

# Non-Judicial Resolution of Custody and Visitation Disputes

*This article examines the problems created by adversary judicial resolution of child custody and visitation disputes between parents arising during and after dissolution of their marriage. It reviews current responses to these problems and suggests arbitration and mediation as non-judicial alternatives to the adversary system. It concludes that mediation is the method most appropriate for family dispute resolution and that family law practitioners can play a key role in reducing harm to families by counseling their clients toward such non-adversary resolution of child custody and visitation disputes.*

Bob and Helen<sup>1</sup> married when Helen graduated from college and Bob was beginning graduate study in history. Helen worked to support the couple until Bob completed his doctoral dissertation and got a university teaching job. Helen then turned her energy toward maintaining their home and became involved in community activities. The couple had three children, ages 15, 13, and 10, when, after 18 years together, Bob and Helen consulted attorney Marsha about a dissolution<sup>2</sup> of their marriage. During Marsha's first interview with the couple it became clear that property and support matters could be worked out by the couple with general planning and tax advice from Marsha. Marsha's question about custody and visitation plans for the couple's children, however, triggered an emotional discussion between Bob and Helen which threatened to escalate and destroy an otherwise amicable separation.

Randy and Barbara were divorced after a stormy marriage. They had married when Barbara was 19 and Randy was 21. A child, Tony, had been born soon thereafter. Barbara received

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<sup>1</sup> The names and facts in this scenario as well as those in the one that follow are fictitious, but will no doubt be familiar to anyone who works with families in a helping role.

<sup>2</sup> The terminology of California no-fault divorce law will be used throughout this article. The trend toward no-fault divorce has resulted in only three American jurisdictions retaining strict fault requirements. Freed & Foster, *Divorce in the Fifty States: An Outline*, 11 FAM. L. Q. 297, 300 (1977).

custody of Tony with reasonable visitation to Randy after an emotional court battle. Two years after the dissolution, when Tony was five, Randy called attorney Alan, complaining that Barbara was accusing Randy of mistreating Tony during weekly visitation. Angrily telling Alan about Barbara's immoral lifestyle, Randy explained the upsetting effects on Tony of living with his mother. Randy told Alan he wanted to take custody of Tony away from Barbara and asked if Alan would take the case.

These scenerios illustrate two ways in which clients frequently present the highly emotionally-charged issue of child custody to a practicing family lawyer. This article will explore how an attorney facing such situations can play a crucial role in minimizing significant harm to the families involved and reduce the burden of custody and visitation litigation on the courts by promoting non-judicial resolution of such disputes.<sup>3</sup> In Part I this article will examine the problems created by the adversary nature of judicial resolution of custody and visitation disputes and some current responses to those problems. Part II will suggest non-judicial dispute resolution as an alternative to the adversary system, and consider arbitration and mediation as possible methods of non-judicial resolution appropriate to custody and visitation disputes. Part III will discuss the attorney's key role in implementing such non-judicial dispute resolution and will recommend supporting legislative and judicial changes.

## I. THE PROBLEM

Adversary courtroom proceedings are generally ineffective for the resolution of family disputes. Judicial decisions focus on legal issues, frequently disregarding families' emotional issues, and thus lead to repeated future litigation. Current responses to this problem emphasize reform within the adversary model and so are similiarly inadequate. Non-adversary approaches, however, offer a more constructive method of family dispute resolution.

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<sup>3</sup> The term "custody dispute" will be used in this article to refer to disagreement between the natural parents as to which will have legal custody of the couple's children following dissolution of the parents' marriage. "Visitation dispute" will be used to refer to a controversy between the parents following dissolution, concerning the non-custodial parent's right to visitation of the children. Either of these disputes may occur at the time of dissolution or some months or years later.

### A. Adversary Judicial Resolution

Judicial resolution of custody and visitation disputes places a costly burden on the courts and leads to serious emotional and financial problems for the families involved. Attorneys' adversary approach and ambiguous legal standards aggravate the harm to families and encourage repeated lengthy litigation of custody and visitation matters.

The burden of contested custody cases on the courts increases as the dissolution rate rises<sup>4</sup> and as more fathers, granted an equal right to custody of their children under current law,<sup>5</sup> request custody at dissolution. Initial custody hearings are often lengthy and significant additional court time is expended by post-dissolution litigation over custody and visitation modification,<sup>6</sup> often motivated by unresolved anger and desire for revenge.<sup>7</sup>

No-fault divorce laws designed to minimize emotional conflicts in the courtroom have limited such manipulation of the legal system by angry spouses in the dissolution context. Evidence of misconduct is inadmissible in a dissolution proceeding unless relevant to the issue of child custody.<sup>8</sup> Thus, couples precluded from airing their grievances in the dissolution hearing often use a custody contest to express their anger and frustration.<sup>9</sup>

The emotional strain of these adversary proceedings has a significant effect on the parents and children involved. The adults are often consumed with anger at each other, fear for themselves, and guilt about their children.<sup>10</sup> These emotional conflicts inhibit them from building a new life for themselves and make it difficult for them to respond to their children's emotional needs during the

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<sup>4</sup> Nearly one out of every two marriages in the United States end in divorce, involving one million children each year. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, CURRENT POPULATION REPORT SERIES P-20 No. 287, MARITAL STATUS AND LIVING ARRANGEMENTS: MARCH 1975, at 2-5 (1975).

<sup>5</sup> CAL. CIV. CODE § 4509 (West Cum. Supp. 1979). *But see*, Weitzman & Dixon, *Child Custody Awards: Legal Standards and Empirical Patterns*, this issue.

<sup>6</sup> When children are involved court contests continue for about two years in 52% of the cases. Sugar, *Children of Divorce*, 46 PEDIATRICS 588, 590 (1970).

<sup>7</sup> Elkin, *Premarital Counseling for Minors: The Los Angeles Experience*, 26 FAM. COORDINATOR 429, 433 (1977).

<sup>8</sup> CAL. CIV. CODE § 4509 (West Cum. Supp. 1979).

<sup>9</sup> Bodenheimer, *The Rights of Children and the Crisis in Custody Litigation: Modification of Custody In and Out of State*, 46 U. COLO. L. REV. 495, 496 (1975).

<sup>10</sup> J. DESPERT, CHILDREN OF DIVORCE 195 (1962).

dissolution process.<sup>11</sup>

The children's trauma in a custody proceeding is perhaps more serious, as it results from a situation over which they have little or no control or understanding. They often feel the brunt of their parents' anger and bitterness as parents consciously or unconsciously use their children as weapons against each other.<sup>12</sup> The children's emotional trauma is intensified by the uncertainty of lengthy legal proceedings which too often result in a custody or visitation plan tailored to the wishes of their competing parents rather than their own needs and desires.<sup>13</sup> A child's fear of separation and need for continuity in relationships is frequently disregarded.<sup>14</sup> Studies of children during the post-divorce period, most notably by Judith S. Wallerstein and Joan B. Kelly of the Children of Divorce Project in Marin County, California, provide indications of the severe emotional cost suffered by many children of divorce. Wallerstein and Kelly report developmental regression, feelings of rejection, helplessness, and anger, during the post-divorce period, as characteristic of the various age groups studied.<sup>15</sup> Other researchers have reported trends toward delinquency among children of divorce.<sup>16</sup>

In addition to these serious emotional effects on family members, the financial burden of a contested custody case is significant for the family often already over-burdened by supporting two households on income previously supporting only one. Expert witness fees for psychiatric examination of family members and

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<sup>11</sup> Elkin, *Post-Divorce Counseling in a Conciliation Court* 10 (unpublished manuscript, portions of which were prepared for presentation by the author at the Third Invitational Conference on Marriage Counselors' Education on Oct. 9, 1976, in San Francisco, California, available from the Conciliation Court of the Superior Court, Los Angeles County, California, 90012).

<sup>12</sup> Kelly & Wallerstein, *The Effects of Parental Divorce: Experiences of the Child in Early Latency*, 46 AM. J. ORTHOPSYCH. 20, 27 (1976).

<sup>13</sup> J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 54 (1973) [hereinafter cited as GOLDSTEIN, FREUD, & SOLNIT].

<sup>14</sup> *Id.* at 11.

<sup>15</sup> Wallerstein & Kelly, *The Effects of Parental Divorce: Experiences of the Preschool Child*, 14 J. AM. ACAD. CHILD PSYCH. 600 (1975); *The Effects of Parental Divorce: Experiences of the Child in Early Latency*, *supra* note 12; *The Effects of Parental Divorce: Experiences of the Child in Later Latency*, 46 AM. J. ORTHOPSYCH. 256 (1976); *The Effects of Parental Divorce: The Adolescent Experience*, in 3 *THE CHILD IN HIS FAMILY: CHILDREN AT PSYCHIATRIC RISK* 479 (E. Anthony & C. Koupernick eds. 1974).

<sup>16</sup> *E.g.*, McDermott, *Divorce and Its Psychiatric Sequelae in Children*, 23 ARCHIVES GEN. PSYCH. 421, 423 (1970). *But cf.* S. GETTLEMAN & J. MARKOWITZ, *THE COURAGE TO DIVORCE* 79-114 (1974) (discussing the potential for positive healthful changes in parent-child relationships following divorce).

court testimony, lengthy depositions, and substantial legal fees due in part to the parties' frequent contact with the attorney for emotional support, make a custody case an expensive proposition.

Attorneys' adversary approach to custody cases intensifies these emotional and financial effects on families and encourages repeated and lengthy litigation. Legal education emphasizes a rational, logical approach to dispute resolution within an adversary context. Such training leads attorneys to adopt the adversary stance in family conflicts and leaves them unprepared for the resulting highly emotional response from their clients.<sup>17</sup> Their attorneys' adversary approach reinforces the clients' desires to publicly humiliate and punish their spouses and the conflict escalates to the detriment of both the family and the legal system.<sup>18</sup>

Ambiguous legal standards further aggravate the strain on families and the courts. For example, the "best interests of the child"<sup>19</sup> standard on which the courts ostensibly base custody determinations is subject to a multitude of interpretations and is highly vulnerable to judicial bias.<sup>20</sup> Likewise, "reasonable visita-

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<sup>17</sup> Elkins, *A Counseling Model for Lawyering in Divorce Cases*, 53 NOTRE DAME LAW. 229, 232 (1977).

<sup>18</sup> [L]egal education tends to blunt native ability so far as psychological sensitivity is concerned. Together with this functional "blindness," there is a strong inclination for lawyers to be oblivious to the emotional results of their procedures. They appear to believe that they can conduct a vigorous adversary contest and then have the contestants return to some kind of working rapport. Such contests in child custody cases will most surely produce wounds which do not heal adequately to assure a good subsequent working relationship between the parents.

Watson, *The Children of Armageddon: Problems of Custody Following Divorce*, 21 SYRACUSE L. REV. 55, 65 (1969) (footnote omitted).

<sup>19</sup> CAL. CIV. CODE § 4600(a) (West Cum. Supp. 1979).

<sup>20</sup> See, e.g., *Painter v. Bannister*, 258 Iowa 1390, 140 N.W.2d 152, cert. denied, 385 U.S. 949 (1966), In *Painter*, a five year old boy lived with his grandparents for a year following his mother's death. Able to make a home for him at the end of that year, the father requested custody. The court compared the grandparent's "stable dependable, conventional, middleclass, middlewest background," 140 N.W. 2d at 154, with the father's "Bohemian approach to finances and life in general," *id.* at 154, including his membership in the A.C.L.U., and granted the grandparents custody. The court commented. "In the Painter (father's) home, Mark would have more freedom of conduct and thought with an opportunity to develop his individual talents. It would be more exciting and challenging in many respects, but romantic, impractical and unstable." *Id.* See also Moskowitz, *Divorce-Custody Dispositions: The Child's Wishes in Perspective*, 18 SANTA CLARA L. REV. 427, 442-43 (1978).

tion" granted to noncustodial parents presents similar implementation problems and creates significant potential for future dispute.<sup>21</sup> Judicial application of these legislative standards in custody determinations leads to the imposition of cultural norms and values on parenting and lifestyles.<sup>22</sup> Judicial decision-making is necessarily influenced by individual judges' backgrounds, personalities, and prejudices.<sup>23</sup> The burden of these custody and visitation problems on families and the courts has led the legislature and the practicing bar to institute various reforms.

### B. Current Responses

Legal representation for the child, court-ordered social investigations, and the use of mental health professionals as experts are among the reforms adopted in many states in response to problems created by judicial resolution of custody and visitation disputes. As noted above, these provisions involve reform within the adversary system and therefore do not effectively deal with the inherent shortcomings of judicial resolution. In contrast, the establishment of Conciliation Courts in a number of jurisdictions, another recent reform, offers a more constructive non-adversary alternative for the resolution of these family conflicts.

Provisions for appointment of counsel for the child are a result of concern for the child's rights in custody and visitation litigation. When the court finds it in the child's best interest, independent counsel is provided for the child and compensation ordered paid by the parents as the court deems just.<sup>24</sup> Some commentators criticize this procedure for increasing the adversary nature of the proceedings and for emphasizing division between parents and children.<sup>25</sup> Other writers and practitioners, however, feel that the child's attorney can act as a mediator between the parents and thus effectively represent the child's best interests.<sup>26</sup>

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<sup>21</sup> Elkin, *supra* note 11, at 6-7; Johnson, *Visitation: When Access Becomes Excess*, FAM. ADVOCATE, Summer, 1978, at 14; Savage, *The Impact of Changes on Service*, CONCILIATION CTS. REV., Dec., 1977, at 12, 14.

<sup>22</sup> See, Batt, *Child Custody Disputes: A Developmental-Psychological Approach to Proof and Decisionmaking*, 12 WILLAMETTE L. J. 491 (1976).

<sup>23</sup> J. DESPERT, *supra* note 10, at 195.

<sup>24</sup> CAL. CIV. CODE § 4604 (West Cum. Supp. 1979).

<sup>25</sup> E.g., Sheffner & Suarez, *The Postdivorce Clinic*, 132 AM. J. PSYCH. 442, 443 (1975).

<sup>26</sup> See, e.g., Note, *Lawyering for the Child: Principles of Representation in Custody and Visitation Disputes Arising from Divorce*, 87 YALE L. J. 1126, 1172-77 (1978); Interview with Brinkley A. Long, Director Family Court Services,

Over-burdened courts and judges' limited behavioral science training have led to provisions for court-ordered social investigations in contested custody cases.<sup>27</sup> Carried out by probation officers or domestic relations case investigators, these reports condense accusations made by parties, reports of friends and neighbors, and the investigator's own evaluation of the situation for the judge's consideration. This practice recognizes the importance of a behavioral science perspective to custody determinations and enables the judge to utilize the trained observations of the investigator in awarding custody. The preparation of these reports, however, has a detrimental effect on relations between the parents, their children, relatives, and friends. During the investigation, the parties attempt to bring the investigator to their side by presenting themselves in the best light, and their "opponent" parent in the worst possible light. Friends and relatives are often forced to take sides when interviewed as a reference for one side or the other. This process thus tends to emphasize family weaknesses and exacerbates already serious conflict within the family.<sup>28</sup>

Recognition of the value of a behavioral science perspective in custody and visitation determinations has also led attorneys and judges to make use of mental health professionals as expert witnesses in such cases. Mental health professionals however, are often reluctant to become involved in legal proceedings. When they do become involved, they are often left feeling frustrated with the legal system's insensitivity to the psychological and emotional needs of the child.<sup>29</sup>

The reluctance of mental health professionals to become involved in a custody dispute as a witness for one side against the other stems from a number of factors. These professionals' private practices are disrupted by the uncertainty of trial calendars and frequent continuances.<sup>30</sup> They are frustrated by attorneys and judges who ask for specific answers and predictions about human behavior inappropriate to the imprecision of the sciences of psychology or psychiatry.<sup>31</sup> Finally, mental health professionals are

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Superior Court of Sacramento County, California, in Sacramento (Sept. 21, 1978).

<sup>27</sup> CAL. CODE CIV. PROC. § 263 (West 1954).

<sup>28</sup> Gozansky, *Court-Ordered Investigations in Child Custody Cases*, 12 WILLAMETTE L. J. 511, 523 (1976); Savage, *supra* note 21, at 13.

<sup>29</sup> See, Littner, *The Doctor's Role in Contested Custody Matters*, CONCILIATION CTS. REV., Dec., 1971, at 34.

<sup>30</sup> *Id.* at 35-36

<sup>31</sup> *Id.* at 34.

reluctant to participate in court proceedings which frequently result in custody or visitation plans which the professional feels are detrimental to the child or family.<sup>32</sup> Experts who familiarize themselves with the legal process and who are prepared by the attorney calling them to testify, however, more often feel they are able to contribute significantly to the court's decision.<sup>33</sup>

Most mental health professionals involved in custody or visitation disputes would rather play a neutral role than represent one side of the dispute against the other.<sup>34</sup> In 1968, the Los Angeles Superior Court established a panel of psychiatric consultants hired by the Family Law Department to fulfill such a neutral role.<sup>35</sup> These psychiatrists interview all significant family members in a contested custody case, prepare a recommended disposition for the court, and are available for cross-examination by both sides at trial.<sup>36</sup> As experts for the court, mental health professionals are better able to sensitize judges to the psychological context of custody disputes. Moreover, they can help to insure decisions tailored to the psychological and emotional needs of the child.<sup>37</sup>

The most innovative and effective response to the problems of adversary resolution of custody and visitation disputes has been the establishment of Conciliation Courts. The California legislature enacted the first Conciliation Court Law in 1939 providing counseling for families in order to encourage reconciliation and avoid divorce.<sup>38</sup> Los Angeles County was the first to establish a Conciliation Court and thus became a model for the state and nation. By the early 1960's Conciliation Courts had been established in a number of other California counties and other states.<sup>39</sup>

The current California Conciliation Court Law allows considerable flexibility of services directed both toward avoiding dissolution and settling disputes between parents during the dissolution process.<sup>40</sup> Conciliation Court counselors, appointed by the county

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<sup>32</sup> *Id.* at 36.

<sup>33</sup> R. SADOFF, *FORENSIC PSYCHIATRY: A PRACTICAL GUIDE FOR LAWYERS AND PSYCHIATRISTS* 47-58 (1975).

<sup>34</sup> J. DESPERT, *supra* note 10, at 191-92.

<sup>35</sup> Chase, *Criteria for Psychiatric Evaluations in Child Custody Contests*, *CONCILIATION CTS. REV.*, Sept., 1977, at 19.

<sup>36</sup> Interview with Gary A. Chase, M.D., Senior Psychiatric Consultant, Los Angeles Superior Court Family Law Department, in Los Angeles (Aug. 23, 1978).

<sup>37</sup> *Id.*

<sup>38</sup> Blum, *Conciliation Courts: Instruments of Peace*, 41 *J. ST. B. CAL.* 33, 33-34 (1966).

<sup>39</sup> *Id.* at 35.

<sup>40</sup> *CAL. CODE CIV. PROC.* §§ 1730-1772 (West 1972).



Superior Court, counsel parties involved in proceedings under the Family Law Act and make recommendations for disposition of those proceedings to the judge.<sup>41</sup> Conciliation Court counselors may invoke the aid of outside mental health professionals<sup>42</sup> and any agreement reached during counseling may be reduced to writing and given the force of court order.<sup>43</sup>

County Conciliation Courts in California and in other states have developed a variety of models from this basic structure. Shasta County, in rural northern California, has two part-time Conciliation Court counselors who interview parents involved in custody and visitation disputes at the courthouse immediately after referral from the court. Although counselors usually recommend a disposition to the judge after that initial interview, they sometimes conduct additional investigation before filing the report.<sup>44</sup> In Sacramento County, which serves a diverse urban population, custody and visitation matters are routinely referred to Family Court Services by domestic relations judges. The family meets with a Court counselor for a single three to four hour session within two weeks of court referral. If the parties fail to come to an agreement within that period, the counselor makes a full custody investigation and subsequent recommendation to the court.<sup>45</sup> In Ann Arbor, Michigan, the Washtenaw County Friend of the Court Program uses family law attorneys as referees in informal custody hearings after which a recommendation is made to the court for final determination.<sup>46</sup> The Milwaukee County Family Court Department of Family Conciliation provides social workers to help families evaluate alternatives and develop a custody plan without going to court.<sup>47</sup>

The Conciliation Court's emphasis on non-adversary resolution of custody and visitation disputes makes it the most positive current response to the problems of adversary judicial resolution. Individual county Superior Court judges, however, control the creation and policies of local Conciliation Courts.<sup>48</sup> This results

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<sup>41</sup> CAL. CODE CIV. PROC. § 1744 (West 1972).

<sup>42</sup> CAL. CODE CIV. PROC. § 1768 (West 1972).

<sup>43</sup> CAL. CODE CIV. PROC. § 1769(b) (West Cum. Supp. 1979).

<sup>44</sup> Interview with Joan Lewis and Paul A. Burdett, Conciliation Court Counselors, Shasta County Superior Court, at Redding, California (Aug. 14, 1978).

<sup>45</sup> Interview with Brinkley A. Long, *supra* note 26.

<sup>46</sup> Benedek, Del Campo & Bendek, *Michigan's Friends of the Court: Creative Programs for Children of Divorce*, 26 FAM. COORDINATOR 447 (1977).

<sup>47</sup> Hansen & Goldberg, *Casework in a Family Court*, 48 SOC. CASEWORK 416 (1967).

<sup>48</sup> CAL. CODE CIV. PROC. § 1733 (West 1972).

in considerable variation in procedure and program emphasis among counties depending on the philosophy of the current domestic relations judges. It also creates instability as judges change from year to year.<sup>49</sup> Furthermore, Conciliation Courts depend on county funding. As a result, local political and economic conservatism has limited the establishment of Conciliation Courts in many rural areas, with the majority of such services being developed in urban centers.<sup>50</sup> In short, these problems significantly limit Conciliation Courts' effectiveness in the resolution of family conflicts.

## II. MECHANISMS OF NON-JUDICIAL RESOLUTION

Although the Conciliation Court model provides a constructive alternative to traditional proceedings, its limitations require development of an additional non-adversary approach in order to reduce the burden of custody and visitation litigation on the courts and families.<sup>51</sup> This section considers arbitration and mediation as possible non-judicial approaches appropriate to custody and visitation disputes, with mediation being the most useful of the two proposed methods of dispute resolution.

### A. Arbitration

Courts increasingly use arbitration as an alternative to judicial dispute resolution in order to alleviate over-crowding the court's calendar and the expense of courtroom litigation.<sup>52</sup> Its informality, speed of resolution, and reduced cost make arbitration an attractive alternative for many types of conflicts.<sup>53</sup> The conceptual goal of arbitration, to find the best possible remedy to a problem rather than determine guilt or innocence, makes it especially appropriate for resolving family disputes.<sup>54</sup>

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<sup>49</sup> Interview with Brinkley A. Long, *supra* note 26.

<sup>50</sup> Shipman, *In My Opinion: The Role of Counseling in the Reform of Marriage and Divorce Procedures*, 26 FAM. COORDINATOR 395, 404 (1977).

<sup>51</sup> See Ginsburg, *American Bar Association Delegation Visits the People's Republic of China*, 64 A.B.A.J. 1516, 1520-23 (1978), for a description of the heavy emphasis on conciliation and mediation of matrimonial disputes, rather than adjudication, in the Chinese legal system.

<sup>52</sup> Note, *Compulsory Judicial Arbitration in California: Reducing the Delay and Expense of Resolving Uncomplicated Civil Disputes*, 29 HASTINGS L. J. 475, 483-96 (1978).

<sup>53</sup> Lightman & Irving, *Conciliation and Arbitration in Family Disputes*, CONCILIATION CTS. REV., Dec., 1976, at 12, 17.

<sup>54</sup> *Id.*

Recognizing the growing importance of non-judicial dispute resolution and the need for such services in family law matters, the American Arbitration Association has established its Family Dispute Services.<sup>55</sup> The Association trains family lawyers, the clergy, social workers and other helping professionals to serve as conciliators, mediators, referees, and arbitrators of family disputes. Arbitration rules include provisions for the arbitrator to obtain interviews with the child, professional opinions relevant to the best interests of the child, and the parties' agreement not to include the arbitrator as a witness in any subsequent related court hearings.<sup>56</sup>

Arbitration clauses in marital property settlement agreements have received a mixed reaction from courts. Arbitration of spousal and child support disputes are generally upheld.<sup>57</sup> Courts, however, have recently overturned earlier decisions enforcing arbitration of custody and visitation issues and have found such agreements between parents impermissible.<sup>58</sup> A New Jersey court explained the general judicial objection to enforcement of these arbitrated agreements as follows:

Since the State is *parens patriae* to children, and since the support, education and welfare of children is the exclusive concern of the courts so that parties can make no permanent binding contract with respect to those matters, child custody is not arbitrable . . . The conscience of equity will not permit the present needs of children to be limited by the agreement of the parties (footnotes omitted).<sup>59</sup>

In basing their decisions on this premise, however, the courts fail to recognize parents' basic right to raise their children as they choose, a right freely exercised by intact families, subject only to basic health, safety and educational requirements.<sup>60</sup>

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<sup>55</sup> American Arbitration Association, Family Dispute Services (available at American Arbitration Association, 140 W. 51st St., New York, N. Y. 10020); Spencer & Zammit, *Reflections on Arbitration Under the Family Dispute Services*, 32 *ARB. J.* 111 (1977); Spencer & Zammit, *Mediation-Arbitration: A Proposal For Private Resolution of Disputes Between Divorced or Separated Parents*, 1976 *DUKE L. J.* 911, 921-24.

<sup>56</sup> American Arbitration Association, *supra* note 55, at 14, 16.

<sup>57</sup> Annot., 18 *A.L.R.3d* 1264, 1266 (1968).

<sup>58</sup> Annot., 18 *A.L.R.3d* 1272, 5(b) (Supp. Aug. 1978).

<sup>59</sup> *Westlake v. Westlake*, 127 N.J. Super. 595, 559, 318 A. 2d 446, 448 (1974) (marital settlement agreement providing for arbitration of any financial claim or dispute held invalid).

<sup>60</sup> *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (Amish parents not required to send children to school when in conflict with religious beliefs); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (state responsibility to educate citizens yielded to parents' right to provide equivalent private school education for their chil-

Arbitration is a less expensive, faster, and less conflict-producing method of dispute settlement than courtroom adjudication. Like judicial resolution, however, arbitration imposes on a family an outside decision-maker's notion of their "best interests." This imposition conflicts with some commentators' emphasis on family privacy<sup>61</sup> and self-determination<sup>62</sup> as essential for stable, healthy parent-child relationships.

### B. Mediation

Mediation has the advantages of arbitration and also fosters these values of privacy and self-determination in the resolution of family disputes. Mediation counseling provides a non-adversary setting in which families are encouraged to take responsibility for custody and visitation decisions and for the effective implementation of those decisions. Mediation thus makes resort to future litigation less likely.<sup>63</sup> An experienced mediator, whether attorney or mental health professional, can help the parties to realistically assess the financial and emotional costs of a custody trial. The mediator can also share basic principles of child psychology and family dynamics to aid the parents in understanding their children's and their own reactions to the stress of the dissolution process.<sup>64</sup>

A mediator trained in the behavioral sciences can provide psychological counseling to the parties as well as mediating a resolu-

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dren); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (upheld parents' right to have children taught German in private school).

<sup>61</sup> *E.g.*, GOLDSTEIN, FREUD & SOLNIT, *supra* note 13, at 7-8.

<sup>62</sup> Elkin, *Editorial: Self-Determination and Family Law*, CONCILIATION CTS. REV., Sept., 1977, at iii; Wald, *State Intervention on Behalf of Neglected Children: Standards for Removal of Children from their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 STAN. L. REV. 623, 638-39 (1976).

<sup>63</sup> Druckman & Rhodes, *Family Impact Analysis: Application to Child Custody Determination*, 26 FAM. COORDINATOR 451, 456-57 (1977); Elkin, *supra* note 62; Spencer & Zammit, *Reflections on Arbitration Under the Family Dispute Services*, *supra* note 55, at 121. Concern for families involved in the dissolution process has led Professor Brigitte Bodenheimer to comment,

The only way I can see to give the child full protection in such situations is to assist the parties to come to grips with their feelings and with the realities of divorce insofar as the children are concerned. This must be done in a different setting, in a non-adversary atmosphere

*See* note 9 *supra*, at 506-507.

<sup>64</sup> *See generally* J. DESPERT, *supra* note 10, at 91-115; GOLDSTEIN, FREUD & SOLNIT, *supra* note 13, at 38; Sugar, *supra* note 6.

tion of their custody or visitation dispute. During the post-divorce period parents have been found to be relatively open to change in their behavior toward their children and each other as co-parents.<sup>65</sup> Parents' guilt about perceived harm inflicted on the children during the divorce process, and their feeling that the divorce presents an opportunity for building a new life, create this openness. The mediator can use this willingness to change to help parents defuse their anger and resolve underlying emotional issues.<sup>66</sup> Finally, a skilled mediator can guide parents in establishing new patterns of relating to each other which are appropriate for their continuing roles as co-parents.<sup>67</sup>

Mediated custody and visitation agreements are more stable and result in a significant reduction in the burden of costly litigation on families and the courts.<sup>68</sup> Mediation limits future litigation by giving the parties a feeling of cooperative give-and-take,<sup>69</sup> as opposed to judicial decision-making which tends to polarize parties, increasing animosity between them and making future disputes likely.<sup>70</sup> Agreements drafted using specific language understood by the parties, rather than ambiguous legal terms such as "reasonable visitation" and "best interests of the child" also serve to reduce later litigation.<sup>71</sup> Finally, parents who develop their own custody and visitation plans apply values appropriate to their family, rather than having a particular judge's biases imposed on them.<sup>72</sup> This involvement and self-determination makes parents feel more responsible for the success of their cus-

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<sup>65</sup> Wallerstein & Kelly, *Divorce Counseling: A Community Service for Families in the Midst of Divorce*, 47 AM. J. ORTHOPSYCH. 4, 6 (1977).

<sup>66</sup> Bienenfeld, *Pay-Offs in Post-Dissolution Visitation Counseling*, CONCILIATION CTS. REV., Dec., 1974, at 27, 28; E. FISHER, *DIVORCE: THE NEW FREEDOM* 72 (1974); Marschall & Gatz, *The Custody Decision Process: Toward New Roles for Parents and the State*, 7 N.C. CENT. L. REV. 50, 63 (1975).

<sup>67</sup> Bodenheimer, *supra* note 9, at 507; Marschall & Gatz, *supra* note 66; Spencer & Zammit, *Mediation-Arbitration: A Proposal For Private Resolution of Disputes Between Divorced or Separated Parents*, 1976 DUKE L.J. 911, 930-31.

<sup>68</sup> Bodenheimer, *supra* note 9, at 507; *Conciliation Courts: Hearings Before California Legislature Senate Committee on Judiciary*, 1977-78 Reg. Sess. 7 (1978) (statement of Judge Donald B. King, San Francisco Superior Court reporting that out of approximately 1,300 custody and visitation disputes referred to mediation, fewer than 12 resulted in a request for court hearing.)

<sup>69</sup> Bodenheimer, *supra* note 9, at 508; Lightman & Irving, *supra* note 53, at 14.

<sup>70</sup> Marschall & Gatz, *supra* note 66, at 64.

<sup>71</sup> See text accompanying notes 19-21 *supra*; Bienenfeld, *supra* note 66, at 28; Fuller, *Mediation—Its Forms and Functions*, 44 SO. CAL. L. REV. 305, 326 (1971).

<sup>72</sup> See text accompanying notes 22-23 *supra*; Savage, *supra* note 21; Spencer & Zammit, *supra* note 67, at 932.

tody and visitation plans, further limiting resort to the courts if problems arise.<sup>73</sup>

Public agencies and private organizations provide a variety of mediation models appropriate to family disputes. California's broad Conciliation Court Law<sup>74</sup> has allowed a number of California counties to focus on mediation of family disputes in an attempt to reduce the burden of litigation on the courts. The Alameda County Conciliation Court, for example, accepts referrals from attorneys and the court on stipulation by the parties that the mediator may testify in court if requested. The Conciliation Court refers families to mediators from a panel of psychologists, psychiatrists, and social workers who serve the Court on a part-time basis. These mediators work with the parents to resolve underlying emotional conflicts, as well as to develop a workable custody or visitation plan.<sup>75</sup>

The Marin County Conciliation Court counselor requires a stipulation by the parties that the counselor will not be called to testify if the case goes to trial, before beginning intensive mediation counseling in which family members are seen every other day for a two week period. In addition to attorney and court referrals, parents may contact the counselor directly for initial mediation or later modification of custody or visitation arrangements. The counselor encourages parents to take responsibility for decisions affecting themselves and their children in drafting custody and visitation agreements which are then given the force of court order.<sup>76</sup>

In Los Angeles County, domestic relations judges refer all custody and visitation cases to the Conciliation Court for mediation. Families go directly from the domestic relations courtroom to the Conciliation Court where counselors are available to mediate their dispute after receiving a stipulation of confidentiality from the parties and their attorneys. The counselor is available for sessions with parents and children, alone and together, to resolve emotional conflicts and draft an agreement which the parties feel is appropriate for their family situation. The parties give the agreement a six-week trial period after which additional sessions can be held to make needed modifications before the agreement

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<sup>73</sup> Druckman and Rhodes, *supra* note 63, at 456-57.

<sup>74</sup> See text accompanying notes 40-43 *supra*.

<sup>75</sup> Interview with Elizabeth M. O'Neill, Director, Alameda County Conciliation Court, at Oakland, California (Oct. 16, 1978).

<sup>76</sup> Interview with Ann Roth, Counselor, Marin County Conciliation Court, at San Rafael, California (Oct. 16, 1978).

becomes a court order. The counselor encourages families to contact the Court for mediation if future problems arise.<sup>77</sup>

Private organizations also have developed alternative methods of family dispute resolution,<sup>78</sup> as have mental health professionals in public and private agencies.<sup>79</sup> Individual helping professionals in the community can also act as mediators for families either on self-referral by parents seeking counseling, or on referral by attorneys.<sup>80</sup> Psychiatrists, psychologists, and licensed marriage and family counselors in private practice bring valuable therapeutic

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<sup>77</sup> Interview with Hugh McIsaac, Director, Family Conciliation Service, Los Angeles Conciliation Court, at Los Angeles (Aug. 23, 1978).

<sup>78</sup> For example, the Family Mediation Association based in Winston-Salem, North Carolina, serves couples who want to mediate a marital settlement agreement to be incorporated in a pro per uncontested dissolution. A mediator meets with the couple to help them develop a realistic and acceptable agreement covering property, support, and child custody matters. An Advisory Attorney provides legal and tax advice and drafts the final agreement. The Association is a non-profit organization to which participating couples pay a membership donation as well as hourly fees for the mediator and Advisory Attorney. Letter from O.J. Coogler, President, Family Mediation Association, 1725 D Franciscan Terrace, Winston-Salem, North Carolina, 27107 (Sept. 15, 1978).

The San Fernando Valley Bar Association (Los Angeles County) has established a Family Law Mediator Program. Volunteer family law attorneys are available at the courthouse during the morning short cause calendar and are on call for afternoon long cause hearings to act as mediators in family law matters. Attorneys obtain mediation on referral from the court clerk and by self-referral to resolve some or all issues without going to trial. Stipulations reached in mediation are referred back to the court where the calendar is interrupted to record the stipulation and conclude the matter. This speed of resolution has brought significant support for the program from the Bench, Bar, and public. Letter from Herman J. Isman, Chairman, Family Law Section, San Fernando Valley Bar Association, Suite 203, Encino Law Center, 15915 Ventura Boulevard, Encino, California, 91436 (Sept. 7, 1978).

See also American Arbitration Association Family Dispute Service discussed in text accompanying notes 55-56 *supra*.

<sup>79</sup> For example, the Center for Legal Psychiatry (formerly U.C.L.A. Section on Legal Psychiatry) acts as a consultant to the Domestic Relations Department of the Los Angeles Superior Court to provide in-depth post-divorce counseling. An interdisciplinary staff of psychiatrists, psychologists, and social workers applies a therapeutic model to the resolution of family disputes. The counselors require that the parties and their attorneys stipulate that the counselors will not be called to testify at trial, but are willing to consult with attorneys about cases referred to the Center. Interview with Nancy Weston, U.C.L.A. Section on Legal Psychiatry, in Los Angeles (Aug. 23, 1978); Sheffner & Suarez, *supra* note 25, at 442; Suarez, Weston & Hartstein, *Mental Health Interventions in Divorce Proceedings*, 48 AM. J. ORTHOPSYCH. 273, 273-74 (1978).

<sup>80</sup> Armstrong, *Community Resources in Family Counselling*, 19 Juv. Cr. JUDGES J. 16 (1968).

skills to a mediation situation. Ministers, priests, and rabbis with family counseling training are also potential mediators, particularly if they have an established relationship with the family involved.

The success of many of the mediation programs discussed above suggests that the non-judicial model of custody and visitation dispute resolution has strong potential for reducing the burden of these cases on families and the courts.<sup>81</sup> Arbitration and mediation models are less expensive, faster, and less conflict-producing than adversary judicial resolution. Arbitration, however, does not as effectively eliminate the problems of judicial resolution as does mediation. Though less formal than court hearings, arbitration proceedings still promote a somewhat adversary atmosphere by imposing an outside decision-maker on the family. Mediation, on the other hand, emphasizes parental responsibility for custody decisions, thereby more effectively limiting future litigation.

### III. IMPLEMENTATION OF NON-JUDICIAL RESOLUTION

As discussed above, mediation of family disputes provides a constructive alternative to adversary judicial resolution. Implementation of this alternative model however, requires recognition by attorneys and judges of the value of the non-adversary approach and the need for skillful and sensitive counseling in family law settings. Moreover, legislative changes are needed to facilitate this change toward non-judicial resolution of family conflicts.

#### A. *The Attorney's Role*

As the helping professionals<sup>82</sup> to whom families often first turn for counsel, attorneys are in a key position to facilitate or impede change toward non-adversary family dispute resolution. For many attorneys, however, successful implementation of this alternative method of dispute resolution would involve a shift in

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<sup>81</sup> All interviewees cited in notes 26, 75, 76, and 77 *supra*, described significant reduction in repeated custody and visitation litigation from families who had reached a mediated settlement through the interviewees' programs.

<sup>82</sup> The term "helping professional" is used here to refer to mental health professionals such as psychiatrists, psychologists, marriage and family counselors and social workers, as well as physicians, the clergy, and attorneys. In short, any professional who works with families or individuals in a helping role is included.



role from advocate to counselor.<sup>83</sup> Attorneys are generally most comfortable applying a rational, logical approach to dispute resolution as advocates within an adversary context.<sup>84</sup> This detached professionalism, however, does not work well in the frequently emotion-laden context of family law cases.<sup>85</sup> In these emotional situations attorneys must consider the human problem in order to best resolve the legal problem.<sup>86</sup>

Attorneys practicing family law need to develop the skills and understanding of interpersonal and family dynamics necessary for successful resolution of legal problems within an emotional context.<sup>87</sup> Law school and continuing education courses in counseling, psychology, and human development would all be appropriate.<sup>88</sup> The question of whether untrained attorneys should attempt the counseling role is a purely academic one.<sup>89</sup> The very nature of lawyering requires the role of counselor, just as much as the role of advocate. It is essential that all attorneys, and particularly family practitioners, be prepared to skillfully and sensitively fulfill the counseling role.

The attorney's role as counselor is becoming increasingly important in states with "no-fault" divorce laws. In these states, clients frequently feel that paying two attorneys is unnecessary and would rather make their own decisions about property division, support, and child custody.<sup>90</sup> Attorneys can support these clients' wishes for self-determination and a minimum of animosity by providing tax and drafting advice and serving as neutral mediators between the parties.<sup>91</sup> Such dual representation is per-

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<sup>83</sup> Mussehl, *From Advocate to Counselor: The Emerging Role of the Family Law Practitioner*, 12 GONZ. L. REV. 443, 445-46 (1977).

<sup>84</sup> See text accompanying notes 17-18 *supra*.

<sup>85</sup> Elkins, *supra* note 17, at 232.

<sup>86</sup> Goodpaster, *The Human Arts of Lawyering: Interviewing and Counseling*, 27 J. LEGAL EDUC. 5, 9 (1975).

<sup>87</sup> Baernstein, *Functional Relations Between Law and Psychiatry—A Study of Characteristics Inherent in Professional Interaction*, 23 J. LEGAL EDUC. 399, 418-19 (1971).

<sup>88</sup> Buxton & Dubin, *Teaching Psychiatry to Law Students: Toward a Replicable Model*, 13 NEW ENG. L. REV. 233 (1977); Steinberg, *The Therapeutic Potential of the Divorce Process*, 62 A.B.A.J. 617, 618 (1976).

<sup>89</sup> Elkins, *supra* note 17, at 232.

<sup>90</sup> Note, *Simultaneous Representation: Transaction Resolution in the Adversary System*, 28 CASE W. RES. L. REV. 86, 100-101 (1977). The "do-it-yourself" divorce business, as well as divorce services which fill out and file forms are additional manifestations of this growing trend under no-fault divorce laws. San Francisco Chronicle, Oct. 21, 1978, at 2, col. 1. See also, California Summary Dissolution, CAL. CIV. CODE §§ 4550-4556 (West Cum. Supp. 1979).

<sup>91</sup> Coogler, *Changing the Lawyer's Role in Matrimonial Practice*,

missable where the attorney advises both parties of the potential conflicts between them and obtains their informed consent to the arrangement in writing.<sup>92</sup> If, however, an actual conflict does arise between the parties, the attorney must withdraw and both parties should hire new attorneys.<sup>93</sup>

An attorney in this mediator role can help prevent escalation of potential conflicts between the parties by focusing their attention on drafting an agreement which is tailored to their family's needs and which will minimize potential for future disagreement.<sup>94</sup> The attorney can sensitize the parties to the common emotional and psychological effects of dissolution on parents and children and guide them in beginning to form new roles which will allow them to function as co-parents in relation to their children and each other. If there is a potential custody conflict, the attorney can help the parties to realistically assess the financial and emotional costs of a court contest and hopefully help them to evaluate the best interests of their children to reach an agreement. The attorney might also refer the couple to a psychiatrist or marriage and family counselor if the parties feel that more in-depth counseling would help them resolve their differences.<sup>95</sup>

If an actual custody conflict already exists when clients come to the attorney, dual representation is not possible. Attorneys in this situation should explain the financial and emotional costs of contested custody cases to their clients. They should also help the

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CONCILIATION CTS. REV., Sept., 1977, at 1; Note, *supra* note 90, at 105.

<sup>92</sup> *Klemm v. Superior Court*, 75 Cal. App. 3d 893, 142 Cal. Rptr. 509 (5th Dist. 1977). The court in *Klemm* upheld a marital settlement agreement. One attorney had represented both husband and wife in an uncontested dissolution with the parties' informed written consent. The court commented, "The conclusion we arrive at is particularly congruent with dissolution proceedings under the Family Law Act of 1970, the purpose of which was to discard the concept of fault in dissolution of marriage actions . . . , to minimize the adversary nature of such proceedings and to eliminate conflicts created only to secure a divorce." (*Id.* at 900, 142 Cal. Rptr. at 513). See California Family Law Act of 1970, CAL. CIV. CODE §§ 4000-5138 (West Cum. Supp. 1979); RULES OF PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA 5-102(B) (1975); AMERICAN BAR ASSOCIATION CODE OF PROFESSIONAL RESPONSIBILITY EC 5-16, DR5-105(C) (1976); *Reports, Proposals and Rulings, Yes. There Are Ethical Issues, ABA Finds*, 3 FAM. L. REP. 2633 (1977).

<sup>93</sup> RULES OF PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA 2-111(B)(2) (1975); AMERICAN BAR ASSOCIATION CODE OF PROFESSIONAL RESPONSIBILITY DR2-110(B)(2) (1976).

<sup>94</sup> *Spencer & Zammit*, *supra* note 67, at 931.

<sup>95</sup> *Conway, To Insure Domestic Tranquility: Reconciliation Services as an Alternative to the Divorce Attorney*, 9 J. FAM. L. 408, 412 (1970).

clients to evaluate the strength of their case, as well as their motives for requesting custody. The attorney might suggest that the client and spouse see a third party mediator in an attempt to resolve their differences without an adversary proceeding. If the spouse is represented, cooperation between the attorneys is necessary to facilitate the parties' acceptance of the value of mediation. If the parties agree to mediation, the attorneys should stipulate to exclude the mediator as a witness if the case goes to trial, and provide for payment of the mediator's fee, if any.

The variety of mediation resources discussed above may or may not be available depending on the size of the city and financial status of the clients. Fortunately, mental health professionals in private practice will generally be available for such referrals even in smaller communities. Their fee may seem high to the client, but the attorney should emphasize the even greater cost of taking the case to trial if mediation fails.<sup>96</sup> In larger cities, public agencies and perhaps even Conciliation Court services may be available as sources of referral for mediation.

In order to make effective referrals, family law attorneys should acquaint themselves thoroughly with the counseling resources available in their community. Mental health professionals' training, methods, fees, and willingness to work with attorneys on such problems are important considerations.<sup>97</sup> Attorneys should familiarize themselves with the basic principles of various counseling theories and approaches in order to establish productive working relationships with these professionals.<sup>98</sup>

If mediation is unsuccessful, the attorneys can recommend arbitration of the custody dispute. An arbitrated settlement would, however, probably be subject to judicial review.<sup>99</sup> If the parties nevertheless agree to arbitration, each party could choose one member of the panel with those two selecting a third.<sup>100</sup> The parties could select arbitrators who they felt shared their values and perspective on parenting and the needs of their children.<sup>101</sup> Alternatively, they could use the American Arbitration Association

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<sup>96</sup> An attorney making such a referral should be sure to have the mediator present a separate bill to the clients to comply with fee splitting prohibitions. RULES OF PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA 3-102 (1975); AMERICAN BAR ASSOCIATION CODE OF PROFESSIONAL RESPONSIBILITY DR3-102 (1976); Annot., 6 A.L.R.3d 1446 (1966).

<sup>97</sup> N. KOHUT, THERAPEUTIC FAMILY LAW, chs. 15-21 (1968).

<sup>98</sup> Baernstein, *supra* note 87, at 421.

<sup>99</sup> See text accompanying notes 57-59 *supra*.

<sup>100</sup> Moskowitz, *supra* note 20, at 446-47.

<sup>101</sup> Spencer & Zammit, *supra* note 67, at 934.

Family Dispute Services mechanism for selecting arbitrators.<sup>102</sup>

If the parties are unable to agree on a mediated or arbitrated settlement, the case will probably go to trial. The attorneys can attempt to minimize the escalation of hostility between the parties, but the adversary nature of the trial process will make this a difficult task. Some cases will require judicial decision and the attorney's role at this point becomes the more traditional one of advocate for the client.

An attorney's emphasis on non-judicial resolution of custody and visitation disputes as described in this section may not conform with the client's concept of the attorney as a weapon against a former spouse. Attorneys who resist this role may occasionally find the client hiring another attorney who better symbolizes their aggression.<sup>103</sup> The benefits of non-judicial resolution of family disputes, however, will far outweigh this burden on the attorney. In addition to reducing the burden of litigation on the courts, and the financial and emotional costs to families, non-judicial resolution of family disputes is also less stressful and more satisfying for attorneys.<sup>104</sup> Moreover, custody determinations made in nonadversary settings result in more stable family relationships and ultimately in healthier, happier living environments for the parents and children involved.

### B. Recommended Legislative and Judicial Changes

State legislatures and local Superior Court judges can also play significant roles in implementing non-judicial resolution of family disputes. A legislative preference for non-adversary alternatives and family self-determination in custody and visitation matters could be reflected in a number of areas.

The legislature should allocate increased funds for community mental health services to allow more extensive divorce and marriage counseling to be provided.<sup>105</sup> Such counseling would not only

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<sup>102</sup> American Arbitration Association, *supra* note 55.

<sup>103</sup> Shipman, *supra* note 50, at 402.

<sup>104</sup> Steinberg, *supra* note 88, at 620.

<sup>105</sup> The California legislature passed several bills of this type in the 1977-78 regular session including legislation requiring increased funding of children's mental health services (1978 Cal. Stats., 10 West Cal. Legis. Service, p. 4255, ch. 1228, to be codified at CAL. WELF. & INST. CODE § 5704.6) and increased financing of community mental health programs (1978 Cal. Stats., 10 West Cal. Legis. Service, pp. 4256-59, chs. 1229, 1230, to be codified at CAL. WELF. & INST. CODE §§ 5715, 5721). The general trend toward limited government spending, however, is already having a negative effect on availability of mental health services in California. San Francisco Chronicle, Nov. 30, 1978, at 8, col. 1.

help couples decide whether dissolution is really the best alternative for them, but also provide support for their adjustment during and after the dissolution process. Such services would also provide attorneys with sources for referrals in cases where reconciliation between the parties is possible, or where in-depth counseling is needed to help the client build a new life following separation.

The legislature should amend the state rules of professional conduct to specifically provide for attorneys' dual representation of parties in a dissolution action when appropriate, and should develop guidelines for attorneys to protect the interests of both parties in such a dual representation situation.<sup>106</sup>

Legislative amendments should also be made to mandate the Conciliation Court counselors' mediator role and set standards of training and supervision for Court counselors.<sup>107</sup> This legislation should insure access to such services in rural as well as urban areas, to families both during and after the dissolution.<sup>108</sup> Such counseling should be provided to parents on a self-referral basis, as well as court and attorney referral bases.<sup>109</sup>

Finally, the legislature should make arbitration of family disputes an option for families who agree to be bound by the arbitrator's finding.<sup>110</sup> Parents should be able to choose arbitrators by a mutually agreeable method and provide in marital settlement agreements for the arbitration of future disputes.<sup>111</sup>

Superior Court judges should support non-adversary resolution of family disputes by backing the establishment of Conciliation Court mediation services in their county.<sup>112</sup> Judges should rou-

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<sup>106</sup> Note, *Simultaneous Representation*, *supra* note 90, 104-109.

<sup>107</sup> Adequate training and supervision of Conciliation Court counselors is necessary to insure that counselors maintain the mediator role rather than becoming judgmental, arbitrary decision-makers. See Burke, *Need for Standards For Conciliation Courts*, CONCIILIATION CTS. REV., Sept., 1971, at 1, which suggests professionally trained counselors with at least master's degrees in the behavioral sciences, supervised by a person with at least five years of clinical counseling experience. See also Elkin, *Conciliation Court Counselor Needs*, CONCIILIATION CTS. REV., Dec., 1970, at 29, 30-31, and Watson, *Modern Family Rescue Team—Judge, Lawyer & Behavioral Scientist*, CONCIILIATION CTS. REV., Sept., 1970, at 1, 6.

<sup>108</sup> CAL. CODE CIV. PROC. §§ 1744, 1744.1, 1744.2, 1745 (West 1972 & Cum. Supp. 1979) should be amended to include this mediator role.

<sup>109</sup> Interview with Ann Roth, *supra* note 76.

<sup>110</sup> Spencer & Zammit, *supra* note 67, at 936-37.

<sup>111</sup> *Id.* at 931.

<sup>112</sup> Lindsley, *Custody Proceedings, Battlefield or Peace Conference?*, CONCIILIATION CTS. REV., Sept., 1975, at 1.

tinely refer to mediation cases that come to their courts. Moreover, they should encourage attorneys' efforts toward settlement. At trial, judges need to obtain unbiased evaluations of the family involved from mental health professionals who serve as experts for the court.<sup>113</sup> Finally, domestic relations courts need judges trained in the behavioral sciences who will rise to the challenge of family law cases, rather than view them as an undesirable assignment to be endured.<sup>114</sup>

#### CONCLUSION

Families who become involved in the adversary process too often emerge fragmented and permanently scarred. Family law practitioners can play a key role in reducing such harm and in promoting family stability by counseling their clients toward non-judicial resolution of family disputes. This article has examined several such non-judicial alternatives and has identified mediation as the one most appropriate to family conflicts. Mediation provides rapid, inexpensive resolution of family disputes, and limits future litigation by emphasizing family autonomy in the decision-making process. As new methods of family dispute resolution are developed, however, it is essential that the individual rights of parents and children, as well as the family's rights of privacy and self-determination, be protected. Only then will the best interests of the family truly be served.

*Elizabeth J. Smith*

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<sup>113</sup> J. DESPERT, *supra* note 10, at 192-93.

<sup>114</sup> Cantor & Ferguson, *From the Judge's View—Family Counseling in the Conciliation Courts: An Alternative to Custody Litigation*, CONCILIATION CTS. REV., Sept., 1976, at 1.