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# Comments on the Miller Commission Report: A California Perspective

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## I. Introduction

In February, 2004, New York Chief Judge Judith S. Kaye established the Matrimonial Commission (the Commission)[2] to examine all facets of divorce and custody law and practice in New York State and to recommend reforms to reduce "[t]rauma, cost and delay to the parties, and most importantly the children" who participate in the system.[3] After almost two years of work, the Commission issued its report in February of 2006 along with a collection of appendices. The report included a review of the current law and practice, identified a number of areas that the Commission believed should be changed, and made a series of recommendations. It acknowledged that some of the recommended changes could only be accomplished by legislation, but noted that others could be implemented by administrative action.

The Commission hosted a conference in New York City on October 6, 2006, to review and discuss the report and its recommendations. Commentators from around the country addressed an assembly of close to two hundred judges, attorneys, court administrators, and mediators from New York. This article sum-

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1. The author is a Judge-in-Residence with the California Administrative Office of the Courts. He retired from the Superior Court of California, County of Santa Clara in 2006 after twenty-six years on the bench. The author wishes to thank the following persons for assistance with this article: Emily Hobbins, Steve Baron, George Ferrick, Christine Cleary, Julia Weber, Linda Syzmanski, and Charlene Depner.

2. The Miller Commission's name derives from the Chairperson of the Commission, Honorable Sondra Miller, Associate Justice, Appellate Division – Second Department.

3. *Matrimonial Commission of the State of New York, Report to the Chief Judge of the State of New York* (Feb. 2006), http://www.nycourts.gov/reports/matrimonialcommissionreport.pdf.; available at Appendix A. [hereinafter THE REPORT]. Judge Kaye's announcement was a part of The State of the Judiciary 2004 speech given on February 9, 2004.

marizes some of the observations and recommendations made by the commentators, and particularly by the author, who is a recently retired judge from California. It also reviews the experience that California has had with child custody disputes within its court system in the hope that this perspective might be useful to colleagues in New York and elsewhere.

## II. The Miller Commission Report

The Miller Commission Report (The Report), released in February of 2006, addressed a wide range of topics under four main headings: "The Judiciary and Administrative Process," "Role and Appointment of Attorney for the Child," "The Role and Appointment of Experts," and "Access and Equity in Matrimonial Litigation."[4] In summary, The Report made the following recommendations:

A. Court System Administration: Elevate the status of the Statewide Administrative Judge for Matrimonial Matters, paying special attention to:

+ The recruitment, assignment and length of assignment of matrimonial judges;

+ The identification of dedicated judges and the designation of supervising matrimonial judges;

+ Increasing resources, including the addition of judicial officers to the Matrimonial Part together with improved facilities;

+ Improving the process for selection and training of judges for matrimonial cases.

B. Improving the Court Process: Amend the state Domestic Relations Law to provide for no fault divorce, and to include no presumptions regarding the award of custody; create a number of events or stages through the life of a custody case that would address screening for services, a preliminary conference held early in the case, and a three-tiered time line for the processing of contested divorce matters. The Report also addresses the problems inherent in a court system with two levels of courts

4. *Id.*

capable of determining custody, parenting time, and other issues.[5]

C. Alternative Dispute Resolution (ADR): Increase the use of ADR and particularly mediation in matrimonial matters. The decision to mediate would be made early in the case, but would occur only by stipulation by both parties or by judicial order. Mediation referrals would not be made where there is domestic violence, child abuse allegations, or severe power imbalance between the parties. All ADR would be conducted in confidence, and attorneys would be urged to discuss ADR options with their clients. All persons in the court system including judges would be fully and extensively educated about ADR programs, and statewide guidelines would be developed for the qualifications and training of mediators, early settlement panelists, and parent coordinators. It is notable that a major portion of The Report deals with ADR, particularly with mediation.

D. Statewide Parent Education and Awareness Program: Building on the success of current state-supported parent education, judicial officers would be empowered to order parents to attend a parent education program. Related to this, The Report recommends that the Office of Court Administration (OCA) develop parenting programs where they do not currently exist and that the OCA promulgate rules defining all aspects of the program, including its administration and its processes.

E. Process Related Topic: Statewide automatic orders would be developed along with instructions, that certain issues (support and fees) not be stayed on appeal without judicial order, that signed orders be permitted to be faxed, and that uniform court processes be utilized in all counties.

F. Role and Appointment of Attorney for the Child:

+ Develop a rule describing the duties of an attorney for the child;

+ Leave with the court the decision to appoint an attorney for the child;

+ Expand education for attorneys for children;

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5. The New York court system gives jurisdiction over matrimonial cases to two separate courts, the family court and the supreme court. The Commission was not asked to make recommendations regarding the structure of the state court system, but it is clear to the author that many judges and attorneys in New York have strongly held opinions on this issue. This paper will address some of these concerns *infra* pp. 658-76.

+ Further educate judges on issues relating to the appointment of attorneys for children, including the duties and obligations of a child's attorney;

+ Change the law to give the court authority to enter orders regarding the payment of attorneys for children.

The Report also recommended that the attorney for a child should not be considered a fiduciary.

G. The Role and Appointment of Experts: The Report makes several recommendations regarding the qualifications, training and appointment of experts in matrimonial cases, including the following:

+ Statewide standards for minimum qualifications of evaluators, including training and periodic review;

+ Implementation of a uniform appointment order;

+ Development of a detailed framework for the conduct of an evaluation and the content and use of an evaluation report.

The Report further recommended that the judicial officer should determine whether an expert can give an opinion regarding custody.

H. Access and Equity in Matrimonial Litigation:

+ Provide assigned counsel in the supreme court when the case has been transferred and litigants are eligible;

+ Expand assigned counsel programs and establish a panel of certified attorneys;

+ Address diversity issues, including development of training and education about diversity;

+ Create a task force to research and make recommendations about a number of issues, including "divorce mills" and the use of interpreter services in the courts;

+ Enact legislative measures to promote the equitable treatment of same sex couples in the handling of custody and parenting time issues.

On the issue of attorney's fees, The Report recommends that interim attorney fees be awarded by the court (unless good cause be found by the court), that marital assets be available for such fees, that limited appearances by attorneys be permitted by law, and that the court be given contempt power over willful failure to pay attorney's fees.

I. Role of the Bar: The Report recommends that the organized bar continue to provide pro bono assistance to low and moderate income litigants, and that mandatory continuing legal education be required in the area of matrimonial law and practice be required of all attorneys practicing in this area.

## III. The Importance of Positive Resolution of Family Custody Issues

Should those within the court system be concerned about the impact that divorce and/or the adversarial process has upon families and children? Chief Judge Judith Kaye affirmatively responded to this question when she first was appointed Chief Judge over ten years ago. One of her first efforts to reform the New York court system was the creation of a process that led to new rules governing attorney-client relationships and case management in matrimonial matters.[6] Then, in 2004, she created the Matrimonial Commission to continue court reform in matrimonial matters. She asked that the Commission examine every facet of the divorce and custody determination process and recommend reforms to reduce trauma, delay and cost to parents and children so personally impacted by the system. Implicit in this action was the notion that the Matrimonial Court could make improvements that would benefit the families that appear before it.

The Governor's Task Force in Maryland highlighted the importance of positive outcomes in family matters more than a decade ago when it stated:

> The goal of a court dealing with family disputes should be more than simply resolving the particular issues before them. Rather, such resolution should leave the family with the skills and access to support services necessary to enable them to resolve subsequent disputes constructively with a minimum need for legal intervention.[7]

The impact of the court system on families as they attempt to resolve custody and other family issues can be positive or

6. JUDITH S. KAYE, THE STATE OF THE JUDICIARY 2 (2004), *available at* http://www.nycourts.gov/admin/stateofjudiciary/soj2004.pdf.

7. GOVERNOR'S TASK FORCE ON FAMILY LAW (Maryland's Committee on Family Court and Family Service, Oct. 1992).

negative.[8] If it is to be positive, it should be able to empower the family by teaching it skills and enhancing family members' ability to solve their own problems in the future. A court system seeking to improve outcomes for families should adopt policies and procedures that will enhance family ties in the future, encouraging both parents to stay involved with and connected to the children of the relationship. If the impact of the court system is negative, it could leave the family fractured, with winners and losers, and with the strong possibility that one parent may not participate fully in the life of the children.

Implicit in Judge Kaye's efforts to reform the New York court system is her understanding that a child custody dispute is a highly significant event in family life. The outcome of a custody dispute will determine where a child will live, what access each parent will have to the child, and what decisions each parent will be able to make about the child's future. State courts have been entrusted as the final decision makers in contested custody matters. It is important for the court system to take advantage of this opportunity to make the resolution of child custody matters as positive as possible. An empowering process will leave the parents in a better position to deal with future custody issues and leave the children of the relationship less traumatized. It will also maximize the chances that the non-custodial parent will stay connected to the children, thus providing both emotional and financial support to them. Finally, a court process that strengthens family ultimately strengthens the community.

## IV. The Miller Commission Symposium

On October 6, 2006, the Commission convened a symposium in New York City, "Improving Justice for Children of Divorce and Separation," to address its report and recommendations. Attended by over two hundred judges, attorneys, mediators, mental health providers, and law students, it

8. One of the classic texts on the impact of separation on the family is JUDITH S. WALLERSTEIN & JOAN KELLY, SURVIVING THE BREAKUP (1980). Moreover, it is now clear that the impact of separation and divorce on children is usually negative, cumulative and long-lasting. Judith S. Wallerstein & Julia Lewis, *The Long-Term Impact of Divorce on Children*, 36 FAM. & CONCILIATION CTS. REV. 368 (July 1998).

featured nine invited speakers including researchers, dispute resolution experts, attorneys, and judges from around the country. The agenda for the day also included an opportunity for all attendees to gather in small groups and discuss the report and the observations by the invited speakers. The focus of the small group sessions and the final plenary session was to address the question: "Where do we go from here?"

Most of the speakers focused their comments on the recommendations about the expansion of ADR procedures in New York. Other Report recommendations apparently were either not controversial or were acknowledged to be within the power of the New York judiciary and legislature to address without additional support or comment. Thus, both Marsha Kline Pruett, Ph.D., from Connecticut and Robert F. Emery, Ph.D. from the University of Virginia described the data they had collected regarding the long term effects of ADR on divorcing families. Judge Robert Ross of New York and Judge Julia Dewey of Connecticut discussed the effectiveness of on-going ADR programs in their courts. Barry Amata, Esq. of Connecticut also discussed the successes of ADR in his state, while Sharon Press, Esq. discussed the significant Florida experience with ADR, and Judge Leonard Edwards (the author of this article) discussed the California experience. Two New York judges, Judge Janice M. Rosa and Judge Jeffry S. Sunshine, described their current ADR efforts within New York State.

## V. The California Experience With Child Custody Cases

### A. *Background*

California, the most populous of the United States, with over thirty-six million people, has fifty-eight counties ranging in population from about one thousand (Alpine County) to approximately ten million (Los Angeles). In 1970, California became the first state to adopt no-fault divorce. Ten years later in 1980, California became the first state to adopt mandatory mediation in contested child custody and parent time cases.[9] The process that led to the enactment of each law was complex, involving

9. California may have been the first state to adopt mandatory mediation, but it was far behind Japan, a country that turned to mandatory mediation in 1947. *See* SUPREME COURT OF JAPAN, GUIDE TO THE FAMILY COURT OF JAPAN 6, 18 (2004).

judges, counselors, attorneys, researchers, law professors, and clients in addition to political leaders in the legislative and executive branches.[10] Since that time child custody mediation has been implemented in each of California's fifty-eight counties, and child protection mediation has spread to twenty-three of the state's juvenile dependency courts.[11] Both the California Administrative Office of the Courts and private researchers have evaluated the state's mediation services.[12] These evaluations have addressed many issues including whether mediation is effective in resolving disputes, whether it saves the courts time, whether utilizing mediation results in longer-lasting and more positive case resolutions, and whether clients, attorneys, and judges are satisfied with the mediation process.

### B. *History of Mandatory Mediation in Child Custody Matters*[13]

Before 1970 all state laws regarding marriage and divorce were modeled on age-old legal and religious traditions.[14] At one time, divorce was not permitted by certain religions and by some state laws. Annulment was utilized under certain circumstances, particularly where the church forbade divorce, and where the parties believed that marriage was sacred. An annulment permitted the parties to declare that there never was a marriage because of some defect in the marital process.[15] As

10. For the history of custody mediation in California, see Leonard P. Edwards, *The Mediation Miracle*, CAL. CTS. REV. 16-20 (Spring 2006) [hereinafter *The Mediation Miracle*].

11. CALIFORNIA JUVENILE DEPENDENCY COURT IMPROVEMENT PROGRAM REASSESSMENT 3-15 (Ctr. for Families, Children & the Cts, Nov. 2005), http://www.courtinfo.ca.gov/programs/cfcc/pdffiles/CIPReassessmentReport.pdf [hereinafter DEPENDENCY COURT REASSESSMENT].

12. *See, e.g.*, *Demographic Trends of Clients in Court-Based Child Custody Mediation*, RESEARCH UPDATE (Center for Families, Children & the Courts, San Francisco, Cal.), July 2005. Other evaluations are reviewed *infra* pp. XXXX.

13. Some of this history is based upon the article *The Mediation Miracle*, *supra* note 10, at 19-20.

14. For information on the "no fault" divorce revolution, see ROBERT MNOOKIN AND ELEANOR MACCOBY, DIVIDING THE CHILD: SOCIAL & LEGAL DILEMMAS OF CUSTODY 5-6 (1992) [hereinafter DIVIDING THE CHILD]; Philip L. Hammer, *Divorce Reform in California: The Governor's Commission on the Family and Beyond*, 9 SANTA CLARA L. REV. 32 (1968); Susan W. Reppy, *The End of Innocence: Elimination of Fault in California Divorce Law*, 17 UCLA L. REV. 1306, 1307-14 (1969).

15. N.Y. DOM. REL. LAW § 140 (McKinney 2007).

divorce laws were relaxed, it became possible to obtain a divorce if one could prove that the other spouse was at fault. The "at-fault" divorce laws brought the parties before the court with the task of proving that one or both of the spouses had done something so blameworthy that divorce was legally justified. Often adultery provided the factual basis for an at-fault divorce.[16]

### C. *The Adversarial Process*

Divorces, whether "fault" or "no-fault," have had to proceed through the legal system and the adversarial process. The adversarial process is the foundation of the legal system in the United States. Lawyers learn about and are trained in this process from the time they enter law school. The fundamental idea behind the adversarial process is that the best answer to a legal problem will result from the presentation of evidence by the two sides of a legal problem to a neutral judge. Each side presents the best evidence available from that side's perspective while at the same time attacking and minimizing the importance of the evidence presented by the other side. The judge then decides what "the truth" is.[17] The principle tool used by the attorney is cross-examination of a witness where the attorney for one side has the opportunity to ask questions of the witnesses called by the other side. Many attorneys pride themselves on their ability to use the adversarial process effectively to win their cases.[18] The judge's role in the adversarial process is comparable to that of a referee in a match, making certain that the rules are followed, and then finding the best result after hearing the evidence from the two sides.[19]

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16. Fault divorce also made perjurers out of some parents. Those who wished to have a divorce had to state that one of the parents had committed a blameworthy act (adultery, etc.) even if that fact was not true. *See* Reppy, *supra* note 14, at 1307.

17. Wikipedia, Adversarial System, http://en.wikipedia.org/wiki/Adversarial_system (last visited Mar. 13, 2007).

18. "I would say to the client, if you're interested in settlement, you go and talk to the other side about it, I'm very bad at it. My job is to manage a war, not to manage a peace." Julie Macfarlane, *Will Changing the Process Change the Outcome? The Relationship Between Procedural and Systemic Change*, 65 LA. L. REV. 1487, 1491 (2005).

19. Wikipedia, Basic Features of the Adversarial System, http://en.wikipedia.org/wiki/Adversarial_system (last visited Mar. 13, 2007).

At-fault divorces often take full advantage of the adversarial process.[20] In contested cases each side attempts to prove that the other has committed blameworthy acts. Private investigators frequently are employed, and the strong, get-tough lawyer is seen as a valuable asset for a party seeking to win the case. These attorneys bring all of their advocacy and adversarial tools to the matrimonial court, along with the high costs of litigation, both financial and emotional. At the conclusion of the presentation of the evidence, the court is given the power to determine the property division, support, and custody/visitation issues for the parties. The at-fault party is often punished by the court for the actions leading to the divorce. Property can be unevenly divided, and children are likely to be placed with the aggrieved/innocent party. Perhaps most significantly for the children of the marriage, the relationship between the parents is often further damaged by the legal proceedings. The children are exposed to the emotional ups and downs of the divorce process, and are likely to suffer the consequences of poor parental relations in the years following the divorce.

There are many critics of the adversarial process,[21] and the criticism is strongest when families are involved.[22] Critics point

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20. *See generally* Andrew Schepard, *The Evolving Judicial Role in Child Custody Disputes: From Fault Finder to Conflict Manager to Differential Case Management*, 22 U. ARK. LITTLE ROCK L. REV. 395, 400 (2000).

21. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, *in* HANDBOOK FOR JUDGES 287, 287-88 (American Judicature Society 1975); ROBERT W. TOBIN, CREATING THE JUDICIAL BRANCH: THE UNFINISHED REFORM (National Center for State Courts 1999):

> The adversarial process is in trouble, because it is perceived as lacking both integrity and respect for persons. The system stands accused of producing a shoddy form of justice that is divorced from the truth, demeaning those who participate in the process, and denying access to many who might invoke the aid of the system . . . . It is traumatic for participants, costly in money, lengthy, and not particularly reliable as a means of justice. The whole process seems clouded in legal mythology and remarkably hostile to the laity. Inexpensive and less harrowing alternatives abound but are still not fully institutionalized. The underlying premises of the adversarial system are due for reexamination.

*Id.* at x-xi. It is an obsolete relic of ancient customs like trial by ordeal and divine law. ANNE STRICK, INJUSTICE FOR ALL 21 (1977).

22. Worst of all, it is an adversary system that not only allows people to fight, it encourages it, even for most of those divorcing these days who I find do not want to fight. It is a system in which we require every case to fit the system, not one where the system is flexible enough to fit the case. Donald B. King, *Family Law*

to the harm that engaging in adversarial tactics can bring—harm in the use of cross-examination on vulnerable witnesses, in the expense of engaging in prolonged discovery, and the ultimate harm created when there are winners and losers in each case[23] leading to mounting distrust and alienation between parents.[24]

> The traditional adversarial approach of trial courts creates new barriers to this relationship, rather than breaking down the old barriers. Public accusations in the courtroom, cross-examination, exposing confidences within the family, anxieties caused by courtroom settings and humiliation are all the direct results of in court proceedings. Experience has shown that this kind of formal dispute resolution not only creates hostility and anger, but also intensifies the basic problem rather than offering solutions.[25]

While many juvenile and family court observers believe that the adversarial process can be damaging to family members and to future family relationships,[26] others go even further

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*Courts–A Better Way* (2004) (on file with author). Gregory Firestone & Janet Weinstein, *In the Best Interests of Children: A Proposal to Transform the Adversarial System*, 42 FAM. CT. REV 203 (2004) [hereinafter *In the Best Interests of Children*]. "In litigation, even if you get a good legal result for the client . . . at the end of it there is just depression and ashes. It leaves more than a sour taste – it leaves a sickness in the stomach of the client and in mine too." Julie Macfarlane, *Experiences in Collaborative Law: Preliminary Results from the Collaborative Lawyering Research Project*, 2004 J. DISP. RESOL. 179, 194 (2004).

23. Black's Law Dictionary defines the adversary system as "involving active and unhindered parties contesting with each other to put forth a case before an independent decision maker." BLACK'S LAW DICTIONARY 54 (7th ed. 1999). Winners and losers in child custody cases can often lead to children losing a relationship with one of their parents. *In the Best Interests of Children*, *supra* note 22, at 204.

24. Macfarlane, *supra* note 22, at 194; Heather Crosby, *The Irretrievable Breakdown of the Child: Minnesota's Move Towards Parenting Plans*, 21 HAMLINE J. PUB. L. & POL'Y 504 (2000).

25. Robert Page, *Family Courts: An Effective Judicial Approach to the Resolution of Family Disputes*, 44 JUV. & FAM. CT. J. 30 (1993).

26. "By the time the adversary process ends, the parties can be financially devastated, emotionally drained, and permanently embittered." Robert W. Lueck, *The Collaborative Law (R)evolution: An Idea Whose Time Has Come in Nevada*, NEVADA LAWYER, Apr. 2004, *available at* http://www.nvbar.org/publications/Nevada%20Lawyer%20Magazine/2004/April/CollLaw.htm. "The costs of litigation, especially for children, are clearly demonstrated by research and recognized by many disillusioned lawyers." *See generally* Changing the Process, *supra* note 18 (citing numerous sources); ROBERT EMERY, MARRIAGE, DIVORCE, AND CHILDREN'S ADJUSTMENT (2d ed. 1999); PETER MCCARTHY ET AL., LONGITUDINAL STUDY OF THE IMPACT OF DIFFERENT DISPUTE RESOLUTION PROCESSES ON POST-DIVORCE RELA-

and state that the adversarial process is an ineffective means of reaching the truth.[27] An experienced researcher and clinician concluded that the adversarial process is "unwieldy, expensive, unsatisfactory, and unnecessary for [a] large number of divorcing parents wanting to reach good agreements about their children."[28]

The critics have been somewhat persuasive, and some recently enacted legislation, judicial rulings, and court procedures have acknowledged the harmful effects of the adversarial process by taking steps to reduce those effects. For example, in many states victims of crime may have a support person accompany them when they appear in court to testify.[29] The California legislature passed a law instructing the court and parties in juvenile child protection cases to conduct them in a non-adversarial setting.[30] Rules of evidence have been modified to reduce the fear and intimidation that a witness might experience under cross-examination and make it more likely that the truth will come out.[31] Both statutory changes and case law have

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TIONSHIPS BETWEEN PARENTS AND CHILDREN, REPORT TO THE FUND FOR RESEARCH ON DISPUTE RESOLUTION (1992); Joan B. Kelly, *Children's Adjustment in Conflicted Marriage and Divorce: A Decade Review of Research*, 10 J. CHILD. & ADOLESCENT PSYCHIATRY 237 (2003).

27. "[C]ounsel having objected to a piece of documentary evidence, which appeared to be relevant to the case but inadmissible in law, the judge asked: 'Am I not to hear the truth?' an enquiry which sounds reasonable enough, but which attracted the somewhat startling answer: 'No, Your Lordship is to hear the evidence.'" 1 PETER MURPHY, MURPHY ON EVIDENCE 1 (Blackstone Press 5th ed. 1995).

28. Joan B. Kelly, *The Determination of Child Custody*, 4 THE FUTURE OF CHILDREN 137 (Spring 1994).

29. *See, e.g.*, CAL. PENAL CODE § 868 (West 2007).

30. "Except where there is a contested issue of fact or law, the proceedings shall be conducted in an informal non-adversary atmosphere with a view to obtaining the maximum cooperation of the minor upon whose behalf the petition is brought and all persons in his or her welfare with any provisions that the court may make for the disposition and care of the minor." CAL. WELF. & INST. CODE § 350(b) (West 2007).

31. CAL. EVID. CODE § 765 (West 2007) instructs the court to control interrogation of witnesses and to protect witnesses from embarrassment or harassment. The section further instructs the court to ensure that questions asked of witnesses be "[r]easonably likely to be understood by a person of the age or cognitive level of the witness." CAL. EVID. CODE § 767(b) provides that the court may permit leading questions to be asked of a child under ten years or a dependent person with a substantial cognitive impairment in certain cases. CAL. EVID. CODE § 767(b).

made it possible for certain victims of crime to testify outside the presence of the accused.[32]

There are few remaining defenders of using the adversarial process in family matters. However, legal systems and culture are difficult to change. It takes bold leadership and considerable effort to overcome the inertia of legal practices and traditions that trace their roots to the Middle Ages.

### D. *The Beginnings of Change*

Critics of the adversarial process for the resolution of family matters in California appeared as early as the 1960s.[33] Judges and attorneys within the legal process and counselors and legal scholars observing the process argued that the legal system had to be changed for the sake of the court system and the families who appeared there. Nor was the public pleased with the process. Those who had to use the legal system to settle their divorces often found themselves in shambles after the process was over.

Before 1960, California had a modest tradition of assisting families through the divorce process.[34] The California Conciliation Court Act of 1939 permitted the creation of "conciliation courts" in the court system.[35] The original idea was that counselors might help parents reconcile and preserve the marriage, but the most valuable result was the introduction of trained counselors into the divorce process. Although at first only sixteen of California's fifty-eight counties were able to afford such counselors, their assistance to families was significant. They were able to counsel families about their separation and help them focus on the needs of their children. Their successes were noticed by others including attorneys and judges. Soon the idea

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32. Maryland v. Craig, 497 U.S. 836, 837 (1990) (closed circuit television); CAL. WELF. & INST. CODE § 350(b) (West 2007); CAL. R. CT. 5.534 (West 2007); CAL. PENAL CODE § 1247 (repealed 1999) (West 2007).

33. REPORT OF THE GOVERNOR'S COMMISSION ON THE FAMILY (Sacramento, Ca. 1966). The California Governor, Edmund G. Brown, created the Commission with the following message: "the time has come to acknowledge that our present social and legal procedures for dealing with divorce are no longer adequate." Hammer, *supra* note 14, at 32 (citing *Letter to the Governor's Commission*).

34. This portion of the article draws heavily from *The Mediation Miracle*, *supra* note 10.

35. *See* CAL. FAM. CODE § 1800 (West 2007).

of counseling became a topic of discussion among those seeking to improve the family court process.

Underlying these changes was the philosophical position that the court system should provide a framework in which parents can determine their post-dissolution rights and responsibilities with respect to their children. Professor Robert Mnookin, who was an active participant in the California reforms, referred to this process as "private ordering," meaning that the court system has a role to inform, educate, and thus empower parents so that they can make intelligent agreements regarding the future of their family life.[36]

Another source motivating the change was the Report of the Governor's Commission on the Family, issued in 1966. It was the product of a multi-disciplinary commission including judges, family law attorneys, researchers, and experts in family law proceedings. The report recommended significant changes in the law and resulted in the passage of the California Family Law Act of 1970, establishing the nation's first no-fault divorce law. Under the new law, parties did not need to prove that one or the other was at fault, but only that irreconcilable differences had arisen making continuation of the marriage impossible.[37] This law was a major step towards giving parents more control of their relationships and moving away from the adversarial process.

California's population exploded during the 1970s and 1980s as did marital dissolutions.[38] Family courts tried to find

36. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 992 [hereinafter *Bargaining in the Shadow of the Law*]; Robert H. Mnookin, *Divorce and the Law, Mediation of Child Custody and Visitation Disputes,* a part of the materials prepared for the Vallambrosa Retreat in 1981 (copy available from author). *See also* Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226 (Summer 1975).

37. CAL. FAM. CODE § 2000 (West 2007).

38. JAN PRYOR & BRYAN RODGERS, CHILDREN IN CHANGING FAMILIES: LIFE AFTER PARENTAL SEPARATION (2001). More than forty percent of first marriages in the United States are still predicted to end in divorce. ARTHUR J. NORTON & LOUISA F. MILLER, U.S. DEPARTMENT OF COMMERCE, MARRIAGE, DIVORCE, AND REMARRIAGE IN THE 1990S, U.S. Bureau of the Census, 23-180 (1992). Of course, that does not take into account children born to unmarried parents. *See also* STATE COURT CASEBOOK STATISTICS, ANNUAL REPORT (Nat'l Ctr. for State Cts. 2004), *available at* http://www.ncsconline.org/D_Comm/UCSCAnnlRpt_Archives/04AnnualReport.pdf (last visited Mar. 13, 2007).

creative ways to deal with their increased caseloads. Several courts began using the conciliation court counselors in creative ways. In 1973, Los Angeles, Santa Clara, San Diego, Alameda, San Francisco, and a few other courts began to send family cases to the conciliation counselors in the hope that the cases would resolve. Their success rates were excellent. Counselors reported that by using counseling and mediation techniques, parents could reach agreements in a great majority of the referred cases.

The successes in these counties led to a movement to make mediation available in all counties. An Advisory Commission on Family Law recommended that mediation become mandatory statewide.[39] In 1980, after two years of deliberations in the state legislature, SB 961 (Sieroty) became law, mandating mediation in all California contested family court child custody matters.[40] Much of the credit for the passage of this law must go to consumers who argued to the legislature and to the Governor who agreed that the current system was not working.[41] The new law mandated that mediation take place before litigation on matters of custody or visitation. It specified the training and experience that professionals needed to have in order to qualify as mediators, as well as continuing education requirements. The inclusion of mediation into the marital dissolution process was a significant step in the movement towards family self-determination or "private ordering" and gave parents more control of their lives during and after separation. The legislation also included an increase in marital dissolution filing fees to pay for the financing of the mediation programs.

Legislation enhancing the mediation process was passed in 1984, when AB 2445 (Farr) was enacted. This law created both a statewide Office of Family Court Services and identified resources for the funding of research. The office was officially established in 1986 within the California Administrative Office of

39. CONCILIATION COURTS, MEDIATION, COUNSELING AND FAMILY COURT COORDINATION, SECOND REPORT (Ca. Advisory Commission on Family Law May 1979).

40. Hugh McIsaac, *Mandatory Conciliation Custody / Visitation Matters: California's Bold Stroke*, 19 CONCILIATION CTS. REV. 73 (Dec. 1981), *available at* http://www.blackwell-synergy.com/doi/pdf/10.1111/j.174-1617.1981.tb00070.x.

41. *Id.* at 73, 75.

the Courts, and Isolina Ricci, an author, mediator, and researcher, was named its first director. In 2000, the Office of Family Court Services was integrated into the Center for Families, Children & the Courts, a division of the Administrative Office of the Courts.

Since the enactment of mandatory mediation, the California courts have been able to evaluate the mediation process on an on-going basis. As a result, problems have been identified, and additional legislation and new California Rules of Court have strengthened standards of practice for mediation in the state.[42] In 1991, the Judicial Council adopted uniform standards of practice for court-connected child custody mediation in California. These standards address the way mediation should be conducted, the requirement of continuing education for mediators and the methods of dealing with parents who have unequal power in their relationship. A critical issue was identified by a number of mediators and courts – what to do when one of the participants in mediation had been the victim of domestic violence. Local protocols were developed, and the Judicial Council ultimately adopted a statewide protocol for mediation, including special provisions dealing with mediation when there has been domestic violence,[43] as well as laws and court rules relating to domestic violence training for mediators and others involved in the child custody determination process.[44]

### E. *Resolving Custody Conflicts in California Courts*

In the past fifty years, California's courts have become the site for the resolution of increasing numbers of family conflicts. During these years California's population has sharply increased from approximately 10,000,000 in 1950 to over 36,000,000 in 2006. The work of the courts in family matters has increased proportionally. Statistics indicate that fifty percent of all marriages in the state will end in divorce with an even higher percentage in Southern California.[45] Additionally,

42. *See* CAL. R. CT. 5.210, 5.215, 5.220, 5.230 (West 2007).

43. CAL. R. CT. 5.215.

44. CAL. FAM. CODE § 1816 (West 2007); CAL. R. CT. 5.210, 5.215, 5.220, 5.225, 5.230.

45. *See* Center for Disease Control, *Births, Marriages, Divorces, and Deaths: Provisional Date for 2005*, 54 NAT'L VITAL STAT. REP. 1 (July 2006).

the state's population has become more diverse, less familiar with the English language, and more likely to be self-represented in domestic relations matters.[46]

As a result of the population explosion, California's courts have not been able to keep up with the need for judges, subordinate judicial officers, courtrooms, and staff to hear these cases.[47] As the state population has become more diverse,[48] less familiar with the English language, and more likely to be self-represented in domestic relations matters, the courts have had to modify policies and procedures. One result of this increase in judicial workload has been fewer and fewer minutes of judicial time available to litigants who need a judge to hear their case.[49] Another result has been the growth of alternate dispute resolution techniques that offer the litigants a different way to resolve their disputes. Court systems, attorneys, and communities have developed and enhanced services including mediation, arbitration, collaborative justice,[50] the appointment of attorneys

46. There is no racial or cultural majority in California, U.S. Census, 2006; 39.5 percent of the population speak a language other than English (U.S. Census, 2006), and a larger and larger percentage of family court litigants are self-represented. *Fact Sheet, Programs for Self-Represented Litigants*, RESEARCH UPDATE (Judicial Council of California), 2005; *Demographic Trends of Clients in Court-Based Child Custody Mediation*, RESEARCH UPDATE (Center for Families, Children & the Courts, San Francisco, Cal.), July 2005, at 1-6.

47. This fact was confirmed in recent legislative hearings where the California legislature created fifty new judgeships and indicated that at least one hundred more were needed to meet the population growth.

48. *Custody Mediation and Ethnic Diversity in California*, RESEARCH UPDATE (Center for Families, Children & the Courts, San Francisco, Cal.), Oct. 2001, at 1-2.

49. Fred Silberberg, *Family Law Cases Do Not Get Enough Judicial Time in Court*, L.A. DAILY JOURNAL, June 23, 2006. "[A] judge now is able to devote an average of ten minutes to each child's case . . . by 1995 judges will be allowed only five minutes to determine a child's fate." Paul Boland, *Perspective of a Juvenile Court Judge*, THE FUTURE OF CHILDREN 100, at 101 (Spring 1991). This reduction of time available to hear these cases is one of the reasons that the public has been critical of the California's juvenile and family courts. TRUST AND CONFIDENCE IN THE CALIFORNIA COURTS: A SURVEY OF PUBLIC AND ATTORNEYS 4 (Nat'l Ctr. for State Cts. Sept. 2005) [hereinafter *Trust and Confidence*].

50. RICHARD SHIELDS, JUDITH RYAN & VICTORIA SMITH, COLLABORATIVE FAMILY LAW: ANOTHER WAY TO RESOLVE FAMILY DISPUTES (2003); John Lande & Gregg Herman, *Fitting the Forum to the Family Fuss: Choosing Mediation, Collaborative Law, or Cooperative Law for Negotiating Divorce Cases*, 42 FAM. CT. J. 280 (Apr. 2004); Marsha K. Pruett, Glendessa M. Insabella & Katherine Gustafson, *The Collaborative Divorce Project: A Court-Based Intervention for Separating Parents with Young Children*, 43 FAM. CT. REV 38, 39 (Jan. 2005).

for children,[51] special masters,[52] and the use of private judges. Of these alternatives, mediation is by far the most frequently used by the parties.[53]

Being heard by a judge is thought to be a basic right of citizens in the United States. While having one's day in court is understood by most Americans as necessary to fundamental fairness, that ideal has become a myth in many matrimonial courts. Non-jury dockets often are overwhelmed with cases, and judges can barely complete the calendar during the allotted hours. Few people get to tell their story to the judge, and those that do are often not satisfied.[54]

There are far more cases to be heard than the judges in the courts can possibly hear.[55] There simply is not enough time. Divorce courts and other dockets that address family problems are crowded, leading to shorter hearings.[56] Often time is spent

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51. CAL. FAM. CODE §§ 3150, 3184 (West 2007); California Standard of Judicial Administration § 20.5 (West 2007); Leonard P. Edwards, *A Proposal for the Appointment of Counsel for Children in Marital Dissolution Actions*, THE NEWS LETTER 34, 41-42 (Spring 1985).

52. Philip Stahl, *The Use of Special Masters in High Conflict Divorce*, 21 CAL. PSYCHOLOGIST 4 (1995); *Task Force Appointed to Develop Model Standards for Parenting Coordinators and Special Masters*, 20 ASS'N OF FAM. & CONCILIATION CTS NEWSL. 1 (2001); Matthew J. Sullivan, *Ethical, Legal, and Professional Practice Issues Involved in Acting as a Psychologist Parent Coordinator in Child Custody Cases*, 42 FAM. CT. REV 576 (July 2004); Christine A. Coates et al., *Parent Psycho-Educational Programs and Reducing the Negative Effects of Inter-Parental Conflict Following Divorce*, 42 FAM. CT. REV 246, 257 (2004).

53. This is based on the author's experience as a judge in child custody cases for 26 years.

54. *See* the discussion related to *Trust and Confidence, supra* note 49 and *infra* pp. 19-20. The author had two New York judges visit his court a few years ago. After watching the proceedings, one of the judges remarked that he wished he had the time to talk to the clients, but his calendar was so crowded that he barely had time to make rulings, much less converse with litigants. *See generally* TOM TYLER, WHY PEOPLE OBEY THE LAW (1990); Tom Tyler, *Public Opinion of the Courts: How It Has Been Formed and How We May Reshape It*, 36 COURT REV. 46 (Fall 1999).

55. The California Administrative Office of the Courts has studied the shortage of judicial resources. *See* Frederick Miller, *A New Process for Assessing Judicial Needs in California* (Judicial Council Services, Administrative Office of California, San Francisco, Aug. 24, 2001); Dag MacLeod, *Update of Judicial Needs Study* (Administrative Office of California, Office of Court Research, Aug. 9, 2004), *available at* http://www.courtinfo.ca.gov/jc/documents/reports/0804item6.pdf.

56. "The family court judge can give about twenty minutes to a dissolution case involving child support, spousal support, property division including a house and a pension. The value of all that may be over a million dollars." Barbara Miller, Speech at Alameda Superior Court, Monterey, California (Apr. 2006).

explaining to the parties the rules of the court, what can and cannot be said, where auxiliary services can be accessed, and the limitations of the court process. This shortage of time means that the parties do not get an opportunity to tell their story, to be heard, and the court is forced to make decisions without a full understanding of the facts that would enable the court to render comprehensive, specific orders to guide the family. As a result of these pressures, much time and energy in the court system is spent educating parents about the court system and devising alternative methods of resolving cases short of having a judge hear the matter.[57]

Knowing that the judge may only have a few minutes to hear the facts of a case, many parties resolve their matters in the hallways, in the "shadow of the law."[58] Custody, support, and property division issues are often decided at the last moment before the scheduled hearing before the judge. Commentators have criticized this type of resolution on a number of grounds. They claim that some parents (usually mothers) will sacrifice financial benefits as they bargain to ensure they will receive custody of the children.[59] They also argue that a lasting, positive resolution can best be produced by careful planning and discussion.[60]

The court process has changed greatly over the years. Few cases actually get to trial,[61] as most settle at some point during the legal proceedings. One comprehensive study in two Califor-

57. A useful innovation has been the development of court websites. These websites explain where the courthouse is, how to get there, where to seek assistance in filing papers and even summaries of the law. An award winning website can be located at http://www.sccsuperiorcourt.org (last visited Mar. 13, 2007).

58. *Bargaining in the Shadow of the Law*, *supra* note 36.

59. *Id.* Interestingly, Professors Mnookin and Kornhauser found that women did not in fact bargain away financial issues in exchange for child custody during the mediation process.

60. *Id.*

61. However for those states that do not provide accessible alternative dispute resolution opportunities, the number of custody trials is many times higher than in jurisdictions that offer them. *See The Determination of Custody*, *supra* note 28, at 126. Furthermore, the changing role of the judge was reflected by Judge Donald B. King's comment that:

> Thirty years ago, the judge acted primarily as a trier of cases. Today, the primary role of judges in civil cases is that of expediting and settling them. In my view, the judge of the future is not going to be primarily a trial or a settlement judge, but a case manager.

nia counties showed that approximately one-half of divorces are handled by the parties with no court involvement while close to a quarter of divorces required the involvement of lawyers. The remaining quarter of divorces involved either substantial or intense conflict.[62]

Another significant development in divorce proceedings has been the sharp increase in self-represented litigants. In California family law (domestic relations) cases, sixty-seven percent of petitioners at filing are self-represented and eighty percent of petitioners at disposition for dissolution cases are self-represented.[63] Some believe that the price of an attorney has become too high for most couples, but it is also true that many litigants believe they can complete their legal work without the assistance of an attorney.[64]

One result of this development has been the expansive growth of educational and legal assistance programs in and around California's family courts.[65] These programs include divorce education programs that usually feature educational films and lectures about the divorce process,[66] clinics and legal service centers where litigants can learn how to complete and fill out their legal papers, court websites that provide information about the law and access to the courts, and mediation.

An important element of these programs is the attempt to focus parents' attention on the needs of their children during the separation and divorce process. The perception of those who work in the family courts is that divorcing parents are in a state of crisis and that the parents' personal needs often come before

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Donald B. King, *Accentuate the Positive-Eliminate the Negative*, 31 FAM. & CONCILIATION CTS. REV. 9, 13 (Jan. 1993), *available at* http://www.blackwell-synergy.com/doi/pdf/10.1111/j.174-1617.1993.tb00280.x.

62. DIVIDING THE CHILD, *supra* note 14.

63. *Statewide Uniform Statistical Reporting System: 2003 Baseline Study*, RESEARCH UPDATE (Center for Families, Children & the Courts, San Francisco, Cal.), June 2004. New York figures are similar. *See* Madelynn Herman, *Pro Se: Self-Represented Litigants*, http://www.ncsconline.org/WC/Publications/Memos/ProSeStatsMemo.htm (last visited Mar. 13, 2007).

64. *Trust and Confidence, supra* note 49.

65. Bonnie Rose Hough, *Description of California Courts Programs on Self Represented Litigants*, Presented at a Harvard International Legal Aid Conference (June 2003) (copy available from author).

66. John H. Grych, *Interparental Conflict as a Risk Factor for Child Maladjustment: Implications for the Development of Prevention Programs*, 43 FAM. CT. REV 97 (Jan. 2005).

the needs of the children. For that reason, much time and effort in the court process is spent educating and reminding parents of the child's perspective.[67] Mediators and court administrators have also learned that resources and interventions provided at the front end of the custody resolution process are more likely to result in the parties resolving the case themselves than those provided later in the process.[68]

### F. *Court-Based Child Custody Mediation in California*

Mediation is a process in which specially trained neutral persons, mediators who have no decision-making authority, help the parties before them discuss and resolve the disputes and problems they bring to the table. In the mediation process, decision making remains with the parties. The California legislature declared the purposes of child custody mediation to be as follows:

> (a) To reduce acrimony that may exist between the parties.
>
> (b) To develop an agreement assuring the child close and continuing contact with both parents that is in the best interest of the child, consistent with Sections 3011 and 3020. (These are Family Code sections that describe what the legislature has defined as a child's best interests).
>
> (c) To effect a settlement of the issue of visitation rights of all parties that is in the best interest of the child.[69]

In California, all contested child custody or visitation issues must be referred to mediation,[70] and each superior court must provide mediation services and make a mediator available.[71]

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67. *See generally* Donald T. Saposnek, *The Value of Children in Mediation: A Cross-Cultural Perspective*, 8 MEDIATION Q. 325 (1991). "For example, a mediator might say, 'I feel tense and jumpy just sitting in this room with you. When you start to fight, I want to either yell or run away. I wonder how your children feel, since they're sitting in this same middle position day in and day out.'" Robert E. Emery, David A. Sbarra & Tara Grover, *Divorce Mediation: Research and Reflections*, 43 FAM. CT. REV 22, 37 (Jan. 2005).

68. Jayne Zuberbuhler, *The Use of Court-Ordered Mediation in the Initial Stages of Divorce Litigation to Resolve Parenting Issues*, 39 FAM. CT. REV 203 (Apr. 2001), *available at* http://www.blackwell-synergy.com/doi/pdf/10.1111/j.174-1617.2001.TB00604.x.

69. CAL. FAM. CODE § 3161 (West 2007).

70. *Id.* § 3170(a).

71. *Id.* § 3160.

The mediator may be a member of the professional staff of a family conciliation court, a probation department, or may be a mental health provider or any other person designated by the court, but the mediator must meet the minimum statutory qualifications of a counselor of conciliation pursuant to Family Code section 1815.[72] Contested custody or visitation cases involving stepparents and grandparents must also be referred to mediation.[73] Mediation services are also available even if paternity is at issue.[74]

California courts provide mediation in two different modes. The majority of large- and medium-sized courts hire mediators as court staff. In many of these counties a special unit of the court called Family Court Services provides mediation and other services for parents. In some medium and most small counties, the court contracts with private mediators to provide mediation services. Alternatively, parties can turn to private mediators, lawyers, and other professionals in the community who can provide dispute resolution services to them, usually for a fee.

When the legislature enacted mandatory mediation in 1980, there were a few California counties that had been experimenting with mediation and conciliation, but no other states had experience that California could draw upon. As a result, California has had to experiment with mediation practices. Over the years, the legislature and the courts have modified and refined custody laws, practices, and procedures, basing many of these modifications on the experience of the mediators, judges, attorneys, private practitioners, researchers, and participants in the mediation process. For example, new laws and court rules have been added to address concerns about the impact of domestic violence on the mediation process,[75] representation for children in domestic relations cases,[76] and protocols

72. *Id.* § 3173.

73. *Id.* § 3171(a).

74. *Id.* § 3172.

75. *Id.* §§ 3161, 3181 (separate meetings), 6303 (a support person may accompany the victim of domestic violence) (West 2007); CAL. R. CT. 5.215 (West 2007).

76. CAL. FAM. CODE §§ 3150, 3114 (Mediator can recommend to the court that counsel for the child should be appointed) (West 2007); CAL. R. CT. 20.6.

for the mediation process.[77] The development of standards for court-connected child custody mediation has attempted to bring uniform practice across the state.[78]

The California courts continue to struggle with some aspects of the mediation process. Mediation is a confidential process in which the mediator does not disclose the content of a discussion (unless an allegation of child abuse is made) except when the parties reach an agreement.[79] However, in California the state law permits mediators to make recommendations to the court if the parties are unable to reach an agreement.[80] Not all mediation programs permit the mediator to make recommendations. In practice, there is a split in local court practice between "recommending" and "confidential" mediation.[81] Many in the mediation field believe that "recommending mediation" makes no sense, since the person conducting the "mediation" can give a recommendation if the parties do not resolve the matter themselves. It does not appear that this dual approach to mediation will change in the near future[82] and Californians will have to live with this anomaly.[83]

Additionally, some California courts have difficulty maintaining adequate resources to sustain their mediation ser-

77. CAL. R. CT. 5.210; Leonard P. Edwards, *A Proposal for the Appointment of Counsel for Children in Marital Dissolution Actions*, The News Letter for the California Association of Family and Conciliation Courts (Spring 1985).

78. Edwina Norton et al., *Development of Uniform Standards of Practice for Court-Connected Custody Mediation in California*, 30 FAM. CT. REV 2003 (Apr. 1992) *available at* http://www.blackwell-synergy.com/doi/pdf/10.1111/j.174-1617.1992.TB01047.x.

79. Christopher W. Moore, *How Mediation Works, in* THE MEDIATION PROCESS 41 (2d ed. 1996).

80. CAL. FAM. CODE § 3183 (West 2007).

81. On the history of mandatory mediation and "recommending mediation" in California, see McIssac, *supra* note 40; Hugh McIsaac, *Confidentiality Revisited: California Style*, 39 FAM. CT. REV 4, 405-14 (Oct. 2001); George Ferrick, *Three Crucial Questions; Key Issues in Family Mediation: Training and Practice,* 13 MEDIATION Q. (Fall 1986).

82. Legislation was introduced in 2002 to amend the mediation statute so that the mediator could not make recommendations, but it was defeated in the legislature. Additional legislation authorized the creation of up to four pilot counties to transition from a "recommending" to a confidential mediation program. These pilot programs have not been created because of a lack of state funding. CAL. FAM. CODE § 3188 (West 2007).

83. On some of the practice issues regarding "recommending" and confidential mediation, see Lilly Grenz, *Confidential and Recommending Mediation in Domestic Violence Cases*, DOMESTIC VIOLENCE NEWSLETTER (copy available from author).

vices.[84] Some mediation services can only offer the parents an hour or even less to resolve their differences. This is insufficient time to devote to the mediation process and to give the parents an opportunity to express their views fully and to reach a lasting resolution.

California experience has demonstrated that the quality of the mediator is critical to the success of a mediation program.[85] One long-time mediator concludes that "the best mediators tend to have the following characteristics: they like people, like to mediate, and tend, by nature to balance a tendency towards trust with a healthy skepticism; they are compassionate, understanding, and patient; they are excellent listeners, communicators, problem formulators, and are solution oriented."[86]

California has developed guidelines for mediator qualifications. Mediators must have a college degree and a graduate degree in one of several designated subject matter areas, at least two years of experience, and knowledge about a number of substantive areas relevant to children of divorce.[87] Additionally, court-appointed mediators must participate in continuing education that covers a number of subjects including family dynamics, substance abuse, domestic violence, child abuse, and certain aspects of custody law.[88] To maximize the effectiveness of the mediation process, a number of jurisdictions[89] have utilized co-mediators, one man and one woman, to conduct mediation sessions. This is obviously more costly, but the results have been uniformly positive.[90]

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84. *See generally The Mediation Miracle*, *supra* note 10.

85. Bobby M. Harges, *Mediator Qualifications: The Trend Towards Professionalization*, 1997 BYU L. REV. 687 (1997); Joan B. Kelly, *Family Mediation Research: Is There Empirical Support for the Field?*, 22 CONFLICT RESOL. Q. 3, 28 (Fall-Winter 2004); Peggy English & Linda C. Neilson, *Certifying Mediators*, *in* DIVORCE AND FAMILY MEDIATION 483; Andrew Schepard, *The Model Standards of Practice for Family and Divorce Mediation*, *in* DIVORCE AND FAMILY MEDIATION, 516, 523-43; Leonard P. Edwards, *Dependency Court Mediation: The Role of the Judge*, 35 FAM. & CONCILIATION CT. REV. 160, 160 (Apr. 1997).

86. Steve Baron's statement was made in a communication with the author (copy available from the author).

87. CAL. FAM. CODE §§ 1815, 3164, 3165 (West 2007); CAL. R. CT. 5.210 (West 2007).

88. CAL. FAM. CODE § 1816; CAL. R. CT. 5.210, 5.230 (West 2007).

89. CAL. FAM. CODE § 1815; CAL. R. CT. 5.210 (West 2007).

90. Yvonne Pearson, *Early Neutral Evaluations: Application to Custody and Parenting Time Cases: Program Development and Implementation in Hennepin*

Child custody mediation has had a significant impact on litigants and the courts in California. In states without mediation, it is estimated that fifteen to twenty percent of custody cases are litigated, while in California mediation has reduced the number of trials to one to five percent.[91] The savings in court costs and attorney's fees for those families who resolved their cases through mediation is estimated to be in the tens of thousands of dollars.[92]

## VI. Evaluations of Mediation

Mediation researchers have addressed a number of issues: Does mediation resolve/settle more child custody/parenting time disputes than does the adversarial process? Do mediated settlements occur more quickly than those in the adversarial process? Is the mediation process less expensive for the parents than the adversarial process? Does mediation reduce the conflicts between separating parents? Are parents more satisfied with the results of mediation over the results of the adversarial process? Are relationships between the children and their parents better after a mediated settlement as compared to completion of the adversarial process? Are children better off as a result of mediated agreements as opposed to resolution through the adversarial process? Is it possible to conduct mediation fairly and effectively when there has been domestic violence between the parties or when there is a power imbalance between them? Does mediation serve the court system well? Is the judicial caseload reduced as a result of mediation? Are judges and attorneys satisfied with the mediation process?

### A. *Evaluations of Mediation in California*

The California AOC and private researchers have evaluated custody mediation for a number of years, addressing a number of the issues listed above. The conclusions of this re-

*County, Minnesota*, 44 FAM. CT. REV 672 (Oct. 2006); Ann W. Yellott, *Mediation and Domestic Violence: A Call for Collaboration*, 7 MEDIATION Q. 47 (Fall 1990); Leonard P. Edwards, *Mediation in Child Protection Cases*, 5 J. OF THE CENTER FOR FAMILIES, CHILD. & THE CTS. 57, 62-63 (2004); Family Court Services in Orange County, California, utilize two mediators in all of their custody mediations.

91. *The Determination of Child Custody*, *supra* note 28, at 126.

92. *Id.*; Emery, *supra* note 67.

search have been consistent.[93] Mediation is effective in resolving child custody disputes.[94] Mediation resolves contested cases much more quickly than the traditional legal process,[95] and has more positive outcomes over longer periods of time for families.[96] Evaluations also indicate that clients were satisfied with the mediation process. More than eighty percent of clients provided positive feedback saying they were not rushed, they were not pressured, that mediation helped them see more ways to work together as parents, that mediation is a good way to come up with a parenting plan, and that they would recommend mediation to friends if they had a custody problem.[97] Regarding focusing parents on the needs of their child, even higher marks were given to mediation. This was also true for client satisfaction regarding the safety of the mediation process, the belief that the parent's role was taken seriously, and that they were treated with respect.[98]

### B. *National Evaluations*

Experts and commentators across the nation and from foreign countries have evaluated child custody mediation, and their conclusions are consistent with the results of the California research.[99] National studies confirm that mediation can

93. *Family Mediation Research*, *supra* note 85, at 20.

94. *Id.* at 29; Emery, *supra* note 67, at 26.

95. Emery, *supra* note 67, at 26.

96. Charlene E. Depner, Karen V. Cannata & Marlene B. Simon, *Building a Uniform Statistical Reporting System: A Snapshot of California Family Court Services*, 30 FAM. & CONCILIATION CTS. REV. 169 (Apr. 1992).

97. *Client Feedback in California Court-Based Child Custody Mediation*, Center for Families Children & the Courts, RESEARCH UPDATE (Center for Families, Children & the Courts, San Francisco, Cal.) Apr. 2004; Charlene Depner, Karen Cannata & Isolina Ricci, *Client Evaluations of Mediation Services: The Impact of Case Characteristics and Mediation Service Models*, 32 FAM. & CONCILIATION CTS. REV. 306 (July 1994).

98. *Client Feedback in California Court-Based Child Custody Mediation*, RESEARCH UPDATE (Center for Families, Children & the Courts, San Francisco, Cal.) Apr. 2004.

99. Barbara Davies & Stephen Ralph, *Client and Counselor Perceptions of the Process and Outcomes of Family Court Counselling in Cases Involving Domestic Violence*, 36 FAM. & CONCILIATION CTS. REV. 227, 242 (Apr. 1998); Bryce F. Sullivan, Andrew I. Schwebel & Jessica S. Lind, *Parties' Evaluations of Their Relationships With their Mediators and Accomplishments in a Court-Connected Mediation Program*, 35 FAM. & CONCILIATION CTS. REV. 405 (Oct. 1997); Barbara Davies, Stephen Ralph, Michael Hawton & Lorri Craig, *A Study of Client Satisfaction with*

have a more positive and long lasting impact on family relationships when compared to families that used the adversarial process.[100] In a number of studies it has been clearly demonstrated that mediation results in settlement of cases at far higher rates than the adversarial process,[101] that settlement through the mediation process takes place sooner than the adversarial process,[102] that the cost to the litigants is less than the costs of the adversarial process,[103] and that the parties are more satisfied with the outcomes of the mediation process as opposed to satisfaction through the adversarial process.[104] One of the most positive aspects of mediated agreements is that over time, relations between the non-custodial parent and the children are much better than those when the parents participated in the adversarial process.[105]

Childrens' interests can be better protected using mediation than the traditional adversarial process. As Joan Kelly points out,"[S]pecialized interventions for interviewing children during separation and divorce processes have been developed that solicit children's voices and provide feedback to parents in a manner that protects children's safety and interests typically

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*Family Court Counselling in Cases Involving Domestic Violence*, 33 FAM. & CONCILIATION CTS. REV. 324 (July 1995).

100. An experienced researcher's examination of multiple evaluations of child custody mediation reveals that "family mediation has been consistently successful in resolving custody and access disputes, comprehensive divorce disputes and child protection disputes. Mediation has given evidence of its power to settle complex, highly emotional disputes and reach agreements that are generally durable." *Family Mediation Research*, *supra* note 85; Schepard, *supra* note 20, at 411. *See* Joan B. Kelly & Mary A. Duryee, *Women and Men's Views of Mediation in Voluntary and Mandatory Mediation Settings*, 30 FAM. & CONCILIATION CTS. REV. 34 (Jan. 1992); *see* the numerous sources cited in Leonard P. Edwards, *Mediation in Child Protection Cases*, 5 J. OF THE CENTER FOR FAMILIES, CHILD. & THE CTS. 57, 62-63 (2004).

101. Emery, *supra* note 67, at 26; *Family Mediation Research*, *supra* note 85, at 3-36; Schepard, *supra* note 20, at 408-10.

102. Connie J.A. Beck, Bruce D. Sales & Robert E. Emery, *Research on the Impact of Family Mediation*, *in* DIVORCE AND FAMILY MEDIATION, *supra* note 85, at 447, 451-52; Emery, *supra* note 67, at 37.

103. *See* Beck, *supra* note 101, at 447, 451-52.

104. Emery, *supra* note 67, at 28-29; *Family Mediation Research*, *supra* note 85, at 29.

105. *Id.*; *see* DIVIDING THE CHILD, *supra* note 14, at 197-98. The authors conclude that the increased contact with the non-custodial parent is beneficial to the children. *Id.* at 286-87.

within a mediation context."[106] Moreover, more sophisticated parenting and child sharing plans can be made available through mediation.[107]

In summary, Joan Kelly writes that: "It is evident that, in settling custody and visiting disputes, the adversarial legal system pitting parent against parent, is unwieldy, expensive, unsatisfactory, and unnecessary for large numbers of divorcing parents wanting to reach good agreements about their children."[108]

## VII. Examining the Process From the Client's Perspective

Changes in the court system are usually made by judges, court administrators, or legislators. On occasion members of the bar association are consulted. Rarely is the public included in the decision making process.[109] With this fact in mind, in 2003 the California Judicial Council[110] commissioned a study to measure current perceptions of the California court system held by the public and practicing attorneys, in order to inform the Council's strategic policy planning process. The report, authored by the National Center of State Courts in collaboration with the Public Research Institute of San Francisco State University, *Trust and Confidence in the California Courts,*[111] surveyed public and attorney opinion regarding their views of the entire court system. Several thousand California adults (litigants and attorneys) were surveyed regarding a number of issues relating to their knowledge, perceptions, experiences, expectation, and sense of the accessibility, fairness and efficiency of the courts.[112] Generally the report found that the public perceives a high level of job performance by the California

106. *The Determination of Child Custody*, *supra* note 28, at 137.

107. Joan B. Kelly, *Parenting Following Separation and Divorce*, 19 J. AM. ACAD. MATRIMONIAL L. 237 (2005).

108. *The Determination of Child Custody*, *supra* note 28, at 137.

109. Mandatory custody mediation in California is an exception to this statement. *See* Hugh McIsaac, *Mandatory Conciliation Custody/Visitation Matters: California's Bold Stroke*, 19 CONCILIATION CTS. REV. 73 (Dec. 1981).

110. The California Judicial Council is the governing body of the Judicial Branch of California Government.

111. *Trust and Confidence*, *supra* note 49, at 4, 6, 17, 27-28.

112. *Id.* at 1.

courts.[113] However, the report identified juvenile and family courts as those parts of the California court system (along with traffic and small claims court) with which the public has the least confidence.[114] The report concluded that "[t]here is equal or greater urgency to improving procedural fairness in family and juvenile cases, to improve confidence in the process both for litigants and their attorneys. Court resources need to be reallocated to improve the way family and juvenile cases are handled."[115]

Within the California court system it is well known that juvenile and family court are the least favored assignments for judges,[116] are thought by some to be less important than civil and criminal matters, are seen as stressful for all participants, and, as a result, some have pointed out that these courts are often used as the first assignment or training ground for new judges.[117] Moreover, in many courts subordinate judicial officers and judges-pro-tem hear the majority of matters on the family and juvenile court calendars.[118]

The *Trust and Confidence Report* found that ADR, and in particular, mediation, was viewed positively by litigants.[119] Court users commented that mediation provided them with an

113. *Id.* at 6.

114. "Litigants in family and juvenile cases and defendants in traffic cases perceive less procedural fairness than do litigants in other kinds of cases." *Id.*

115. *Id.*

116. "Judicial officers in family law seem to experience high stress, frustration, feelings of helplessness, and burnout." Deborah Chase & Peggy Fulton Hora, *The Implications of Therapeutic Jurisprudence for Judicial Satisfaction*, 37 FAM. CT. REV 12, 13 (Spring 2000). "That the family law assignment is typically more burdensome than other court assignments is common knowledge." Fred Silberberg, *Family Law Jurists Need to Let Lawyers Present Their Cases*, L.A. DAILY JOURNAL, June 23, 2006.

117. "It is too often the newest judge with no prior family law experience who is placed in the family law assignment, and who leaves the assignment as quickly as possible." King, *supra* note 22; *see* Leonard P. Edwards, *The Juvenile Court and the Role of the Juvenile Court Judge*, 43 JUV. & FAM. CT. J. 34 (1992).

118. In 2005, California courts employed more than 400 subordinate judicial officers, many of them to hear family and juvenile law matters. Additionally, attorneys from the local bar association often sit as judges-pro-tem in the juvenile and family calendars. California Administrative Office of the Courts, http://www.courtinfo.ca.gov/courtadmin/aoc/ (last visited May 15, 2007); *see also* DEPENDENCY COURT REASSESSMENT, *supra* note 11, at 5-2, 5-3. This report indicates that subordinate judicial officers (commissioners and referees) hear a majority of juvenile cases in California. *Id.*

119. *Trust and Confidence*, *supra* note 49.

opportunity to be heard, to be treated with dignity, and to complete their legal business.[120] The report recommended expansion of mediation services in both family (domestic relations) and juvenile courts.[121]

It is significant that the California judicial leadership concluded that the court system should ask those who use the system for their perceptions of how well the courts serve their interests. This conclusion is an indication that California courts acknowledge that one of the judiciary's primary functions is to serve the public. It also legitimizes several questions to be asked when court reforms are considered including, "How will this impact the public?" and "What does the public think of these proposals?"

## VIII. Recent Trends in Court-Based Custody Mediation

In addition to the research drawn upon in the writing of this article, the author has had an opportunity to discuss with judges, court administrators, attorneys and mediators in California the current use and effectiveness of mediation in child custody and dependency cases. These discussions have taken place at local courthouses, by telephone and e-mail and at conferences. The picture that emerges from these discussions is that mediation is valuable, but that it is a scarce resource that often has been cut back because of budgetary difficulties. Specifically, those involved in the court system reported to the author the following:

1. Mediation is a valuable service, one that resolves most of the cases referred to it.

2. Mediators need more time with clients than the current caseloads in some California counties permit. In some counties only one hour of mediation or less is possible and that is not enough time for the clients to be heard and for the mediator to work out agreements.

120. *Id.* According to Tom Tyler people come to court not expecting to win. They come to court expecting to be listened to and to leave court understanding what happened and why the judge made the decision. TOM TYLER, WHY PEOPLE OBEY THE LAW (Yale University Press 1996); Tom Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283 (2003).

121. Tyler, *supra* note 120.

3. The shorter the time available for the mediator, the fewer agreements will be reached and the less comprehensive and long-lasting any agreement reached will prove to be.[122]

4. Clients like mediation and find that it meets their needs.

5. Mediation is safe for the great majority of clients. Existing protocols provide safety and fairness for the parties even when domestic violence or other types of power imbalances are present.

6. Judges and court administrators recognize the value of mediation. Some are frustrated that adequate resources do not exist to provide effective mediation to more of the parties coming before the court.

7. Mediation is more effective if there is an orientation session that informs the parties about the law and the purposes of mediation.[123] In this regard, client orientation should be considered the first phase of mediation. Furthermore, mediation should take place early in the separation process before the parties have committed to the adversarial process.[124]

8. Mediation as an alternative to litigation in matters involving the family continues to expand. Mediation in child custody disputes is mandated in twelve states and several local jurisdictions. Nearly all courts have the discretion to order mediation in selected cases.[125] Mediation is growing rapidly in child protection cases.[126] Custody mediation is also being utilized in several other countries including Japan,[127] England, Norway, Egypt, Austra-

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122. Donald T. Saposnik, *Issues and Approaches for Conducting Confidential Child Custody Mediation*, Workshop Presentation for the Superior Court Family Court Services of Contra Costa County (Jan. 25, 2002). The author is a mediator, psychologist, teacher and researcher with more than thirty years of experience in mediation and child custody work.

123. "In states offering or mandating custody mediation, orientation sessions should also be mandatory to educate parents about what mediation is and how it works." *The Determination of Child Custody*, *supra* note 28, at 134; THE BLACKWELL HANDBOOK OF MEDIATION 23-32 (Margaret S. Herman ed., 2006).

124. Jayne Zuberbuhler, *The Use of Court-Ordered Mediation in the Initial Stages of Divorce Litigation to Resolve Parenting Issues*, 39 FAM. CT. REV 203 (Apr. 2001); Isolina Ricci, *Court-Based Mandatory Mediation*, *in* DIVORCE AND FAMILY MEDIATION, *supra* note 85, at 397, 406.

125. Carrie-Anne Tondo, Rinarisa Coronel & Bethany Drucker, *Mediation Trends: A Survey of the States*, 39 FAM. L. REV. 431 (Oct. 2001).

126. Edwards, *supra* note 90, at 63.

127. *See generally* GUIDE TO THE FAMILY COURT OF JAPAN, *supra* note 9; Rieko Nishikawa, *Alternative Dispute Resolution in Japan* (Keio University 2000), http://www.iadb.org/int/jpn/Japanese/activities/publications/workingpapers/1.pdf (last

lia,[128] Denmark,[129] New Zealand,[130] Canada,[131] and Hong Kong.[132]

9. Increasing numbers of commentators recommend that mediation services for separating parents be expanded.[133]

## IX. Comments on the Miller Commission Report

Three over-arching observations are relevant to the author's comments about the Miller Commission Report that appear below. First, it must be recognized that more and more parents in custody cases are self-represented.[134] This means that these parents will not have the benefit of learning about the court system from a lawyer, but will have to learn on their own, possibly from information that the court is able to provide. This observation has significant implications for the court as it designs educational programs, websites, interventions, and services for litigants.[135]

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visited Mar. 13, 2007). The article notes that mediation has a long history in Japan traceable to the Edo Period (1600-1868). *Id.*

128. Alastair Nicholson, *Setting the Scene: Australian Family Law and the Family Court - A Perspective From the Bench*, 40 FAM. CT. REV 279, 285 (July 2002).

129. Hlastair Andrup & Jean Graham Hall, *Mediation and Divorce: The Danish Contribution*, 33 FAM. & CONCILIATION CTS. REV. 194 (Apr. 1995); for Europe, *see* Committee of Ministers to Member States on Family Mediation, *Family Mediation in Europe*, 37 FAM. & CONCILIATION CTS. REV. 257 (Apr. 1999).

130. Peter Boshier, *New Zealand Family Law Report*, 33 FAM. & CONCILIATION CTS. REV. 182, 187 (Apr. 1995).

131. Edward Kruk, *Practice Issues, Strategies, and Models: The Current State of the Art of Family Mediation*, 36 FAM. & CONCILIATION CTS. REV. 195 (Apr. 1998).

132. Patricia L. Sullivan, *Culture, Divorce, and Family Mediation in Hong Kong*, 43 FAM. CT. REV 109 (Jan. 2005). The authors report positive responses from over eighty percent of the parents and high success rates in all issues related to the divorce. *Id.* at 116.

133. Dane A. Gaschen, *Mandatory Custody Mediation: The Debate Over its Usefulness Continues*, 10 OHIO ST. J. ON DISP. RESOL. 469 (1995); Forrest S. Mosten, *Institutionalization of Mediation*, 42 FAM. CT. REV 292 (Apr. 2004).

134. The estimate in California is that in approximately sixty-nine percent of cases, one parent is self-represented, and that in thirty percent of cases neither parent is represented by counsel. *2003 Baseline Study: Summary Findings*, RESEARCH UPDATE (Center for Families, Children & the Courts, San Francisco, Cal.) June 2004.

135. California's Self-Help for Litigants initiative may be of great assistance to New York and other states attempting to improve access to the court system for unrepresented litigants. *See* Christopher N. Wu, *Making Families and Children a High Priority*, 40 FAM. CT. REV 417, 429-31 (Oct. 2002).

Second, more and more child custody cases involve non-married couples. As of 2004, thirty-five percent of parents participating in mediation had never been married.[136] Court systems must adjust their education and mediation programs to acknowledge this reality.[137] Some courts have established separate dockets to address the special issues presented by these couples.[138]

Third, any reform of the court system that resolves critical issues relating to families such as custody and visitation, should hear from those who use the system – parents and other family members. Many states have modified their court systems, instituting "best practices," better case management processes, and other innovations, but until those who use the system are consulted, the result will be changes that address the needs of the courts and not necessarily those who use the court system.[139] While lawyers were included in the New York process, it seems

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136. The California Administrative Office of the Courts calculates that one-third of all custody conflicts in court take place between couples who have never married. *Demographic Trends of Clients in Court-Based Child Custody Mediation*, RESEARCH UPDATE (Center for Families, Children & the Courts, San Francisco, Cal.) June 2004; *2003 Client Baseline Study: Summary Findings*, RESEARCH UPDATE (Center for Families, Children & the Courts, San Francisco, Cal.) June, 2004, at 4. Nationally, for the first time in history less than half of U.S. households are headed by married couples. Leah Ward Sears, *A Case for Strengthening Marriage*, WASH. POST, Oct. 30, 2006, at A17.

137. Joan K. Raisner, *Mediation with Never-Married Parents*, *in* DIVORCE AND FAMILY MEDIATION, *supra* note 85, at 283.

138. Thomas C. Dudgeon, *On-the-Spot Mediation and Supervised Visitation: A Pilot Project Comes to Courtroom 2003,* J. OF DUPAGE COUNTY BAR ASS'N (Feb. 1999), *available at* http://www.dcba.org/brief/febissue/1999/art20299.htm.

139. *Trust and Confidence* is an excellent example of a state court determining how the public views the court process. The letter below was one way that the California legislature learned of the public's interest in mediation. *See Trust and Confidence*, *supra* note 49.

> Dear Judge Mills: The Conciliation Court and mediation, is in my opinion the very best thing that has ever happened to the divorced parent! What took two attorneys and many thousands of dollars and a tremendous amount of personal pain and stress through their overt hostile methods of negotiation, not to mention the fact that I felt they presented the case to be hopelessly deadlocked, was calmly and fairly settled in about an hour and a half by one of your counselors. What more can I say? Thank you.

A parent quoted in Jeanne Ames' notes for a workshop, 1982. Judge Billy Mills was a judge of the Los Angeles Superior Court and an early proponent of mediation. Jeanne Ames was a long-time mediator in the San Francisco Family Court.

that the Miller Commission did not solicit significant input from the families themselves, the people who use the court process.[140]

### A. *Referrals to Mediation*

The Miller Commission recommends that mediation only take place if the parties stipulate or if the judge exercises his or her discretion.[141] Using the experience from other jurisdictions, this is overly restrictive. First of all, the parties should not be given the ultimate power to decide whether to participate in mediation. They are not in a position to make an informed decision about the process. Indeed, as Edward DeBono states: "Unfortunately, the parties involved in a dispute happen to be in the worst possible position to settle that dispute."[142] It would be preferable to have the mediation process take place even over the objection of one or both parties.

Relying on judicial discretion to determine whether parties participate in mediation is also too restrictive. Research from across the country and the author's experience working with courts lead to the conclusion that many judges will not use mediation at all or will use it only rarely, believing that the court process is preferable to alternative dispute resolution.[143] After all, judges have attended law school and have learned that the adversarial process is the foundation of the legal system. Many judges believe that the legal process is preferable and superior to alternative forms of dispute resolution. These observations hold true for attorneys as well. If mediation is going to be given

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140. In California the public input has been particularly important in influencing changes in custody law. Mandatory mediation was strongly supported by those who used the courts, and political decision makers were strongly influenced by statements from the public. *See* McIsaac, *supra* note 40; *see also Trust and Confidence*, *supra* note 49.

141. THE REPORT, *supra* note 3, at 32.

142. EDWARD DEBONO, CONFLICTS: A BETTER WAY TO RESOLVE THEM 92 (1991).

143. Arkansas is one example where mediation was shown to be very effective in resolving cases satisfactorily and sooner than the traditional adversarial process, but after it was made available statewide, sixty-eight percent of the judges did not use it at all; twenty-nine percent ordered mediation in less than five percent of cases; and three percent referred more than ten percent of cases to mediation. Arkansas Supreme Court Ad Hoc Committee of Foster Care and Adoption, *Arkansas Court Improvement (CIP) Reassessment Report,* Little Rock, Arkansas, 2005; Kelly B. Olson, *Lessons Learned From A Child Protection Mediation Program*, 41 FAM. CT. REV 480 (Oct. 2003).

the opportunity to accomplish what it has in other states and countries, it must not be left to the parties, to attorneys, or to judges to decide who will use the process.[144] Mediation in New York in child custody matters should be mandatory.[145]

## B. *Domestic Violence and Mediation*

The Miller Commission recommends that mediation not take place where there has been domestic violence between the parents.[146] A number of commentators have also recommended that mediation should not be conducted where there has been violence between the parents.[147] They join the Miller Commission in arguing that the violence that has taken place may result in an unfair advantage for the batterer. They point out that the victim of violence may be placed in a coercive situation in which she may feel she has to give in to the demands of the batterer.

The experience in California and elsewhere indicates that with the proper procedures in place, mediation can be safely and fairly conducted even where there has been violence between the parties.[148] Over the twenty-five years that

144. Supportive of mandatory mediation, see Isolina Ricci, *Court-Based Mandatory Mediation: Special Considerations*, *in* DIVORCE AND FAMILY MEDIATION, *supra* note 85, at ch. 18.

145. *See* Schepard, *supra* note 20, at 398-99.

146. THE REPORT, *supra* note 3, at vii, 32.

147. Karla Fischer, Neil Vidmar & Rene Ellis, *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 SMU L. REV. 2117 (1992); ONTARIO ASSOCIATION OF INTERVAL AND TRANSITION HOUSES, STOP THE VIOLENCE AGAINST WOMEN, BACKGROUND REPORT (Toronto, Ontario, 1989); Nancy Ver Steegh, *Yes, No, and Maybe: Informed Decision Making About Divorce Mediation in the Presence of Domestic Violence*, 9 WM. & MARY J. WOMEN & L. 145 (Winter 2003); DENNIS P. SACCUZZO, NANCY JOHNSON & WENDY J. KOEN, MANDATORY CUSTODY MEDIATION: EMPIRICAL EVIDENCE OF INCREASED RISK FOR DOMESTIC VIOLENCE VICTIMS AND THEIR CHILDREN (Dep't of Justice, Apr. 2003), available at http://vaw.sagepub.com/cgi/reprint/11/8/1022.pdf. Both sides of the debate are reviewed in Rene Rimelspach, *Mediating Family Disputes in a World with Domestic Violence: How to Devise a Safe and Effective Court-Connected Mediation Program*, 17 OHIO ST. J. ON DISP. RESOL. 95 (2001) [hereinafter *Mediating Family Disputes*].

148. George Ferrick asks the question: "Can the process of mediation be so structured, and the mediator act in such a way, that the abused woman will be able to reflect and decide in a self-determinative manner sufficiently independent of the influence of the abuser?" George Ferrick, *Three Crucial Questions; Key Issues in Family Mediation: Training and Practice*, 13 MEDIATION Q. (Fall 1986). Mr. Ferrick answers his own question with a "Yes." *Id.*

mandatory mediation has been in place, the California legislature and courts have refined the mediation process to address the concerns expressed above. The result has been the development of a sophisticated child custody mediation process that is both safe and effective. First, the mediation staff is required to be trained in the dynamics of domestic violence.[149] Second, all contested custody cases are screened for any history of violence as the parents enter the court system.[150] If violence is detected, California law mandates that, if requested or if the mediator so decides, the mediator shall meet with the parties separately and at separate times.[151] If the mediator at any time during the mediation learns of a history of violence, the mediator must ask the victim of that violence whether he or she would prefer separate sessions or other safety precautions during the mediation. Additionally, the victim can have the assistance of a support person throughout the marital dissolution process including any mediation.[152] A California Rule of Court has been developed that outlines a comprehensive safety protocol to be used in these cases.[153] California law also permits mediators in appropriate cases to "recommend that restraining orders be issued,

149. CAL. R. CT. 5.210(f) and (g) (West 2007).

150. CAL. R. CT. 5.215 (f). Other courts and researchers have developed screening tools for use during the mediation process. Desmond Ellis & Noreen Stuckless, *Domestic Violence, DOVE, and Divorce Mediation*, 44 FAM. CT. REV 658 (Oct. 2006); Woman Abuse Council of Toronto, *A Tool for Risk Assessment in Woman Abuse Situations*, http://www.womanabuse.ca/HighRiskAssessmentTool.doc (last visited Mar. 13, 2007); Linda K. Girdner, *Mediation Triage: Screening for Spouse Abuse in Divorce Mediation*, 7 MEDIATION Q. 365 (Summer 1990).

151. CAL. FAM. CODE § 3181 (West 2007); CAL. R. CT. 5.215(g)(1) (West 2007). For example, in Orange County, California, (population 3,000,000) all mediations where there is a history of domestic violence are conducted so that the parties do not have contact with one another. Some of these are conducted over the telephone. In 2005, there were 5,038 custody mediations in Orange County and out of those 1,129 were identified as having domestic violence issues. All of these were mediated separately either in separate rooms or by telephone. Communication with Cathy Harmon, Manager, Orange County Family Court Services (copy available from author). Telephone mediation has been practiced elsewhere. Laurie S. Coltri & E. Joan Hunt, *A Model for Telephone Mediation*, 36 FAM. & CONCILIATION CTS. REV. 179 (1998).

152. CAL. FAM. CODE § 6303 (West 2007); CAL. R. CT. 5.215 (West 2007).

153. CAL. R. CT. 5.215 (West 2007).

pending determination of the controversy, to protect the well-being of the child involved in the controversy."[154]

Perhaps most importantly, under the circumstances, the mediator is in the best position to know whether mediation will be safe and fair for the parties. Pursuant to California law, if serious safety or power imbalance problems are detected, the mediator can always terminate the mediation and refer the case back to the formal court process.

> California Rule of Court 5.210
>
> (c) Mediation Process (7) Termination of mediation if the mediator believes that he or she is unable to achieve a balanced discussion between the parties.[155]

Additionally, those who would exclude cases involving domestic violence from mediation place too much confidence in the safety and fairness of the adversarial process. When the parties go to court, there are significant safety concerns both in and about the courthouse. The courtroom environment is intimidating for most people, likely more so for the victim of violence. The victim-client will have to appear in the courtroom with the perpetrator. There may not be enough time for her to tell her story fully to the judge, and there certainly will not be any negotiating for a resolution that would be satisfactory to both parents. As a veteran domestic relations judge has stated:

> After years of experience in cases involving parents, domestic violence, and child custody, I have concluded that if properly designed and operated, mediation provides a safe, effective way of resolving these custody disputes. What many people forget is that the court process does not offer a better environment for the resolution of these cases. The parties have to appear together in the same courtroom, and there is much less time for the judge to hear evidence and understand the family dynamics. Moreover, in the courtroom there will be no opportunity for the parties to exchange

154. CAL. FAM. CODE § 3183(c) (West 2007). The California legislature also mandates that if the court finds that a party seeking custody of a child has perpetrated an act of domestic violence against the other party, the child or the child's siblings, there is a rebuttable presumption that granting sole or joint legal or physical custody to the perpetrator is detrimental to the best interest of the child. *Id.* § 3044.

155. CAL. R. CT. 5.210 (West 2007); *see Mediating Family Disputes*, *supra* note 147, at 7.

proposals and to have some level of control over what happens to their children.[156]

The California experience in mediation where there has been violence between the parents is supported by national policy makers. More than ten years ago, the Family Violence Department of the National Council of Juvenile and Family Court Judges (NCJFCJ) wrote *Family Violence: A Model State Code.*[157] The Model Code was approved by the NCJFCJ Board of Trustees on January 13, 1994. Since that time, the Model Code has been adopted in whole or in part in many states across the nation. The Model Code recommends that courts not order mediation where there is an allegation of domestic or family violence unless the court finds that:

1a. The mediation is provided by a certified mediator who is trained in the dynamics of domestic and family violence; and

b. The mediator or mediation service provides procedures to protect the victim from intimidation by the alleged perpetrator in accordance with subsection 2.

2. Procedures to protect the victim must include but are not limited to:

a. Permission for the victim to have in attendance at mediation a supporting person of his or her choice, including but not limited to an attorney or advocate; and

b. Any other procedure deemed necessary by the court to protect the victim from intimidation by the alleged perpetrator.[158]

These recommendations are similar to other national policy positions taken by experts in domestic violence and court proceedings.[159]

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156. Statement to the author by the Honorable Mary Ann Grilli, Superior Court Judge, Superior Court, County of Santa Clara. Judge Grilli was the former Chair of the Santa Clara County Domestic Violence Council and Co-Chair of the Family and Juvenile Law Advisory Committee to the California Judicial Council.

157. MODEL CODE ON DOMESTIC AND FAMILY VIOLENCE (Advisory Comm. of the Conrad N. Hilton Found. Model Code Project of the Family Violence Project 1994).

158. *Id.* § 408(B).

159. This recommendation is similar to the recommendation from another national policy publication, written by an advisory committee consisting of domestic violence advocates, child welfare leaders and juvenile court judges. *See* FAMILY VIOLENCE DEPARTMENT, EFFECTIVE INTERVENTION IN DOMESTIC VIOLENCE & CHILD MALTREATMENT CASES: GUIDELINES FOR POLICY AND PROCEDURE (1999). In Recommendation 48, the publication stresses when domestic violence has occurred, medi-

The California Administrative Office of the Courts has surveyed the characteristics of those who use mediation in the state. In their studies, client self-reporting and court records reveal that there is a history of some violence in approximately fifty percent of all cases that participate in mediation.[160] This figure is most likely a conservative estimate as it is clear that not everyone with a history of domestic violence will report that at a screening. Being a victim of domestic violence is not a fact that many people admit when first asked.[161] Often it is the mediator who first learns that there has been violence. It is also reasonable to conclude that some people with violent histories complete the mediation process without revealing anything about that violence.

Finally, California has evaluated client satisfaction with the mediation process and learned that victims of violence prefer mediation to the formal court process, and that they often feel empowered by the mediation process.[162] This is also true in some foreign studies.[163] In summary, the California experience

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ation should only take place when mediators are thoroughly trained. The mediation program should have specialized procedures to protect the victims of domestic violence from intimidation by alleged perpetrators and correct power imbalances (including no contact during the mediation session and the availability of an advocate). The publication also stresses that others, such as child advocates and attorneys, be permitted to participate in the mediation session, and that during the session the mediators are vigilant about possible victim blaming or possible discounting of the significance of the violence or abuse. *Id.* at 41.

160. *Statewide Uniform Statistical Reporting System 2003 Client Baseline Study: Summary Findings*, RESEARCH UPDATE (Center for Families, Children & the Courts, San Francisco, Cal.) June 2004, at 9; *Domestic Violence in Court-Based Child Custody Mediation Cases in California*, RESEARCH UPDATE, (Center for Families, Children & the Courts, San Francisco, Cal.) Nov. 2002, at 1; *accord* Nancy Thoennes, *Mediation and Domestic Violence: Current Policies and Practices*, 33 FAM. & CONCILIATION CTS. REV. 7 (1995).

161. The author's experience in a Family Drug Treatment Court is that it takes three to six months with some clients before they will admit that they have been the victim of violence. *See generally* Leonard P. Edwards & James A. Ray, *Judicial Perspectives on Family Drug Treatment Courts*, 56 JUV. & FAM. CT. J. 1, 4-5 (Summer 2005). Approximately fifty percent of mediating parents reporting violence in the relationship. *Statewide Uniform Statistical Reporting System 2003 Client Baseline Study: Summary Findings*, RESEARCH UPDATE (Administrative Office of the Courts, San Francisco, Cal.) June 2004, at 9.

162. Kelly, *supra* note 85, at 28. Client satisfaction in mediation where there has been a history of violence was reported to be positive in an Australian study. *See* Davies & Ralph, *supra* note 99.

163. Barbara Davis, Stephen Ralph, Michael Hawton & Lorro Craig, *A Study of Client Satisfaction with Family Court Counselling in Cases Involving Domestic*

along with that in other states and countries is that with proper procedures mediation can be safely and effectively conducted in cases where there has been violence.[164] Perhaps Ann Milne framed the issue best when she said, "What process can we develop that will best help individuals who have been involved in an abusive relationship address the issues between them so that they can move on with their lives without violence and without the need for ongoing court and legal interventions?"[165] Judges, attorneys, domestic violence advocates, and mediators in New York can work together to create that process as other states have done.

### C. *Allegations of Child Abuse and Severe Power Imbalances*

The Miller Commission also recommends that mediation not be ordered where there have been allegations of child abuse or where there are severe power imbalances between the parties.[166] As with cases involving domestic violence, these categories of cases involve significant numbers of clients.[167] Once again the California experience, as well as those of commentators, is that a different approach to each situation should be considered.

With regards to cases where child abuse allegations have been made, the first step should be to terminate the mediation and refer the case to the child protection authorities for investigation.[168] New York has a mandatory reporting law,[169] and a

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*Violence*, 33 FAM. & CONCILIATION CTS. REV. 324 (July 1995); Davies & Ralph, *supra* note 99, at 242.

164. Professor Andrew Schepard concludes that "the domestic violence community may need to recognize that some victims of violence involved in custody disputes may benefit from parent education and mediation." Schepard, *supra* note 20, at 421.

165. Ann L. Milne, *Mediation and Domestic Abuse*, *in* DIVORCE AND FAMILY MEDIATION, *supra* note 85, at 304, 314.

166. THE REPORT, *supra* note 3, at 32.

167. The most recent California statistics indicated that in 1996 approximately twenty-five percent of mediated cases had a child protection investigation involved. *Preparing Court-Based Child Custody Mediation Services for the Future*, RESEARCH UPDATE (Center for Families, Children & the Courts, San Francisco, Cal.) Sept. 2000, at 9.

168. CAL. FAM. CODE § 3027 (West 2007). "Suspension or discontinuance of mediation if allegations of child abuse or neglect are made until a designated agency performs an investigation and reports a case determination to the mediator." CAL. R. CT. 5.215 (d)(6) (West 2007); CAL. PENAL CODE § 11165 (West 2007).

child abuse report by a mediator or even by a parent against another parent is sufficient to trigger that law.[170] At that point, a child protection agency should investigate the allegations. The Matrimonial Court does not have adequate investigative resources to conduct such an investigation. When the investigation is complete, the court can decide whether to proceed with the matrimonial litigation or to have the matter referred to the juvenile child protection court.

"Severe power imbalances" should also not be automatically excluded from the mediation process. First of all, making the determination of which cases are "severe" poses problems for a court system. Who is to make that determination and on what information? Second, mediators are trained in dealing with power imbalances.[171] In fact, most cases have power imbalances of one kind or another. In most cases a skilled mediator can adjust the dynamic within the mediation process in order to make the communications meaningful and the outcome fair.[172] If the mediator is unable to do so, he or she can return the case to the court for litigation.[173]

### D. *Resources for Mediation*

Mediation is a service rendered by trained professionals. Mediation programs cost money and must be properly funded if the mediation process is going to be given a fair opportunity to succeed. One of the challenges to successful child custody medi-

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169. N.Y. SOC. SERV. LAW §§ 411-28 (McKinney 2007).

170. CAL. FAM. CODE §§ 3011, 3118 (West 2007); *see generally* Leonard P. Edwards, *The Relationship of Juvenile and Family Courts in Child Abuse Cases*, 27 U. OF SANTA CLARA L. REV. 201 (Spring 1987).

171. California statute directs mediators to follow standards of practice including "[t]he conducting of negotiations in such a way as to equalize the power relationships between the parties." CAL. FAM. CODE § 3162(b)(3) (West 2007); Cal. R. Ct. 5.210 (West 2007); *see* Lenard Marlow, *Samson and Delilah in Divorce Mediation*, 38 FAM. & CONCILIATION CTS. REV. 224 (Apr. 2000).

172. Michael Lang, *Understanding and Responding to Power in Mediation*, *in* DIVORCE AND FAMILY MEDIATION, *supra* note 85, at 209, 213; Kelly B. Olson, *Lessons Learned From a Child Protection Mediation Program: If At First You Succeed and Then You Don't*, 41 FAM. CT. REV 480, 485 (Oct. 2003); Allan E. Barsky, *Why Parties Agree to Mediate: The Case of Child Protection*, 35 FAM. & CONCILIATION CTS. REV. 164 (Apr. 1977); Jennifer P. Maxwell, *Mandatory Mediation of Custody in the Face of Domestic Violence: Suggestions for Courts and Mediators*, 37 FAM. & CONCILIATION CTS. REV. 335 (July 1999).

173. *See* CAL. R. CT. 5.210 (West 2007).

ation programs in California has been the inability or unwillingness of some courts to devote sufficient resources to the mediation process. Without adequate resources, the time for mediation may be reduced to minutes rather than hours, and the mediators may find themselves rushing to complete a process that needs adequate time to be successful. New York must devote adequate resources to the mediation process if it is going to be given a fair opportunity to demonstrate its effectiveness.

Expansion of child custody mediation services will require New York to train a new generation of mediators. As the discussion earlier indicated, the success of a mediation program is directly related to the quality of the mediators. The preparation for a wide-spread expansion of mediation will require both time and careful planning.

### E. *Parent Education*

The Miller Commission recommends that the Parent Education Program be expanded, and that the judge have the authority to order parents to participate in the program.[174] This recommendation is consistent with recommendations from national commissions,[175] practice in other states, California in particular, and with certain foreign jurisdictions.[176] The New York experience with court-based parent education has been excellent, and the Commission recommends expansion of the pro-

174. THE REPORT, *supra* note 3, at 35.

175. "Courts should require separating, divorcing and unmarried parents to attend orientation and education programs to help them understand court processes and the effect that their decisions will have on their lives and the lives of their children." 1 PARENTING OUR CHILDREN: IN THE BEST INTEREST OF THE NATION, FINAL REPORT, UNITED STATES COMMISSION ON CHILD & FAMILY WELFARE 34 (1996), *available at* http://members.aol.com/asherah/majority.htm (Recommendation 4); Jack Arbuthnot, *A Call Unheeded: Courts' Perceived Obstacles to Establishing Divorce Education Programs*, 40 FAM. CT. REV 371 (July 2002).

176. Marsha K. Pruett, *supra* note 50, at 38-51; Karen R. Blaisure & Margie J. Geasler, *The Divorce Education Intervention Model*, 38 FAM. CT. REV 501 (Oct. 2000). Re-litigation is reduced after parent education classes. Jack Arbuthnot, Kevin M. Kramer & Donald A. Gordon, *Patterns of Re-Litigation Following Divorce Education*, 35 FAM. & CONCILIATION CTS. REV. 269 (July 1997). Evaluations of one program found increased agreements after orientation. Hugh McIsaac, *Orientation to Mediation in Portland, Oregon*, 32 FAM. & CONCILIATION CTS. REV. 55 (Jan. 1995).

gram as well.[177] Evaluations of parent education and orientation programs with regards to a number of measures have been positive.[178] In California, evaluations conclude that some cases settle simply by parents attending the program, and for those cases that do not resolve, the parties are in a much better position to take advantage of mediation after completing the parenting program. The conclusion of many California counties and researchers is that courts should require parents to attend a parent education program as a first step in the divorce process.[179] New York should consider mandating parenting education.[180]

### F. *Selection and Training of Judges*

The Miller Commission found that public confidence and respect in matrimonial cases "hinges on the proper selection and retention of judges of these parts."[181] To this end the Commission made several recommendations regarding the selection, education, and training of matrimonial judges. These are excellent recommendations, but should be combined with some attention to the tenure of matrimonial judges and to their role on

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177. New York has developed several community-based parenting programs with promising results. *See* Ronald W. Heilmann, *A Community-Based Parent Education Program for Separating Parents*, 38 FAM. & CONCILIATION CTS. REV. 514 (Oct. 2000). Other commentators recommend expansion. *See* Cathleen Gray, Mary Jeanne Verdieck, Elizabeth Smith & Karen Freed, *Making It Work: An Evaluation of Court-Mandated Parenting Workshops for Divorcing Families*, 35 FAM. & CONCILIATION CTS. REV. 280 (July 1997); Margie J. Geasler & Karen R. Blaisure, *Court-Connected Programs for Divorcing Parents in Michigan: A Status Report*, 33 FAM. & CONCILIATION CTS. REV. 484 (Oct. 1995).

178. Jack Arbuthnot & Donald Gordon, *Does Mandatory Divorce Education for Parents Work? A Six-Month Outcome Evaluation*, 34 FAM. & CONCILIATION CTS. REV. 60, 79-80 (Jan. 1996).

179. "[P]arent education is more helpful when it occurs as early as possible in the separation process." Peter Salem, Andrew Schepard & Stephen W. Schlissel, *Parent Education as a Distinct Field of Practice, The Agenda for the Future*, 34 FAM. & CONCILIATION CTS. REV. 9, 18 (Jan. 1996). "In states offering or mandating custody mediation, orientation sessions should also be mandatory to educate parents about what mediation is and how it works." *The Determination of Child Custody*, *supra* note 28, at 134.

180. "Perhaps the most important concern is that parents simply will not attend parent education programs unless ordered by the court to do so." Sanford L. Braver, Peter Salem, Jessica Pearson & Stephanie R. DeLusé, *The Content of Divorce Education Programs, Results of a Survey*, 35 FAM. & CONCILIATION CTS. REV. 41, 55 (Jan. 1996); Arbuthnot & Gordon, *supra* note 178, at 79-80.

181. *The Report*, *supra* note 3, at 15.

the matrimonial bench. The California Judicial Council has just enacted a Standard of Judicial Administration with recommendations regarding the tenure (minimum three years) and the role of these judges.[182] The New York judiciary should consider the issues and recommendations contained therein.[183]

### G. *Stages Within The Custody Determination Process*

The Miller Commission pointed out that each case that comes before the court will have different dynamics, and that it is important for the court to make an early and accurate assessment of the needs of each family and then to devote the appropriate resources to each case. Experienced matrimonial judges know that a small percentage of cases take up a large percentage of court time. These are the so-called "high conflict" cases.[184] If these cases can be identified early, the court can impose a more structured process on them and perhaps avoid unnecessary delays and expenditure of scarce court resources. Specialized interventions have been developed to address the needs of these families.[185]

One way of analyzing a court-based child custody resolution scheme is to look at the entire court process from filing to completion as a series of steps or stages, each designed with an eye towards facilitating resolution of the custody dispute. Using this framework, one can see that most parties resolve their custody issues without the use of the court or services provided by the court. The study by Mnookin and Macoby indicated that approximately eighty percent of all litigants resolve their case

182. CAL. R. CT. 5.30(a) (West 2007).

183. *See* the discussion of the evolving role of the matrimonial judge *supra* section X of this article.

184. CARLA B. GARRITY & MITCHELL A. BARIS, CAUGHT IN THE MIDDLE: PROTECTING THE CHILDREN OF HIGH-CONFLICT DIVORCE (Basic Books 1994); Beck, Sales & Emery, *supra* note 102, at 451; Christine A. Coates, Robin Deutsch, Hugh Starnes, Matthew J. Sullivan, & BeaLisa Sydlik, *Parenting Coordination for High-Conflict Families*, 42 FAM. CT. REV 246, 252 (Apr. 2004); JANET R. JOHNSTON & VIVIENNE ROSEBY, IN THE NAME OF THE CHILD: A DEVELOPMENTAL APPROACH TO UNDERSTANDING AND HELPING CHILDREN OF HIGH CONFLICT AND VIOLENT DIVORCE (1997).

185. Marsha K. Pruett & Janet R. Johnston, *Therapeutic Mediation with High-Conflict Parents: Effective Models and Strategies*, *in* DIVORCE AND FAMILY MEDIATION, *supra* note 85, at 92.

without resort to formal court processes.[186] The remaining twenty percent start with the filing of legal papers, the first step in the court process. For litigants without access to legal assistance, the court may provide a facilitator or helper to educate the litigant about the correct forms to use and the steps in the legal process.[187] Once the papers are filed, the parties would be assessed for domestic violence and service needs. They would then be ordered to attend a parent education class. This order might come directly from a judge or from the Family Court Services office. If there is domestic violence present, they would be instructed to attend the class separately. The class addresses child custody issues including the needs of their child and the benefits of mediation. If the parents do not resolve the issues at this level, they would be ordered to mediation. If the case does not settle at mediation, they would be ordered to a pre-trial conference in front of a judge. If the conference is unsuccessful, the judge can then order a child custody evaluation. The next stage would be for the parents to meet with the custody evaluator, after the evaluation is completed, and consider what the evaluator has to say about his or her recommendations. If the matter does not resolve after that meeting, it would return to the judge for a settlement conference. Finally, if all has failed, the case would be set for trial.

The experience in Santa Clara County, California, a county that utilizes all of these stages, is that a percentage of cases will settle at each stage, the largest percentage at the mediation stage. Ultimately from one to two percent will go to trial, but those are the cases, at least under this model, that must have a judicial resolution. This type of staged approach to the resolution of child custody cases is consistent with the words of Judge Robert Page of New Jersey written over ten years ago: "I have a dream of a [family] court where the smallest room, and the least utilized, is the courtroom; where the parties have attempted to

186. DIVIDING THE CHILD, *supra* note 14, at 139-62.

187. California, for example, provides Family Law Facilitators in each domestic relations court in the state. They are usually stationed in the Self-Help Center located at or near the Family Court. In addition, each Superior Court website provides information to potential litigants about procedures and forms.

get through all the other rooms first, where the courtroom is not the preferred room to resolve disputes."[188]

## X. The Evolving Role of the Matrimonial Judge[189]

The analysis and recommendations presented by the Miller Commission and the comments offered in this paper, if adopted, would modify the traditional role of the matrimonial/ domestic relations judge.[190] Judges would have increased administrative responsibilities, would have to become more familiar with services such as mediation, parent orientation, and parent education, and would have to start looking at the court system as a series of educational steps and procedural opportunities for parents to resolve their child custody disputes.[191] The judge would become more of a case manager and less of a trier of fact.[192] The judge would develop an attitude that while the court remains ready to provide a trial, if necessary, the preferred outcome is for parents to reach an agreement without resort to the formal court process.

California has adopted a Standard of Judicial Administration that reflects the evolving role of the domestic relations judge.[193] In Standard 5.30, the California Judicial Council has declared that judges in these cases should remain in the assignment for a period of at least three years, that actions filed in one department should be assigned to that same judicial officer for all purposes, that the supervising and presiding judges should motivate and educate other judges regarding the significance of

188. Statement by Honorable Robert Page at the First Key Issues Faculty Consortium Meeting, Teaneck, New Jersey (May 27, 1988), cited in *Court-Approved Alternative Dispute Resolution: A Better Way to Resolve Minor Delinquency, Status Offenses and Abuse/Neglect Cases*, 40 JUV. & FAM. CT. J. 47, at 50 (1989).

189. Perhaps it is also time to change the name from Matrimonial Judge to Family Court Judge, Domestic Relations Judge, or some more relevant title. In a higher and higher percentage of the cases that appear on the domestic relations docket, there has been no marriage.

190. Other commentators have addressed this evolving role of the judge. *See* Schepard, *supra* note 20, at 396.

191. Ricci, *supra* note 124, at 406.

192. King, *supra* note 61, at 14-15.

193. The Standard is based on California Standard of Judicial Administration 24 regarding the role of the Juvenile Court Judge passed in 1988 and modified several times thereafter (codified today as CAL. R. CT. 5.40 (West 2007)). *See also* Leonard P. Edwards, *The Juvenile Court and the Role of the Juvenile Court Judge*, 43 JUV. & FAM. CT. J. 25 (1992).

the matrimonial court, and they should work to ensure that there are adequate resources for all participants in the court process. The Standard stresses training for all participants in the family court process. Additionally, the Standard describes the unique role of the court and of the judges serving in the court. It encourages those judges to:

> (1) Provide active leadership within the community in determining the needs of and obtaining and developing resources and services for children and families who participate in the court system;
>
> (2) Investigate and determine the availability of specific prevention, intervention and treatment services in the community for these families;
>
> (3) Take an active role in helping the court develop rules and procedures that will result in appropriate services and treatment for these families;
>
> (4) Exercise a leadership role in the development and maintenance of services for self-represented and financially disadvantaged litigants;
>
> (5) Take an active part in the formation of a community-wide network to promote and coordinate private- and public-sector efforts to focus attention and resources on the needs of these litigants;
>
> (6) Educate the community and its institutions, including the media, concerning the role of the court in meeting the complex needs of families;
>
> (7) Encourage the development of community services and resources to assist families and children in this court system with attention to self-help information, supervised visitation, substance abuse and drug prevention, intervention and treatment, services for families with domestic violence issues, counseling, parenting education, vocational training, mediation, alternative dispute resolution options, and other resources to support families;
>
> (8) Manage cases more efficiently and effectively to avoid conflicting orders;
>
> (9) Take an active role in promoting completion of cases in a timely manner;
>
> (10) Appoint counsel for children in appropriate custody cases;

(11) Ensure that the best interests of children are served throughout the court process.[194]

This Standard offers relevant and useful suggestions for the New York Judiciary as it continues to improve its Matrimonial Courts. As Professor Barbara Babb has written: "[J]udges in these cases must be more than triers of fact. Family law decision makers must embrace a goal of family law jurisprudence the need to strengthen individuals and families and to enhance their functioning."[195]

## XI. Conclusion

The New York court system has taken significant steps to examine its Matrimonial Court operations and to make recommendations for improvement. Many of the changes will be implemented without difficulty. Others will take time, energy, education, training, and additional resources. It is a challenge to change a legal culture, one that has been educated and trained in the adversarial process and that believes that judges and lawyers have the best answers for separating families. But it can be done. Some states and local jurisdictions have acknowledged that the traditional legal process can be harmful for families, and that there is a preferable process to resolve child custody disputes. They have changed from the litigation mode to the mediation mode and now have a different legal culture, one that judges, attorneys, and clients appreciate as preferable to the traditional model.

While the participants in the symposium appeared to be supportive of the majority of the Miller Commission recommendations, it was also clear from this author's perspective that the invited guests were recommending that New York take bolder steps to install mediation and parenting classes as an integral part of the legal process for parents resolving custody issues. Based on what has happened in some other court systems, it would be a culture change that would benefit the parents, the children, the court process and ultimately the community.

194. CAL. R. CT. 5.30 (West 2007) (effective Jan. 1, 2007).

195. Barbara Babb, *An Interdisciplinary Approach to Family Law Jurisprudence: Application of an Ecological and Therapeutic Perspective*, 72 IND. L. J. 775, 808 (Summer 1997).

Families in crisis want help. They turn to the court system to help them get through what is perhaps the most difficult time they have faced as a family. They want a fair resolution, one that makes it possible for each adult to continue with his or her life, and they want the children to be able to have safe and healthy relationships with each parent. They want to have a say in what life will be after marital dissolution, and they do not want to spend a lot of scarce family resources to attain those goals. They want a court process that will listen to them, their grievances, and their desires, and one that is conducted in a manner designed to preserve their safety.

Of course, often some members of the family want revenge. They are hurt and angry, and many want to get back at the person who is leaving them or who has treated them unfairly. They would like to use all of the tools and opportunities available to them in the adversarial court system to accomplish these goals.

Judges and court administrators must understand these conflicting realities facing families as they enter the court system.[196] They need to redirect parents towards the needs of their children and towards the future. For decades the courts have offered parents the opportunity to wage battle in the courtroom using traditional adversarial methods. The courts should not deny anyone the right to a trial, but it is critical for the court system to provide alternatives before the trial starts. A staged court process that includes assessment, education, mediation, and other opportunities to resolve the custody dispute prior to trial will give to families what they need to resolve the great majority of custody disputes.

More than twenty years ago Justice Sandra Day O'Connor summarized her views regarding the resolution of disputes. She said,

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196. As Professor Babb has written:

> The tremendous volume and breadth of family law cases now before the courts, coupled with the critical role of the family in today's society to provide stable and nurturing environments for family members, require that judges understand relevant social science research about child development and family life. This informed perspective can assist decision makers to dispense justice aimed at strengthening and supporting families.

*Id.* at 776.

> The courts of this country should not be the places where the resolution of disputes begins. They should be the places where disputes end—after alternative methods of resolving disputes have been considered.[197]

In no court, other than domestic relations court, and in no type of case, other than child custody cases, is this statement more true. The resolution of custody disputes should focus on the future for relationships between each parent and the child, not upon the fault of the parents. If New York is to maximize the positive impact that courts can have on couples struggling with child custody issues, it should move forward on the recommendations of the Miller Commission, but with some changes, the most important of which is to mandate parent education and mediation in child custody cases.

197. Justice Sandra Day O'Connor, Address at the Consumer Dispute Resolution Conference: Exploring the Alternatives (Jan. 21, 1983). Anthropologists have noted that mediation in some African tribes strives to bring the parties back to a state where they can move forward. "[W]hen Lozi and Tiv [2 African tribes] are considered together . . . the main function of the court is to conciliate and to reintroduce harmony in the social relations of the contending parties, so that in effect the community itself will return to a state of smooth functioning." Victor Ayoub, *The Judicial Process in Two African Tribes*, *in* JUDICIAL BEHAVIOR: A READER IN THEORY AND RESEARCH 124-31 (G. Schubert ed., Rand McNally and Company, Chicago_1964). The goal of courts determining custody should be similar: to permit each parent to have a positive and long-lasting relationship with the children of the relationship.