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Family Law from a Family System Perspective--The Binary Equation

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I. Abstract

Family law is a binary equation composed of two elements—legal issues and psycho-social relationships. Our current family law procedures do not balance the equation. There is a need for a comprehensive family court that consolidates within one structure the resolution of legal issues with the psycho-social. The comprehensive family court will pair the resolution of family conflict with procedures such as arbitration, mediation, pre-trial settlement conferences and services, such as specialized intake screening, consumer education and cross-indexing of cases that support family decision-making and thereby balance both sides of the equation.

The 1980's have produced significant changes in family law. All fifty states allow no-fault divorce.[1] Shared parenting of children after divorce is a threshold presumption in approximately thirty-three states.[2] Mediation of child custody and visitation disputes is mandated by statute in an increasing number of states.[3] Protection orders in cases involving domestic violence are issued within twenty-four hours. Parent-child mediation is being used to prevent the unnecessary removal from the

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1. *See, e.g.*, CAL. CIV. CODE §§ 4506-4511 (West Supp. 1990).

2. *See, e.g.*, CAL. CIV. CODE § 4600.5(a) (West Supp. 1990) ("There shall be a presumption, affecting the burden of proof, that joint custody is in the best interests of the child . . .").

3. *See, e.g.*, CAL. CIV. CODE § 4607(a) (West Supp. 1990) (mandatory mediation for disputes relating to custody or visitation).

home of children declared dependent or charged with status offenses. In camera interviews have spared sexually abused children the trauma of direct testimony.[4]

Yet this novel legislation has not eliminated the trauma that continues to be inflicted on families in conflict by the practices and procedures of our legal system. Families continue to be overwhelmed by ambiguity, delay, jurisdictional disputes and legal resolutions that do not come close to resolving the real conflict.

The emotional and financial costs of resolving conflict within our present legal structure are higher than our families can pay. Too often courthouse resolutions resolve only the legal conflicts, leaving unaddressed the underlying personal, relationship and psychological disputes.

The use of alternative dispute resolution mechanisms (arbitration, mediation, pre-trial settlement conferences, etc.) has shown great promise—but as with most systemic change, it brings about new concerns and new procedural problems.

This Article presents five typical family conflicts that appear in family related courts across the country: Marital dissolution,[5] domestic abuse,[6] dependency,[7] child sexual abuse,[8] and a multi-conflict family.[9] Contemporary approaches and procedural concerns are discussed. The illustrated problems point to a need for continued improvement within our family law system. The goal of this article is to stimulate further ideas for the refinement of our family court procedures.

II. Scenario I. Marital Dissolution

> Susan and John Brown were married at their respective ages of twenty-two and twenty-four. They had known each other and dated steadily for several years before marrying. They were well suited for each other. They were in love. The Browns have now been married twelve years. They have two children, ages eight and ten, a house, two cars and both work outside the home. They're no longer in love.
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> To see them in court, one wonders how they could ever have cared

4. *Cf.* Coy v. Iowa, 108 S. Ct. 2798 (1988) (confrontation clause requires face to face confrontation of witness even in child sexual abuse cases). *But see* Hobson, *Appointed Counsel to Protect the Child Victim's Rights,* 21 Pac. L.J. 691, 722 (1990) (appointment of counsel in child molestation cases does not violate confrontation clause).

5. *See infra* notes 9-17 and accompanying text.

6. *See infra* notes 18-24 and accompanying text.

7. *See infra* notes 25-30 and accompanying text.

8. *See infra* notes 31-34 and accompanying text.

9. *See infra* notes 35-44 and accompanying text.

> for each other. Susan and John are fighting over everything—the children, the house, property, finances, even the bills. They've each hired attorneys who have pursued all legal avenues—depositions, interrogatories, multiple appraisals, private investigators, outside consultants and witnesses—to protect the interests of their clients and to attempt to obtain the best deal. Susan and John have put their marriage on trial.
>
> Each expects to be able to tell his or her story to the judge, to be heard and understood and to receive a fair settlement. Unbeknownst to the Browns, the rules of evidence do not permit them to tell all and the judge finds that much of the story is irrelevant to the disposition of the case. The children are torn between taking sides and withdrawing from both parents. The lives of friends and family have been disrupted, and Susan and John have depleted their meager estate in litigation.
>
> The judge's decision does not end the warfare. Each spouse feels resentful of the process as the conflicts continue. The Browns could spend the rest of their lives acting out the hurts, angers and other emotions that occurred during and after divorce.

Over one half of the cases filed in all trial courts of original jurisdiction are concerned with matrimonial actions. In New York alone, more than fifty percent of all civil cases are filed in the family court system and this figure is estimated to have increased to sixty-six percent in some states.

Divorce constitutes the dissolution of a marriage, the re-affirmation of a parental relationship, the re-organization of the family, the divestment of shared property and the establishment of financial provisions for the support of the children and, in some instances, one or both of the spouses.[10]

A divorce is a legal crisis. It is also a psychological, economic and parental crisis.[11] Social scientists tell us that divorce is a conflict medium. Unfortunately, as the above scenario illustrates, the natural and normal conflicts are exacerbated by the often-used trench warfare tactics and procedures of the adversary system. The natural and normal psychological responses to divorce, such as fear, anger, sadness, depression and rejection which comprise the non-litigatable issues of divorce, are projected onto the litigatable issues of custody, property division and child support. As a result, judicially sanctioned settlements often fail

10. *See generally* CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 405 (1988).

11. Payne, *Future Prospects for Family Conflict Resolution in Canada*, 24 CONCILIATION COURTS REV. 51, 52 (1986).

to resolve the conflicts and merely provide an easily punctured veneer for the underlying conflicts.

In an effort to address some of these issues, courts have turned to court-connected counseling and mediation services to attempt to help family members identify the issues in dispute, negotiate their own settlements and reach agreements that are of their own making and that they will have an investment in supporting.

Although most court-connected mediation services limit the mediation to custody and visitation issues,[12] a few courts, with the consent of the parties and their attorneys, are expanding the mediation to include child support and property division.

A number of courts sponsor educational seminars or orientation programs as an introduction to the divorce process. These educational seminars typically include information about divorce, children's adjustment to divorce and information about the mediation process. These informational programs help family members better understand the presenting conflicts and the conflict resolution procedures available to them.

Pre-trial settlement conferences, often conducted by a judge or commissioner, have also been used to deflect cases from litigation. Typically the settlement officer does not hear the case if it proceeds, thus assuring the parties and legal counsel that the case will not be pre-judged.

The appointment of a guardian ad litem (GAL) or Court-Appointed Special Advocate (CASA)[13] in a contested child custody matter allows all the parties to a marital dissolution, including the children, to be represented at the table and to negotiate a resolution that reflects the needs and interests of all family members.

III. Recommendations

A. *Family Law Specialists*

Recognizing that the marital dissolution process is much more encompassing than resolving a set of pre-established legal issues will require that the training and education of court personnel include expertise in

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12. California is one such jurisdiction. *See* Cal. Civ. Code § 4607(a) (requiring mediation only for custody and visitation conflicts).

13. *See, e.g.*, Cal. Civ. Code § 4606 (West Supp. 1990) (court may appoint private counsel at parents' expense when in the best interests of the child). A mediator may also recommend appointment of counsel. Cal. Civ. Code § 4607(f) (West Supp. 1990).

the psychological aspects of divorce, the developmental needs of children and the nature of conflict in divorce matters. The specialization of family law is a welcome addition to the legal profession. This specialization needs to be extended to court-connected personnel and to the trial and appellate levels of the judiciary.

Custody evaluators, mediators, guardians ad litem and others appointed to help families with divorce-related issues must be viewed as specialists and not randomly plucked from the pool of mental health and legal professionals. Judicial rotation in and out of divorce court will never provide the expertise necessary to be effective family law jurists. Family law jurists should be drawn from family law practitioners who have demonstrated an aptitude for dealing with inter-personal issues beyond those circumscribed by statute and who desire to help family members self-determine a resolution to their conflicts as opposed to resolving conflict by legal edict.

B. Family Law Procedures

The increased use of court-connected personnel and services such as mediation, custody evaluation, and parent education programs will enhance the quality of our family law practices. Providing technical assistance to courts and court-connected agencies, such as is offered by the Association of Family and Conciliation Courts, will allow courts to draw upon the expertise of other jurisdictions and institutionalize the use of ancillary court services as a complement to the judicial system.

Methods of alternative dispute resolution, such as mediation and pretrial settlement conferences, take us one step closer toward enabling families to resolve conflicts in a cooperative as opposed to a competitive manner. The promise of alternative dispute resolution can be realized by the expanded use of mediation and by the use of arbitration for those cases which can not be successfully resolved in mediation. Arbitrators and mediators need not be legal professionals, but may include those having expertise in child custody or financial matters. A team of arbitrators or mediators, including legal and mental health professionals, may be another approach to resolving the co-mingled legal and psychological issues of divorce.

C. Substantive Changes

Although this Article is intended to address the procedural aspects of family law rather than the substantive, the substantive aspects of divorce clearly affect the ability of the family to effectively address the issues that need to be resolved in divorce and to re-establish itself as a new family entity after divorce.

Considerable advances in the substantive area of family law have occurred including no-fault divorce,[14] joint custody,[15] and guidelines for establishing child support.[16] Other changes are necessary.

The nomenclature of divorce continues to breed conflict with terminology such as custody, visitation and maintenance. Substituting less inflammatory language into our statutes such as "periods of physical placement" for custody and visitation and "financial provisions" for maintenance and child support will improve the emotional climate and lessen the antagonism between divorcing spouses.[17]

D. Systemic Changes

A marital dissolution is a legal and an emotional event. It may include adversarial feelings because of the emotions that accompany the event, but it ought not be adversarial in practice. Our legal practices and procedures do not serve the family, our ultimate client, when natural and normal conflicts are fanned by a system that is intended to resolve them. The adversarial system is unable to address and resolve the types of conflicts that occur in divorce and as a result, the system is undermined.

Short of dismantling years of legal precedent, it is time to design an administrative process that helps divorcing spouses "close the book gently" on the marriage and establish a new way of being related; a new way of being family.

IV. SCENARIO II. DOMESTIC ABUSE

> Mary and Mark have been married for seven years. They've had their ups and downs but have managed to weather most of the storms. They have two boys, ages five and six. The boys have been a handful and don't leave much time for Mary and Mark to attend to their

14. *See, e.g.*, CAL. CIV. CODE §§ 4406-4511 (West Supp. 1990).
15. *See, e.g.*, CAL. CIV. CODE § 4600.5(a) (presumption that joint custody is in the best interests of the child).
16. *See, e.g.*, CAL. CIV. CODE §§ 4700-4732 (West Supp. 1990) (including Agnos Child Support Act which directs courts to establish guidelines for establishing child support).
17. *See, e.g.*, I WAGNER, FAMILY LAW 5 (UOP McGeorge School of Law 1988) (terminology is both legally and emotionally significant in family law disputes).

> marital relationship. Mark just finished his printer's apprenticeship and Mary has been working as a night duty nurse to supplement the family income. Mark cares for the boys while Mary is working. This will be the first weekend Mary and Mark have had together in three months. Unfortunately, one of the boys is sick with the flu, so Mary and Mark are not able to go out as planned. Their mutual frustrations become barbs between them and lead to one of "those nights". Mary calls the police and Mark is taken to jail and booked.
>
> A restraining order is issued prohibiting Mark from having any contact with Mary until the case can be scheduled for a status conference with the district attorney's office. Given the office's heavy schedule, this could be delayed for several weeks.
>
> Mary has to go to work tonight. She has used up all of her sick leave and does not want to involve her parents in this. The boys do not understand why their father is not home. They sense there is trouble in the household and are acting out accordingly. Mary thinks about Mark. In spite of the violence of the previous evening, she knows from past experience that Mark will be contrite and that he won't touch her again—for now.
>
> The district attorney has seen hundreds of these cases. This is not the first time for Mary and Mark either. Mary does not want to press charges but the district attorney is telling her it is out of her hands now. They are going to charge Mark and he will ultimately serve time. Every one knows that this will only cause new problems for this family but that is the way the system works.

Domestic violence, once viewed as a private matter, has become a headline topic in our society. An increasing number of incidents of domestic violence are being reported. These developments have led to more aggressive treatment of domestic violence as a crime rather than a family matter. Research indicates that each year in the United States alone, almost two million husbands severely batter their wives (when "battering" is defined as kicking, biting, punching, striking with an object, beating up or threatening or attacking with a knife or gun).[18] Women also beat men with whom they cohabit, but federal crime statistics indicate this occurs in only about one out of every twenty married or post-marital assault convictions[19] and the person most severely injured in reported cases is usually the woman.[20]

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18. M. Straus, R. Gelles & S. Steinmetz, Behind Closed Doors: Violence in the American Family 43 (1980).
19. U.S. Department of Justice, Report to the Nation on Crime and Justice 21 (1983).
20. M. Straus, R. Gelles & S. Steinmetz, *supra* note 19, at 43.

The justice system has been forced to address instances of domestic abuse and establish a body of law and ancillary procedures. These procedures extend from the civil to the criminal and have evolved over time from a dependency on a victim's complaint and willingness to press charges, to current practices which place the prosecutorial decision making with the state.

Following an arrest, the accused spouse may be jailed until he or she can post bail, be formally charged or meet other conditions for release. Prosecution is a much more likely response today, but the dismissal rate remains high, around eighty percent in some jurisdictions.[21]

Courts will typically issue a civil protection order which provides that the police shall intervene at the next instance of contact, harassment or violence.[22] Some communities have established counseling programs as an alternative to prosecution and upon satisfactory completion, the charges are dismissed. Other communities have established mediation programs or victim-offender restitution programs. These mediation programs, for obvious reasons, do not mediate whether or not an abusive act has occurred or will occur, but rather provide an opportunity for the participants to discuss the nature of their relationship (which often continues after the abuse), the type and place of contact that will occur, referrals to counseling or other treatment programs and the nature of the relationship with the children and the type and place of contact.

The use of mediation in these matters has been debated elsewhere and will not be repeated here.[23] The objective is quite simple—stop the offending behavior and treat it. What constitutes appropriate "treatment" is the question. In this case, "treatment" is not meant to be limited to counseling or other psycho-social interventions, but includes the entire spectrum of responses including that of the justice system.

Most court interventions focus on the accused spouse. The use of deferment programs such as "alternative to aggression" counseling and other behavioral change programs have shown a modest success rate. In most instances, deferment programs are limited to dealing with the perpetrator and do not deal with the underlying dynamics of the interrelationship between the partners. The effectiveness of these programs

21. U.S. Commission on Civil Rights, Under Rule of Thumb: Battered Women and the Administration of Justice 61-76 (1982).

22. In some states, mediators may recommend the issuance of mutual restraining orders. *See, e.g.,* Cal. Civ. Code § 4607(e) (West Supp. 1990).

23. *See, e.g.,* S. Kuehl & L. Lerman, Mediators' Response to Abusive Men and Battered Women, Guidelines for Policymakers and Mediators, National Women Abuse Prevention Project, Washington, D.C. (1988); Cloke, *Date Rape and the Limits of Mediation*, 21 Mediation Q. 77 (1988).

is hampered by their inability to address issues that require the input of both spouses, such as reconciliation, visitation with the children, and economic support during a separation.

As a complement to existing interventions, mediation provides for the input of both partners and facilitates the resolution of these day to day matters. The referral of the family to mediation must be predicated on the consent of the victim when the violence is a separate civil or criminal matter. However, mediation may be mandated when custody and visitation are an issue in a divorce or post-divorce action.[24] Thus, a batterer in a divorce action can theoretically force the other spouse to the table by commencing a custody or visitation suit.

The use of mediation in divorce matters involving domestic abuse is under debate. Concerns about inequality of power, dominance, and safety can not be overlooked. The Association of Family and Conciliation Courts at its annual meeting in May 1989 convened a national forum on this subject in an effort to thoughtfully raise the issues and concerns before premature positions are taken and procedures and policies are cast in concrete. This forum should be followed by a smaller task group which will further explore the use of mediation in these types of cases.

V. RECOMMENDATIONS

A. Specialized Intake Personnel and Procedures

In the above scenario, a "legal" response may only provoke further crisis within the family system. Once again, conjoint issues require both a legal and a sociological response. If one could create the "perfect" system, it would allow for the protection and safety of individuals and provide a forum which allows the disputants to identify the issues in dispute and either direct themselves or be directed to the appropriate resources—safe shelters, victim support services, counseling, batterers groups, mediation, drug and alcohol treatment programs.

The "perfect" system could perhaps best be achieved through the use of specially trained intake personnel who would review the case upon its entry into the justice system, contact the participants to

24. *See, e.g.*, CAL. CIV. CODE § 4607(e) (West Supp. 1990).

ascertain any immediate needs or concerns, and schedule the matter for a further conference. The conference could include a separate caucus with each of the parties, a joint mediation session, or result in delaying the matter pending further investigation or upon participant request. The conference would serve as a conduit to other community resources or judicial intervention.

Those couples already in the court system because of a pending divorce action would have an opportunity to have the immediate issues of shelter, visitation, and custody addressed. Further, an assessment could be made regarding the parties ability to proceed with conjoint mediation or alternative procedures.

B. A Forum for Safe Communication

Domestic Violence is the failure of the parties to appropriately and safely communicate their needs, wishes, desires, and fears. Domestic violence is a primitive response to an actual or perceived threat. It rarely begins with hate, but usually ends with it. If we are to put an end to domestic violence, we must provide procedures which put an end to the conflict rather than exacerbate to it.

Courthouse procedures which exacerbate the already antagonized relationship and communication patterns must be improved or eliminated. Mediation and other diversion programs are not a panacea. A formalized system is needed which allows us to identify which procedures are appropriate and, most importantly, allow the parties to participate in the choice. The syllogism is as follows: The further removed the parties are from the settlement process, the less able they are to communicate their needs and interests; the less able they are to communicate their needs and interests, the more disempowered they are; the more disempowered they are, the more likely they will resort to domestic violence.

VI. SCENARIO III. A DEPENDENCY CASE

Brenda is a divorced mother with three teenagers. She works long hours as a legal secretary trying to make ends meet. Brian, the fifteen-year-old, has been suspended from school for cutting classes and was recently picked up for shoplifting. This will be the third notation on his police record for similar kinds of infractions. Brian and his brothers are constantly fighting and Brenda is worn out. Brian wants to quit school and get a job. Maybe he'll get his GED later on like his older

> brother did.
> The social worker feels Brian needs to be in counseling and that he needs more supervision than Brenda can provide. Perhaps placement in a treatment facility or foster home would get this kid back on track. Brenda can not afford a private placement facility so Brian will likely have to be declared delinquent and in need of supervision so he can be placed outside the home. Brenda is too tired to think about the long-term consequences of this. Brian is afraid of being sent away and his fears cause him to become even more highly agitated at home. Now he has really done it. His absence from home for the past several days forced Brenda to call the social worker and report him missing. He was at a friend's house the whole time but it does not matter now. The delinquency petition has been filed and it looks like Brian will be placed outside the family home.

Reading this scenario, one can predict that Brian's life has taken a significant turn. Further, a legal determination will have far reaching effects not only for him but for the whole family. Brian's removal from the family home may provide some immediate relief to the mounting tensions but will soon weigh heavily on the conscience of the family. Brenda will likely become more depressed about the loss of one of her children and question further her own adequacy as a mother. The other boys will worry about their own tenure in the home—will they be next?—and wonder if there was something that they did that caused Brian to be separated from them.

Brian's re-integration into the family is unlikely. He may be returned home after some indefinite period of time but he will return with new experiences that the other family members have not shared. Further, he will be returning to a family system that will have re-organized itself following his absence.

Perhaps most importantly, the family will have experienced the denial of its ability to self-determine and to resolve family problems while others outside the family system take over the decision-making process. The loss of power and control over one's own life typically produces either a sense of family helplessness and depression or family outrage.

In states such as New York, status offenders are legally referred to as PINS.[25] This includes youths, sixteen years and younger, who are legally classified as educationally truant, "incorrigible, ungovernable, or habitually disobedient."[26] They are deemed to be "beyond the lawful

25. J. Block, *Mediation: An Alternative for PINS*, 2 (1982).
26. *Id.*

control of parent, or other legal authority," and they fall within the jurisdiction of the Family Court.[27]

The creation of a separate juvenile justice system at the beginning of the twentieth century represented a trend within the justice system to distinguish between juvenile and adult offenders.[28] The justice system began to recognize an obligation to rehabilitate and treat problem youth rather than merely punish them for their offenses. Most applauded this shift, although there has been considerable re-evaluation with respect to the treatment of minors who commit serious criminal offenses.[29]

Presently, status offenders are brought to the court's attention either upon the petition of a parent or upon the petition of a social service agency, the police, or some other agent of the legal system.[30] The juvenile is typically treated without much regard for the larger family system from which he or she comes. The court system usually addresses only the most recent problematic behavior and rarely recognizes the "story behind the story"—typically, the underlying family conflict. Addressing the juvenile's behaviors in isolation from the larger family context usually results in a judicial determination or a recommendation from a social service agency that the individual be placed on probation, referred to counseling, or placed outside the home. The determination focuses on the youth and looses sight of the big picture.

VII. Recommendations

A. *Family-centered Interventions*

A judicial response that focuses solely on the child sets in motion a series of events that may undermine the functioning of the family and the eventual re-integration of the child. Home-based or family-centered interventions must be developed. These interventions could include in-home counseling, day treatment programs, partial foster care, and special volunteers to provide support and supervision.

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27. *Id.*

28. *See generally,* C. Miller, I California Juvenile Court Practice 5-6 (Cal. CEB Publications 1981).

29. *See generally, Id.* at 14-15 (increase in juvenile crime has resulted in disillusionment with rehabilitative capabilities of the juvenile justice system).

30. *See generally,* I California Juvenile Court Practice 17-39 (CEB Publications 1981) (describing the California juvenile offender intake process).

B. Parent-child Mediation

Our current legal procedures in matters of dependency and delinquency do not look at the issues and offending behaviors in the larger context. Attending solely to the juvenile results in blind justice and does not recognize the preceding issues and the succeeding problems that confront this family. Attending solely to the juvenile will eventually bring the juvenile back through the revolving door of the courthouse.

Parent-child mediation programs have attracted recent attention as an alternative to traditional court interventions such as probation, counseling and placement outside the home. Cases are referred to mediation for the purpose of allowing the family members to discuss their concerns and conflicts and to reach a written agreement. The mediator has no authority to impose a decision, other than to terminate mediation. The mediator also has no authority to ensure that the parties adhere to the agreement. Rather, the mediation process reframes the problem from that of an offender child to that of a family matter which is causing and will continue to cause distress to the entire family if it is not resolved satisfactorily by the family itself.

At the first point of contact with the juvenile justice system, specially trained intake personnel make an initial determination whether or not the case is appropriate for diversion to the mediation program. The intake officer explains the mediation process to the parties, ascertains the need for any other interventions, and schedules a mediation session. The intake staff provides a liaison with the court, tracks the case so it does not falter in the system, and reviews the matter for referral back to the justice system should mediation be unsuccessful.

VIII. Scenario IV. A Child Sexual Abuse

> Karen was divorced when Janie was a baby. She remarried soon after the divorce and her new husband, Tom, adopted Janie. Karen and Tom now have a four year old son, Danny. Janie just turned twelve and has been growing up real fast. She has also been acting funny lately. Karen is not quite sure what this is all about but she has her suspicions. The last couple of times when she has left Tom with the kids, Danny told her that Daddy told him to play outside and locked him out of the house.
>
> Karen's worst suspicions have now been confirmed. Janie came to her and told her that Daddy was playing with her. Karen took Janie to

> see a counselor who reported the sexual abuse per the mandatory reporting statute. Tom left home when he heard the police wanted to talk with him.
>
> All kinds of people have gotten involved now. Someone from the Sensitive Crimes Unit of the Police Department talked with Janie as did a social worker from the county. A lawyer has been appointed for Janie and is recommending that Tom not have visitation. Danny has been asking about his father and wondering if he will ever see him again. Janie is tired of talking about this stuff and the other night told her mother that she might have dreamt this. Karen is hurt and confused and wonders how she will manage as a divorced parent. The district attorney has contacted Tom and wants him to come in for an interview. Tom's been trying to get in touch with that lawyer who helped him out a couple of years ago with a speeding ticket. Maybe if he called Karen she would give him another chance. Maybe if she called Tom they could get together to talk about this.

In 1985, in the United States, approximately 32,000 children under the age of six and another 81,000 children between the ages of six and eighteen were sexually victimized.[31] The majority of sexual assaults are committed by family members and friends.[32]

The legal interventions available include criminal prosecution of the perpetrator, declaration of the victim as dependent and in need of protection, possible removal from the home, or referral of the family members for psychotherapy.[33] Family members are usually seen individually in order to spare the victim further trauma. Psychotherapy focuses on the victim and perpetrator and the other family members are often tangential to the therapy process.

The choices in this scenario seem to be so limited—either the father is removed or the child is removed or they continue living together, leaving the child subject to possible further abuse. Each of these produces further family trauma. The removal of the father produces a void in the family and further disrupts an already disrupted family. The child feels he or she is to blame for the parent's absence, the guilt causes a recanting of the story, and the child learns not to trust his or her own judgment. Alternatively,

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31. American Humane Association, Highlights of Official Child Neglect and Abuse Reporting (1987).

32. Spungen, Jensen, Finklestein & Stinsky, *Child Personal Safety: Model Program for Prevention of Child Sexual Abuse*, 34 Soc. Work 127 (1989). the most commonly reported type of sexual abuse is between father and daughter or between step-father and step-daughter. Clark, The Law of Domestic Relations in the United States 346 (1988).

33. *See, e.g.*, Cal. Welf. & Inst. Code § 300(d) & (f) (sexually abused children may be adjudged dependent of the court).

the removal of the child causes a significant upheaval for the child, destroys the security of home and known family caretakers, and causes the child to believe that she is a bad person and consequently is being punished by being removed from the home. Both of these alternatives may create irreparable and permanent breaches among family members.[34] Legally, we have protected the child from further abuse; systemically, we have added to the crisis. We have produced an iatrogenic system—one where the cure produces another illness.

IX. Recommendations

A. Participatory Case Determination Conferences

As with the domestic abuse scenario above, the goal is to stop the abuse and to treat it. A case determination conference using a specially trained facilitator to assist the family members to surface the issues, to explore the available options, and to determine a course of action may be more successful than the external decision-making of our present system.

The facilitator can educate the parties regarding the legal procedures that may be implemented and the community and court-connected resources that are available to them. This education may successfully balance the equation between the court's obligation to represent society and protect the child and the obligation to support the family in resolving its conflict.

B. Combining Legal and Therapeutic Interventions

Some studies have shown that the authority of the legal system and prosecution of the perpetrator coupled with family therapy address the dual needs of sanction and treatment. The abusive behavior is not minimized while family functioning is maximized through treatment.

Referrals to specially designed sexual abuse counseling programs may be utilized by the court system. These programs can be sup-

34. Blush & Ross, *Sexual Allegations in Divorce: The Said Syndrome*, 25 Conciliation Cts. Rev. 1 (1987).

plemented by family foster care, safe houses, supervised visitation, and support groups for children and adults.

X. Scenario V. The multi-conflict family

> What happens when our divorcing couple, Susan and John Brown, are not only involved in the divorce process, but there is an allegation by one parent of sexual abuse of a child . . . or when one or more of the children are referred to juvenile court during the pendency of a custody dispute . . . or when an incident of domestic violence occurs during the pendency of the divorce action. The Browns could find themselves mired in the legal system and paralyzed between the jurisdictions of civil, criminal and juvenile court. A custody investigation may have been commenced in one jurisdiction while the parties are being referred to mediation in another. A parent may have been granted visitation by one court while being denied contact by another court during the pendency of a sexual abuse investigation.

These five scenarios illustrate the tangled web that families find themselves in when faced with family conflicts that require legal intervention. Although we have made considerable progress in revising our laws and procedures related to domestic relations, these illustrative scenarios demonstrate that our present system continues to introduce further conflict into the family.

The bifurcated practices of legal procedure, the adversary system, and the lack of coordination between the law and other community resources force families to resolve family conflicts in a system ill equipped to address the underlying causes of family crisis. Courts increasingly turn to court-connected resources such as counseling, mediation, child custody investigation units, and sensitive crime divisions to assist with the complexity of these family issues. The question no longer is what should a judge do in these matters but rather how do we match the appropriate procedures with the identified issues and in a manner that allows the family to have a say in the methods of intervention.

Of course, new procedures present new procedural problems. How do we protect the interests of children or of absent or unrepresented parties? How do we determine which disputes are appropriate to be addressed privately and which disputes require a public airing and the precedence of law and appellate procedures?

XI. Recommendations

A. The Comprehensive Family Court

The establishment of a Family Court having jurisdiction over all interpersonal and family related conflicts would acknowledge that family law conflicts are a binary equation—they are "compounded or consisting of or marked by two things or parts; composed of two chemical elements, an element and a radical that acts as an element, or two such radicals."[35] Family conflicts are not solely legal issues any more than they are solely sociological. Family conflicts can not be isolated in a legal vacuum nor can they be isolated from the protections provided by our legal system. But, our present legal procedures do not provide the triage[36] to adequately address the complexity of legal and social conflicts presented by family disputes.

Family disputes require procedures which integrate the societal protections provided by the law with the remedial interventions provided by social services, court-connected agencies and mediation. A true Family Court would allow for the specialization of court personnel and the cross-referencing of multiple family conflicts. A Family Court could consolidate the use of alternative dispute resolution approaches, such as arbitration, mediation, settlement conferences, case status determination conferences with more authoritative, and investigatory procedures without duplicating services.

Case tracking can be facilitated by cross indexing and the use of computer referencing of cases as they come into the legal system.[37] Master calendaring would reduce the occurrence of conflicting orders and procedures.

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35. Webster's New Collegiate Dictionary 109 (____ed. 1979).

36. *Id.* at 1237 (the sorting of and allocation of treatment . . . according to a system of priorities designed to maximize the number of survivors).

37. Gaddis, *A Protocol for the Judicial Management of Family Violence Cases*, 25 Conciliation Cts. Rev. 19, 20 (1987).

B. Specialized Intake Personnel and Procedures

The Family Court can be staffed with intake personnel who are specially trained to discern those cases which require external decision-making as opposed to those cases which are amenable to self-determination. These intake personnel would function as the courthouse traffic director helping the disputants determine which procedures are most likely to resolve the problems. This approach is similar to the provisions of the Multi-Door Courthouse proposed by Harvard Professor Frank Sander[38] and the concept of the Complete Courthouse proposed by Eric Green.[39]

The heart of the multi door courthouse is the initial intake screening.[40]

> Here disputes would be analyzed according to various criteria to determine what mechanism would be best suited for the resolution of the problem . . . The notion thus is that a sophisticated intake officer would analyze the dispute and refer it to that process, or sequence of processes, most likely to resolve it effectively. The potential benefits of such an approach are enhanced responsiveness and effectiveness, possible time and cost savings, and the legitimization of various alternative dispute resolution processes; which should result in less frustration among the populace in dealing with the vagaries of the legal system.[41]

C. Court-connected Services

A Unified Family Court was established in several provinces in Canada in the 1970's. The Unified Family Court has two fundamental racteristics: First, that the court must exercise a comprehensive and exclusive jurisdiction over family law matters; and second, the administrative, counseling, legal, and enforcement services must be established in or near the court. The objective of these services is to promote the settlement of family disputes and to avoid recourse to more formal and adversarial legal proceedings.[42]

38. Sander, *Varieties of Dispute Resolution: Pound Conference Address*, 70 F.R.D. III (1976).
39. E. Green, The Complete Courthouse: Dispute Resolution Devices in a Democratic Society 15-70 (1985).
40. *Id.* at 54.
41. S. Goldberg, E. Green & F. Sander, Dispute Resolution (1985).
42. Payne, *Future Prospects for Family Conflict Resolution in Canada*, 24 Conciliation Cts. Rev. 51, 62 (1986).

A New Zealand Family Court has been established since 1981. The most notable aspect of the newly created Family Court is the provision for specialized assistance for the presiding judges. The New Zealand Marriage Guidance Council, a national network of specially trained volunteers, provides counseling services to disputants before they are permitted to air their grievances in court.[43] A court employed Counseling Coordinator serves as the traffic director helping the parties determine what services are needed and assisting with referrals to appropriate community resources.[44]

A Family Court system across the United States would consolidate the procedures appropriate to the disposition of the case and resources appropriate to the issues at hand. Advocates of alternative dispute resolution techniques argue that the further removed the parties are from the settlement process, the less satisfactory is the resolution. The further removed the parties are from the selection of procedures, the less satisfactory are the procedures. The comprehensive Family Court unites the procedural and substantive aspects of conflict resolution. From this author's perspective, we will see less change in the substantive matters of family law over the next decade. We need to see changes in the procedural aspects of family law. The establishment of the comprehensive Family Court with specialized personnel and services will begin to effect that change.

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43. Cartwright, *The New Zealand Family Court—An Overview*, 25 CONCILIATION CTS. REV. 29, 31 (1987).
44. *Id.* at 29.