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# THE CHALLENGE TO RURAL STATES OF PROCEDURAL REFORM IN HIGH CONFLICT CUSTODY CASES

*Elizabeth Barker Brandt, J.D.\**

## I. INTRODUCTION

Procedural experimentation and reform in the family law area has been underway in a number of courts across the country for at least the last decade.<sup>1</sup> This reform has been driven by several distinct but related developments—including the recognition of mediation as an effective dispute resolution tool particularly in child custody cases,<sup>2</sup> and the increasing research in the social sciences showing the negative effects on children of highly conflicted divorce.<sup>3</sup> The institutionalization of reform, however, is never smooth and in the family law area the progress of reform has been especially bumpy. The resistance to changed procedural handling of family law cases rises to more than the normal resistance to change than any institution experiences because the proposed reforms challenge basic assumptions about the role of both the lawyer and the adversary system in resolving disputes. In addition, most of the reform movements adopt an interdisciplinary model integrating substantial numbers of non-lawyer, mental health professionals into the family court system. This latter development has been

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1. See generally AMERICAN BAR ASSOCIATION, ABA SUMMIT ON UNIFIED FAMILY COURTS: EXPLORING SOLUTIONS FOR FAMILIES, WOMEN AND CHILDREN IN CRISIS (1998); CAROL R. FLANGO ET AL., HOW ARE COURTS COORDINATING FAMILY CASES? 2, 24-26 (1999); Catherine J. Ross, *The Failure of Fragmentation: The Promise of a System of Unified Family Courts*, 32 FAM. L. Q. 3 (1998); Jeffery A. Kuhn, *A Seven-Year Lesson on Unified Family Courts: What We Have Learned Since the 1990 National Family Court Symposium*, 32 FAM. L.Q. 67 (1998); Barbara A. Babb, *Fashioning an Interdisciplinary Framework for Court Reform in Family Law: A Blueprint to Construct a Unified Family Court*, 71 S. CAL. L. REV. 469, 520 (1998); ABA PRESIDENTIAL WORKING GROUP ON THE UNMET NEEDS OF CHILDREN AND THEIR FAMILIES, AMERICA'S CHILDREN AT RISK: A NATIONAL AGENDA FOR LEGAL ACTION (1993); Judith S. Kaye, *Changing Courts in Changing Times: The Need for a Fresh Look at How Courts Are Run*, 44 HASTINGS L.J. 851 (1997); Robert W. Page, "Family Courts": A Model for the Effective Judicial Approach to the Resolution of Family Disputes, 44 JUV. & FAM. CT. J. 1 (1993).

2. See *infra* notes 4-10 and accompanying text.

3. See *infra* notes 11-13 and accompanying text.

threatening to lawyers wedded to a more traditional adversarial mode of court decision-making.

Jurisdictions with significant rural populations face additional barriers to reform. The absence of a specialized family law bar, the lack of specialized courts or specialization among judges, as well as geographic issues that exacerbate the typical lack of resources, all contribute to the problems confronted in rural states. Rural populations are often scattered and difficult to reach with existing social service delivery models. The irregular demand for services has sometimes meant that the necessary services are not available in some localities.

## II. FACTORS PUSHING THE MOVE FOR FAMILY COURT REFORM

### A. Mediation

The advent of mediation in the 1980s as an effective dispute resolution tool for child custody cases has been one of the major factors driving much of the reform in family courts. The reasons for the profound effect of mediation on the family court system are varied. Certainly, mediation provides a model of cooperative decision-making that mirrors more effectively the behavior necessary for good on-going family relations than does the adversary system.<sup>4</sup> In addition, although mediation is sometimes viewed as an additional expense in the family dissolution process, the success of mediated agreements in settling custody disputes and decreased rates of re-litigation of mediated settlements has led some to conclude that mediation is a cost effective means of resolving family disputes.<sup>5</sup> Research also indicates that parties who mediate tend to be more satisfied with the process than those who do not mediate.<sup>6</sup>

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4. See Jessica Pearson & Nancy Thoennes, *Mediating and Litigating Custody Disputes: A Longitudinal Evaluation*, 17 FAM. L.Q. 497, 498-99 (1984); Joan B. Kelly, *Who Should Be the Mediator?*, FAM. ADVOC., Spring 1992, at 20-21.

5. See Pearson & Thoennes, *supra* note 4, at 507-08; Jessica Pearson & Nancy Thoennes, *Mediation and Divorce: The Benefits Outweigh the Costs*, FAM ADVOC., Winter 1982, at 29; but see Lee E. Teitelbaum & Laura DuPaix, *Alternative Dispute Resolution and Divorce: Natural Experimentation in Family Law*, 40 RUTGERS L. REV. 1093, 1115 (1988).

6. See Pearson & Thoennes, *supra* note 4, at 505; Barbara J. Bautz, *Divorce Mediation: For Better or For Worse?*, 22 MEDIATION Q. 51 (1988) (reporting on a study of California and Kansas divorcing couples which found that those using mediation were more satisfied than couples using the adversarial process); Peter A. Dillon & Robert E. Emery, *Divorce Mediation and Resolution of Child Custody Disputes: Long-Term Effects*, 6 AM. J. ORTHOPSYCHIATRY 131 (1996) (reporting on a study that found, over a

Despite resistance to mediation from a number of different fronts, particularly advocates for disempowered women<sup>7</sup> and victims of domestic violence,<sup>8</sup> the movement to integrate mediation into the regular process of child custody decision making has continued. In 1991, California became the first state to require mediation in most custody cases.<sup>9</sup> Court reform projects incorporating mediation are underway in many states.<sup>10</sup>

#### B. Research Documenting the Detrimental Effect of High Conflict on Children

Increasingly both qualitative and quantitative research in the social sciences is documenting the detrimental effect on children of highly conflicted custody disputes. Janet Johnston, one of the leading researchers in this area has concluded that inter-parental conflict after divorce and the custodial parent's emotional distress are jointly predictive of an increase in problematic parent/child relationships and adjustment problems for the children.<sup>11</sup> In their book, *Caught in the Middle*, Carla B. Garrity and Mitchell A. Baris summarize research on the effect of high conflict on children as follows:

The level and intensity of parental conflict is the most potent factor in children's post divorce adjustment. High conflict between

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nine year period, that parents who mediated had more meaningful contact with their children and more communication about them); Joan B. Kelly, *A Decade of Divorce Mediation Research: Some Answers and Questions*, 34 FAM. & CONCILIATION CTS. REV. 373 (1996).

7. See Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L. REV. 1545 (1991); Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441 (1992); Martha A. Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727 (1988).

8. See Karla Fischer et al., *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 S.M.U. L. REV. 2117 (1993); Barbara J. Hart, *Gentle Jeopardy: The Further Endangerment of Battered Women and Children in Custody Mediation*, 7 MEDIATION Q. 317 (1990); Grillo, *supra* note 7.

9. See CAL. CIV. CODE § 4607(a)(West Supp. 1990); see Grillo *supra* note 7, at 1551-1555 (describing the California process).

10. See, e.g., FLANGO ET AL., *supra* note 1, at 127; Hildy Mauzerall et al., *Protecting the Children of High Conflict Divorce: An Analysis of the Idaho Bench—Bar Committee to Protect Children of High Conflict Divorce's Report to the Idaho Supreme Court*, 33 IDAHO L. REV. 291 (1997). See also ABA SUMMIT ON UNIFIED FAMILY COURTS, *supra* note 1.

11. See Janet R. Johnston, *High-Conflict Divorce*, THE FUTURE OF CHILDREN, Spring 1994 at 172-76.

parents is the single best predictor of a poor outcome. Fortunately, it is also one of the factors over which parents have the most control.

Aggression, behavior problems, and depression are frequent early responses to being caught in the middle of continuing animosity between parents. Later in life, too, the children of high-conflict divorce are very likely to suffer serious emotional problems. Ten to fifteen years after a divorce, such children report haunting memories, especially of episodes of physical violence.<sup>12</sup>

As Kathleen Faller writes in this symposium, "[d]espite its frequency, research and mental health practice both indicate that divorce has long term detrimental impacts on children, often representing the single most traumatic experience of their childhoods."<sup>13</sup>

### C. Nature of the Change

While family court reform has followed many different patterns, all of the reforms focus on reducing the level of conflict and speeding the resolution of the case. Three dominant themes have emerged. The first reform has focused on incorporating more alternative dispute resolution mechanisms, particularly mediation, into the litigation process as early as possible.<sup>14</sup> This is the most frequent and most common change in family courts over the last decade. Many jurisdictions now have the ability by either statute or rule to order mediation in cases where the judge deems it appropriate. Although having the power to order mediation is an important first step for reform, it is not, in itself, an answer to problems of high conflict. It is necessary for a jurisdiction to generate enough demand for mediation to support a qualified pool of

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12. See CARLA B. GARRITY AND MITCHELL A. BARIS, CAUGHT IN THE MIDDLE: PROTECTING THE CHILDREN OF HIGH-CONFLICT DIVORCE 19 (1994) (internal citations omitted); see also JUDITH S. WALLERSTEIN & JOAN BERLIN KELLY, SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE (1980); Judith Wallerstein, *The Long Term Effects of Divorce on Children: A Review*, 3 J. AM. ACAD. CHILD & ADOLESCENT PSYCH. 349 (1991).

13. See Kathleen Faller, *Child Maltreatment and Endangerment in the Context of Divorce*, 22 U. ARK. LITTLE ROCK L. REV. 427 (2000).

14. See generally Louise Everett Graham, *Implementing Custody Mediation in Family Court: Some Comments on the Jefferson County Family Court Experience*, 81 KY. L. J. 1107 (1993); Dane A. Gaschen, Note and Comment, *Mandatory Custody Mediation: The Debate Over its Usefulness Continues*, 10 OHIO ST. J. ON DISP. RESOL. 469 (1995) (summarizing custody mediation legislation around the U.S.); Christy L. Hendricks, Note, *The Trend Toward Mandatory Mediation in Custody and Visitation Disputes of Minor Children: An Overview*, 32 J. FAM. L. 491 (1994) (overview of existing statutory enactments mandating mediation for child custody disputes).

mediators. Moreover, standards must be established to ensure not only that there are adequate numbers of mediators to meet the demand but also that those mediators have the necessary training to do an adequate job.<sup>15</sup>

In addition to addressing the supply and demand issues regarding mediators, these jurisdictions inevitably experience the problem that by the time the judge has interacted with the case enough to determine that mediation would be appropriate, the parties have undertaken a litigation strategy that jeopardizes the success of mediation. In a typical situation, unless a party files a motion requesting the court to order mediation, the judge's first opportunity to consider such a course of action would be at a pretrial conference. Such a conference often does not occur until after requests for temporary orders are filed or an answer is filed and discovery is underway. Finally, the brief and often highly controlled setting in which the court interacts with the parties and their attorneys makes it difficult for a judge to evaluate the possible usefulness or appropriateness of mediation in many cases.

In addition to giving courts the power to order mediation, many reforms focus on methods of incorporating and accessing more social service support mechanisms for families involved in the system.<sup>16</sup> These efforts can vary drastically in their scope. They can include anything from ordering parents to attend a parent education program early in the litigation process to on-site family services. Such parent education programs are geared to inform parents about the court process, encourage them to settle their parenting disputes and enter into an agreement regarding their children, or to participate in mediation.<sup>17</sup> In addition to parent education programs, some states have undertaken the task of identifying high conflict cases early in the litigation process in order to divert disputing parents into various forms of social services including parenting education, anger management training and various types of evaluations running from substance abuse evaluations to

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15. See generally Nancy J. Foster & Joan B. Kelly, *Divorce Mediation: Who Should be Certified?*, 30 U.S.F. L. REV. 665 (1995); Nichol M. Schoenfield, *Turf Battles & Professional Biases: An Analysis of Mediator Qualifications in Child Custody Disputes*, 11 OHIO ST J. ON DISP. RESOL. 469 (1996); Alison Taylor, *The Four Foundations of Family Mediation: Implications for Training and Certification*, 12 MEDIATION Q. 77 (1994).

16. See Robert W. Page, *Family Courts: A Model for an Effective Judicial Approach to the Resolution of Family Disputes*, in ABA SUMMIT ON UNIFIED FAMILY COURTS, *supra* note 1, at 16; FLANGO ET AL., *supra* note 1 at 6-7; Kuhn, *supra* note 1, at 77-79; Ross, *supra* note 1, at 17; Babb, *supra* note 1, at 520.

17. See Andrew Schephard, *War and P.E.A.C.E.: A Preliminary Report on a Model Statute on an Interdisciplinary Educational Program for Divorcing and Separating Parents*, 27 U. MICH. J. L. REF. 155 (1993).

violence evaluations.<sup>18</sup> Finally, some courts have developed and enhanced court-annexed family services programs which make various types of education and therapeutic support available in the courthouse itself.<sup>19</sup>

Third, these reform movements focus on court management of cases. The most dominant approach is the unified family court movement. Under this system, courts use intake management devices and court management devices to coordinate all litigation involving a particular family, sometime under the auspices of a single judge, but always through shared management of overlapping cases.<sup>20</sup> The genesis of the unified family court movement is twofold. The first was a recognition that the most troubled family law cases are ones in which the family is not only involved in a divorce, for example, but is also under the jurisdiction of the child protective services system and/or the criminal court system. There may be domestic violence protective order proceedings pending along with a paternity and custody action. Coordinating these overlapping actions is important for the best interests of the child. Moreover, the unified family court movement has arisen from the recognition of the need for specialized family courts in which there is consistent long term service by qualified judges who are adequately trained for their positions.<sup>21</sup>

Because the family court reform movement is taking place largely at the state court level, the reforms adopted in any particular jurisdiction vary with individual state needs, resources, demographics, etc. Some states have followed strategies that implement more intensive use of mediation along with social service support and more coordinated court management. Other states are just now beginning to experiment with more intensive use of alternative dispute resolution.

### III. ONGOING RESISTANCE TO CHANGE

Despite the progress with reform across the country, there are still substantial impediments to change in a number of jurisdictions. In some states, courts lack the basic authority to order parties to mediation.<sup>22</sup> In

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18. See FLANGO ET AL., *supra* note 1, at 57-60.

19. See FLANGO ET AL., *supra* note 1, at 62-70.

20. See FLANGO ET AL., *supra* note 1, at 24-38; *see generally* ABA SUMMIT ON UNIFIED FAMILY COURTS, *supra* note 1.

21. See FLANGO ET AL., *supra* note 1, at 24-38; *see generally* ABA SUMMIT ON UNIFIED FAMILY COURTS, *supra* note 1.

22. See Gaschen, *supra* note 14, at 472 (reporting that in 1995 approximately 60% of the states had adopted rules or statutes giving judges the ability to order mediation).

many jurisdictions there are insufficient numbers of trained mediators.<sup>23</sup> Court management and coordination policies (or the lack thereof) often prove an impediment to reform.<sup>24</sup> However, at the root of the resistance to change in most jurisdictions is the lack of incentive and leadership within the local bench and bar and the lack of adequate resources. This resistance to change often is exaggerated in rural states where there is not a specialized family law bar and where the bench is not specialized. The problems confronting children in family court are simply outside the expertise of most general practice lawyers. And without a professional group willing to spearhead training and awareness, problems continue unresolved.

The emergence of a more consensus-based and, necessarily, less adversarial model for dispute resolution and the incorporation of non-lawyer professionals more directly into the family court process has also fueled resistance to change in many jurisdictions. Again, these problems are exacerbated in rural jurisdictions primarily because of the absence of a significant specialized family law bar and the absence of specialized courts or specialization among judges.

#### A. Resistance by Lawyers

Practicing in the area of family law differs in substantial ways from the general practice of law. In discussing the unique demands of family law practice, commentators have noted the intense personal impact of family law cases on participants in the system, and the accompanying emotional involvement of clients. These aspects of family law practice demand that lawyers have a solid understanding of human behavior and interact regularly with social science professionals.<sup>25</sup> Moreover, family law specialists have recognized that the collaborative nature of decision making in family law contexts differs significantly from the adversarial approach to general civil and, particularly, criminal litigation. Finally, it is often difficult for family law lawyers to represent the interests of their individual client without considering the interests of other family members.<sup>26</sup> The unique demands on lawyers in this area caused the

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23. See Morris L. Medley and James A. Schellenberg, *Attitudes of Attorneys Towards Mediation*, 12 MEDIATION Q. 185 (1994) (reporting that attorneys' negative attitudes toward mediation were, in part, based on poor quality of mediators).

24. See Ross, *supra* note 1, at 6-11.

25. See HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* § 14.7 at 559-60 (2d ed. 1989).

26. AMERICAN ACADEMY OF MATRIMONIAL LAWYERS STANDARDS OF CONDUCT 3 (1991) ("First, their emphasis on zealous representation of individual clients in criminal and



American Academy of Matrimonial Lawyers to address the fact that "[e]xisting codes [of conduct] often do not provide adequate guidance to the matrimonial lawyer" by promulgating a specialized guide to conduct for family law attorneys.<sup>27</sup>

The writers of one recent study of family court reform concluded that family law cases differ from civil litigation in four important ways. Such cases may require coordination with other courts, they may be more likely to incorporate alternative dispute resolution tactics, they may require court monitoring after disposition, and they may require coordination with social service agencies.<sup>28</sup> In the context of child custody litigation, in particular, lawyers are often required to engage in highly specialized decision-making for which basic law school education did not prepare them.<sup>29</sup>

Despite the unique demands placed on family law attorneys, family law tends to be a low status specialty in which the additional training necessary to be effective is rarely undertaken.<sup>30</sup> The problem is exacerbated in rural areas where family law is most often practiced not as a low status specialty but as just one component of a general civil practice. In this context the specialized demands of family law practice are minimized. Often family law practice is viewed as a necessary evil that comes with general practice in a small community. To the extent

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some civil cases is not always appropriate in family law matters.")

27. See *id.*

28. See FLANGO, ET AL., *supra* note 1, at 1-2.

29. See Janet Weinstein, *And Never the Twain Shall Meet: The Best Interests of the Child and the Adversary System*, 52 U. MIAMI L. REV. 79, 104-05 (1997).

Paradoxically, professionals are called upon to perform tasks which they may never have intended to perform when they chose to enter their respective professions. Judges and attorneys find themselves involved in the lives of families in an intimate way for which they never prepared in law school. Professionals are asked to assess parenting abilities and risks to children, to determine the qualifications of the experts on whom they rely, and to make many decisions beyond their training and knowledge. The best interests standard, which has been criticized for being vague, and for being an illusory determinant of the child's welfare, exaggerates the training deficiencies because those who make the decisions are forced to rely upon their personal biases and experience. Without basic training in an area such as child development, judges are left to their own intuition. Judges and attorneys are also forced to rely upon the word of other professionals who have more specific training in issues relating to parent-child relationships, child development, and risk assessment.

*Id.*

30. See *id.* at 107 (citing Leonard P. Edwards, *A Comprehensive Approach to the Representation of Children: The Child Advocacy Coordinating Council*, 27 FAM. L. Q. 417, 418 (1993) ("Attorneys practicing in these areas tend to be lower paid and have a lower professional status than attorneys involved in cases where money is involved.")).

the general civil litigation bar of a particular area declines to take family law cases, it is because such cases are viewed as messy, emotional charged, and not economically rewarding. The result is that not only is family law practiced by non-specialists, but by the least experienced members of the general practice bar.

Lawyers who do not view themselves as family law specialists do not make a commitment to special training in handling family law cases, nor do these lawyers come to understand the roles of other mental health professionals who interact with the family court system. They tend to view such non-lawyer professionals as merely incidental to the litigation process and not as an integral part of the system. Moreover, when non-lawyer professionals get involved in family law cases, they are often viewed as usurping the role of the lawyer, as placing necessary demands on the lawyer's time, and as causing delay in the resolution of the litigation.<sup>31</sup>

In addition to being unmotivated to work effectively with non-lawyers in the family law system, these general practitioners tend to be overly skeptical of the potential for mediation to solve disputes they have evaluated as not susceptible to settlement. And they tend to view their own role of negotiator on behalf of their client as synonymous with the role a mediator would play. Thus, it is often difficult to convince these general practitioners to use mediation. In the course of preparing their case and client for litigation, they often engage in a course of conduct that can sabotage the success of the mediation.

In child custody cases, in particular, the legal principles governing the controversy are general and do not provide a clear guide to a solution.<sup>32</sup> Rather, resolution of custody cases is uniquely fact driven and differs from case to case. Thus, it is much more common in family mediation to have a non-lawyer mediator who conducts the mediation outside the presence of the parties' lawyers. When untrained lawyers approach family law cases in the same way they approach other civil disputes, they often fail to cooperate on such basic matters as selection of a mediator and structuring the mediation and thereby inadvertently exacerbate the controversy in the case. Thus, inexperienced lawyers, by

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31. See generally *infra* note 41.

32. Much has been written about the indeterminate nature of the "best interests of the child" test. See, e.g., Naomi R. Cahn, *Reframing Child Custody Decisionmaking*, 58 OHIO ST. L.J. 1 (1997); Robert H. Mnookin, *Child-Custody Adjudication: Judicial Function in the Face of Indeterminacy*, LAW & CONTEMP. PROBS., Summer 1975 at 226; Carl E. Schneider, *Discretion, Rules, and Law: Child Custody and the UMDA's Best-Interest Standard*, 89 MICH. L. REV. 2215 (1991); Jon Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. CHI. L. REV. 1 (1987).

handling divorce and custody cases the same way they handle other civil litigation, can cause delay and escalate the controversy that often harms children and lowers the prospects for an effective settlement.

## B. Judicial Resistance

Very little research has been conducted on judicial attitudes toward mediation or proactive judicial management of family law cases.<sup>33</sup> The studies that have been conducted are in courts in which mediation is already being used to resolve disputes. These studies report positive judicial attitudes based on a sense that mediation can provide a way to resolve some of the most troubling cases and reduce case loads. My own anecdotal observations from interacting with judges who are being asked for the first time to use their power to order mediation and to proactively manage cases is that these general jurisdiction judges are skeptical.

In many rural states, family law is handled by the court of general jurisdiction.<sup>34</sup> Of the seventeen states handling family law cases in their courts of general jurisdiction, nine are among the most rural states in the country.<sup>35</sup> A number of other very rural states have adopted systems by which there is a specialized court in the population center of the state, but other rural areas of the state handle family law matters in the court of general jurisdiction.<sup>36</sup> The judges in these courts often move to the judiciary with little or no training in handling family law cases;<sup>37</sup> many come from positions as prosecutors or criminal defense lawyers. Thus, judges frequently come from the most adversarial and traditional component of our court system to the most managerial (at least at the state level) component of the system and to the part of the court system experimenting most aggressively with reducing adversariness. It is small wonder that they lack experience with court management tools as

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33. See Elizabeth Kooperman et al., *Professional Perspectives on Court Connected Child Custody Mediation*, 29 FAM. & CONCILIATION CTS. REV. 304 (1991); Morris L. Medley & James A. Schellenberg, *Attitudes of Indiana Judges Toward Mediation*, 11 MEDIATION Q. 329 (1994).

34. See Barbara A. Babb, *Where We Stand: An Analysis of America's Family Law Adjudicatory Systems and the Mandate to Establish Unified Family Courts*, 32 FAM. L.Q. 31, 38-40 (1998) (summarizing the structure of family law courts in the U.S.).

35. See *id.* (including Alaska, Arkansas, Idaho, Montana, Nebraska, North Dakota, South Dakota, Utah and Wyoming).

36. See *id.* (including Alabama, Mississippi, Nevada, New Mexico and Oklahoma).

37. See Ross, *supra* note 1, at 20-21.

well as alternative dispute resolution and are suspicious of its possibilities for success.

Court reform in family law cases imposes a number of expectations on judges that are unique from traditional litigation and especially from criminal litigation. First, the judge must become aware of and able to identify the early symptoms of high conflict divorces and their impact on the litigants and on children. A judge cannot accurately assess the demeanor of a perpetrator and victim of domestic violence, for example, unless she is sensitive to the general behavioral patterns these different players can exhibit in the courtroom. Moreover, the court must be willing to act in a proactive manner—taking the initial initiative to determine whether the case is appropriate for mediation, for example. Such proactive conduct might well require the judge to view a social service report evaluating the parties even before such a report has been introduced into evidence—something the criminal court judge would never be asked to do until after conviction.

At least one author has identified the harm that results to families from the inability of courts to effectively handle family law cases as a “jurigenic” effect<sup>38</sup>—the court system actually acts to inflame family problems. Catherine Ross has identified some of the problems created by the courts that harm families as:

unnecessary delays in adjudication and services; delays that have the equivalent of a multiplier effect on children because of children’s sense of time (one year is half of a two year old’s entire life); courts with overlapping jurisdiction issuing conflicting orders; failing to identify or protect persons at risk of domestic violence; subjecting children to the risk of becoming lost in foster care drift; repeated interviews of children by different examiners; and the related problem of calling children as witnesses when it is unnecessary to do so.<sup>39</sup>

In addition to careful case management, handling family law cases requires an understanding of social, medical, and psychological considerations that come together in this context. Making the case for unified family courts, Catherine Ross has observed:

Judges and others who work with families in the court system need intensive training in issues delegated to other professions. Because considerations of child development, varying cultural norms, service

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38. See Ross, *supra* note 1, at 7 (quoting Hawaii judge Michael Town, National Council of Juvenile and Family Court Judges, 2 TECH. ASSISTANCE NEWS No. 7, 1, Apr. 13, 1994).

39. See Ross, *supra* note 1, at 8.

delivery choices, and social work and medical terminology coalesce with legal analysis so frequently in cases about children and families, every person who works in a unified family court, from clerks to intake personnel to case managers to lawyers and judges, requires specialized training.<sup>40</sup>

Many general jurisdiction judges are reluctant to engage in such management of cases. Few see the need for the specialized training Ross suggests. With regard to training, in particular, some judges feel that their role of decision-maker would be jeopardized by bringing too much specialized non-legal knowledge to the courtroom. Their view, influenced by a traditional litigation model, is that the parties should bring their evidence to the court, for the court's evaluation. Under this model, if understanding of the particular individual's circumstances is necessary, such information should be placed before the court in the form of testimony so that the court may assess the witness in the traditional manner of a finder of fact. To do otherwise is to compromise the judge's neutrality.

In a family law case, the traditional model leaves the family with no support during the preliminary period of litigation. It ensures that conflict will escalate as the parties put together the record to prove their case regarding the best interests of the children, and it increases the probability that the only forum in which the parties will be able to resolve their dispute is a trial over child custody.

### C. Integration of Mental Health Professionals in the Family Court System

Most models for family court reform involve significantly enhanced roles for mental health professionals in the resolution of family disputes. This integration can be seen in the growth of court-annexed family service programs. It can also be seen in the growth of qualified non-lawyer family mediators. The new family court system relies on non-lawyer professionals to play diverse roles such as serving as guardian ad litem for children, serving as court appointed custody experts in contested cases, mediators, special masters, and custody supervisors. Moreover, it is increasingly common for families to be able to receive both educational and therapeutic services in the courthouse itself from paid court professional staff.

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40. See Ross, *supra* note 1, at 20-21.

This increased presence of mental health professionals has led at times to a perception that such professionals are usurping functions traditionally performed by lawyers. This notion is reflected, for example, in the literature regarding lawyers and non-lawyers as mediators.<sup>41</sup>

In some rural jurisdictions, the issue of competition between lawyers and mental health professionals is irrelevant because of a more troubling factor—there simply are no qualified mental health professionals available to meet the needs of conflicted families. In addition, the available professionals often have conflicts of interest because they have pre-existing therapeutic relationships with one or more of the family members or because they have served in a forensic capacity in other litigation involving one or more members of the family.

#### IV. SUGGESTIONS FOR RURAL REFORM

##### A. General Concerns

Three factors should play a role in any attempt at system-wide reform of family courts in rural jurisdictions. First, family court reform cannot take place in rural states without addressing the unique rural legal culture. Attention must be paid to the lack of specialization and the absence of grassroots incentive for reform. Consequently, leadership for change must come from the top of both the bench and the bar, in contrast to many jurisdictions where movements for reform have begun as grassroots movements within a particular county or court, or within an area of specialized practice. This is not to say that there are no practicing lawyers or informed judges in rural jurisdictions who are sensitive to the need for reform in family courts. It is simply to acknowledge that these individuals will rarely form the critical mass necessary to change jurisdiction-wide practice norms. It is crucial for proponents of reform to involve institutions such as the State Supreme Court and bar association leadership in the reform movement.

High level leadership is necessary, in particular, to change a litigation oriented legal culture. Only with pressure from the top down

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41. See, e.g., Penelope Eileen Bryan, *Reclaiming Professionalism: The Lawyer's Role in Divorce Mediation*, 28 FAM. L.Q. 177 (1994) (arguing that only lawyers can adequately protect a client's interests in mediation); Judy C. Cohn, *Custody Disputes: The Case for Independent Lawyer-Mediators*, 10 GA. ST. U. L. REV. 487 (1994) (setting forth the benefits of having lawyers serve as mediators); Foster & Kelly, *supra* note 15; Schoenfield, *supra* note 15.

will lawyers and judges be willing to obtain the necessary education. Such leadership is imperative for new approaches to family law cases to become an accepted part of the legal process within a jurisdiction. Leadership within the judiciary is particularly important. Judges can push local reform in the practicing bar through the use of standing orders and local rules.

Second, reform must be interdisciplinary. A comprehensive court reform movement must focus not only on the reform of internal court practices and rules, but must also be sensitive to the development of external supporting institutions. It does no good to have judges with the power to manage cases and to divert families into needed services if such services are not available in the local community! It is crucial if social service support mechanisms necessary to family court reform are going to be developed in rural areas that existing social service agency representatives be included in the process. Consequently, court reform movements must coordinate with department of health and welfare personnel at the state level as well as local counselors, psychology and psychiatric communities, juvenile corrections personnel, and education professionals. Other resources should also be considered. One of the richest resources for rural areas is the state Cooperative Extension Service. These services often have a cadre of highly trained family and consumer science specialists as well as a state-wide distribution network and access to the most difficult to reach rural communities.

Finally, creative solutions must be found to address the problem of services delivery. Some rural areas will never have enough demand for such services to support their full time existence in the community. The periodic needs that communities will experience are simply not frequent enough. To some extent, families may be able to travel to services developed in local population centers. However, even that will be difficult in some areas. Thus social service support services need to be offered on a flexible basis, and must be mobile so that they can reach those most in need.

#### B. The Idaho Model

During the last four years, the court system in Idaho has been reforming the process for handling of family law cases. I believe the process in that state can serve as a model for other rural jurisdictions addressing these issues. Idaho is a state with a population of just over one million. It has one substantial urban center—Boise. The population of the Boise metropolitan area is approximately 300,000. The only

other urbanized areas in the state are in the Idaho Falls/Pocatello area in the eastern portion of the state and the Coeur d'Alene area in the northern part of the state. The population of the combined Idaho Falls/Pocatello area is approximately 150,000. The metropolitan population in the Coeur d'Alene area is approximately 90,000. In addition to its small population, Idaho is a geographically large state. Boise and Idaho Falls are 300 miles apart; Boise and Coeur d'Alene are separated by 400 miles. Travel is cumbersome. Interstate travel is possible between Idaho Falls, Pocatello and Boise. However, travel from Boise to the northern parts of the state is by a two to three lane state highway through rugged canyon and mountain country. Air travel is by commuter planes. Significant areas of the state are located more than a three hour drive from one of the three major population centers. Most counties have a population of below 40,000.

Family law cases are handled in Idaho in the Magistrate Division of the District Court. The Magistrate Division's jurisdiction extends to misdemeanor criminal actions, preliminary hearings, juvenile matters, probate, small civil litigation, small claims, and family law matters. An appeal *de novo* is available from the Magistrate Division to the District Court.<sup>42</sup>

During the late 1980s, a small group of Idaho lawyers and judges began an effort to integrate mediation into the resolution of family law cases. After several state-wide education efforts and lobbying to the Idaho Supreme Court's Civil Rules Committee, revisions to Idaho Rule of Civil Procedure 16 were adopted, permitting courts to order mediation in appropriate cases and establishing standards for court appointed mediators.<sup>43</sup> Subsequently, the Idaho Rules of Evidence were amended to establish a privilege for communications by parties during mediation.<sup>44</sup> Over a ten year period of time, mediation slowly took hold as an accepted device for resolving family disputes. In the metropolitan area of Boise where case loads were heavier and where some specialization among the bench and bar existed, mediation became frequent. In other parts of the state the use of mediation was uneven both because of resistance in the practicing bar and on the bench to the use of court ordered mediation, and also because of the lack of trained mediators.

As mediation became more accepted and was used with increasing frequency, family court reformers within the state realized that the most

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42. See IDAHO CODE § 1-2208 (1999).

43. See IDAHO R. CIV. P. 16(j) & (k).

44. See IDAHO R. EVID. 507.



difficult cases were still winding up in the system to the detriment of the children involved. The problem was twofold. By the time courts had an opportunity to order mediation at a Rule 16 pre-trial conference, the parties in the most conflicted cases had already engaged in a course of strategic, litigation oriented behavior that caused polarization and undermined the possibility that mediation could be successful. Second, in many of the most conflicted cases, additional intervention was necessary before the parties would be in a position to begin settling their custody issues. Yet, there was no reliable way for the court to link parties in the litigation setting to the services available in a community in a timely fashion.

It was in this environment that the Idaho Bench Bar Committee to Protect Children of High Conflict Divorce was formed.<sup>45</sup> Family court reformers were able to convince the justices of the Idaho Supreme Court of the importance of the effort to reduce conflict for children in the family court system and together with the leadership of the Family Law Section of the Idaho State Bar Association, they convened an interdisciplinary committee to investigate the problem and propose solutions. That committee was comprised of judges, lawyers, mental health professionals, education professionals, representatives from the state departments of health and welfare, and juvenile corrections officials. In addition, the committee itself put together regional advisory panels mirroring the composition of the committee for each of the eight judicial districts in the state. The regional groups were given the opportunity to comment on and respond to the work of the committee while it was in progress.<sup>46</sup>

The result of the process was a multifaceted reform movement which is still in progress. The significant work to date has been in producing a protocol for handling high conflict divorce cases, initiating an extensive judicial education effort and initiating efforts to coordinate management of family law cases.

The protocol instituted a plan for managing custody cases.<sup>47</sup> First, the protocol requires that all litigants filing a complaint seeking custody of a child be immediately ordered to attend a "Divorce Parenting

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45. See generally Charles B. Bauer & Kit Furey, *Bench/Bar Committee Recommends Practical Ways to Reduce Impact of High Conflict Divorce on Children*, THE ADVOCATE, June 1996.

46. See *id.*

47. See Mauzerall et al., *supra* note 10, for a copy of the first draft of the Idaho protocol.

Orientation Program.”<sup>48</sup> If a request for temporary orders is filed, an answer is filed, or if the parties fail to file a parenting plan within thirty days of attending a Divorce Parenting Orientation, the parties are ordered to a preliminary evaluation. This evaluation is done in Boise by court-annexed family services staff. Because none of the judicial districts outside the Boise area have such staff, the evaluations in the rest of the state are provided by local mental health personnel who perform the evaluation as independent contractors for the court.<sup>49</sup> Because the evaluations are provided on an independent contractor basis, areas within the state that could not support a full time family services employee can still offer such services locally.

These evaluations consist of meeting with each of the parties. After the meetings the evaluator makes a recommendation to the court regarding whether the case is an immediate candidate for court-ordered mediation, whether additional interventions such as parenting education, anger management training, etc. would be appropriate before mediation, or whether the case is inappropriate for mediation and should be immediately set for trial. The protocol also establishes custody standards in the highest conflict cases involving violence.

The introduction of the protocol was accompanied by an intensive judicial education effort. Education seminars were held at four different locations throughout the state. A deskbook dealing with high conflict custody cases was also produced—each trial judge received a copy and the deskbook was made available to Idaho lawyers.<sup>50</sup>

The institution of the protocol and the accompanying judicial education efforts have led to a growing awareness among Idaho trial lawyers and judges of the unique issues arising in family law cases and an increased sensitivity to these issues. However, there is still a significant amount of work to do. The protocol was adopted by the Idaho Supreme Court as a guideline and is not binding on the lower

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48. Over the last ten years these programs have become available in most Idaho judicial districts. The Divorce Parenting Orientation Program is an effort to retrain and support single parents. In most judicial districts, the program is provided by a local community college. However, in one judicial district the program is offered personally by two magistrate judges.

49. The independent evaluation program was begun with grant funding and has been continued on a combination of grant and legislative funding. Independent contractors must be master's level mental health professionals, have court approval and complete a course of training.

50. See ELIZABETH BARKER BRANDT, *PROTECTING CHILDREN OF HIGH CONFLICT DIVORCE: AN IDAHO BENCHBOOK* (1998) (portions of the benchbook were adapted from FAMILY VIOLENCE PREVENTION FUND, *DOMESTIC VIOLENCE AND CHILDREN: RESOLVING CUSTODY AND VISITATION DISPUTES*, A NATIONAL JUDICIAL CURRICULUM (1995)).

courts. Despite the education efforts, there are still areas of the state in which the protocol has not been implemented. The funding for ongoing evaluations is unstable. The protocol depends, in part, on the existence and accessibility of mental health and social service support services which are still not available in some parts of the state. Finally, the quality of the evaluations has been uneven, in part, because of the unavailability of truly qualified mental health professional in some parts of the state.

Nonetheless, early anecdotal experience under the program indicates that courts are pleased with the process. Evaluations have led to early settlements in some cases and have enabled judges to move other cases along more swiftly. The project evaluation report concluded that judges believed the protocol focused the custody process more on the needs of the children and contributed to better parenting. The majority of judges reported that the process had the effect of de-escalating the conflict in their cases.<sup>51</sup> As a direct result of the project, the Idaho Bench/Bar Committee is now embarked on a study to provide supervised visitation resources. It is also planning a state supported Family Law Summit so that the education and planning process can continue and so that state efforts to reform the family court system can be coordinated.

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51. See CAROLYN KEELER, PROTECTING CHILDREN OF HIGH CONFLICT DIVORCE: PROJECT EVALUATION REPORT (1999).