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# Family Court Reform and ADR: Shifting Values and Expectations Transform the Divorce Process

Nancy Ver Steegh

*Mitchell Hamline School of Law*, [nancy.versteegh@mitchellhamline.edu](mailto:nancy.versteegh@mitchellhamline.edu)

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# Family Court Reform and ADR: Shifting Values and Expectations Transform the Divorce Process

**Abstract**

During the last fifty years, the process of divorce has undergone a remarkable transformation. This article examines the sweeping breadth of the change and the underlying societal forces behind it. As the family court landscape has changed, a ripple effect has occurred necessitating reconsideration of the roles that lawyers and judges play in the divorce process. Although lack of judicial resources has fueled some of the change, deep funding cuts foreshadow a less positive transformation, one potentially resulting in a two-tiered system of justice for families.

**Keywords**

family law, divorce, alternative dispute resolution

**Disciplines**

Family Law

# Family Court Reform and ADR: Shifting Values and Expectations Transform the Divorce Process

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NANCY VER STEEGH\*

During the last fifty years, the process of divorce has undergone a remarkable transformation. This article examines the sweeping breadth of the change and the underlying societal forces behind it. As the family court landscape has changed, a ripple effect has occurred necessitating reconsideration of the roles that lawyers and judges play in the divorce process. Although lack of judicial resources has fueled some of the change, deep funding cuts foreshadow a less positive transformation, one potentially resulting in a two-tiered system of justice for families.

## I. Setting the Stage for Change

Shifting societal values and family expectations have quietly revolutionized the divorce process—particularly when children are involved. Unhappiness with the traditional system, changing parental roles, social science research on children and divorce, and adoption of new expectations have altered social policy.

Families express, and research shows, persistent dissatisfaction with the traditional adversarial divorce process. For example, the adversarial legal system was thought to be “impersonal, intimidating, and intrusive” by 50% to 70% of those involved in a prominent study.<sup>1</sup> Similarly, in another study, 71% of parents reported that the court process escalated the

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\* Professor and Vice Dean for Academic Programs at William Mitchell College of Law in St. Paul, Minnesota. She is a member of the Board of Editors of the *Family Law Quarterly*.

1. MARY R. CATHCART & ROBERT E. ROBLES, PARENTING OUR CHILDREN: IN THE BEST INTEREST OF THE NATION 39 (1996).

level of conflict and distrust “to a further extreme.”<sup>2</sup> A sizable number of families believe that the traditional divorce process is too lengthy, too costly, too inefficient, and not sufficiently tailored to meet their needs.<sup>3</sup> Consequently, families have sought alternatives to traditional litigation and turned to models emphasizing self-determination and problem solving approaches.

Another fundamental policy shift is based on the belief that following divorce children benefit from healthy ongoing relationships with both parents. Fifty years ago, mothers were primarily granted physical custody, and fathers were cast as “visitors” of their children.<sup>4</sup> However, the assumptive nature of such arrangements was called into question as sex and parenting roles changed. New norms were bolstered by research indicating that a child’s postdivorce adjustment is enhanced by a close relationship with an actively involved father.<sup>5</sup>

Momentum in favor of coparenting arrangements has been tempered by empirical consensus that ongoing parental conflict is harmful to children.<sup>6</sup> While nearly half of custody cases are uncontested and parents report negligible conflict, approximately one quarter of custody cases can be characterized as involving substantial or intense conflict.<sup>7</sup> In fact, some 10% of divorcing couples demonstrate “unremitting animosity” as their children grow up.<sup>8</sup>

Although fifty years ago divorcing parents made a “clean break” from one another, today’s parents are expected to have *more postdivorce contact* but *less postdivorce conflict*. Thus “successful” divorce came to be

2. Marsha Kline Pruett & Tamara D. Jackson, *The Lawyer’s Role During the Divorce Process: Perceptions of Parents, Their Young Children, and Their Attorneys*, 33 FAM. L.Q. 283, 298 (1999).

3. *Id.* at 299.

4. ANDREW I. SCHEPARD, CHILDREN, COURTS, AND CUSTODY: INTERDISCIPLINARY MODELS FOR DIVORCING FAMILIES 15–22 (2004) [hereinafter SCHEPARD]; Joan B. Kelly, *Children’s Living Arrangements Following Separation and Divorce: Insights from Empirical and Clinical Research*, 46 FAM. PROCESS 35, 35–6 (2006).

5. Kelly, *Children’s Living Arrangements*, *supra* note 4, at 45. See Joan B. Kelly & Michael E. Lamb, *Using Child Development Research to Make Appropriate Custody and Access Decisions for Young Children*, 38 FAM. & CONCILIATION CTS. REV. 297, 300 (2000).

6. See Joan B. Kelly & Robert E. Emery, *Children’s Adjustment Following Divorce: Risk and Resilience Perspectives*, 52 FAM. RELATIONS 352, 353 (2003); Linda D. Elrod, *Reforming the System to Protect Children in High Conflict Custody Cases*, 28 WM. MITCHELL L. REV. 495, 496–97 (2001) [hereinafter Elrod]; SCHEPARD, *supra* note 4, at 31–36.

7. ELEANOR E. MACCOBY & ROBERT J. MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY 137, 141 (1997) [hereinafter MACCOBY].

8. JOHNSTON & ROSEBY, IN THE NAME OF THE CHILD: A DEVELOPMENTAL APPROACH TO UNDERSTANDING AND HELPING CHILDREN OF CONFLICTED AND VIOLENT DIVORCE 4 (1997) [hereinafter JOHNSTON]. For discussion of custody cases involving domestic violence, see Janet R. Johnston, *A Child Centered Approach to High-Conflict and Domestic Violence Families: Differential Assessment and Interventions*, 12 J. FAM. STUDIES 15 (2006).

defined as one where “the adults are able to work through their anger, disappointment, and loss in a timely manner and terminate their spousal relationship with each other (legally and emotionally), while at the same time retaining or rebuilding their parental alliance with and commitment to their children.”<sup>9</sup>

These expectations created high but worthy aspirations for families and they sought new tools to assist in achieving them. Consequently, parents embraced models of alternative dispute resolution that equipped them with communication and conflict resolution skills and placed a premium on self-determination and tailored outcomes.

## II. Alternative Divorce Processes and Services for Families

A number of services and programs have been developed that potentially fall under the rubric of alternative dispute resolution. A few examples are discussed below.

### A. Parenting Education Programs

Over the last thirty years, parenting education programs have become commonplace.<sup>10</sup> However, they are structured in a variety of ways. In some states attendance is mandated, whereas in others it is discretionary.<sup>11</sup> Some programs are implemented on a statewide basis, but others are established by local rules.<sup>12</sup>

Most programs instruct parents concerning the emotional and legal aspects of divorce, the impact of divorce on children, coparenting arrangements, communication skills, and community resources.<sup>13</sup> The American Law Institute recommends informing parents about parenting plan preparation, the needs of children, the impact of conflict and domestic violence on children, mediation, and community referrals.<sup>14</sup>

Although some parents benefit more than others from participation in parenting education classes, most parents are quite satisfied with the program attended.<sup>15</sup> There is some research indicating that participating

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9. JOHNSTON & ROSEBY, *supra* note 8, at 3.

10. Jack Arbuthnot, *Courts' Perceived Obstacles to Establishing Divorce Education Programs*, 40 FAM. CT. REV. 371 (2002); Nancy Thoennes & Jessica Pearson, *Parent Education in the Domestic Relations Court: A Multisite Assessment*, 37 FAM. & CONCILIATION COURTS REV. 195 (1999) [hereinafter THOENNES].

11. Solveig Erickson & Nancy Ver Steegh, *Mandatory Divorce Education Classes: What Do the Parents Say?*, 28 WM. MITCHELL L. REV. 889, 885–99 (2002).

12. *Id.* at 885–99.

13. *Id.* at 895; Elrod, *supra* note 6, at 531–32.

14. AMERICAN LAW INSTITUTE, *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS* § 2.07(1) (2002).

15. THOENNES, *supra* note 10, at 196.

parents become more cooperative,<sup>16</sup> that the programs raise awareness concerning the needs of children, and that conflict levels may be reduced.<sup>17</sup>

### *B. Settlement Processes*

Because less than 2% of family cases are ultimately decided by a judge<sup>18</sup> and families prefer to avoid litigating, new emphasis has been placed on settlement and new settlement processes have been developed.

#### 1. MEDIATION

Almost nonexistent in the family courts fifty years ago, mediation has since become the workhorse of family dispute resolution. Indeed, some states mandate participation.<sup>19</sup> The Model Standards of Practice for Family and Divorce Mediation define mediation as:

A process in which a mediator, an impartial third party, facilitates the resolution of family disputes by promoting the participants' voluntary agreement. The family Mediator assists communication, encourages understanding and focuses the participants on their individual and common interests. The family mediator works with the participants to explore options, make decisions and reach their own agreements.<sup>20</sup>

As with any new field, especially an interdisciplinary one, controversy raged between advocates of various styles and schools of mediation. In addition, programs vary regarding the qualifications of mediators, the scope of issues considered, the number of sessions offered, and the extent to which lawyers are involved.<sup>21</sup> However, mediation generally involves a neutral facilitator who helps the parties focus on long-term underlying needs and interests.

Many cases are settled in mediation, and parties are usually satisfied with the process. Not surprisingly, mediation settlement rates vary by program but generally range from 40% to 80%.<sup>22</sup> Although satisfaction rates

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16. *Id.* at 195 (1999).

17. Joan B. Kelly, *Psychological and Legal Interventions for Parents and Children in Custody and Access Disputes: Current Research and Practice*, 10 VA. J. SOC. POL'Y & L. 129, 163 (2002).

18. MACCOBY, *supra* note 7, at 137 (1997).

19. See Carrie-Anne Tondo, et al., *Mediation Trends*, 39 FAM. CT. REV. 445 (2001).

20. Andrew Schepard, *An Introduction to the Model Standards of Practice for Family and Divorce Mediation*, 35 FAM. L.Q. 1, 3 (2001) [hereinafter *Model Standards*].

21. See Connie J.A. Beck & Bruce D. Sales, *A Critical Reappraisal of Divorce Mediation Research and Policy*, 6 PSYCHOL. PUB. POL'Y & L. 989, 995 (2000) [hereinafter Beck]; Jessica Pearson & Nancy Thoennes, *Divorce Mediation: Reflections on a Decade of Research*, in *MEDIATION RES.*, 16 (Kenneth Kressel et al. eds., (1989)).

22. DESMOND ELLIS & NOREEN STUCKLESS, *MEDIATING AND NEGOTIATING MARITAL CONFLICTS* 103 (1996) [hereinafter *MEDIATING*]. See also Jeanne A. Clement & Andres I.

differ depending upon whether agreement is reached, participant satisfaction levels generally range from 60% to 93%.<sup>23</sup> Research indicates that mediation is more likely to result in settlement and accompanying behavioral change when parents spend more time with an experienced mediator who focuses on enhancing communications.<sup>24</sup>

## 2. EARLY NEUTRAL EVALUATION

Early Neutral Evaluation (ENE) provides another example of a family law ADR process that has become available in some states in recent years. In ENE, the parties receive a nonbinding evaluation of their situation by an expert or team of family law experts.<sup>25</sup> Subsequent to hearing the evaluation and recommendations, the parties have an opportunity to negotiate a settlement. Sessions are confidential and generally last two to three hours.<sup>26</sup>

## 3. PARENTING COORDINATION

New roles and processes have been created to assist families in restructuring their relationships during and after divorce. A prime example is a relatively new process known as parenting coordination. The role of the parenting coordinator is analogous to that of a special master in federal civil cases. There, a judge delegates limited decision-making power to a professional with particular subject-matter expertise.<sup>27</sup> Similarly, in high-conflict family cases, a parenting coordinator manages recurring custody and access disputes. The role came to the fore based on the recommendation of professionals attending an interdisciplinary conference on high-conflict families sponsored by the American Bar Association Section of

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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, 99 (1992) [hereinafter Clement] (45% to 75%); Jay Folberg, *Mediation of Child Custody Disputes*, 19 COLUM. J.L. & SOC. PROBS. 413, 422 (1985) (58%) [hereinafter Folberg]; Joan B. Kelly & Lynn L. Gigy, *Divorce Mediation: Characteristics of Clients and Outcomes*, in MEDIATION RES. 18 (Kenneth Kressel et al. eds., 1989); KENNETH KRESSEL & DEAN G. PRUITT, MEDIATION RES. 397 (1989) [hereinafter KRESSEL] (60%); *Model Standards*, *supra* note 20, at 3 (50% to 60%).

23. See ELIZABETH M. ELLIS, DIVORCE WARS: INTERVENTIONS WITH FAMILIES IN CONFLICT 74(2000); Folberg, *supra* note 22, at 424. See also KRESSEL, *supra* note 22, at 395 (1989) (75%); Clement, *supra* note 22, at 98 (80% TO 100%).

24. Joan B. Kelly, *A Decade of Divorce Mediation Research*, 34 FAM. & CONCILIATION CTS. REV. 373, 380 (1996).

25. See Yvonne Pearson, *Early Neutral Evaluations: Applications to Custody and Parenting Time Cases: Program Development and Implementation in Hennepin County, Minnesota*, 44 FAM. CT. REV. 672 (2006).

26. See *Id.*

27. Matthew J. Sullivan, *Ethical, Legal, and Professional Practice Issues Involved in Acting as a Psychologist Parent Coordinator in Child Custody Cases*, 42 FAM. CT. REV. 576, 576 (2004).

Family Law in 2000.<sup>28</sup> Remarkably, by 2003, some fourteen states had implemented it.<sup>29</sup> Its use continued to expand to such an extent that the Association of Family and Conciliation Courts (AFCC) empanelled a task force to create Guidelines for Parenting Coordination, which were published in 2005.<sup>30</sup>

The AFCC Guidelines describe the purpose of parenting coordination as follows:

The overall objective of parenting coordination is to assist high conflict parents to implement their parenting plan, to monitor compliance with the details of the plan, to resolve conflicts regarding their children and the parenting plan in a timely manner, and to protect and sustain safe, healthy and meaningful parent-child relationships. Parenting coordination is a quasi-legal, mental health, alternative dispute resolution (ADR) process that combines assessment, education, case management, conflict management and sometimes decision-making functions.<sup>31</sup>

Typically parenting coordinators work with families and make decisions about day-to-day issues such as scheduling, activities, transportation, child care, discipline, education, and health care.<sup>32</sup> They are generally not empowered to make major changes to court orders such as modification of custody or granting permission to relocate.<sup>33</sup>

Because of concerns about delegation of judicial authority and continuing jurisdiction, parenting coordinators are usually appointed pursuant to stipulation by the parties. However, in some states, appointment may be authorized by statute, court rule, or court order.<sup>34</sup>

#### 4. CONCERNS ABOUT ALTERNATIVE PROCESSES AND SERVICES: DOMESTIC VIOLENCE

Although alternative processes and services clearly benefit most families, this may not be true in cases involving domestic violence. In such

28. Conference Report and Action Plan, *High Conflict Custody Cases: Reforming the System for Children*, Wingspread Conference at Racine, Wisconsin, September 8–10, 2000, sponsored by the American Bar Association and the Johnson Foundation.

29. Association of Family and Conciliation Courts (AFCC) Task Force on Parenting Coordination, *Parenting Coordination: Implementation Issues*, 41 FAM. CT. REV. 533, 534 (2003).

30. The AFCC Task Force on Parenting Coordination, *Guidelines for Parenting Coordination* (2005) (available on the AFCC website at: [http://www.afccnet.org/pdfs/AFCC\\_GuidelinesforParentingcoordinationnew.pdf](http://www.afccnet.org/pdfs/AFCC_GuidelinesforParentingcoordinationnew.pdf), last visited on Nov. 2, 2008) [hereinafter Task Force].

31. *Id.* at 2.

32. Sullivan, *Ethical, Legal, and Professional Practice Issues*, *supra* note 27, at 576.

33. Task Force, *supra* note 30, at Guideline XI.

34. Elrod, *supra* note 6, at 533; Task Force, *supra* note 30, at Guideline VII; Barnes v. Barnes, 107 P.3d 560 (Okla. 2005) (parenting coordinator statute was held not to violate equal protection and due process).

situations, participation in some processes and services may place family members in danger. At the same time, excluding families from participation may deny them access to programs that could be beneficial, if safe. Because researchers agree that families experiencing domestic violence differ significantly from each other, blanket inclusion or exclusion from processes and services makes little sense. Rather, each situation should be assessed, and families should receive sufficient information to make informed choices about participation.

In some, but not all cases involving domestic violence, existing processes and services may be modified to enhance participant safety. For example, as discussed previously, parenting education programs have become commonplace, and most parents seem to benefit from attendance. However, in cases involving a pattern of coercive, controlling violence (“classic battering”),<sup>35</sup> messages about coparenting and enhancing communications are inappropriate and often dangerous. However, when such situations have been identified, it may be possible to conduct specialized parenting education courses emphasizing safety planning, domestic violence information, community resources, and structuring safe parenting alternatives.<sup>36</sup> All parenting education courses should prohibit parents from attending the same sessions and should keep scheduling confidential.

Similarly, participation in mediation (or programs such as early neutral evaluation) may be unsafe and/or inappropriate in some cases involving domestic violence. In order to make informed decisions about participation in mediation, families should consider factors such as the following: the pattern of domestic violence;<sup>37</sup> the frequency and severity of the violence; the health and mental health status of the parties; the likely response of the primary perpetrator; the quality of the mediation process actually available; whether the parties are represented; the presence of

35. See MEDIATING, *supra* note 22, at 2 (control instigated abuse); Desmond Ellis & Noreen Stuckless, *Domestic Violence, DOVE, and Divorce Mediation*, 44 FAM. CT. REV. 658, 658 (2006) [hereinafter DOVE]; Michael P. Johnson & Kathleen J. Ferraro, *Research on Domestic Violence in the 1990s: Making Distinctions*, 62 J. MARRIAGE & FAM. 948, 950, 954 (2000) (intimate terrorism); Janet R. Johnston & Linda E. G. Campbell, *Parent-Child Relationships in Domestic Violence Families Disputing Custody*, 31 FAM. & CONCL. CTS. REV. 282, 286–87 (1993); Janet R. Johnston & Linda E. G. Campbell, *A Clinical Typology of Interparental Violence in Disputed-Custody Divorces*, 63 AM. J. ORTHOPSYCHIAT. 190 (1993) (ongoing and episodic male battering); Amy Holtzworth-Munroe & Gregory L. Stuart, *Typologies of Male Batterers: Three Subtypes and the Differences Among Them*, 116 PSYCH. BULL. 476, 492 (1994).

36. See Geri S. W. Furchmann et. al., *Parent Education’s Second Generation: Integrating Violence Sensitivity*, 37 FAM. & CONCL. CTS. REV. 24, 27 (1999).

37. See Nancy Ver Steegh & Clare Dalton, *Report from the Wingspread Conference on Domestic Violence and Family Courts*, 46 FAM. CT. REV. 454, 458–54 (2008) [hereinafter *Report*] (violence used by a perpetrator in the exercise of coercive control over the victim, violent resistance, violence driven by conflict, separation-instigated violence, violence stemming from severe mental illness).

children; relative financial resources; and preferred decision making approach.<sup>38</sup> If it occurs, mediation should be conducted by an experienced and specially trained mediator who institutes tailored safety precautions and procedures. At a minimum, these should include written ground rules, inclusion of lawyers and support persons; separate arrivals and departures, and use of separate caucusing.<sup>39</sup>

All mediators should monitor and continually screen for domestic violence. An instrument such as DOVE can be part of an ongoing domestic violence protocol.<sup>40</sup> DOVE is an empirically tested screening instrument designed for use by mediators. It identifies risk level using specific predictors and recommends particular mediation procedures.<sup>41</sup>

Obviously identification of situations involving domestic violence is key to making deliberate decisions about inclusion in, exclusion from, and modification of a variety of processes and services. Consequently it is incumbent upon family law professionals and family court systems to adopt and implement ongoing domestic violence screening protocols in order to afford families the opportunity to make informed decisions about participation in alternative processes and services.<sup>42</sup>

### III. Changing Roles for Lawyers

The advent of alternative divorce processes required family lawyers to expand their traditional areas of expertise and in some cases to adopt new roles.

#### A. Conflict Resolution Advocacy

As lawyers began to advise clients concerning participation in alternative processes, they found themselves representing clients in new and different venues. Renewed emphasis on settlement meant that lawyers spent more time negotiating (and preparing for negotiation) and less time in court. Professor Julie MacFarlane describes this new model of practice as “conflict resolution advocacy:”

The new lawyer’s advocacy role is focused on developing the best possible outcome—often in the form of settlement—for her client, using communication, persuasion, and relationship building in contrast to positional argument and “puffing” up the case. This understanding of advocacy builds on traditional

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38. Nancy Ver Steegh, *Yes, No, and Maybe: Informed Decision Making about Divorce Mediation in the Presence of Domestic Violence*, 9 WM. & MARY J. WOMEN & L. 145 (2003) [hereinafter *Yes, No, and Maybe*].

39. *Id.* at 198.

40. DOVE, *supra* note 35, at 658.

41. *Id.* at 658.

42. *See Yes, No, and Maybe, supra* note 38, at 198.

“zealous advocacy” but goes beyond the narrow articulation of partisan interests to the practical realization of a conflict specialist role for counsel.<sup>43</sup>

She suggests that some lawyers suffer from a “skills gap” in that they lack sufficient understanding of new strategies, tools, and skills<sup>44</sup> required in today’s changed practice environment.<sup>45</sup>

The Family Law Education Reform Project<sup>46</sup> urges law schools to make fundamental changes in family law teaching:

Today’s family lawyers need a thorough understanding of many issues and practices that traditional family law courses rarely touch upon. These include the appropriate—and inappropriate—uses of dispute resolution processes, new case management techniques in the family courts, the key roles played by professionals from other disciplines in the court system, and current research on such issues as the effects of conflict and loss of parental contact on children.<sup>47</sup>

The Report recommends that law schools focus additional attention on advocacy in ADR settings as well as communication skills such as active listening, handling emotional content, and setting boundaries with clients.<sup>48</sup>

### B. Collaborative Law

Some lawyers have chosen to focus their practices entirely on settlement of cases. Under the collaborative law model both parties retain collaborative lawyers who use interest-based problem-solving negotiation techniques to assist the parties in resolving issues.<sup>49</sup> The parties and lawyers agree at the outset that the matter will be resolved without going to court and that the collaborative lawyers will be disqualified from continued representation if impasse is reached and court action is required. In that event, the parties must retain new litigation counsel.<sup>50</sup>

As a result of the increasing popularity of collaborative law, several states have adopted statutes governing collaborative law<sup>51</sup> and some states

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43. JULIE MACFARLANE, *THE NEW LAWYER: HOW SETTLEMENT IS TRANSFORMING THE PRACTICE OF LAW XII* (2008).

44. *Id.* at 18.

45. *Id.*

46. The Family Law Education Reform Project is cosponsored by the Association of Family and Conciliation Courts and the Center for Children, Families, and the Law at Hofstra Law School.

47. Mary E. O’Connell & J. Herbie DiFonzo, *The Family Law Education Reform Project Final Report*, 44 *FAM. CT. REV.* 524, 524 (2006).

48. *Id.* at 541–43.

49. See Pauline H. Tessler, *Collaborative Family Law*, 4 *PEPP. DISP. RESOL. L.J.* 317 (2004).

50. See Susan A. Hansen & Gregory M. Hildebrand, *Collaborative Practice, in INNOVATIONS IN FAMILY LAW PRACTICE 29* (Kelly Browe Olson & Nancy Ver Steegh eds., 2008).

51. See *CAL. FAM. CODE* § 2013 (West 2007); *N.C. GEN. STAT. ANN.* § 50-70 et seq. (West 2007); *VERNON’S TEX. STAT. & CODES ANN.* §§ 6.603, 153.0072 (West 2007).

have issued ethical opinions on its use.<sup>52</sup> In 2007, the American Bar Association Standing Committee on Ethics and Professional Responsibility issued an ethical opinion generally approving the practice.<sup>53</sup> The National Conference of Commissioners on Uniform State Laws has also established a committee to draft a Uniform Collaborative Law Act.<sup>54</sup>

### *C. Cooperative Law*

Some lawyers identify themselves as practitioners of cooperative law. This model of practice uses the interest-based problem-solving techniques found in collaborative law but without the disqualification agreement. Consequently, if parties are not able to settle all aspects of the case, the cooperative lawyers will represent the parties in court.<sup>55</sup> This saves the parties the expense and delay associated with retaining and educating new litigation counsel.

## **IV. Court Management of Cases**

The role of the family court system, and the judges functioning within it, has undergone dramatic change. Rather than deciding cases presented, many courts now manage cases and direct them through the system.

As additional processes and services became available for families, courts tended to adopt linear service delivery models.<sup>56</sup> Families would begin with less intrusive and time-consuming processes, such as parenting education and mediation, and if unsuccessful with these, would go on to participate in more intrusive and time-consuming processes—typically custody evaluation and trial. Unfortunately, some high-conflict families spent time and money in programs and for services that were not likely to be helpful to them, rather than proceeding directly to programs and services better tailored to their needs.<sup>57</sup>

In contrast, some courts adopted Differentiated Case Management

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52. See ethical opinions on collaborative practice from Colorado, Kentucky, Minnesota, Maryland, New Jersey, North Carolina, Pennsylvania, and Missouri at the ABA Section of Dispute Resolution Collaborative Law Committee website at <http://www.abanet.org/dch/committee.cfm?com=DR035000> (last visited 11-9-08).

53. American Bar Association Standing Committee on Ethics and Professional Responsibility, Formal Opinion 07-447 (2007).

54. See National Conference of Commissioners on Uniform State Laws at <http://www.nccusl.org/Update/CommitteeSearchResults.aspx?committee=279> (last visited 11-9-08).

55. See David A. Hoffman, *Cooperative Negotiation Agreements: Using Contracts to Make a Safe Place for a Difficult Conversation*, in *INNOVATIONS IN FAMILY LAW PRACTICE* 63 (Kelly Browe Olson & Nancy Ver Steegh eds., 2008).

56. See Peter Salem et al., *Triaging Family Court Services: The Connecticut Judicial Branch's Family Court Civil Intake Screen*, 27 *PACE L. REV.* 101, 108-09 (2007).

57. *Id.* at 109-10.

(DCM) as a way to more efficiently match families with processes and services.<sup>58</sup> When DCM is used, cases go through screening and triage and a service plan is created for the family.<sup>59</sup> Unlike linear service delivery models, high-conflict families proceed directly to the programs and services most likely to be successful for them in developing a parenting plan or having parenting arrangements decided for them.<sup>60</sup>

Court systems have thus expanded their role to include activities such as screening, assessment, creation of service plans, and referral to community resources. In some cases, courts provide ongoing monitoring and continued involvement even after the divorce is final.

New challenges are presented as courts and judges become case managers in addition to fulfilling the traditional role of decision maker. Questions such as the following are currently being debated.

- Are judges and court personnel trained and qualified to perform the new tasks?<sup>61</sup>
- Will families be mandated to participate in various processes and services or will they be encouraged to make informed choices for themselves?
- Will screening and triage information be kept confidential?<sup>62</sup>
- What will be the quality of screening and triage services? Will there be sufficient accountability and adequate feedback loops when mistakes are made?<sup>63</sup>
- Will screening and assessment services be culturally and socioeconomically appropriate?<sup>64</sup>

## **V. What Do Declining Court System Resources Mean for ADR and Family Court Reform?**

Family courts are experiencing higher caseloads involving more complex cases.<sup>65</sup> For example, according to the American Bar Association, between 1984 and 2000, domestic relations filings increased by 79%.<sup>66</sup>

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58. Elrod, *supra* note 6, at 522.

59. SCHEPARD, *supra* note 4, at 114.

60. *Id.* at 114–15.

61. *See Report, supra* note 37, at 465.

62. Loretta Frederick, *Questions About Family Court Domestic Violence Screening and Assessment*, 46 FAM. CT. REV. 523, 528 (2008).

63. *Report, supra* note 37, at 461.

64. *Id.* at 461.

65. *See SCHEPARD, supra* note 4, at 38–39.

66. *Justice in Jeopardy*, Rep. of ABA Commission on the 21st Century Judiciary (ABA,

Similarly, the National Center for State Courts reported that between 1993 and 2001, child custody filings increased by 36%.<sup>67</sup>

Courts are simultaneously experiencing a remarkable increase in the number of unrepresented parties. For example, in Oregon at least one party is unrepresented in 80% of family cases.<sup>68</sup> By contrast, a 1980 study found that one party lacked representation in only 24% of cases.<sup>69</sup> *Pro se* family litigants experience various problems as they attempt to navigate the court system. These include the following difficulties: determining where and how to file papers; understanding court procedures; obtaining and completing forms; obtaining evidence; speaking in court; and scheduling the case.<sup>70</sup> Consequently, unrepresented litigants absorb additional court resources.

Serious funding challenges are adding stress to an already overtaxed system. According to the Judicial Division of the American Bar Association, cuts in court funding have resulted in the closing of courtrooms, decreased hours of operation, and elimination of key court staff.<sup>71</sup> Family and juvenile courts are experiencing “the brunt of the budget cuts.”<sup>72</sup>

What does this mean for families? More *pro se* parties with more complex situations are seeking to use a court system that offers fewer services, is open less often, and is less well staffed. Court-connected mediation programs are likely to offer fewer sessions, if they exist at all. Parties are

Chicago, Ill.), July 2003, at 24–25, available at <http://www.abanet.org/judind/jeopardy/pdf/report.pdf> (in contrast general civil filings increased by 30%, criminal filings by 46%, and juvenile filings by 66%) (citing National Center for State Courts, *Examining the Work of State Courts 1999–2000—A National Perspective from the Court Statistics Project 76* (Brian J. Ostrom et al. eds., 2001), available at <http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/ctadmin&CISOPTR=603>).

67. National Center for State Courts, *State Guide to Statistical Reporting, Domestic Relations 31* (2003), available at [http://www.ncsconline.org/D\\_RESEARCH/csp/2003\\_Files/2003\\_DomRel.pdf](http://www.ncsconline.org/D_RESEARCH/csp/2003_Files/2003_DomRel.pdf).

68. Oregon Task Force on Family Law, *Creating a New Family Conflict Resolution System: Final Report to Governor John A. Kitzhaber and the Oregon Legislative Assembly 5* (1997). See also Steven K. Berenson, *A Family Law Residency Program?: A Modest Proposal in Response to the Burdens Created by Self-Represented Litigants in Family Court*, 33 *RUTGERS L.J.* 105, 109 (2001) [hereinafter Berenson] (one party unrepresented in 80% of cases); Beck, *supra* note 21, at 993 (at least one spouse appearing *pro se* in 67% of domestic relations cases and 40% of child custody cases) (72% of domestic relations cases involved at least one unrepresented party).

69. Berenson, *supra* note 68, at 109.

70. Carol Flango et al., *How Are Courts Coordinating Family Cases?*, National Center for State Courts 46, available at: <http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/famct&CISOPTR=69> (last visited Nov. 9, 2008).

71. American Bar Association, Judicial Division, *State Court Funding Online Toolkit available at* <http://www.abanet.org/jd/courtfunding/talkingpts.html> (last visited Nov. 9, 2008).

72. *Id.*

required to pay higher fees for services they can ill afford. At the same time, families with means are able to hire private mediators, collaborative lawyers, and divorce coaches. Some are opting out of the family law system altogether by hiring “private judges.”<sup>73</sup>

The family courts appear to be on a road toward a distinctly two-tiered system of justice. While dispute resolution programs have become so common that they are not really “alternative” to the court system anymore, it is possible that in becoming available only to wealthier parties, they will be alternative in an entirely different sense.

On the other hand, ADR and family court reform have unleashed an amazing amount of creative energy aimed at achieving better outcomes for families. Preliminary research on Differentiated Case Management indicates that such programs lead to quicker resolution of cases and fewer court hearings.<sup>74</sup> Consequently it is possible that legislatures will be receptive to funding alternative processes in order to help families as efficiently as possible.

## VI. Conclusion

Fifty years ago, no one had heard of parenting education, mediation, early neutral evaluation, parenting coordinators, interest-based negotiation, or collaborative law. Today use of these processes has become the norm. If this rate of change continues, one can only imagine what the divorce process will look like fifty years from now. However, the extent to which future change benefits or harms families depends on our continued willingness to invest in the family court system and related alternatives.

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73. See Sheila Nagaraj, *The Marriage of Family Law and Private Judging in California*, 116 YALE L.J. 1615 (2007).

74. SCHEPARD, *supra* note 4, at 122–23 (citing studies from Australia, Wisconsin, and Canada).

