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This volume of the Pace Law Review explores select issues addressed by the Miller Matrimonial Commission's Report to the Honorable Judith S. Kaye, Chief Judge of the Court of Appeals of the State of New York.[1] It does not purport to be a comprehensive exploration of all recommendations of the Miller Commission for reform of the New York divorce process.

New York has been uniquely resistant to true "no fault" divorce reform, a concept introduced into American divorce law by California in 1970. Every state, with the sole exception of New York, provides for dissolution of marriage either based solely on proof of the breakdown of the marital relationship or irreconcilable differences, or addition of one of these no-fault options to traditional fault-based grounds. Domiciliaries of New York seeking to end their marriages, however, must still prove a

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1. MATRIMONIAL COMMISSION REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK (2006), http://www.courts.state.ny.us/reports/matrimonialcommissionreport.pdf; reprinted here as Appendix A.

traditional fault ground, e.g., adultery, abandonment, or cruel and inhuman treatment, unless they live separately pursuant to a separation agreement for one year. As Professor DiFonzo and attorney Ruth Stern observe in their article exploring why New York seems so resistant to no fault divorce:

> Never having banished fault from its moral and legal consciousness, New York remains dependent upon it as a rationale for framing and resolving marital dissolution issues. Fault continues to pervade analysis of property distribution and spousal support matters. It has even achieved a certain strategic legitimacy in the eyes of those who currently oppose measures to evict fault entirely from New York's divorce laws.[2]

Attorney Dolores Gebhardt and the Honorable Sondra Miller provide an in depth analysis of the New York case law dealing with abandonment,[3] a ground for divorce that was added, along with others, to the historical ground of adultery as part of the Divorce Reform Act of 1966.[4] Since that time, "the courts' efforts to define and describe . . . [the term, that is not defined in the statutory law,] have resulted in a complicated and confusing body of case law that confuses the matrimonial bar as well as the very courts that created it. The result is often a denial of justice . . . ."[5]

Gebhardt and Miller argue that divorce in New York is expensive, emotionally draining and uncertain. No-fault divorce is the logical extension of the mostly failed reform effort that was mounted forty years ago. They urge the New York State Legislature to act favorably on the Miller Commission's recommendations.

Other issues related to the expense, emotional trauma and economic inequity of divorce are not limited to fault-based laws.

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2. J. Herbie DiFonzo & Ruth C. Stern, *Addicted to Fault: Why Divorce Reform Has Lagged in New York,* 27 PACE L. REV. 561 (2007).

3. Dolores Gebhardt & Sondra Miller, *Justice Abandoned: Forty Years of Stalemate in Actions for Divorce on the Ground of Abandonment,* 27 PACE L. REV. 605 (2007).

4. THE REPORT OF THE JOINT LEGIS. COMM. ON MATRIMONIAL AND FAMILY LAW, N.Y. LEGIS. DOC. [1966] No. 8, at 96.

5. Gebhardt & Miller, *supra* note 3, at 606.

Nevertheless, as Judge Leonard Edwards observes in his article:[6]

> At-fault divorces often take full advantage of the adversarial process. In contested cases each side attempts to prove that the other has committed blameworthy acts. . . . [T]he 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. . . .[7]
>
> There are few remaining defenders of using the adversarial process in family matters. However, legal systems and culture are difficult to change.[8]

Judge Edwards argues in favor of mandated mediation in custody and visitation matters.[9] Following the California model, this approach includes the establishment of a statewide office to oversee the mediation process and to provide for ongoing research and evaluation of the process, the adoption of uniform standards of practice, a statewide protocol for mediation, including special provisions dealing with mediation when there has been domestic violence, and standards for mediator qualification.

Professor Andrew Schepard endorses the Miller Commission's recommendation that the divorce resolution system should make mediation a preferred method in most cases in-

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6. Judge Leonard Edwards, *Comments on the Miller Commission Report: A California Perspective,* 27 PACE L. REV. 627 (2007).

7. *Id.* at 636.

8. *Id.* at 639.

9. More than three-fourths of the states have court-based programs for mediation of disputes involving child custody and visitation. New York is not included.

volving parenting disputes.[10] He argues that a lawyer representing a client in an action against the other parent should have an affirmative, ethical obligation to advise the client about mediation and other alternatives to litigation – an "ADR discussion requirement." He urges legislative, bar association, and judicial action to change the litigation culture of divorce in New York. Finally, Professor Schepard argues that law schools must change the way in which students are educated about issues involving family law. He cites particularly the Family Law Education Reform Project (FLER), a joint effort of the Association of Family and Conciliation Courts and the Hofstra Law School's Center for Children, Families and the Law, to reform law school curricula to require education "regarding the needs of children of divorce, in ADR, and the contributions of other disciplines to the resolution of family law disputes."[11]

Professor Marsha Kline Pruett, and co-authors Lauren Arthur and Rachel Ebling, use empirical data to explore the effects of a Connecticut court-based intervention model, the Collaborative Divorce Project (CDP), a hybrid form of alternative dispute resolution that combines psycho-educational parenting classes, therapeutic mediation and case management services with collaborative input from legal and mental health professionals.[12] The major goal of the intervention was to establish "a 'culture of collaboration' that emphasized both parents' continuing involvement with and responsibility for their children."[13] The central premise of the article is that the mother, in her customary role as primary caretaker, becomes the monitor, supervisor, permission grantor, and controller of the father's (and others') involvement with the child and the form of that involvement that is, the gatekeeper. The authors conclude that a court-based intervention aimed at facilitating parental recognition of the significance of "gatekeeping" in resolution of parental disputes (a non-litigation approach) will result in greater

10. Andrew Schepard, *Kramer vs. Kramer Revisited: A Comment on the Miller Commission Report and the Obligation of Divorce Lawyers for Parents to Discuss Alternative Dispute Resolution with Their Clients*, 27 PACE L. REV. 677 (2007).

11. *Id.* at 703.

12. Marsha Kline Pruett, Lauren A. Arthur, & Rachel Ebling, *The Hand that Rocks the Cradle: Maternal Gatekeeping after Divorce*, 27 PACE L. REV. 709 (2007).

13. *Id.* at 725.

and more positive involvement of both parents in the post-divorce family.

Co-authors Peter Salem, Debra Kulak and Robin Deutsch explore Connecticut's triage system as a means of delivering services to families in conflict.[14] Court services have traditionally been delivered in a linear manner, meaning that they "begin with the service that is least intrusive and time consuming, and, if the dispute is not resolved, the family then moves to the next available process."[15] Since the 1970s most services have focused on providing child custody evaluations/investigations and mediation services to assist parents in resolving conflicts over child custody and visitation. More recently, however, additional dispute resolution processes, e.g., parenting coordination, high conflict couples counseling, collaborative divorce and cooperative law, have evolved.

Connecticut responded to these developments by creating the Court Support Services Division (CSSD) – Family Services Unit as a judicial branch agency with oversight responsibilities for all family matters. The Family Civil Intake Screen was developed to facilitate early identification of parenting conflicts and to assist professionals in more accurately matching families' needs to appropriate services. On going research is designed to evaluate the effectiveness and efficiency of the Family Civil Intake Screen.[16]

In their articles, Professors Linda Elrod, Martin Guggenheim and Merril Sobie address the proper role of attorneys appointed to represent children and their interests. Professor Guggenheim believes that attorneys for children should represent the best interests of that child, in contrast to the Miller Commission's position that attorneys for children involved in custody and visitation proceedings should diligently advocate

14. Peter Salem, Debra Kulak & Robin M. Deutsch, *Triaging Family Court Services: The Connecticut Judicial Branch's Family Civil Intake Screen,* 27 PACE L. REV. 741 (2007).

15. *Id. at* 749.

16. Preliminary data suggest that Connecticut's triage initiative has been successful in facilitating early resolution of custody, parenting and parental access disputes while also providing a more efficient and effective delivery of services. *Id.* at 767.

the child's position.[17] He argues that the Commission's position ultimately does not mean advocating for what the child wants, but rather advocating for a result chosen by the lawyer.

> Other than warning [lawyers] against acting on their own biases, the Commission simply leaves children's lawyers free to make all of the important decisions with which they are charged. They are free to decide whether or when to be bound by what their client instructs[,] [a]nd . . . free to advocate for whatever position they choose after deciding not to be bound by what their client instructs.[18]

Professor Guggenheim further asserts that children's lawyers are expected to recommend to the court the outcome they believe will serve their client's best interest, contrary to the Miller Commission's position that the court should not request nor should the attorney for the child present the attorney's recommendation.

In summary, Professor Guggenheim believes that the Miller Commission failed to answer many open questions concerning attorneys for children, such as, when a court should appoint an attorney for a child, the attorney's qualifications and the protocols for representation.

Professor Sobie, in contrast, asserts that attorneys for children should maintain a traditional attorney-client relationship, advocating for the client as in other cases, not the best interests of the child.[19] Attorneys for children are simply attorneys, and their responsibilities are to protect the client's interests and attempt to achieve the client's goals. He argues that a lawyer's determination of the child's best interests usurps the court's function, violates New York statutory law and conflicts with rules of professional responsibility. He criticizes the Miller Commission for failing to resolve this problem.

> The Matrimonial Commission could have urged a return to New York's statutory standards . . . . [o]r the Commission could have suggested an entirely different approach, such as 'best interests' advocacy . . . . It did neither, falling back on a confusingly modest

17. Martin Guggenheim, *A Law Guardian by Any Other Name: A Critique of the Report of the Matrimonial Commission,* 27 PACE L. REV. 785 (2007).

18. *Id.* at 829.

19. Merril Sobie, *A Law Guardian by the Same Name – A Response To Professor Guggenheim's Matrimonial Commission Critique,* 27 PACE L. REV. 831 (2007).

> encouragement of the attorney-client model, and a plea for additional study of an issue which has already been studied to death.[20]

Professor Sobie further laments the Matrimonial Commission's failure to address the serious problem that stems from the judicial appointment of attorneys for children. Many judges who appoint attorneys view the attorney as an arm of the court. A lawyer chosen by the court does not want to jeopardize future appointment by going against the judge's wishes and falling from the judge's good graces. To assure attorney independence, appointive power should be removed from the court's hands.

Professor Elrod argues that attorneys for children should represent a child's best interests, but those interests are best discovered through a child's preferences.[21] She argues that client-centered lawyers are necessary. Congressional ratification of the United Nations Convention on the Rights of the Child is an important first step to improve the laws that protect and secure full rights of citizenship for children.

Professor Elrod goes on to call for statutory rights giving children standing to enforce their rights. Without a statute, courts are reluctant to expand the rights available. Without enforceable rights children remain vulnerable. Children should have their voice, and it is not necessarily true that the parent's interests are the same as a child's. Professor Elrod explains,

> Therefore, as a general rule, we can say that a child has the right to be raised by his or her parents without state intervention unless the child is at risk of serious harm, or where divorced or separated parents are unable to resolve a dispute. . . .[22]
>
> . . . Because the child's best interests may be different than one or both of the parent's interests, the child should have a voice.[23]

Parents who agree on what is in their child's best interests should, generally, have their wishes prevail, but the problem surfaces when parents cannot agree. She argues that the best-interest standard must be more child-focused. A child-centered approach would require that the child's perspective be

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20. *Id.* at 853.

21. Linda D. Elrod, *Client-Directed Lawyers for Children: It is the 'Right' Thing to Do,* 27 PACE L. REV. 869 (2007).

22. *Id.* at 890.

23. *Id.* at 894.

presented and heard; that the child be presumed capable of participation, and; that the decision be developmentally appropriate. The client-directed lawyer for the child would ensure that the best-interest standard does not forget the child at its center.

This symposium issue concludes with two articles addressing specific aspects of New York law that contribute to delay, expense and conflict in divorce cases. Professor Marsha Garrison states that despite good intentions the Miller Commission's recommendations lack the capacity effectively to address the problems identified by Judge Kaye in her charge to the Commission – reforms to reduce trauma, delay and cost to parents and children.[24] She argues that one of the major sources of delay, expense and litigation-induced pain is the highly discretionary entitlement rules, specifically, those dealing with distribution of property and spousal maintenance. New York law provides the divorcing couple no predictability. While the statutes provide a list of factors that the court is to consider, the scope, methodology and use of that appraisal is left entirely to judicial discretion.[25] As a result, persons cannot assess their entitlements to reach an agreement, but must rely on lawyers and other experts to assess their prospects.[26]

In summary, Professor Garrison concludes that the Miller Commission should have recommended 1) a clear and predictable entitlement to "reimbursement alimony" to supplement its recommendation that enhanced earning capacity should not be an asset subject to distribution as property at divorce,[27] 2)

24. Marsha Garrison, *Reforming Divorce: What's Needed and What's Not*, 27 PACE L. REV. 921 (2007).

25. *Id.* at 925.

26. Earlier research by the author revealed, for example, that the most significant variables for determining whether a spousal maintenance award was permanent or for a limited term were the duration of the marriage and the political party of the trial judge! Similarly, the value of the maintenance award was more strongly predicted by the particular appellate division in which the case arose than by either spouse's income or the value of the net marital property. *See* Marsha Garrison, *Good Intentions Gone Awry: The Impact of New York's Equitable Distribution Law on Divorce Outcomes*, 57 BROOKLYN L. REV. 621 (1991); Marsha Garrison, *How Do Judges Decide Divorce Cases? An Empirical Analysis of Discretionary Decision Making*, N.C.L. REV. 401 (1996) [hereinafter *Discretionary Decision Making*].

27. This issue is addressed by Professor Ellman's article that follows Professor Garrison's article.

changes in the entitlement rules to enhance predictability,[28] and 3) rules authorizing simplified procedures in uncontested cases.

Professor Ira Ellman meticulously analyses *O'Brien v. O'Brien*,[29] the New York Court of Appeals case making New York the only state to recognize a property interest of one spouse in the degrees and licenses of the other spouse.[30] He treats the reader to the full story of the O'Briens and their divorce, as well as an informative review of the legal context of the time. Professor Ellman observes that *O'Brien* transforms every advance in a spouse's earning capacity during the marriage into marital property and "has made it impossible for New York to follow the national trend toward divorce law that presumes marital property be divided equally. The division of marital property in New York must instead involve time-consuming and expensive inquiries into the conduct of the parties' marriage."[31]

On behalf of the Pace Law Review, I wish to thank the authors for their generous cooperation and efforts in addressing many of the important issues raised (and perhaps left unstated) by the Miller Commission Report. Thanks are also due to Judge Judith Kaye for her wisdom in establishing the Matrimonial Commission and to Justice Sondra Miller for her outstanding leadership of the Commission. Only time will tell whether New York can overcome its addiction to fault and other barriers to a less expensive, less time-consuming and less emotionally traumatic dispute resolution process.

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28. Professor Garrison suggests a legislative presumption in favor of alimony for the long-married spouse whose earnings (and earnings capacity) make up a small percentage of family income, a legislative provision specifying that maintenance is presumed to be inappropriate when the earning capacities are relatively equal or when the marriage is short and childless, and a presumption of equal division of net assets. *See* Garrison, *Discretionary Decision Making, supra* note 27.

29. Ira Mark Ellman, *O'Brien v. O'Brien: A Failed Reform, Unlikely Reformers*, 27 PACE L. REV. 949 (2007).

30. O'Brien v. O'Brien, 66 N.Y.2d 576 (App. Div. 1985).

31. Ellman, *supra* note 30, at 982.