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War and P.E.A.C.E.: A Preliminary Report and a Model Statute on an Interdisciplinary Educational Program for Divorcing and Separating Parents

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**WAR AND P.E.A.C.E.: A PRELIMINARY
REPORT AND A MODEL STATUTE ON AN
INTERDISCIPLINARY EDUCATIONAL PROGRAM
FOR DIVORCING AND SEPARATING PARENTS**

Andrew Schepard*

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As this Article will describe, P.E.A.C.E. (Parent Education and Custody Effectiveness) is an interdisciplinary volunteer effort by Hofstra University, lawyers, and mental health professionals, in cooperation with the New York court system, to help divorcing parents manage conflict for the benefit of their children. Numerous people have contributed to this volunteer research and development effort and deserve recognition for it. So as not to burden the reader with a lengthy acknowledgement at this point, I have placed it at the conclusion of this Article.

P.E.A.C.E. recently received a grant for further pilot programs and a curriculum development project from the State Justice Institute, a federally-funded agency which makes grants to projects it believes show potential for significant improvement of the administration of justice in the state courts. This grant will help finance some of the necessary improvements to P.E.A.C.E. that are described in this text.

I am one of the principal founders of the P.E.A.C.E. program described in this Article. The views expressed in this Article are my own and should not be attributed to the State Justice Institute or anyone else involved in the development of P.E.A.C.E.

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It is a sea of confusion, anger and fear out there. And most of us don't know how to swim. . . . For me the P.E.A.C.E. program was the missing link.¹

Interdisciplinary efforts of this kind [the P.E.A.C.E. program], to my mind, promise us and offer us a splendid model for addressing the sort of social problems, new societal problems that are increasingly coming into our courts. Pervasive problems that reach far beyond simply litigating and deciding an isolated finite dispute between two private parties. . . . [A]t the conclusion of our initial rounds of [P.E.A.C.E.] pilot programs, we already know that we don't yet have the answers. We believe we have a promising start. We think we have a good beginning.²

During the preliminary conference [with the divorce court], the parties should be advised of education programs such as Parent Education and Custody Effectiveness (P.E.A.C.E.) or similar efforts, which foster communication between the parents on matters relating to the children. . . . [T]he Committee believes any effort to study and evaluate programs which may promote better communication for the well-being of the children caught in the midst of the divorce should be encouraged and supported.³

INTRODUCTION

As divorce, separation, and the accompanying parental conflicts become increasingly common events in the lives of

1. Tammy Ale, Remarks at the Conference *From War to P.E.A.C.E.: New Directions for New York's Child Custody Disputes* (Apr. 24, 1993) (on file with the *University of Michigan Journal of Law Reform*) (parent participant in the P.E.A.C.E. program).

2. Chief Judge Judith S. Kaye of the New York Court of Appeals, Remarks at the Conference *From War to P.E.A.C.E.: New Directions for New York's Child Custody Disputes* (Apr. 24, 1993) (on file with the *University of Michigan Journal of Law Reform*).

3. COMMITTEE TO EXAMINE LAWYER CONDUCT IN MATRIMONIAL ACTIONS REPORT 35 (1993) [hereinafter MATRIMONIAL LAWYER CONDUCT REPORT].

American children, numerous commentators have emphasized the importance of educating parents about how to help children cope with these events.⁴ For example, at a recent conference entitled "Family Law for the Next Century," cosponsored by the Family Law Section of the American Bar Association and the University of California-Berkeley School of Law, "[c]onsiderable enthusiasm was voiced for . . . a program that would explain the divorce process, child custody alternatives, and the parties' legal rights and obligations."⁵ Several states have started programs, some of them government mandated, for this purpose.⁶

This Article is a report on P.E.A.C.E. (Parent Education and Custody Effectiveness), an interdisciplinary attempt to create a parent education program in New York. P.E.A.C.E. is an educational program that provides information to parents on three topics: the legal process for determining custody and child support; the effects of divorce and separation on adults; and the effects of divorce and separation on children, and how parents can help children cope with this difficult transition.⁷ P.E.A.C.E. is education—nothing more. It is not mediation or

4. See, e.g., Meyer Elkin, *Educational Preparation for Divorce—Another Missing Link in the Divorce Process*, CONCILIATION CTS. REV., Dec. 1983, at v; Jane W. Ellis, *Plans, Protections and Professional Intervention: Innovations in Divorce Custody Reform and the Role of Professionals*, 24 U. MICH. J.L. REF. 65, 87–90 (1990); Elaine Ciulla Kamarck & William A. Galston, *A Progressive Family Policy for the 1990s*, in MANDATE FOR CHANGE 153, 164–65 (Will Marshall & Martin Schram eds., 1993) (policy paper of the Democratic Leadership Council); Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 958 (1979) (referring to the state's "important responsibility to inform parents concerning the child's needs during and after divorce").

5. Grace Ganz Blumberg, *Who Should Do the Work of Family Law?*, 27 FAM. L. Q. 213, 221 (1993).

6. Junda Woo, *More Courts are Forcing Couples to Take Divorce-Education Class*, WALL ST. J., Oct. 1, 1993, at B8 (describing programs in Hawaii, Kentucky, New York and other states); see also Carol Lawson, *Requiring Classes in Divorce*, N.Y. TIMES, Jan. 23, 1992, at C1 (describing the court mandated parent education program in Cobb County, Georgia); Marcy L. Wachtel, *Divorce Counseling: For the Sake of the Child*, LEGAL TIMES, May 24, 1993, at 29 (listing Kansas, California, Connecticut, Florida, Georgia, Indiana, Minnesota and Texas as states with mandatory parent education programs).

7. P.E.A.C.E. began in 1989 as a joint project of the Hofstra University Law School and the School of Education Graduate Programs in Marriage and Family Counseling. P.E.A.C.E. has grown with the support of the Interdisciplinary Forum on Mental Health and Family Law, an organization consisting of representatives of the leading family law and mental health groups in New York State. P.E.A.C.E. has also been supported by the Office of Court Administration of New York, which authorized pilot programs to be conducted in several judicial districts with the support of Chief Judge Judith S. Kaye of the New York Court of Appeals.

therapy. Parents do not talk to each other directly during P.E.A.C.E. sessions and the program makes no attempt to settle individual disputes. Parents receive the information that P.E.A.C.E. provides and use it as they see fit. They can take it to heart, ignore it completely, or anything in between.

As will be seen, the effort is a work in progress that has generated a great deal of interest. This Article is written in the hope that others will experiment with similar programs, will learn from P.E.A.C.E.'s successes and mistakes, and will join in the dialogue to determine how best to educate parents in order to better help their children cope with divorce and separation.

This Article describes the history and development of P.E.A.C.E., the results of the initial pilot programs, and the implications of what has been learned. Part I provides a summary of the Article. Part II briefly describes the empirical literature addressing the effects of divorce, separation, and parental conflict on children, the factors that help children cope with this stressful period in their lives, and the role that an education program can play in the parental dispute settlement process. Part III describes the organization and content of P.E.A.C.E. Part IV summarizes data from P.E.A.C.E.'s pilot programs. Part V discusses a number of planned improvements in P.E.A.C.E.'s curriculum, organization, and structure based on the pilot program experience. Finally, Part VI addresses the broader philosophical issues inevitably raised by an educational program for parents in a divorce system that has been roundly criticized by advocates of many different interests.⁸

8. An overview of some of the criticisms of the current divorce system in New York can be found in the MATRIMONIAL LAWYER CONDUCT REPORT, *supra* note 3. The Report contains the findings of a committee of distinguished New York lawyers and judges, who heard public testimony from numerous divorce litigants, judges, and lawyers about their experiences. It summarizes the reports they received as follows:

Litigants describe the courts as being unsympathetic, unresponsive, impotent and overwhelmed by delay, and claim that the main concern of lawyers is not to serve their clients' best interests but their own. A number of attorneys assert that the criticism of the courts and the wholesale indictment of matrimonial lawyers is unfair and is the result of litigants' unrealistic expectations. They allege that matrimonial clients are at the lowest emotional ebb of their lives, and that their judgment is clouded by hostility and insecurity. Lawyers also claim that the vast majority of matrimonial disputes are quietly resolved by agreement, out of the courts, and at a reasonable cost.

Id. at 1. The Committee went on to identify and propose solutions for many of the specific problems in the current matrimonial system, such as clients' lack of infor-

Attached as Appendix B to this Article is a model statute that interested states may use as a starting point to create parent education programs similar to P.E.A.C.E. The model statute is a preliminary but concrete thought experiment in designing a system organized by the judiciary and by judicial districts. In this system, judges, lawyers, mental health professionals, educators, and divorcing or separating parents take responsibility for the parents' children through educational programs. The aim of the model statute is to make parental educational programs a routine part of the process of divorce and separation. Achieving that goal requires the resolution of complex issues of curriculum, training, judicial administration, civil procedure, and financing that are described later in Part V. The model statute has not been enacted anywhere or endorsed by any group, but is the result of my own reflection on the P.E.A.C.E. experience to date, my previous work as a consultant to the New York State Law Revision Commission, which produced a recommendation for a revised system of custody procedures for the state, and my study of educational programs and authorizing legislation in other states.

Preliminary data⁹ from the first round of P.E.A.C.E. pilot programs substantiates some of the observations in this Article. Appendix A summarizes data from over 452 parent questionnaires that were collected between December 1992 and December 1993 by the Dutchess County, New York Helping Children Cope Program, which is affiliated with P.E.A.C.E. in spirit and content.

Readers should be aware, however, that many of the assessments in this Article are based on my own personal observations of numerous P.E.A.C.E. sessions over the last five years and on my own discussions with participating parents as well as judges, lawyers, mental health professionals and educators involved in the program.

mation about their rights and responsibilities, the quality of retainer agreements, attorneys who require security interests from clients, attorneys who solicit confessions of judgment from clients, and inefficient case management by courts. See *id.* at 3-4 for a summary of proposed solutions to these problems.

9. See *infra* Part IV.B.2 for a discussion of this data.

I. SUMMARY

The results of P.E.A.C.E.'s pilot programs, and similar programs elsewhere,¹⁰ establish that an educational program for divorcing parents is feasible, cost efficient, and, above all, a useful addition to the divorce process for parents and children. P.E.A.C.E. helps parents focus on the needs of their children at a time when the turmoil and stress suffered by parents may result in those needs being overlooked. It provides parents with important information and support in order to help put the court process and the parents' relationship with counsel into context. Participating in P.E.A.C.E. may reduce a parent's feelings of isolation and embattlement by promoting a sense of shared experience with other parents who are going through similarly difficult times.

Many parents, courts, attorneys, and mental health professionals have had positive experiences with the P.E.A.C.E. program. Both mothers and fathers are grateful to have the educational experience that P.E.A.C.E. provides, and many believe it should be required for other parents.¹¹ Courts have found P.E.A.C.E. to be a valuable tool of public education that increases the courts' ability to respond to those they serve.¹²

10. P.E.A.C.E. is simply one example of parent education programs that exist in a number of other states. S.M.I.L.E. (Start Making It Livable for Everyone) in Michigan, KIDS FIRST in Maine, and the Ocean County, New Jersey Program are examples of programs in other states that share similar goals, but operate somewhat differently. A list of all programs and contact persons of which I am currently aware is available upon request to P.E.A.C.E. at Hofstra Law School. See *supra* note 6. The idea of parent education is, however, relatively new and many of these programs are in the early stages of development, underfunded, and just now undergoing systematic evaluation.

11. Contrary to expectations, and perhaps stereotypes, no gender differences have been detected in parent evaluations of P.E.A.C.E. See *infra* Part VI.C and Appendix A.

12. See *infra* Part IV.A.5. At a December, 1993 meeting of the Buffalo, New York P.E.A.C.E. Advisory Committee, for example, the 20 member interdisciplinary group of judges, court administrators, and mental health professionals unanimously decided to continue P.E.A.C.E. programs on a once a month basis for one year after two successful preliminary programs. The preliminary P.E.A.C.E. programs in Buffalo received substantial attention in the local media. The reactions of parent participants, as reflected on their evaluation sheets, included expressions of deep gratitude to the court system for organizing the program and to the volunteer presenters, judges, court administrators, lawyers, and mental health professionals who donated their time to it. Anonymous parent evaluations of the preliminary Buffalo P.E.A.C.E. programs included the following statements:

Lawyers have found P.E.A.C.E. to be a helpful resource in encouraging clients to develop reasonable expectations about the possibility of settlement and about the role lawyers play.¹³ Mental health professionals have found P.E.A.C.E. to be a natural part of their public education activities and a source of referrals to other community resources.¹⁴ Additionally, lawyers and mental health professionals have found that, by working together on the development of P.E.A.C.E., they tend to develop more positive relationships between their professions than those that are likely to arise in hostile courtroom confrontations.

We must be cautious, however, in drawing conclusions based upon the P.E.A.C.E. pilot programs to date. Although the preliminary results justify research and development, no long-term research on the effect of the program on divorcing parents has been conducted.¹⁵ P.E.A.C.E. programs should not, therefore, be created with the expectation that they will turn deeply embattled parents into models of cooperation or clear crowded court dockets of custody cases.

In addition, significant curricular, administrative, and philosophical issues must be addressed during P.E.A.C.E.'s evolution from a pilot program to a more permanent status. P.E.A.C.E. needs continuous development and refinement to insure that it is fair to all interests in the divorce and custody process, as well as responsive to the needs of diverse populations of parents and children. Issues of funding, curriculum, instructor training, program organization, confidentiality, and

"I am a better person and parent for having had exposure to this program. I used to feel that the legal environment did not care about individuals who are going through this [divorce and separation] but now I know better."

"I could not thank you enough. Thank you, and God bless you all."

Memorandum from Andrew Schepard to P.E.A.C.E. Statewide Advisory Committee (Jan. 3, 1994) (on file with the *University of Michigan Journal of Law Reform*).

13. This observation is based in part on the reactions of the matrimonial lawyers who have made presentations during P.E.A.C.E. programs or at Advisory Committee meetings, such as the one in Buffalo described *supra* note 12. A systematic survey of lawyers' reactions to their clients' participation in P.E.A.C.E. has not yet been done. See *infra* Part IV.A.3.

14. This observation is based on my numerous conversations with mental health professionals who have made presentations at local P.E.A.C.E. programs throughout New York and who have served on Advisory Committees such as Buffalo's.

15. A recent grant to P.E.A.C.E. has enabled it to hire an independent evaluator who will provide more reliable, long-term data on the next round of P.E.A.C.E. pilot programs.

mandatory attendance for parents must be addressed. As an entirely volunteer effort, P.E.A.C.E. thus far has been virtually cost free and has operated without the benefit of authorizing legislation or court rule. Resources will have to be found and formal ground rules enacted if P.E.A.C.E. is to become a permanent part of the custody dispute resolution process.

II. WHY P.E.A.C.E.?

A. *Divorce and Children: A Brief Overview*

—[E]ach divorce is the death of a small civilization.¹⁶

Each year in the United States approximately 1.2 million marriages end in divorce. These divorces involve more than one million children.¹⁷ Estimates suggest that one of every two children born today will undergo this transitional period of turmoil and stress before they reach the age of eighteen.¹⁸

1. *Parental Conflict and Children's Emotional Distress*—Parental divorce and separation can be a period of intense emotional distress for children and continuing combat between parents.¹⁹ As stated in a recent review of relevant studies:

16. Barbara Dafoe Whitehead, *Dan Quayle Was Right*, ATLANTIC MONTHLY, Apr. 1993, at 47, 64 (quoting Pat Conroy).

17. U.S. Dep't of Health and Human Servs., *Monthly Vital Statistics Report: Final Data from The National Center for Health Statistics*, May 21, 1991, at 1, 7, 9.

18. See Paul C. Glick & Arthur J. Norton, *Marrying, Divorcing and Living Together in the U.S. Today*, 32 POPULATION BULL. 3 (1977); Whitehead, *supra* note 16, at 47.

19. A caveat at the outset is important: empirical studies simply have not produced—and probably never will produce—the kind of data that will enable policy makers to isolate with confidence a typical emotional effect of marital discord on children generally, or on any particular class of children. Studies cannot control all of the relevant variables, which include family structure, economic status, race, and class. Studies also lack acceptable control groups and do not follow reconstituted families over time. See David H. Demo & Alan C. Acock, *The Impact of Divorce on Children*, 50 J. MARRIAGE & FAM. 619, 642–43 (1988); Joan B. Kelly, *Longer-Term Adjustment in Children of Divorce: Converging Findings and Implications for Practice*, 2 J. FAM. PSYCHOL. 119, 119–20 (1988); Judith S. Wallerstein, *The Long-Term Effects of Divorce on Children: A Review*, 30 J. AM. ACAD. CHILD ADOLESCENT PSYCHIATRY 349, 358 (1991). While empirical research is suggestive of problems and questions, decision makers ultimately must use values and common sense to set policy prescriptions.

[T]here is general agreement [among researchers] that parental separation precipitates a crisis for most children. The vast majority of youngsters are not anticipating divorce when it occurs, even when there has been considerable conflict between their parents; and only those experiencing repeated, intense conflict and family violence are relieved. The most common crisis-engendered reactions include intense anxiety about their future well-being and caretaking, sadness and acute reactive depressions, increased anger, disruptions in concentration at school, distress about the loss of contact with one parent, loyalty conflicts, and preoccupation with reconciliation.²⁰

Intense conflict between parents also entails substantial risks for the development of children.²¹ Commentators have found that "ongoing high levels of [family] conflict, whether in intact or divorced homes, produce lower self-esteem, increased anxiety, and a loss of self control."²² After conducting an extensive empirical study of California families experiencing divorce, Eleanor Maccoby and Robert Mnookin concluded that "as the parental alliance weakens, the behavior standards for the children decline. If parents quarrel openly in front of the children, and show contempt for each other, the atmosphere of mutual respect that underlies their joint authority and effective co-parenting is seriously weakened."²³ Children thus have a significant interest in programs that encourage parents to shield them from conflicts related to separation and divorce.²⁴ If parents place their children in a demilitarized zone, their children will be better able to cope with the emotional turmoil created by divorce and separation.

2. *The Quality of Life for Children in Single Parent Families*—The problems of children of divorce and separation are not, however, solely the result of intense parental conflict. Children also experience the interrelated emotional, economic, and educational problems of adjusting to life in a single parent family.

20. Kelly, *supra* note 19, at 122 (citations omitted).

21. Eleanor E. Maccoby et al., *Coparenting in the Second Year After Divorce*, 52 J. MARRIAGE & FAM. 141, 142 (1990).

22. Demo & Acock, *supra* note 19, at 642.

23. ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY 31 (1992).

24. Dirk Johnson, *More and More, the Single Parent is Dad*, N.Y. TIMES, Aug. 31, 1993, at A15 (interviewing Eleanor E. Maccoby).

Parental divorce and separation are the most prominent reasons why children live in single parent families, most of which are headed by women.²⁵ The data from New York is typical. There, the increase in the number of children in single parent families paralleled an increase in New York State's divorce rate, which rose from 3.7 per thousand females of marriageable age in 1970, to 8.9 per thousand in 1985.²⁶ Commentators have found that "[m]arital disruption was the most common reason why New York State children lived with single parents. . . . [Sixty-one] percent of all children in single-parent households lived with a separated or divorced parent in 1980 as did 58% in 1970."²⁷

As American divorce rates have soared, the problems of children in single parent families have become more evident. Such children tend to do less well than their two parent peers on aggregate measures of emotional health, economic well-being, and educational performance.²⁸

Single parent families typically have less time and money to invest in the development of their children than do two parent families. In part, this results from the fact that a large number of children in single parent families have little effective relationship with the parent—usually the father—living

25. In 1992, about 86% of single family households were headed by women, down approximately 4% from 1980, when 90% of single family households were headed by women. *Id.*

26. Susan Bubb & Nancy E. Dunton, *Children in Families*, in STATE OF THE CHILD IN NEW YORK STATE 44, 47-51 (1988).

27. *Id.* at 51. The causes of single parent families, however, are different for whites and African-Americans. Nationally, among white mothers, the major causes are divorce and separation, although the number of single white mothers who have never married has increased rapidly, from 3% of one parent families in 1970 to 19% in 1991. Roberto Suro, *For Women, Varied Reasons for Single Motherhood*, N.Y. TIMES, May 26, 1992, at A12. Among African-Americans, 54% of one parent families in 1991 were headed by women who had never married. *Id.* New York State patterns are similar, though less recent data is available. See Bubb & Dunton, *supra* note 26, at 51.

28. For a recent overview of the literature, see Whitehead, *supra* note 16. See also *Family Values: The Bargain Breaks*, ECONOMIST, Dec. 26, 1992-Jan. 8, 1993, at 37-39 (reviewing research findings in the United States and Great Britain); David Popenoe, *The Controversial Truth: Two-Parent Families Are Better*, N.Y. TIMES, Dec. 26, 1992, at 21 (summarizing research evidence). See generally Daniel P. Moynihan, *Defining Deviancy Down*, 62 AM. SCHOLAR 17, 21-26 (1993) (surveying literature on single parent families and concluding, within a larger context, that "a wide spectrum of interest groups . . . benefit from re-defining the problem as essentially normal and doing little to reduce it.").

outside of the home.²⁹ Two parent families tend to create more economic resources with which to support children.

More than half (55%) of the children living with only their mothers in 1979 were in poverty compared with 9 percent of those with two parents in the household. Households that have two parents obviously have more persons available to work. It is not simply the number of working parents that produces this differential. Children of single mothers who worked were more likely to be poor (24%) than children living with two parents in which only one parent worked (9%).³⁰

The disadvantages of children in single parent families are not limited to economics. Less adult involvement in the children's lives also leads to less adult investment in their emotional development and education. "[P]overty is probably the least destructive aspect of father absence. More serious and longer-lasting, both for the individual and society as a whole, is the role of father absence in producing educational and cognitive deficits, mental illness, drug use, and crime."³¹

Children in single parent families score lower on virtually every indicator of childhood stability and quality of life than do their counterparts living with two parents. Children in single parent families are, in general, far more likely to be in poor physical health, have a higher rate of suicide and mental

29. See generally Frank F. Furstenberg, Jr. & Christine Winquist Nord, *Parenting Apart: Patterns of Childrearing After Marital Disruption*, 47 J. MARRIAGE & FAM. 893, 902 (1985) (indicating that most children have little contact with their nonresident parents, and what contact there is tends to be social rather than instrumental); Frank F. Furstenberg, Jr. & Kathleen Mullan Harris, *The Disappearing American Father? Divorce and the Waning Significance of Biological Parenthood* 4 (Mar. 1990) (unpublished manuscript, on file with the *University of Michigan Journal of Law Reform*) (finding in an empirical study of fathers' contact with their children after a divorce, that close to half of the children had not seen their father during the previous year).

30. Nancy E. Dunton, *The Economic Status of Children*, in STATE OF THE CHILD IN NEW YORK STATE 57, 72 (1988) (footnote omitted). Fathers head 14% of single parent households; of such households, 18% live in poverty. Johnson, *supra* note 24, at A1. In 1979 in New York, 11% of single father households lived in poverty when the father was employed. Dunton, *supra*, at 72.

31. Nicholas Davidson, *Life Without Father: America's Greatest Social Catastrophe*, 51 POL'Y REV. 40, 44 (1990). See generally HENRY B. BILLER, *FATHERS AND FAMILIES: PATERNAL FACTORS IN CHILD DEVELOPMENT* (1993) (discussing the importance of the father in helping his child develop socially, personally and intellectually).

illness, and suffer more accidents and injuries.³² Family disruption significantly increases the risk of adolescent drug use, particularly among boys.³³ Overall, children of divorce also tend to be less optimistic about their capacities to master life's opportunities and problems and to develop lasting relationships with others, a state of mind that tends to reduce their capacities for achievement as well as for physical and mental health.³⁴

Educational problems are more prevalent among children in single parent families. "Children living with both their biological parents were about half as likely to have repeated a grade in school compared with children in all other types of families."³⁵ A recent comprehensive statistical analysis of the differences in educational achievement between children in single parent families and their two parent peers concluded that "[i]n general, the longer the time spent in a single-parent family, the greater the reduction in educational attainment Controlling for income does not reduce the magnitude of the effect noticeably."³⁶ Indeed, a recent review by the Educational Testing Service shows that although the proportion of two parent families to single parent families varies widely from state to state, it is closely correlated with variations in academic achievement.³⁷ Thus, to some extent, the widely discussed problems of American students may be attributed not just to failing schools, but also to falling parent-pupil ratios.

A particularly striking aspect of the problem of socialization of children in single parent families is the statistical link

32. Barbara Bloom & Deborah Dawson, *Family Structure and Child Health*, 81 AM. J. PUB. HEALTH 1526, 1526 (1991) (noting that children in disrupted families are more likely to have an accident or suffer injury); Davidson, *supra* note 31, at 41-42 (linking suicide and mental illness to single parent homes); Dunton, *supra* note 30, at 73 (stating that poor children are more likely to be in poor health); John Guidubaldi & Joseph D. Perry, *Divorce and Mental Health Sequelae for Children: A Two-Year Follow-up of a Nationwide Sample*, 24 J. AM. ACAD. CHILD PSYCHIATRY 531, 533 (1985) (finding that children of divorce perform more poorly on 9 of 30 mental health measures).

33. Richard H. Needle et al., *Divorce, Remarriage and Adolescent Substance Use: A Prospective Longitudinal Study*, 52 J. MARRIAGE & FAM. 157, 166-67 (1990).

34. See MARTIN SELIGMAN, *LEARNED OPTIMISM* 145-49 (1991).

35. Bloom & Dawson, *supra* note 32, at 1526.

36. Sheila Fitzgerald Krein & Andrea H. Beller, *Educational Attainment of Children From Single-Parent Families: Differences by Exposure, Gender, and Race*, 25 DEMOGRAPHY 221, 228 (1988). It is important to note, however, that the authors did not observe this effect for white women and higher income black women. *Id.*

37. EDUCATIONAL TESTING SERVICE, *AMERICA'S SMALLEST SCHOOL: THE FAMILY* 8-9 (1992).

between single parent families and criminal behavior.³⁸ A study of victimization data on over 11,000 individuals from three urban areas found, holding the poverty level constant, a significant relationship between the proportion of single parent families in a community and the rate of violent crime and burglary.³⁹

This data should not be taken to mean that all children from single parent families will have emotional problems, will become academic and economic failures, or will commit crimes, while their peers from two parent families will not. Obviously, parents and children are too complex and too resilient for such facile generalizations. Indeed, despite the combined problems of exposure to marital conflict and adjustment to single parent family life, some children emerge emotionally stronger after parental divorce and separation.⁴⁰ The long-term impact of parental divorce and conflict on any particular child is highly individual. It depends on available support systems and the child's developmental needs. Dr. Judith S. Wallerstein, a pioneering researcher on the empirical effects of divorce on children, summarized:

[D]ivorce is not a single event but a complex series of changes, a multistage process of radically changing family relationships, which begins in the failing marriage, continues through the often chaotic period of the marital rupture and its immediate aftermath, and continues further, often over several years of disequilibrium within the family.⁴¹

Dr. Andrew Cherlin, another leading divorce researcher, comments: "[d]ivorce is bad for children, but not for all children

38. See Davidson, *supra* note 31, at 42 (surveying studies linking increased violence and the absence of fathers).

39. Douglas A. Smith & G. Roger Jarjoura, *Social Structure and Criminal Victimization*, 25 J. RES. IN CRIME & DELINQ. 27, 37, 42-43, 46-47 (1988).

40. See JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, *SECOND CHANCES: MEN, WOMEN, AND CHILDREN A DECADE AFTER DIVORCE* 298-99 (1989) (stating that ten years after divorce many of the children who experienced it "emerged in young adulthood as compassionate, courageous, and competent people. Those who did well were helped along the way by a combination of their own inner resources and supportive relationships with one or both parents, grandparents, stepparents, siblings, or mentors."); Kelly, *supra* note 19, at 125-33 (showing that certain post-divorce parental behavior and custody arrangements could compensate for children's initial negative reactions).

41. Wallerstein, *supra* note 19, at 350.

equally. It is very bad for a small group of children, and moderately bad for many more. If the marriage is truly filled with conflict, it may be better to have a divorce."⁴²

The critical factor from the perspective of many children is that parental divorce and separation is the vortex of a long-term, interrelated period of difficult adjustments. Children suffer from both the potential loss of multi-faceted support from one parent and the intense exposure to parental conflict. Indeed, to some extent, parental conflict and the loss of one parent's support may be interrelated: the more unpleasant the interaction between parents, the more likely one parent will withdraw from the child's life by simply "giving up" or by further escalating the conflict.⁴³

B. The Need for Parental Conflict Management in the Adversary System

Despite a child's overriding need for conflict management, the prevalent adversarial model of courtroom confrontation rewards parental conflict. The adversarial system implicitly assumes that all parents who bring their dispute to court are incapable of cooperation. Given the parents' completely conflicting relationship, the only function the legal system can perform is to prevent violence by deciding which parent is entitled to a greater right to make decisions and have access to the child. This decision is made through the traditional adversarial process, perhaps preceded by a forensic evaluation of the child and the family by a mental health professional.⁴⁴

Few custody cases result in a trial.⁴⁵ The adversarial

42. *Family Values: The Bargain Breaks*, *supra* note 28, at 40.

43. *See infra* note 53.

44. *See* Andrew Schepard, *Taking Children Seriously: Promoting Cooperative Custody After Divorce*, 64 TEX. L. REV. 687, 735-39, 750-52 (1985).

45. There is no published data in New York comparing the percentage of parental custody disputes that are filed with a court and those that go to trial. A major reason is "the confidentiality accorded domestic relations cases" in New York. MATRIMONIAL LAWYER CONDUCT REPORT, *supra* note 3, at 15 (recommending that lawyer-client retainer agreements in matrimonial cases be filed with the court to encourage scholarly study).

Another problem with determining how many custody cases are tried in New York is that custody disputes—or aspects thereof—can be litigated in two different forums. Despite its name, the New York Family Court does not have subject matter jurisdiction over divorces and separation, or the custody and support disputes incident

mentality, however, can permeate the custody dispute and the thinking of parents and counsel. Precisely when children need parents to lessen the degree of hostility and behave cooperatively, the specter of courtroom combat—and especially the conflict over the vague legal standard of the “best interests of the child”—encourages conflict.

When parental combat escalates, it tends to prolong itself, insuring that the dispute resolution process and the final resolution itself are emotionally unsatisfactory to one parent and to the child. The adversarial process encourages parents to denigrate one another, rather than to cooperate on the essential task of post-divorce child rearing. Embattled parents demand, and sometimes seek to buy, the loyalty of their hopelessly torn children.⁴⁶ The custody dispute also drains

thereto. Only the Supreme Court can hear such “matrimonial actions.” The Family Court can, however, hear some custody disputes on referral from the Supreme Court. DAVID D. SIEGEL, *NEW YORK PRACTICE* § 16 (2d ed. 1991). Any analysis of filed versus tried custody cases would have to take into account the fact that a single case can be filed and litigated in both the Family and Supreme Courts in New York.

A California study, however, indicates that the percentage of custody cases that are filed and actually tried is very small. Based on their study of California families, Maccoby and Mnookin report:

Our data suggest that the common perception that conflict is the norm for divorcing parents is largely unfounded. Three-quarters of the families we studied experienced little if any conflict over the terms of the divorce decree. Moreover, almost all of the high-conflict cases were settled through negotiation, some of which included court-annexed mediation or a court-ordered evaluation. Only a trivial number of cases (about 1.5 percent of our sample) required a formal adjudication. Although no comparative data exist from an earlier period, our findings certainly suggest that the procedural innovations adopted in California to reduce reliance on adversary proceedings and promote resolution through negotiation have proved successful in reducing the number of adjudicated custody cases.

MACCOBY & MNOOKIN, *supra* note 23, at 159.

Maccoby and Mnookin's California findings, however, may not be applicable in New York. Unlike California, New York has no system for mediation of custody disputes, having rejected the recommendation of its Law Revision Commission in 1985 to create one. See *Recommendation of the Law Review Commission to the 1985 Legislature: Relating to the Child Custody Process*, 19 COLUM. J.L. & SOC. PROBS. 105, 106 (1985) [hereinafter *Recommendation of the Law Review Commission*]; see also Frederica K. Lombard, *Judicial Interviewing of Children in Custody Cases: An Empirical and Analytical Study*, 17 U.C. DAVIS L. REV. 807, 807 n.1 (1984) (citing sources which indicate that only 10% of custody disputes go to trial).

One of the additional incidental benefits of the research and development associated with P.E.A.C.E. in New York may be to generate some empirical data on the types of parental custody disputes that do result in a trial.

46. Parents are aware that a child's views may be important in the custody

resources from limited marital assets at a time when those assets could better be used to preserve the family's standard of living.⁴⁷

Currently, many custody disputes in divorce cases in New York begin, in practice, with motions for *pendente lite* temporary custody.⁴⁸ The motion process itself, which requires extensive and usually conflicting affidavits, drains resources from the family as a result of expensive legal fees. The process also deepens parental antagonism. The usual result of such motions is a court file consisting of an extensive pile of paper and the conclusion that a decision cannot be made without mental health evaluations and a contested evidentiary hearing.⁴⁹

The initial hostility may be exacerbated by additional motions and requests for judicial intervention, until a judge nearly becomes the day-to-day manager of family interaction. Evaluations of the parents and children by mental health experts intrude on family autonomy and privacy and may tempt some parents to try to influence what children say to the evaluator. Parents may become obsessed with the conflict

determination and may attempt to influence what the child says to the judge. See Schepard, *supra* note 44, at 737-38. A child's preference may be considered by the judge, but it is not dispositive. See, e.g., *Friederwitzer v. Friederwitzer*, 432 N.E.2d 765, 767 (N.Y. 1982). For an empirical study of judicial attitudes in interviewing children in custody cases, see Lombard, *supra* note 45.

47. No comprehensive empirical survey of the economic costs of custody litigation exists. My experience in custody cases and conversations with numerous New York divorce lawyers suggest that it is not unknown for a parent to spend several years of potential college tuition on a custody lawyer. Numerous courts and commentators have mentioned the increasing costs of divorce and custody litigation in recent years. For a list of additional sources, see Stephen W. Schlissel, *A Proposal for Final and Binding Arbitration of Initial Custody Determinations*, 26 FAM. L.Q. 71, 75 n.28 (1992).

48. New York cases historically have commenced with service of a summons, which is not filed with the court. That system now has been changed so that cases are initiated by filing a summons and complaint, or by filing a summons with notice with the court. N.Y. CIV. PRAC. L. & R. § 304 (McKinney Supp. 1993). Cases are not assigned to individual judges, however, until a litigant files a request for judicial intervention—a formal statement to the court that a judicial decision on some matter is necessary. N.Y. COMP. CODES R. & REGS. tit. 22, § 202.3(b) (1993).

49. See *Audubon v. Audubon*, 526 N.Y.S.2d 474, 475 (App. Div. 1988) (holding that "custody determinations should be made only after a full and fair hearing" and that the parties and children should submit to "forensic examinations") (citations omitted); *Biagi v. Biagi*, 508 N.Y.S.2d 488, 489 (App. Div. 1986) (holding that it is legal error to order custody without a full hearing to resolve conflicting allegations made in the affidavits); *Bellinger v. Bellinger*, 487 N.Y.S.2d 232, 233 (App. Div. 1985) (holding that a court should not determine custody based on "recriminating and controverted allegations, but only after an evidentiary hearing.").

and function less competently in all aspects of their lives. Friends, relatives, teachers, doctors, or clergy who know the family also may get drawn into the fray. Moreover, this dispute seems to go on endlessly, taking far longer than parents anticipate and children can tolerate. The combat continues through trial and appeal, until one party or the other simply runs out of emotional or financial resources.⁵⁰

State court judges who preside over custody disputes commonly describe such cases as both frustrating and saddening, and as perhaps the hardest of all cases to decide.⁵¹ Some judges regard custody disputes as distasteful and as a product of parental bitterness and bickering that would be better resolved by mental health professionals than by lawyers.⁵² This frustration understandably results from the predicament in which a state court is placed when it is confronted with a custody dispute. Regardless of the court's ultimate decision, judges intuitively recognize what the empirical evidence supports: the adversarial combat inherent in custody cases is contrary to the child's best interests. Children need two parents, while the adversarial process forces the court to choose only one. Furthermore, one parent usually leaves the courtroom having been stigmatized as the less important parent in the child's life and embittered as a result of what the parent may perceive as lies told by the other spouse. These feelings may lead to either of two extremes: withdrawal by the parent from the child's life, or obsessive relitigation that prolongs parental hostility and involves the courts in the perpetual management of the family's relations.⁵³ Neither result serves

50. Schepard, *supra* note 44, at 736-39.

51. *Id.* at 691 n.4.

52. Lombard, *supra* note 45, at 807, 812 n.31, 816; see also Jessica Pearson & Maria A. Luchesi Ring, *Judicial Decision-Making in Contested Custody Cases*, 21 J. FAM. L. 703, 722-23 (1982-83) (noting that judges dislike contested custody cases, but also noting that judges did not believe the job should be turned over to another group of professionals).

53. See STEPHEN P. HERMAN, *PARENT VS. PARENT* 198-200 (1990) (describing the intense emotional burden on children, including when custody and visitation is revised); MEL ROMAN & WILLIAM HADDAD, *THE DISPOSABLE PARENT: THE CASE FOR JOINT CUSTODY*, 74-75 (1978) (noting that the intense loss a father feels at having to court his children and treat them as guests often causes him to withdraw); Frederic W. Ilfeld, Jr. et al., *Does Joint Custody Work? A First Look at Outcome Data of Relitigation*, 139 AM. J. PSYCHIATRY 62, 63-64 (1982) (finding half as many relitigations in joint custody as in exclusive custody and discussing the harm to children from relitigation); John W. Jacobs, *The Effect of Divorce on Fathers: An Overview of the Literature*, 139 AM. J. PSYCHIATRY, 1235, 1236-37 (1982) (citing a study which found that some fathers who were highly involved with their children before a divorce

the child's best interests in parental conflict reduction and post-divorce cooperation.

C. Education as the First Step in Parent Conflict Management

The underlying assumption in the adversarial system—that all parents who bring their disputes to court are hopelessly combative—is inaccurate. The universe of divorcing parents does not present a single pattern of attitudes, interaction, or behavior. Rather, parental behavior following divorce is a continuum from high to low conflict. It may include anything from abuse to no contact with the former spouse and child; from parallel parenting to continuing courtroom confrontations.⁵⁴ There is simply no typical way divorcing parents interact with each other or their children. As stated by Dr. Wallerstein:

We have [through empirical research] become increasingly aware that there is not one divorce population, but that there are many divorce populations and many sub-groups. People come to divorce for a variety of reasons, at different stages in the life course of the family and the lives of their children. They come out of different family traditions and with different histories.⁵⁵

Many parents turn to the courts to resolve their problems because they do not know where else to turn, or they use the court process as an outlet for their temporary anger at the other spouse. In effect, the adversarial system of custody dispute resolution allows the most combative parents—and sometimes their lawyers—to establish the tone of dispute resolution concerning the children. The most combative end of the continuum of parental behavior, that most frequently

chose to avoid seeing their children altogether rather than suffer at seeing them intermittently); Paula M. Raines, *Joint Custody and the Right to Travel: Legal and Psychological Implications*, 24 J. FAM. L. 625, 637–38, 645–46 (1985) (concluding that joint custody is in the children's best interest); Jack C. Westman et al., *Role of Child Psychiatry in Divorce*, 23 ARCHIVES GEN. PSYCHIATRY 416, 417–18 (1970) (finding that 50% of surveyed divorces involving children were relitigated and finding that 50% of children receiving psychiatric assistance had totally lost contact with one parent).

54. See Maccoby et al., *supra* note 21, at 146–47.

55. Wallerstein, *supra* note 19, at 350.

exhibited in courtrooms, may unfortunately dominate the thinking of parents, lawyers, and judges about the options available to everyone.

The diversity of divorcing parents creates an opportunity for positive state intervention. Some parents will behave responsibly under any system of law and procedure, while others will behave badly. Hopefully, however, some divorcing and separating parents want to behave in the best interests of their children, but need education on how to do so during this time of great personal anger, stress, and change. A parent's attitudes about his spouse is not cast in stone, and still may be influenced by education and moral persuasion. A working hypothesis underlying P.E.A.C.E. is that those parents in the middle of the conflict continuum are most likely to benefit from the program. As stated by one respected divorce researcher:

[W]hen the more "average" [as opposed to the highly combative] divorcing couple is provided with a mediation (or divorce counseling) forum, given assistance in developing detailed and thoughtfully structured parenting plans, delineating future expectations for decision making and communications regarding the children, and encouraged and given the tools to restructure their failed marital relationship into a more businesslike parenting partnership, the outcomes are positive.⁵⁶

P.E.A.C.E. is aimed at affecting such an "average" divorcing couple.

The premise of P.E.A.C.E. is that before parents begin escalating their level of conflict, they should know the probable consequences for themselves and their children, and they should be informed of alternatives. From a legal perspective, participation in P.E.A.C.E. is a type of informed consent to custody litigation, a method of insuring that parents understand the potential consequences of their decisions. From a mental health perspective, P.E.A.C.E. is premised on the idea that divorce-related parental conflict that affects children is a public health concern that is amenable to long-term improvement through public education.

56. Joan B. Kelly, *Further Thoughts on Longer-Term Adjustment in Children of Divorce*, 2 J. FAM. PSYCHOL. 159, 161 (1988) (citation omitted).

P.E.A.C.E. emphasizes that parents, not the court system, must ultimately take personal responsibility for ensuring the welfare of their children during this time of transition.⁵⁷ One aim of P.E.A.C.E. is to ask parents to reflect on the advantages of deescalation as opposed to continued custody conflict. Parental settlements allow flexibility in tailoring custody arrangements to the particular needs of parents and children that judicial orders cannot match. Parents also are more likely to adhere to self-determined custody arrangements than arrangements that are imposed on them by the courts.⁵⁸

How well children cope with divorce is related directly to how well their parents behave and manage their conflict.⁵⁹ It is possible for parents to mitigate the emotional intensity of divorce on their children by assuring them that the divorce is a rational response to spousal conflict and that the children are not to blame.⁶⁰ It is also possible for parents to create a relatively stable economic, emotional, and educational environment for children that will reduce the problems of adjustment to life in a single parent family.

Parents can take a number of steps to create this type of stable environment. Children need to be assured that a relationship with both parents will continue even after one parent physically leaves the house. Loyalty battles can be avoided. Parents need not disparage each other. Parents can cooperate in decision making about their children. Time the child spends with her other parent—away from her primary

57. In an intact family, parental decisions regarding child-rearing are given a large measure of freedom from state interference. "The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) (holding that Amish parents have a right under the First Amendment to keep their children out of the public schools after the eighth grade, despite the state's interest in universal compulsory education); see also *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (holding that the Fourteenth Amendment protects the right of parents to choose the schools where their children will be educated); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (holding that the Fourteenth Amendment protects the right of parents and teachers to instruct children in a foreign language).

58. Richard Ingelby, *The Solicitor as Intermediary in DIVORCE MEDIATION AND THE LEGAL PROCESS* 43, 47 (Robert Dingwall & John Eekelaar eds., 1988); see Jay Folberg, *Mediation of Child Custody Disputes*, 19 COLUM. J.L. & SOC. PROBS. 413, 422-24 (1985) (surveying results of mediation studies).

59. HERMAN, *supra* note 53, at 173; ROMAN & HADDAD, *supra* note 53, at 69.

60. WALLERSTEIN & BLAKESLEE, *supra* note 40, at 286.

residence—can be cooperative and can provide the foundation for a meaningful parent-child relationship. Therapy and support groups can help the children of divorce adjust, as can sympathetic teachers and adult figures. Child support can be paid regularly.

By behaving responsibly, parents can create a post-divorce environment which holds out hope for better outcomes for their children. P.E.A.C.E.'s premise is that formal education can encourage at least some parents to behave this way.

III. WHAT IS P.E.A.C.E.?

One of the most constructive benefits of P.E.A.C.E. is the interplay that it creates among the courts, the legal profession, and mental health professions—all of which participated in the creation of the program. This cooperation has resulted in a creative mix of statewide uniformity regarding some issues, and local diversity regarding others.

General policy for the P.E.A.C.E. project is set by an interdisciplinary Statewide Advisory Committee which consists of judges, court administrators, lawyers, mental health professionals, and others concerned with the welfare of children. The Statewide Advisory Committee members are volunteers who have expressed interest in developing the program. They are chosen in consultation with Hofstra University, where the headquarters of P.E.A.C.E. is located, the Interdisciplinary Forum on Mental Health and Family Law, and the Office of Court Administration.⁶¹

The Statewide P.E.A.C.E. Advisory Committee sets policies of general applicability, such as the rule that professionals who give P.E.A.C.E. presentations are forbidden from soliciting referrals from parent participants in that particular program. The Statewide Committee also assists the local P.E.A.C.E. projects by providing curricular and educational materials, training manuals, and resource personnel.

61. Currently P.E.A.C.E. is not a formally incorporated entity, but simply a project to which many people and organizations contribute effort and resources. It has no written charter or by-laws. The structure of P.E.A.C.E. set forth in the text is the author's description of the way the project has operated to date. As P.E.A.C.E. matures, it may become necessary for it to adopt a formal legal structure.

To insure that P.E.A.C.E. is responsive to local needs and diverse populations, however, each judicial district that established a pilot program also created a parallel interdisciplinary advisory committee made up of local volunteers. The judge who oversaw the local P.E.A.C.E. program recruited the members of the local advisory committee.

Within the framework of the statewide policies, each local advisory committee organized and conducted the local P.E.A.C.E. program. The local committee was responsible for establishing its own policies, organizing training sessions, fostering relationships with interested local constituencies, screening and supplying volunteer presenters, and providing feedback to the Statewide Committee regarding which methods proved effective and which did not. The local group was encouraged to adapt program content and structure to meet its local needs.

A. The Initial Pilot Programs

1. Structure and Organization—Five P.E.A.C.E. pilot programs were conducted in the counties of New York, Nassau, Westchester, Orange, and Erie between October 1992 and December 1993. These locations were chosen because each had a judge, or judges, interested in implementing a program and a sufficient pool of legal and mental health volunteers to staff the project. Administration of P.E.A.C.E. was conducted by volunteer personnel, most often a judge's law assistant or clerk. In Buffalo (Erie County), the Dispute Resolution Service of the local Better Business Bureau, which administers an education program for first time shoplifters for the local court system, also administers the P.E.A.C.E. pilot programs. The administrators' duties included registering parents and scheduling sessions. Sessions were organized periodically as demand required and included approximately twenty-four parents each.

Parents who participated in the P.E.A.C.E. pilot programs did so without the compulsion of a formal court order. An attempt was made to inform the divorce bar and mental health professions about P.E.A.C.E. in order to encourage their referral of parents even when no court case had been filed. Some P.E.A.C.E. participants were referred directly to the program through this method.

Nevertheless, most participants were referred by state court

judges after a custody case was filed, often during an initial appearance before the court. Even so, many of the parent participants were referred at a much more advanced stage of custody litigation. P.E.A.C.E. did not, at least initially, set criteria for judicial referrals, instead leaving referral to the discretion of the judge. In later pilots, judges considering referrals were advised that referrals of parents early in litigation was desirable, and that they should consider not referring parents to P.E.A.C.E. if the case involved a serious allegation of parental or spousal abuse or neglect, or a long history of custody motions.

While the court did not enter a formal order of referral to P.E.A.C.E., many parents who attended P.E.A.C.E. sessions believed that the referring judge required them to attend. However, no report was made to the court about whether parents attended and no sanction was threatened or imposed for failure to attend.

Pilot program organizers strongly encouraged both parents to attend P.E.A.C.E. sessions, but allowed only one parent to enroll if the other parent chose not to attend. Program organizers reasoned that it would be better for the children for one parent to receive the educational material than for neither parent to receive this information.

2. *Content*—P.E.A.C.E. sessions covered three subjects: the legal process of divorce and custody; children's reactions to divorce and how parents might help their children cope with these reactions; and parents' experience of the divorce process and how they might employ effective coping mechanisms. The three topics were presented in six hours. In different pilot locations the sessions were divided into different blocks of time, including: two three-hour sessions, three two-hour sessions, and a two-hour and a four-hour session. Sessions were generally held in the local courthouse and employed both a large group lecture and a small group discussion.⁶²

Volunteer presenters for the pilot programs were recruited from the legal and mental health communities by the local organizing committee. Presenters were trained by representatives of the Statewide P.E.A.C.E. program in half-day sessions before their first presentations.

62. The content of all three topics was standardized in a curriculum manual. The curriculum manual used for the pilot program was an early draft and is in the process of revision. The current version is available from the P.E.A.C.E. Project at Hofstra Law School.

The legal process session was led by a judge with significant experience in family law. The judge explained the process and standards the court uses in deciding custody litigation, emphasizing that the custody dispute resolution process supplants parental decision making only if the parents do not take responsibility for reaching an agreement themselves. If parents cannot control their feelings toward each other, then custody decisions may be taken out of their hands. A family practitioner also made a presentation at the first session regarding what clients can and cannot expect of their counsel. Both the judge and the lawyers also emphasized the importance of complying with parental support obligations.

The remaining two topics, which addressed the experiences of children and parents involved in a divorce, were led by trained volunteers from the local mental health community, including marriage and family therapists and psychiatrists. At the end of the program, parents were provided with a list of non-profit organizations in a position to assist the entire family during the stressful period of divorce, as well as with booklets designed to help parents aid their children in coping with divorce.

As an entirely educational program, P.E.A.C.E. did not involve mediation or therapy. Presenters were advised not to answer questions about participants' individual cases and problems, including difficulties with their lawyers or therapists, but to use those questions to illustrate general themes and principles. Furthermore, participating spouses did not speak directly with each other during P.E.A.C.E. sessions, but were assigned to sessions taking place on different days, or to separate discussion groups.

IV. PROGRAM EVALUATION

Evaluation procedures for P.E.A.C.E. pilots thus far have been relatively simple. Data was gathered from the following sources: questionnaires completed by parent participants; questionnaires completed by observers of P.E.A.C.E. sessions—either Hofstra Law School students or students in Hofstra's Graduate Program in Marriage and Family Counseling; and discussions by P.E.A.C.E. organizers with presenters, observers, and other individuals. In addition, each local advisory

committee provided an evaluation of its program.

The general applicability of the rudimentary data collected thus far is limited. More research is necessary to evaluate the long-term effects of parental participation. For example, a study should be done comparing the quality of experiences of parents who participate in P.E.A.C.E. with the experiences of a similarly situated control group who does not participate. A representative sample of the parent population is lacking, because the participants in P.E.A.C.E. thus far have been predominantly white and middle class. The children of the parent participants in P.E.A.C.E. should also be interviewed.

Despite these limitations, the data collected thus far suggest that parental participation in P.E.A.C.E. results in numerous benefits to everyone involved in divorce and separation including children, parents, parents' attorneys, mental health professionals, and courts. The following section presents a summary of those benefits, followed by a description of some of the empirical data recently collected.

A. The Benefits of P.E.A.C.E.: An Overview

1. *Children*—Children benefit from P.E.A.C.E. through their parents.⁶³ P.E.A.C.E. reminds parents of the primacy of the children's interests at a time when parents may overlook them. Many parents undergoing divorce experience great stress and wide emotional swings. Through participation in P.E.A.C.E., parents are encouraged to separate their parental obligations from their spousal conflicts and are given information about tools to help their children cope with divorce. While communicating information does not guarantee changes in parental behavior, P.E.A.C.E. attempts to help parents evaluate past behavior and future options concerning their children.

Parents who participated in P.E.A.C.E. have been overwhelmingly grateful for the information the program provides about their children's needs and for the reflection the program encourages. A number of parents have reported reestablishing communication with their spouse concerning their children as

63. For a discussion of the negative impacts of parental behavior on children, see *supra* Part II.A.

a result of participation in P.E.A.C.E. The parents who participated in P.E.A.C.E. thus far would overwhelmingly recommend the program to other parents; most believe P.E.A.C.E. should be required for all divorcing or separating parents as early as possible in the course of their dispute.⁶⁴

2. *Parents*—When children benefit from parental education about the need for conflict management, their parents also benefit. The pilot programs have identified two somewhat unexpected benefits of parental participation in P.E.A.C.E.: parents feel that the program helps them become informed, responsible consumers of the professional services required by divorce, and parents' sense of isolation from others is reduced.

In many aspects of the divorce process—dealing with a lawyer, the court, or a spouse—parents feel dependent and helpless. Parents want information about their experiences in order to achieve a greater sense of security and control. They feel that they need more information than they have about divorce before participating in P.E.A.C.E. This finding from P.E.A.C.E.'s pilot programs confirms the results of an earlier empirical study⁶⁵ and suggests an important need for the courts, the bar, and the mental health professions to undertake a program of divorce-related community education.

In addition, divorcing parents often feel that their difficulties are unique. The information that parents receive during the P.E.A.C.E. sessions, and particularly the experiences that they share with other participants, help them understand that they are not alone. Parent participants who were more familiar with the litigation process were particularly valuable in serving as mentors to litigation neophytes, by helping to place events in context.

Many parents thus perceived the information and support provided by P.E.A.C.E. as personally empowering. Participation in P.E.A.C.E. made them feel that the court system was concerned about them and their children. P.E.A.C.E. encouraged parents to accept personal responsibility for their

64. See *infra* Part IV.B.2.

65. STATEWIDE OFFICE OF FAMILY COURT SERVICES, THE JUDICIAL COUNCIL OF CALIFORNIA, STATEWIDE NEEDS ASSESSMENT STUDY: COURT-CONNECTED CHILD CUSTODY MEDIATION AND FAMILY COURT SERVICES PROGRAMS IN CALIFORNIA, ABBREVIATED EXECUTIVE SUMMARY 6-9 (1990) (reporting the findings of a survey of 1585 clients of mediation and family court services in California, and describing the need for information on successful custody and parenting plans, the court system, domestic abuse and violence, and child support and enforcement) (on file with the *University of Michigan Journal of Law Reform*).

behavior toward their children and their spouse, and to inquire about steps that might be taken to improve their behavior.

3. *Lawyers*—Some lawyers initially expressed fears that P.E.A.C.E. would interfere with their relationships with their clients.⁶⁶ Somewhat surprisingly, however, experience in the program indicates that lawyers also benefit when parents participate in P.E.A.C.E.

First, participants in P.E.A.C.E. gain information about what a lawyer can and cannot do for them, as well as information on how to be responsible clients.⁶⁷ Clients often are in a period of great stress and turmoil at the time of divorce and separation. They may be vulnerable and prone to misunderstand both the events that occur during their divorce and the role of their lawyers in shaping those events. Participation in P.E.A.C.E. can help clients develop a more accurate understanding of what a lawyer does and what she can achieve. P.E.A.C.E. also helps clients distinguish between the role of a lawyer and the role of a therapist or friend. Increased understanding of the role of a lawyer may increase the level of client satisfaction with the lawyer's representation and may promote more harmonious lawyer-client relationships.

Second, P.E.A.C.E. can reduce client pressure on lawyers to contest custody to the limits allowed by the adversarial system.

66. Most of these concerns were expressed in conversations with the author. Some lawyers expressed concern that the lawyers who made presentations at the P.E.A.C.E. sessions would "steal" their clients. This concern was somewhat assuaged by the rule imposed on presenters that "no solicitation or acceptance of referrals from people in that session of the program" would be allowed. See *supra* Part III. Other lawyers expressed concern that the information received during P.E.A.C.E. sessions would contradict or qualify advice they had given their clients. Some lawyers who represented primarily women in divorce cases, for example, expressed concern that participation in P.E.A.C.E. would have an undue influence on women who were likely to be swayed into improvident financial or custody settlements if presented with information about the negative effects of continued conflict on their children. See *infra* Part VI.C for a discussion of the gender fairness issues P.E.A.C.E. raises. Many of these concerns were reduced by allowing lawyers to observe P.E.A.C.E. sessions if they wished.

67. Although there is no systematic study of whether clients are satisfied with representation by divorce lawyers, what factors increase client satisfaction, or whether satisfaction with the services of divorce lawyers is higher or lower relative to other fields of law, available evidence suggests a higher level of client dissatisfaction with divorce lawyers. See Stephen Labaton, *Are Divorce Lawyers Really the Sleaziest?*, N.Y. TIMES, Sept. 5, 1993, § 4 at E5 (finding that under some statistical compilations more formal disciplinary complaints are filed against divorce lawyers than those in other fields, but that data conflicts as to whether more complaints are sustained after investigation against divorce lawyers than those in other fields); MATRIMONIAL LAWYER CONDUCT REPORT, *supra* note 3, *passim*.

Sensible lawyers recognize that a custody trial is a family tragedy from which neither parents nor children are likely to emerge unscathed. Most lawyers who have participated in a custody dispute know that in the great majority of cases, a private parental settlement is far preferable to a court imposed solution, except in those cases involving child or spousal abuse or neglect. Yet the lawyer for one parent must often accommodate his client's desire to punish the other parent by using the children as a pawn in a custody dispute in order to avoid losing the client.

Representing a client in a custody case can often be emotionally taxing and professionally unsatisfying when lawyers recognize that their clients' desires are not in the best interests of the children. Aid from the court system, other lawyers, and mental health professionals that encourages clients to behave responsibly toward their children has been welcomed by many members of the divorce bar as a method of reducing the stress of the divorce practice, as well as for the benefits it provides to parents and children. P.E.A.C.E. thus reinforces the advice a sensible lawyer should already be giving to a client. Clients who do not receive such advice—and instead are advised to contest custody vigorously—are reminded by P.E.A.C.E. of the damage to the child that may result.

4. *Mental Health Professionals*—For mental health professionals, P.E.A.C.E. can be a positive alternative to their present roles in custody litigation: testifying as experts in an adversarial setting and picking up the emotional pieces of parents and children after the damage due to the adversarial system and the severance of the parent-child relationship has already occurred. Participation in P.E.A.C.E. can be, in effect, a form of preventive public education about a serious event in the lives of many families. It also makes parents more aware of the mental health resources available to help them through their period of adjustment.

Additionally, P.E.A.C.E. can produce an important societal benefit by bridging the gap between lawyers and mental health professionals. Lawyers and mental health professionals involved in custody cases frequently spend a great deal of time and effort in courtroom confrontations and bemoan the fact that one profession does not “understand” the other. Working together to develop and implement P.E.A.C.E. has generated a very important and positive dialogue between lawyers and mental health professionals about the welfare of children—a

dialogue which may extend to other areas.⁶⁸ Although joint development of P.E.A.C.E. has not ended all antagonism and misunderstanding between the professions, it is a positive step toward bridging this gap.

5. *The Court System*—By promoting conflict management between parents, P.E.A.C.E. can promote the best interests of children, which is the court system's primary mission in custody cases. It is important to reiterate that P.E.A.C.E. is essentially an orientation program and not an attempt to settle individual cases. Standing alone, it is unlikely to clear congested court dockets of custody disputes. Parent participation does, however, help set the proper tone for the court proceedings to follow and may encourage parents to behave responsibly. The program also may result in earlier settlements by encouraging parent cooperation.

Court sponsorship of P.E.A.C.E. produces an even more important benefit. Parents who participate in P.E.A.C.E. often get a more favorable perspective on how seriously judges take their responsibilities in custody matters than they would otherwise. Virtually every parent participant and several newspaper editorials thanked the local court system for sponsoring P.E.A.C.E. The judicial process simply seems more humane, less threatening, and more responsive when explained by the judges who participate in P.E.A.C.E. than it does when the parents' only encounter with a judge is in the formal atmosphere of a courtroom.

B. Survey Data

1. *Participants*—Survey data have been collected from four of the pilots thus far.⁶⁹ Most data are based on the responses

68. The type of multi-disciplinary coalition that developed P.E.A.C.E. has played an important role in custody reform in other states. A similar coalition of professional groups interested in reducing the trauma of marital disruption on children was very effective in devising and implementing Washington's innovative child custody reforms following the defeat of a joint custody bill in that state during the 1980s. See Ellis, *supra* note 4, at 75-80. See generally Chief Judge Judith S. Kaye of the N.Y. Court of Appeals, *The Changing World of Children: The Responsibility of the Law and the Courts*, Address Before the American Law Institute (May 13, 1993) (emphasizing the need for the legal profession to move outside its traditional roles in order to improve the law relating to children and families) (transcript on file with the *University of Michigan Journal of Law Reform*).

69. The pilot programs from which these data were collected are in New York, Erie, Nassau, and Westchester counties.

of sixty-seven participants. Apparently, slightly more women than men attended the seminars.⁷⁰ The participants were white (100%) and well-educated: 85% had some college experience and 55% of these held graduate or postgraduate degrees. Based on responses from sixty-seven participants, 44% of the respondents reported income over \$40,000; 48% of the respondents were separated; 29% were married but considering divorce; 19% were divorced; and 9% were married.⁷¹ Forty-two percent had one child; 38% had two children; 12% had three children; and 8% reported four children. The average age for all children was 8.5 years. In 67% of the cases, both spouses attended the program. Sixty-four percent of the participants were recommended to the program by judges, 26% by attorneys, and 8% by mental health professionals.

2. *Preliminary Data*—The previous section's conclusions find support in the following comments, reprinted from either observer or participant evaluations.

After the second session of one pilot program, the evaluators and the administrators of the program were approached by a couple who had attended both sessions.

They came to thank the administrators and the people who had referred them. This couple told the administrators that they had settled their differences concerning custody, were now on speaking terms, and had been out to dinner together since the last meeting. Both of these people stated that they had been at "each others' throats," and had been in court at least once a week for the past few months. The couple then informed the administrators that they had cancelled all court dates and told their attorneys of their agreements concerning custody.

Following another program, an attorney for one of the parties who had attended the P.E.A.C.E. sessions contacted one of the administrators and referring agents. The attorney informed the administrator that:

70. Thirty-four participants did not indicate their sex.

71. The married parents who were referred probably had custody or visitation disputes with a former spouse. The questionnaire used to collect the data, however, did not include a space for the parent to explain the nature of the dispute in depth, so no firm conclusion can be drawn.

I do not speak to my client every day now. There is not nearly the animosity that existed before the program. And, finally, and most importantly, the two parties for the first time are sitting down and coherently discussing some sort of an agreement leading to a custody and dispute resolution, without trying to kill each other.

An observer reported another incident on an evaluation sheet:

One woman labeled her husband an abuser during the large group session. The husband, in a separate group, presented some of his insights into the couple's interactions. Later he admitted having heard the views from the "other side" of similar situations which he found helpful and insightful. At the end of the evening he inquired about getting therapy for himself.

Other participants' comments drawn from the questionnaires include:

It was fantastic how each of my fellow members in the small group gave advice and feedback if they heard of a similar situation that somebody else was having problems with.

I found this program very helpful, but my spouse did not attend. I wish he could have heard the exact same seminar.

This was a wonderful program, but I wish I had been told of the legal aspects before I went to a lawyer.

There were several comments along the following lines:

It gave me a better understanding of how things were done in our system.

It is good to know other people are going through the same thing.

I wish there were more small group discussions. It was wonderful to be able to talk through these things.

It was nice to have a large room so that you did not have to worry about having to speak with your spouse, if you did not want to.

I am a better person and parent for having had exposure to program. I used to feel that the legal environment did not care about individuals who are going through this but now I know better.

Most, but not all, of the comments were positive. Representative negative comments included:

It is frustrating to be told that the specifics of a person's case cannot be discussed.

The first session emphasized not to fight for custody in court because of its expense; but how else can you be part of the child's life when the other parent makes it so difficult?

The responses from both the participants and the evaluators were nearly unanimous in suggesting that parents should participate in P.E.A.C.E. at the earliest possible moment in their divorce proceedings. Participants also stated nearly unanimously that parents should be required to attend. Further, the stage of the participant in the divorce process seemed to be correlated to his satisfaction with the program: the earlier the participant was in the divorce process, the more he believed he had benefited from participation in P.E.A.C.E.

In response to the question of what was most helpful about the P.E.A.C.E. program, 30% of the respondents felt the small group discussions were most helpful, while 28% believed the presentations were most helpful.⁷²

When asked what was "most helpful" about P.E.A.C.E., representative participant responses included:

Information about joint custody
Learning to focus on the child's best interests
Learning to communicate

72. Ninety-five percent of the respondents agreed that the presentations were "well-organized"; 75% felt the presentations "met needs"; and 89% felt that the small group portion of P.E.A.C.E. "was helpful."

How to cope with single parenthood
 Asking questions
 Realizing the importance of cooperation
 Realizing the need for individual counseling
 Information on the children's experience of divorce
 Guidelines for giving children a normal life

When asked what was "least helpful" about P.E.A.C.E., representative participant responses included:

Need more time to discuss problems in small groups
 Need more time on legal issues
 Session was too much like a lecture
 People should be referred early in the divorce process
 Participant was past the stages discussed in the sessions

When asked what additional information might be included in the program, representative participant responses included:

Urgings to reconcile
 Financial support
 Abuse
 More legal issues (e.g. repercussions of violating a court order)
 Mental health referrals for custody evaluation

3. *Helping Children Cope—Dutchess County Program Data*—At approximately the same time that the P.E.A.C.E. pilot programs began, the Dutchess County Family Court in Poughkeepsie, New York instituted a program similar to P.E.A.C.E. The Dutchess County Program, named Helping Children Cope (H.C.C.), is based on the Atlanta, Georgia model program.⁷³

The principal difference between H.C.C. and the P.E.A.C.E. pilots is that P.E.A.C.E. includes an educational session about the legal process, while the Dutchess County Program does not. The Dutchess County Program also charges a modest fee for participation, is directed by a professional, and receives some funding from the local county legislature.

Despite these differences, the better organized survey results from the Dutchess County program confirm the P.E.A.C.E. assessments. From December 1992 to December 1993, H.C.C.

73. For a brief description of the Atlanta model program, see Lawson, *supra* note 6, at C1.

surveyed a somewhat larger and more diverse participant base of 452 individuals, including 29 members of minority groups. The survey attempted to determine how participants' understanding of the divorce process improved because of the H.C.C. program and how they evaluated the quality of the program.⁷⁴ The comments of the participants in H.C.C. echo the comments of the participants in the P.E.A.C.E. program.⁷⁵

V. IMPROVING THE P.E.A.C.E. PROCESS

The conclusion of the first round of pilot programs marks the end of P.E.A.C.E.'s early childhood. The childhood experiences must be evaluated and appropriate developmental tasks established if P.E.A.C.E. is to have a successful transition to early adolescence, and to ultimately reach its full potential. A number of complex and interrelated issues of divorce and custody procedure, curriculum and training, program organization, and financing must be resolved if P.E.A.C.E. is to become a standard part of the process of custody dispute resolution.

This section of the Article identifies and discusses some of these critical issues. The model statute in Appendix B provides a concrete starting point for jurisdictions that want to consider creating a permanent structure for parent education programs.

74. See Appendix A for the H.C.C. survey results. This data is on file with the *University of Michigan Journal of Law Reform*, and also can be obtained directly from Patricia Glatt, H.C.C.'s coordinator.

75. Selections follow from responses to the survey question, "The two most important things I learned from this seminar were":

Children should be put first; put aside anger for ex-spouse where children are concerned; what reactions and needs that are expected from different age groups; importance of maintaining as much of Mom-Dad as possible for the children; that I am not the only one going through this; not to blame the father; not to blame the child; the effects of divorce on children can be minimized; gave me confidence in what I was attempting to do with the children, and how I must work twice as hard to be objective; reinforcement of my own belief that there are no winners; get spouse to come to this program; divorcing parents have to communicate; we can overcome the problem and will.

A. Early Intervention

The purpose of P.E.A.C.E. is to encourage rational thinking by parents about conflict escalation. The data P.E.A.C.E. has gathered confirm that divorcing and separating parents should be informed about P.E.A.C.E. and encouraged to participate in it at the earliest possible stage of the divorce process. This is evidenced by the fact that many of the questionnaire responses by participants who had been enmeshed in litigation for a lengthy period of time contained the similar refrain: I needed this program earlier.

Successful early intervention, however, depends on a court's ability to accurately assess whether a particular divorce complaint in fact involves a custody dispute.⁷⁶ It has been traditional in New York practice to include a form demand for custody in virtually every complaint for divorce, whether or not the litigant actually seeks custody. A system of early intervention will require some mechanism through which serious custody claims may be distinguished from pro forma demands.

The best way to encourage only legitimate demands for custody is to impose both ethical and procedural obligations on counsel and litigants, including appropriate sanctions. Such an obligation might take the form of a formal written allegation, verified by both counsel and litigants, that the demand for custody is being made in good faith and has a reasonable basis in fact. If it is later determined that the custody allegation was frivolous, the court could be authorized to strike it and impose monetary or other appropriate sanctions.

Imposing sanctions for frivolous allegations is not a new principle in New York civil practice. All claims filed in a New York court and verified by both counsel and litigants must already meet the standard of good faith and reasonable basis in fact, as defined by both the *Code of Professional Responsibility*⁷⁷ and New York's court rule which provides monetary sanctions for the filing of "frivolous conduct."⁷⁸ The only dif-

76. An easy way to encourage early parent participation in P.E.A.C.E. would be to order all parents who file a divorce or custody complaint to attend the program. See *infra* text accompanying notes 96-105 for a full discussion of the scope of mandatory court attendance and the accompanying resource issues.

77. Code of Professional Responsibility, N.Y. JUD. LAW app. DR 7-102(A)(1), (2) (McKinney 1992).

78. New York Rules of Court, N.Y. COMP. CODES R. & REGS. tit. 22, § 130-1.1 (1993).

ference between current law and the proposal for prefiling certification is making the implicit ethical requirement explicit.

Indeed, it could be argued that the certification of filing in good faith is not sufficient prefiling protection for a child about to be subjected to a custody dispute. Additional certifications could be required. For example, the lawyer and the parent could be required to certify as part of the filing process that they have been informed about the existence of P.E.A.C.E. and have decided to attend or not to attend the program.

These prefiling certification requirements are consistent with trends in the development of ethical standards in the organized divorce bar, which has begun to formally recognize its obligations to the children of divorce. The American Academy of Matrimonial Lawyers (AAML) recently adopted a supplementary code of aspirational standards for divorce law specialists, titled *Bounds of Advocacy*, which emphasizes the importance of children's interests.⁷⁹ One of the provisions of that code requires an attorney to consider the welfare of the children in his representation of the parent.⁸⁰ Another provision suggests that an attorney should advise the client of the effects of a meritless custody claim on children and should withdraw from representation if the client persists in asserting such a claim.⁸¹ Similarly, other states are considering creating ethical rules and rules of civil procedure which require lawyers to discuss alternative dispute resolution techniques with their clients before filing suit.⁸²

The same principle should be incorporated into the *Model Rules of Professional Conduct*, which is applicable to all lawyers. This is important because many lawyers who handle custody disputes do not belong to the AAML and are not

79. BOUNDS OF ADVOCACY: AMERICAN ACADEMY OF MATRIMONIAL LAWYERS STANDARDS OF CONDUCT (1991) [hereinafter MATRIMONIAL LAWYERS STANDARDS].

80. *Id.* at No. 2.23.

81. *Id.* at No. 2.14 cmt., No. 2.25 cmt.

82. See STATE BAR OF CAL., JOINT BD. COMM. ON ADMIN. OF JUSTICE/JUDICIAL TASKFORCE ON ACCESS TO JUSTICE, ALTERNATIVE DISPUTE RESOLUTION ACTION PLAN 12-13 (May 1991) (proposing that once alternative dispute resolution options are "widely available and known," a rule of professional conduct requiring attorneys to inform clients of such options should be considered) (on file with the *University of Michigan Journal of Law Reform*). Colorado recently amended its code of professional responsibility to state that "[i]n a matter involving or expected to involve litigation, a lawyer should advise the client of alternative forms of dispute resolution which might reasonably be pursued to attempt to resolve the legal dispute or to reach the legal objective sought." COLORADO RULES OF PROFESSIONAL CONDUCT Rule 2.1 (1993).

familiar with its aspirational guidelines.⁸³ Further, New York's *Code of Professional Responsibility* contains no special provisions requiring lawyers to minimize the harm to children during child custody representation.⁸⁴ Therefore, in New York, any lawyer—even one without special training, experience, or ethical obligations—can represent a parent in a divorce.

Thus, the scope of the divorce lawyer's ethical duties to the child and the permissible sanctions for ethical violations need refinement. Many lawyers are not professionally prepared to comply with the proposed revised precomplaint filing system which would emphasize those ethical obligations. Significant lead time and a concentrated program of professional education would be needed to effectuate such a change.⁸⁵ Law schools must be encouraged to include education about lawyers' duty to children in custody cases in their curricula. Consideration should be given to making such education for lawyers a mandatory condition of representing parents in child custody disputes.

The recent *Report of New York's Committee to Examine Lawyer Conduct* took a significant step forward by recommending that a preliminary conference take place within forty-

83. AAML ethical standards lack the backing of state-created machinery—such as requirements for continuing education, disciplinary sanctions, frivolous conduct rules, and potential malpractice liability—to enforce the professional responsibility obligations of counsel. See *MATRIMONIAL LAWYERS STANDARDS*, *supra* note 79, at 5.

84. The New York Code of Professional Responsibility, however, already contains provisions concerning divorce law and other specialized fields of practice. See, e.g., Code of Professional Responsibility, N.Y. JUD. LAW app. EC 2-20 (McKinney 1992) (indicating that contingent fees in domestic relations cases are “rarely justified”); *id.* at EC 5-17 (indicating that representation of multiple defendants in a criminal case or co-plaintiffs in a tort action is likely to lead to differing interests).

The Model Rules of Professional Conduct, which have replaced the Model Code in some jurisdictions, include stronger language regarding contingency fees in domestic relations cases. See MODEL CODE OF PROFESSIONAL CONDUCT Rule 1.5(d) (proscribing the collection of a fee “contingent upon the securing of a divorce or upon the amount of alimony or support”); Rule 1.7 (containing the command that lawyers not represent parties with differing interests); Rule 1.16(b)(3) (allowing a lawyer to withdraw if “the client insists on pursuing an objective that the lawyer considers repugnant or imprudent”).

New York's Committee to Examine Lawyer Conduct in Matrimonial Actions recently recommended that additional provisions be added to the Code of Professional Responsibility to regulate the conduct of lawyers in matrimonial actions. The recommended provisions deal with fees and fee dispute arbitration, statements of client rights and responsibilities, and withdrawal from representation. *MATRIMONIAL LAWYERS CONDUCT REPORT*, *supra* note 3, *passim*.

85. See Ellis, *supra* note 4, at 181 (emphasizing the importance of professional education for lawyers in implementing the State of Washington's new child custody law and procedures).

five days of service of the complaint in matrimonial actions to examine whether bona fide issues regarding custody exist, and to discuss possible referral to P.E.A.C.E.⁸⁶ Moving the time of intervention, and thus parental reflection about the wisdom of making a custody demand, to an earlier point in the dispute process through the imposition of certification requirements and ethical proscriptions would help insure that both counsel and parents take demands for custody seriously. The economic costs of these changes are minimal; the resulting changes in attitude toward children could be dramatic. In addition, courts would have more assurance that parents referred to P.E.A.C.E. would receive the greatest benefit from the education that the program provides.

Finally, the mental health, educational, and religious communities, as well as lawyers, should be encouraged to refer parents to P.E.A.C.E. as early as possible, even before a complaint is filed with the court. P.E.A.C.E. programs might also be advertised in the local media to encourage parent self-referral. In short, every effort should be made to encourage parents to attend P.E.A.C.E. as early in their dispute as possible, before conflict escalates and adversarial positions harden.

B. Child Support

While the primary emphasis in many of the pilot programs was on the emotional needs of the children involved in divorce and custody proceedings, many participants reported serious problems in collecting child support during the period between the interim award and the final divorce. Custodial parents experiencing such problems reported severe economic distress for themselves and their children as a result of the non-payment of support. They also reported a great deal of anger on the part of their children and themselves for being placed in these circumstances.

The P.E.A.C.E. curriculum is therefore being revised to incorporate substantially more material on a child's need for

86. See MATRIMONIAL LAWYER CONDUCT REPORT, *supra* note 3, at 33-35. The Report also recommended that the preliminary conference also address issues of fault and finance. *Id.* at 34.

financial and emotional support. Heavy emphasis is being placed in the curriculum revision on the fact that visitation problems do not justify withholding child support.

C. Spousal and Child Abuse

P.E.A.C.E. recognizes the special problems of parent participants who have been victims of spousal abuse, or who believe that their children have been abused by the other spouse. The program's procedures provide significant assurances of personal security. Spouses are never in the same small discussion group during P.E.A.C.E. sessions and do not have to speak with each other at any time during the program. Court security personnel are present during the sessions, all of which take place in the courthouse.

The concerns of fearful spouses were addressed more specifically in two of the pilot programs. In those programs, the large group P.E.A.C.E. session was presented twice during the same week. Thus, a parent who did not wish to attend the same session as her spouse could be assigned to a different session. While this procedure doubled the required number of presenters and sessions—a real cost in a volunteer program—it reduced the fear of some participants and encouraged more open parent participation.⁸⁷

87. This dual session procedure was adopted under the "local option" of particular P.E.A.C.E. programs with the input of a local program which provides shelter to battered women. *See supra* Part III.

It should be noted that this procedure is not without controversy. The option of attending a separate session was offered to a parent after a statement to the program administrator that the parent was fearful of being in the same room with the spouse. No attempt was made to determine whether the expressed fear had any basis in fact. In addition to the resource problems created by dual sessions, some members of the P.E.A.C.E. Advisory Committee felt that it was symbolically wrong to organize the program with parents in separate rooms on separate nights. They reasoned that if parents were not able to be in the same room together, they could not be expected to cooperate for the benefit of the children. Some mental health professionals who are members of the P.E.A.C.E. Advisory Committee and who conduct forensic mental health evaluations of parents for custody cases reported that many spouses were initially fearful of a joint interview with their spouse by the mental health professional in an office setting. They report, however, that these fears recede once the evaluation process begins and the fearful spouse realizes that she is protected from harm by the presence of the professional. Power imbalances can be reduced in a setting where both spouses are present because the "powerful" spouse can be controlled by authority figures. More research, experience, and reflection in this area is

The P.E.A.C.E. curriculum is being revised to emphasize that if a parent believes that he, or she, or a child, has been the victim of physical abuse, some of the emphasis on the need for parental cooperation for the benefit of their children may not be applicable.⁸⁸ Parents who believe that they are in such circumstances will be advised to discuss the problem with their counsel. They will also be given a list of appropriate legal and medical resources.

In addition, parents who believe that they or their children are victims of abuse should not be denied access to judicial relief and orders of protection, even if scheduled to attend P.E.A.C.E. Genuine family emergencies do exist which require the courts to protect the victims of abuse; judicial protection should not be postponed pending parental attendance at an educational program.

D. Involvement of Children

P.E.A.C.E. is an educational program for parents. Children caught in the emotional maelstrom of divorce and custody problems may also need support programs sensitive to their needs. Thus far, P.E.A.C.E. has not involved children directly for fear that short-term educational intervention might create more problems for children than it would solve. Children experience multiple losses at the time of divorce. Many of the mental health experts associated with P.E.A.C.E. feel strongly that a one- or two-hour program for children in which the children develop transient relationships with group leaders would only magnify that experience. Furthermore, they expressed concern that programs involving children needed to be carefully tailored to different age groups and sexes. Some experimentation with programs for children may, however, be undertaken cautiously in the future.⁸⁹

necessary as P.E.A.C.E. develops. *See infra* Part VI.C for a further discussion of these issues.

88. In more recent pilots, judges have been advised that they should not refer parents to P.E.A.C.E. if the family history includes a documented allegation of spousal or child abuse. *See supra* Part III.A.1. This advice, too, will be reviewed by the P.E.A.C.E. Advisory Committee in light of future data and experience.

89. The Louisville, Kentucky divorce education program, for example, involves both parents and children and is mandatory for some families. Parents attend a three session, eighteen-hour program while their children between the ages of 8 and 12

P.E.A.C.E. organizers are aware, however, that many primary schools have recognized the educational and emotional support needs of children of divorce. This is not surprising, as parental separation and divorce are often associated with serious educational decline in children.⁹⁰

A number of school-based intervention programs have been developed to help children of divorce cope with their turmoil. An example is the twelve-session Children of Divorce Intervention Program created at the University of Rochester. The program's curriculum addresses issues and concerns of children of divorce who are in early adolescence. It uses a variety of innovative teaching techniques such as journals and simulated television programs produced by children.⁹¹ Empirical research has demonstrated the effectiveness of such programs in helping children cope with the divorce process.⁹²

Programs such as the University of Rochester's need to be made more widely available. Lawyers and courts have a special responsibility to become knowledgeable about such programs and to encourage parents to refer their children to them. In addition, lawyers, courts, and especially family law bar organizations must take some responsibility for lobbying education officials to promote and fund these programs.

When intervention programs for children exist in a community, P.E.A.C.E. is an excellent vehicle for advising parents of their existence and encouraging parents to have their children participate. Similarly, programs for children could be an important source of referrals of parents to P.E.A.C.E.

Assuming wide-spread availability of divorce education programs for both parents and children, one could envision a day when parents must certify that their children have been enrolled in an appropriate support program and that they have attended educational seminars like P.E.A.C.E. before a divorce is granted.⁹³

simultaneously attend their own sessions. The aim of the children's session is to teach the children divorce-related coping tasks, such as understanding that divorce is permanent and real, separating themselves from their parents' conflicts, and dealing with the feelings of loss and the difficulty of adjusting to two households. A variety of small group-based educational activities and processes are used to illustrate these skills. See Woo, *supra* note 6.

90. See *supra* text accompanying notes 35-37.

91. JoAnne L. Pedro-Carroll & Emory L. Cowen, *The Children of Divorce Intervention Program: Implementation and Evaluation of a Time Limited Group Approach*, in 4 ADVANCES IN FAM. INTERVENTION, ASSESSMENT & THEORY 281, 287-89, 297 (1987).

92. *Id.* at 286-87.

93. See *infra* Part V.F.1.

*E. Future Involvement of Minority Families
and Other Interested Groups*

Thus far, participation by parents who are members of minority groups has been relatively limited. P.E.A.C.E. will make an effort to ascertain why, and to strive for more minority participation in the future.

Minorities may have a special interest in the future expansion and development of P.E.A.C.E. Higher income parents tend to be represented by counsel in a divorce and to have access to mental health advice. One suspects, however, that a significant percentage of minority families may not have the financial resources to afford such advice. The information non-represented minority parents—indeed all pro se parents—receive from P.E.A.C.E. about the legal process and how to minimize the difficulties their children experience may be the only such information they will receive.⁹⁴

The P.E.A.C.E. curriculum and program concept thus need to be reviewed generally with constituencies interested in the divorce and custody process, including advocates for minorities, families, women, men, and children. Education about P.E.A.C.E. and its purposes, as well as opportunities for community input, reduces suspicion about the program and makes it more responsive to the parents and children it seeks to serve.

F. Court-Directed Attendance

Perhaps the most debated issue in the development of P.E.A.C.E. is whether all or some divorcing parents should be compelled by court order to attend it. An argument can be made that all divorcing or separating parents, no matter where they are on the conflict-cooperation continuum,⁹⁵ should attend

94. The number of pro se divorce litigants is large and apparently growing. See Jodi Duckett, *Benefits, Trials of Becoming Your Own Lawyer*, L.A. TIMES, May 11, 1990, at N12 (noting that 70% of divorces in California are handled pro se); Phyllis Brasch Librach, *Jury's Still Out Here on Divorce Without Lawyer; Elsewhere, Going Solo to Court Is In*, ST. LOUIS POST-DISPATCH, Oct. 20, 1993, at 1B (finding that in metropolitan Phoenix almost 90% of divorces in 1990 involved at least one pro se litigant).

95. See *supra* text accompanying notes 54-56.

an educational program about their children's needs. The information they receive will be beneficial and useful in many cases and the burden of attendance generally will be minimal.

One obvious possibility is to require that parents involved in a divorce or custody dispute automatically be ordered to attend P.E.A.C.E. within a specified period of time after a complaint raising a custody problem is filed. Uniformity would eliminate the need to make administrative decisions about which parents should attend and which should not. A uniform requirement of early attendance also insures that parents attend P.E.A.C.E. at the earliest possible stage of their dispute.⁹⁶ If parents did not attend, sanctions could be imposed. For example, parents could be held in contempt, or their failure to attend P.E.A.C.E. could be taken into account in the court's final custody determination, on the theory that it suggests a lack of concern for the best interests of the children.

The constitutional implications of requiring the attendance of parents and children as a prerequisite to divorce merit further attention. Because states retain great discretion in setting the terms and conditions of divorce, they would be unlikely to face many problems in compelling parental attendance at educational programs as a condition of divorce,⁹⁷ assuming that provision is made for divorcing parents too poor to pay any required fees.⁹⁸

The more pressing problems with mandating universal attendance are the lack of available resources and the educational techniques used. Evaluating mandatory attendance, at least in New York, must be undertaken against the backdrop of another program widely believed to have failed: the system of mandated conciliation conferences. Attendance at these conferences was required of all divorcing couples, whether or not they had children, in each judicial district from 1967 until the repeal of the requirement in 1973.⁹⁹ The conciliation conference was the product of a political compromise to enact more liberal

96. See *supra* Part V.A.

97. See *infra* Part V.F.1.

98. Cf. *Boddie v. Connecticut*, 401 U.S. 371, 374 (1971) (holding that the Fourteenth Amendment prevents a State from denying judicial marriage dissolution to indigents unable to pay court fees and costs). Uncharted constitutional problems might arise, however, if parents were denied a divorce because a child refused to attend a mandatory educational program and the parents could not compel the child's attendance.

99. N.Y. DOM. REL. LAW § 215, 1966 N.Y. LAWS, ch. 254, art. 11-B, *repealed by* 1973 N.Y. LAWS, ch. 1034, § 2.

grounds for divorce in New York.¹⁰⁰

The primary purpose of the conciliation conference was to "prevent the dissolution of marriage."¹⁰¹ Divorce proceedings were stayed for 120 days to allow time for the conciliation conference.¹⁰² The program was abandoned in large part because it became a meaningless formality—a technical roadblock on the road to divorce, administered by political appointees without special training or competence in family counseling.¹⁰³

P.E.A.C.E. is not aimed at encouraging parental reconciliation. That task may well be beyond the competence of any court or counselor by the time parents have initiated litigation.¹⁰⁴ Rather, the purpose of P.E.A.C.E. is to better equip parents to help them cope. This is a far more manageable educational task.¹⁰⁵ It also does not delay judicial proceedings.

Although P.E.A.C.E.'s purpose is thus different from that of the conciliation conference, the conference's experience raises several key issues that should be addressed after first discussing whether a court should have the power to require parents to participate in P.E.A.C.E. against their expressed desire. These key issues include: who will staff and administer P.E.A.C.E.; how P.E.A.C.E. presenters will be trained and evaluated; and how P.E.A.C.E. will be funded. Given the conciliation conference experience, it simply makes no sense to direct parents to attend a P.E.A.C.E. program that is not adequately staffed and funded.

100. The Catholic Church was opposed to any reform of New York's grounds for divorce that would result in making divorce too easy to obtain and thus vehemently opposed the proposed "living separate and apart" ground. Eric Pace, *Panel on Divorce Weighs 6 Reforms*, N.Y. TIMES, Dec. 3, 1965, at A1, A29. As a compromise, the Legislature adopted the Roman Catholic Church's recommendation that required the formation of a conciliation court which was designed to rescue those marriages that were capable of being saved. Natalie Jaffe, *Divorce Reform Believed Gaining*, N.Y. TIMES, Dec. 28, 1965, at A1, A11; see also MAX RHEINSTEIN, MARRIAGE STABILITY, DIVORCE AND THE LAW 359 (1972) (indicating that the two major concessions included in the Reform Act were the establishment of a scheme of conciliation as a prerequisite to a divorce suit, and the establishment of a scheme aimed at preventing "out of state migratory divorce").

101. N.Y. DOM. REL. LAW § 215, 1966 N.Y. LAWS, ch. 254, art. 11-B, *repealed* by 1973 N.Y. LAWS, ch. 1034, § 2.

102. *Id.* § 215-g, *repealed* by 1973 N.Y. LAWS, ch. 1034, § 2.

103. See RHEINSTEIN, *supra* note 100, at 359-60 (indicating that the conferences were run by political appointees and were unsuccessful at saving marriages).

104. See the research summarized in IRA M. ELLMAN ET AL., FAMILY LAW: CASES, TEXT, PROBLEMS 198-99 (2d ed. 1991) (indicating that some states that formerly required reconciliation as a part of mandatory counseling no longer do so).

105. See *id.* at 199 (summarizing studies indicating the usefulness of conciliation courts in helping families adjust to the effects of divorce).

1. *The Scope of Court-Directed Attendance*—Assuming that an adequately organized and funded P.E.A.C.E. program exists,¹⁰⁶ a threshold question is whether all or some divorcing parents should be compelled to attend it. In some states, such as Georgia, participation in programs similar to P.E.A.C.E. is mandatory for all custody litigants.¹⁰⁷ Court rules authorize and set forth procedural requirements.¹⁰⁸ In such mandatory programs, participants pay an affordable fee, which may be waived in certain circumstances.¹⁰⁹

A strong case for mandatory parental participation in P.E.A.C.E. may be made on both philosophical and practical grounds. If a driver violates speeding laws too often, she can be required to take a mandatory driver's education course in order to maintain the privilege of a driver's license.¹¹⁰ Like the license to drive a car, a divorce is not a constitutional right. Liberal divorce laws give parents with children the privilege of divorce, but the legislature can impose reasonable restrictions on that privilege.¹¹¹ Although parents cannot be compelled to submit to ongoing therapy as a prerequisite to receiving visitation or custody privileges,¹¹² a court can, where appropriate, compel counseling to assist in its custody determination.¹¹³ Adults divorce for reasons that benefit them, but the

106. See *infra* Parts V.F.2-4.

107. See, e.g., Super. Ct., Cobb County, Ga., Seminar for Divorcing Parents, Order 8850845-99 (Aug. 17, 1988) (on file with the *University of Michigan Journal of Law Reform*); see also Lawson, *supra* note 6, at C1 (noting that Cobb County, Georgia mandates participation in a four-hour seminar for divorcing parents). Utah has established a similar mandatory pilot program for divorcing parents in two of its judicial districts. UTAH CODE ANN. § 30-3-11.3 (Supp. 1993).

108. Super. Ct., Cobb County, Ga., Seminar for Divorcing Parents, Order 8850845-99 (Aug. 17, 1988).

109. *Id.* Participants pay a \$30.00 fee, which is waived if the party meets indigency criteria.

110. See, e.g., N.Y. VEH. & TRAF. LAW § 530(1) (McKinney 1986) (allowing the Commissioner of Motor Vehicles to require a driver whose license has been suspended or revoked to "attend a driver rehabilitation program specified by the commissioner").

111. *Sosna v. Iowa*, 419 U.S. 393, 404 (1975) ("The State . . . has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved." (quoting *Pennoyer v. Neff*, 95 U.S. 714, 734-35 (1878))).

112. See, e.g., *Tito G. v. Thelma G.*, 591 N.Y.S.2d 41, 42 (App. Div. 1992); *Ramshaw v. Ramshaw*, 588 N.Y.S.2d 310, 311 (App. Div. 1992); *Nacson v. Nacson*, 560 N.Y.S.2d 792, 793 (App. Div. 1990).

113. See, e.g., *Ramshaw*, 588 N.Y.S.2d at 311. In *Zablocki v. Redhail*, 434 U.S. 374 (1978), the Supreme Court invalidated a Wisconsin statute that required a parent with unpaid child support obligations to obtain court permission to marry. One of the interests Wisconsin asserted in support of the statute was the opportunity it furnished "to counsel the applicant as to the necessity of fulfilling his prior support obligations."

same cannot be said of divorce's effects on many children. Certainly, protecting the best interests of children—which is the fundamental aim of state intervention in the divorcing family—can support the requirement that parents learn about ways to minimize the harm divorce will cause to their children as a condition to divorce.

In this sense, a required educational program for divorcing parents is a moral statement to parents about the state's priorities in resolving family problems. Parents should learn how to prevent harm to their children before being granted the privilege of divorce by the state.

Significant practical benefits also flow from allowing courts to direct parents to attend P.E.A.C.E. sessions. Experience in other states suggests that few parents are willing to invest the necessary time and emotional energy to attend parent education programs voluntarily.¹¹⁴ Experience with voluntary mediation programs confirms this view.¹¹⁵ Once parents attend, however, their views of the value of the educational experience change dramatically. As indicated earlier,¹¹⁶ parents who participated in P.E.A.C.E. overwhelmingly believe that attendance should be mandatory.

Court-directed attendance also insures that both parents get the same information at approximately the same time. In the pilot programs, P.E.A.C.E. participants whose spouses did not attend often asked why the court did not also require the other parent to be present. This is an important point. The premise of P.E.A.C.E. is that marriages may dissolve, but parents

Id. at 388. The Court accepted the theoretical state interest in providing counseling to parents as "legitimate and substantial." *Id.* It nonetheless invalidated the Wisconsin statute because as enacted it did "not expressly require or provide for any counseling whatsoever, nor for any automatic granting of permission to marry by the court" once counseling occurred. *Id.* at 388-89. Parents ordered to participate in P.E.A.C.E., in contrast to parents affected by the Wisconsin statute in *Zablocki*, would actually receive counseling in the form of education. Furthermore, participation or non-participation in a mandatory P.E.A.C.E. program would not necessarily affect their ability to divorce or remarry, see *infra* notes 125-32 and accompanying text, but simply would be taken into account in any custody determination or in a contempt judgment.

114. Wachtel, *supra* note 6, at 30.

115. Civil Justice, An Agenda for the 1990s: REPORT OF THE AMERICAN BAR ASSOCIATION NATIONAL CONFERENCE ON ACCESS TO JUSTICE IN THE 1990S 40 (1989) [hereinafter REPORT OF THE A.B.A.]; Jessica Pearson & Nancy Thoennes, *Divorce Mediation: An Overview of Research Results*, 19 COLUM. J.L. & SOC. PROBS. 451, 454 (1988).

116. See *supra* Part IV, which reports the P.E.A.C.E. pilot program data and the survey of parent participants in H.C.C.

remain parents forever. Both parents, therefore, should receive whatever the program has to offer.

Finally, court-directed attendance also negates any strategic calculations by lawyers and clients as to whether to attend P.E.A.C.E. Some lawyers may not want their clients to attend out of philosophical disagreements with the program's premises, fear of loss of client control, or for less noble reasons.¹¹⁷ Some clients do not want to attend out of dislike for, or fear of, the other spouse, or because they do not want to reevaluate their own behavior in light of the information provided at the P.E.A.C.E. sessions. Court-directed attendance ensures that such considerations do not stand in the way of parent attendance.

2. *Volunteers and Agencies*—Unlike the conciliation conference, P.E.A.C.E. is conducted by volunteers, not by government employees or a social service agency. The number of parents able to participate in P.E.A.C.E. will depend on how many presenters are trained and available to serve, as well as on resources made available to administer the program.

One of the benefits of P.E.A.C.E.'s volunteer structure is that, since the project is independent of any social service or government agency, it has inspired closer cooperation among the judiciary, lawyers, and all segments of the mental health community. Interdisciplinary communication now exists where previously it did not. Where P.E.A.C.E. exists, it is a model of public-private partnership for the benefit of children.¹¹⁸

As I can attest, however, the administration of P.E.A.C.E. requires significant effort. Volunteers are difficult to recruit, train, and keep involved. Some courts have found it more convenient to assign the administration of parent education programs to a particular agency rather than to undertake them through an in-house, volunteer model like P.E.A.C.E. While the agency model promotes efficiency, it may lose the constant infusion of ideas, energy, and fresh perspectives that characterizes volunteer and interdisciplinary undertakings.

Variations in the administration of P.E.A.C.E. will almost certainly develop. A professional administrator could be hired to coordinate an otherwise entirely volunteer program. A social

117. See *supra* note 66; *infra* notes 137–39.

118. See generally DAVID OSBORNE & TED GAEBLER, REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR 25–59 (1992) (discussing examples of successful government cooperation with the private sector).

services agency might be used to operate P.E.A.C.E. under contract from a court. The agency could be required to establish a P.E.A.C.E. interdisciplinary advisory board separate from its usual board to give advice and counsel.

Any governing structure for P.E.A.C.E. must take into account the values, needs, and resources of the local community served by the program. There is no single right way to create and administer P.E.A.C.E. in a particular location. In a large urban community like New York City where legal and mental health resources are significant and volunteers are plentiful, a volunteer model coordinated by a single administrator may make sense. In contrast, in a more rural community where there are few judges, lawyers, and mental health professionals to volunteer for P.E.A.C.E., an agency model might make more sense. The structure for P.E.A.C.E. in any particular community must be flexible.

The critical point is that the structure of P.E.A.C.E. in a particular community should be the result of a planning process that insures P.E.A.C.E. has wide-spread community support. The best planning mechanism that has been identified is a local interdisciplinary planning group established under the auspices of the local judiciary whose mandate is to create a local P.E.A.C.E. program. The local group receives advice and technical support from the statewide group, which continuously refines the core P.E.A.C.E. curriculum. This structure provides P.E.A.C.E. with the ability to adapt and renew continuously while maintaining some consistency. It also helps insure that a local community takes more responsibility for the welfare of its children experiencing parental divorce and separation.

3. Recruiting, Training, and Supervision—Regardless of how P.E.A.C.E. is organized, the presenters must be adequately trained, monitored, and evaluated.¹¹⁹ Presenters deal with vulnerable parents at a time of crisis in both the parents' and their children's lives. Presenters, therefore, must be extremely careful to convey information to participants at a level that participants can understand and digest. The information must also be neutral—that is, it must be based on the best available

119. Thus far, P.E.A.C.E. has produced a training manual which includes a curriculum and relevant articles. This manual is in the process of being revised after the first round of pilot programs. All presenters, who are already licensed lawyers or mental health professionals, must review the manual and complete a training seminar. Plans are underway to produce videotapes to aid in presentations to parents, in training P.E.A.C.E. presenters, and in establishing P.E.A.C.E. programs.

data and should convey the message that the problems of divorce for children can be surmounted with responsible parental behavior. Furthermore, while showing the advantages of parental settlement, P.E.A.C.E. presenters must also be careful to insure that parents understand that they are entitled to litigate custody issues and that litigation may be appropriate in some cases, particularly where abuse or neglect is alleged. Finally, the presenters must be careful not to undermine the participants' existing relationships with their lawyers and mental health professionals.

The presenters thus face a formidable, but not impossible, task. The quality of P.E.A.C.E. depends on the adequacy of their training, monitoring, and evaluation. All large group presenters on both the law and mental health were experienced in working with divorcing parents and their children. The four-hour training session seemed to be more than adequate for these professionals, who were generally quite familiar with the material in the curriculum.

Many of the leaders of the small groups during the mental health sessions of P.E.A.C.E. were graduate students in mental health disciplines. Experience at some of the P.E.A.C.E. sessions strongly suggests that it would be valuable to have an experienced mental health professional available for consultation during the group sessions. In one small group session, for example, a participant admitted that he had physically abused his spouse. He sought referral for treatment. The presence of a senior mental health professional experienced in handling such matters facilitated the individual's search for help.

Evaluation procedures for presenters will have to be established as P.E.A.C.E. matures. Delicacy will be required, as presenters normally include a community's prominent judges, lawyers, and mental health professionals. Volunteers may be hard to come by after the initial enthusiasm for a new program wears off.

4. *Funding*—Thus far, P.E.A.C.E. has been relatively inexpensive to operate. Professional services have been donated by unpaid volunteers. Small voluntary contributions have covered the costs of printing, supplies, and postage. Ultimately, however, if P.E.A.C.E. is to become a permanent fixture of child custody dispute resolution, it will require permanent funding. Funds will be required to train presenters, develop curriculum materials, administer and evaluate existing programs and establish new ones.

New York, like many other states, is in the throes of a major budget deficit. The current state judiciary budget is already severely constrained and delivers reduced levels of services.¹²⁰ There is very little government money available to fund new programs.

Funding for P.E.A.C.E., should be viewed as an investment in children,¹²¹ promising future returns based on reduced parental conflict. Funds should be invested not only to contain parental conflict through normal judicial processes, but also to teach parents to manage conflict effectively. Over time, the net effect may be to reduce state expenditures by reducing the amount of custody-related litigation.

A detailed analysis of how much it would cost to make P.E.A.C.E. widely available in all judicial districts in New York has not been done yet, nor has a study been done of the total economic costs of custody litigation to litigants and society. One suspects, however, that the costs of operating P.E.A.C.E. for a year are likely to be recovered if a relatively small number of major custody disputes are settled yearly as a result of parental participation in the educational program. If this speculation is correct, P.E.A.C.E. could be a social bargain.

P.E.A.C.E. could be funded from portions of user taxes such as fees charged for marriage licenses, or from filing fees for divorce or for custody. As in California,¹²² these fees could be deposited in a special government account and used only for the purpose of promoting parental education. Provisions would, of course, have to be made to waive fees for those too poor to afford them.¹²³ In addition, programs to promote parental

120. See MATRIMONIAL LAWYER CONDUCT REPORT, *supra* note 3, at 47-48. See generally Matthew T. Crosson, *A New Era for Commercial Litigation*, N.Y.L.J., Jan. 13, 1993, at 2 (explaining the need for adequate funding of courts); Joseph Kelner & Robert S. Kelner, *The Courts in Crisis*, N.Y.L.J., Sept. 24, 1991, at 3 (describing the effects of budgetary cuts on the court system); Paul L. Lamb, *Law Day '91: The Bill of Rights, Overburdened Courts are a Threat to Justice*, N.Y.L.J., May 1, 1991, at 45 (describing an understaffed and overloaded judiciary).

121. See OSBORNE & GAEBLER, *supra* note 118, at 206-09 (discussing the need to invest money in order to save it, citing examples such as Head Start and some welfare programs).

122. California assigns fees received for certified copies of marriage and marriage dissolution records to the General Fund to be used for the statewide coordination of family mediation and conciliation services. See CAL. HEALTH & SAFETY CODE § 10605(c) (West 1991); CAL. GOV'T CODE § 26832(a) (West 1988 & Supp. 1993); CAL. CIV. CODE § 5183 (West Supp. 1993); CAL. FAMILY CODE § 1852 (West 1993).

123. See *Boddie v. Connecticut*, 401 U.S. 371 (1971) (holding that the Fourteenth Amendment prevents a state from denying judicial marriage dissolution to indigents unable to pay court fees and costs).

education could be funded by grants and bequests from private sources to a designated state fund.

Thus, there are numerous funding options for P.E.A.C.E., even in a time of budgetary constraint. The money required is minimal, and the benefits to the community over time are likely to be substantial.

With a well-organized, sufficiently staffed, and adequately funded P.E.A.C.E. program, court-mandated attendance will benefit many parents and children alike. Presently, however, court directions to attend should be discretionary. On one end of the conflict continuum are some parents who have already settled on custody arrangements and do not need further education. On the other end are parents so embattled that attendance at P.E.A.C.E. is unlikely to accomplish anything. P.E.A.C.E. is a limited resource, which courts should direct to parents most likely to benefit from participation. Mandatory across-the-board participation in P.E.A.C.E. runs the risks of overwhelming available resources, or of turning a useful educational program into a pro forma requirement like the conciliation conference.¹²⁴

Indicators need to be developed so that courts can identify parents who are in the middle range of the conflict continuum and who are thus most likely to benefit from participation in P.E.A.C.E. At present, guidelines for parental participation in P.E.A.C.E. are mostly negative. P.E.A.C.E. recommends against referring parents if their case involves a serious allegation of spousal or child abuse. P.E.A.C.E. has begun to suggest that judges not refer parents with a long history of motion practice. Parents involved in uncontested default divorces have, however, been included in P.E.A.C.E. sessions. Obviously, there is a long way to go in defining which parents should be required to attend, and which should not.

In the pilot programs, the court has often met with the parents and their counsel to explain the purposes of P.E.A.C.E. and to suggest participation. A preliminary conference at a very early point after a complaint is filed is an ideal time for such a meeting. This procedure suggests to the parents that the court is making the recommendation to attend P.E.A.C.E. on an individualized basis, because it cares about the welfare of both parents and children.

124. See *supra* text accompanying notes 99-103.

G. Confidentiality

Whether or not participation in P.E.A.C.E. is court-directed, participants' comments at P.E.A.C.E. sessions must be confidential. Participants should feel free to ask questions and make comments without fear that their spouse will hear about the communication and report it to others involved in the litigation. While P.E.A.C.E. presenters are lawyers and mental health professionals, they do not function in that capacity during the program. The traditional guarantees of confidentiality between professionals and their clients thus do not necessarily apply to P.E.A.C.E. sessions. Furthermore, the duties of P.E.A.C.E. presenters to report child abuse allegations under mandatory child abuse reporting laws¹²⁵ should be clarified by court rule or legislation, as should the presenters' liability for suit based on allegations of malpractice.

VI. P.E.A.C.E.'S FUTURE: A BROADER PERSPECTIVE

Ultimately, an education program for divorcing parents does not exist in a vacuum, isolated from political and economic currents. P.E.A.C.E., useful though it may be, is limited as a mechanism for reforming the divorce system because it addresses what exists, rather than promotes what should be.

This fact has given rise to various concerns about P.E.A.C.E. Some critics feel the concept of a parental education program does not go far enough to protect children and that restrictions should be placed on the ability of parents to divorce. Criticism of P.E.A.C.E. also comes from another direction—the advocates of mediation and joint custody. These critics feel that P.E.A.C.E. does not go far enough in promoting alternatives to the adversarial system for custody disputes, or in promoting cooperative parenting after divorce. Finally, other critics are concerned that by emphasizing the harm that prolonged

125. N.Y. SOC. SERV. LAW § 413(1) (McKinney 1992) (mandating the reporting of child abuse allegations by certain health professionals, child care providers, and school officials among others). In New York, the only lawyers required to report child abuse are the district attorney and his assistants. *Id.* As of 1992 there were 22 states which mandated that lawyers report child abuse allegations to one degree or another. See Robert P. Mosteller, *Child Abuse Reporting Laws and Attorney-Client Confidences: The Reality and the Specter of Lawyer as Informant*, 42 DUKE L.J. 203, 217 (1992).

parental conflict causes children, P.E.A.C.E. puts undue pressure on women, who are usually the primary caretakers of children, to reduce conflict and accept less favorable financial settlements.

This Part will briefly address some of these larger concerns about P.E.A.C.E. These concerns cannot be fully resolved by adjusting the program's content, organization, or administration. They go to the very heart of what contemporary family law and procedure is, or should be.

A. *The Alternative of Less Readily-Available Divorce*

Encouraging better treatment of the children of divorce through education is one conceptual response to the multiple problems that children experience in single parent families. It has been argued that an alternative way to deal with the problem is simpler and less expensive—simply refuse to allow parents easy access to divorce. Some commentators have proposed that parents with children not be permitted to divorce during the children's minority, while others have proposed reinvigorating fault grounds for divorcing parents.¹²⁶ They argue for the creation of a separate class of marriage for parents while their children are minors—one that can be dissolved, in effect, only upon a showing that one parent is abusive or neglectful of the other parent or the children.¹²⁷ While not opposing parental education programs, these commentators argue that they do not go far enough to protect children from the harm of divorce.

Although the legislature can restrict the privilege of divorce,¹²⁸ restrictive divorce laws create far more problems than they solve. New York, for example, already restricts access to divorce more than most other states by requiring that

126. See Davidson, *supra* note 31, at 44 (advocating the return to fault divorce for the benefit of the children); Judith T. Younger, *Marital Regimes: A Story of Compromise and Demoralization, Together With Criticism and Suggestions for Reform*, 67 CORNELL L. REV. 45, 90 (1981) (favoring more stringent access to divorce by establishing the need to show that continuation of the marriage would cause either spouse exceptional hardship and would be more harmful to minor children than divorce); Whitehead, *supra* note 16, at 71 (noting similar proposals).

127. See Younger, *supra* note 126, at 90.

128. See *supra* note 111.

absent mutual consent, parents—as well as all other spouses—prove marital fault to establish grounds for divorce.¹²⁹ The problems of collusion and evasion that plague New York's current fault divorce laws would increase under the “marriage for minor children” concept.¹³⁰ Rich parents who agree to divorce will establish residency in another state to avoid the impact of restrictive divorce laws, while poor parents, or those with less access to sophisticated legal advice, will find themselves unable to terminate their marriage, and will remain in legal and emotional limbo.

Resurrecting a larger role for marital fault in the divorce process is also a troubling idea. It would partially undo the no-fault divorce revolution that resulted from the accurate perception that finding fault with only one spouse for the dissolution of a marriage was rarely an easy or fruitful inquiry.¹³¹ Reinvigorating fault and its emphasis on adversary procedures in the name of protecting children would also be an ironic twist, as children generally need parents to reduce their level of contention, not increase it.

There is certainly no indication that New York's children, who already live under a highly restrictive, fault-based divorce law, are any better off than children in states that provide parents with easier access to divorce. Indeed, social science simply cannot tell us if individual children will benefit more if their parents are forced to remain married than if their parents are allowed to divorce.¹³² The child's best interests in

129. N.Y. DOM. REL. LAW § 170 (McKinney 1988); cf. Timothy B. Walker, *Family Law in the Fifty States: An Overview*, 25 FAM. L.Q. 417, 439–40 (1992) (listing 16 states that have irreconcilable differences or irretrievable breakdown as the sole ground for divorce).

130. Schepard, *supra* note 44, at 744–45.

131. See REPORT OF THE CALIFORNIA GOVERNOR'S COMMISSION ON THE FAMILY 27 (1966); see also C. FOOTE ET AL., CASES AND MATERIALS ON FAMILY LAW 1089–90 (2d ed. 1976) (showing, in a fictionalized account, how difficult it is to locate fault in a divorce); MICHAEL WHEELER, NO-FAULT DIVORCE 13 (1974); Joseph Goldstein & Max Gitter, *On Abolition of Grounds for Divorce: A Model Statute & Commentary*, 3 FAM. L.Q. 75, 78–84 (1969) (showing, with examples, the difficulty in assigning fault, and explaining its irrelevancy to “the functions or consequences of divorce”); Herma Hill Kay, *Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath*, 56 U. CIN. L. REV. 1, 26–44 (1987) (discussing the history of the no-fault divorce movement in California).

132. See Wallerstein, *supra* note 19, at 354 (stating that “[t]here is evidence from many studies that intense parental conflict poses severe threats to the psychological health of children, whether the family is divorced or remains married” (citations omitted)).

some cases may be better served if parents divorce quickly, rather than having the child suffer prolonged parental conflict in the household. In addition, the problems of spousal abuse or child abuse may become worse if parents are forced to remain married because of restrictive divorce grounds.

Marriages that live on paper but not as an emotional commitment do not necessarily provide a desirable environment in which to raise children. The child's concern is not whether her parents are legally married, but how well they fulfill their parental responsibilities. Restricting access to divorce is likely to do very little to seriously address the problems that marital discord creates for children, and may make such problems worse. The marriage for minor children concept is at best a symbolic gesture that imposes a serious restriction on the ability of parents to find a second chance for marital happiness. We should not restrict adults' options until less restrictive measures have failed to refocus parental responsibility toward children.

P.E.A.C.E. is a less restrictive and more viable alternative to coerced continuation of marriage. An emphasis on the education of parents does not applaud divorce, but recognizes that in a free society adults should be given significant license to dissolve marriages in order to promote their own happiness and productivity. The condition of that license, however, is education about responsible post-dissolution behavior and reasonable incentives for parents to behave with their children's best interests in mind.

B. P.E.A.C.E., Alternative Dispute Resolution, and Joint Custody

Some in the mediation community are concerned that P.E.A.C.E. does not go far enough in encouraging parental cooperation because it does not abandon the adversarial system of dispute resolution altogether.¹³³ These critics argue, in effect, that P.E.A.C.E. is only a cosmetic reform of procedures that

133. Letter from Leonard Marlow, Director of Legal Services, Divorce Mediation Professionals, to Mental Health Professionals and the P.E.A.C.E. project (Apr. 16, 1993) (on file with the *University of Michigan Journal of Law Reform*).

need to be abandoned totally in favor of mediation or other forms of alternative dispute resolution. Others argue that P.E.A.C.E. does not go far enough in promoting post-divorce parental cooperation concerning children, because it does not sponsor or promote joint custody arrangements or legislation.

Frustration with the adversarial nature of divorce and custody determinations should not be misdirected toward a modest educational program for parents. P.E.A.C.E. should be evaluated for what it is.¹³⁴ It is not mediation or, indeed, any form of dispute resolution. P.E.A.C.E. is solely an educational program, the purpose of which is to provide information and perspective to divorcing parents. The program and its presenters should not take positions on law reform issues. P.E.A.C.E.'s content is determined by a jurisdiction's existing substantive law and procedure. P.E.A.C.E.'s tent is large enough to accommodate many differing groups with varying perspectives about the value of mediation, joint custody, and other controversial issues in divorce law reform.¹³⁵

P.E.A.C.E. is not a panacea. Education will not transform deeply embittered parents into models of cooperation, nor will it cure the psychological problems that may be the cause of some custodial disputes.¹³⁶ More intensive programs are needed for these purposes. An educational program can, however, help troubled parents by advising them of the availability of more intensive programs and encouraging their participation in those programs. P.E.A.C.E. will not clear crowded court dockets of custody cases, or totally replace the adversarial system. It can, however, be an efficient beginning to a coordinated program that would funnel custody disputes into appropriate

134. See Blumberg, *supra* note 5, at 222-23. Those opposing a particular proposed reform in family law should answer the critical question: "compared to what?" *Id.* Are we better off with or without the program?

135. The founders of P.E.A.C.E. themselves have differing views on the utility of mediation in divorce and custody cases. One—the author—was a consultant to the New York State Law Revision Commission which recommended a coordinated system of custody dispute resolution procedures, including mediation. See *Recommendation of the Law Review Commission*, *supra* note 45 at 42-43. Another, Dr. Atwood, shares some of the concerns about the effects of mediation on women expressed in recent law review articles dealing with this theme. See, e.g., Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441 (1992); see *infra* Part VI.C for a discussion on gender issues. The third—Mr. Schlissel—favors arbitration of custody disputes, but is skeptical of the value of mediation. See Schlissel, *supra* note 47. All, however, agree on the educational value of P.E.A.C.E.

136. See Judith S. Wallerstein, *The Overburdened Child: Some Long-Term Consequences of Divorce*, 19 COLUM. J.L. & SOC. PROBS. 165, 177-79 (1985).

forms of alternate dispute resolution and thus divert cases from adversarial combat.¹³⁷

The education of parents, however, is itself an important process, whether or not a community also offers mediation or other alternatives to the adversarial process. P.E.A.C.E. promotes important goals by focusing parents on the welfare of their children, encouraging responsible conflict reduction, providing valuable information to consumers of divorce services, reducing isolation of parents, encouraging interdisciplinary cooperation, and developing community acceptance of responsibility for the welfare of children. Mediation serves many of the same goals, but through different means. Mediation provides a neutral party to help parents facilitate a resolution of their particular dispute. In contrast, during P.E.A.C.E. parents do not speak to each other, nor is a neutral party assigned to facilitate resolution of their dispute. Mediation and P.E.A.C.E. are thus different means toward many of the same ends. Education and mediation may intersect, run parallel, or exist independently. Neither choice precludes the other.

C. Gender Fairness

While some in the mediation community have criticized P.E.A.C.E. for not being mediation, other organized groups of lawyers representing women's interests have criticized P.E.A.C.E. as a form of mediation.¹³⁸ These groups fear that women exposed to information about the deleterious effects of prolonged parental conflict will be unduly influenced to give up their legal rights to a fair share of the marital estate, support, and maintenance in order to prevent harm to their children.

While endorsing experimentation with P.E.A.C.E. as "a vehicle to foster communication during the divorce process," the recent *Report of New York's Committee to Examine Lawyer*

137. See Shepard, *supra* note 44, at 753-80 (describing a system of judicial administration that maximizes cooperative parenting after divorce); *Recommendation of the Law Review Commission*, *supra* note 45, at 121-28.

138. Letter from Harriet N. Cohen et al., Coalition on Women's Issues, to Honorable E. Leo Milonas, Justice of the Appellate Division, and Chair, Committee to Examine Lawyers Conduct in Matrimonial Actions (Mar. 5, 1993) (on file with the *University of Michigan Journal of Law Reform*).

Conduct in Matrimonial Actions expressed this same concern in an Addendum entitled "The Longer View":

[B]oth mediation programs and P.E.A.C.E. drew sharp criticism from respected [women's] advocacy groups which focused on the disparity of the negotiating positions between the spouses. These disparities may be caused by physical or emotional abuse, the coercion implicit in a spouse's refusal to pay support, or the general imbalance of power between a monied husband and a nonmonied wife. These concerns must be addressed for these programs to have efficacious results.¹³⁹

P.E.A.C.E. must be perceived as fair to both women and men if it is to achieve its educational goals. So far, participants of both sexes have reported general satisfaction with the pilot programs. Female and male judges, lawyers, and mental health professionals have presented at P.E.A.C.E. sessions and have been heavily involved in developing the program's curriculum.

P.E.A.C.E. organizers are, however, concerned that the information the program provides about the adverse effects of parental disputes on children might be misinterpreted by a participant as a message to "settle at any cost" for the benefit of the children. There are cases, particularly those involving child or spousal abuse, that may not be appropriate for settlement and may have to be litigated. Courts protect legal rights. The purpose of P.E.A.C.E. is to help parents use the legal system effectively for their own benefit and for their children's benefit, not to deter those who need the legal system's protection from seeking it.

Indeed, P.E.A.C.E. may help make the divorce and custody system more rather than less responsive to the problems women experience in divorce and custody disputes. While a mother's participation in P.E.A.C.E. cannot eliminate the possible causes of disparity in negotiating positions between spouses, it may be able to ameliorate them.

P.E.A.C.E. has taken steps to insure that spouses who believe themselves to be the victims of abuse receive useful information during the program. The P.E.A.C.E. curriculum includes advice that cooperation with a spouse concerning the children may not be appropriate if a parent has experienced

139. MATRIMONIAL LAWYER CONDUCT REPORT, *supra* note 3, at 47.

abusive conduct from the other parent. She is also advised to consult with her lawyer about the problem. The list of referral resources provided to parents includes non-profit organizations which aid abused spouses. Hopefully, as a result of the information received from attending P.E.A.C.E., more women who need protection from their spouse will receive it.

Procedures have also been established to assuage concerns about physical safety that a spouse may have because the other spouse also attends P.E.A.C.E. In all P.E.A.C.E. programs, spouses do not talk to each other directly; in some of the pilot programs, spouses have the option of attending P.E.A.C.E. sessions led by the same presenters, but at different times. Uniformed court officers are present at all P.E.A.C.E. sessions to provide security. Parent participation in P.E.A.C.E. thus may inform a fearful spouse that the legal system can require her husband to comply with legal and social norms and will create an environment to shield her from physical harm.

Economic coercion resulting from a spouse's refusal to pay support is strongly discouraged by participation in P.E.A.C.E. P.E.A.C.E.'s curriculum includes the message that payment of court-ordered child support is morally and legally responsible behavior and essential for the well-being of children.¹⁴⁰ Hopefully, as a result of attendance at P.E.A.C.E., more parents will be educated about the importance of child support and will fulfill this obligation.

While P.E.A.C.E. cannot equalize financial resources, it can help equalize informational resources. For nonmonied wives, as well as monied husbands, information about the legal process and the options available within it provides power. A nonmonied wife is likely to start out with less information than a monied husband, who presumably has the resources to pay counsel. After attending P.E.A.C.E., the nonmonied wife will know more about the legal process and what choices are available to her. The nonmonied wife who attends P.E.A.C.E. thus has a more realistic basis on which to choose counsel and with which to evaluate the professional advice she receives from her lawyer and the other professionals who serve her interests. This information will help enable her to understand the choices she faces and to make more informed decisions.

140. For example, one video segment which P.E.A.C.E. has used features a child who, when asked how she felt when her father failed to pay court ordered support, responds "it is like he told me to sit in the corner and die. It shows he doesn't care about me." A judge then appears on the screen and reminds parents of the importance of paying support. Few parents could fail to be moved by the child's statement.

P.E.A.C.E. does not supplant lawyers for those spouses who have them; it only supplements the information and perspective lawyers provide. The assumption of the program is that a participant will discuss the information and impressions received during the program with her lawyer. By providing information to participants, P.E.A.C.E. should increase the client's capacity to provide direction to counsel and should improve lawyer-client relationships.

As currently structured, it is likely that the litigation process, at least in New York, is biased against the economic interests of nonmonied women. A large part of the problem seems to rest on the fact that these women lack the information to act as sophisticated consumers of divorce-related services. A recent report by the Department of Consumer Affairs of New York City detailed the problems many formerly upper middle-class women have in relationships with divorce lawyers.¹⁴¹ The *Lawyer Conduct Report*¹⁴² also documented the same problems, many of which resulted from the imbalance of power and information between some matrimonial lawyers and their clients. In both reports, lawyers were accused of taking financial advantage of their clients through devices such as non-refundable retainers and liens on marital homes. Another theme of both reports is that expense and delay in matrimonial litigation have increased dramatically in recent years, largely to the detriment of women, who typically have fewer available resources to finance extended litigation.¹⁴³

Women enmeshed in divorce and custody litigation should receive as much information as possible about what they are likely to experience, so that they may make informed decisions in consultation with their lawyers about how to proceed. So far, at least in New York, there is some indication that the infor-

141. DEPARTMENT OF CONSUMER AFFAIRS, CITY OF NEW YORK, *WOMEN IN DIVORCE: LAWYERS, ETHICS, FEES AND FAIRNESS* (1992) [hereinafter *WOMEN IN DIVORCE*].

142. *MATRIMONIAL LAWYER CONDUCT REPORT*, *supra* note 3 at 30-31.

143. Some lawyers use motion practice as a means of "wearing down" the adversary by delaying the divorce. This practice creates unnecessary attorney's fees and drains the resources of the nonmonied spouse, usually the wife. Thus the nonmonied wife is in a difficult bargaining position when her husband has the funds to finance litigation and she does not. See *WOMEN IN DIVORCE*, *supra* note 141, at 3. In a survey of Nassau County lawyers who have represented wives in divorce, 30% said that the wife settled prematurely due to her inability to pay; by comparison, 17% of the attorneys represented husbands who settled prematurely. *Id.* at 8. A worse situation may occur, however, if the nonmonied spouse is abandoned by her lawyer when she can no longer pay the bill and she is left without representation while the marital estate is divided. *Id.* at 17.

mation available to women does not meet this test. To some extent, P.E.A.C.E. fills the information gap for all parents, women and men alike.

That P.E.A.C.E. includes factual information about what children experience during the divorce and custody process, and steps that parents can take to reduce their pain and suffering, is a strength of the program. For most parents the welfare of their children should be a central factor in the decision about what kind of post-divorce family structure they wish to negotiate and organize. Parents who receive information from P.E.A.C.E. about how best to organize their post-divorce family life for their children's benefit have a more informed basis on which to make decisions.

Suggestions that women should not have access to information about the harm their children can experience because they may misconstrue this information are unintentionally paternalistic. An analogy might be drawn to the argument that patients should not receive information about the risks of surgery or chemotherapy because the doctor fears they will make unwise choices as a result. Experience to date suggests that women who participate in P.E.A.C.E. believe the information they receive about their children's welfare is informative and helpful. Denying them access to this information assumes that, based on their sex alone, women do not have the capacity to process and place in context what they learn about the welfare of their children from P.E.A.C.E. Unless proven otherwise, parents—both women and men—deserve to be treated as fully capable, reasoning adults able to evaluate information they receive and give it whatever weight they deem appropriate to their individual situation.

In the end, the information that P.E.A.C.E. provides is only as good as the law and procedure about which it educates. Perceived imbalances of power between men and women, or between monied and nonmonied spouses, cannot be eliminated by education, but providing education will make all parents better informed about what they and their children can expect in the divorce process, and what they can do about these inequalities.

CONCLUSION

Herodotus observed: "[i]n peace, children inter their parents; war violates the order of nature and causes parents to inter

their children."¹⁴⁴ While Herodotus was speaking of war between nations, his observation applies equally well to war between parents over their children. Divorcing parents can enter their children emotionally, educationally, and economically by warring between themselves.

If current trends continue, the children of today are likely to be worse off emotionally, educationally, and economically than their parents.¹⁴⁵ Divorce-related parental warfare contributes to a reduction in the quality of children's lives. Whatever battles parents fight between themselves, it is in society's interest to keep children in a demilitarized zone.

P.E.A.C.E. is an attempt to de-escalate parental conflict and establish peace between divorcing parents as the established "order of nature." Education is not a perfect or a complete tool for this purpose, but it is unquestionably a useful one. The experiences of the P.E.A.C.E. pilot program offer a foundation on which further research and development may be conducted in order to make the concept of a parental education program more responsive and helpful over time. We owe it to our children to give P.E.A.C.E. this chance.

144. HERODOTUS, *THE HISTORIES OF HERODOTUS OF HALICARNASSUS* bk. I, ch. 87, 38 (Harry Carter trans., Heritage Press 1958).

145. See *supra* Part II.A.

ACKNOWLEDGEMENTS

P.E.A.C.E. was founded by two others in addition to me: Dr. Joan Atwood, Coordinator of the Marriage and Family Counseling Programs at Hofstra University and Stephen W. Schlissel, a Special Professor of Law at Hofstra University and a distinguished member of the New York matrimonial bar. This Article is as much theirs as it is mine, even if they do not agree with everything in it. P.E.A.C.E. would be nowhere without them.

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Richard Mandell, a long time friend, organized the first P.E.A.C.E. Program in Orange County, New York. He has generously assumed the responsibility of systematizing the legal aspects of P.E.A.C.E.'s curriculum, and of serving as a constant source of advice and counsel.

The Ninth Judicial District of New York under the leadership of Presiding Judge James Kane and its Chief Executive Officer Harold Brand, have established a model P.E.A.C.E. Program for the Buffalo area. They have had the able assistance of Judith Peters and the staff of the Dispute Resolution Center of the Better Business Bureau in organizing and administering the program. The Buffalo P.E.A.C.E. Advisory Committee is a model of interdisciplinary cooperation.

Additional P.E.A.C.E. pilot programs are currently being organized in the Albany area and in Brooklyn, New York. Sheri Dwyer in Albany, and Matthew D'Emic and Lawrence Rothbart in Brooklyn, with the support of the local judiciary, lawyers, and mental health professionals have generously taken responsibility for beginning the effort in their communities.

As described in the text, Judge Damian J. Amodeo of the Dutchess County Family Court independently began a program similar in concept to P.E.A.C.E., Helping Children Cope, almost simultaneously with the P.E.A.C.E. pilot projects. He and those he works with (especially Joan S. Posner, his law assistant, and Patricia F. Glatt, H.C.C.'s Director in Dutchess County) have generously shared ideas and expertise as well as the evaluation data provided in the text.

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Nancy Grasser, P.E.A.C.E.'s current secretary, and Betty Pigozzi, my former secretary, have borne much of the brunt of organizing P.E.A.C.E. Without them, too, the program would not have come to be.

My long-time friends Jerry Neugarten and Charlotte Carter-Neugarten provided encouragement and expertise and have been significant forces for P.E.A.C.E.'s establishment in the Albany area. Jerry's detailed editorial suggestions significantly improved the final product.

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Above all, my wife Debra and my children David and Eric provide the support of a family that helps make productive work possible.

APPENDIX A

**HELPING CHILDREN COPE
DUTCHESS COUNTY
EVALUATION REPORT FOR DECEMBER 1992-DECEMBER 1993**

1. Sex: VALID RESPONSES=452
 Male=209 (46.24%)
 Female=243 (53.76%)
2. Average Age for Attendees: 34.26
 Age Distribution Attendee:
 1-19=41 20-29=108
 30-39=224 40-49=81
 50-59=12 60+=4
 Age Distribution Children:
 0-4=313 5-8=274
 9-12=202 13-18=116
 18+=34
3. Racial Demographics: VALID RESPONSES=451
 White=93.57% African-American=4.88%
 Latin=0.89% Native American=0.22%
 Asian=0.44%
4. Education: VALID RESPONSES=438
 Less than high school=15.53%
 High School=20.55%
 High School Plus=26.71%
 College Degree=23.52%
 College Degree Plus=7.08%
 Graduate Degree=7.08%
5. Annual Household Income: VALID RESPONSES=424
 Less than \$15,000=24.06% \$15,000-29,999=25.47%
 \$30,000-44,999=21.70% \$45,000-59,000=13.68%
 \$60,000-74,999=7.78% \$75,000-89,999=3.54%
 More than \$90,000=3.77%
6. The case pending before the court is:
 No Action Pending=17 Divorce=111
 Maintenance/Support=20 Legitimation/Paternity=3
 Custody=190 Visitation=103
 Grandparent Visitation=2 Guardianship=2
 Other=41
7. The court action was filed by: VALID RESPONSES=378
 Myself=56.88%
 Spouse/Partner/Co-Parent=36.24%
 Both=6.88%
8. How did you hear about this seminar? VALID RESPONSES=434
 Attorney=10.83%
 Judge=66.13%
 Mental Health Organization=1.61%
 Newspaper/Newsletter=5.76%
 Former Participant=0.69%
 Friend=3.46%
 Other=11.52%

Indicate how the attendees understanding of the issues involved in divorce may have changed.

	PERCENT CHANGED				
	Improved	Much Improved	No Change	Worse	Much Worse
1. Divorce is a process rather than a single event.	25.11	45.92	27.47	0.64	0.86
2. Child(ren)'s anger/depression is normal unless lasting or becomes worse.	26.02	45.38	27.31	1.08	0.22
3. Cooperation with my ex-spouse on parenting issues has an impact on our child(ren)'s adjustment to the divorce process.	28.42	35.14	33.62	1.52	1.30
4. Child support is not a payment for visitation rights, but is necessary to meet my child(ren)'s economic needs.	18.66	20.82	58.35	0.65	1.52
5. There are important things to tell my child(ren) about the divorce as well as things not to tell them.	26.13	47.52	25.49	0.65	0.22
6. Truly listening to my child(ren) is an important part of helping them cope with the divorce process.	35.78	40.09	23.28	0.65	0.22
7. The age and maturity of the child(ren) should be taken into account when determining visitation arrangements.	26.61	40.99	30.47	1.07	0.86
8. Special care should be taken when parents introduce children to people they date.	23.44	33.33	41.94	0.86	0.43
9. Children should not be involved in struggles between divorcing parents.	29.18	29.83	39.27	0.86	0.86
10. Children have different needs during a divorce than do the parents.	28.51	47.59	23.45	0.46	0.00
11. Divorcing parents should seek emotional support from other adults, and should provide emotional support to meet their child(ren)'s needs.	25.46	43.58	30.50	0.46	0.00

Overall impressions of the program.

	PERCENT				
	Strongly Agree	Agree	Neutral	Disagree	Strongly Disagree
1. The presenters knew their subject matter well.	62.67	31.90	4.52	0.45	0.45
2. I will use what I learned at this seminar.	49.44	44.92	5.42	0.23	0.00
3. I would recommend this seminar to others.	61.14	27.50	8.41	1.36	1.59
4. I resented being required to attend.	8.91	9.41	28.24	22.90	30.53
5. I think this seminar should be mandatory.	38.76	25.60	24.16	7.18	4.31
6. My knowledge about families and divorce has increased.	32.19	48.17	16.21	2.74	0.68
<hr/>					
	Extremely Helpful	Very Helpful	Somewhat Helpful	Of No Help	
7. Overall, I found the seminar to be:	34.77	38.41	23.64	3.18	

APPENDIX B

MODEL LEGISLATION FOR ENACTING PARENT
EDUCATION PROGRAMS¹

The following is designed for discussion purposes only. It is intended to be a working model for states that may wish to enact legislation establishing parent education programs within their borders. This is not a proposal designed to mandate the implementation of P.E.A.C.E. in New York State.

INTRODUCTION

This Appendix contains model legislation for authorizing courts to provide parent education programs like P.E.A.C.E. It is based on a survey of parent education programs, authorizing legislation and court rules nationwide. Although some of the commentary is focused on New York law and precedents, other states can easily adapt the language of the statute and the commentary.

The fundamental assumption of the legislation is that education programs should be a routine and integral part of the process of dispute resolution for divorcing or separating parents. The courts should be responsible for organizing and administering these parent education programs.

States considering enacting legislation to authorize and implement parent education programs initially must decide whether legislation is necessary at all, or whether authorization by court rule is sufficient. Some states have adopted parent education programs by court rule alone.²

Once a jurisdiction chooses to authorize parent education programs by statute, it must decide how detailed the statute should be and how much should be left to implementing court

1. Norma von Stange, Hofstra Law School class of 1994, is a principal draftsman of the statute and commentary which follows. Megan Woolley, Hofstra Law School class of 1993, also contributed to an early draft. Debra Masterson, Hofstra Law School class of 1994, provided invaluable research assistance.

2. See, e.g., Super. Ct. Cobb County, Ga., Seminar for Divorcing Parents, Order 8850845-99 (Aug. 17, 1988) (on file with the *University of Michigan Journal of Law Reform*); see also Comment to section 00.02 *infra*.

rules. The statute which follows is very detailed. An alternative form of statute simply authorize the courts to create parent education programs via court rule.³ In the event that a state takes this course of action, many of the provisions of the legislation that follows could be included in the implementing court rules.

OVERVIEW OF THE LEGISLATION

The legislation which follows has several principal provisions. It mandates that local judicial districts provide parent education programs. Courts are authorized to require parents to attend such programs in appropriate circumstances. Procedures are created to encourage courts to refer parents to the programs as early in their dispute as possible.

This Act creates a tripartite administrative scheme for developing and implementing the Parent Education Program. The state judicial authority may promulgate rules and devise procedures necessary to execute the program and will generally oversee and supervise its operation. The statute establishes an interdisciplinary state advisory committee to support the state judicial authority with expert recommendations on curriculum; this committee will also work to develop materials and procedures for local programs where standardization is appropriate. Facilitation of the operational details of the Parent Education Program is charged to the local advisory committee established in each judicial district. The statute establishes qualifications for program presenters and evaluation mechanisms for program content and quality.

In addition, financing options are provided to cover the costs of parent education programs. These include raising marriage license fees and divorce filing fees. These fees are deposited into a special statewide fund to be used solely for the purpose of supporting parent education programs. Local programs are authorized to charge modest fees to participants to defray program costs, with a fee waiver for indigency.

Confidentiality of what transpires at the programs is man-

3. See, e.g., N.Y. CIV. PRAC. L. & R. § 3405 (McKinney 1992 & Supp. 1994) (brief legislation authorizing court system to promulgate rules for arbitration of small amount civil cases); see also, 1993 Mo. Legis. Serv. H.B. 353 (Vernon) (signed into law on June 23, 1993).

dated. Lastly, the liability of program presenters is limited under this statutory scheme.

00.01 Legislative Findings and Purpose

The legislature hereby finds that:

- (a) each year a large number of children experience divorce or separation of their parents. Divorce related parental conflict is a social concern because children suffer potential immediate and long term detrimental emotional, economic, and educational conflict in this difficult period of transition, especially when their parents engage in protracted legal conflict.
- (b) parents are more likely to take the best interests of their children into account in negotiating postdivorce or postseparation parental arrangements if courts provide families with information regarding the process by which courts make decisions on issues affecting children and methods by which parents may ease children's crises and help them to assimilate change in the structure of their families.
- (c) it is desirable and beneficial to divorcing families that courts make available to the parents an educational program that will provide general information about:
 - 1. the issues and legal procedures for resolving custody and child support disputes;
 - 2. the emotional experiences and problems of divorcing adults;
 - 3. the family problems and the emotional concerns and needs of the children; and
 - 4. community services.
- (d) divorcing parents are likely to receive maximum benefit from the program if they attend at the earliest possible stage of their dispute, before extensive litigation takes place and adversarial positions are defined.
- (e) The legislature declares that it is the purpose of this Act to promote the best interests of children ex-

perienicing divorce of their parents by establishing an educational program to increase divorcing parents' awareness of the legal process of divorce and the impact on children of restructuring families. The educational program is designed to:

1. increase parental awareness of the importance of reducing acrimony that may exist between the parties;
2. develop an understanding or an atmosphere that will encourage parents to assure a child of a close and continuing contact with both parents, when that is in a child's best interests;
3. provide divorcing parents with basic information about issues relating to contested custody disputes as determined by mental health and legal professionals; and
4. assist parties in identifying real issues and clarifying potential priorities.

Comment to 00.01

Divorce is a complex process that implicates cultural, social, and economic considerations as well as concern for the emotional, psychological, and financial well-being of the families it affects. A child whose parents are divorcing faces enormous adjustments as the family restructures. Commentators have observed that a child's struggle to assimilate the changes that accompany the divorce or separation of the child's parents intensifies when custody disputes increase and prolong adversarial attitudes. Protracted parental conflict may have a short- and long-term detrimental impact on a child's relationship with both parents, the child's general emotional and mental health, and even the child's educational achievement.

The Parent Education Program is established in response to the problems of a growing number of children who must cope with the difficult circumstances of their parents' divorce or separation. Each year approximately 1.2 million marriages nationwide end in divorce. It is projected that more than half of this nation's children will experience a parental divorce or separation before reaching the age of eighteen.

The goal of the Parent Education Program is to educate and

prepare divorcing parents concerning what they may expect from the legal process and what emotional responses and behavior can be anticipated as they move through the transitional stages of divorce. Informed parents will be better able to understand the consequences of conflict escalation and to manage constructively the resolution of their dispute.

00.02 Parent Education Program

This Act establishes a parent education program to be administered by the state judicial authority in consultation with the state and local advisory committees established pursuant to sections 00.09 and 00.11 of this Act. The state judicial authority may promulgate rules and regulations to implement this Act.

Comment to section 00.02

The authority to regulate practice and procedure in the court is primarily designated to the legislature by the State Constitution. Although the court may promulgate rules that directly concern matters which deal with the inherent nature of the judicial function, its rulemaking authority is strongest when expressly authorized by enabling legislation such as this.

00.03 Definitions

- (a) “action involving custody or support” means an initial action in family, supreme or superior court or an action between parents to modify an order of custody or child support issued by those courts.
- (b) “agency” means a public or private organization that exists to provide legal, mental health, social welfare, medical, or educational services, and which is incorporated under the laws of this state and has its actual place of business within this state.
- (c) “available resources” means resources such as, but not limited to, public or private agencies, publications,

support groups, informational sessions, television or radio programs, out-patient or residential treatment facilities, as well as social workers, mental health, medical and legal practitioners, and marriage and family counsellors.

- (d) "contempt" means a civil penalty for disobedience of a lawful mandate of the court pursuant to the judicial law.
- (e) "court" means the family court and the superior or supreme court of the state, as applicable.
- (f) "custody" means the care, control, and maintenance of minor children awarded to a parent by the court.
- (g) "custody determination" means a court decision or court order and instruction providing for the temporary or permanent custody of a child, including visitation rights.
- (h) "custody proceeding" includes proceedings in which custody is at issue, including any matrimonial action, but not including proceedings for adoption, child protective proceedings, proceedings for permanent termination of parental custody, or proceedings involving the guardianship and custody of neglected or abused dependent children.
- (i) "educational sessions" or "sessions" means meetings of the Parent Education Program established by this Act.
- (j) "fee" means the money collected for participation in the Parent Education Program.
- (k) "judicial district" means the divisions of the state as provided by the judicial law.
- (l) "local" refers to a judicial district.
- (m) "matrimonial action" means actions for separation, annulment or dissolution of a marriage, declaration of nullity of a void marriage or nullity or validity of a

foreign judgment or divorce, or declaration of validity or nullity of a marriage.

- (n) "minor" means a person under eighteen years of age.
- (o) "order" means an order of the family, supreme or superior court.
- (p) "program presenter" means an individual selected in accordance with the terms of this Act to conduct Parent Education Program sessions in the capacity of an educator.
- (q) "security personnel" means courthouse security personnel or other persons trained and equipped to provide personal security and curtail disruptive conduct.
- (r) "service provider" means an agency or individual that provides legal, educational, mental health, social welfare, medical, or other such service.
- (s) "support" refers to the legal obligation of a parent to contribute to the economic maintenance of his or her child or children.
- (t) "training program" means a program sponsored and required by the state or local advisory committee to prepare program presenters to fulfill their duties.

00.04 Curriculum

- (a) The Parent Education Program shall generally cover, but is not limited to, the following topics as they relate to court actions between parents involving custody, care, visitation, and support of a child or children:
 - 1. legal aspects;
 - 2. adult emotional aspects;
 - 3. childhood emotional aspects;
 - 4. spousal or child abuse and neglect issues; and
 - 5. financial responsibilities.

- (b) The state judicial authority, in consultation with the state advisory committee established in section 00.09 of this Act, shall set forth curricular guidelines to instruct participants about divorce and its impacts on:
1. their child or children;
 2. their family relationship;
 3. their financial responsibilities to their child or children;
 4. the legal process for deciding child-related disputes between parents; and
 5. such other related matters as may be determined by the state judicial authority.
- (c) The content of each program shall be detailed by the local advisory committee in its plan pursuant to section 00.11 of this Act, and shall conform to the curricular guidelines set forth by the state judicial authority and state advisory committee.
- (d) Information regarding spousal and child abuse or neglect, including a list of local agencies that assist with such issues, shall be included in every Parent Education Program.
- (e) The Parent Education Program shall be educational in nature and not designed to provide individual mental health therapy for parents or children, or individual legal advice to parents or children.

Comment to 00.04

The essential function of the Parent Education Program is to provide information that will assist divorcing parents to minimize the detrimental effects of the marriage dissolution on their child or children. The curriculum embodies this objective and is characterized by information, rather than direction or intervention. As such, this program recognizes and reinforces the principle that parents, not the state, are ultimately responsible for raising children and making decisions that effect them. *See, e.g.,* Wisconsin v. Yoder 406 U.S. 205 (1972); Prince v. Massachusetts, 321 U.S. 158, 166 (1944);

Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390, 398-400 (1923).

The overall topics to be included in the educational sessions are set forth herein and will be supplemented by guidelines developed by the state judicial authority with advice and consultation from the state advisory committee. Defining and describing specific details of each program is the responsibility of the local advisory committee pursuant to section 00.12 of this Act.

Generally, the program will cover five topic areas. The first of these concerns the legal process for deciding issues related to divorce that concern children. The program imparts information regarding court procedures, as well as standards that guide courts in decision making, to enable divorcing parents to become knowledgeable participants in the process. Distinctions are to be drawn between the various roles fulfilled by the court, lawyers, and mental health professionals. This introduction to the legal process is intended to create an understanding of the relevant legal issues and the procedures for decision making, as well as to foster reasonable expectations. It describes the means by which the parties' dispute will be resolved by the court if the parties do not reach an agreement themselves.

The program also will address the emotional dimension of divorce from both a child's and an adult's perspective. In doing so, the curriculum will address children's emotional and behavioral responses at various ages and developmental stages and suggest means by which parents may most effectively identify and meet their children's needs. Additionally, the emotional and psychological consequences of marital dissolution for adults will be discussed to increase awareness of the stress that may be experienced as the divorce process unfolds. Coping mechanisms that may ease the difficult adjustment period will be reviewed and information about available mental health resources will be offered.

Because children have a need for financial stability, the program will stress to parents the importance of their ongoing duty to support their children financially. This obligation will be identified as existing independently of other issues such as visitation. The curriculum strives to encourage parents to accept personal responsibility for their children's financial well-being, as well as their children's emotional welfare. Issues relating to interim support and support collection assistance

will be addressed, as will the need for parents to comply with interim and permanent court orders setting parental financial obligations, roles, and responsibilities.

Some of the material concerning cooperative parenting and fostering ongoing contact with the other parent may be inapplicable to families in which a parent has been abusive or neglectful. This issue will be addressed expressly at the educational sessions. The sessions should include information regarding the special problems facing families which have experienced abuse or neglect and information about resources available to address these issues in more depth and with individual specificity.

00.05 Notification and publication of the program

- (a) The state judicial authority shall promulgate rules and procedures which will enable courts promptly to notify each party to any action described in section 00.06 of this Act as to the location, date, and general content of the education program as soon as possible after the action is commenced.
- (b) The state judicial authority shall devise procedures to publicize the program and to encourage legal and mental health professionals, educators, and other interested persons to refer parties to the program before a case is filed.

Comment to 00.05

The Parent Education Program will be of optimal benefit to participants who attend the sessions in the initial stages of the divorce process. Early participation affords the opportunity to advocate rational thinking by parents about conflict escalation and its consequences before adversarial attitudes intensify. To that end, this section mandates that notification procedures be established by the court to make parties aware of the educational sessions as soon as the court becomes aware of the parties' action.

This section also charges the state judicial authority with a duty to build general awareness of the Parent Education

Program through publicity. This effort is designed to encourage the divorce bar, mental health professionals, educators, clergy, and other interested parties to refer parents contemplating divorce or separation to the program before, or in the absence of, filing a case in court. It is also expected that general public knowledge of the availability of the program will result in self referral.

00.06 Court required attendance

- (a) In any action between parents before the superior court, supreme court, or family court in which the custody or support of a minor child is an issue, the court may, upon the motion of a party or upon the court's own motion, order parties, excluding minor children, to attend the Parent Education Program, if the court finds it to be in the best interests of the child or children. The court, in making its determination, shall consider the factors set forth in section 00.07 of this Act.
- (b) At the first conference of any case described in subsection (a) of this section, the court shall decide whether to order parties, excluding minor children, to attend the parent education course. Such an order shall specify the date by which course attendance must be completed.
- (c) Where abuse or neglect is alleged by one party against the other, or under other circumstances of concern to the court, the court may, upon its own motion or upon the motion of a party, order each spouse to attend a separate session of the program.

Comment to 00.06

This section authorizes the court to require divorcing parents to attend the Parent Education Program. This requirement accords with due process protections that safeguard divorcing parties' access to courts, as it constitutes a procedural requirement with no preclusive effect. *See Boddie v. Connecticut*, 401

U.S. 371, 382–83 (1971). The state may devise formalities and procedural requisites for hearings, which may vary with the import of the interests involved. *Id.* at 377–79. An educational requirement for divorcing parents furthers the state’s compelling concern for the best interests of the child in an action that pertains to the child’s welfare. There is nothing in this Act to indicate that failure to participate in the program would bar individuals from filing an action or from receiving final disposition of their case. The state’s right to prescribe conditions upon which a marital relationship may be created and dissolved is absolute, *Sosna v. Iowa*, 419 U.S. 393, 404 (1975), subject only to constitutional limitations. *Loving v. Virginia*, 388 U.S. 1, 7 (1967).

The court’s authority in this context does not conflict with the prohibition against ordering a parent to submit to ongoing therapy, treatment, or analysis as a condition to receiving custody or visitation rights. An order to attend the Parent Education Program is readily distinguished from such a condition. The program established by this Act is educational and in no way directed toward individual counselling, whether legal, psychological, or emotional. Attendance is to be short-term, confined to one series of sessions, and is to occur prior to final disposition of a case, not as an ongoing condition.

This section directs the court to make a determination whether to order attendance at the first conference of the case, again underscoring the importance of offering education to divorcing parents as soon as the opportunity to do so arises. Although the Act expressly applies to parties to matrimonial actions, the court may consider requiring attendance by parties to any action before it that concerns the care, custody, visitation, or support of minor children. Children are exempted from court ordered attendance at the program, but this provision in no way prevents local advisory committees from developing a session in which children participate.

The court is to consider specifically the special problems facing families in which abuse or neglect has been alleged and to direct spouses in such families to attend separate sessions of the program where appropriate. If there is only one available session, the court should refer to the list of alternative approved programs compiled by the local advisory committee pursuant to section 00.12 of this Act. Factors to guide the court in determining whether to issue an order to attend are detailed in the following section of the Act.

00.07 Waiver of attendance requirement

In considering whether to order parents to attend the Parent Education Program, the court shall presume that such attendance is in the best interests of the child or children involved. The court may, in its discretion, decide that either or both parents should not attend the Parent Education Program. In determining whether a parent should be exempt from the requirement to participate in this program, the court shall consider the following:

- (a) participation in an alternative program approved by the local advisory committee;
- (b) economic or other burdens (including travel time and costs) of attending;
- (c) allegations or a history of child or spousal abuse or neglect;
- (d) the history of motions related to custody and visitation or child support;
- (e) guidelines promulgated by the state judicial authority regarding attendance requirements; and
- (f) any other factors the court deems relevant.

Comment to 00.07

Courts should have the power to order parents to attend the Parent Education Program even if the courts initially refuse to do so. The Parent Education Program provides all parents with a useful educational framework which will help them make critical decisions concerning their children at a time of great stress and transition in their own lives. Parent participation in the program is an important reminder to them that the court's first consideration in determining the dispute concerning their child is the child's best interests, not their own anger or desire for vindication. The benefits of parental attendance generally outweigh whatever burden attendance

places on the parents.

Attendance at the Parent Education Program is presumed to be in the best interests of the children involved in parental conflict. However, such attendance is not intended to constitute a rote prerequisite to receiving an order of dissolution or court hearing. The court should give thoughtful consideration to individual situations as it identifies parents for whom participation in this program is appropriate. The presumption of attendance may be overcome by a showing of participation at a comparable program approved by the local advisory committee, or by evidence that attendance would create an economic or other hardship because of residence in a foreign jurisdiction. Indigence does not excuse failure to attend, as the Act establishes a fund to cover participation fees when necessary. There may be others for whom attendance is not appropriate, such as parties to an already settled custody arrangement or parties whose adversarial positions are so intensely implacable and hostile that a positive influence is unlikely.

In situations where a parent alleges spousal or child abuse or neglect against the other, the court should first consider the option of ordering spouses to attend separate sessions of the Parent Education Program if they are available in the local community. However, the legislature also recognizes that in some extreme cases, this program may not be best suited to address the needs of families dealing with the crisis of abuse. In such instances, the court should refer the parties to appropriate service providers.

00.08 Failure to attend

- (a) The court may hold in contempt a party who, in the absence of good cause, fails to attend all sessions of the Parent Education Program after receiving notice and an order to attend.
- (b) The court may take into account a parent's wilful disregard of an order to attend the Parent Education Program in making a custody determination.

Comment to 00.08

To underscore the seriousness of the attendance requirement, the court is empowered with the authority to impose civil sanctions on parties who fail to comply with an order to participate in the Parent Education Program, if the court is not satisfied that the failure to attend was excusable. The penalty of civil contempt may be assessed at the court's discretion. However, final disposition of an action will not be withheld pending a party's fulfillment of the attendance requirement.

A wilful refusal to attend the Parent Education Program may be considered by the court in its custody determination. Disinterest in the child's welfare or lack of parenting cooperation may be reasonably inferred from a parent's unwillingness to attend the program. This negative inference is incorporated appropriately into the court's custody decision guided by the "best interests of the child" standard. Although wilful failure to attend the Parent Education Program may be taken into account in the court's custody determination, it should be considered as only one factor in the court's determination of what is in the best interests of the child.

00.09 Creation of a state advisory committee for the Parent Education Program

- (a) A state advisory committee shall be established that will consist of no more than fifteen members to be appointed by the chief judge. This Committee shall include members who represent:
1. the matrimonial section of the state bar association;
 2. educators specializing in child and family studies;
 3. mental health professionals;
 4. the judiciary, including:
 - (i) one judicial representative from the family court; and
 - (ii) one judicial representative from the supreme or superior court as applicable; and
 5. other interested members of the community.
- (b) The committee members shall elect a chairperson from their membership.

- (c) Each member will be appointed to serve a two year term and may be appointed for successive terms.
- (d) The committee members will receive no compensation, but may be reimbursed for actual expenses.

Comment to 00.09

The state advisory committee is established as an interdisciplinary volunteer resource of expertise and interest to advise the state judicial authority. Its general objective is to oversee the development of the program and to nurture its continuation while executing the specific tasks set forth in the following section.

00.10 Duties and responsibilities of the state advisory committee

- (a) The state advisory committee shall advise the state judicial authority on the following matters:
 - 1. development of curricular guidelines and requirements for Parent Education Programs;
 - 2. development, production, and distribution of standardized video and printed educational materials;
 - 3. planning and implementation of an official state training program for program presenters;
 - 4. selection, training, qualification, and evaluation of program presenters;
 - 5. establishment of standard procedures for program evaluation and collection of demographic data to be followed by local advisory committees; and
 - 6. general supervision and oversight of the program.
- (b) The state advisory committee shall advise the chief judge on the rules and procedures necessary to implement the Parent Education Program.
- (c) The state advisory committee shall submit reports to the state judicial authority consistent with the requirements of section 00.19 of this Act.

- (d) The state judicial authority shall provide staff services to the state advisory committee.

Comment to 00.10

The essence of the state advisory committee's task is guidance and counsel. Its recommendations to the state judicial authority will be the product of discussion and debate by the members who represent all pertinent disciplines, as well as the community at large. Specifically, this committee will deal with matters that should be standardized statewide for the sake of consistency, such as evaluation forms or procedures to collect demographic data, or for the sake of efficiency, such as the production of video or printed educational materials. The state committee also will suggest a curricular overview to guide local committees in creating a program course. This committee, because of its broad range of expertise, is also particularly well situated to recommend criteria for selecting, training, and evaluating program presenters. It is the task of the state advisory group to plan and implement an official statewide training course which will be offered at least once a year for all program presenters.

00.11 Creation of a local advisory committee for the Parent Education Program

- (a) Each judicial district shall establish a local advisory committee, which will consist of no more than ten members to be appointed by the administrative judges of the family and supreme courts in each district or such other person as designated by the chief judge. This Committee shall include members who represent:
1. the matrimonial section of the local bar association;
 2. educators specializing in child and family studies;
 3. mental health professionals;
 4. the judiciary, including
 - (i) one judicial representative from the family court; and
 - (ii) one judicial representative from the supreme or superior court as applicable; and

5. other interested members of the community.
- (b) Each local advisory committee shall elect a chairperson from its membership.
- (c) Each member will be appointed to serve a two year term and may be appointed for successive terms.
- (d) The committee members will receive no compensation, but may be reimbursed for actual expenses.

Comment to 00.11

Each judicial district shall be assisted in implementing its local Parent Education Program by an appointed interdisciplinary and lay advisory board. Recognizing that each community can best determine its own needs and available resources, the comprehensive task of arranging details of each local program, as set forth in the following section, is given to the local advisory group. The local advisory committee should be a forum for the community to take responsibility for the welfare of its children and to share professional expertise to aid children in need.

00.12 Duties and responsibilities of the local advisory committee

- (a) It shall be the duty of each local advisory committee to develop a plan for, and to supervise, the Parent Education Program in its judicial district.
- (b) Each local advisory committee, within six months of appointment, shall submit to the State Advisory Committee for approval, a plan to implement the Parent Education Program in its judicial district. This plan shall include, but is not limited to, provisions for:
 1. the delivery of professional services necessary to conduct the education program by
 - (i) selecting individual qualified personnel; or
 - (ii) contracting with qualified public or private agencies;

2. the recruitment, selection, qualification, training, and evaluation of program presenters and program administration; and
3. all operational details of the program including, but not limited to
 - (i) scheduling of sessions;
 - (ii) location;
 - (iii) publicity;
 - (iv) registration of participants;
 - (v) collection of fees pursuant to section 00.18 of this Act;
 - (vi) creation of an account for deposit of funds generated and payment of expenses;
 - (vii) program content;
 - (viii) program format;
 - (ix) security;
 - (x) certification to the court of attendance and completion;
 - (xi) notification to the court of failure to attend;
 - (xii) development and distribution to all participants of a current list of social services and support groups available in the judicial district;
 - (xiii) evaluation and approval of other local parent education programs that may serve as attendance alternatives to the Parent Education Program; and
 - (xiv) coordination of services between the supreme or superior and family courts.

Comment to 00.12

Within the guidelines promulgated by the state judicial authority, each local advisory committee is given broad latitude in developing its own unique Parent Education Program reflecting the needs and utilizing the resources of the community. For example, local advisory groups may opt to have committee members organize and supervise all facets of the program, or they may choose to contract with a qualified agency to provide those services. The program may be led by volunteers or a paid staff and may be fee based or free to participants. The local committee will make decisions regarding the time and location of the program and how it is to be formatted and structured. For example, a program may be

organized in a lecture format or include discussion periods as well; participants may attend in large groups, small groups, or a combination of the two; a program also may utilize video materials, role playing, or a question and answer scheme.

All operational decisions detailed in this section are the province of the local advisory committee, subject to approval by the state judicial authority. The list is intended to be illustrative, not exclusive; however, each element of the program listed must be addressed. Arrangements must be made for adequate security if the program does not take place at a courthouse where security personnel are present. Communication procedures with the courts must be organized efficiently to allow prompt notification of a participant's completion of the program or failure to attend.

00.13 Qualifications and duties of program presenters

- (a) All program presenters conducting education sessions under this Act shall attend the official statewide training session and additional training required by the local advisory committee for the judicial district in which the program is to be presented. Such training shall be completed within one year prior to teaching a parent education program.
 1. All program leaders who present information regarding legal aspects of actions regarding custody, care, visitation, or support of minor children shall have the following qualifications:
 - (i) a law degree and admission to the state bar; and
 - (ii) at least two years experience in matrimonial practice.
 2. All program leaders who present information regarding the childhood or adult emotional aspects of actions involving custody, care, visitation, or support of minor children shall have the following qualifications:
 - (i) a degree in and certification to practice psychiatry; or a doctorate or masters degree in psychology, social work, marriage and family counselling, or other mental health discipline, and a license to practice psychology or social work; and
 - (ii) at least two years post-graduate experience in child

or family counselling or in psychiatry.

3. All program leaders shall conform to other qualification requirements set forth by the state advisory committee.
- (b) It shall be the duty of program presenters to conduct sessions and prepare reports in conformity with directives of the local advisory committee.
- (c) No adjudication, sanction, or penalty for non-participation or for any other reason may be made or imposed by any service provider or program leader.
- (d) Program presenters shall not solicit participants from the sessions they conduct to become private clients or patients.
- (e) Program presenters shall not provide individual legal advice or mental health therapy.

Comment to 00.13

The success of the Parent Education Program is dependent on the competence of the program presenters. Tremendous effort and expertise are involved in developing and implementing this program, but its ultimate effectiveness lies in the hands of the professionals making the presentations. To insure excellence, high standards of qualification and training are required of each presenter. Additionally, the Act directs local advisory committees to observe and evaluate each presenter to assure conformity with the standards and regulations of the state judicial authority as well as the requirements of the local board.

The scope of responsibility of the presenter is confined to presenting relevant information in as impartial a manner as possible and in a manner comprehensible to the lay public. Presenters are prohibited from soliciting clients or patients from their audience, as that is inconsistent with the purposes of this Act. Furthermore, the presenters are directed to focus on common legal and emotional patterns and problems that arise from divorce and custody issues; individual consultation

is neither encouraged nor available before, during, or following the session.

Presenters have no authority to provide individually focused legal or mental health therapy, or to attempt to resolve disputes between parents. Nor do they have authority to impose any type of sanction on parents for comments made during the session, or for non-attendance. However, presenters may direct that security personnel remove a participant for antagonistic or dangerous behavior and such an occurrence will be reported to the court. Security personnel must be present at all sessions of this program.

00.14 Exemption from duty to report abuse allegations

- (a) Program presenters have no duty to report allegations of abuse, pursuant to provisions of the social services law, heard during a program session.
- (b) Program presenters advised by a participant of alleged abuse shall provide information regarding agencies to whom such allegations may be addressed, as well as other relevant resource material.

Comment to 00.14

Program presenters do not function in their professional capacities when they lead educational sessions, as no individual therapy or advice is dispensed. Therefore, presenters are exempt from the duty to report abuse allegations heard during the Parent Education Program which they might otherwise have because of their professional licenses as, for example, a physician or social worker.

However, the legislature recognizes the special problems of participants who feel they or their children have been the victims of the other spouse's abuse. Accordingly, program presenters who are advised by a participant of alleged abuse are directed to refer that person to agencies that deal specifically with abuse and neglect issues; a list of appropriate legal and medical resources will be supplied.

00.15 Confidentiality of communications

- (a) All communications during the education program and all written records of the program are confidential and shall not be admissible as evidence in any court proceeding except to the extent necessary for a court to determine whether or not a parent wilfully refused to attend sessions of the program or to impose a penalty pursuant to section 00.08 hereof.
- (b) No program presenter will be subject to a subpoena to testify regarding any communication from a parent participant during the program.

Comment to 00.15

It is imperative that the educational sessions be conducted with the utmost confidentiality. Several concerns support this conclusion. First, participants should be assured that the privacy of their questions and comments are protected from communication to the other spouse, that spouse's attorney, or the court. Without such a guarantee, the effectiveness of the program as an open forum for questions and discussion is severely curtailed. Secondly, as discussed above, the presenters do not act in their professional capacities when they conduct the Parent Education Program. The cloak of confidentiality that protects communications to such persons when they practice their profession is not present. The statute speaks to the absence of these traditional guarantees by prohibiting subpoena of presenters to testify about out-of-court statements made by participants or about their opinion regarding the participant.

00.16 Limitation on liability

The liability of program presenters and members of the state and local advisory committees shall be limited to damages for intentional or reckless misconduct.

Comment to 00.16

It is presumed that all persons acting as program presenters and advisors undertake their duties as a good faith effort to act in the best interests of the program and its participants. It will be made clear to participants that the information presented is generalized and that an attorney or mental health specialist should be consulted regarding specific and personal matters. Therefore, persons associated with planning and implementing the Parent Education Program will be held liable only for intentional or reckless misconduct in dispensing information or conducting the sessions.

00.17 Appropriations

- (a) The state judicial authority shall establish and supervise a special account to be administered solely for the benefit of the Parent Education Program.
- (b) The marriage license fee or matrimonial action filing fee may be increased by the state judicial authority with the proceeds from such an increase to be deposited to the special account for the Parent Education Program.

Comment to 00.17

Adequate financing is essential to the efficacy of the Parent Education Program. Several options exist for achieving this financing. One is through an appropriation from the State's general funds. Another is to charge parents who participate in the program a modest fee, which is waivable if the parent is unable to afford it. A third possibility is to raise the divorce filing fee or the fee for marriage licenses.

This Act authorizes raising divorce filing and marriage license fees to cover the costs of the Parent Education Program statewide and, in the next section, authorizes local judicial districts to charge fees to parent participants for financing local programs. The funds raised from increased divorce filing and marriage license fees will be used to cover expenses for the statewide training sessions for program presenters, producing

educational materials, research, publicity, and for reimbursing local programs for the cost of participation for those who cannot pay.

The funds raised will be deposited in a special account used solely for the purposes of the Parent Education Program. Establishment of this fund does not exclude the possibility of grant solicitation or private donations. Additional sources of funding exist and should be pursued.

00.18 Fees

- (a) Local judicial districts may charge and collect fees from parents for participation in the Parent Education Program.
- (b) Participation fees:
 - 1. shall not exceed \$50 per person;
 - 2. may be adjusted annually to reflect the rate of inflation;
 - 3. shall be deposited in an account for administration of the Parent Education Program, which will be subject to audit by the state judicial authority; and
 - 4. shall be expended solely for purposes related to the local parent education program.
- (c) No person shall be excluded from the program based upon the inability to pay. Upon a showing of a party's indigence, the local advisory committee shall waive the fee and shall be reimbursed for that amount from the fund established pursuant to section 00.17.

Comment to 00.18

Unless the local education program is a purely voluntary effort, it will be necessary for each local advisory committee to generate funds to cover expenses. To that end, the statute authorizes the local committees to charge nominal participation fees. Such funds, including interest earned, are to be held in a special account and dedicated to promoting and implementing the Parent Education Program. Any interest earned by such an account must be reserved or disbursed for the benefit of the

program. The assessment of a participation fee does not exclude the possibility of seeking other funding sources. Local committees are encouraged to do so.

The local committee will be accountable for the administration of fees and other monies collected. The state judicial authority may from time to time audit the local committee's special account.

00.19 Reporting requirements

- (a) One year from the date of enactment of this section and annually thereafter, it shall be the responsibility of each local advisory board to report its activities during the year and its evaluation of the local program to the state advisory committee. This report shall include, but not be limited to:
 1. summaries of reports from program presenters;
 2. a compilation of demographic data collected;
 3. summaries of evaluation surveys by participants;
 4. comments and recommendations from the judiciary, lawyers, mental health professionals, educators, and other interested persons in that judicial district; and
 5. recommendations for the program.

- (b) Eighteen months from the date of enactment of this Act and annually thereafter, it shall be the responsibility of the state advisory committee to report its activities and recommendations to the state judicial authority. This report shall include, but is not limited to:
 1. summaries of reports from program presenters;
 2. a compilation of demographic data collected;
 3. summaries of evaluation surveys by participants;
 4. comments and recommendations from the judiciary, lawyers, mental health professionals, educators, and other interested persons; and
 5. recommendations for the program.

- (c) Two years from the effective date of this Act, and on each subsequent anniversary date, the state judicial

authority shall submit to the governor and state legislature a comprehensive descriptive and evaluative report on the Parent Education Program incorporating, but not limited to:

1. reports from the state and local advisory committees;
2. additional studies or reports commissioned by the state judicial authority;
3. recommendations for the program; and
4. any additional information requested by the state legislature.

Comment to 00.19

The monitoring and reporting provisions of this section are intended to insure that the education programs comport with the purpose and philosophy of the Act. Additionally, these requirements guarantee an influx of evaluative information, demographic data, and recommendations that will serve to enhance ongoing growth and improvement of the program. The reporting scheme uses detailed information from local committees as the initial building blocks of a comprehensive annual report prepared by the state advisory committee. Data and recommendations from the localities are compiled and summarized by the state advisory committee, which supplements this information with its own recommendations and observations. The report of the state advisory committee is incorporated in the state judicial authority's report to the legislature. This evaluation contains all demographic and evaluative information derived from the program and from other relevant research, assesses the strengths and weaknesses of the program, discloses financial matters, and makes recommendations for the future direction of the program.

