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## The Revolution in Family Law Dispute Resolution

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# The Revolution in Family Law Dispute Resolution

by  
John Lande\*

## I. Introduction

Much has changed in the United States since the American Academy of Matrimonial Lawyers was founded in 1962. The civil rights, women's, and environmental movements caused major transformations in our culture. The United States fought the Cold War, Vietnam War, two Iraq Wars, and the "War on Terrorism." With the end of the Cold War, dissolution of the Soviet Union, transformation of Chinese society, and industrial development of many other countries, the structure of international relations is fundamentally different. The accelerating flow of technological developments has radically changed the way that people live, think, work, and communicate with each other. Watching the *Mad Men* television series, which depicts life in the early 1960s, shows how much life has changed in this half-century.

This period also spawned what political scientist Herbert Jacob calls the "Silent Revolution" of divorce law.<sup>1</sup> He describes the pre-revolutionary regime of marital relations this way:

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\* Isidor Loeb Professor, University of Missouri School of Law. Thanks to Nancy Levit, Andy Shepard, Peter Salem, and Nancy Ver Steegh for comments on an earlier draft.

<sup>1</sup> HERBERT JACOB, *SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES* (1988). In this article, references to the "revolution" refer to the transformation of divorce law and/or dispute resolution methods beginning in the 1960s.

For a thoughtful portrait of shifting patterns of marriage and divorce since the 1950s, see J. Herbie DiFonzo & Ruth C. Stern, *The Winding Road from Form to Function: A Brief History of Contemporary Marriage*, 21 J. AM. ACAD. MATRIM. LAW. 1 (2008). For a summary of some major changes in family law since the 1950s, see Sanford N. Katz, *Five Decades of Family Law*, 42 FAM. L.Q. 295 (2008).

Although family law includes many issues in addition to divorce, this article focuses only on divorce. In other areas of family law, such as juvenile and

In the early nineteenth century, wives were clearly subordinate to their husbands. Upon marriage, a woman lost her maiden name and took up the identity of her husband. Her name change signified not only a new identity but also subordination to her husband in many matters. For instance, both custom and law required a wife to live wherever her husband chose. When a husband moved to a new neighborhood or city, his wife and children were obliged to move with him. Husbands had responsibility for supporting their families, but they did not have to live up to specific standards; the living standard was the husband's choice. In return, the wives were expected to maintain the home and to submit to their husband's sexual demands. Finally, wives originally had no control over property, even when they brought it with them into marriage.<sup>2</sup>

Marriage and divorce law – and related social norms about family life – started changing in the nineteenth century, but much of the change occurred in the last fifty years.<sup>3</sup> Formerly, adultery was grounds for divorce, sometimes the only ground. Now, with no-fault divorce, whether a spouse committed adultery is irrelevant to whether spouses can divorce and generally has no bearing on other issues in a divorce.<sup>4</sup> A couple's property is now generally considered joint "marital property" regardless of who is the title owner or who contributed the property after marriage.<sup>5</sup> The law of alimony has changed so that both husbands and wives can receive alimony (often called "spousal support" or "maintenance") and, instead of a lifelong commitment, it is intended to be transitional assistance promoting self-sufficiency.<sup>6</sup> Courts no longer follow the "tender years doctrine," so that there is no legal presumption that mothers get physical custody of young children after divorce.<sup>7</sup> In addition, the federal government required states to adopt child-support guidelines based on the incomes of

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child protection, there are some parallel developments to those described in this article.

<sup>2</sup> JACOB, *supra* note 1, at 3-4.

<sup>3</sup> *Id.* at 1-9.

<sup>4</sup> *Id.* at 1-2, 4-5. For further discussion of the transition away from fault divorces, see *infra* text accompanying notes 35-40.

<sup>5</sup> *Id.* at 2.

<sup>6</sup> *Id.* at 3.

<sup>7</sup> *Id.* at 2. ANDREW I. SCHEPARD, CHILDREN, COURTS, AND CUSTODY: INTERDISCIPLINARY MODELS FOR DIVORCING FAMILIES 14-22, 45-47 (2004). For further discussion of the tender years doctrine and its successor, see *infra* Part II.E.1.

both parents.<sup>8</sup> So the revolution led to a radical change in family law and social norms:

Equality has replaced hierarchy as the guiding principle of family law. Spouses no longer need to point the finger of blame at one another. Blame is not considered in determining maintenance, property division, or custody of the children. Divorce rarely stigmatizes and has become easy and often quick. Marriage is no longer presumed to be a lifelong commitment.<sup>9</sup>

Herbert identifies several factors related to these changes in family law and norms. People generally lived significantly longer and often had an extended period of active life after their children left home.<sup>10</sup> Most women worked outside the home, often as a necessity to support the family.<sup>11</sup> Women's increasing role in the workforce led to strains in marriages and gave women greater financial independence.<sup>12</sup> The feminist movement led to changes in social norms legitimizing the notion of marriage as a relationship between equals instead of subordination of women and gendered division of labor in the workplace and at home.<sup>13</sup> Ideals for marriage shifted from being primarily an institution for raising families to one in which long-term love and companionship were critically important. Given the importance of a "partnership" basis of marriage for many people, it became socially acceptable to leave marriages that are intolerable or merely unfulfilling.<sup>14</sup> Movements promoting children's rights<sup>15</sup> and fathers' rights<sup>16</sup> also contributed to increased family conflict.

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<sup>8</sup> LYNN MATHER, CRAIG A. MCEWEN & RICHARD J. MAIMAN, *DIVORCE LAWYERS AT WORK: VARIETIES OF PROFESSIONALISM IN PRACTICE* 118-19 (2001). See generally Jane C. Venohr & Tracy E. Griffith, *Child Support Guidelines: Issues and Reviews*, 43 *FAM. CT. REV.* 415 (2005).

<sup>9</sup> JACOB, *supra* note 1, at 5.

<sup>10</sup> *Id.* at 16-17.

<sup>11</sup> See Herma Hill Kay, *No-Fault Divorce and Child Custody: Chilling Out the Gender Wars*, 36 *FAM. L.Q.* 27, 27-28 (2002) (citing official statistics showing that the percentage of wives living with their husbands who were in the workforce increased from 30% to 61% from 1960 to 2000).

<sup>12</sup> JACOB, *supra* note 1, at 17-21.

<sup>13</sup> *Id.* at 21-24.

<sup>14</sup> *Id.* at 24-26.

<sup>15</sup> See Fiona E. Raitt, *The Children's Rights Movement: Infusions of Feminism*, 22 *CAN. J. FAM. L.* 11 (2005).

<sup>16</sup> See *FATHERS' RIGHTS ACTIVISM AND LAW REFORM IN COMPARATIVE PERSPECTIVE* (Richard Collier & Sally Sheldon eds., 2006); Nancy Ellen Yaffe,

The frequency and social meaning of marriage and divorce changed radically during this period. The marriage rate increased from 8.5 per thousand of population in 1960, to more than 10.0 in the 1970s and 1980s, and went down to 7.7 in 2005.<sup>17</sup> There was a parallel trend in the divorce rate with 2.2 divorces per thousand of population in 1960, to more than 5.0 in the 1980s, and 3.7 in 2005.<sup>18</sup> Married-couple households represented 78% of the nation's households in 1950 but only 52.8% in 2000.<sup>19</sup> The stigma of divorce decreased with increasing frequency of divorce and the weakening of religious objections to it.<sup>20</sup> The structure of family relationships has changed as more people are in non-marital and same-sex relationships and many children are raised by single parents.<sup>21</sup>

As a result of the family law revolution, courts regularly handle a much broader range of issues than before. These include disputes about alienation of parents and children,<sup>22</sup> parental relocation,<sup>23</sup> religious upbringing,<sup>24</sup> whether parents are required to pay for children's college educations,<sup>25</sup> rights of grandparents to visit children whose parents are divorced or sep-

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Note, *A Fathers' Rights Perspective on Custody Law in California: Would You Believe It If I Told You That the Law Is Fair to Fathers?*, 4 S. CAL. INTERDISC. L.J. 135, 137-40 (1995).

<sup>17</sup> See DiFonzo & Stern, *supra* note 1, at 24 (citing research studies).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 23.

<sup>20</sup> JACOB, *supra* note 1, at 26-27.

<sup>21</sup> ROBERT E. OLIPHANT & NANCY VER STEEGH, *FAMILY LAW: EXAMPLES AND EXPLANATIONS* 6-7 (2d ed. 2007).

<sup>22</sup> See, e.g., *Guest Editors' Introduction to Special Issue on Alienated Children in Divorce and Separation: Emerging Approaches for Families and Courts*, 48 FAM. CT. REV. 6 (2010); Ira Turkat, *Parental Alienation Syndrome: A Review of Critical Issues*, 18 J. AM. ACAD. MATRIM. LAW. 131 (2002).

<sup>23</sup> See, e.g., Samara Nazir, Comment, *The Changing Path to Relocation: An Update on Post-Divorce Relocation Issues*, 22 J. AM. ACAD. MATRIM. LAW. 483 (2009).

<sup>24</sup> See, e.g., Joanne Ross Wilder, *Resolving Religious Disputes in Custody Cases: It's Really Not About Best Interests*, 22 J. AM. ACAD. MATRIM. LAW. 411 (2009).

<sup>25</sup> See, e.g., Madeline Marzano-Lesnevich & Scott Adam Lartera, *Child Support and College: What Is the Correct Result?*, 22 J. AM. ACAD. MATRIM. LAW. 335 (2009).

arated,<sup>26</sup> rights of step-parents to visitation,<sup>27</sup> and the role of e-mail, the internet, and cybersex in divorce,<sup>28</sup> among many other novel issues.<sup>29</sup>

These major legal and social changes have dramatically affected the way that family disputes are resolved in the United States. Although no-fault divorce, joint custody, and domestic violence laws have generally been quite appropriate as reflections of social norms and ideals of fairness, they often require difficult decisions using much vaguer legal standards than in the past.<sup>30</sup> The increasing number and complexity of legal issues has led to an increase in the legalization and cost of divorce. Family court caseloads have increased and courts have increased the range of services they provide or require.<sup>31</sup> In addition, a large body of private professionals in wide range of fields provide divorce-related services.<sup>32</sup> In response to these developments, family courts have increasingly embraced:

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<sup>26</sup> See, e.g., Daniel R. Victor & Keri L. Middleditch, *Grandparent Visitation: A Survey of History, Jurisprudence, and Legislative Trends Across the United States in the Past Decade*, 22 J. AM. ACAD. MATRIM. LAW. 391 (2009).

<sup>27</sup> See, e.g., Susan L. Pollet, *Still a Patchwork Quilt: A Nationwide Survey of State Laws Regarding Stepparent Rights and Obligations*, 48 FAM. CT. REV. 528 (2010).

<sup>28</sup> See, e.g., Katherine Fisher Clevenger, Comment, *Spousal Abuse Through Spyware: The Inadequacy of Legal Protection in the Modern Age*, 21 J. AM. ACAD. MATRIM. LAW. 653 (2008); L. Kathryn Hedrick & Mark Gruber, *Cybersex and Divorce: Interception of and Access to E-mail and Other Electronic Communications in the Marital Home*, 17 J. AM. ACAD. MATRIM. LAW. 1 (2001).

<sup>29</sup> For an extensive review of the wide range of issues that family courts and family law professionals currently deal with, see Nancy Levit, *Family Law in the Twenty-First Century: An Annotated Bibliography*, 21 J. AM. ACAD. MATRIM. LAW. 271 (2008). Before the revolution, most of these issues probably were raised rarely in litigation, if at all.

<sup>30</sup> See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 977-80 (1979) (analyzing uncertainty in custody decisions).

<sup>31</sup> See SCHEPARD, *supra* note 7, at 38-40, 58-60, 68-78, 90-95, 100-24; Nancy Ver Steegh, *Family Court Reform and ADR: Shifting Values and Expectations Transform the Divorce Process*, 42 FAM. L.Q. 659, 669-70 (2008).

<sup>32</sup> SCHEPARD, *supra* note 7, at 50-67, 100-12, 152-61. This article uses the term "family law professional" to include a wide range of mental health, financial, and other professionals, as well as lawyers, who provide services in family law matters.

[A] philosophy that supports collaborative, interdisciplinary, interest-based dispute resolution processes and limited use of traditional litigation. Over the years this movement—combined with the growing number of challenges families bring with them to the court—has unleashed the creativity of professionals worldwide, resulting in literally dozens of distinct dispute resolution processes for separating and divorcing parents. These include multiple models of mediation; psycho-educational programs; collaborative law; interdisciplinary arbitration panels; parenting coordination; and early neutral custody evaluation to name just a few.<sup>33</sup>

Part II provides sketches of some, but certainly not all, of the family law dispute resolution processes that have proliferated in the past fifty years. Part III suggests possible directions for the future.

## **II. Developments in Family Law Dispute Resolution**

### *A. Self Representation*

Although family law professionals are naturally oriented to divorcing parties who use legal assistance, many parties do not do so. Indeed, historically, couples with problems in their marriage often did not go to lawyers. For much of American history, most people could not get a divorce unless they were wealthy. Occasionally, couples might get a legal separation or, very rarely, a legislative bill of divorce.<sup>34</sup> Over time, divorce laws were liberalized to make it easier to get a divorce, though it was still challenging. Under the “fault” regime, divorce was available only to legally “innocent” parties who could prove that the other spouse was at fault due to such things as adultery, cruelty, or desertion.<sup>35</sup> Parties could not be divorced if both were considered to be at fault and the courts developed a knotty body of rules specifying acceptable grounds and defenses.<sup>36</sup>

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<sup>33</sup> Peter Salem, *The Emergence of Triage in Family Court Services: The Beginning of the End for Mandatory Mediation?*, 47 FAM. CT. REV. 371, 371 (2009).

<sup>34</sup> Judith G. McMullen & Debra Oswald, *Why Do We Need a Lawyer?: An Empirical Study of Divorce Cases*, 12 J. L. & FAM. STUD. 57, 60 (2010).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 60-61.

The esoteric and complex nature of the necessary claims made it almost a necessity to hire a lawyer to provide guidance through the process. Unfortunately, the confining nature of the fault system created a system where a lawyer's expertise was frequently employed to get around the divorce laws. Although the law refused to recognize divorce by mutual agreement, by the end of the 19th century, "the vast majority of divorce cases were empty charades. Both parties wanted the divorce; or were at least willing to concede it to the other party."<sup>37</sup>

Given the legal and social barriers to divorce in this pre-revolutionary period, presumably many couples avoided the legal system in various ways. Some undoubtedly lived together in unhappy marriages and others lived separately without engaging the legal system. Perhaps some divorcing parties navigated the legal system without legal counsel but apparently this was not common.

In 1969, California adopted the first no-fault divorce statute, permitting either spouse to unilaterally get a divorce without specifying a reason, and other states quickly followed suit.<sup>38</sup> This enabled people to "do their own divorces" (sometimes called "kitchen table divorces") much more easily than under the fault regime. In 1994, the American Bar Association Standing Committee on the Delivery of Legal Services noted research showing "a steady and significant increase in pro se divorce cases from the mid-1970s through the mid-1990s."<sup>39</sup> The Committee's report indicated that parties were more likely to represent themselves if they were relatively young, had lower earnings, had no minor

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<sup>37</sup> *Id.* at 61 (quoting Lawrence M. Friedman). Lawyers sometimes conspired with couples to manufacture legal cases of adultery so that the couples could get divorced. *See id.* (describing accounts of a "cottage industry" creating phony evidence of adultery, choreographed with women who met men in hotels, got undressed, and had photographers document the scene).

<sup>38</sup> *Id.* at 62.

<sup>39</sup> STANDING COMM. ON THE DELIVERY OF LEGAL SERVICES, AM. BAR ASS'N, RESPONDING TO THE NEEDS OF THE SELF-REPRESENTED DIVORCE LITIGANT 5-8 (1994), *cited in* McMullen & Oswald, *supra* note 34, at 63.

The terms "pro se," "pro per," and "unrepresented" are sometimes used, though Professor Jim Hilbert follows a pattern of using the term "self-represented," as the other terms are "falling out of favor." Jim Hilbert, *Educational Workshops on Settlement and Dispute Resolution: Another Tool for Self-Represented Litigants in Family Court*, 43 FAM. L.Q. 545, 545 n.1 (2009).



children, had no real estate or substantial personal property, were married for less than ten years, and were better educated.<sup>40</sup>

In 2002, researchers Ronald Staudt and Paula Hannaford summarized the volume of self-representation in divorce this way:

In the mid-1990s, at least one party was self-represented in more than two-thirds of domestic relations cases in Phoenix, Arizona and Washington, DC. Half of the cases filed in the Florida family courts are entirely pro se, and over 80% have at least one pro se litigant. Recent reports by various state and local court task forces document similar trends in courts across the country.<sup>41</sup>

Parties are more likely to represent themselves when they have less at stake and perhaps fewer resources with which to litigate.<sup>42</sup> When more is at stake, parties are more likely to benefit from legal representation in managing litigation. Although rational calculation of interests and costs of representation undoubtedly affect some parties' decisions to represent themselves, other factors may also play a role. Some divorcing couples feel cooperative and self-confident, and some may be wary of lawyers aggravating and prolonging conflict and increasing the costs. Such couples may want to maintain control of their lives rather than delegating significant authority to lawyers.<sup>43</sup>

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<sup>40</sup> STANDING COMM. ON THE DELIVERY OF LEGAL SERVICES, *supra* note 39, at 1, 8-12.

<sup>41</sup> Ronald W. Staudt & Paula L. Hannaford, *Access to Justice for the Self-Represented Litigant: An Interdisciplinary Investigation by Designers and Lawyers*, 52 SYRACUSE L. REV. 1017, 1018 (2002). See also Memorandum from Madelyn Herman, *Self-Representation: Pro Se Statistics*, NAT'L CTR. ST. CTS. (Sept. 25, 2006), <http://www.ncsconline.org/wc/publications/memos/prosestat-smemo.htm> (listing reports showing that at least one divorcing party is self-represented in more than 70% of cases in many courts).

In some cases, parties agree that only one party will be represented by counsel and the self-represented party cooperates with the lawyer. In this situation, although one party is formally unrepresented, both parties are taking advantage of legal services, which can raise challenging issues for the lawyers. See Leslie Feitz, *Pro Se Litigants in Domestic Relations Cases*, 21 J. AM. ACAD. MATRIM. LAW. 193, 199-201 (2008).

<sup>42</sup> McMullen & Oswald, *supra* note 34, at 71-73, 80-81. Given the limited funding of legal aid services, poor people often have limited or no access to legal services when going through divorce. See Hilbert, *supra* note 39, at 545.

<sup>43</sup> See Feitz, *supra* note 41, at 194-95; Hilbert, *supra* note 39, at 545, 551-52. For recent analyses of issues related to self-represented litigants, see *Special Issue: Ensuring Access to Justice for Self-Represented Litigants*, 48 FAM. CT.

The existence of self-help books, internet resources, and programs for self-represented parties encourages some divorcing spouses to represent themselves. For example, Nolo Press, which started publishing self-help legal books in 1971, provides books, software, videos, legal forms, blogs, podcasts, and other information on its website about divorce. Its books include *Nolo's Essential Guide to Divorce*, *The Legal Answer Book for Families*, *Building a Parenting Agreement That Works*, and *Living Together*.<sup>44</sup> There are numerous other self-help divorce books.<sup>45</sup> Most states operate websites with information for self-represented parties in divorces.<sup>46</sup> People can find a tremendous amount of information on the internet, as reflected by a Google search for "pro se divorce" that identified more than 50,000 sites.

Many courts, bar associations, and legal aid programs operate programs to help self-represented parties, including clinics, educational programs, self-help centers, and ADR programs.<sup>47</sup> Clinics and educational programs provide information about legal procedures and substantive law through individual meetings or group instruction.<sup>48</sup> Self-help centers in courthouses provide model court forms and educational materials.<sup>49</sup> ADR programs

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REV. 602 (2010). For reports about these issues, see Standing Comm. on the Delivery of Legal Services, *Books and Reports*, AM. BAR ASS'N, [http://www.americanbar.org/groups/delivery\\_legal\\_services/resources/pro\\_se\\_unbundling\\_resource\\_center/books\\_reports.html](http://www.americanbar.org/groups/delivery_legal_services/resources/pro_se_unbundling_resource_center/books_reports.html) (last visited Aug. 15, 2011).

<sup>44</sup> NOLO PRESS, *DIVORCE & FAMILY LAW CENTER*, <http://www.nolo.com/legal-encyclopedia/family-law-divorce/> (last visited Aug. 15, 2011).

<sup>45</sup> See, e.g., DAVID YARIAN, *THE GUIDE TO SELF HELP BOOKS* (2011), <http://www.books4selfhelp.com/divorce.htm>.

<sup>46</sup> See Margaret B. Flaherty, Note, *How Courts Help You Help Yourself: The Internet and the Pro Se Divorce Litigant*, 40 FAM. CT. REV. 91 (2002). For state-by-state listings of self-help information and resources, see *Self-Help/Information Resources and Centers*, NAT'L CTR. ST. CTS., <http://www.ncsc.org/topics/access-and-fairness/self-representation/state-links.aspx> (last visited Aug. 15, 2011).

<sup>47</sup> Hilbert, *supra* note 39, at 553-57.

<sup>48</sup> *Id.* at 554-55. SCHEPARD, *supra* note 7, at 68-78. For discussion of parent education programs, see *infra* Part II.E.1.

<sup>49</sup> Hilbert, *supra* note 39, at 555-56. For a list of self-service centers, see Standing Comm. on the Delivery of Legal Services, *Self-Service Centers*, AM. BAR ASS'N (last visited June 21, 2011), [http://www.americanbar.org/groups/delivery\\_legal\\_services/resources/pro\\_se\\_unbundling\\_resource\\_center/self\\_service\\_centers.html](http://www.americanbar.org/groups/delivery_legal_services/resources/pro_se_unbundling_resource_center/self_service_centers.html).

provide neutral professionals to help parties resolve issues and may also lead people to decide to represent themselves.

As this Part shows, a major aspect of the family dispute resolution revolution has been a widescale opening of the courts to self-represented parties due to no-fault divorce laws and the proliferation of mechanisms to help people handle their own divorces. Of course, some couples understandably retain lawyers for each spouse to engage in extensive litigation, but this is not the only way that parties handle divorce disputes and, indeed, it is not even the norm these days.

### B. *Unbundled Legal Services*

In some cases, divorcing parties want to represent themselves but also want a limited amount of legal assistance. The practice of lawyers offering a limited scope of services is referred to as “unbundling” or “discrete task representation.”<sup>50</sup> This is an intermediate approach between parties’ entirely representing themselves and retaining lawyers to provide a full range of services. Rule 1.2(c) of the Model Rules of Professional Conduct and state counterparts regulate limited scope representation by requiring lawyers to obtain clients’ informed consent because there are non-obvious risks when lawyers do not undertake the full scope of representation.<sup>51</sup> A comment to a Missouri rule provides a model form for clients and lawyers to explicitly agree on which legal services lawyers would or would not provide in a matter. This list provides a useful illustration of the kinds of discrete services lawyers can provide:

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<sup>50</sup> See generally FORREST S. MOSTEN, UNBUNDLING LEGAL SERVICES: A GUIDE TO DELIVERING LEGAL SERVICES A LA CARTE (2000) (manual published by the American Bar Association Law Practice Management Section); *Special Issue: Unbundled Legal Services and Unrepresented Family Court Litigants*, 40 FAM. CT. REV. 5 (2002); Standing Comm. on the Delivery of Legal Services, *Unbundling Resources*, AM. BAR ASS’N (July 12, 2011), [http://www.americanbar.org/groups/delivery\\_legal\\_services/resources.html](http://www.americanbar.org/groups/delivery_legal_services/resources.html) (collecting listings of articles, books and reports, cases, court rules, ethics opinions, and information about self-service centers).

<sup>51</sup> MODEL RULES OF PROF’L CONDUCT R. 1.2(c) (2002). For a state-by-state listing of rules regarding unbundling, see *Unbundling Rules*, NAT’L CTR. ST. CTS., <http://www.ncsc.org/Topics/Access-and-Fairness/Self-Representation/State-Links.aspx?cat=unbundling%20Rules> (last visited Aug. 17, 2011).

- a) Give legal advice through office visits, telephone calls, facsimile (fax), mail or e-mail
- b) Advise about alternate means of resolving the matter including mediation and arbitration
- c) Evaluate the client's self-diagnosis of the case and advise about legal rights and responsibilities.
- d) Review pleadings and other documents prepared by you, the client
- e) Provide guidance and procedural information regarding filing and serving documents
- f) Suggest documents to be prepared
- g) Draft pleadings, motions and other documents
- h) Perform factual investigation including contacting witnesses, public record searches, in-depth interview of you, the client
- i) Perform legal research and analysis
- j) Evaluate settlement options
- k) Perform discovery by interrogatories, deposition and requests for admissions
- l) Plan for negotiations
- m) Plan for court appearances
- n) Provide standby telephone assistance during negotiations or settlement conferences
- o) Refer you, the client, to expert witnesses, special masters or other attorneys
- p) Provide procedural assistance with an appeal
- q) Provide substantive legal arguments in an appeal
- r) Appear in court for the limited purpose of \_\_.<sup>52</sup>

Lawyers have been unbundling legal services for a long time. As lawyer Forrest "Woody" Mosten, who is often called the "father of unbundling," wrote:

What's really new about unbundling? Lawyers have long provided client consultations, second opinions, answered phone questions, and provided other discrete task services. What is really new about unbundling is the mind-set of lawyers to proactively make such limited services available and to tell Jane Q Public how to get them.<sup>53</sup>

In 2000, a coalition of bar associations, legal aid offices, and other organizations held a national conference leading to agreement on recommendation to systematically promote the use of unbundled legal services.<sup>54</sup> A recent report of the A.B.A. Stand-

<sup>52</sup> MO. SUP. CT. R. 4-1.2 cmt. 2.

<sup>53</sup> Forrest S. Mosten, *Unbundling*, 40 FAM. CT. REV. 15, 15 (2002).

<sup>54</sup> *A National Conference on 'Unbundled' Legal Services October 2000*, 40 FAM. CT. REV. 26 (2002).

ing Committee on the Delivery of Legal Services noted lawyers' recent patterns in providing unbundled services:

A substantial number of lawyers seem to offer unbundled services. The 2010 Legal Technology Survey Report indicates 54% of solo practitioners and 45% of those in firms of two to nine lawyers provide unbundling. Similarly, research from the California Administrative Office of the Courts shows that half of the lawyers who responded prepare documents, half review documents, 40% prepare clients for hearings, 40% appear for a limited number of hearings and only a quarter do not provide any unbundled services.<sup>55</sup>

The Committee recently commissioned a national poll of the general public, asking about using legal services including unbundling.<sup>56</sup> The survey found that 70% of the respondents were not familiar with unbundling, which was described as the concept of lawyers and clients both doing some work on a matter.<sup>57</sup> When asked how likely they were to talk to a lawyer about unbundling for personal legal matter, about a third said that they were very likely to do so and another third said they were somewhat likely.<sup>58</sup> Younger individuals and those with less income more often reported interest in unbundling than older respondents and those with more income.<sup>59</sup>

Although lawyers have probably offered unbundled services for centuries, it is only recently that this approach has been recognized as a distinct phenomenon and given a name. Unbundling is not a distinct procedure, so it is hard to know how much parties use these discrete legal services. No-fault divorce has freed parties to handle divorces on their own, yet legal issues have become increasingly complex. So some parties combine the benefits of both self-representation and unbundled legal services, a phenomenon that has probably grown significantly in the past fifty years.

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<sup>55</sup> Standing Comm. on the Delivery of Legal Services, *Perspectives on Finding Personal Legal Services: The Results of a Public Opinion Poll*, AM. BAR ASS'N, 17 (2011) (footnotes omitted), available at <http://www.in.gov/judiciary/probono/survey-report.pdf>. Presumably these lawyers were referring to unbundled services not limited to divorce cases.

<sup>56</sup> *Id.* at 6.

<sup>57</sup> *Id.* at 17-19.

<sup>58</sup> *Id.* at 19-20.

<sup>59</sup> *Id.*

### C. Mediation

Since the 1970s, divorcing couples have increasingly used mediation to manage the divorce process and resolve disputes. Following enactment of no-fault divorce laws, there was little change in adversarial legal procedures. Some lawyers and mental health professionals started offering mediation to help divorcing couples resolve their issues in a less adversarial process.<sup>60</sup> Changes in child custody laws presumably contributed to the increase in use of mediation. Starting in the late 1970s, state legislatures and courts shifted away from the “tender years” doctrine and assumption that it was important for children of divorce to have a single “psychological parent.”<sup>61</sup> Under modern laws, there is a presumption that neither parent is necessarily better than the other and that both parents should actively participate in their children’s upbringing.<sup>62</sup> Custody decisions address which parents are responsible for making decisions about children and where the children spend their time.<sup>63</sup>

Mediation is a process in which a neutral third party helps parties try to reach agreement but does not have authority to impose decisions as judges and arbitrators do.<sup>64</sup> Family mediators generally have training as mental health professionals or lawyers.<sup>65</sup> Family mediators often use an interest-based approach, helping the parties reach agreements advancing the interests of both parties.<sup>66</sup> Generally, statutes and rules provide that communications in mediation cannot be used in legal proceedings, though there are some exceptions. For example, state-

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<sup>60</sup> SCHEPARD, *supra* note 7, at 58; Ann L. Milne, Jay Folberg & Peter Salem, *The Evolution of Divorce and Family Mediation: An Overview*, in *DIVORCE AND FAMILY MEDIATION: MODELS, TECHNIQUES, AND APPLICATIONS* 4-6, 10-13 (Ann L. Milne, Jay Folberg & Peter Salem eds., 2004).

<sup>61</sup> SCHEPARD, *supra* note 7, at 14-22, 45-47. *See also* Jeanne A. Clement & Andrew I. Schwebel, *A Research Agenda for Divorce Mediation: The Creation of Second Order Knowledge to Inform Legal Policy*, 9 OHIO ST. J. ON DISP. RESOL. 95, 95-97 (1993).

<sup>62</sup> SCHEPARD, *supra* note 7, at 14-22, 45-47.

<sup>63</sup> *Id.* These issues have been referred to as legal and physical custody, though people often use other terms such as decision-making responsibility and parenting time, among others. *Id.* at 48-49.

<sup>64</sup> Milne, Folberg & Salem, *supra* note 60, at 8.

<sup>65</sup> *Id.* at 9-13.

<sup>66</sup> *Id.* at 60.

ments made in mediation about child abuse often may be admitted in court.<sup>67</sup> Divorce mediation typically involves a number of sessions over a period of time. If parties are represented by lawyers, the lawyers usually do not attend the mediation sessions but advise clients outside of mediation and draft or review agreements reached in mediation.<sup>68</sup>

Family courts have increasingly required parties to use mediation before they may have a contested court hearing, particularly for disputes involving children.<sup>69</sup> By the early 1990s, child custody mediation became the “heart” of family court dispute resolution systems and at least thirty-eight states developed court-connected mediation programs.<sup>70</sup> Some courts have mediators on staff, though parties may be required to hire their own mediators in some jurisdictions.

Mediation is often appropriate in family cases because it generally focuses parents on their shared interest in promoting the children’s welfare. Moreover, mediators often encourage parents to develop an effective parenting relationship, regardless of any negative feelings that they have for each other, so that they can cooperate about the numerous parenting issues that will arise over an extended time.<sup>71</sup>

Craig McEwen and his colleagues researched an early mandatory divorce mediation program in Maine and found that, after some initial resistance, lawyers increasingly appreciated the value of mediation for them and their clients.

[L]awyers see mediation as providing an arena that encourages settlement while also aiding them in preparation for trial. The questions, challenges, and suggestions of fairly active mediators give lawyers valued leverage in leading clients toward “reasonable” positions without, lawyers believe, compromising their credibility as advocates and supporters. At the same time, they see mediation as permitting their clients a unique opportunity to voice feelings and to participate directly

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<sup>67</sup> Andrew Schepard, *The Model Standards of Practice for Family and Divorce Mediation*, in *DIVORCE AND FAMILY MEDIATION: MODELS, TECHNIQUES, AND APPLICATIONS* 516, 525-26 (ANN L. MILNE, JAY FOLBERG, & PETER SALEM EDS., 2004)

<sup>68</sup> Milne, Folberg, & Salem, *supra* note 60, at 9-13.

<sup>69</sup> *Id.*

<sup>70</sup> Salem, *supra* note 33, at 373 (citing an estimate by the National Center for State Courts).

<sup>71</sup> Milne, Folberg & Salem, *supra* note 60, at 9-13.

in shaping an agreement that suits their needs. Through joint lawyer-client participation in mediation, lawyers believe that they can take a strong role in drafting agreements on issues with legal ramifications such as division of pension benefits, while clients can with lawyer assistance address nonlegal issues such as setting visitation schedules and dividing personal property. The ability to invoke mediation within the framework of a mandatory system, lawyers feel, provides them with new opportunities to control the pace and direction of a case and to move it forward in the midst of a busy practice.<sup>72</sup>

In some cases, there has been domestic violence, which can lead to serious problems if one party tries to take advantage of the other in mediation. Thus many mediators and court mediation programs screen cases for histories of violence or abuse and associated problems.<sup>73</sup> When such histories or problems are detected, mediation may not be appropriate and some statutes and court rules provide an exclusion for mandatory mediation when mediation would be inappropriate.<sup>74</sup> There are different patterns of domestic violence and researchers have found that the exercise of coercive control is a critical element to identify and address.<sup>75</sup> Courts and professionals generally do not categorically exclude all such cases from mediation since the parties (including victims) may prefer mediation, which may be better than the alternatives, especially if measures are available to protect the safety of family members.<sup>76</sup>

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<sup>72</sup> Craig A. McEwen, Lynn Mather & Richard J. Maiman, *Lawyers, Mediation, and the Management of Divorce Practice*, 28 *LAW & SOC'Y REV.* 149, 182 (1994).

<sup>73</sup> See generally Amy Holtzworth-Munroe, Connie J. A. Beck & Amy G. Applegate, *The Mediator's Assessment of Safety Issues and Concerns (MASIC): A Screening Interview for Intimate Partner Violence and Abuse Available in the Public Domain*, 48 *FAM. CT. REV.* 646 (2010). For discussion of services related to domestic violence, see *infra* Part II.E.6.

<sup>74</sup> COMM'N ON DOMESTIC VIOLENCE, AM. BAR ASS'N, *MEDIATION IN FAMILY LAW MATTERS WHERE DV IS PRESENT* (2008), available at [http://www.americanbar.org/content/dam/aba/migrated/domviol/docs/mediation\\_january\\_2008.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/domviol/docs/mediation_january_2008.authcheckdam.pdf) (listing of state rules).

<sup>75</sup> Connie J. A. Beck & Chitra Raghavan, *Intimate Partner Abuse Screening in Custody Mediation: The Importance of Assessing Coercive Control*, 48 *FAM. CT. REV.* 555 (2010).

<sup>76</sup> See generally Ann L. Milne, *Mediation and Domestic Abuse*, in *DIVORCE AND FAMILY MEDIATION: MODELS, TECHNIQUES, AND APPLICATIONS* 304-35 (Jay Folberg, Ann L. Milne & Peter Salem eds., 2004).



Today, mediation is a flexible process that serves as a cornerstone of the family law dispute resolution system. Ideally, parties would be concerned about each other's interests, though mediation can be adapted to protect parties even in cases with histories of domestic violence. Divorcing parties use mediation to resolve discrete issues, such as developing a parenting plan, or to manage a comprehensive divorce process.<sup>77</sup> They may mediate with or without legal representation.<sup>78</sup> They may choose it on their own or participate because of a court order. They may use it to decide issues initially, resolve disputes over implementation of their arrangements, and/or develop agreements addressing circumstances that have changed after a prior agreement or order.

#### D. *Changes in Legal Services*

Changes in legal rules governing family law and the nature of family relationships<sup>79</sup> as well as the related changes in the function of the courts<sup>80</sup> have fundamentally altered the nature of family lawyers' services. Lawyers have needed to become members of professional workgroups solving family problems as well as advocates of their clients' rights and interests.<sup>81</sup>

Despite a public image of family lawyers as fomenters of conflict, empirical research indicates that most family lawyers try to be reasonable.<sup>82</sup> Moreover, many modern family lawyers

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<sup>77</sup> See, e.g., Daniel B. Pickar & Jeffrey J. Kahn, *Settlement-Focused Parenting Plan Consultations: An Evaluative Mediation Alternative to Child Custody Evaluations*, 49 FAM. CT. REV. 59 (2011).

<sup>78</sup> See, e.g., Connie J. A. Beck et al., *Divorce Mediation With and Without Legal Representation: A Focus on Intimate Partner Violence and Abuse*, 48 FAM. CT. REV. 631 (2010).

<sup>79</sup> See *supra* Part I.

<sup>80</sup> See *infra* Part II.E.

<sup>81</sup> SCHEPARD, *supra* note 7, at 7.

<sup>82</sup> See MATHER, MCEWEN & MAIMAN, *supra* note 8, at 48-56, 87-109 (finding a "norm of the reasonable lawyer" in the general community of divorce law practice); HUBERT J. O'GORMAN, *LAWYERS AND MATRIMONIAL CASES: A STUDY OF INFORMAL PRESSURES IN PRIVATE PROFESSIONAL PRACTICE* 132-43 (1963) (finding that almost two-thirds of matrimonial lawyers define their roles as counselors who try to shape clients' expectations and achieve reasonable results through negotiation); AUSTIN SARAT & WILLIAM L. F. FELSTINER, *DIVORCE LAWYERS AND THEIR CLIENTS: POWER AND MEANING IN THE LEGAL PROCESS* 53-58 (1995) (describing multiple strategies that lawyers use to persuade clients to accept what is legally possible in negotiations); Howard S.

function not only as *legal* advocates and counselors but also as (non-therapeutic) *family* counselors, advising clients about dealing with spouses and children.<sup>83</sup> This is not to suggest that before the revolution, family lawyers always used adversarial methods or that they are now always cooperative.<sup>84</sup> But research shows that family lawyers are likely to “dampen legal conflict far more than they exacerbate it and generally try to avoid adversarial actions.”<sup>85</sup> “Reasonable” lawyers are not necessarily “pushovers,” but rather are “realistic” about which “battles are worth fighting.”<sup>86</sup> In other words, family lawyers often try to distinguish what is important and exercise good judgment.<sup>87</sup>

This approach reflects the articulated best practices within the family law bar. In 1991, the American Academy of Matrimonial Lawyers first published *Bounds of Advocacy*,<sup>88</sup> a guide supplementing the ethical rules and describing considerations that distinguish family law practice from other types of legal practice:

Family law disputes occur in a volatile and emotional atmosphere. It is difficult for matrimonial lawyers to represent the interests of their clients without addressing the interests of other family members. Unlike most other concluded disputes in which the parties may harbor

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Erlanger, Elizabeth Chambliss & Marygold S. Melli, *Participation and Flexibility in Informal Processes: Cautions from the Divorce Context*, 21 LAW & SOC'Y REV. 585, 593, 601 (1987) (finding that divorce lawyers commonly pressure clients to accept settlements that the lawyers believe are reasonable).

<sup>83</sup> See, e.g., Joan B. Kelly & Mary Kay Kisthardt, *Helping Parents Tell Their Children About Separation and Divorce: Social Science Frameworks and the Lawyer's Counseling Responsibility*, 22 J. AM. ACAD. MATRIM. LAW. 315 (2009).

<sup>84</sup> For a description of cooperation by pre-revolutionary lawyers, see McMullen & Oswald, *supra* note 37 and accompanying text. Some contemporary lawyers act in a very adversarial manner when the stakes are high enough or when parties' or lawyers' adversarial motivations predominate. Moreover, researchers have found that lawyers “who violate the norm of the reasonable divorce lawyer may do so because they are outsiders to that community, sharing neither its standards nor its bonds of reciprocity.” MATHER, McEWEN & MAIMAN, *supra* note 8, at 51.

<sup>85</sup> *Id.* at 114.

<sup>86</sup> *Id.* at 49.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 113. The American Academy of Matrimonial Lawyers updated the document in 2000. See AM. ACAD. MATRIM. LAW., BOUNDS OF ADVOCACY (2000), available at <http://www.aaml.org/library/publications/19/bounds-advocacy>.

substantial animosity without practical effect, the parties in matrimonial disputes may interact for years to come. In addition, many matrimonial lawyers believe themselves obligated to consider the best interests of children, regardless of which family member they represent.<sup>89</sup>

Based on the distinctive nature of family law practice, the *Bounds of Advocacy* states that public and professional opinion has been moving away from a model of “zealous advocacy,” in which the lawyer’s only job is to win, and toward a counseling and problem-solving model that the guide calls “constructive advocacy.”<sup>90</sup> This approach reflects the reality that most matters are resolved through negotiation, mediation, and arbitration rather than by judicial decision. The guide argues that even when parties litigate, lawyers should do so constructively, “considering with the client what is in the client’s best interests and determining the most effective means to achieve that result. The client’s best interests include the well being of children, family peace, and economic stability.”<sup>91</sup>

Family law practice became more specialized, which was related, in part, to an influx of females as lawyers. In a study of lawyers in Maine and New Hampshire in the mid-1980s, 20% of the divorce lawyers handled 56-65% of the divorce cases.<sup>92</sup> By contrast, 55-66% of the lawyers appearing on family court dockets in a four-year period had only one or two family cases during that time.<sup>93</sup> In recent decades, increasing numbers of women became lawyers and many female lawyers concentrated in family law.<sup>94</sup> Indeed, females were more likely than males to be family law specialists; women constituted 33% of the overall sample of the study but 67% of the lawyers whose practices involved three-quarters or more of divorce cases.<sup>95</sup> Although both generalists and specialists typically were committed to being reasonable, generalists often interpreted this in terms of informality and limited cost whereas the specialists were more concerned about the

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<sup>89</sup> AM. ACAD. MATRIM. LAW., *supra* note 88, Preliminary Statement.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* For further discussion of this point, see *infra* text accompanying notes 190-92.

<sup>92</sup> MATHER, MCEWEN & MAIMAN, *supra* note 8, at 48.

<sup>93</sup> *Id.* at 47-48.

<sup>94</sup> *Id.* at 125.

<sup>95</sup> *Id.* at 52.

“legal intricacies of property division, the difficulties and risks of the legal process, the psychological dynamics of divorce, and the importance of divorce to the parties who struggle through it.”<sup>96</sup> Female lawyers, who were not part of the “old boy network,” often found that they were shut out of the established professional community and had a hard time taking advantage of informal negotiation.<sup>97</sup> Whereas many male lawyers exchanged information informally, female lawyers began to use litigation procedures from civil cases such as formal discovery and contested motions.<sup>98</sup>

The Collaborative Law (or “Collaborative Practice”) movement promoted greater reasonableness in handling family law matters. The movement was founded in 1990 and developed significant momentum after 2000.<sup>99</sup> Collaborative Practice involves an agreement between parties to negotiate, making full disclosure of relevant facts with the goal of reaching an agreement satisfying the interests of both parties.<sup>100</sup> A “disqualification” clause in the “participation agreement” provides that if the parties engage in contested litigation, both Collaborative lawyers are disqualified from representing them in litigation. If the parties want legal representation in litigation, they must hire new lawyers. The disqualification provision thus creates incentives for parties and Collaborative lawyers to settle.<sup>101</sup> In addition to the lawyers, the Collaborative process often engages a team of professionals such as child development specialists, financial specialists, and mental health coaches to help parties communicate effectively.<sup>102</sup>

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<sup>96</sup> *Id.* at 52-53.

<sup>97</sup> *Id.* at 125.

<sup>98</sup> *Id.* at 125-27.

<sup>99</sup> John Lande, *An Empirical Analysis of Collaborative Practice*, 49 FAM. CT. REV. 257, 257 (2011).

Virtually all Collaborative cases involve divorces. See Unpublished Description of IACP Research (n.d.) (on file with author); Information Sheet, FAQ Based on Cases Reported to the International Academy of Collaborative Professionals Research Project (Oct. 25, 2009) (information sheet distributed at the IACP Annual Networking and Educational Forum, Minneapolis, MN, on file with author, stating that 96% of cases in the database were divorce cases).

<sup>100</sup> Lande, *supra* note 99, at 257.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 264-65.

The Collaborative movement has attracted many lawyers and other family professionals. The International Academy of Collaborative Professionals has about 4,300 members around the world and the executive director estimates that more than 30,000 professionals have received Collaborative training.<sup>103</sup> One study found that lawyers wanted to offer Collaborative Practice to gain greater satisfaction by providing better service to clients.<sup>104</sup> Most Collaborative lawyers are females with extensive practice experience. In two surveys, 60-70% of the Collaborative lawyers are females with an average or median of 11-20 years in practice.<sup>105</sup> In another study, one lawyer described a “general pattern that Collaborative lawyers are predominantly women in their fifties and sixties who are ‘tired of arguing with each other[.]’”<sup>106</sup> This suggests that many Collaborative practitioners are from the substantial cohort of women who entered the legal profession in the 1970s and 1980s.

A smaller movement of lawyers offer “Cooperative Practice,” which is an intermediate approach between Collaborative Practice and litigation-oriented practice. Cooperative Practice is similar to Collaborative Practice but does not involve the disqualification provision. A study of the Divorce Cooperation Institute (DCI), an association of Cooperative lawyers in Wisconsin, found that DCI members generally believed that the Cooperative process was less cumbersome, time-consuming, and expensive than Collaborative Practice.<sup>107</sup> DCI members said that in Cooperative Practice, people were less likely to use litigation procedures to structure the process, less focused on protecting their interests, and often less adversarial than in a traditional litigation-oriented approach.<sup>108</sup> These characterizations reflect

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<sup>103</sup> *Id.* at 277 n.5.

<sup>104</sup> Julie Macfarlane, *The Emerging Phenomenon of Collaborative Family Law (CFL): A Qualitative Study of CFL Cases* 6 (2005), available at [http://www.justice.gc.ca/eng/pi/fcy-fea/lib-bib/rep-rap/2005/2005\\_1/pdf/2005\\_1.pdf](http://www.justice.gc.ca/eng/pi/fcy-fea/lib-bib/rep-rap/2005/2005_1/pdf/2005_1.pdf).

<sup>105</sup> MARK SEFTON, COLLABORATIVE LAW IN ENGLAND AND WALES: EARLY FINDINGS: A RESEARCH REPORT FOR RESOLUTION 14, 65 (2009); William H. Schwab, *Collaborative Lawyering: A Closer Look at an Emerging Practice*, 4 PEPP. DISP. RESOL. L.J. 351, 372 (2004).

<sup>106</sup> John Lande, *Practical Insights from an Empirical Study of Cooperative Lawyers in Wisconsin*, 2008 J. DISP. RESOL. 203, 248.

<sup>107</sup> *Id.* at 222-23.

<sup>108</sup> *Id.* at 213-17.

the particular views of DCI members and the point here is not to argue whether one process is generally better than others but rather to highlight the various efforts of family lawyers to seek reasonable solutions for their clients. Collaborative and Cooperative Practice are both mechanisms for lawyers and parties to use “planned early negotiation” to better satisfy their clients’ needs.<sup>109</sup> While many family lawyers do not explicitly identify their procedures with one of these models, they often use some of these procedures in their normal practice.

Of course, some lawyers still rely primarily on litigation procedures to manage family cases and sometimes are unnecessarily adversarial. But the trend has been to focus increasingly on clients’ interests and avoid unnecessarily aggravating clients’ conflicts. In part, these changes in family lawyers’ worldviews reflect changes in the courts’ role and the increased availability of family court services, as described in the following Part.

#### E. *Shift of Court’s Role*

The primary role of family courts has shifted from adjudication of disputes to proactive management of the family law-related problems of individuals subject to their jurisdiction.<sup>110</sup> Thus family courts have moved from primarily “umpiring” to include a “rehabilitative” or “problem-solving” role.<sup>111</sup> This is related to a change in the goal of divorce from producing a “clean break” to restructuring family relationships.<sup>112</sup> The old regime was particularly problematic when minor children were involved.

The court had to choose between parents because the child could not be left in emotional limbo, subject to continuous disputes, not knowing where he or she lived or which parent could make a decision about which doctor could treat him or her. It took the advent of mass divorce and much research and time to understand that these underlying philosophical premises were incompatible with the needs of most children.<sup>113</sup>

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<sup>109</sup> See generally JOHN LANDE, *LAWYERING WITH PLANNED EARLY NEGOTIATION: HOW YOU CAN GET GOOD RESULTS FOR CLIENTS AND MAKE MONEY* (2011).

<sup>110</sup> SCHEPARD, *supra* note 7, at 2.

<sup>111</sup> *Id.* at 2-6.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 4.

Under the old system, family courts were not expected to plan and manage cases, only adjudicate them. With a new therapeutic goal, judges essentially direct a process to diagnose and treat family disputes and dysfunctions in addition to managing litigation and adjudicating legal rights.<sup>114</sup> Moreover, there has been a movement to organize “unified” family courts so that a single judge and professional team would deal with all issues of a particular family including child abuse or neglect, juvenile delinquency, family violence, or divorce.<sup>115</sup> A recent review found that thirty-eight states have “statewide family courts, family courts in selected areas of the state, or pilot or planned family courts[.]”<sup>116</sup>

In many courts, especially in larger communities, courts, lawyers, and other family professionals can choose from a range of services to help families deal with problems entering the family courts. Family courts that actively manage referrals to various services use two alternative approaches, which expert Peter Salem calls “tiered” and “triage” systems. Under a “tiered” system, “families begin with the least intrusive and least time consuming service and, if the dispute is not resolved, proceed to the next available process, which is typically more intrusive and directive than the one preceding it.”<sup>117</sup> According to Salem, tiered systems almost always include — and often begin with — mediation.<sup>118</sup> Under “triage” (or “differentiated case management”) systems, courts make preliminary assessments and refer cases to different services based on characteristics of the cases. The process may involve screening, development of a plan for family services, appointment of a case manager, development of a parenting plan, and periodic court review.<sup>119</sup> Some courts still do not systematically plan for extensive family court services, especially in smaller communities where courts typically have fewer resources and there are fewer providers of relevant services.

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<sup>114</sup> *Id.* at 5.

<sup>115</sup> *Id.* at 4.

<sup>116</sup> Barbara A. Babb, *Reevaluating Where We Stand: A Comprehensive Survey of America's Family Justice Systems*, 46 *FAM. CT. REV.* 230, 230 (2008).

<sup>117</sup> Salem, *supra* note 33, at 371.

<sup>118</sup> *Id.* at 371-74.

<sup>119</sup> SCHEPARD, *supra* note 7, at 7; Salem, *supra* note 33, at 38-84.

The following Parts briefly sketch some of the more common services that family courts manage. Few, if any, of these services were regularly provided before the revolution.

### 1. *Parent Education*

Courts saw little need to provide parent education programs before the revolution. When parents divorced, it was generally fairly obvious who would get child custody. Under the English common law that prevailed in the United States through the nineteenth century, fathers would normally get child custody.<sup>120</sup> In the twentieth century, courts followed the “tender years” doctrine, reversing this presumption so that mothers would get custody if the children were not yet teens.<sup>121</sup> In both regimes, the non-custodial parent would be relegated to merely having “reasonable visitation” rights and little involvement in the children’s lives.<sup>122</sup>

Part of the revolution involved replacing the tender years doctrine with the “best interests of the child” standard.<sup>123</sup> The best interests standard avoids making assumptions based on gender stereotypes and the notion that children should have only one “psychological parent.”<sup>124</sup> Instead, the best interests standard (and related theory) assumes that it is often important for children to have attachments with both parents (and others) and that courts should make individualized decisions rather than crude general assumptions.<sup>125</sup>

The best interests standard creates new problems, however, precisely because it provides so little guidance. A typical statute may list a dozen or more factors relevant to children’s interests without indicating which are most important.<sup>126</sup> Relevant factors might include the parents’ and children’s preferences, the past family relationships, the length of time that children have lived in a stable and satisfactory situation and the value of maintaining the situation, the permanence of the family unit, the mental and

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<sup>120</sup> SCHEPARD, *supra* note 7, at 15.

<sup>121</sup> *Id.* at 16.

<sup>122</sup> *Id.* at 14.

<sup>123</sup> *Id.* at 13-26, 162-64.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 162-64.

<sup>126</sup> *Id.*



physical health of various family members, the parents' abilities to be good parents, whether child abuse or neglect or domestic violence has taken place, and the willingness of each parent to permit continuing contact between the children and the other parent.<sup>127</sup> Given a long list of factors like this, most parents can make plausible arguments about why their receiving custody would be in their children's best interests. Thus, while the best interests standard is fairer and more appropriate than its predecessors, paradoxically, it can stimulate conflict because it creates uncertainty.<sup>128</sup>

Courts have established parent education programs to help deal with the large number of actual or potential disputes about custody-related issues. The programs are intended to help parents cooperate in decision-making, minimize the need for professional and court intervention, and improve family relationships.<sup>129</sup> Some programs are directed toward children to help them cope with their parents' divorce-related conflicts.<sup>130</sup> These educational programs can be especially helpful for self-represented litigants and users of unbundled legal services who get little or no guidance from lawyers.<sup>131</sup>

Professor Andrew Schepard identified three categories of parent education programs.<sup>132</sup> Primary education programs are provided soon after cases are initiated and possibly even before there is a court filing. These are often provided at sites other than courthouses and may include "marriage and divorce education programs, support groups for parents and children in community centers, and family life education in schools."<sup>133</sup> Secondary education programs are typically provided in courthouses by court employees or contractors soon after cases are

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<sup>127</sup> *Id.* at 163-64.

<sup>128</sup> *Id.* at 162-64.

<sup>129</sup> *See generally* A Special Focus on Court-Affiliated Parent Education Programs, 49 FAM. CT. REV. 107 (2011). For a state-by-state listing of parent education programs, see *Parental Education Programs*, NAT'L CTR. ST. CTS., <http://www.ncsc.org/topics/children-families-and-elders/marriage-divorce-and-custody/state-links.aspx?cat=parental%20education%20programs> (last visited Aug. 17, 2011).

<sup>130</sup> SCHEPARD, *supra* note 7, at 69.

<sup>131</sup> *See supra* Parts II.A, II.B.

<sup>132</sup> SCHEPARD, *supra* note 7, at 68-78.

<sup>133</sup> *Id.* at 70. *See also id.* 71-73.

filed. The programs may cover topics such as legal rules and procedures relating to children's issues, the effects of divorce on parents and children, and techniques for effective co-parenting.<sup>134</sup> Tertiary programs are therapeutically-oriented to "teach chronically litigious parents how to manage their conflicts without resorting to litigation and to help the children cope with parental conflict."<sup>135</sup>

## 2. *Appointment of Advocates for Children and Their Interests*

Family courts sometimes appoint guardians and/or lawyers for minor children to protect and represent the children's interests.<sup>136</sup> While pre-revolution courts may have occasionally appointed guardians or lawyers for children, the legal and social changes described in the preceding Part dramatically increased the need for these services. There are not clear standards about when courts should appoint individuals in these roles, however, since state laws generally leave this to the discretion of the court.<sup>137</sup> Indeed, courts' practices in using such professionals vary widely.<sup>138</sup>

A general consensus exists that when lawyers are appointed to represent children, the lawyers are required to advocate for the children's expressed objectives, just like any other clients, even if the lawyers believe that achieving the clients' objectives would not be in their best interests.<sup>139</sup> There is also broad agreement that courts should sometimes appoint some professionals

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<sup>134</sup> *Id.* at 73-74.

<sup>135</sup> *Id.* at 74.

<sup>136</sup> SCHEPARD, *supra* note 7, at 142-47.

<sup>137</sup> For a table summarizing features of state laws regarding appointment of advocates for children and their interests in divorce cases, see Linda D. Elrod, *Raising the Bar for Lawyers Who Represent Children: ABA Standards of Practice for Custody Cases*, 37 FAM. L.Q. 105, 126-29 (2003) (Appendix).

<sup>138</sup> See Martin Guggenheim, *The AAML's Revised Standards for Representing Children in Custody and Visitation Proceedings: The Reporter's Perspective*, 22 J. AM. ACAD. MATRIM. LAW. 251, 265 (2009) (noting that different members of the AAML drafting committee practiced in courts that "routinely" appoint children's attorneys in contested custody and visitation cases whereas others practice in courts where such appointments are "virtually unheard of").

<sup>139</sup> *Id.* at 285-86. There is less agreement about the weight that courts should give to children's preferences in making their rulings. *Id.* at 285-87.

(often called “guardians ad litem” or “GAL”s) to investigate the case and report to the court, including their opinions about the children’s best interests, even if these opinions differ from the children’s preferences. However, there continues to be controversy about what these professionals’ roles should be and what they should be called. In recent years, the American Bar Association (A.B.A.), Uniform Law Commission, and American Academy of Matrimonial Lawyers have taken different positions on these issues, reflecting differences in views of different states, academics, and practitioners.<sup>140</sup>

In 2003, the A.B.A. Family Law Section approved “Standards of Practice for Lawyers Representing Children in Custody Cases,” which establish the role of a “best interests attorney,” defined as a “lawyer who provides independent legal services for the purpose of protecting a child’s best interests, without being bound by the child’s directives or objectives.”<sup>141</sup> The Commentary states that “the Best Interests Attorney investigates and advocates the best interests of the child as a lawyer in the litigation” and does not act as a witness.<sup>142</sup> In 2007, the Uniform Law Commission adopted the Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act, which establishes roles of both a “best interests attorney” and a “best interests advocate.”<sup>143</sup> Under this Act, the definition of the “best interests attorney” is very similar to that of the A.B.A. Family Law Section: “an attorney who provides legal representation for a child

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<sup>140</sup> See generally Guggenheim, *supra* note 138.

<sup>141</sup> AM. BAR ASS’N, SECTION OF FAMILY LAW, STANDARDS OF PRACTICE FOR LAWYERS REPRESENTING CHILDREN IN CUSTODY CASES § II.B.2 (Aug. 2003), available at [http://www.americanbar.org/content/dam/aba/migrated/domviol/pdfs/0908/Standards\\_of\\_Practice\\_for\\_Lawyers\\_Representing\\_Children.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/domviol/pdfs/0908/Standards_of_Practice_for_Lawyers_Representing_Children.authcheckdam.pdf).

<sup>142</sup> *Id.* § II, Commentary. The Standards reject the use of the term “guardian ad litem,” stating that it “has often been stretched beyond recognition to serve fundamentally new functions, such as parenting coordinator, referee, facilitator, arbitrator, evaluator, mediator and advocate.” *Id.*

<sup>143</sup> UNIF. REPRESENTATION OF CHILDREN IN ABUSE, NEGLECT, AND CUSTODY PROCEEDINGS ACT §§ 2(2), 2(3) (2007). The American Bar Association recently adopted a Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings, which includes roles for both children’s lawyers and best interest advocates. MODEL ACT GOVERNING REPRESENTATION OF CHILDREN IN ABUSE, NEGLECT, AND DEPENDENCY PROCEEDINGS §§ 1(c), 1(d) (2011).

to protect the child's best interests without being bound by the child's directives or objectives."<sup>144</sup> By contrast, a "best interests advocate" is "an individual, not functioning as an attorney, appointed to assist the court in determining the best interests of a child."<sup>145</sup> Best interests advocates "investigate the child's circumstances and may sometimes testify in the case about the child's best interests."<sup>146</sup> As such, these best interests advocates may themselves be represented by counsel.<sup>147</sup> In 2009, the American Academy of Matrimonial Lawyers (A.A.M.L.) adopted Standards for Attorneys for Children in Custody or Visitation Proceedings.<sup>148</sup> The A.A.M.L. Standards use the term "court-appointed professionals other than counsel for the child," which is defined as a "person, whether or not licensed to practice law, who is appointed in a contested custody or visitation case for the purpose of assisting the court in deciding the case."<sup>149</sup> The purpose of defining the role in this way is to clearly separate functions of partisan advocacy and neutral investigation.<sup>150</sup>

For the purpose of this discussion, it is not important to analyze or advocate any of these particular views.<sup>151</sup> Rather, the point is to highlight these issues as part of the family law dispute resolution revolution. Before the revolution, courts did not regularly consider appointing professionals to advocate for children or their interests, let alone parse their functions in different contexts. Now, there is a general recognition of the need for courts to make such appointments in some cases and a lively debate about the best way to do so.

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<sup>144</sup> UNIF. REPRESENTATION OF CHILDREN IN ABUSE, NEGLECT, AND CUSTODY PROCEEDINGS ACT § 2(3).

<sup>145</sup> *Id.* § 2(2).

<sup>146</sup> *Id.* § 2 cmt.

<sup>147</sup> *Id.*

<sup>148</sup> The American Academy of Matrimonial Lawyers adopted *Standards for Attorneys for Children in Custody or Visitation Proceedings* (2009), published at 22 J. AM. ACAD. MATRIM. LAW. 227 (2009).

<sup>149</sup> *Id.* at 234. Scope and Definitions B.2.

<sup>150</sup> See Guggenheim, *supra* note 138, at 263-68.

<sup>151</sup> While family law professionals may benefit from considering the general issues in this controversy, as a practical matter, they should pay special attention to the laws in their jurisdiction and, most importantly, the normal practices in particular courts.

### 3. *Child Custody Evaluation*

As noted above, use of the “best interest of the child” standard for child custody made it difficult for judges, lawyers, and parents to predict the outcome of a child custody dispute.<sup>152</sup> Since these factors are quite subjective, courts have difficulty hearing and deciding these issues. To help judges handle serious child custody disputes, they may appoint neutral custody evaluators to investigate and report to the court. As Professor Andrew Shepard writes:

Child custody is one of the few areas in which our otherwise adversarial, party-driven courts routinely appoint a neutral expert to conduct an investigation on its behalf. In the typical auto accident or medical malpractice case, for example, courts rely on parties to a dispute to present and pay for partisan expert testimony.<sup>153</sup>

Child custody evaluators review relevant records and interview parents, children, and others who might have relevant information such as relatives, teachers, or therapists.<sup>154</sup> Because the purpose is to provide a report with recommendations to the court, statements made to the evaluator are not confidential, unlike in mediation or early neutral evaluation processes.<sup>155</sup> Courts do not necessarily follow the evaluators’ recommendations, though they often do so. The fact that courts often do follow the recommendations creates incentives for parties to accept the recommendations, or at least use them as the basis for negotiation, to avoid the need for a contested trial.<sup>156</sup>

### 4. *Early Neutral Evaluation*

Some courts sponsor an early neutral evaluation (ENE) process and parties can also arrange for it privately. Before the revolution, lawyers would sometimes ask experienced lawyers not involved in the case to give their opinions, though this would be done on an ad hoc and informal basis. By contrast, ENE is a

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<sup>152</sup> See *supra* text accompanying notes 126-28.

<sup>153</sup> SHEPARD, *supra* note 7, at 152.

<sup>154</sup> *Id.* Some courts order “brief focused assessments” to get input on narrowly defined, issue-specific questions. See ASS’N FAM. & CONCILIATION CTS., GUIDELINES FOR BRIEF FOCUSED ASSESSMENTS (2009).

<sup>155</sup> SHEPARD, *supra* note 7, at 152-53. For discussion of early neutral evaluation, see *infra* Part II.E.4.

<sup>156</sup> *Id.* at 153-54.

regular, confidential process conducted early in a case. Each side presents a summary of its position and a neutral expert gives an evaluation of the strengths and weaknesses of the case. If the parties do not fully settle the case after receiving the evaluation, the evaluator helps develop a case plan that is narrowly tailored to efficiently manage the case.<sup>157</sup> ENE is particularly appropriate when parties (or their lawyers) have sharply differing assessments of what would happen if they went to court and these differences make it difficult or impossible to settle the matter. Whereas full custody evaluations are high-stakes processes that require substantial time and money and are designed for an adversarial contest in court, ENEs are designed to help parties efficiently reach settlements in private.

As an example of an ENE program, Minnesota's Fourth Judicial District (including Minneapolis) has used two ENE processes since 2002.<sup>158</sup> The "Social" ENE program addresses custody and parenting time issues and the "Financial" ENE program addresses marital estate issues.<sup>159</sup> At the initial case management conference, which occurs within three weeks after case filing, the parties and lawyers meet with their judge and discuss, among other things, whether they want to use one or both of the ENE processes. If so, the ENE meetings are scheduled to take place soon afterward. If the parties do not settle, the evaluators help them and the court manage the litigation, including possible referrals to mediation or other procedures.<sup>160</sup>

### 5. Parenting Coordination

Even after courts receive neutral expert custody evaluations and adjudicate custody issues, some parents continue to engage in high levels of conflict about these issues. Because parenting

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<sup>157</sup> See Yvonne Pearson et al., *Early Neutral Evaluations: Applications to Custody and Parenting Time Cases Program Development and Implementation in Hennepin County, Minnesota*, 44 FAM. CT. REV. 672, 673-74 (2006). See generally Wayne D. Brazil, *Early Neutral Evaluation or Mediation? When Might ENE Deliver More Value?*, 14 DISP. RESOL. MAG. 10, 11 (Fall 2007).

<sup>158</sup> Pearson et al., *supra* note 157, at 673.

<sup>159</sup> Minn. Fourth Dist. Ct., *Social Early Neutral Evaluation*, <http://www.mncourts.gov/district/4/?page=1732> (last visited Aug. 17, 2011); Minn. Fourth Dist. Ct., *Financial Early Neutral Evaluation*, <http://www.mncourts.gov/district/4/?page=1731> (last visited Aug. 17, 2011).

<sup>160</sup> See *Standards for Attorneys*, *supra* note 148.

involves a continuous stream of decisions about a wide range of parenting issues, a court decision does not necessarily provide finality as in most other civil matters. Virtually any aspect of parents' and children's daily lives can be the basis of claims of harm to children. Parents can bring motions for courts to enforce or modify court orders and punish each other for contempt. To reduce the level of harmful conflict and use of the legal system to resolve it, courts may appoint special masters, often called "parenting coordinators" (PC).<sup>161</sup> Parents can also privately hire PCs without court orders.

PCs are usually mental health professionals or lawyers trained in mediation who serve as a "combination educator, mediator, and limited purpose arbitrator in parenting disputes."<sup>162</sup> They may interview the parents, their children, and others with relevant information. They usually focus on implementing existing court orders, improving communication, facilitating exchanges of the children between parents, and resolving disputes related to the children. PCs may make recommendations to a court and make decisions within the scope of their authority.<sup>163</sup>

### 6. *Services Related to Family Violence*

Before the 1970s, domestic violence<sup>164</sup> was generally seen as a private matter and thus law enforcement agencies and courts

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<sup>161</sup> See generally ASS'N FAM. & CONCILIATION CTS., GUIDELINES FOR PARENTING COORDINATION (2005), <http://www.afccnet.org/pdfs/AFCCGuideLinesforParentingCoordinationnew.pdf>. See also ARIZ. ASS'N FAM. & CONCILIATION CTS., SUMMIT PROJECT: PARENTING COMMUNICATION RESOURCES IN HIGH-CONFLICT CASES (2011) <http://www.azafcc.org/pdfs/2011%20AzAFCC%20SUMMIT%20PROJECT%20FINAL%20Version.pdf>; PARENTING COORDINATION CENTRAL, <http://www.parentingcoordinationcentral.com/index.cfm> (last visited Aug. 17, 2011).

<sup>162</sup> SCHEPARD, *supra* note 7, at 108. See also Sherrill W. Hayes, "More of a Street Cop than a Detective": An Analysis of the Roles and Functions of Parenting Coordinators in North Carolina, 48 FAM. CT. REV. 698 (2010).

<sup>163</sup> See ASS'N FAM. & CONCILIATION CTS., *supra* note 161, at 2-3.

<sup>164</sup> There is no consensus on the definition of domestic violence or even the best term to use. See Nancy Ver Steegh & Clare Dalton, *Report from the Wingspread Conference on Domestic Violence and Family Courts*, 46 FAM. CT. REV. 454, 456-60 (2008). The report of a conference of practitioners and researchers who have specialized in domestic violence concluded:

Families who experience domestic violence differ from one other in significant ways. Violent behavior may range from an isolated inci-

rarely became involved.<sup>165</sup> Since then, government agencies, courts, professionals, researchers, activists, and the public have increasingly recognized it as a serious social problem requiring public intervention. In particular, family courts have needed to pay particular attention to protecting the health and safety of family members because of the frequent incidence of child abuse and neglect as well as domestic violence.<sup>166</sup>

Domestic violence and child abuse allegations in child custody disputes raise similar problems; when either is alleged, child custody courts must verify the charges, devise parenting plans that maximize safety, attempt to preserve a relationship between a violent parent and a child, and coordinate resolution of a dispute with the criminal justice system and child protective services.<sup>167</sup>

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dent to pronounced patterns that recur over time, often escalating in intensity and frequency. Infrequent or occasional physical violence may or may not be accompanied by other forms of abuse, including threats, sexual coercion, verbal abuse, isolation, and financial control. The level of prior physical violence may or may not be a reliable indicator of future risk or lethality. The violence may be complicated by other problems such as mental illness or substance abuse. Finally, while researchers agree that exposure to domestic violence is harmful to children's development, not all children are equally affected; there are multiple factors that influence children's well-being and contribute to decisions about their best interests. Frequently the law of any given state or jurisdiction imposes a definition of domestic violence that is both under- and overinclusive and demands uniform treatment of families that fit the definition, despite growing recognition that they are not all alike.

*Id.* at 456 (footnotes omitted).

The A.B.A. Commission on Domestic Violence uses the following definition: "Domestic violence is a pattern of behavior in which one intimate partner uses physical violence, coercion, threats, intimidation, isolation or emotional, sexual or economic abuse to control the other partner in the relationship." Commission on Domestic Violence, *Tool for Attorneys to Screen for Domestic Violence*, AM. BAR ASS'N, available at [http://www.americanbar.org/content/dam/aba/multimedia/domestic\\_violence/20110419\\_cdv\\_screeningtool.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/multimedia/domestic_violence/20110419_cdv_screeningtool.authcheckdam.pdf). Note that this definition does not require physical contact or harm for an action to be considered as domestic violence.

<sup>165</sup> Randal B. Fritzler & Leonore M. J. Simon, *The Development of a Specialized Domestic Violence Court in Vancouver, Washington Utilizing Innovative Judicial Paradigms*, 69 UMKC L. REV. 139, 139-40 (2000).

<sup>166</sup> SCHEPARD, *supra* note 7, at 5-6. See generally, *Special Issue: Domestic Violence*, 46 FAM. CT. REV. 434 (2008).

<sup>167</sup> SCHEPARD, *supra* note 7, at 85.



In addition, courts may be involved in issuing protective orders for victims and adjudicating civil actions. Alleged perpetrators have legal rights and are sometimes falsely accused, so courts often have a difficult task of analyzing ambiguous evidence and balancing conflicting legal rights and interests.<sup>168</sup>

Some courts have adopted special procedures to protect the parties when there are allegations or findings of violence. For example, parties may be required to attend educational programs, mediators may be required to screen for domestic abuse and use additional protective procedures in mediation, abusers may be required to have court-approved supervision when they spend time with the children, and courts may appoint special masters or “parenting coordinators” to manage cases involving especially high levels of conflict.<sup>169</sup>

The heightened recognition of problems of family violence has led to concentrated efforts to develop valid methods for screening violence and an expectation that courts, lawyers, and other family law professionals will routinely identify problems related to family violence and effectively deal with them.<sup>170</sup>

#### F. *Arbitration and Private Judging*

With the increase in family court caseloads that reduce courts’ capacity to provide prompt adjudication, some parties in family law matters have sought private adjudication through arbitration and private judging. These processes permit greater control over the timing of the procedures as well as the ability to select the adjudicators and protect the parties’ privacy. These adjudicators get their authority from agreements by the parties to use their services.

In arbitration, a neutral third party (other than a sitting public judge) presides over a process including presentation of evi-

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<sup>168</sup> *Id.* at 85-100.

<sup>169</sup> *Id.* at 100-12.

<sup>170</sup> See Commission on Domestic Violence, *supra* note 164; Loretta Frederick, *Questions about Family Court Domestic Violence Screening and Assessment*, 46 FAM. CT. REV. 523 (2008); Ver Steegh & Dalton, *supra* note 164, at 460-61. See also *supra* notes 73-75 and accompanying text. For a thoughtful analysis of domestic violence issues and how lawyers should deal with them, see Nancy Ver Steegh, *The Uniform Collaborative Law Act and Intimate Partner Violence: A Roadmap for Collaborative (And Non-Collaborative) Lawyers*, 38 HOFSTRA L. REV. 699 (2009).

dence and arguments and then makes an award. Normally, arbitration awards will be enforced by the courts.<sup>171</sup> Some courts have refused to enforce agreements to arbitrate or arbitration awards in family matters, especially regarding issues related to children.<sup>172</sup> In these contexts, arbitration may be considered problematic because arbitration awards are generally considered final, binding, and non-modifiable but it is often appropriate to modify decisions in family law matters based on changes in circumstances. To address these concerns, the American Academy of Matrimonial Lawyers promulgated the Model Family Law Arbitration Act.<sup>173</sup>

Unlike the [Revised Uniform Arbitration Act], the Model [Family Law Arbitration] Act permits judicial appeals of substantive issues of law and modification of child custody, child support and spousal support to the extent those issues are modifiable under state law. The Model Act also provides for de novo judicial review of child custody and child support arbitration awards.

Arbitration of other matters, such as distribution of property, normally should be enforceable, though the enforceability of an agreement to arbitrate or arbitration award depends on the law of each jurisdiction.

Some states have laws specifically authorizing appointment of individuals popularly known as “private judges” or “rent-a-judges.”<sup>174</sup> Arbitration and private judging are similar in that, compared with public court adjudication, both are conducted in private and the parties exercise greater control over the selection of neutral adjudicators and the process. Unlike arbitrators, private judges are typically required to follow the law and their de-

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<sup>171</sup> See generally Federal Arbitration Act, 9 U.S.C. §§ 1-16; REV. UNIV. ARB. ACT (2000).

<sup>172</sup> See George K. Walker, *Arbitrating Family Law Cases by Agreement*, 18 J. AM. ACAD. MATRIM. LAW. 429, 431 n.8 (2003).

<sup>173</sup> Am. Acad. Matrimonial Law., Model Family Law Arbitration Act (2004), <http://www.aaml.org/library/publications/21215/model-family-law-arbitration-act>.

<sup>174</sup> See John W. Whittlesey, Note, *Private Judges, Public Juries: The Ohio Legislature Should Rewrite R.C. § 2701.10 to Explicitly Authorize Private Judges to Conduct Jury Trials*, 58 CASE W. RES. L. REV. 543, 543-46 (2008). Various statutes may use terms such as “referees” or “special masters.” Helen I. Bendix & Richard Chernick, *Renting the Judge*, 21 LITIG. 33, 33 (1994). See generally 66 AM. JUR. 2D *References* (2011).

isions are appealable in the court system.<sup>175</sup> Thus some parties prefer private judging so that they can maintain greater control over a private process and also preserve the option of appealing if they are dissatisfied with the decision.

### III. Conclusion

In 1968, Virginia Slims cigarettes were marketed to women with the slogan, “You’ve Come a Long Way, Baby[.]”<sup>176</sup> reflecting the major social changes then underway. By then, both women and men *had* come a long way in terms of changing social and legal norms about family and gender relationships. Now, looking back more than forty years later, it is clear that a lot more change was to follow.

As noted at the outset of this article, Herbert Jacob used the term “silent revolution” referring to these changes.<sup>177</sup> This phrase is paradoxical given a common perception of revolutions as being relatively brief dramatic events with sharply different conditions before and afterward. The family and gender changes in the last fifty years reflect a fundamental transformation, though the changes have been incremental and are not limited to a short time period. While the family and gender changes in recent decades have seemed dramatic and uncertain at the time, in hindsight, they seem obviously right to most people, who are surprised that there was ever any controversy about them. The family law revolution still continues. For example, American society is now in the midst of a major transformation in social and legal norms about same-sex relationships.<sup>178</sup> In ten or twenty years, it would not be surprising to find that same-sex marriage is recognized in most or all states.

The revolution in family law doctrine has been a mixed blessing. Undoubtedly, it has liberated many people to have their individual preferences and actions respected rather than to be treated according to unfair stereotypical assumptions. This

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<sup>175</sup> Amanda Bronstad, “*Private Judges*” *Alter Legal Landscape*, NAT’L L.J., Apr. 5, 2006.

<sup>176</sup> *Virginia Slims*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Virginia\\_Slims](http://en.wikipedia.org/wiki/Virginia_Slims) (last visited Aug. 17, 2011).

<sup>177</sup> See *supra* Part I.

<sup>178</sup> See Jennifer L. Levi, *Marriage Equality for Same-Sex Couples: Where We Are and Where We Are Going*, 22 J. AM. ACAD. MATRIM. LAW. 55 (2009).

revolution has recognized the needs of children and abuse victims and provided new resources to help these vulnerable populations. Of course, family law is an imperfect work-in-progress and more work is needed.

The improvements in family law have been accompanied by the challenges of greater conflict that inevitably resulted. The virtue of the “old days” was that the rules and social norms were generally so clear that most people accepted their roles and did not even imagine other possibilities. With the freedom legitimized through the revolution, people increased their expectations, which predictably led to more conflict. As the divorce rate increased, family courts had to deal with much larger caseloads and make more complex decisions without the benefit of simple rules like the “tender years” doctrine. Thus the work of the family courts has become much harder and parties and professionals struggle to cope with these challenges.

The revolution in family law necessitated the revolution in family law dispute resolution.<sup>179</sup> Not only did family courts struggle with the increased volume of cases and ambiguous rules, they also found that the tools of litigation were poorly suited to handle most of the problems presented to them. Similarly, people often found that they did not want to use litigation to resolve their family disputes because the adversarial structure could easily escalate conflict. Many parties did not want to rely on lawyers at all, often because of the expense but sometimes because they were afraid that lawyers might stimulate new conflict or exercise too much control of their personal affairs. The development of “alternative” dispute resolution methods has been a continuing process of innovation where professionals try to craft ever-more effective, efficient, and satisfying ways to handle conflict. In this ongoing process of innovation, past innovations sometimes became institutionalized as the current status quo, only to be challenged by even newer innovations.

Some courts have used “dispute system design” (DSD) methods to better handle an ongoing flow of disputes to satisfy the interests of key constituents.<sup>180</sup>

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<sup>179</sup> For a thoughtful review of these changes, see Ver Steegh, *supra* note 31.

<sup>180</sup> See John Lande, *Principles for Policymaking about Collaborative Law and Other ADR Processes*, 22 OHIO ST. J. ON DISP. RESOL. 619, 629-64 (2007)

DSD focuses on systematically managing a series of disputes rather than handling individual disputes on an ad hoc basis. . . In general, DSD involves assessing the needs of disputants and other stakeholders in the system, planning a system to address those needs, providing necessary training and education for disputants and relevant dispute resolution professionals, implementing the system, evaluating it, and making periodic modifications as needed.<sup>181</sup>

Although courts and other organizations perform some of these functions without explicitly using a DSD process, purposely doing so may produce more effective policies and procedures “because it often involves an explicit assessment of problems and stakeholders’ interests, participation by diverse stakeholder groups, group facilitation techniques, and systematic procedures for implementing and evaluating new policies.”<sup>182</sup> In self-consciously using a DSD process, some organizations may decide to use some but not all elements of DSD theory, depending on what is feasible in their situations.

When family courts conduct DSD processes, they should engage representatives of key stakeholder groups including parties, attorneys, judges, court administrators, mediators, mental health professionals, critical constituency groups (e.g., victims of child abuse or domestic violence), and possibly others such as school systems and law enforcement agencies.<sup>183</sup>

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[hereinafter Lande, *Principles for ADR Policymaking*]; John Lande, *Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs*, 50 UCLA L. REV. 69, 108-39 (2002) [hereinafter Lande, *DSD in Court Programs*].

<sup>181</sup> Lande, *Principles for ADR Policymaking*, *supra* note 180, at 630 (footnotes omitted).

<sup>182</sup> Lande, *DSD in Court Programs*, *supra* note 180, at 114.

<sup>183</sup> In developing and operating civil court mediation programs, a DSD process should engage representatives of key stakeholder groups including parties, attorneys, courts, and mediators. *See id.* at 118-26 (describing general interests of respective stakeholder groups). Family courts use similar procedures with the broader range of stakeholder groups listed in the text.

While DSD efforts often focus on providing an appropriate “supply” of services, they can also consider reducing the “demand.” For example, reducing the level of family conflict would help relieve the stress on family courts and professionals. There would be less “demand” for family law services if more people made better decisions about marriage and having children, treated each other with greater respect, resisted impulses to act abusively and violently, and learned how to deal with conflict more constructively. Indeed, court-connected education programs are generally based on this principle. *See supra* Part II.E.1.

Bar associations and law offices can also conduct DSD processes. Bar associations often operate lawyer referral service programs that could benefit from systematic analysis, planning, and review. More generally, bar associations are interested in identifying the legal needs of the public, barriers to fulfilling those needs, and mechanisms to help people get appropriate legal services.<sup>184</sup> Law offices — even solo practices — are dispute systems that could benefit from systematic analysis and planning to assess and improve their services.<sup>185</sup>

Looking to the future, it seems likely that family courts and professionals are going to face increasing challenges in helping people handle their family conflicts. In 2011, the United States is still recovering from an economic crisis that materialized in 2008 and full recovery is likely to require at least several more years. Many individuals and institutions throughout society, including family courts, are likely to have to do more with less.<sup>186</sup> Although the wealthiest parties will continue to be able to afford expensive family law services, most people are likely to feel increasing financial limits on what they are willing and able to invest in family law dispute resolution.

To provide services that are both high-quality and affordable, judges, lawyers, and other dispute resolution professionals should conduct DSD processes to develop and use early assessment and intervention procedures. Obviously, everyone can realize efficiencies if problems are assessed at the earliest appropriate time. For family judges, early assessment of cases entering their courts would enable them to make the most appro-

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Similarly, providing assistance to self-represented litigants may reduce demand to the extent that parties are better able to resolve disputes without extensive intervention. Richard Zorza sketches a DSD approach focusing particularly on the needs of self-represented litigants. See Richard Zorza, *An Overview of Self-Represented Litigation Innovation, Its Impact, and an Approach for the Future: An Invitation to Dialogue*, 43 FAM. L.Q. 519 (2009).

<sup>184</sup> See John Lande, *Helping Lawyers Help Clients Make Good Decisions About Dispute Resolution*, 17 DISP. RESOL. MAG. 14, 14 (Fall 2010).

<sup>185</sup> LANDE, *supra* note 109, at xxi.

<sup>186</sup> See Ver Steegh, *supra* note 31, at 670 (2008) (describing resource constraints before the current economic crisis).

ropriate referrals and use their resources most efficiently.<sup>187</sup> For professionals, this would help them identify particular services that would be most helpful.

For example, projects promoting early case assessment and intervention might produce and disseminate educational materials for parties about dispute resolution options. These projects might develop protocols for lawyers and other professionals “to help clients assess dispute resolution options. These might include convenient checklists of questions that [professionals] might ask clients to assess the clients’ substantive and procedural interests, potential litigation outcomes, risk assessments, and clients’ risk preferences, among other factors.”<sup>188</sup> The projects might train professionals to use these tools in client counseling. As part of an overall dispute resolution strategy, courts might adopt rules requiring lawyers to advise clients about dispute resolution processes or bar associations might adopt guidelines encouraging lawyers to do so. “Enlisting courts to seriously support such initiatives is likely to be particularly effective, as opposed to simply putting rules ‘on the books’ but generally ignoring them.”<sup>189</sup>

Family lawyers representing “opposing” parties should jointly use planned early negotiation processes (such as Cooperative and Collaborative Practice) instead of litigation procedures whenever appropriate.<sup>190</sup> Family lawyers should try to be peacemakers whenever possible.<sup>191</sup> Although some people think of courts as necessarily antithetical to peacemaking, sometimes lawyers use litigation procedures as tools of cooperation.<sup>192</sup> Of

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<sup>187</sup> See *supra* note 119 and accompanying text. See generally John Lande, *The Movement Toward Early Case Handling in Courts and Private Dispute Resolution*, 24 OHIO ST. J. ON DISP. RESOL. 81 (2008).

<sup>188</sup> Lande, *supra* note 184, at 16.

<sup>189</sup> *Id.*

<sup>190</sup> See generally LANDE, *supra* note 109. Good practice involves appropriate and reliable exchanges of information and use of needed experts before trying to resolve substantive issues. Thus early negotiation should normally involve such preliminary steps before attempting to resolve substantive issues.

<sup>191</sup> See generally Forrest S. Mosten, *Lawyer as Peacemaker: Building a Successful Law Practice Without Ever Going to Court*, 43 FAM. L.Q. 489 (2009).

<sup>192</sup> See LANDE, *supra* note 109, at 124-26 (describing ways that opposing counsel in litigation can work together to promote their clients’ interests, including cooperation in using litigation procedures and arranging informal lec-

course, some cases require tough and extensive litigation processes to protect children and other vulnerable individuals from untrustworthy or dangerous people.<sup>193</sup> When family courts and professionals can help parties to handle matters with as little litigation as necessary, however, this helps everyone conserve their limited resources to meet other priorities.

Contemporary family law professionals live in revolutionary times. Revolutions are times of both risks and opportunities. Pressures of change and limited resources can contribute to deterioration of family court services, frustration of family law professionals, and, most importantly, increased family dysfunction. These pressures also create incentives for family professionals and courts to collaborate more effectively and efficiently to serve family members and the public. The great challenge for family law dispute resolution professionals is to manage these risks wisely and create ever better ways to serve our clients.

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tures by judges); Lande, *supra* note 105, at 242-43; Mosten, *supra* note 191, at 500-02 (listing numerous ways that litigators can promote peace).

<sup>193</sup> Dean Stephen Easton recommends that lawyers “determine what is worth fighting about and concede everything else.” If something is not worth fighting about, he suggests finding a compromise that is acceptable to both parties. If something is worth fighting about, he says, “fight hard, fight smart, fight with conviction, passion, and perseverance, and fight to win.” Stephen D. Easton, *My Last Lecture: Unsolicited Advice for Future and Current Lawyers*, 56 S.C. L. Rev. 229, 236-37 (2004).



