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# Resolving Divisive Social Issues: A Case Study of the Minnesota Child Custody Dialogue

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## RESOLVING DIVISIVE SOCIAL ISSUES: A CASE STUDY OF THE MINNESOTA CHILD CUSTODY DIALOGUE

Mariah Levison<sup>†</sup>

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### I. INTRODUCTION

Two interesting and contradictory trends in American politics are germane to the field of dispute resolution: polarization and collaboration. The former gets a lot more attention than the latter.<sup>1</sup> Let's follow the trend and start with polarization.

A recent Pew Research Center report shows that Americans are more divided along political lines than any other category, including race, gender, age, and income.<sup>2</sup> Additionally, the National Journal reported that, based on congressional voting records, 2010 and 2011 were the most polarized years on record.<sup>3</sup>

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1. See generally Gillian E. Metzger, *Agencies, Polarization, and the States*, 115 COLUM. L. REV. 1739, 1740 (2015) (“Political polarization is all the rage. Both popular and scholarly voices regularly bemoan the depths of partisanship and division to which our national politics have sunk.”).

2. PEW RES. CTR., *Partisan Polarization Surges in Bush, Obama Years* (June 4, 2012), <http://www.people-press.org/2012/06/04/partisan-polarization-surges-in-bush-obama-years/>.

3. Josh Kraushaar, *The Most Divided Congress Ever, At Least Until Next Year*,

This polarization is preventing our government from solving pressing problems.<sup>4</sup> For example, in the eleventh hour, Band-Aid solutions were implemented to the debt ceiling and the fiscal cliff issues.<sup>5</sup> These types of solutions are preventing us from coming up with real solutions to urgent problems, such as the rising cost of medical care, the precarious fiscal future of social security, and the continuing backslide in the U.S. educational outcomes in comparison with other countries.

In spite of the polarization, or because of it, collaboration in government is increasing, too. Some of the benefits of collaborative problem solving of public issues include:

- **EFFICIENT USE OF PUBLIC AND PRIVATE RESOURCES.** There are fewer federal, state, and local dollars available to deal with critical issues facing our society. Collaborative processes engage a range of public, private, and community institutions, as well as leadership, to bring a wider array of resources to bear on the problems.
- **HIGH QUALITY SOLUTIONS.** As people learn about each other's views and needs, they learn more about the problems. In developing options together, they consider a wider variety of possibilities. In arriving at a plan or policy that reflects the concerns and ideas of all parties, they develop the best possible solutions.
- **ACCELERATED PACES OF PROJECTS.** Parties are less likely to block implementation if they understand that a plan or policy reflects their input and has been crafted to meet their basic interests. Parties involved in this process often have a high commitment to the success of the plan or policy.
- **BRIDGED DIFFERENCES.** Collaborative processes allow parties to better understand each other's interests,

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NAT'L J. (Feb. 6, 2014), <https://www.nationaljournal.com/hotline/2014/02/06/most-divided-congress-ever-least-until-next-year>.

4. See generally Molly J. Walker Wilson, *The Rhetoric of Fear and Partisan Entrenchment*, 39 L. & PSYCHOL. REV. 117, 119 (2015) (discussing the "fallout . . . when a Congress . . . is so divided . . . and cannot find common ground").

5. See Richard Cowan & Thomas Ferraro, *At 11th Hour, U.S. Edges Away From Brink of Debt Crisis*, REUTERS (Oct. 16, 2013), <http://www.reuters.com/article/us-usa-fiscal-idUSBRE98N11220131016>; David Lawder & Richard Cowan, *Lawmakers Set Up 11th-hour Bid on "Fiscal Cliff,"* REUTERS (Dec. 27, 2012), <http://www.reuters.com/article/us-usa-fiscal-idUSBRE8A80WV20121227>.

build trust, improve relations, work together, and find mutually acceptable solutions based on common interests.

- **SHARED POWER FOR DECISION-MAKING.** This process brings a wide array of stakeholders to the table who seek mutually beneficial solutions as a response to the reality that power has become widely and thinly distributed with many interests desiring increased participation and able to block the possibility of action. Recent examples include the Occupy Wall Street and Black Lives Matter movements.

Another reason that collaboration is increasing is that there are more and more wicked problems—problems that are complex and cross the jurisdictional boundaries for resolving them.<sup>6</sup> Climate change is a perfect example of a wicked problem.<sup>7</sup> Its sources and solutions are local and international, as well as social and technical.

Environmental conflict resolution gained a solid track record over the past ten years. While environmental issues certainly are wicked, many of our wickedest issues are polarizing social issues such as abortion, gay marriage, race relations, inequality, and police-community relations. It is fair to wonder whether collaborative problem solving is up to the task of addressing these issues. Will bringing such polarized parties together only escalate the tension? Is it possible to do collaborative problem solving when more of the issues are symbolic or subjective than objective issues which can be traded and negotiated? Are social issues that are rooted in belief systems and ideology negotiable?

The Minnesota Child Custody Dialogue (CCD) demonstrates that it is possible to resolve polarizing social issues using collaborative problem solving.<sup>8</sup> This article will lay out what was accomplished by the CCD and how and what lessons the CCD

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6. See generally Horst W.J. Rittel & Melvin M. Webber, *Dilemmas in a General Theory of Planning*, 4 POL'Y SCI. 155, 160–69, (1973) (defining the term “wicked problems” to describe social policy problems without clear resolutions).

7. See Richard J. Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*, 94 CORNELL L. REV. 1153, 1160 (describing climate change as a “super wicked problem”).

8. Minn. Child Custody Dialogue Grp., *The New Best Interest of the Child Factors: A Summary of the New Provisions in Minnesota Family Law*, 73 BENCH & B. MINN. 22, 22 (Jan. 5, 2016) [hereinafter *New Provisions*], <http://mnbenchbar.com/2016/01/the-new-best-interest-of-the-child-factors/>.

offers for resolving other polarizing social issues using a collaborative approach.

## II. MINNESOTA CHILD CUSTODY DIALOGUE

Little in life is more personal than the custody and welfare of one's children. Throughout the country, various fathers' and parents' rights groups have advocated for changes in child custody and parenting time (visitation) laws for the purpose of overcoming a perceived judicial bias against fathers. For more than ten years, the Center for Parental Responsibility, one of Minnesota's fathers' rights groups, lobbied the Minnesota legislature to enact a statutory presumption establishing joint physical custody and an equally shared parenting time schedule. However, other groups, including the Family Law Section of the Minnesota Bar Association and the Minnesota Chapter of the American Academy of Matrimonial Lawyers, opposed the presumption on the grounds that family law judges should not make any presumptions in cases of child custody in favor of any custody arrangement but rather should examine each case and make a decision that reflects the best interest of each particular child in his or her unique circumstances.

Following years of acrimonious debate, the 2012 legislature passed a bill establishing a presumption of 35% parenting time for each parent.<sup>9</sup> Minnesota Governor Mark Dayton neither vetoed nor signed the legislation, which meant that it did not become law.<sup>10</sup> Instead, he encouraged the stakeholders to work together collaboratively to find a solution to this debate that would satisfy both sides.

A former presiding family court judge in Minnesota's largest county responded to Governor Dayton's charge and convened a group of family law stakeholders, including the Center for Parental Responsibility, the Family Law Section of the Bar Association, Legal Aid, anti-domestic violence advocates, legislators, and many others. Following more than a year of working together, they proposed consensus based legislation in the 2014 legislative session. Their legislation passed unanimously and the Governor signed it into

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9. H.F. 322, 87th Sess. (Minn. 2011).

10. See Sasha Aslanian, *Dayton Vetoes Bill That Would Have Given Divorced Parents More Presumed Custody*, MPR NEWS (May 24, 2012), <http://www.mprnews.org/story/2012/05/24/joint-custody-bill-veto>.

law.<sup>11</sup> The legislation was a package of technical procedural changes aiming to avoid any bias against joint custody. The changes included:<sup>12</sup>

- Clarification that there is no presumption for, or against, joint physical custody, except in cases involving domestic violence as defined in the statute;
- Confirmation that the courts have the authority to reserve a later re-determination of parenting time to correspond with the child's changing developmental needs;
- A requirement that the court provided detailed findings in all cases when parents disagree over legal and physical custody labels; and
- Instruction to the court that when considering either joint legal or joint physical custody, the court would not use one of the joint physical custody factors (which have been repealed) to the exclusion of all others or to determine that parental disagreement over custody labels and parenting time schedules constitutes an inability for the parents to cooperate enough to share joint legal or physical custody.

The group continued to meet, and in the 2015 legislative session, they proposed changes that are considered by some to be the most significant changes in Minnesota's family law in two decades.<sup>13</sup> Those changes passed nearly unanimously in the legislature and the Governor signed them into law.

The most significant change was the revision to the Best Interest of the Child Factors.<sup>14</sup> These factors are utilized not only by

11. William A. Winter & Michael P. Boulette, *Custody and Parenting Time*, 71 BENCH & B. MINN. 20 (Oct. 8, 2014), <http://mnbenchbar.com/2014/10/custody-and-parenting-time-minnesota-amendments-codify-compromises/>.

12. H.F. 2722, 88th Sess. (Minn. 2014).

13. Jason Brown & Cynthia Brown, *All in the Family: Dayton Signs Best-Interest Factors into Law*, MINN. LAW. (June 4, 2015), <http://minnlawyer.com/2015/06/04/all-in-the-family-dayton-signs-best-interest-factors-into-law/>.

14. MINN. STAT. § 508.17, subdiv. 1(a)(1)–(12). Compare MINN. STAT. § 518.17, subdiv. 1(a)(1)–(12) (2015), with MINN. STAT. § 518.17, subdiv. 1(a)(1)–(13) (2014). See also *New Provisions*, *supra* note 8 (discussing the new changes to the Best Interests of the Child Factors); Brown & Brown, *supra* note 13; Michael Boulette, *Big Changes Coming to Minnesota's Custody and Child Support Laws*, FAMILY-IN-LAW (Feb. 10, 2015), <http://family-in-law.com/big-changes-coming-to-minnesotas-custody-and-child-support-laws/> (discussing the textual changes to Minnesota's Best Interests of the Child Factors and its relevant implications). For a general

the court when called upon to award custody and parenting time,<sup>15</sup> but also by custody evaluators, attorneys, and parents, when considering how to structure their child's time with each parent.<sup>16</sup> The previous Best Interest Factors focused on how parents shared responsibilities in the past and sometimes fostered a comparison of the parents.<sup>17</sup> The revised Best Interest Factors are more prospective and consider a child's ongoing emotional, cultural, spiritual, and developmental needs in the structuring of custody and parenting time arrangements.<sup>18</sup> Additionally, the new factors clearly acknowledge the importance of a child having safe, stable, and nurturing relationships with both parents.<sup>19</sup> Other aspects of the 2015 legislation include:

- Improved remedies for when a parent is not following court orders in such areas as parenting time, tax filing, or income disclosures;<sup>20</sup>
- Clear identification of the right of both parents to access school, medical, and legal information in the custody order;<sup>21</sup> and
- Clarification that the existing 25% presumption of parenting time is a presumed minimum amount, not the presumptive schedule.<sup>22</sup>

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explanation of Best Interest of the Child Factors and child custody, see Kelly Schwartz, *The Kids Are Not All Right: Using the Best Interest Standard to Prevent Parental Alienation and a Therapeutic Intervention Approach to Provide Relief*, 56 B.U. L. REV. 803, 815 n.76 (2015).

15. *E.g.*, *In re Custody of D.T.R.*, 796 N.W.2d 509, 515 n.4 (Minn. 2011) (“In a disputed child custody proceeding, the court must consider the ‘best interests of the child.’”).

16. *See* Brown & Brown, *supra* note 13.

17. *See* MINN. STAT. § 508.17, subdiv. 1(a)(1)–(12) (2014).

18. *See id.* § 518.17, subdiv. 1(a)(7) (stating that the court must consider “the willingness and ability of each parent to provide ongoing care for the child; to meet the child's ongoing *developmental, emotional, spiritual, and cultural* needs; and to maintain consistency and follow through with parenting time” (emphasis added)).

19. *See id.* at subdiv. 1(b)(2) (“The court shall consider that it is in the best interests of the child to promote the child's healthy growth and development through *safe, stable, nurturing* relationships between a child and both parents.” (emphasis added)).

20. *See id.* at subdiv. 1(b)(4) (“The court shall not consider conduct of a party that does not affect the party's relationship with the child.”).

21. *See id.* at subdiv. 3a (providing the notice requirement for child custody orders granting rights to each party).

22. MINN. STAT. § 518.175, subdiv. 1(g) (Supp. 2015).

Taken together, Brown and Brown<sup>23</sup> state that these changes are bringing dissolution statutes into alignment “with the last 40 years worth of social science, in focusing on child development, conflict avoidance, and the importance of both parents in the life of a child.”<sup>24</sup>

The CCD<sup>25</sup> also set in motion changes to the formula for child support. The group felt that the precipitous change to child support payments when one parent reaches 45.1% parenting time caused some parents to base parenting time decisions on financial concerns rather than the best interests of their child.<sup>26</sup> Additionally, this often resulted in unnecessary parental conflict.<sup>27</sup> The goal of the CCD was to reformulate the parenting expense adjustment with increased parenting time, thereby eliminating the precipitous change.<sup>28</sup> The CCD legislation created a child support work group that recommend changes to the parenting expense adjustment formula.<sup>29</sup> The proposed changes will go before the legislature this year.<sup>30</sup>

### III. THE COLLABORATIVE PROBLEM SOLVING PROCESS

When the group began to meet, the level of trust between them was very low.<sup>31</sup> Brian Ulrich, a member of the Center for

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23. Brown & Brown, *supra* note 13.

24. *Id.*

25. See *New Provisions*, *supra* note 8, at 23 (“The Minnesota Child Custody Dialogue Group was formed as a result of Gov. Mark Dayton’s 2012 veto of HF 322, which would have increased Minnesota’s rebuttable presumption of parenting time from 25 percent to 35 percent. Numerous stakeholders lobbied the governor’s office asking that he oppose and ultimately veto the bill. In his veto letter, Dayton wrote, ‘My view is that this dialogue and, hopefully, collaboration among legislators of both parties and the various stakeholders should continue into the 2013 Legislative Session.’ Shortly afterward, Hennepin County Judge Bruce Peterson acted on the governor’s suggestion and brought together many of the various stakeholders to work toward a collaborative solution.”).

26. CHILD SUPPORT WORK GRP. & MINN. DEP’T OF HUMAN SERVS.—CHILD SUPPORT DIV., CHILD SUPPORT WORK GROUP FINAL REPORT 3 (Jan. 29, 2016), [http://mn.gov/dhs/images/child\\_support\\_work\\_group\\_2016.pdf](http://mn.gov/dhs/images/child_support_work_group_2016.pdf).

27. *Id.*

28. *Id.* at 4–5.

29. *Id.* at 6–8.

30. *Id.* at 3.

31. See CTR. FOR EFFICIENT COLLAB., *Transforming Polarized Politics in the Minnesota State Legislature: A Convergent Facilitation Case Study*, (Aug. 2015) [hereinafter *Transforming Polarized Politics*], <http://efficientcollaboration.org/wp->



Parental Responsibility, says that when he was invited to participate he laughed.<sup>32</sup> “I thought, you’re just wasting your time. . . . We were so entirely opposed. I had seen the lobbying. I had seen the emotions of the presentations at the committee hearings, the unpleasant glances, the unwillingness to sit down and talk before that. It was just a recipe for failure.”<sup>33</sup> Minnesota State Representative Carolyn Laine, who participated in the process, said, “We started with deeply entrenched views and distrust, and ended up with friendships and understanding.”<sup>34</sup>

How did these staunch opponents on a socially and culturally divisive issue come to champion each other’s concerns and reach agreement on legislative changes? They went through a collaborative problem solving process that helped them move from positions—support or opposition to a presumption of joint custody—to identifying the concerns they were trying to address and fundamental outcomes they were trying to accomplish.<sup>35</sup> Those concerns included that parents not have to engage in a contest to prove who is the better parent,<sup>36</sup> which promotes conflict between them,<sup>37</sup> and that judges weigh the particulars of each case in order

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content/uploads/MinnesotaCaseStudy.pdf .

32. *Id.* at 1.

33. *Id.*

34. *Id.* at 2.

35. See OFF. FOR COLLAB. & DISP. RESOL., CHILD CUSTODY DIALOGUE ASSESSMENT REPORT 1–2 (Mar. 6, 2014) (on file with author) (detailing the strengths of the group’s collaborative process). The Minnesota Child Custody Dialogue Group created 26 Guiding Principles to accomplish its goals, including “reducing conflict,” “making available and offering collaborative paths and solutions,” and “seeking to maximize benefit for everyone involved.” MINN. CHILD CUSTODY DIALOGUE GRP., MINNESOTA CUSTODY DIALOGUE—PRINCIPLES AND CRITERIA (Apr. 5, 2013) [hereinafter MINNESOTA CUSTODY DIALOGUE], <http://baynvc.org/wp-content/uploads/2015/07/Minnesota-Custody-Dialogue-Principles.pdf> . See also *Transforming Polarized Politics*, *supra* note 31, at 1 (“The trust that this process built has been quite amazing to me,” says Rep. Tim Mahoney. ‘I wouldn’t have believed it was possible, but we achieved more collaboratively than we were able to do as adversaries.”); *New Provisions*, *supra* note 8, at 22 (“After several years of deeply collaborative work by representatives from various factions of family law interests, a number of statutory changes have been made to Minnesota law.”).

36. See MINNESOTA CUSTODY DIALOGUE, *supra* note 35, at 1 (stating that one of the group’s guiding principles was to “[honor] the contributions of both parents,” by “designing solutions that emerge from the recognition that both parents need respect and support for their roles in raising their children”).

37. See *New Provisions*, *supra* note 8, at 22 (“The redirection of decision-making to reflect the unique needs of the child . . . will hopefully result in a

to arrive at the optimum arrangement for each unique family.<sup>38</sup> Their desired outcomes included reducing conflict, empowering families, involving both parents in the life of the child, maintaining safety for all, and making child-centered decisions. Generating options that addressed their concerns and goals,<sup>39</sup> rather than sticking to their positions, enabled the group to develop solutions that everyone could agree to and which resulted in a comprehensive overhaul of custody and parenting time legislation,<sup>40</sup> bringing parenting time laws in to accord with changing social norms and the latest social science which focuses on child development, mitigation of conflict, and importance of both parents in the life of the child.<sup>41</sup> There were three key elements to the group's collaborative problem solving process.

1) CONSENSUS-BASED DECISION MAKING. The group used the following definition of consensus:

The group will reach consensus on an issue when it agrees upon a single proposal and each member can honestly say:

- I believe that other members understand what is important to me and my constituency.
- I believe I understand what is important to other members and their constituency.
- I believe the process as a whole has allowed for all needs and concerns to surface and be included in the development of this proposal.
- Whether or not I prefer this decision, I support it because it attends to more needs and concerns than any other proposal we

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reduction of the conflict between parents as they decide parenting time. This conflict has been exacerbated by the perception that the issue of custody was a win-lose contest between parents, and also by the perception that the temporary orders served as a template for the final orders.”).

38. See MINNESOTA CUSTODY DIALOGUE, *supra* note 35, at 1 (stating that one of the group's guiding principles was to recognize the “diverse context in which children live,” by “[h]aving legal systems work with the wide variety of life circumstances of today's children and those who care for them”).

39. *Id.*

40. See Brown & Brown, *supra* note 13, at 1.

41. *Id.* at 3.

explored, and because I trust the process that brought us to this point.<sup>42</sup>

The clear definition of consensus, which otherwise can be interpreted in a wide variety of ways,<sup>43</sup> made it clear to participants what they would need to achieve in order to make legislative changes. The group agreed that it would not propose any legislative changes (or any other work product) for which consensus had not been reached.<sup>44</sup> There would be no voting and no minority reports.<sup>45</sup> The group committed to finding solutions “that work[ed] for everyone, and nothing less.”<sup>46</sup> Knowing that nothing could move forward without the consensus of all group members motivated participants to do the hard work of developing solutions that truly met the needs of everyone involved.<sup>47</sup> This resulted in solutions that are more comprehensive, nuanced, and effective.<sup>48</sup>

- 2) INTEREST-BASED PROBLEM SOLVING. The group first sought to identify and understand the interests driving each participant’s and constituent group’s positions or preferred solutions.<sup>49</sup>

At the group’s first meeting they worked to understand the interests, concerns, and needs underlying each participant’s position or preferred solution.<sup>50</sup> They then translated those

42. See Miki Kashtan, *A Blueprint for Collaborative Lawmaking*, 3 INTERDISC. J. PARTNERSHIP STUD. 1, 12 (2016); see also, MINNESOTA CHILD CUSTODY DIALOGUE PHASE II GROUP CHARTER 8 [hereinafter CCD PHASE II] (on file with author).

43. Compare MONTEZE M. SNYDER ET AL., BUILDING CONSENSUS: CONFLICTS AND UNITY (2001), with CHEL AVERY ET AL., BUILDING UNITED JUDGMENT: A HANDBOOK FOR CONSENSUS DECISION MAKING (1981).

44. See CCD PHASE II, *supra* note 42, at 8.

45. *Id.*

46. See *Transforming Polarized Politics*, *supra* note 31, at 4; see also *id.* at 3 (“Judge Bruce Peterson says this kind of cooperation was the most memorable part of the process: ‘It was so apparent to me when people became problem-solvers rather than position-staters.’”); CCD PHASE II, *supra* note 42, at 8 (detailing the collaborative consensus process for the group).

47. See *Transforming Polarized Politics*, *supra* note 31, at 3 (stating that the group was able to reach consensus because of collaborative problem-solving); see also CCD PHASE II, *supra* note 42, at 8 (detailing the collaborative consensus process for the group).

48. *Transforming Polarized Politics*, *supra* note 31, at 4.

49. *Id.* at 1.

50. *Id.*

interests into principles that everyone in the group supported.<sup>51</sup> They didn't add any principle to the list until it had the full support of the group.<sup>52</sup> In practice, this meant that the facilitator worked with the participant expressing an interest until that person articulated the noncontroversial essence of what he or she was trying to achieve at its most basic level.<sup>53</sup> At this basic level, interests are usually something that everyone supports. For example, one of the interests underlying the position of a presumption of equal parenting time is realizing the benefit to the child of two maximally involved parents.<sup>54</sup> The group came up with twenty-six principles.<sup>55</sup> The principles guided the creation of their legislative proposals. Some of their principles included:

- Reducing conflict;
- Empowering families;
- Child-centered;
- Honoring the contributions of both parents;
- Safety for all;
- Sensitivity to each family's needs; and
- User-friendly system.

The process of developing shared principles enabled the participants to realize that there existed substantial common ground among them.<sup>56</sup> They all wanted to see conflict reduced, families empowered, safety for all, and many other shared goals.<sup>57</sup> Over time, they reframed the issue from a presumption of equal parenting time versus no presumptions to child-centered, case-by-case decision making.<sup>58</sup> When done well, child-centered, case-by-case decision making would minimize both equal parenting time when it is not in the best interest of the child and bias in favor of mothers which would lead to increased parenting time for fathers.

3) INTEGRATION. Participants committed to finding solutions that addressed the interests of all involved in

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51. *Id.* at 2.

52. *Id.*

53. *Id.*

54. *Id.* at 3.

55. MINNESOTA CUSTODY DIALOGUE, *supra* note 35, at 2.

56. *Transforming Polarized Politics*, *supra* note 31, at 2.

57. *See* MINNESOTA CUSTODY DIALOGUE, *supra* note 35; *New Provisions*, *supra* note 8.

58. *Transforming Polarized Politics*, *supra* note 31, at 3.

mutually reinforcing rather than mutually exclusive ways rather than to compromise or convince each other.

Once shared principles and a shared vision were in place, the CCD turned to generating options that would reflect the principles and vision.<sup>59</sup> They divided into smaller, representative workgroups to generate proposals.

A good example of the integration that the group achieved is the new tenth Best Interest Factor.<sup>60</sup> It directs judges to consider “the benefit to a child in maximizing parenting time with both parents and the detriment to the child in limiting parenting time with either parent.”<sup>61</sup> This provision addresses fathers’ rights groups and their supporters’ concern that in too many cases the court is failing to recognize the importance to the child of having both parents substantially involved in his or her life. At the same time, it addresses the concern of groups that oppose presumptions by directing the judge to consider the impact on the child of the substantial involvement of both parents without directing the judge exactly what to do, which gives the judge the flexibility to make a decision based on the particulars of the unique family before him or her.

This language was proposed by an individual who was one of the staunchest opponents of a presumption of equal parenting time. The fact that an individual in direct opposition to Brian Ulrich’s position was not lost on him as he notes: “That is probably the only language that we all could have found good agreement on . . . , someone who stood so adamantly opposed to our thinking was the one who put it out there.”<sup>62</sup>

#### IV. TRANSFERABLE LESSONS

The past few years have been among the most politically polarized and stagnant in our nation’s history.<sup>63</sup> This group’s accomplishments demonstrate that a better way is possible.<sup>64</sup> If collaborative problem solving can work for an issue as personal and

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59. *Id.*

60. See MINN. STAT. § 518.17, subdiv. 1(a)(10) (2015).

61. MINN. STAT. § 518.17 (2015).

62. See *Transforming Polarized Politics*, *supra* note 31, at 3.

63. PEW RES. CTR., *Political Polarization in the American Public* (June 12, 2014), <http://www.people-press.org/2014/06/12/political-polarization-in-the-american-public/>.

64. See generally *Transforming Polarized Politics*, *supra* note 31.

contentious as child custody, it can work for many of the other deadlocked issues that our nation so desperately needs to resolve, issues such as immigration and entitlement reform. Here are some lessons learned for local and national leaders wishing to heed this call and to take a collaborative approach.

A. *Skilled Facilitator*

If there is one element that most contributed to the success of the Child Custody Dialogue it was the skill level of the group's facilitator Dr. Miki Kashtan. A 2014 assessment of the project conducted by the Minnesota State Office for Collaboration and Dispute Resolution found:

The single most consistent theme to emerge from the interviews was the participants' satisfaction with the facilitator, Dr. Kashtan. Participants strongly believe that she has been instrumental in building the trust between group members which has been the foundation for the progress that the group has made. Participants were unanimous in their perspective that the group would have been at extreme risk of disbanding were it not for the facilitator and that her continued participation is essential for future progress.<sup>65</sup>

Dr. Kashtan designed a process that enabled the group to build trust and common ground in order to develop solutions that would meet the needs of all stakeholders. She assisted the participants in translating their positions or demands into the needs or outcomes they were seeking. In doing so, she enabled all of the participants to see the positive goals of each participant, rather than their opposing views. Recognizing the positive goals of each participant paved the way for them to identify the components of a solution.<sup>66</sup> Finally, she worked tirelessly and selflessly on behalf of the group, putting in long, arduous, often unpaid hours to help the group move past obstacles and keep moving forward.

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65. CHILD CUSTODY DIALOGUE ASSESSMENT REPORT, *supra* note 35. *See also* Press Release, State Representative Carolyn Laine, Traditionally Opponents, Family Law Stakeholders Achieve Joint Legislation (Feb. 19, 2014), <http://www.house.leg.state.mn.us/members/pressrelease.asp?party=1&pressid=8393&memid=15272>.

66. *See generally* CCD PHASE II, *supra* note 42.

Dr. Kashtan's calls her method Convergent Facilitation. It was developed at the Center for Efficient Collaboration and is grounded in Nonviolent Communication.<sup>67</sup> Nonviolent Communication posits that all human beings have the capacity for compassion and only resort to behavior that harms others when they do not recognize more effective strategies for meeting needs. Nonviolent Communication theory purports that all human behavior stems from attempts to meet universal human needs and that these needs are never in conflict. Conflict arises when strategies for meeting needs clash.<sup>68</sup>

### *B. Powerful Convener*

In a collaborative problem solving process, a convener is a respected, usually neutral, individual who calls the parties to the issue together and charges them with resolving it. The convener has the respect of all parties and has access to resources and power. These qualities of the convener bring a crucial gravitas to the process. The convener invites the parties to the table and then helps to keep them there, motivated, and moving forward by utilizing the carrots and sticks that she has at her disposal. These sticks and carrots may include the ability to reserve free space for the use of the group, to block or impose an outcome if the group does not reach consensus, to arrange meetings with key leaders and more. Optimally, a convener works with a skilled facilitator to lead a group through a collaborative problems solving process.

In the case of the Child Custody Dialogue, two individuals played the role of convener. Minnesota Governor Mark Dayton fulfilled a key function of the convener by charging the parties with building consensus and by blocking an outcome that was not based on consensus—the 35% parenting time presumption. However, Governor Dayton did not go on to work with the parties in the collaborative problem solving process. Judge Bruce Peterson, former presiding judge of the family court in the largest county in the state, took up the Governor's call and the remaining duties of a convener. He worked with stakeholders to assemble a

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67. *Want to Make Collaborative Decisions Without Sacrificing Productivity?*, CTR. FOR EFFICIENT COLLAB. (2015), <http://efficientcollaboration.org/facilitation-training/>.

68. MARSHALL B. ROSENBERG, *NONVIOLENT COMMUNICATION: A LANGUAGE OF LIFE* (2003).

representative group to participate in the collaborative problem solving process, arranged for a skilled facilitator to work with the group, helped individual participants to bridge differences, and much more.

While a group may utilize co-conveners for the purpose of balancing perspectives or skill sets, this was a unique arrangement of two partial conveners. Nonetheless, the impasse created by Governor Dayton's choice to neither sign nor veto the 35% parenting time legislation and a charge to build consensus coming from the top leader in the state, combined with Judge Peterson's day-to-day efforts to make the group successful, proved a powerful combination. Had Governor Dayton played the role of convener throughout the process, laid out a timeline and provided resources, it is reasonable to assume that the group would have accomplished its goals more quickly and with more ease, but one can never know. The key take away is a convener with the highest relevant level of authority and a convener skilled in consensus building, such as Judge Peterson, contribute to the success of collaborative problem solving.

### *C. Infrastructure*

The Minnesota State Office for Collaboration and Dispute Resolution (OCDR) is a state government office which utilizes collaborative problem solving processes to address pressing matters of public interest.<sup>69</sup> OCDR provided funds for Dr. Kashtan, space to meet for the group, co-facilitation by OCDR staff, logistical support such as scheduling many meetings for very busy people, documents such as a group charter, preliminary agreements, and meeting summaries, and more. Collaborative problem solving processes are often time consuming and resource intensive. Logistical support, whether provided by a government agency, a nonprofit organization or some other entity, substantially reduces the burden on the participants in the process and the facilitator. The infrastructure provided by OCDR enabled the participants and facilitator to focus on the hard work of building consensus.

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69. *Office of Collaboration and Dispute Resolution*, BUREAU OF MEDIATION SERVS., <http://mn.gov/admin/bms/ocdr/> (last visited Aug. 12, 2016).



*D. Ripeness*

Collaborative problem solving is often most successful when other options have been exhausted. That was the case with the Child Custody Dialogue. More than ten years of advocacy at the state legislature had not produced the presumption of equal parenting time that fathers' rights groups desired, but neither had it put to bed the argument that such a presumption should exist. The passage of a 35% presumption made it clear to opponents of a presumption that a presumption could become law, while the Governor's choice not to sign the legislation indicated how hard it would be to accomplish a presumption. Both sides were weary of their long battle and both felt more could be accomplished for children and families if this fight was not taking up so much time and energy. This sense of being out of other options kept the participants engaged in the collaborative problem solving process at the times when it was really difficult.

This example should not be taken as evidence that collaborative problem solving should only be attempted as a last ditch effort. On the contrary, working together before years of acrimonious encounters have piled up, positions have hardened, and views of each other have taken on the flavor of caricatures can greatly increase the likelihood of success at collaborative problem solving. However, having no other readily available options often substantially increase the motivation to do the hard work of examining one's assumptions, understanding the needs and concerns of the other side, and generating solutions that integrate the needs of all involved.

*E. Right Players at the Table*

To be successful any collaborative problem solving must be made up of a representative group of stakeholders. It must also include the people who will put the solution into place if one is agreed upon. Those people may be elected officials in the case of changes to laws or government staff in the case of changes to policy. Those people may participate in the collaborative problem solving process or not but agree to implement any decision that group has agreed upon. The Child Custody Dialogue checked both boxes. They were a representative group made up of family law attorneys, a child psychologist, anti-domestic violence advocates, a judge, fathers' rights advocates, academics, and many others. They

also had four legislators with strong feelings about the topic participating in the process. In addition to these essential elements, at least four of the group members had training in some kind of mediation or dialogue practice and used their skills to build bridges.

#### V. CONCLUSION

While there is no denying that the world faces complex, intransient problems, the Child Custody Dialogue makes it undeniable that complex, intransient problems can be solved in an effective and sustainable manner. The key lies in a collaborative approach in which participants move beyond positions (the solution they insist upon) to interests (the concerns and needs underlying the positions) to shared principles (the fundamental outcomes that all agree upon). From there, participants generate options for solutions that integrate all of the shared principles. This process is not easy and a skilled facilitator is usually necessary. A powerful convener, problem solving infrastructure, and a ripe issue greatly increase the likelihood of success.

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