soc. Servs.*, 884 F.2d 133, 137 (4th Cir. 1989) (quoting *Imbler v. Pachtman*, 424 U.S. 409, 425 (1976)) (holding that social workers are absolutely immune from liability arising from their role in filing a removal petition); *see also Jenkins v. County of Orange*, 212 Cal. App. 3d 278, 287 (Cal. Ct. App. 1989) (asserting that refusal to hold social worker absolutely immune from suits arising out of worker’s effort to protect child “would indirectly eliminate



D. CASAs and GALs: A Welter of Protections

*If the judge presiding over the Smith case is concerned about the couple's children, she may appoint a CASA to make recommendations regarding the children's best interest.*

Communities across the United States have developed a variety of programs to provide advocacy for children in court proceedings. Many of these programs use CASAs, who are known in some jurisdictions as guardians ad litem ("GALs"); under either name, most are members of the National Court Appointed Special Advocate Association, which trains community volunteers to act as officers of the court.<sup>110</sup> These volunteers also make recommendations as to a child's best interest in litigation.<sup>111</sup> Courts can appoint lawyers to act as GALs,<sup>112</sup> although the role of the so-called law guardian has been described as hybrid of "attorney/advocate and investigator/proponent."<sup>113</sup> Both CASAs and law guardians have been granted immunity by legislatures and courts because they promote the child's best interest.<sup>114</sup>

CASAs are widely considered to be necessary to protect children.<sup>115</sup> Although the concept of a child advocate has its roots in abuse-neglect

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the protection afforded to children"); *Martin v. Children's Aid Soc'y*, 544 N.W.2d 651, 656 (Mich. Ct. App. 1996) ("The threat of a suit like this one could make any social worker back off from making discretionary decisions that he or she would otherwise believe to be in the child's best interest.") (quoting CAS defendant's brief).

<sup>110</sup> See Michael S. Piraino, *Law Representation of Abused and Neglected Children*, 1 J. CENTER FOR CHILD. & CTS. 63, 68 (1999).

<sup>111</sup> *Id.* at 66.

<sup>112</sup> *Id.* (noting that federal legislation allows a GAL to be "a lawyer, a court appointed special advocate, or both").

<sup>113</sup> *Bradt v. White*, 740 N.Y.S.2d 777, 781–82 (2002); see also *id.* at 781 (noting that the law guardian's responsibility is to "determine the child's best interests and the child's wishes are but one factor to be considered").

<sup>114</sup> *Id.* at 782.

<sup>115</sup> See, e.g., *In re Report of the Family Court Steering Comm.*, 794 So. 2d 518, 526–27 (Fla. 2001) (listing GALs as one of twelve elements "essential . . . to a model family court . . . in all family cases involving abuse, neglect, abandonment and children at risk of harm"). But see Richard Ducote, *Guardians Ad Litem in Private Custody Litigation: The Case for Abolition*, 3 LOY. J. PUB. INT. L. 106, 115–16 (2002) (arguing, inter alia, that GALs have ill-defined roles, usurp the role of the judge, deprive parents of privacy, and are unaccountable for their actions).

dependency litigation, many commentators call for some type of child advocacy in a “custody, visitation, and parentage litigation.”<sup>116</sup> The CASA and GAL<sup>117</sup> networks (these individuals will be hereinafter referred to collectively as CASAs) currently have about 843 programs serving 900 jurisdictions across the U.S.,<sup>118</sup> with over 70,000 volunteers.<sup>119</sup> The responsibilities of these community-trained volunteers may include the following:

- reviewing records[;]
- interviewing appropriate parties involved in the case, including the child[;]
- determining if a permanent plan has been created for the child and whether appropriate services, including reasonable efforts, are being provided to the child and family[;]
- submitting a signed written report with recommendations to the court on what placement and services are best for the child[;]
- attending court hearings[; and]
- maintaining complete records about the case, including appointments, interviews, and information gathered about the child and the child’s life circumstances.<sup>120</sup>

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<sup>116</sup> Sheila M. Murphy, Essay, *Guardians Ad Litem: The Guardian Angels of Our Children in Domestic Violence Court*, 30 LOY. U. CHILD. L.J. 281, 287 (1999) (“The need for guardians ad litem is particularly necessary in custody, visitation, and parentage litigation. The presence of guardians ad litem would help prevent batterers from using children as tools or pawns in domestic violence court. Moreover, when the parents’ attorneys fail to do so, a guardian ad litem could bring the issue of domestic violence, as well as any potential drug abuse by either parent, to the attention of judges making custody or visitation decisions.”). *But see* Raven C. Lidman & Betsy R. Hollingsworth, *The Guardian Ad Litem in Child Custody Cases: The Contours of our Judicial System Stretched Beyond Recognition*, 6 GEO. MASON L. REV. 255, 261 (1998) (arguing that there is no need for GALs in disputed custody cases, and that they “often undermine[ ] the normal functioning of the courts”).

<sup>117</sup> The term guardian ad litem, referring to the judicial protection of children, dates to English common law. Today the term describes both attorneys and non-lawyer volunteers. *See* Piraino, *supra* note 110, at 63. Piraino’s discussion of the history of the term “guardian ad litem” and description of various models used by courts to protect children’s best interests provide a helpful overview of the development and growth of the CASA system.

<sup>118</sup> *Id.* at 64.

<sup>119</sup> Nat’l CASA Ass’n, *About CASA*, at <http://www.nationalcasa.org/html/about.htm> (last visited Sept. 26, 2003).

<sup>120</sup> NAT’L CASA ASS’N, STANDARDS FOR NATIONAL CASA ASSOCIATION MEMBER PROGRAMS § VIII.E (2002) [hereinafter NAT’L CASA ASS’N,

State CASA organizations usually employ staff members to train, coordinate, and supervise those volunteers.<sup>121</sup> CASA programs are funded mostly by the states, National CASA, and the courts.<sup>122</sup>

National CASA has developed standards for CASAs.<sup>123</sup> Federal legislation has also recognized the crucial function of CASAs. The Child Abuse Prevention and Treatment Act states that the role of a CASA is “(I) to obtain first-hand, a clear understanding of the situation and needs of the child; and (II) to make recommendations to the court concerning the best interests of the child.”<sup>124</sup>

Although the CASA network was developed to focus on children in juvenile dependency proceedings, commentators have increasingly seen the need for CASAs to protect children caught in their parents’ civil custody litigation.<sup>125</sup> The frequent coincidence of domestic violence and child maltreatment,<sup>126</sup> as well as the pervasive allegations of child abuse and illicit parental behavior raised in disputed custody litigation,<sup>127</sup> have led courts to appoint CASAs in these high-conflict custody cases.<sup>128</sup> As one

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STANDARDS], <http://www.casenet.org/download/guides-manuals/standards-and-self-assessment-for-casa-programs/ncasaa-standards-for-member-programs-10-02.pdf>.

<sup>121</sup> “State CASA organizations reported a median of two full-time paid staff persons . . . . Just over one-third (35%) had only one full-time staff person, and 9% had none. Nearly one-fifth (18%) had more than ten full-time staff.” NAT’L CASA ASS’N, ANNUAL STATE ORGANIZATION SURVEY 2001, 11 (2001) [hereinafter STATE SURVEY], <http://www.casenet.org/download/casa-surveys/2001-ncasa-survey-stareport.pdf>.

<sup>122</sup> *Id.* at 9.

<sup>123</sup> See NAT’L CASA ASS’N, STANDARDS, *supra* note 120.

<sup>124</sup> 42 U.S.C. § 5106a(b)(2)(A)(xiii) (2003).

<sup>125</sup> Cf. Dana E. Prescott, *The Guardian Ad Litem in Custody and Conflict Cases: Investigator, Champion, and Referee?*, 22 U. ARK. LITTLE ROCK L. REV. 529, 530 (2000) (discussing the crucial role GALs play in custody battles).

<sup>126</sup> See, e.g., Christine A. O’Riley & Cindy S. Lederman, *Co-occurring Child Maltreatment and Domestic Violence: The Judicial Imperative to Ensure Reasonable Efforts*, FLA. B.J., Nov. 2001, at 41–42 (“Too often, without intervention, family violence results in child homicide. Each year we continue to observe that a history of domestic violence is prevalent in more than one third of the child abuse death cases.”).

<sup>127</sup> See, e.g., Murphy, *supra* note 116, at 289 (“In addition to alerting judges to the issue of domestic violence as a whole, guardians ad litem could also bring forth evidence of any potential substance abuse by parents in a custody or visitation proceeding.”).

<sup>128</sup> *Id.* at 299 (“[G]uardians ad litem must be appointed to represent children in domestic violence court where decisions regarding visitation and custody are made.”).

court put it: “[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.”<sup>129</sup>

CASAs’ expanded participation in proceedings involving children has resulted in a jaggged assortment of immunity laws for these child representatives. Fewer than half the states have passed legislation that specifically provides civil and/or criminal immunity for CASAs<sup>130</sup> who assist courts by investigating claims of child abuse or neglect and reporting, as “citizen advocates,”<sup>131</sup> to the court. Most of these states provide immunity from both civil and criminal liability to CASA staff and volunteers<sup>132</sup> as long as they are exercising good faith<sup>133</sup> and do not engage in intentional or wanton misconduct.<sup>134</sup> Other states bestow immunity by declaring that the CASA is an officer of the court for purposes of immunity from civil liability.<sup>135</sup>

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<sup>129</sup> Short v. Short, 730 F. Supp. 1037, 1039 (D. Colo. 1990).

<sup>130</sup> See, e.g., ARIZ. REV. STAT. § 8-522(H) (2003); COLO. REV. STAT. ANN. § 19-1-212 (West 1999); DEL. CODE ANN. tit. 29, § 9006A(2) (2003); FLA. STAT. ANN. § 39.822(1) (West 2003); 705 ILL. COMP. STAT. ANN. 405/2-17.1 (West 2003); IND. CODE ANN. § 31-15-6-9 (West 1998); KAN. STAT. ANN. § 38-1505a(b) (2002); LA. CIV. CODE ANN. art. 424.10 (West 2002); ME. REV. STAT. ANN. tit. 4, § 1506 (West 2003); MONT. CODE ANN. § 41-3-1010 (2002); NEB. REV. STAT. § 43-3716 (2002); N.D. CENT. CODE § 14-09-06.4 (2003); OKLA. STAT. tit. 10, § 7003-3.7(D) (2002); OR. REV. STAT. § 419A.170(4), (5) (2001) (amended by 2003 Or. Laws 396); 42 PA. CONST. STAT. ANN. § 6342(b) (West 2003); R.I. GEN. LAWS § 9-1-27.2 (2002); S.C. CODE ANN. § 20-7-127 (Law. Co-op. 2002); TENN. CODE ANN. § 36-4-132 (2003); VA. CODE ANN. § 9.1-154 (Michie 2003); WASH. REV. CODE § 13.34.105(2) (2003); WIS. STAT. § 48.236(5) (2003).

<sup>131</sup> Nat’l CASA Ass’n, *About CASA*, *supra* note 119.

<sup>132</sup> See, e.g., ARIZ. REV. STAT. § 8-522(H) (2003) (providing immunity from both civil and criminal liability for the advocate’s acts or omissions in connection with authorized responsibilities performed in good faith); *see also* 705 ILL. COMP. STAT. 405/2-17.1 (2003) (extending immunity from civil and criminal liability to CASAs acting within the scope of appointment); *but see* WASH. REV. CODE § 13.34.105(2) (2003); ME. REV. STAT. ANN. tit. 4, § 1506 (West 2003) (extending to CASAs immunity from only civil liability).

<sup>133</sup> See, e.g., ARIZ. REV. STAT. § 8-522(H) (2003). Several states create a statutory presumption that the CASA was acting in good faith. *See, e.g.*, OKLA. STAT. tit. 10, § 7003-3.7(D) (2002) (presumption that CASAs and GALs are acting in good faith when participating in a judicial proceeding).

<sup>134</sup> See, e.g., 42 PA. CONST. STAT. ANN. § 6342 (West 2003) (providing civil immunity to CASAs except in cases of gross negligence, intentional misconduct, or reckless, willful or wanton misconduct).

<sup>135</sup> See, e.g., WASH. REV. CODE ANN. § 13.34.105 (West 2003).

Without explicit legislative guidance, some courts have relied on common law principles to extend absolute judicial immunity to CASAs.<sup>136</sup> Some judges have recognized the potential for parents' harassment and intimidation of child representatives in disputed custody cases and have therefore extended absolute immunity to CASAs.<sup>137</sup> As a Nevada court observed:

CASA and its volunteers perform a valuable and integral function by assisting courts in evaluating cases involving children. Exposure to liability could deter their acceptance of court appointments or color their recommendations. Indeed, such exposure could produce a chilling effect upon future acceptances of court appointments and the willingness of private citizens to volunteer their time to serve as special advocates.<sup>138</sup>

Similarly, a New York court weighing the decision to restrict an aggrieved parent's right to sue an attorney law guardian decided that "from a public policy perspective, it is better to have a diligent, unbiased and objective advocate to assist the court in determining and protecting the best interest of the child than it is to assure that the minor child may later recover damages in tort."<sup>139</sup> In Connecticut, another court shielded an attorney law guardian from tort liability, noting:

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<sup>136</sup> See, e.g., *Janicki v. Subbloie*, No. CV0102778485, 2002 Conn. Super. LEXIS 1026, at \*7–10 (Conn. Super. Ct. Apr. 3, 2002). The court in that case noted that Connecticut law does not clearly indicate whether GALs are covered by any type of immunity. *Id.* at \*6 n.2. Still, the court stated that "[p]ublic policy requires that [GALs] be allowed the protection of absolute immunity because to expose them to the possibility of personal liability will deter them from working as advocates for minor children." *Id.* at \*9–10.

<sup>137</sup> See, e.g., *Bluntt v. O'Connor*, 737 N.Y.S.2d 471, 480 (N.Y. App. Div. 2002). Quoting the Wisconsin Supreme Court, the court remarked that "opening the door to negligence liability . . . would likely result in a decline in the number of attorneys willing to serve as GALs in custody proceedings." *Id.* at 479 (citing *Paige K.B. v. Molepske*, 580 N.W.2d 289, 296 (Wis. 1998)); see also *Kurzawa v. Mueller*, 732 F.2d 1456, 1458 (6th Cir. 1984) (holding that a GAL was entitled to absolute immunity under the U.S. Supreme Court's decision in *Briscoe v. Lattue*, 460 U.S. 800 (1983)).

<sup>138</sup> *Foster v. Washoe Co.*, 964 P.2d 788, 793 (Nev. 1998) (internal citations omitted) (holding that CASAs and CASA volunteers are entitled to absolute quasi-judicial immunity).

<sup>139</sup> *Bradt v. White*, 740 N.Y.S.2d 777, 784 (2002) (quoting *Paige K.B. v. Molepske*, 580 N.W.2d 289, 294 (Wis. 1998)) (holding that attorney "law guardians" of children who are subjects of family court proceedings are entitled to immunity). The court noted that a "law guardian . . . is not strictly an arm of the

In cases involving the custody of children, parents often demonstrate a lack of professional and emotional judgment. It is specifically for this reason that the court made the decision to appoint the defendant as the attorney for the minor child. Therefore, her actions in that role should be protected from tort liability.<sup>140</sup>

Thus, some state courts have recognized absolute “derived judicial immunity”<sup>141</sup> or “absolute quasi-judicial immunity”<sup>142</sup> for CASAs and law guardians.<sup>143</sup> In addition, federal courts have specifically concluded that GALs, functioning as agents of the court, are entitled to “absolute quasi-judicial immunity for these activities integrally related to the judicial process.”<sup>144</sup> Over half the states, however, do not have separate legislative immunity provisions for CASA workers,<sup>145</sup> in those states courts must determine whether CASAs are immune from suit.<sup>146</sup>

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Court, but . . . has the hybrid role of attorney/advocate and investigator/proponent of the child’s best interests. . . . [T]he roles are so intertwined as to warrant treatment of the law guardian for immunity purposes in the same manner as a guardian ad litem whose role is to promote the best interests of the child.” *Id.* at 781–82.

<sup>140</sup> Carrubba v. Moskowitz, No. CV0008023545, 2002 Conn. Super. LEXIS 596, at \*7 (Conn. Super. Ct. Feb. 22, 2002), *aff’d*, 2004 Conn. App. LEXIS 40 (Conn. App. Ct. Feb. 3, 2004). The court held to this reasoning several months later in *Janicki*, No. CV0102778485, 2002 Conn. Super. LEXIS 1026, at \*9 (holding that a GAL was entitled to absolute judicial immunity because she was court-appointed, and therefore an “arm of the court”).

<sup>141</sup> *Delcourt v. Silverman*, 919 S.W.2d 777, 782 (Tex. App. 1996) (holding that a GAL acting within the scope of her employment is entitled to absolute immunity because she acts “as an integral part of the judicial system or an ‘arm of the court’” (citing *Briscoe v. Lattue*, 460 U.S. 325, 335 (1983))). *Id.* at 782, 786.

<sup>142</sup> *Berndt v. Molepske*, 565 N.W.2d 549, 551 (Wis. Ct. App. 1997) (declaring absolute quasi-judicial immunity for GALs), *aff’d sub nom. Peterson v. Molepske*, 580 N.W.2d 289 (1998). The court held that GALs’ “functions are intimately related” to those of the Court. *Id.*

<sup>143</sup> *See, e.g., Bradt*, 740 N.Y.S.2d at 781; *see also supra* note 139.

<sup>144</sup> *Cok v. Cosentino*, 876 F.2d 1, 3 (1st Cir. 1989).

<sup>145</sup> *See supra* notes 130–35.

<sup>146</sup> *See, e.g., George S. Mahaffey, Jr., Role Duality and the Issue of Immunity for the Guardian Ad Litem in the District of Columbia*, 4 J.L. & FAM. STUD. 279, 299 (2002) (stating that if the District of Columbia enacted immunity legislation for GALs, “statutory immunity would mean that a guardian would be able to function solely in the best interests of the child without fear of professional malpractice suits” and that “the uncertainty that comes with a trial court having to employ a functions analysis . . . would be done away with”).

*E. Mental Health Professionals: Emerging Calls for Immunity*

*Both Mr. and Mrs. Smith retain their own separate psychologists to testify as to their individual fitness as parents. Both sides' attorneys file multiple motions to exclude the other's psychological reports. Frustrated with the specter of dueling professionals, the judge appoints an independent custody evaluator to make a recommendation as to custody and parental responsibility. Mr. Smith sues the custody evaluator, alleging that the resulting evaluation was improperly biased in favor of Mrs. Smith.*

Mental health clinicians have struggled to develop processes to deal with high-conflict parents, who possess anomalous behavioral traits that are a therapist's nightmare.<sup>147</sup> It is a relatively new phenomenon for courts to involve mental health professionals in custody cases.<sup>148</sup> When courts ask clinicians to conduct parenting or child custody evaluations to assist the court with tasks such as determining the child's best interests in custody and visitation, those mental health professionals find themselves cast directly into the war zone. Several authors have sounded the call for standardizing parenting evaluators' professional practices so that these experts can provide courts with needed information without fearing retaliatory litigation from disgruntled parents.<sup>149</sup> Unfortunately, the animosity of irate parents who have engaged in "hostile attacks" on parenting evaluators and therapists apparently discourages many of these professionals from working with these families.<sup>150</sup> One survey of the member boards of the Association of State and Provincial Psychology Boards found that psychologists who conduct child custody evaluations

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<sup>147</sup> See Barry Bricklin & Gail Elliot, *Qualifications of and Techniques to Be Used by Judges, Attorneys, and Mental Health Professionals Who Deal with Children in High Conflict Divorce Cases*, 22 U. ARK. LITTLE ROCK L. REV. 501, 507 (2000) (noting that litigants in high-conflict divorce cases manifest narcissism, anger, self-righteousness, and "blaming orientations").

<sup>148</sup> The practice of using custody evaluations became widespread only about fifteen years ago. See BARIS ET AL., *supra* note 16, at ix.

<sup>149</sup> See, e.g., Schacht, *supra* note 3, at 588–90 (outlining a proposal to extend immunity to experts involved in custody evaluations, except in cases of egregious conduct on the part of the expert); see also Karl Kirkland, *The Epistemology of Child Custody Evaluations*, 40 FAM. CT. REV. 185, 188 (2002) (stating that "[a]s the field has grown, the components of the [child custody evaluation] have come under tremendous increases in scrutiny and a directly related need for standardization of professional practices").

<sup>150</sup> Stern et al., *supra* note 22, at 349.

will probably be subjected to a related licensure board complaint.<sup>151</sup> Parenting evaluators are warned of the intensity of custody litigation;<sup>152</sup> they are advised that they may see extreme action, based on parents' despair and rage "as witnessed in increased family violence and violent courthouse incidents."<sup>153</sup> The American Psychological Association states:

The practice of psychotherapy is being adversely affected by the proliferation of personal threats, complaints, and lawsuits against therapists by clients and their families. Many therapists are carefully screening their words and actions to minimize the risks. Other refuse to work with clients who are or have been in violent family relationships.<sup>154</sup>

Several authors have called for legislatures to extend judicial immunity to mental health professionals who act in good faith while serving as court-ordered parenting evaluators in disputed custody cases.<sup>155</sup> We found no state laws expressly bestowing immunity on court-appointed evaluators; still, many state and federal courts, using the function approach,<sup>156</sup> have extended common law judicial immunity to psychologists and psychiatrists upon finding that they act "as arms of the court and [perform] functions

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<sup>151</sup> Karl Kirkland & Kristin L. Kirkland, *Frequency of Child Custody Evaluation Complaints and Related Disciplinary Action: A Survey of the Association of State and Provincial Psychology Boards*, 32 PROF. PSYCHOL. RES. & PRAC. 171, 171–74 (2001). The survey, completed by thirty-four of the organization's sixty-one members boards, revealed 2413 complaints against practitioners from 1990 to August 1999. Boards disciplined practitioners in only one percent of those cases.

<sup>152</sup> Philip Stahl, *Ethical Considerations*, in ASS'N OF FAMILY AND CONCILIATION COURTS, RESOURCE GUIDE FOR CUSTODY EVALUATORS: A HANDBOOK FOR PARENTING EVALUATIONS ch. 3 (Phil Bushard & Dorothy A. Howard eds., 1995).

<sup>153</sup> *Id.*

<sup>154</sup> AM. PSYCHOLOGICAL ASS'N, *supra* note 17, at 27.

<sup>155</sup> Schacht, *supra* note 3, recommends that each state "establish a Custody and Child Abuse Evaluation Board or Commission to set standards for the credentials and conduct of experts involved in custody evaluations." *Id.* at 589. His ideas, however, are not far-ranging enough. Many of the service providers that the courts rely on would not be considered "experts" and therefore would not fit into Schacht's immunity vision. *See id.* (characterizing as experts only those who are "selected and appointed by the judge to advise the court"). Our scope is much broader.

<sup>156</sup> *See supra* note 77 and accompanying text.



integral to the judicial process.”<sup>157</sup> On the other hand, such professionals must be very careful: quasi-judicial immunity has been held not to apply if the evaluator’s contract with the parties does not contain language characterizing the evaluator as an arm of the court, even where the court order contains language mandating such an evaluation.<sup>158</sup>

Other mental health professionals besides psychologists and psychiatrists can conduct custodial evaluations for courts. Without statutory guidance, immunity in this area is developing through case law; this may leave evaluator defendants twisting in the legal winds for years before courts extricate them by granting immunity. In *Stone v. Glass*,<sup>159</sup> a Kentucky court noted that it could find no state case law regarding the immunity of social workers who perform court-ordered custody evaluations.<sup>160</sup> The parent in *Stone v. Glass* initiated litigation against the social worker in 1993;<sup>161</sup> the appeals court rendered its opinion granting her quasi-judicial immunity in 2000.<sup>162</sup>

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<sup>157</sup> *Hughes v. Long*, 242 F.3d 121, 127 (3d Cir. 2001) (noting that the evaluators’ main duties were “to engage in neutral fact-finding and advise the court”); *see also* *Lythgoe v. Guinn*, 884 P.2d 1085, 1092–93 (Alaska 1994) (granting custody investigator absolute immunity); *Lavit v. Superior Court*, 839 P.2d 1141, 1144–45 (Ariz. Ct. App. 1992) (granting absolute immunity to psychologist who performed child custody evaluation “as an expert for the court”); *Howard v. Drapkin*, 271 Cal. Rptr. 893, 902 (Cal. Ct. App. 1990) (entitling psychologist custody evaluator to same immunity given others who function as neutrals in resolving disputes); *S.T.J. v. P.M.*, 556 So. 2d 244, 247 (La. Ct. App. 1990) (granting psychologist custody evaluators appointed by the court absolute quasi-judicial immunity); *LaLonde v. Eissner*, 539 N.E.2d 538, 541–42 (Mass. 1989) (granting non-court-appointed psychiatrist evaluator in visitation dispute immunity “because of the function he performed [and its] essential connection to the judicial process”); *Duff v. Lewis*, 958 P.2d 82, 86 (Nev. 1998) (finding psychiatrist performed “integral function in assisting courts” entitling him to absolute quasi-judicial immunity); *Delcourt v. Silverman*, 919 S.W.2d 777, 782 (Tex. Ct. App. 1996) (granting psychologist custody evaluator absolute quasi-judicial immunity upon finding his function “intimately associated with the judicial process”); *Parker v. Dodgion*, 971 P.2d 496, 499 (Utah 1998) (finding psychologist custody evaluator immune from suit).

<sup>158</sup> *See* *Politi v. Tyler*, 751 A.2d 788, 792 (Vt. 2000) (concluding that the evaluator was not “performing a judicial or quasi-judicial function pursuant to a court directive”).

<sup>159</sup> *Stone v. Glass*, 35 S.W.3d 827 (Ky. Ct. App. 2000).

<sup>160</sup> *Id.* at 829.

<sup>161</sup> *Id.* at 828.

<sup>162</sup> *Id.* at 830 (holding that “court-appointed custodial evaluators should be entitled to quasi-judicial immunity”).

As modern courts struggle to deal with high-conflict families, they solicit the help of many professionals with many labels: parenting coordinators, re-contact clinicians, emergency case stabilization clinicians, and supervised visitation clinicians, to name a few.<sup>163</sup> One author has described these professionals as being “interventionists for the family,” rather than “expert[s] for the court.”<sup>164</sup> We view this as an empty distinction; at a time when judges “articulate frustration over the fact that they are trained to answer questions of law, not to ‘manage social work cases,’”<sup>165</sup> it has become a truly judicial function to “manage” these dysfunctional families by soliciting and appointing neutral assistance.

In the case of a mental health professional appointed as an emergency case stabilizer, for example, the courts want a quick assessment of serious issues “prior to writing *temporary orders* in a case.”<sup>166</sup> Its preliminary nature distinguishes this service from a formal custody evaluation, but, we argue, both interventions create the same risk of retaliatory lawsuits. Emergency case stabilization and other “forensically informed therapeutic interventions,”<sup>167</sup> designed to assist the court in determining the children’s best interests and reducing conflict, deserve legislatures’ attention within certain limits.<sup>168</sup> Absent legislative action, the continued need to address the problems of high-conflict families—and there is no sign that these cases will go away—guarantees a glut of future cases of first impression to determine whether judicial immunity should be extended.

#### *F. The Volunteer Protection Act: A Federal Approach to Limiting Liability*

Recognizing that government lacks the capacity to carry out all needed services and that volunteers make important contributions in their communities, Congress passed the Volunteer Protection Act of 1997

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<sup>163</sup> Lynn M. Kenney & Diana Vigel, *A Lawyer’s Guide to Therapeutic Intervention in Domestic Relations Court*, 28 ARIZ. ST. L.J. 629, 635–39 (1996) (discussing the roles of mental health professionals in family law settings).

<sup>164</sup> *Id.* at 635.

<sup>165</sup> *Id.* at 633 (citing an anonymous judge’s comment).

<sup>166</sup> *Id.* at 649–50 (emphasis added).

<sup>167</sup> *Id.* at 653.

<sup>168</sup> Of course, fairness requires that the goals and boundaries of the intervention—as well as confidentiality requirements, if any—be addressed by the court.

("VPA").<sup>169</sup> Declaring that "the willingness of volunteers to offer their services is deterred by the potential for liability actions against them,"<sup>170</sup> the VPA limits the liability of volunteers of nonprofit organizations and government agencies.<sup>171</sup> Relevant provisions of the Act provide that no volunteer of a nonprofit organization or governmental entity shall be liable for harm caused by her act or omission as long as the volunteer was acting within the scope of her responsibilities; was properly certified, licensed, or authorized by authorities, if required or appropriate; and was not acting in a grossly negligent, reckless, willful, or criminal manner.<sup>172</sup>

Several states offered qualified immunity for nonprofit corporation volunteers before the federal legislation was passed.<sup>173</sup> Other states subse-

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<sup>169</sup> 42 U.S.C. §§ 14501–14505 (2003). The concept of granting immunity for charitable work has deep roots in American law. The doctrine of charitable immunity, which insulates charities but holds volunteers liable, began in 1876, when the court in *McDonald v. Massachusetts General Hospital*, 120 Mass. 432, 434 (Mass. 1876), *overruled in part by* *Colby v. Corney Hosp.*, 254 N.E.2d 407 (Mass. 1969), *overruled in part as stated by* *O'Connell v. State*, 795 A.2d 857 (N.J. 2002), held that a hospital's charitable status protected it from tort liability. Unlike the charitable immunity doctrine, the federal Volunteer Protection Act provides qualified immunity to the volunteer but does not affect the agency's liability. 42 U.S.C. § 14503(c). For an interesting examination of how courts began the shift from protecting the organization to protecting the individual, see *President & Directors of Georgetown College v. Hughes*, 130 F.2d 810, 814 (D.C. Cir. 1942) (questioning why doctors who volunteered at a hospital could be held liable while the hospital in which they worked retained immunity for tortious acts).

<sup>170</sup> 42 U.S.C. § 14501(a)(1).

<sup>171</sup> *Id.* § 14501(a)(7).

<sup>172</sup> *Id.* § 14503(a). Certain additional exceptions apply: The Act does not apply to misconduct that constitutes a crime of violence, an act of terrorism, a hate crime, a sexual offense, or a violation of civil rights, or to misconduct caused by the use of alcohol or drugs. *Id.* § 14503(f). In addition, the defendant is not protected from harm caused by operating a vehicle. *Id.* § 14503(a)(4). The Act states that "liability reform for volunteers, will promote the free flow of goods and services, lessen burdens on interstate commerce and uphold constitutionally protected due process rights," as well as addressing "legitimate fears of volunteers about frivolous, arbitrary, or capricious lawsuits." *Id.* § 14501(a)(7)(A), (D).

<sup>173</sup> *See, e.g.*, ALA. CODE § 6-5-336 (2003) (enacted in 1991); ARK. CODE ANN. § 16-6-102 (Michie 2003) (enacted in 1987) (recognizing the "spirit of volunteerism"); DEL. CODE ANN. tit. 10, § 8135 (2003) (enacted in 1992) (granting liability for medical and dental clinic volunteers); GEORGIA CODE ANN. § 51-1-20 (2003) (enacted in 1969); KAN. STAT. ANN. 60-3601 (2002) (enacted in 1987); LA. REV. STAT. ANN. § 9:2792.9 (West 2002) (enacted in 1995); MASS. GEN. LAWS ANN. ch. 231, § 85K (2003) (enacted in 1987); N.C. GEN. STAT. § 1-539.10 (2003)

quently enacted their own volunteer protection acts, consistent with the requirements of the federal legislation.<sup>174</sup> As with the federal act, state legislation appears to have grown out of concern over the specter of high liability costs and unwarranted litigation costs in cases against volunteers.<sup>175</sup>

### III. THE INADEQUATE SCOPE OF CURRENT PROTECTION: DEVELOPING NEEDED IMMUNITIES

The hodgepodge of state-created protections described in the preceding section hardly amounts to a coherent system of immunities for those assigned to promote the welfare of vulnerable children. Nor do other safeguards, such as the Volunteer Protection Act and its state counterparts<sup>176</sup> or liability insurance,<sup>177</sup> adequately shield these stewards from dissatisfied parents' legal harassment and intimidation. Accordingly, we propose a framework through which legislatures can develop and courts can apply immunities for those actors whose presence in custody cases promises to reduce conflict.

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(enacted in 1987); N.J. STAT. ANN. § 2A:53A-7.1 (West 2003) (enacted in 1987); R.I. GEN. LAWS § 7-6-g(a) (2002) (enacted in 1984).

<sup>174</sup> *E.g.*, COLO. REV. STAT. § 13-21-115.5 (2003) (enacted in 1997); HAW. REV. STAT. § 662D-2 (2002) (enacted in 1997); ILL. COMP. STAT. § 10/2-214 (2003) (enacted in 1998) (granting liability for court volunteers); IND. CODE § 34-30-4-2 (2003) (enacted in 1999) (liability for directors of nonprofit agencies). 42 U.S.C. § 14502(a) allows states to grant volunteers protection from liability beyond that provided in the VPA, but preempts more restrictive state laws. A state may, however, pass legislation exempting from the VPA all state court civil actions “in which all parties are citizens of the State.” *Id.* § 14502(6). Several states pursued this option. *See, e.g.*, N.H. REV. STAT. ANN. § 292 (2003) (enacted in 1998) (choosing expressly “not to have the Volunteer Protection Act of 1997 apply to any civil action against a volunteer in a New Hampshire court, in which all parties are citizens of New Hampshire”). New Hampshire does, however, limit the liability of volunteers who assist the Police Standards and Training Council in its programs. *See* N.H. REV. STAT. § 188-F:32 (2003).

<sup>175</sup> *See, e.g.*, ARK. CODE ANN. § 16-6-102 (Michie 2003) (“While there are no known recent instances in Arkansas where a volunteer has been subjected to personal liability for negligence in performing volunteer duties . . . the perceived insurance crisis has heightened concern among many who would provide volunteer services . . .”).

<sup>176</sup> *See infra* notes 178–83 and accompanying text.

<sup>177</sup> *See infra* notes 184–85 and accompanying text.

A. *Existing Immunity Provisions: A Tattered Cloak*

The most glaring defect of present immunities under state law is their scattered availability. Beyond judicial immunity, no single approach toward protecting CASAs and other family court actors commands universal support among states. Even more lacking is a broader vision of the degree of tort immunity to which these actors should be entitled. This motley array of protections stands in tension with the move toward a unified family court model, an approach recognizing that family conflicts are complex and deeply intertwined.

Nor does the Volunteer Protection Act supply a sufficient safety net for providers of family court services excluded from state immunity. Although some court services necessary to reduce conflict may be supplied by volunteers (and are thus presumably protected by the Act), several services would not fit under the Act's umbrella of protection. In the area of supervised visitation,<sup>178</sup> for example, communities have responded creatively and variously to the need for visitation program staff. The VPA defines a volunteer as "an individual performing services for a nonprofit organization or a governmental entity who does not receive (A) compensation (other than reasonable reimbursement or allowance for expenses actually incurred); or (B) any other thing of value in lieu of compensation, in excess of \$500 per year, and such term includes a volunteer serving as a director, officer, trustee, or direct service volunteer."<sup>179</sup> Supervised visitation programs in the United States have provided various types of compensation to those who monitor visits: awarding college credit to student monitors;<sup>180</sup> paying hourly wages to staff who moonlight as monitors but work full-time in other professions;<sup>181</sup> paying retirees and local teachers to monitor visits on weekends.<sup>182</sup> Thus, even those who receive a relatively small amount of compensation are stripped of their protections under the Act.<sup>183</sup>

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<sup>178</sup> Supervised visitation programs are discussed in more detail at *infra* Part IV.A.

<sup>179</sup> 42 U.S.C. § 14505(6).

<sup>180</sup> See, e.g., Policies and Procedures of The Family Visitation Program of Tallahassee (on file with authors).

<sup>181</sup> Interview with Betsy Baird, Program Director, Transition Family Visitation Center, Inc. in Liberty, Mo. (Mar. 7, 2003) (on file with authors).

<sup>182</sup> For example, this policy has been implemented at The Family Connection, West Palm Beach, Florida, Barbara Pope, Director.

<sup>183</sup> Moreover, while we have not discovered any legal efforts to question the validity of the Volunteer Protection Act, even its core immunity provisions may be susceptible to constitutional challenge. The Supreme Court in recent years has

The availability of insurance likewise offers only an illusory buffer from the threat of litigation. Several states, including Kansas, California, and Florida, require supervised visitation programs to carry liability insurance.<sup>184</sup> While the existence of such insurance may serve to placate worried program staff, it does not negate the need for legislatively crafted immunity. In fact, the existence of insurance policies may actually invite lawsuits:

Who gets sued often depends on who has insurance. The complaint is often amended, and the discovery and trial strategy accordingly altered, to conform to what the insurance policy covers and what it does not. The value of the case, which we so often assume to be a function of the substantive tort law and costs of civil process, may be just as much a function of how much insurance coverage the defendant has purchased . . . . It is certainly possible that some forms of tort litigation might never have developed had not some insurance broker first paved the way by

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exhibited a willingness to overturn federal legislation thought to intrude upon the prerogatives of the states. *See, e.g., United States v. Morrison*, 529 U.S. 598, 619 (2000) (invalidating civil damages under Violence Against Women Act as exceeding scope of congressional power under Commerce Clause); *United States v. Lopez*, 514 U.S. 549, 561–62 (1995) (invalidating Gun-Free School Zones Act on Commerce Clause grounds), *superseded by statute as stated in United States v. Tucker*, 90 F.3d 1135 (6th Cir. 1998); *see also Printz v. United States*, 521 U.S. 898, 933–35 (1997) (finding provision of Brady Act requiring local law enforcement officers to conduct background checks of certain gun purchasers to violate constitutional scheme of dual sovereignty); *New York v. United States*, 505 U.S. 144, 182–83 (1992) (invalidating federal directive to some states either to take ownership of nuclear waste within state’s borders or to regulate waste according to federal specifications). Our argument does not hinge on any constitutional infirmity of the VPA; the success of such a challenge, however, would obviously bolster our position that the Acts provide insufficient protection to service providers.

<sup>184</sup> *See, e.g., SUPREME COURT OF FLA., STANDARDS FOR SUPERVISED VISITATION, PROGRAM AGREEMENTS 9* (1999), at <http://www.flcourts.org/osca/divisions/family/bin/svnstandard.pdf> [hereinafter FLORIDA VISITATION STANDARDS] (stating that a program must have general and liability insurance for staff and volunteers); OFFICE OF THE KAN. ATTORNEY GEN., CHILD EXCHANGE AND VISITATION CENTER GUIDELINES § 3, ¶ 3.6 (Mar. 1999), at <http://www.ink.org/public/ksag/contents/children/cevc-6.htm> (mandating that “[t]here shall be adequate general liability insurance for directors, staff, volunteers, interns, and clients utilizing the services”) [hereinafter KANSAS VISITATION GUIDELINES].

creating awareness of the liability risk and an insurance policy to cover the judgment.<sup>185</sup>

In addition, settling claims against insured agencies is the norm in the insurance business. Indeed, “[t]he vast majority of professional liability claims, like most liability claims, are ultimately settled.”<sup>186</sup> When an insurance company settles rather than litigates fully the merits of a case, the settlement has several negative consequences. First, even if no determination of wrongdoing is made, the presence of a settled lawsuit leads to the assumption that the defendant did something wrong. This can damage a program’s ability to obtain volunteers, undermine the court’s confidence in the program, and adversely affect parents’ perceptions of the program. Also, when insurance companies raise the programs’ rates, programs already underfunded may cut back services or close.

Finally, it should be noted that the need for a comprehensive scheme of immunity does not rest solely on the fact that psychologists, mediators, CASAs, and other court assistants have been sued in the past. Nor does it rest on an anticipated explosion of litigation against past providers of services to children touched by high-conflict divorce. Rather, nonprofit organizations’ concerns about their staff’s potential liability may hinder the organizations’ valuable activities. Organizations fear that they may be unable to absorb the costs incurred by accidental injury; similarly, nonprofits may feel that it is their duty to expend donors’ funds on providing services, not paying tort costs.<sup>187</sup> It is the pervasive fear of lawsuits, not their actual incidence, that threatens to derail the momentum of therapeutic jurisprudence. A relative handful of suits filed by disgruntled parents could discourage the provision of services to at-risk children by intimidating providers, diverting resources to legal fees, and inflating insurance premiums.<sup>188</sup> By conferring sufficient immunity to deter unwar-

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<sup>185</sup> Kent D. Syverud, *The Duty to Settle*, 76 VA. L. REV. 1113, 1114–15 (1990). The author reveals the symbiotic relationship between insurance companies and tort litigation, arguing compellingly that “liability insurance and tort litigation evolve together, with each institution acting upon, reacting to, and supporting the other.” *Id.* at 1115. We are not suggesting that programs decline to carry liability insurance.

<sup>186</sup> Michael H. Rauch et al., *Settlement of Professional Liability Claims*, 303 P.L.I./LIT. 177, 179 (1996).

<sup>187</sup> *Id.*

<sup>188</sup> The threat of litigation is widely perceived as inhibiting the provision of a variety of important services, including education and health care. See Stuart Taylor, Jr. & Evan Thomas, *Civil Wars*, NEWSWEEK, Dec. 15, 2003, at 73.

ranted suits, legislatures can help assure the continued availability and expansion of these critical services.

### *B. Developing a Comprehensive System of Immunity*

In light of the foregoing, we propose a statutory general presumption of immunity for those engaged in neutral court-ordered conflict-reduction services in family court cases. Rather than attempt to define the precise contours of that immunity for all circumstances, we recommend that legislatures promulgate criteria and principles to be fleshed out by the courts. This approach offers the unifying proposition of presumptive immunity, while at the same time allowing courts to calibrate the degree of protection to the function performed and the claim asserted.<sup>189</sup>

#### *1. Requisites*

As indicated above, we believe that the service's mandatoriness and neutrality constitute the threshold eligibility criteria for granting immunity to family court service providers. In addition, a legislature should require minimum standards of practice in order for a function to qualify for immunity. We explain our understanding of these criteria below.

##### *a. Judicial Mandate*

A court directive to provide the service in question is obviously the sine qua non of any immunity. In part, this requirement reflects the notion that

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<sup>189</sup> Moreover, different communities may use different terms for certain services. For example, the term "parenting coordinator" may mean an individual whose task it is to "educate, mediate, and perhaps arbitrate parental disputes over the raising of their children," *BARIS ET AL.*, *supra* note 16, at 10; or it may have a broader or narrower definition. Our view that labels should not be dispositive in evaluating immunity from torts claims resembles the Supreme Court's approach to immunity from civil rights claims under 42 U.S.C. § 1983. The Court focuses on the nature of the function performed by the defendant and the extent to which exposure to liability would interfere with the performance of that function. *See Forrester v. White*, 484 U.S. 219, 229 (1988) (holding that a state court judge was not cloaked with absolute immunity from sex discrimination suit by probation officer, because the judge's decision to discharge the plaintiff did not constitute a "judicial or adjudicative" function), *superseded by statute as stated in Leclerc v. Webb*, 270 F. Supp. 2d 779 (E.D. La. 2003).



the provider's own immunity derives from that of the judge.<sup>190</sup> To the extent that the rationale for immunity is that a participant is implementing a judicial strategy for coping with the conflict at hand, a nexus to the court is crucial.<sup>191</sup>

Moreover, confining immunity to judicially required services helps to keep the standard manageable. A parent locked in a high-conflict custody dispute might well *unilaterally* elect to obtain the assistance of individuals who the parent feels will advance the child's welfare. For example, a parent might retain her own parenting evaluator, bring the child in for consultation, and submit herself or the child to psychological testing without the consent of the other parent or the court. Our described immunity would not extend to this professional. Without a bright line for immunity drawn at court-designated participants, arguments could regularly erupt over whether such individuals—who may simply be “hired guns” for a party—qualify for statutory protection.<sup>192</sup>

Of course, issues could still arise over whether a particular service provider should be entitled to statutory immunity. Reasonable minds might differ, for example, over the degree of specificity with which a court must identify a particular provider and whether parents should have a role in selecting certain kinds of providers. These types of questions, however, can be worked out by legislatures and courts while still preserving the benefit of requiring judicial mandate of the services furnished by the person whose immunity is at issue.

### *b. Neutrality*

The obligation of neutrality is somewhat more elusive but no less fundamental. In order to receive statutory protection, individuals charged with sheltering a child from the fallout of parental conflict must not have a personal stake in the outcome of the dispute.

To extend immunity to hired counsel—or, indeed, to anyone whose disinterestedness could be seriously questioned—would clash with the justifications for statutory protection in these cases. Like the judge who

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<sup>190</sup> See *supra* note 141 (discussing concept of derived immunity).

<sup>191</sup> Judicial orders that approve of or incorporate by reference parents' agreements to submit to a custody evaluation or other service by a third party, should be considered to cloak the third party with immunity, since the order effectively mandates the service.

<sup>192</sup> Some organizations “hawk frank terrorist manuals for marital warfare.” Schacht, *supra* note 3, at 571.

presides in a high-conflict case, participants who seek immunity from parents' actions must remain nonpartisan. It is essential, for example, that those who perform services for the court, and, indeed the court itself, understand the dynamics of domestic violence. Failure or refusal to perceive the link between domestic violence and the welfare of children is not neutrality, but instead a potentially life-threatening error.<sup>193</sup>

Admittedly, some cases may raise thorny questions concerning the nature of neutrality. For example, a participant charged with gathering information and making recommendations may issue a report that one parent believes betrays a distressing lack of objectivity. A CASA assigned to a case involving allegations of abuse may begin her task with no preconceived suspicions, but ultimately form an opinion that abuse actually occurred and frame her report accordingly. In our view, such a finding alone does not establish a lapse in neutrality. A judge often rules decisively against one parent without abdicating her role as neutral arbiter; similarly, those charged with helping the judge resolve a custody dispute may arrive at determinations adverse to one of the parties without violating their duty of neutrality. Only a clear and specific showing of bias should be permitted to defeat the presumption of neutrality.

### *c. Standards of Practice*

Barring absolute immunity, which we do not endorse, the question of whether a service provider is entitled to protection entails a determination of whether she acted drastically outside the norms of her field. Central to such a determination are standards against which her conduct can be assessed. The very concept of gross negligence assumes a benchmark of behavior deemed reasonable for those similarly situated.<sup>194</sup> Especially in the

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<sup>193</sup> For a helpful discussion of the problems of neutrality in ignoring domestic violence, see Joan S. Meier, *Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining the Solutions*, 11 AM. U. J. GENDER SOC. POL'Y & L. 657, 708–09 (2003). Some courts already recognize the need for parenting evaluators to understand the dynamics of domestic violence. See Gregory L. Lecklitner et al., *Promoting Safety for Abused Children and Battered Mothers: Miami-Dade County's Model Dependence Court Intervention Program*, 4 CHILD MALTREATMENT 175, 179 (1999) (noting that in dependency cases, “[a]ll too often court-ordered evaluations have been used against mothers in court, as potential symptoms of trauma, depression, and other psychological distress that may be related to domestic violence victimization have been portrayed as more chronic indices of poor functioning”).

<sup>194</sup> See, e.g., *Glaab v. Caudill*, 236 So. 2d 180, 182–83 (Fla. Dist. Ct. App. 1970); *Mt. Hawley Ins. Co. v. ADT Sec. Sys., Inc.*, 831 So. 2d 480, 483 (La. Ct. App. 2002); *Mobile Oil Corp. v. Ellender*, 968 S.W. 2d 917, 921 (Tex. 1998).

early phase of construing statutory immunity, courts will be called upon to determine whether a sufficiently coherent body of practice norms is available in particular fields. These standards need not take the form of legal codification; rather, any sort of comprehensive and widely recognized guidelines will suffice.

For the service providers considered here, the extent to which accepted standards prevail varies substantially. In evaluating the performance of mediators, for example, courts can look to standards adopted jointly by the American Arbitration Association and the ABA Section on Dispute Resolution.<sup>195</sup> Other codes of conduct help judges determine whether a defendant family therapist<sup>196</sup> or social worker<sup>197</sup> has adhered to minimum standards of practice. In the next section, we consider the case of standards for the staff of supervised visitation programs.<sup>198</sup>

## 2. *Mental State*

We do not argue for blanket immunity; rather, we would limit the scope of automatic immunity to protect against only allegations of ordinary negligence. In most instances, plausible charges of gross negligence, recklessness, or intentional harm may be considered on their merits. The exposure of service providers to suits for conduct worse than lack of due care reflects recognition that the rationales for absolute judicial immunity<sup>199</sup> do not fully apply to these individuals. For example, the most effective remedy for a judge's wrongful behavior, reversal of an erroneous decision, will often be unavailable in the case of flagrant conduct by someone with direct responsibility for a child's well-being. If a CASA recklessly exposes a child to danger<sup>200</sup> or a heedless social worker drops a baby, the resulting harm may prove irreparable. Accordingly, considerations of justice and deterrence point to a qualified immunity.

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<sup>195</sup> ABA, STANDARDS OF CONDUCT FOR MEDIATORS (1994), <http://www.abanet.org/dispute/modelstandardsconduct.doc>.

<sup>196</sup> See AM. ASS'N OF MARRIAGE & FAMILY THERAPISTS, AAMFT CODE OF ETHICS (July 1, 2001), <http://www.aamft.org/resources/plan/ethics/ethicscode2001.asp>.

<sup>197</sup> See NAT'L ASS'N OF SOCIAL WORKERS, CODE OF ETHICS (1999), <http://www.socialworkers.org/pubs/code/code.asp>.

<sup>198</sup> See *infra* notes 291–98 and accompanying text.

<sup>199</sup> See *supra* notes 71–72 and accompanying text.

<sup>200</sup> Substantially exceeding the speed limit while transporting the child in city traffic would be an obvious example.

On the other hand, the mental state sufficient to trigger immunity need not be the same in every case. When extending statutory immunity to service providers and volunteers,<sup>201</sup> legislatures should weigh the desire to encourage community members' participation in these important services against any loss of accountability and parents' right of redress for possible injury. Since that balance will vary according to the circumstances, we do not propose a single touchstone to govern all claims of immunity. Rather, we recommend that legislatures promulgate factors that courts must take into account as they gradually develop more specific mental state requirements governing immunity for the various family court service providers.

*a. Severity of Harm*

In any sliding scale of threshold mental state required to lose immunity, the harm to a child caused by the service provider's conduct would assume major significance. If the provider causes major physical injury, then the lowest level of intent beyond simple negligence would presumably suffice to remove the cloak of immunity in a suit for damages. Conversely, if the claim arises out of a trivial harm—especially one done to the parent rather than child—then the requisite showing should escalate to recklessness or even outright malice.

*b. Objectivity of Duty*

One of the principal aims of immunity is to discourage frivolous suits so as to encourage desirable behavior by the potential targets of such suits. Because the standard of care for many service providers is subjectively defined, potential defendants will find it difficult to defeat suits at the outset in the absence of immunity. For example, while a charge of grossly negligent counseling might well ultimately be rejected, most defendants would be unable to have the complaint dismissed on the pleadings. Accordingly, the intangible nature of the duty owed forms one convincing argument for a legislative immunity scheme that places a formidable barrier, such as service provider immunity for all conduct short of recklessness, in the way of complaining parents. By the same token, where the duty is defined in concrete terms—e.g., a protocol that social workers

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<sup>201</sup> Some, but not all, of these volunteers may already be protected by the Volunteer Protection Act, 42 U.S.C. §§ 14501–14505. For limitations in the protection afforded by the Volunteer Protection Act, see *supra* notes 181–89 and accompanying text.

must follow in conducting interviews—then a lesser demonstration of fault could suffice.<sup>202</sup>

*c. Consensus on Standards*

A similar consideration in gauging the level of scienter courts must find to deny service providers immunity is the extent to which defendants engaged in the activity in question can consult recognized norms. As noted above,<sup>203</sup> we believe that minimum standards of practice are necessary for the provider of a service to qualify for any degree of immunity. The clarity of those standards, however, will not be identical for each service. For example, while mediators can look to a nationally recognized code of conduct,<sup>204</sup> expectations for CASAs are somewhat hazier.<sup>205</sup> Accordingly, the precision or vagueness of standards of performance of a service should influence the level of intent at which defendants shed immunity. Where definite codes of behavior exist, barring suits for simple negligence alone should usually serve the purposes of immunity. Where norms are still relatively inchoate, then it is generally reasonable to grant defendants a broader immunity.

*d. Nature of Compensation*

In determining the mental state level at which immunity no longer shields service providers, courts should also consider the extent to which

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<sup>202</sup> It should be noted that norms of practice serve two functions under our model. First, a minimum level of accepted norms is a prerequisite for any immunity. Beyond that threshold, the degree of specificity provided may affect the scope of immunity available; more detailed standards may supply more reliable guidance, and thus serve as a factor weighing in favor of immunity only against charges of negligence.

<sup>203</sup> See *supra* Part III.B.1.

<sup>204</sup> See *supra* note 195.

<sup>205</sup> See *supra* note 123 and accompanying text. For example, the Standards for State CASA/Guardian Ad Litem Organizations Affiliated with the National CASA Association list Standard V: “A State organization has policies and procedures that implement applicable state laws and regulations . . . .” NAT’L CASA ASS’N, *supra* note 120, § V. The implementation guidelines accompanying that standard require only that state organizations have written policies and procedures that cover areas such as a code of ethics and personnel management. Little specificity is included as to what should be in the code or the procedures for personnel management, except for general admonitions against conflict of interests or improper use of relationships. *Id.* § VI. The national CASA standards leave the specificity to the state organizations, which may then develop procedures within very broad parameters.

the defendant routinely provides the service at issue for compensation outside the court system. At the core of our proposal of immunity is concern that the specter of lawsuits and liability will chill citizens' motivation to offer their time and energy to assist in the healing of conflicted families. To avoid this disincentive, the defendant's willingness to provide the service in an essentially voluntary capacity, apart from her vocation, should militate in favor of a high level of protection.<sup>206</sup> Conversely, a defendant sued for a service for which she is regularly paid and for which she was paid in this instance should presumptively be entitled to immunity for ordinary negligence only. The potential for defending a suit in which the parent must demonstrate gross negligence is unlikely to drive the service provider out of involvement with the family court system altogether.<sup>207</sup> After all, the parents with whom she works in family court matters would bear a greater risk than her other clients would have to bear, and the fee she earns in private practice may offer a welcome supplement to the income from her work in the courts. Thus, under our model, an unpaid college student working as a supervised visitation monitor may enjoy immunity in a suit for gross negligence when an identically situated clinical psychologist would not.

In determining the weight to be assigned to volunteer status, a court should take a functional approach that recognizes the spectrum of incentives prompting a service provider's involvement in a custody battle. Between the "pure" volunteer and the seasoned professional lie many others who receive some form of compensation but cannot reasonably be charged with working for predominantly pecuniary motives. Some of these individuals have been previously described,<sup>208</sup> and they should not be equated with those who provide the service in question as part of their principal livelihood. In each case, the court should tailor the scope of the immunity to the rationale of attracting public-spirited citizens who desire to contribute to the community by assisting its vulnerable children.

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<sup>206</sup> In some instances, the service provider will be protected by federal law. For a discussion of the limited scope of the Volunteer Protection Act, 42 U.S.C. §§ 14501–14505, see *supra* notes 178–83 and accompanying text.

<sup>207</sup> *Cf. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 772 n.24 (1976) (permitting greater regulation of commercial speech than other types in part because "advertising is the sine qua non of commercial profits, [and therefore] there is little likelihood of its being chilled by proper regulation and foregone entirely").

<sup>208</sup> See *supra* Part II.D.

### 3. *Additional Immunity*

We emphasize that this proposed legislative scheme is intended to provide the minimum degree of tort immunity available to service providers in custody cases. In this nascent area, it is impossible to anticipate every instance in which immunity may be appropriate. Accordingly, our approach should supplement rather than supplant judicially crafted immunity in these cases. Indeed, the legislation itself might provide for some judicial latitude to recognize immunity in compelling circumstances not captured by express statutory categories.<sup>209</sup>

#### IV. AN APPLICATION OF TORT IMMUNITY: SUPERVISED VISITATION PROVIDERS

One area in which our proposal for immunity could avert a danger to valuable services for at-risk children is supervised visitation and monitored exchange. Supervised visitation provides reliable parties who have no personal stake in the outcome to monitor, amidst allegations of parental misconduct, nonresidential parents' contact with their children.<sup>210</sup> Monitored exchanges supply neutral staff to oversee the transfer of the child back and forth between the parents without monitoring the visit itself. Supervised visitation and exchange providers constitute both an increasingly important component of the family court system and a ripe target for disgruntled parents. The value of these providers in addressing high-conflict custody cases, the providers' vulnerability to multifarious threats of litigation, and their heavy reliance on lightly compensated volunteers warrant a liberal measure of immunity for their staff.

##### *A. Supervised Visitation and Monitored Exchange Services*

Even though it is commonly expressed public policy to ensure that minor children of separated or divorced parents have frequent access to both parents,<sup>211</sup> legislatures and courts have acknowledged that conflicts

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<sup>209</sup> Cf. FED. R. EVID. 807 (making admissible under certain conditions hearsay statements that do not fall within specific exception but which "hav[e] equivalent circumstantial guarantees of trustworthiness").

<sup>210</sup> See, e.g., INST. FOR FAMILY VIOLENCE STUDIES, LAW ENFORCEMENT GUIDE TO SUPERVISED VISITATION PROGRAMS 1, <http://www.familyvio.ssw.fsu.edu/lawenforcebook.pdf> (last visited Sept. 25, 2003).

<sup>211</sup> See, e.g., ME. REV. STAT. ANN. tit. 19-A, § 1653(1)(c) (West 2002) (asserting that "it is in the public interest to encourage parents to share the rights and responsibilities of child rearing").

about visitation are common in disputed divorce and custody cases and often require additional judicial intervention.<sup>212</sup> Faced with conflicting accusations regarding parental unfitness, courts increasingly rely on supervised visitation and monitored exchange to protect children while still allowing contact with their nonresidential parents.<sup>213</sup> Frequently, charges of domestic violence, parental substance abuse, physical and sexual abuse,<sup>214</sup> or other parental endangerment of children<sup>215</sup> force judges to

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<sup>212</sup> The state of Utah, for example, created the Expedited Parent-time Enforcement Pilot Program to expedite resolving disputes over “parent-time.” UTAH CODE ANN. § 30-3-38 (2003). Many states provide for restrictions on visitation in cases involving violence and child abuse. *See, e.g.*, HAW. REV. STAT. § 571-46(10) (2002) (providing that “[a] court may award visitation to a parent who committed family violence only if the court finds that adequate provision can be made for the physical safety and psychological well-being of the child”); LA. REV. STAT. ANN. § 341(A) (West 1993) (“Whenever a court finds by preponderance of the evidence that a parent has subjected his or her child to physical abuse, or sexual abuse or exploitation, or has permitted such abuse or exploitation, . . . the court shall prohibit visitation . . . until such parent proves that such visitation would not cause physical, emotional, or psychological damage to the child.”).

<sup>213</sup> *See* ME. REV. STAT. ANN. tit. 19-A, § 1653(6)(B) (“In an order of parental rights and responsibilities, a court may: (1) Order an exchange of a child to occur in a protected setting; (2) Order contact to be supervised by another person or agency . . .”); *see also* ALA. CODE § 30-3-135 (2003) (allowing restrictions including supervised visitation against a parent who has committed violence); MD. CODE ANN., FAMILY LAW § 9-101 (2003) (instructing the court to deny custody or visitation to a parent who has abused or neglected his/her child except in cases in which an approved supervised visitation arrangement can protect the child).

<sup>214</sup> *See, e.g.*, MD. CODE ANN., FAMILY LAW § 9-101:

(a) In any custody or visitation proceeding, if the court has reasonable grounds to believe that a child has been abused or neglected by a party to the proceeding, the court shall determine whether abuse or neglect is likely to occur if custody or visitation rights are granted to the party.

(b) Unless the court specifically finds that there is no likelihood of further child abuse or neglect by the party, the court shall deny custody or visitation rights to that party, except that the court may approve a supervised visitation arrangement that assures the safety and the physiological, psychological, and emotional well-being of the child.

<sup>215</sup> Other examples of improper, dangerous, and even criminal behavior that can lead to court-ordered supervised visitation are parental alcoholism, intentional attempts to estrange the child from the other parent, severe mental illness, and threats of parental abduction. *See, e.g.*, Janet R. Johnston & Linda K. Girdner, *Family Abductors: Descriptive Profiles and Preventive Interventions*, JUV. JUST. BULL. (Office of Juv. Just. and Delinq. Programs, U.S. Dep’t of Justice, Washington, DC), Jan. 2001, at 2–5, at <http://www.ncjrs.org/pdffiles1/ojjdp/>



decide whether a parent's visitation access should be restricted for the child's well-being.<sup>216</sup> In describing the complexities of granting visitation when, for example, domestic violence plagues a family, a commentator noted that visits or "parenting time"<sup>217</sup> between the violent parent and the children "[become] problematic, and can cause judicial headaches, and participant heartaches."<sup>218</sup> Likewise, one judge described the common struggle to address parental substance abuse allegations: "The story is familiar. Every family judge has presided over and every family lawyer has tried a visitation case involving an alcoholic or other-drug-addicted parent."<sup>219</sup>

In case after case across the United States, courts have turned to supervised visitation as an alternative to terminating or suspending a parent's access to the child altogether, trying to "strike[ ] a balance between the custodial parent's interest in protecting the child, the noncustodial

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182788.pdf. The authors list supervised visitation as an intervention for use with sociopathic parents who demonstrate "blatant disregard of custody orders" and in cases in which there are threats that a parent may abscond with a child. *Id.* at 5.

<sup>216</sup> In domestic violence cases, the courts are given wide discretion in ordering parenting arrangements.

While a growing number of states specifically mention domestic violence as a factor to be considered, most of them allow wide discretion and do not give it special weight. It is simply one additional factor when considering the best interests of the child. By the end of the 1997 legislative session, 13 states had adopted the Model Code of the Family Violence Project of the National Council of Juvenile and Family Court Judges (NCF CJ, 1998). These statutes specify that there is a "rebuttable presumption that it is detrimental to the child and not in the best interest of the child to be placed in sole custody, joint legal custody, or joint physical custody with the perpetrator of family violence."

Daniel G. Saunders, Violence Against Women Online Resources, University of Minnesota, *Child Custody and Visitation Decisions in Domestic Violence Cases: Legal Trends, Research Findings, and Recommendations* (1998), at <http://www.vaw.umn.edu/documents/vawnet/custody/custody.htm> (internal citation omitted).

<sup>217</sup> UTAH CODE ANN. § 30-3-38 (2003).

<sup>218</sup> Julie Kunce Field, *Visits in Cases Marked by Violence: Judicial Actions That Can Keep Children and Victims Safe*, 35 FAM. CT. REV. 23, 23 (1998). Moreover, as the author describes, such visits can be lethal to children and non-offending parents. *Id.* at 31.

<sup>219</sup> Karen Cole, *Supervising the Visitation of Alcoholic Parents*, B. & BENCH VISITATION REP. (Clearinghouse on Supervised Visitation, Tallahassee, Fla.), Summer 2002, at 2, <http://familyvio.ssw.fsu.edu/b&bspring2002.pdf>.

parent's right to meaningful access to the child, and the child's welfare."<sup>220</sup> Still, not every high-conflict case is suitable for even supervised visitation. There are some parents who are so dangerous that providing visits creates too high a risk for the child, the non-offending parent, or the community.<sup>221</sup>

In addition to giving the courts broad discretion in ordering supervised visitation,<sup>222</sup> several states have enacted legislation to facilitate the development of independent visitation services. As the New Jersey legislature found, "court[s] often order supervised visitation where there has been a history of child abuse, medical disabilities, psychiatric problems, or other situations where the safety and welfare of the child may be

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<sup>220</sup> Margaret Tortorella, *When Supervised Visitation Is in the Best Interests of the Child*, 30 FAM. L.Q. 199, 200 (1996); see also *Painter v. Painter*, 688 A.2d 479, 486–87 (Md. Ct. Spec. App. 1997) (finding that former husband's severe verbal and physical abuse of former wife, son, and daughter justified supervised visitation order); *In re Marriage of Gocal*, 576 N.E.2d 946, 949 (Ill. App. Ct. 1991) (order of supervised visitation for father and son for twelve months was not abuse of discretion where father had undergone hospitalizations for manic and aggressive episodes); *Hanson v. Spolnik*, 685 N.E.2d 71, 79 (Ind. Ct. App. 1997) (holding that supervised visitation order for mother was not abuse of discretion, because justified by mother's animosity and behavior toward father and failure to provide counseling for daughter who had engaged in sexually inappropriate behavior with a child); *In re Marriage of Burwinkel*, 426 N.W.2d, 664, 665 (Iowa Ct. App. 1988) (father's spanking of child with excessive force justified supervised visitation); *Hollingsworth v. Semerad*, 799 So. 2d 658, 665 (La. Ct. App. 2001) (finding supervised visitation justified where father was alcoholic and had repeatedly abused child and stepmother); *Street v. May*, 803 So. 2d 312, 320 (La. Ct. App. 2001) (holding that mother's substance abuse posed a risk of harm to child justifying supervised visitation); *Meier v. Connelly*, 378 N.W.2d 812, 817–19 (Minn. Ct. App. 1985) (requiring father with history of denying child access to mother to submit to supervised visitation until he posted \$10,000 bond to ensure return of child from unsupervised visitation); *Cox v. Cox*, 515 S.E.2d 61, 67 (N.C. Ct. App. 1999) (supporting lower court's findings that unsupervised visitation between mother and children was not in children's best interest, and that visits should be supervised by child psychologist).

<sup>221</sup> Peter MacDonald, *A View from the Bench*, B. & BENCH VISITATION REP., Winter 1999, at 4–5, <http://familyvio.ssw.fsu.edu/b&bwinter1999.pdf>.

<sup>222</sup> See, e.g., MONT. CODE ANN. § 40-4-218(2) (providing that "if the court finds that . . . the child's physical health would be endangered or the child's emotional development significantly impaired, the court may order supervised visitation"). In Alabama, similarly, if a parent has committed violence, "a court [in a visitation order] may take any of the following actions: (1) Order an exchange of the child to occur in a protected setting. (2) Order visitation supervised in a manner to be determined by the court." ALA. CODE § 30-3-135(b) (2001).

jeopardized,”<sup>223</sup> but that visitation may not occur “due to the inability to locate volunteers willing to be present during the visitation.”<sup>224</sup> The New Jersey legislation is intended to “mak[e] the facilities and members of local community organizations available to assist in court ordered, supervised visitation.”<sup>225</sup>

Commentators and researchers have noted the rapid development and growth of United States supervised visitation programs.<sup>226</sup> Designed “to assure that a child can have safe contact with an absent parent without having to be put in the middle of the parents’ conflicts or other problems,”<sup>227</sup> supervised visitation programs supply independent third parties who are trained and authorized to observe the contact between a child and a nonresidential parent.<sup>228</sup> The institutionalized setting of a visitation program is often far superior to arrangements allowing a friend or family member—who may not believe the allegations and fail to protect the child, or who may be intimidated by the parent and fail to control the visit adequately—to supervise the visits.<sup>229</sup>

Only a few studies have examined supervised visitation and monitored exchange programs. The programs originated in the 1980s<sup>230</sup> through

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<sup>223</sup> N.J. STAT. ANN. § 2A:12-7(a) (West 2003).

<sup>224</sup> *Id.* § 2A:12-7(b).

<sup>225</sup> *Id.*

<sup>226</sup> See, e.g., Janet R. Johnston & Robert B. Straus, *Traumatized Children in Supervised Visitation: What do They Need?*, 37 FAM. & CONCILIATION CTS. REV. 135, 135 (1999). Supervised visitation programs may be referred to by several terms, including “supervised access,” see, for example, *id.* at 135, and “parenting time centers,” MINN. STAT. § 119A.37 (2001).

<sup>227</sup> SVN, SUPERVISED VISITATION HANDBOOK FOR PARENTS 3 (2001).

<sup>228</sup> See, e.g., KANSAS VISITATION GUIDELINES, *supra* note 184, ¶ 2.3 (identifying supervised visitation and exchanges); see also Bonnie S. Newton, *Visitation Centers: A Solution Without Critics*, 71 FLA. B.J. 54, 56 (1997).

<sup>229</sup> “Orders allowing a family member to supervise visitation or visitation exchanges do not adequately address safety and place the family member at risk of violence or manipulation by the abuser. Family members are also more likely to tolerate inappropriate behavior or violations of the visitation order.” ABA Comm’n on Domestic Violence, POLICY OOA109A (2000), [http://www.abanet.org/domviol/vis\\_recomm.html](http://www.abanet.org/domviol/vis_recomm.html). Despite this ABA admonition, some states specifically allow judges to appoint a relative of the nonresidential parent as a supervisor. See, e.g., W. VA. CODE § 48-27-509(d) (2003) (“If a court allows a family or household member to supervise visitation, the court shall establish conditions to be followed during visitation.”); WYO. STAT. ANN. § 35-21-105(b)(i)(B) (Michie 2002) (allowing judges to order visitation to be arranged and supervised by another person, including family or household members).

<sup>230</sup> Peg McCartt Hess, *History and Evolution*, in NEW YORK SOCIETY FOR THE PREVENTION OF CRUELTY TO CHILDREN PROFESSIONALS’ HANDBOOK ON

“grassroots organizing and volunteerism”<sup>231</sup> and currently exist in many forms, including non-profit, for-profit, public agencies, and collaborations between these groups.<sup>232</sup> Notwithstanding the dearth of formal empirical analysis, supervised visitation programs often keep their own statistics.<sup>233</sup> These statistics show that the programs serve an important need: they provide oversight in disputed cases in which courts decide to err on the side of protecting the children’s—and parents’—safety. A program in California, for example, reported that domestic violence is by far the most common reason that a parent’s contact with a child is supervised.<sup>234</sup> Other reasons include parental substance abuse and allegations of child abuse.<sup>235</sup>

Monitored exchange programs provide a neutral third party to supervise the parents delivering the child to and from each other for visits, without supervising the actual visit, in chronically hostile cases. As the Kansas Child Exchange and Visitation Center Guidelines state, “The primary purposes of supervised exchange and visitation centers are to promote the safety and welfare of the child, parents, and program staff during exchanges and visits and to promote the safety of a vulnerable parent at changeovers.”<sup>236</sup>

When courts order monitored exchanges, they allow parents to avoid emotional, and sometimes dangerous, confrontations with one another when they exchange the child after visits.<sup>237</sup> Parents often accuse each other

PROVIDING SUPERVISED VISITATION 11, 20 (Anne Reiniger ed., 2000) [hereinafter NYSPCC HANDBOOK] (stating that the first programs “were initiated in 1982”).

<sup>231</sup> Barbara E. Flory et al., Note, *An Exploratory Study of Supervised Access and Custody Exchange Services*, 39 FAM. CT. REV. 469, 481 (2001).

<sup>232</sup> Nancy Thoennes & Jessica Pearson, *Supervised Visitation: A Profile of Providers*, 37 FAM. & CONCILIATION CTS. REV. 460, 474 (1999).

<sup>233</sup> Programs are encouraged by the SVN to keep statistics. See SVN, STANDARDS AND GUIDELINES FOR SUPERVISED VISITATION NETWORK PRACTICE § 42 [hereinafter SVN, STANDARDS AND GUIDELINES], reprinted in NYSPCC HANDBOOK, *supra* note 230, at 125.

<sup>234</sup> Rally Family Visitation Services is a “mid-sized program” in San Francisco, California. It reports referrals for reasons of “domestic violence (71%), children witnessing domestic abuse (28%), allegations of child abuse (34%), substance abuse (40%), lack of access (48%), and reintroduction of contact with the visiting parent (52%).” Nadine Blaschak-Brown, *Providing the Service*, in NYSPCC HANDBOOK, *supra* note 230, at 68.

<sup>235</sup> *Id.*

<sup>236</sup> KANSAS VISITATION GUIDELINES, *supra* note 184, ¶ 2.3.

<sup>237</sup> This service is viewed as an important court resource. See, e.g., Leigh Goodmark, *From Property to Personhood: What the Legal System Should Do for Children in Family Violence Cases*, 102 W. VA. L. REV. 237, 276–77 (1999)

of violating court orders for visitation by showing up late for the transfer to purposefully interfere with the other's schedule; not showing up at all; using the opportunity for contact to cause heated arguments in the presence of the child; bringing family members and friends to the transfer because they are suspicious of one another; inflicting physical harm, or threats of harm, on the other parent; and fabricating false allegations of misbehavior (e.g., drunkenness) about the other.<sup>238</sup> When the court orders monitored exchange, it can require parents to meet at a neutral site to transfer the child to and from visits, and to have trained personnel record the time of arrival and departure of each parent, observe their interaction, and ensure that the transfer takes place as ordered. This reduces the possibility of parties' interfering with each other's parental rights, as well as protecting falsely accused parents, inhibiting verbal and physical altercations, and allowing a smoother transition for the child.<sup>239</sup>

Many commentators have advocated the widespread availability of supervised visitation<sup>240</sup> and monitored exchange programs for high-conflict

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(describing the benefits of supervised visitation in cases of domestic violence and advocating for the development of such centers in each community); *see also* Amy B. Levin, Comment, *Child Witnesses of Domestic Violence: How Should Judges Apply the Best Interests of the Child Standard in Custody and Visitation Cases Involving Domestic Violence?*, 47 UCLA L. REV. 813, 819 (2000) (calling for courts "to mandate supervised visitation for batterers and their children so that children can be safe and batterers can have continuing contact with their children").

<sup>238</sup> As Kathryn Marsh notes:

This service is also beneficial when parents are very hostile to each other and are not reliable reporters of their attendance . . . . Careful record keeping is important. Reports of "he said, she said" by conflicted parents can absorb significant staff time . . . . It is not unusual for a parent to arrive under the influence of alcohol or drugs or make a complaint of marks found on a child during a visit.

Kathryn Marsh, *The Services*, in NYSPCC HANDBOOK, *supra* note 230, at 31, 32–33.

<sup>239</sup> *Id.* at 36–37. The state of Oklahoma attempted to deal with allegations of non-compliance with court ordered visitation by establishing by statute the Child Visitation Registry Program, which includes a log for each case that must be signed by each parent at the time of arrival and departure. The entries in the log are rebuttable presumptive proof of compliance or non-compliance with court-ordered visitation. OKLA. STAT. tit. 43, § 421 (2002).

<sup>240</sup> Supervised visitation is listed in a group of "services that should be available to all families, without regard to income." Ramsey, *supra* note 6, at 152; *see also* Field, *supra* note 218, at 31 (arguing that the use of supervised visitation programs can "help limit the harm domestic violence victims and their children face

cases.<sup>241</sup> Underscoring the crucial role of supervised visitation in dealing with a domestic violence case, one judge wrote:

[The] goals to be considered are protection of the victim/parent from physical violence; protection of the victim/parent from verbal-emotional abuse; protection of the child from physical violence; protection of the child from verbal-emotional abuse; providing a relationship between the child and the batterer parent while providing for safety; allowing contact while parenting skills are developed; allowing contact while treatment is provided. The availability of supervised visitation is critical to a judge being able to meet any of these goals.<sup>242</sup>

As in the development of the CASA movement, which began when Judge David Soukup of Seattle, Washington recognized the need for children to have advocates in court,<sup>243</sup> supervised visitation is often spearheaded by

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during visits or exchanges”); Newton, *supra* note 228, at 57 (describing supervised visitation as a “solution without a downside”). ABA Comm’n on Domestic Violence, *supra* note 229, encourages “courts to provide or identify, and make use of, locations in which supervised visitation and visitation exchanges can safely occur.”

<sup>241</sup> Johnston, *Building Partnerships*, *supra* note 4, at 478; *see also* Flory et al., *supra* note 231. Flory, who wrote extensively on the development of Heritage House, a supervised visitation program in St. Louis, Missouri, offers her own definition of “high-conflict families.”

For this study, families are considered high conflict when one or more of the following criteria is present: (a) children’s opportunity to maintain a relationship with both parents is precluded by parental behaviors, (b) ongoing adult interpersonal conflict exposes children to negative messages and inappropriate role expectations, (c) ongoing interparental verbal and/or physical conflict exposes children to potential emotional and/or physical harm, (d) child physical or sexual abuse and /or neglect is alleged, or (e) domestic violence exposes adult victims to potential physical harm.

*Id.* at 469.

<sup>242</sup> David Dugan, *A View From the Bench*, B. & BENCH VISITATION REP. (Clearinghouse on Supervised Visitation, Tallahassee, Fla.), Summer 2001, at 2, 3.

<sup>243</sup> In 1976, Superior Court Judge David Soukup of Seattle, Washington, obtained funding to recruit and train community volunteers to assist children in court. The CASA pilot program was then formed. *See* Nat’l CASA Ass’n, *History of CASA*, at <http://www.nationalcasa.org/htm/about.htm> (last visited Sept. 25, 2003).

judges who see the link between what a family in crisis needs and how a new service in the community can respond. In many areas, the court system works with individuals in the community to initiate the development of new supervised visitation providers.<sup>244</sup> One judge in Florida, for example, was spurred to action upon hearing news of a murder/suicide in a divorce case over which he presided.<sup>245</sup> A judge in Kentucky said that there was no freestanding visitation center in his jurisdiction, but he would “do all in [his] power” to see that one was developed.<sup>246</sup> In Illinois, where there are currently only eight monitored exchange programs, the Chicago Tribune reported that family advocates and many judges are “pushing for” the development of more services in the wake of several highly publicized child deaths in custody cases.<sup>247</sup>

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<sup>244</sup> See Dugan, *supra* note 242, at 2–3 (“[I]n those communities that do not have an established program, it would be well worth the court’s time to spearhead the development of a supervised visitation program.”).

<sup>245</sup> Judge Robert Evans had ordered unsupervised visitation between Daniel Demmer and his two-year-old daughter Sarah, despite warnings from Demmer’s wife Laura that he had a violent temper and kept a loaded gun. See Greg Dawson, *Jovial Judge Does Some Serious Good*, ORLANDO SENTINEL, Oct. 15, 1997, at D1. During one of the unsupervised visits, Daniel Demmer called 911 to report his own suicide before killing himself with his handgun. See Tom Leithauser, *Man Shoots Daughter 4 Times, Calls 911 Before Shooting Himself in Head*, ORLANDO SENTINEL, Nov. 8, 1996, at D1. When police arrived, they found Sarah, whom he had shot four times in the chest before turning the gun on himself. *Id.* Police said the suicide note indicated that Demmer was upset about the divorce and the amount of time that he was allowed to spend with his daughter. *Id.* Judge Evans’s response was to organize county support for what became Orlando’s Family Ties Supervised Visitation and Exchange Program, described as “sort of a de-militarized zone” in particularly nasty divorces. Dawson, *supra*. Other supervised visitation programs have been created in response to an identified community need, such as was recognized in Huntsville, Alabama. In May 1998, a Community Vision Summit was held to develop a plan for reducing child abuse and neglect, and Judge Susan T. Moquin helped start the pilot program called Both Parents Program. The program was born out of the recognition that children “deserve regular and safe access to their non-custodial parents, whether they are in foster care . . . or embroiled in their parents’ custody battle.” Pam Berry, *Message from the Coordinator*, BOTH PARENTS PROGRAM NEWSL. (Family Services Center, Huntsville, Ala.), June 2000, at 1.

<sup>246</sup> MacDonald, *supra* note 221, at 4 (emphasizing the importance of supervised visitation, and recalling comments made at the 1999 Supervised Visitation Network Conference in Nashua, New Hampshire).

<sup>247</sup> Amanda Vogt, *Making Divorce Less Painful for Parents and Their Kids*, CHI. TRIB., Feb. 5, 2003, at 1.

The New Mexico state legislature empowered “judicial districts [to] establish a ‘supervised visitation program’ by local court rule . . . [and to allow the use of those programs] when, in the opinion of the court, the best interests of the child are served if confrontation or contact between the parents is to be avoided.”<sup>248</sup> In Idaho, the legislature declared that “an effective response to address the needs of families and children in resolving [domestic relations] disputes would include . . . [s]upervised visitation by trained providers to assure the safety and welfare of children.”<sup>249</sup> Tennessee has authorized its Department of Human Services to “apply for and utilize any federal grants for the purpose of implementing a pilot project for access and visitation programs.”<sup>250</sup>

The Federal Violence Against Women Act of 2000 provided \$15 million for the development of supervised visitation pilot programs across the country.<sup>251</sup> New programs have been developed, and units of government have been awarded planning grants to investigate ways of developing

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Family advocates and many judges are pushing for more monitored exchange sites . . . . They say that the simple act of keeping the parents apart reduces conflict and eases a child’s fear . . . . The body of Joshua Gleeson, 3, was found floating in the Des Plaines River near Channahon, and the body of his sister, Ashley, 5, was recovered the next day. Their father, Patrick Gleeson, 48, is charged in their shooting deaths, which allegedly took place during a court-ordered visit. Gleeson issued a statement saying that his custody battle and visitation disputes with the children’s mother made him depressed. He suggested the children were now better off. On Oct. 1, Mary Elizabeth Brunson-Waller, 3, was shot to death by her father . . . . Mary Elizabeth’s parents were entangled in a custody dispute, and authorities said John Brunson believed he was about to lose visitation privileges when he killed his daughter as she slept in her car seat.

*Id.*

<sup>248</sup> N.M. STAT. ANN. § 40-12-5.1(a) (Michie 2002).

<sup>249</sup> IDAHO CODE § 32-1402 (Michie 2001).

<sup>250</sup> TENN. CODE ANN. § 36-2-312(b) (2000).

<sup>251</sup> 42 U.S.C. § 10420(a) (2000). The Safe Havens for Children Pilot Program provides for the awarding of

grants to states, units of local government, and Indian tribal governments that propose to enter into or expand the scope of existing contracts and cooperative agreements with public or private nonprofit entities to provide supervised visitation and safe visitation exchange of children by and between parents in situations involving domestic violence, child abuse, sexual assault, or stalking.

*Id.*



future supervised visitation programs.<sup>252</sup> This approach ensures the further growth of programs across the United States to assist judges in domestic violence cases. A new request for proposals was issued for 2003, contingent on renewed federal funding.<sup>253</sup>

Supervised visitation providers, in contrast to CASAs,<sup>254</sup> are admonished not to make recommendations to the court;<sup>255</sup> on the other hand, some CASAs do supervise visitation.<sup>256</sup> Visitation program staff seek to develop and maintain a “caring environment” to allow children to play with and spend time with their non-custodial parents.<sup>257</sup> As Kathryn Marsh writes in the New York Society for the Prevention of Cruelty to Children’s *Professionals’ Handbook on Providing Supervised Visitation*:

Supervised visitation programs can be located in schools, churches, courthouses, universities, YMCA’s and YWCA’s, child care agencies, and even renovated houses. Many programs have limited hours but often operate on weekends and evenings to accommodate the schedules of children and parents. Staff may include a program coordinator, full- or part-time visit supervisors, and security guards. Some programs use trained volunteers and students (graduate and college level) to supervise visits . . . . Security and safety for families and staff are critical compo-

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<sup>252</sup> See DEP’T OF JUSTICE OFFICE ON VIOLENCE AGAINST WOMEN, SAFE HAVENS: VISITATION AND SAFE EXCHANGE GRANT PROGRAM FISCAL YEAR 2003 SOLICITATION, at <http://www.ojp.usdoj.gov/vawo/grants/safehavens03/safehavens03.txt>.

<sup>253</sup> *Id.*

<sup>254</sup> Federal legislation on the appointment of GALs includes a provision that among the roles of a GAL is the responsibility to make a recommendation to the court concerning the best interest of the child. See 42 U.S.C. § 5106a(b)(2)(A)(ix) (2000), amended by Keeping Children and Families Safe Act of 2003, Pub. L. No. 108-36, § 114(b)(1)(B)(vii) (2003).

<sup>255</sup> Nevertheless, practice often departs from this expectation because of judicial pressure. For a discussion of the controversy surrounding supervised visitation providers making recommendations, see Nat Stern & Karen Oehme, *The Troubling Admission of Supervised Visitation Records in Custody Proceedings*, 75 TEMP. L. REV. 271, 279–80 (2002).

<sup>256</sup> See, e.g., *West v. Osborne*, 34 P.3d 816, 818 (Wash. Ct. App. 2001) (involving a GAL who supervised visits, among her other duties).

<sup>257</sup> For a discussion of the various philosophies to be considered when setting up a visitation program, a prototype of a visitation room, and lists of furnishings, see Heidi Levenback, *Setting Up the Physical Environment*, in NYSPPC HANDBOOK, *supra* note 230, at 52–57.

nents of supervised visitation programs in terms of location, staffing, and program procedures.<sup>258</sup>

Supervised visitation and exchange providers are trained in areas such as child development, divorce dynamics, child abuse and neglect issues, and administrative procedures.<sup>259</sup> They are fact finders, routinely screening parents for the presence of substance abuse and violence, reviewing records, providing intake, documenting whether parents show up for court-ordered visits, and taking notes regarding the interaction between parent and child during the visits.<sup>260</sup> Providers also inform parents of program rules and policies. They frequently intervene in the visit when those rules are violated,<sup>261</sup> redirecting parent-child interaction, admonishing parents who violate rules, and sometimes terminating visits.<sup>262</sup> Their roles require them to exercise a great deal of “‘discretionary judgment’ as part of their function”<sup>263</sup> when determining when and how to intervene. For example, the Kansas Child Exchange and Visitation Center Guidelines define the Exchange/Visitation Supervisor as the individual trained and authorized to, among other things, facilitate the parent-child interaction.<sup>264</sup> Facilitation is defined as “to encourage age-appropriate activities, promote the child’s safety and welfare, and discourage inappropriate conduct.”<sup>265</sup> Deciding when a child is at risk and determining what behavior is inappropriate certainly involve a great deal of discretionary judgment to fulfill the court’s order for supervised contact.

Despite providing such important services, supervised visitation and exchange programs, like many social services, are chronically under-

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<sup>258</sup> Marsh, *supra* note 238, at 35.

<sup>259</sup> For a thorough discussion of suggested policies and procedures, see Blaschak-Brown, *supra* note 234, at 69–81. The author describes procedures for intake and screening of parents. *See id.* at 69–74.

<sup>260</sup> For a list of the services these programs provide, see *id.* at 69–70.

<sup>261</sup> SVN, STANDARDS AND GUIDELINES, *supra* note 233.

<sup>262</sup> For a description of intake and services, see Blaschak-Brown, *supra* note 234, at 69–75.

<sup>263</sup> Stone v. Glass, 35 S.W.3d 827, 830 (Ky. Ct. App. 2000) (explaining that the discretion accorded to a social worker conducting a court-mandated custody evaluation required that she receive quasi-judicial immunity).

<sup>264</sup> See KANSAS VISITATION GUIDELINES, *supra* note 184, §§ 2.3–2.4; see generally KAN. STAT. ANN. § 75-720(a) (2002) (directing Kansas Attorney General to coordinate and cooperate with local government agencies in providing visitation centers).

<sup>265</sup> See KANSAS VISITATION GUIDELINES, *supra* note 184, § 2.4.

funded.<sup>266</sup> Thus, many programs must rely on an ever-changing amalgam of volunteers, paid staff, licensed clinicians, paid community members, and college interns to monitor visits.<sup>267</sup> Like the citizen advocates of the CASA program, supervised visitation workers are “citizen monitors” charged with ensuring safe visits for at-risk children.<sup>268</sup>

Perhaps because supervised visitation is a scarce resource,<sup>269</sup> “[j]udicial referral to supervised access and custody services is often a last resort in a long line of treatment interventions.”<sup>270</sup> Accordingly, supervised visitation is generally reserved for the most difficult and contentious custody disputes.<sup>271</sup> Thus, while only a small subgroup of divorcing parents are considered high-conflict, these cases are much more prevalent at visitation centers.<sup>272</sup>

Directors of supervised visitation programs regard high-conflict cases as dangerous power struggles. According to the director of a visitation program that was developed specifically for high-conflict cases,

[T]hese are the parents that will fight to the death thinking they can convince the courts, the kids, and service providers that they are the better parent. In actuality, they view the children as possessions. If they perceive a person/service to be in their way, they will “mow you down” in any

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<sup>266</sup> See, e.g., Thoennes & Pearson, *supra* note 232, at 474; see also Debra A. Clements, *A Compelling Need for Mandated Use of Supervised Visitation Programs*, 36 FAM. & CONCILIATION CTS. REV. 294, 306 (1998) (asserting that “[t]he demonstrated inability of most supervised visitation programs to endure, let alone thrive, because of inadequate financial resources provides a compelling reason for state funding”).

<sup>267</sup> See Stern & Oehme, *supra* note 255, at 281. See Katherine M. Reihing, *Protecting Victims of Domestic Violence and Their Children After Divorce: The American Law Institute’s Model*, 37 FAM. & CONCILIATION CTS. REV. 393, 404 (1999); see also Clements, *supra* note 266, at 306 (stating that the chronic need for funding justifies state funding for programs).

<sup>268</sup> See Thoennes & Pearson, *supra* note 232, at 460.

<sup>269</sup> See, e.g., Reihling, *supra* note 267, at 404 (criticizing the American Law Institute’s model statute on child custody for suggesting free or low-cost court-ordered services like supervised visitation for families affected by domestic violence without acknowledging the costs for developing and providing such services).

<sup>270</sup> Flory et al., *supra* note 231, at 480.

<sup>271</sup> See Stern & Oehme, *supra* note 255, at 271.

<sup>272</sup> Flory et al., *supra* note 231, at 469; Thoennes & Pearson, *supra* note 232, at 460.

number of ways. When they perceive bias, they escalate over time and they will eventually lash out.<sup>273</sup>

According to various studies, other directors agree.<sup>274</sup> Supervised visitation staff are responsible for creating a supervised environment, and parents can

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<sup>273</sup> E-mail from Barbara Flory, Project Director, Heritage House, St. Louis, Mo., to Karen Oehme (July 21, 2002) (on file with authors).

<sup>274</sup> There is a paucity of information, as few studies have been done on supervised visitation and monitored exchange services. The few studies that have been conducted, however, show that the majority of supervised visitation programs are either part of private, non-profit social services agencies or linked to public agencies. *See* Thoennes & Pearson, *supra* note 232, at 464. In order to determine whether anecdotal information informally received by the Clearinghouse might be accurate on a large scale, we circulated an informal survey regarding supervised visitation services to program directors at the May 2002 Annual Supervised Visitation Network Conference in Destin, Florida. One hundred and four programs participated in the conference. Sixty-three programs responded. Of those responding, forty-nine percent use volunteers to monitor visits; ten percent pay community members to monitor visits; fifty-seven percent use college interns, who receive credit, to monitor visits; and fifty-seven percent use paid staff (other than directors) to monitor visits. (One study found that one half of supervised visitation programs use graduate and undergraduate volunteers, and that one third to one fourth of programs use other community members. *Id.* at 464. It is unclear, however, whether the student “volunteers” in the study cited by Thoennes & Pearson also received academic credit for their work; nor it is clear whether those students were paid during university holidays in which visits took place, or whether community members were paid nominal hourly wages in any cases. These factors may make a difference when considering issues of immunity under current law.) More interesting in our study are responses to the question, “Have you ever been threatened with a lawsuit by a parent ordered to use your program?” Fifty-five percent of respondents answered yes. In addition, next to their affirmative responses to this question, some respondents wrote “daily.” The program directors were then asked a follow-up question, “Has anyone else ever threatened to file a lawsuit against your staff or your program?” Forty percent answered in the affirmative. The final question asked was the following: “Are you concerned that you, your staff, or your program might get sued by a parent ordered to participate in your program?” Seventy percent of respondents checked, “Yes, this concerns me.” This informal study may shed some light on the oft-discussed discrepancy between the fact that relatively few non-profit organizations have actually been sued, and the concern among many program staff that they *will be* sued. The survey results are on file with the authors.

easily resent what they may perceive as surveillance.<sup>275</sup> Such providers are just as vulnerable to the “intimidating wrath and litigious penchant of disgruntled parents”<sup>276</sup> as CASAs, mediators, and other essential service providers.

### *B. Crafting Immunity for Visitation Staff*

The staff of supervised visitation programs represent strong candidates for the immunity we have proposed. The largest study of supervised visitation programs to date has noted that supervised visitation directors worry about liability issues.<sup>277</sup> The drafters of the Supervised Visitation Network (“SVN”) *Standards and Guidelines* added a provision mandating that liability insurance be provided for staff and families utilizing the services.<sup>278</sup> Lawsuits would be a tremendous drain on the resources and morale of providers. Most supervised visitation staff are presumably not accustomed to the discovery process associated with lawsuits. Despite the fact that many supervised visitation counselors or programs must buy professional liability coverage,<sup>279</sup> creating a presumption of immunity would go a long way toward discouraging frivolous lawsuits filed by angry parents.

The fact that some communities have initiated the development of supervised visitation programs to protect their vulnerable children means that the paid or volunteer status of the programs’ staff members may vary depending on the community’s resources. Supervised visitation providers<sup>280</sup>

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<sup>275</sup> The loss of privacy and exposure of the vulnerability of the parent-child relationship are two reasons mentioned for the “negative feelings” that parents can have about programs. Levenback, *supra* note 257, at 52. One participant called a visitation program “a jail with carpet.” Karen Oehme, *Supervised Visitation Programs in Florida: A Cause for Optimism, A Call for Caution*, 71 FLA. B.J. 50, 54 (1997).

<sup>276</sup> *Short v. Short*, 730 F. Supp. 1037, 1039 (D. Colo. 1990) (finding that a court-appointed GAL for the child had absolute immunity against a claim of negligence by the child’s parents).

<sup>277</sup> Thoennes & Pearson, *supra* note 232, at 475–76.

<sup>278</sup> SVN, STANDARDS AND GUIDELINES, *supra* note 233, § 3.3.

<sup>279</sup> See FLORIDA VISITATION STANDARDS and KANSAS VISITATION GUIDELINES, *supra* note 184 (requiring liability insurance for supervised visitation programs); see also SVN, STANDARDS AND GUIDELINES, *supra* note 233, § 3.3 (requiring that “[a]ll providers of Supervised Visitation services must provide adequate general and liability insurance for staff and families utilizing the services”).

<sup>280</sup> The titles of these workers—whether monitors, coordinators, or staff—are irrelevant to our discussion.

may not fit neatly into the boxes of currently existing protection. For example, only a few providers would be protected by governmental immunity statutes such as the one in Kansas, which protects only governmental employees for damages resulting from exercising “judicial function.”<sup>281</sup> Similarly, many programs’ use of at least some volunteers means only that the Volunteer Protection Act may protect those volunteers from civil liability when angry parents file suit.<sup>282</sup> Other personnel, working side by side with volunteers—like those workers in Palm Beach County, Florida, who are public school teachers and college students during the week, and who make \$12 per hour working at Family Connection supervising visits on weekends<sup>283</sup>—are cast into a much more vulnerable area than their volunteer counterparts. Heritage House, located in Missouri, uses only paid MSW-level supervisors and paid master’s level college students; it never uses volunteers.<sup>284</sup> Children’s Safety Centers, which operates five supervised visitation programs in Minnesota, relies on a combination of volunteers, paid staff, interns, and college students.<sup>285</sup> Some programs provide college credit to students, but must pay them hourly wages in the summer months, during spring break, and at times when the university is closed;<sup>286</sup> after all, as one program director noted, “even dysfunctional parents want to visit with their children during holidays.”<sup>287</sup>

Under our model, to determine the appropriate scope of immunity to be accorded to supervised visitation workers, a court should apply the statutory factors that we have proposed.<sup>288</sup> The providers who accept

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<sup>281</sup> See *Cook v. City of Topeka*, 654 P.2d 953, 956 (Kan. 1982) (construing the immunity for the “judicial function” provided in KAN. STAT. ANN. § 75-6104(b) (2001) as protecting only the performance of functions involving “the exercise of judgment, discernment, or discretion” (internal citation omitted)).

<sup>282</sup> See *supra* notes 169–75.

<sup>283</sup> E-mail from Mary Jaffe, Case Manager, Family Connection, to Karen Oehme (Jan. 31, 2003) (on file with authors). Family Connections runs its visitation program in the cafeteria of the Palm Beach County Courthouse. It frequently advertises for volunteers, but also pays teachers, college students, and community mental health professionals to monitor visits on weekends.

<sup>284</sup> E-mail from Barbara Flory, Project Director, Heritage House, to Karen Oehme (Jan. 31, 2003) (on file with authors).

<sup>285</sup> E-mail from Amber Blackmon, Volunteer Coordinator, Children’s Safety Centers, to Karen Oehme (Jan. 31, 2003) (on file with authors).

<sup>286</sup> E-mail from Susan Marvin, Director of the Family Visitation Program of Tallahassee, to Karen Oehme (Jan. 31, 2003) (on file with authors).

<sup>287</sup> *Id.*

<sup>288</sup> See *supra* Part III.B.

judicially referred cases obviously meet the primary criterion of judicial authority; a child's presence in the program must be directly attributable to a court order. Likewise, it is the very essence of a visitation program that staff avoid conflicts of interest and a personal stake in the outcome of the case. The "ability to maintain an independent role"<sup>289</sup> is an important criterion for staff selection of supervised visitation providers. Indeed, commentators frequently mention the importance of neutrality, emphasizing that supervised visitation "staff members appear in court as neutral fact witnesses rather than biased expert witnesses promoting one parent over the other."<sup>290</sup>

Somewhat more doubtful, however, is whether widely recognized practice standards for visitation staff have materialized with sufficient clarity to justify immunity. No national body has promulgated a definitive code governing supervised visitation staff conduct. On the other hand, the multinational nonprofit SVN<sup>291</sup> promulgated a set of standards and guidelines for the provision of supervised visitation in 1996. These are currently under revision, and no state has yet adopted them in full.

Several states, however, have adopted standards similar to those of SVN in defining the tasks of supervised visitation providers, coordinating the provision of those services, and setting standards for the services.<sup>292</sup> Admittedly, only a few other states have even marginally addressed the issue of independent supervised visitation providers.<sup>293</sup> Yet, their develop-

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<sup>289</sup> SVN, STANDARDS AND GUIDELINES, *supra* note 233, § 10.3.

<sup>290</sup> Flory et al., *supra* note 231, at 474.

<sup>291</sup> SVN, *About Supervised Visitation Network*, at <http://www.svnetwork.net/AboutSVN.html> (last visited Sept. 20, 2003).

<sup>292</sup> *See, e.g.*, CAL. FAM. CODE § 3200 (West 2003) (directing Judicial Council to develop uniform standards of practice for providers of supervised visitation, as found in CAL. RULES OF CT., STANDARDS OF JUDICIAL ADMIN. § 26.2 (2002)); KAN. STAT. ANN. § 75-720(a) (2002) (directing Kansas Attorney General to "coordinate and cooperate with local governmental agencies in providing the child exchange and visitation centers"); FLORIDA VISITATION STANDARDS, *supra* note 184.

<sup>293</sup> *See, e.g.*, COLO. REV. STAT. § 14-10.5-104 (2002) (authorizing development of a "parenting time enforcement program"); CONN. GEN. STAT. ANN. § 17a-1011 (West 2003) (authorizing Commissioner of Children and Families to establish visitation centers); HAW. REV. STAT. § 571-46(14) (2002) (stating that a supervised visitation center must provide a secure setting and specialized procedures for supervised visitation and the transfer of children for visitation and provide supervision by a person trained in security and the avoidance of family violence).

ment and use by the judiciary have far outpaced legislatures' attention to them.<sup>294</sup>

From the few formal studies that exist regarding the service,<sup>295</sup> it is clear that judges want supervised visitation providers in their communities. As one study revealed,

Family court judges . . . say they need more supervised visitation resources. Although many (30%) use family and friends to do the supervision, most (75%) express skepticism about the suitability of such arrangements. And although judges in our survey estimated that supervised visitation was ordered in less than 5% of divorce filings in their jurisdictions, a majority (60%) felt that such services are needed in at least twice as many cases. Most (80%) family court judges and administrators characterize the lack of services as a “moderate” or “serious” problem for the courts.<sup>296</sup>

Ultimately, each state must develop its own standards,<sup>297</sup> make its own evaluation as to the adequacy of those standards, and periodically adjust that assessment in light of the continued development of supervised visitation. These standards would form the basis for judging the actions of providers when the providers are faced with tort claims of litigious parents.

In our view, at least two states—California and Kansas—have created sufficient norms for the provision of supervised visitation services to justify the extension of at least some tort immunity to providers.<sup>298</sup> We contend that although other states may have developed a critical mass of service

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<sup>294</sup> Arizona, Arkansas, Pennsylvania, South Dakota, Virginia, Oklahoma, Vermont, and Georgia, for example, have not addressed supervised visitation providers legislatively, but SVN lists programs offering services in each of those states. For a state-by-state directory, contact Supervised Visitation Network, 2804 Paran Pointe Drive, Cookeville, TN 38506, 931-537-3414; fax 931-537-6348; Info@SVNetwork.net (on file with authors).

<sup>295</sup> See, e.g., Jessica Pearson & Nancy Thoennes, *Supervised Visitation: The Families and Their Experiences*, 38 FAM. & CONCILIATION CTS. REV. 123 (2000); Thoennes & Pearson, *supra* note 232.

<sup>296</sup> Thoennes & Pearson, *supra* note 232, at 473.

<sup>297</sup> In Florida, for example, the Family Supreme Court's Family Court Steering Committee developed minimum standards for the provision of supervised visitation services. These were ultimately adopted by the Florida Supreme Court. See FLORIDA VISITATION STANDARDS, *supra* note 184.

<sup>298</sup> See CAL. RULES OF COURT, STANDARDS OF JUDICIAL ADMIN. § 26.2 (2002); KANSAS VISITATION GUIDELINES, *supra* note 184.



standards based on the *custom* of service delivery, or informally agreed-upon standards, the development of recognized formal minimum standards is necessary for the extension of legislative tort immunity. It may well be that in particular cases, courts will decide to extend immunity to providers who follow accepted community standards, but we think the better approach is to provide statutory immunity based on sound formal standards.

As to the scope of possible immunity, the range of potential allegations against visitation providers precludes a single form of immunity for all suits. At a minimum, however, all staff in states with formal minimum conduct standards should receive immunity against allegations of negligence, and in many cases they should enjoy stronger evidentiary protection as well. Visitation staff who are unpaid volunteers may already be immune from suit under the VPA,<sup>299</sup> the meager compensation for many other workers, however, would leave them vulnerable to liability. This gap in protection is not justified by the modest salary these workers receive. Far from being a “cash cow,” supervised visitation is viewed by the SVN as a service that “should be available to all who need it. Within the limits of available funding, the Provider shall make services available to all families regardless of ability to pay.”<sup>300</sup> Even for salaried program directors, the possibility of broader immunity should be addressed.

A more fluctuating variable shaping immunity is the nature of the claim brought by the complaining parent. Here, two factors that we proposed above, the severity of the harm and the objectivity of the duty, could be expected to come into play. As generalizations, for example, serious physical injury to the child would favor limiting immunity to a claim of simple negligence, whereas a parent’s contention that the parent had suffered intangible damage would suggest that immunity should apply in claims of both simple and gross negligence. Thus, a parent charging that the program’s inadequate supervision had caused her child to suffer fractured limbs would presumably confront a less expansive immunity than one who alleged harm to her reputation by a defamatory statement in a visitation report. Between these two extremes, of course, lie more problematic claims: e.g., failure of custodial duty in releasing a child to a parent displaying signs of inebriation, or assault and battery in restraining a parent from engaging in what a staff member regards as inappropriate behavior. Once a regime of statutory immunity is in place, these are the kinds of

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<sup>299</sup> Volunteer Protection Act, 42 U.S.C. §§ 14501–14505 (2003). For a discussion of the VPA, see *supra* notes 169–75 and accompanying text.

<sup>300</sup> SVN, STANDARDS AND GUIDELINES, *supra* note 233, § 9.1.

issues that courts could explore in the course of developing more general doctrines of immunity in the area.

We consider it a positive step that the governing bodies of some states have begun to address independent supervised visitation. In many states, however, there seems to be a chasm separating lawmakers from those communities in which supervised visitation programs are developing at a rapid pace. Lawmakers should not wait until a crisis occurs in which “citizen monitors” refuse to work at supervised visitation centers for fear of lawsuits by high-conflict parents. After only one or two of these suits, particularly if the suits are publicized, judges and communities could well lose an important ally in the struggle to provide safe havens for children in the court system. This worry is not an overreaction. This Article’s footnotes are replete with cases in which parents sued neutral individuals engaged by the court to assist with determining and acting in children’s best interest. Supervised visitation programs exist, and the courts are using them. It is difficult to determine how many providers the courts are using, but SVN lists nearly 700 individuals in its voluntary association.<sup>301</sup> Legislatures should now consider setting standards for visitation programs and granting immunity for their providers.

#### CONCLUSION

Legislatures should support the invaluable work done by those who assist the courts in addressing the problems in high-conflict families. Our society can show its commitment to children by crafting legislation to protect those who perform this crucial task. Increasingly, in these days of reduced funding and lean budgets, courts need services staffed by trained volunteers, community professionals, and even college interns. These personnel perform crucial work and deserve some measure of protection from the often spurious, vindictive lawsuits filed by angry parents.

We recognize that our proposal of presumptive tort immunity for a range of service providers in high-conflict custody cases entails considerable extension of existing doctrine. Even if legislatures do not adopt this version of immunity, however, legislative consideration of the issue may spur greater recognition of the importance of these services. Perhaps some legislatures might experiment with a more limited immunity, combined with increased allocation of resources to judicially mandated family court

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<sup>301</sup> SVN, EXECUTIVE DIRECTOR REPORT TO THE BOARD OF DIRECTORS (2002) (on file with authors).

services. Moreover, by tying immunity to the presence of practice norms, legislatures could promote the salutary trend toward higher standards of training and expectations for these services. Either development would advance the purpose of our proposal: not adoption of immunity as an end in itself, but rather enhancement of the care of some of society's most fragile children.